IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2018] NZIPT 204693**

AT AUCKLAND

Appellant:	**CN (Entrepreneur Residence Visa)**
Before:	Z N Pearson (Member)
Counsel for the Appellant:	H Brandts-Giesen
Date of Decision:	26 October 2018

RESIDENCE DECISION

---

[1] The appellant is a 45-year-old citizen of the Ukraine. Her husband and four of their five children, also citizens of the Ukraine, are included in her application.

THE ISSUE

[2] Immigration New Zealand declined the appellant's application under the Business (Entrepreneur Residence Visa) category of instructions because it was not satisfied that her business was trading profitably on the date the application was lodged or clearly had the potential to become profitable in the 12 months following lodgement. In addition, it was not satisfied that her business added significant benefit to New Zealand by creating sustained and ongoing full-time employment for one or more New Zealand citizens or residents or by revitalising an existing business leading to significantly increased financial performance.

[3] The principal issue for the Tribunal is whether Immigration New Zealand's assessment of the appellant's application was correct. For the reasons that follow, the Tribunal finds that Immigration New Zealand's decision was correct. The Tribunal also finds that the appellant does not have special circumstances, arising from her and her family's settlement in New Zealand or the potential contribution of her business, such as to warrant a recommendation to the Minister of Immigration that an exception to residence instructions be considered.

BACKGROUND

Work to Residence, Long Term Business Visa (Interim Stage)

[4] The appellant applied for a Work to Residence, Long Term Business Visa (LTBV) on 23 October 2012. Her business plan recorded that she planned to buy the ABC restaurant from GHI Ltd, an existing business in a central location of a New Zealand city with seven full-time and five part-time employees. The business plan projected annual revenue of $1.2 million in year one, increasing to $1.32 million in year two and $1.452 million in year three. The wages paid to staff were also forecast to increase from around $311,000 in year one, to $392,832 in year two, to just over $450,000 in year three.

[5] Immigration New Zealand granted the interim LTBV, which began on 1 July 2013, based on its assessment that the proposed business had the potential to benefit New Zealand by creating employment for New Zealand citizens or residents and by revitalising an existing business.

[6] The appellant arrived in New Zealand on 17 July 2013. She purchased DEF, a restaurant in another area of the city, at the end of November 2013, and began operating the business from late January 2014.

Work to Residence, Long Term Business Visa (Balance Stage)

[7] On 25 February 2014, the appellant applied for the balance of her LTBV. In its initial assessment of that balance application on 27 March 2014, Immigration New Zealand noted that her LTBV business plan had recorded that the appellant had intended to buy the ABC restaurant. However, it appeared that she had bought a different restaurant in a different location. The appellant was asked to explain why she had purchased a different restaurant than the one initially proposed. Immigration New Zealand stated that it appeared a Change of Proposal application would be appropriate because it would need to assess a new financial forecast with proposed investment and benefit identified.

[8] After submissions from the appellant's then counsel, Immigration New Zealand agreed on 14 May 2014 that it was not necessary for the appellant to make a Change of Proposal application. However, Immigration New Zealand requested a revised financial forecast relating to the purchased business and details of any changes the appellant planned to make to the proposed benefit of

her business. The benefit that had been accepted at the LTBV interim stage was employment creation and revitalisation of a business.

[9] On 26 May 2014, the appellant's counsel provided a letter (22 May 2014) from the appellant's accountant concerning the DEF restaurant, and provided historical financial information for that business. The letter from the accountant stated that, at the time the appellant had purchased it, the annual turnover of the business was in decline. The accountant's estimate was that the business's annual turnover for 2014 would drop to approximately $950,000. The accountant stated that the appellant intended to reverse this decline and revitalise the business and had taken steps to do so. The accountant's "prognosis" was that this would result in improved profitability of the business by increasing the annual turnover by at least $50,000 per annum from the time of business purchase such that the annual turnover would be $1.05 million by 2016. Relating to the proposed benefit of the business, counsel advised that the appellant's "plans were still the same — creation of three new employment positions and the revitalisation of the business".

[10] Immigration New Zealand's assessment of the appellant's application for her LTBV balance recorded that the appellant's counsel had explained that because of the length of time it had taken for the appellant's LTBV interim visa to be decided, by the time the appellant had entered New Zealand, the ABC restaurant business was no longer for sale. She had therefore bought a different restaurant business. Counsel had argued that a Change of Proposal application was not required because the appellant's business plan had noted that, should the ABC restaurant business not be available for sale, the appellant would purchase an existing cafe or restaurant that had a similar investment level. Immigration New Zealand recorded that, as the nature of the business was the same, a Change of Proposal application was not necessary.

[11] In relation to the financial forecasts, Immigration New Zealand recorded that the appellant's counsel had advised that the financial forecast remained the same due to the similar scale and the equivalent nature of the two businesses. Immigration New Zealand recorded that the revenue that the appellant had projected in her business plan for year one was $1.2 million and the financial statements for the DEF restaurant showed total revenue for the financial year ending 31 March 2012 (under the former owner) at just over $1.2 million. Immigration New Zealand therefore accepted that the financial forecasts provided at the LTBV interim stage were still realistic. Immigration New Zealand also

recorded that the appellant's counsel had stated that the proposed benefit of the business remained the same, that is, creation of three new employment positions and the revitalisation of the business.

[12] The appellant's application for the balance of her LTBV was approved and began on 9 July 2014, and was due to expire on 2 July 2016.

Residence Application

[13] The appellant made her application for residence under the Business (Entrepreneur Residence Visa) category of instructions on 1 July 2016. The appellant's newly-appointed representative advised that the appellant had begun operating the DEF restaurant on 25 January 2014. The representative submitted that the appellant had met the requirements of instructions as she had successfully revitalised a business in New Zealand and created employment for more than one New Zealand citizen or resident. The annual revenue for the year ending 31 March 2016 was $1.083 million, which the representative highlighted exceeded the projected annual turnover for the second year of operation ($1.05 million) as set out in the appellant's accountant's letter previously provided to Immigration New Zealand in May 2014. The representative therefore submitted that the appellant's business was trading profitably.

Immigration New Zealand's Concerns

[14] On 16 November 2016, Immigration New Zealand advised the appellant that it had a number of concerns regarding her application. It was unable to be satisfied that her business was benefiting New Zealand by creating additional sustained and ongoing full-time employment for one or more New Zealand citizens or residents or through the revitalisation of an existing business. It stated that the business she had bought, previously operated by GHI Ltd, had employed seven full-time staff and it appeared that the restaurant currently only had six full-time employees, rather than the eight that would be required to meet instructions. Further information relating to the employees was requested and the instructions relating to the business revitalisation requirements were provided. Immigration New Zealand advised it was also concerned that the appellant's business was not trading profitably because it appeared that the business had not met the total revenue forecast in her LTBV business plan for its first two years of operation.

Appellant's Response

[15] On 5 December 2016, the appellant's representative responded to Immigration New Zealand's concerns. The representative explained that the appellant had initially planned to purchase the ABC restaurant from GHI Ltd, but the restaurant had been sold to another buyer so she had purchased the DEF restaurant instead. Given that she had not purchased the business from GHI Ltd, Immigration New Zealand's letter "would appear to be null and void" given its concerns were premised on this incorrect claim. Nevertheless, the representative responded to some of Immigration New Zealand's concerns.

[16] The representative argued that the appellant could not be said to have purchased an existing business because she had not taken a majority shareholding in the company that formerly owned the DEF restaurant. Instead, the appellant had incorporated her own company to run the DEF restaurant, which meant she had established a new business. The representative argued this had an impact on how much employment the business had to provide to meet instructions, given that all employment by the appellant's business could be considered to be "new" employment positions. The restaurant had 20 employees, 10 of which were New Zealand citizens or residents. Of those 10, four worked as full-time employees, and six were part-time employees (equivalent to three full-time roles). The representative submitted that the appellant had created sustained and ongoing full-time employment for the equivalent of at least seven full-time roles. Further, the representative stated that the appellant had difficulty recruiting New Zealand citizens or residents for the above roles. Therefore, she had instead filled these positions by employing people on valid work visas. Employers were not permitted to discriminate against temporary visa holders in making offers of employment. It was submitted that all the employment positions offered by the appellant's business met the instructions.

[17] In the alternative, the representative argued that, under the former owner, the DEF restaurant had shown decreased revenue between 2011 and 2013. The changes the appellant had made had significantly improved the performance of the business. The appellant therefore met the instructions for having revitalised a business.

[18] Regarding the issue of trading profitably, the representative noted that the proposed financial forecasts that Immigration New Zealand had referred to were prepared anticipating the purchase of the ABC restaurant. However, the appellant's accountant had provided revised financial forecasts specific to the

DEF restaurant in May 2014. The forecast annual turnover for the first two years was $1 million and $1.05 million respectively. The financial statements for the business for the year ended 31 March 2016 showed that the actual revenue for year one had been around $793,833 and, for year two, $1.083 million. The appellant had also been paid an owner's salary of around $32,000 for the second year. Therefore, the business had met the projected annual turnover even after the owner's salary had been paid. A letter from the appellant's accountant (27 November 2016) was also provided, which outlined the decreasing revenue of the business prior to the appellant's purchase.

Immigration New Zealand's Further Concerns

[19] On 16 February 2017, Immigration New Zealand wrote again to the appellant. It had considered the representative's response but did not accept the submissions that the appellant had established a new business. She had purchased all the assets, stock, and the trading name of the DEF restaurant and leased the same premises. Therefore, in order to show benefit to New Zealand, she needed to show employment creation over and above the existing level of employment at the time she had taken over the business. The appellant's LTBV business plan had proposed that her business would benefit New Zealand through creating employment for an additional three full-time employees as well as five part-time employees.

[20] As no evidence of the previous business's employment levels had been provided, Immigration New Zealand had based its assessment on the wages figures in the financial information for the previous business. Wages and salary costs for the previous business for the year ending 31 March 2013 were $472,875. When these figures were compared to those costs to her business for the year ending 31 March 2016 (total wages and salaries of $307,075), it appeared that no new employment had been created by her business. Further, the information provided for the part-time employees showed that many of the contracts had no minimum hours of work, which suggested they were casual roles rather than new permanent and ongoing part-time positions. Immigration New Zealand was therefore unable to be satisfied that the business had created the sustained and ongoing full-time employment for New Zealand citizens or residents required under instructions.

[21] Immigration New Zealand was also unable to be satisfied that the appellant's business had revitalised an existing business as the appellant had not

demonstrated that she had significantly improved the performance of the existing business as outlined in instructions.

[22] Further, Immigration New Zealand was not satisfied that the appellant's business was trading profitably. It acknowledged that the LTBV business plan had been prepared in anticipation of the purchase of the ABC restaurant. While the appellant's accountant had subsequently provided revised revenue forecasts in relation to the purchase of the DEF restaurant, it noted that the appellant's previous counsel had advised it at the LTBV balance stage that the financial forecasts would remain the same due to the similar scale and the equivalent nature of the ABC restaurant and the DEF restaurant. It further recorded that the instructions required that any changes to original business plans be minimal and the business must continue to offer at least the same benefit to New Zealand relating to employment and annual turnover as set out in the original business plan. It appeared that the business had not met the projected revenue as set out in the LTBV business plan and therefore it was not clear that it was trading profitably or had the clear potential to become profitable in the following 12 months.

[23] In response to a query, Immigration New Zealand wrote again to the representative on 7 March 2017. It noted that it had made an error in its letter of 16 November 2016 by referring to the appellant's purchase of an existing business operated by GHI Ltd. While it acknowledged that it was not correct that the appellant had purchased the ABC restaurant, Immigration New Zealand's concerns outlined in that letter remained. Even though the representative had made submissions in response to the 16 November 2016 letter, Immigration New Zealand considered that, in fairness, the appellant needed to be given a second opportunity to respond to the issues in relation to the business she had established, the DEF restaurant. Therefore, it had sent the letter of 16 February 2017. Immigration New Zealand requested that the representative disregard the letter of 16 November 2016 and respond to the letter of 16 February 2017.

Appellant's Response

[24] On 24 March 2017, the representative responded to Immigration New Zealand's concerns. The representative set out the communication the appellant had with Immigration New Zealand at the time the balance of her LTBV was approved. Her statement at the time was that she would create three new employment positions and revitalise the business. At the time she had purchased

the DEF restaurant, there were four full-time employment positions and four part-time casual positions for New Zealand citizens or residents. The representative advised that the business presently employed eight full-time New Zealand citizens or residents and had two part-time positions for New Zealand citizens or residents. Therefore, the appellant had created four sustained and ongoing full-time employment positions for New Zealand citizens and residents. Copies of individual employment agreements for 10 currently employed New Zealand citizens or residents were provided as was other information relating to those employees' pay and a letter from the appellant's accountant (20 March 2017). The accountant explained that the wages and salaries figures in the financial statements for the appellant's business and the former business were not comparable because the former business's financial statements included the salary paid to the owner, which was not included in the wages and salaries figures in appellant's business's financial statements because it was accounted for separately.

[25] The representative argued that the appellant's business therefore had provided sufficient evidence of revitalising the business by creating two or more full-time ongoing jobs for New Zealand citizens or residents as required by the instructions. In addition, information relating to the support the business received from the community was provided as evidence of the business's benefit to New Zealand.

[26] The representative reiterated that the appellant had provided new financial forecasts to Immigration New Zealand based on the financial situation of the DEF restaurant when she had purchased it. Immigration New Zealand was aware of these changes and subsequently approved the balance of the LTBV application. As previously stated, given that the second-year forecast revenue was $1.05 million and the actual turnover had been $1.083 million, the appellant had met the forecast annual turnover for the business and met the trading profitably criteria in instructions.

Immigration New Zealand's Decision

[27] On 1 November 2017, Immigration New Zealand declined the appellant's application. It was not satisfied that her business added significant benefit to New Zealand by creating sustained and ongoing full-time employment for one or more New Zealand citizens or residents on top of the business's pre-existing employment levels. It also did not accept that she had met the requirements of

instructions regarding revitalisation of an existing business as she had not demonstrated that she had significantly increased the financial performance of the business.

[28] Immigration New Zealand was also not satisfied that the appellant's business was trading profitably on the date the application was lodged or that it clearly had the potential to become profitable within the 12 months following lodgement. Although at the balance stage the appellant's accountant had outlined a financial "prognosis" for the proposed business in his letter of 22 May 2014, her previous counsel had noted that the financial forecasts would remain the same with the purchase of the DEF restaurant as provided for in the original business plan. Immigration New Zealand had never advised that it had consented to any changes to the LTBV business plan, including the forecast revenue figures, which the appellant remained bound by. Given that the business had not met these targets, Immigration New Zealand was not satisfied that the business was trading profitably on the date the application was lodged. It had also not satisfied that the business had demonstrated clear potential to become profitable in the following 12 months from the date of lodgement as during that period the business did not meet the projected annual turnover from the original business plan.

STATUTORY GROUNDS

[29] 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.

[30] 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

[31] On 14 December 2017, the appellant lodged this appeal on both grounds in section 187(4) of the Act.

[32] The appellant appoints new counsel on appeal who makes submissions (2 February 2018) and, in addition to documents already on the Immigration New Zealand files relating to the appellant's residence application, provides copies of new documents, some of which were submitted to Immigration New Zealand in relation to the appellant's application to renew her Entrepreneur Work Visa, including:

(a) documents relating to the appellant's business's employees, including a schedule of average hours worked by employees, letters from the employees (November and December 2017), variation of employment agreements (December 2017), letters from the appellant's accountants (December 2017), and information relating to the employment of former and new employees;

(b) a number of documents relating to the performance and running of DEF, including a *New Zealand Herald* article (2011), details of the menu changes the appellant has made to the restaurant, invoices, advertising material, and reviews of the restaurant (various dates April 2015 to November 2017);

(c) profit and loss statements for the appellant's business for the 12-month periods to March 2015 and to March 2017, and the seven-month period to October 2017;

(d) end of year school reports for the appellant's 14 and 15-year-old children (2017);

(e) internet articles relating to the political situation in Ukraine (September and November 2017);

(f) letters and a petition from community members and customers supporting the appellant and her family (dated variously April to December 2017); and

(g) a copy of the Tribunal's decision of *AR (Entrepreneur Residence Visa)* [2016] NZIPT 203110.

[33] The Tribunal's ability to consider new information and evidence on appeal is constrained by section 189(1) of the Act. The Tribunal is unable to consider new information or evidence when assessing the correctness of Immigration New Zealand's decision to decline unless it falls within the exception at section 189(3)(a). This exception requires that the new information or evidence have been in existence at the time of the decision to decline, that it would have been relevant to the making of that decision, and that the appellant could not, by the exercise of reasonable diligence, have placed that information or evidence before Immigration New Zealand.

[34] A significant amount of the new evidence presented on appeal has come into existence after Immigration New Zealand's decision to decline the appellant's residence application, and is therefore not admissible when assessing the correctness of the decision to decline. No reason is advanced as to why the new evidence on appeal that predated the decision to decline could not have been provided to Immigration New Zealand prior to making its decision on the application. This evidence is therefore also inadmissible under section 189(3)(a) of the Act for the purposes of determining the correctness of Immigration New Zealand's decision. However, the Tribunal can, and does, take all evidence submitted on appeal into account in its discussion of special circumstances, below (as per section 189(3)(b) of the Act), as relevant.

ASSESSMENT

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

[36] 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 that warrant consideration of an exception by the Minister of Immigration.

Whether the Decision is Correct

[37] The application was made on 1 July 2016 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because it was not satisfied that the appellant's business was trading

profitably on the date the application was lodged or clearly had the potential to become profitable in the 12 months following lodgement. In addition, it was not satisfied that her business added significant benefit to New Zealand by creating sustained and ongoing full-time employment for one or more New Zealand citizens or residents or by revitalising an existing business leading to significantly increased financial performance.

Business (Entrepreneur Residence Visa) category instructions

[38] Applicants under the above category must demonstrate that they have successfully established a business in New Zealand that realises the benefits outlined in their business plan and demonstrate that the business is benefiting New Zealand significantly:

> **BH2.1 Successful establishment and operation of a business that benefits New Zealand significantly**
>
> Principal applicants in the Entrepreneur Residence Visa Category are required to demonstrate that:
>
> a. they have successfully established a business in New Zealand that realises the benefits outlined in their business plan, and have operated that business for at least:
>
> i. two years, and meet the requirements of BH2.1.1; or
>
> ii. six months, and meet the requirements of BH2.1.5; and
>
> b. the business is benefiting New Zealand significantly (see BH4.10); and
>
> …
>
> *Effective 01/11/2015*

[39] Paragraph BH4.10 sets out the criteria for a business benefiting New Zealand and provides, relevantly:

> **BH4.10 Criteria for a business benefiting New Zealand**
>
> a. A business is considered to add significant benefit to New Zealand if it can demonstrate that it has promoted New Zealand's economic growth by for example:
>
> …
>
> iv. creating sustained and ongoing full time employment for one or more New Zealand citizens or residents; or
>
> v. the revitalisation of an existing New Zealand business that has led to significantly increased financial performance; or
>
> …

> b. The business is trading profitably on the date the application is lodged or a business immigration specialist is satisfied that it clearly has the potential to become profitable within the following 12 months.
>
> c. For definitions of "new products or services" and "trading profitably" please refer to the Definitions section at BB6.
>
> *Effective 24/03/2014*

[40] The reference to the term "profitable" in paragraph BH4.10.b of the instructions relates to the term "trading profitably" used earlier in the paragraph and both must share the same definition (set out below). Instructions specifically reference the date of the application and so it is this date, not the date of assessment or some other date, on which the business must be trading profitably.

[41] The appellant had to demonstrate that her business was trading profitably, as per BH4.10.b, and therefore had to meet the definition of trading profitably in the instructions, which has two elements:

> **BB6.1.40 Definition of trading profitably**
>
> For the purposes of the instructions in Entrepreneur Work Visa Category (BB) and the Entrepreneur Residence Visa Category (BH), "trading profitably" means:
>
> a. meeting or exceeding the projected annual turnover from the original business plan, and assessment from the points scale at BB3.10(d); and
>
> b. making sufficient profit to enable the principal applicant to pay themselves at least the minimum wage per annum.
>
> *Effective 01/11/2015*

The appellant's LTBV and balance applications

[42] The appellant's LTBV business plan recorded that she intended to buy an existing business, the ABC restaurant. The projected annual revenue set out in the business plan was $1.2 million in year one, increasing to $1.32 million in year two and $1.452 million in year three. However, because this business had been sold by the time the LTBV was approved in July 2013, the appellant purchased another existing business, the DEF restaurant, in late 2013 and began running it in late January 2014.

[43] The fact that the appellant had bought a different restaurant business to that outlined in her business plan was only explained to Immigration New Zealand at the time she applied for the balance of her LTBV in February 2014. Immigration New Zealand initially referred the appellant to the instructions for making an application to change her business proposal, stating that it appeared a Change of Proposal application would be appropriate because it would need to assess a new

financial forecast for the business she had purchased, with the proposed investment and benefit identified. The instructions relevant to the appellant's situation were those at BC10 (effective 8 April 2013), which outlined a clear process in situations where there were genuine reasons for applicants needing to make changes to their business proposals. Changes to business proposals would only be approved in certain circumstances, and BC10.a.ii required that a new or revised business proposal meet the requirements for a business plan under BC4.5 (effective 8 April 2013), including that the financial forecasts were realistic (BC4.5.e).

[44] After submissions from the appellant's then counsel, Immigration New Zealand accepted that a Change of Proposal application was not necessary. It relied on counsel's submissions that the nature of the two businesses was the same and that the appellant's original business plan had noted that, in the event that the ABC restaurant business was not available for sale, the appellant would purchase an existing cafe or restaurant that had a similar investment level. Notwithstanding this, Immigration New Zealand requested a revised financial forecast relating to the business purchased and details of any changes the appellant planned to make to the proposed benefit of her business.

[45] Immigration New Zealand's assessment regarding the LTBV balance application clearly indicates that the balance of the appellant's LTBV was only approved on the basis of clear statements from her then counsel that the financial forecast for the DEF restaurant remained the same as for the ABC restaurant as outlined in her business plan, due to the similar scale and the equivalent nature of the two businesses. Regarding the proposed benefit of the business, counsel had advised that the appellant's "plans were still the same — creation of three new employment positions and the revitalisation of the business".

[46] The appellant's accountant also provided a letter at this point, which briefly set out the accountant's "prognosis" of the total revenue the appellant anticipated from the DEF restaurant for the following two years. The accountant's estimate was that the initiatives the appellant had undertaken to boost the decline the business had apparently shown for the period 2013–2014 would result in improved profitability of the business by increasing the annual turnover by at least $50,000 per annum from the time of business purchase in 2014, such that the annual turnover would be $1.05 million by 2016.

[47] The annual revenue of the DEF restaurant, as forecast by the accountant, was markedly different from the revenue projected in the original business plan.

Instead of the $1.2 million in the first year, rising to $1.32 million in the second year as projected in the business plan, the accountant forecast $1 million in the first year, rising to $1.05 million in the second year. Immigration New Zealand did not indicate that the new figures identified in the accountant's "prognosis" were accepted. Its assessment clearly records that it considered that the financial forecasts provided at the LTBV interim stage were still realistic given that the revenue that the appellant had projected in her business plan for year one was $1.2 million and the financial statements for the DEF restaurant showed total revenue for the financial year ending 31 March 2012 (under the former owner) at just over $1.2 million.

Submissions on appeal

[48] On appeal, the appellant's new counsel submits that Immigration New Zealand reviewed the accountant's revised financial forecasts and proposed benefits for the business, did not require a Change of Proposal application to be made, and accordingly, granted the balance of the appellant's LTBV. Counsel argues that this meant that Immigration New Zealand acknowledged the difference in the scale of the two restaurants by granting the balance and therefore implicitly accepted the revised financial forecasts. Counsel explains that the scale of the DEF restaurant, with 45 seats, is significantly smaller than the ABC restaurant, which had 150 seats. Given the difference in size and scale, it would be impossible for the two restaurants to be able to obtain the same level of turnover. The appellant had relied upon Immigration New Zealand's assessment and had run her business in good faith, in accordance with the revised financial forecasts. Counsel submits that if Immigration New Zealand had not accepted the revised financial information, it should not have granted the balance of the appellant's LTBV.

[49] In effect, what counsel submits on appeal is that the size and scale of the two businesses, the ABC restaurant and the DEF restaurant, was not comparable, and that by granting the balance of the appellant's LTBV, Immigration New Zealand implicitly accepted this and accepted that the financial forecasts in her LTBV would not apply as a result. However, Immigration New Zealand was not made aware of these differences in the two restaurants by the appellant's then counsel when it was considering the application for the balance of her LTBV. Indeed, her counsel at the time went to some lengths on a number of occasions to assure Immigration New Zealand — when Immigration New Zealand correctly pointed out that it appeared that a Change of Proposal application appeared

necessary — that the size, scale and nature of the two businesses were comparable and therefore that a Change of Proposal was not necessary.

[50] If a Change of Proposal application had been made (that included a clear statement from the appellant about how the change in her business would lead to reduced forecast revenue and benefits to that outlined in her LTBV), and had been approved, the appellant would have had stronger grounds for proceeding to run her business in reliance on the figures outlined in the accountant's letter of May 2014. As it was, Immigration New Zealand should, upon receiving those figures, have considered that the forecast revenue figures were sufficiently different such as to require a Change of Proposal application be made, notwithstanding the contradictory advice it had received from her counsel. However, it is clear that it relied upon counsel's assurances about the equivalent size, scale and nature of the business that the appellant had purchased to determine that her LTBV forecasts were still realistic and that a Change of Proposal was not necessary, and so it approved her balance application on that basis. Immigration New Zealand was entitled to rely on her counsel's clear advice.

[51] While Immigration New Zealand did not make an explicit representation to the appellant that she was entitled to rely on the revised financial forecasts, it would have been preferable for Immigration New Zealand to have made it clear to the appellant that she remained bound by the forecast revenue and benefits outlined in her LTBV business plan. However, the appellant was represented by counsel, who must have appreciated that, in arguing that a Change of Proposal was not necessary, the appellant would remain bound by the forecasts and benefits she had committed to in her original LTBV business plan, and should have advised her accordingly. In light of this context, the Tribunal does not accept that, in granting the balance of her LTBV, Immigration New Zealand implicitly accepted the revised financial forecasts as outlined in the accountant's letter nor, in view of her then counsel's submissions (and knowledge of the Change of Proposal process and requirements), could the appellant reasonably have had such an expectation.

Not trading profitably

[52] The projected annual revenue set out in the appellant's LTBV business plan was $1.2 million in year one, increasing to $1.32 million in year two and $1.452 million in year three. These were the figures that the appellant had to meet

in order for her business to be considered to be trading profitably, as per BH4.10.b and BB6.1.40.a.

[53] The appellant began operating her business in late January 2014. The information provided to Immigration New Zealand showed that the business's turnover for its first full year of trading had been $793,833 (to 31 March 2015) and $1.083 Million for its second year of trading (to 31 March 2016). The appellant's business was not trading profitably at the date her application was lodged in July 2016 because it had not met or exceeded the projected annual turnover from the appellant's original business plan, as per BB6.1.40.a. The appellant therefore did not meet one of the criteria for her business to be considered to be benefiting New Zealand, required under BH4.10.b.

[54] As per the second part of BH4.10.b, Immigration New Zealand also needed to consider whether the appellant's business clearly had the potential to trade profitably in the 12 months following lodgement (see *CE (Entrepreneur Residence Visa)* [2018] NZIPT 204649 at [34]–[36]). The appellant's application was lodged on 1 July 2016, so Immigration New Zealand needed to consider whether in the following 12 months, the business would meet its third-year target of $1.452 million.

[55] The information presented by the appellant's accountant in March 2017 indicated that, while the business had increased revenue of $1.237 million in the 11 months to 28 February 2017, it had not met the third-year target, nor would it do so by July 2017. Immigration New Zealand therefore correctly determined that the appellant had not demonstrated her business had clearly the potential to trade profitably in the 12 months following lodgement of her application, as per BH4.10.b.

Conclusion on correctness

[56] The Tribunal finds that Immigration New Zealand's decision was correct. The appellant's business was not trading profitably at the date her application was lodged, nor did she demonstrate that it clearly had the potential to become profitable in the following 12 months. Her business was therefore not benefiting New Zealand.

[57] Because this is a stand-alone ground of decline, it is not necessary for the Tribunal to consider whether Immigration New Zealand's other ground of decline — that the appellant's business had not added significant benefit to New Zealand

by creating sustained and ongoing full-time employment for one or more New Zealand citizens or residents or by revitalising an existing business leading to significantly increased financial performance (BH4.10.a) — was correct.

Whether there are Special Circumstances

[58] 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.

[59] 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.

Personal and family circumstances

[60] The appellant is a 45-year-old citizen of the Ukraine. Her 45-year-old husband and four of their children (5-year-old twins, a 14-year-old son, and a 15-year-old daughter), also citizens of the Ukraine, are included in her application.

[61] The appellant and her 14 and 15-year-old children arrived in New Zealand in July 2013. They have remained here since this time, apart from one short trip abroad. The appellant's husband arrived in New Zealand in October 2013, and has made two short trips outside of New Zealand since this time. The couple's twins were born in New Zealand and have not left.

[62] The appellant was granted a LTBV on 1 July 2013, which, after the balance of that visa was granted in July 2014, was valid until 2 July 2016. Since that visa expired, the appellant has held Specific Purpose work visas. Her application for a renewal of her Entrepreneur Work Visa was approved and began on 21 March 2018, and is valid until 1 July 2019. The appellant's husband has held work visas as the appellant's partner, the 14 and 15-year-old children have held student visas, and the youngest two, visitor visas, with dates that correspond to the appellant's visas.

[63] According to information on the Immigration New Zealand records, the appellant's father is a Russian citizen who spent some time in New Zealand between October 2014 and April 2017 as the holder of visitor visas. He departed

New Zealand in April 2017 and has not returned. Her husband's parents and brother reside in Russia. The couple also have an elder daughter, aged 23, who is not included in the application but who resides in New Zealand. She was granted residence in New Zealand in August 2016 on the basis of her relationship with her New Zealand-citizen partner and is now a permanent resident.

Health, character and English language

[64] Immigration New Zealand was satisfied that the appellant and her family members included in the application were of an acceptable standard of health. The appellant and her husband also met the character requirements of instructions, presenting clear police certificates from the Ukraine, Russia and New Zealand. Immigration New Zealand was also satisfied that the appellant met the English language requirements of instructions and her husband would purchase English language tuition.

Best interests of the appellant's children

[65] The Tribunal is required, pursuant to Article 3 of the 1989 United Nations *Convention on the Rights of the Child*, to have regard to the best interests of the appellant's four children included in her application as a primary consideration. However, the best interests of the children are not the paramount consideration (see *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Tipping J).

[66] The appellant's 14-year-old son and a 15-year-old daughter have lived in New Zealand for about five years; the two youngest children, five-year-old twins, were born here. The 14 and 15-year-old are both attending a local college, and from the information presented on appeal, it is clear that they are well-settled into school, are achieving well and have made friends. The youngest two children will be about to begin their primary schooling.

[67] On appeal, counsel submits that it would be difficult for the children to return to the Ukraine. The youngest two have only ever lived in New Zealand. While the 14 and 15-year-old attended school in the Ukraine prior to coming to New Zealand, they attended schools where the Russian language was spoken and could only speak basic Ukrainian. Counsel provides internet articles that suggests that such schools have been closed and the Russian language is banned in schools in the Ukraine. As a result, it is argued, the children would be unable to understand the language used in Ukrainian schools. Further, counsel asserts that

the “chaotic and unstable” nature of the Ukrainian social and political environment would make relocation to the Ukraine unsafe for the children. Internet articles that outline the difficult political situation in the Ukraine are provided in support.

[68] While the Tribunal finds that returning to the Ukraine would appear to present significant challenges to the appellant’s children, particularly given their settlement here, the Tribunal does not accept that the information presented on appeal indicates that the children would be at any particular risk of harm should they return, nor that they would be unable, with support of their parents, to reintegrate into the school system and life in the Ukraine, should they have to return in due course. The evidence does not establish that the Russian language has been banned from all schools in the Ukraine, or, should the children wish to continue to be educated in English, that completing their education at international schools would not be an option for this family. The family may also be able to put in place extra educational and/or language support on their return, where such a return is required. All children hold visas valid until July 2019, and therefore an immediate return is not required. If the children are unable to remain here beyond that point, the family will have a reasonable period of time to plan for their return to the Ukraine. Primarily, the children’s best interests are served by remaining in the care of their parents, given their young ages, wherever the parents may live.

[69] Although not included in the application and, at 23 years old, not regarded as a child for the purposes of the above Convention, the Tribunal also has regards to the interests of the appellant’s elder daughter. She was granted residence in August 2016 on the basis of her relationship with her New Zealand-citizen partner and is now a New Zealand permanent resident. No information has been provided about her circumstances so as to be able to determine her interests, although the Tribunal accepts it is likely to be in her interests to have her immediate family living near to her. The appellant and her family members have a nexus to New Zealand through her.

The appellant’s business

[70] The appellant purchased an existing business, the DEF restaurant, in late 2013 and began running it in late January 2014. It is apparent that the appellant has worked hard to re-establish the restaurant as a desirable dining location. She has designed new menus, made strategic employment decisions including the recent appointment of a new chef, and has undertaken extensive advertising to increase the profile and community presence of the restaurant. The appellant’s

hard work has resulted in increased revenue. Information provided to Immigration New Zealand and again on appeal indicates that the total revenue for the year ending 31 March 2015 was $793,833. This rose to $1.083 million for the year ending 31 March 2016, and to $1.372 million for the year ending 31 March 2017. Financial statements for the seven months ending 31 October 2017 indicate that the total revenue for that period was $912,250. The restaurant employs a number of full-time and part-time staff, and has also paid the appellant a modest owner's salary. No further updated financial statements have been provided on appeal, but the Tribunal assumes, for the purposes of this appeal, that the upward trending trajectory in the business's revenue has continued.

[71] In addition to the financial success of the business, the appellant has established herself as a valued member of the local business community. A number of letters presented on appeal from members of the local community and customers, as well as a petition of support for the appellant with several hundred signatures on it, indicate that the appellant is a well-respected local restauranteur and that the restaurant has become a desirable destination for locals and visitors alike under her management. Counsel asserts on appeal that to see the business close would be a significant loss to the local community.

[72] The appellant has been granted a renewal of her Entrepreneur Work Visa, which is valid until July 2019. She therefore has a further period on which to base a new residence application that demonstrates to Immigration New Zealand that her business meets the requirements of instructions.

Discussion of special circumstances

[73] 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.

[74] The appellant is a well-respected, hard-working member of her local community, who has re-established an existing restaurant business that is financially successful and well regarded by the local community. Her family is well-settled in New Zealand, and her children have established themselves at school. The family has a nexus to New Zealand through the appellant's elder daughter.

[75] While commendable, the contribution of the appellant's business and the family's level of settlement in New Zealand are not uncommon, in the sense indicated by *Rajan*. The Tribunal notes that the appellant holds a renewed Entrepreneur Work Visa, which enables the family to remain in New Zealand for a further period and to make a further application for residence in due course. The appellant therefore has a possible alternative pathway to residence. Accordingly, the Tribunal finds that the appellant and her family's circumstances, when considered individually and cumulatively, are not special and a recommendation to the Minister of Immigration for consideration of an exception to residence instructions is not warranted.

DETERMINATION

[76] 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 that warrant consideration by the Minister of Immigration as an exception to those instructions under section 188(1)(f) of the Immigration Act 2009.

[77] The appeal is unsuccessful.

"Z N Pearson"
Z N Pearson
Member

Certified to be the Research Copy released for publication.

Z N Pearson
Member