IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2019] NZIPT 205465**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**JR (Skilled Migrant)**
Before:	L Wakim (Member)
Representative for the Appellant:	H P Singh
Date of Decision:	23 August 2019

RESIDENCE DECISION

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[1] The appellant is a 39-year-old citizen of India whose application for residence under the Skilled Migrant category of instructions includes her 44-year-old husband, and their three children; 15-year-old twins and a 6-year-old son. The appellant's husband and children are also all citizens of India.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because her husband had provided false, misleading or forged information in an earlier visa application and therefore did not meet the character requirements under instructions. A character waiver was not granted.

[3] The principal issues for the Tribunal are whether Immigration New Zealand correctly conducted a character waiver assessment; and whether it correctly advised the appellant that she was unable to remove her husband from her residence application.

[4] The Tribunal finds that Immigration New Zealand correctly conducted the character waiver assessment and it correctly advised the appellant that she could not remove her husband from her application. The Tribunal also finds that the appellant does not have special circumstances, arising out of her qualifications, employment, and the family's settlement in New Zealand, such as to warrant a

recommendation that the Minister of Immigration consider an exception to Government residence instructions.

BACKGROUND

[5] The appellant first arrived in New Zealand in February 2015 as the holder of a student visa. Her husband arrived in May 2015, her youngest son in February 2016, and her twins in May 2016. The appellant's husband left New Zealand in January 2018 and has not returned. Her children left for six months in June 2018, returning in January 2019.

[6] The appellant currently holds a work visa, which is valid until January 2021, as are her children's student visas. Her husband lives in India.

Husband's temporary visa applications and appellant's residence application

[7] On 4 May 2017, the appellant's husband lodged an Essential Skills work visa application, in support of which he provided Immigration New Zealand with a copy of his Indian driver's licence. At that time, the appellant held a Post-Study work visa and her husband held a work visa (as the partner of a worker), both of which were due to expire on 30 July 2017.

[8] On 8 May 2017, Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010 ("the Regulations") were amended. Regulation 20(2A) was inserted, specifying that if the spouse or partner of an applicant "holds or has applied for a temporary entry class visa" based on their relationship to the applicant, the applicant "must include" that spouse or partner in their visa application, and the spouse or partner "may not be removed from that application" while the application is being processed, unless there is a change of circumstances that results in the applicant's spouse or partner ceasing to be his or her spouse or partner. Regulation 20(2A) was reflected in residence instructions at R2.40 and R5.115, effective 8 May 2017.

[9] On 4 July 2017, the appellant submitted an Expression of Interest (EOI) under the Skilled Migrant category of residence instructions. On 6 July 2017, she was invited to apply for residence.

[10] On 20 July 2017, Immigration New Zealand declined the husband's Essential Skills work visa application.

[11] On 27 July 2017, the appellant lodged her residence application. The same day, she also lodged an Essential Skills work visa application, and her husband lodged a work visa application (as the partner of a worker).

[12] On 4 August 2017, the appellant's Essential Skills work visa was granted.

False documentation provided in husband's work visa application

[13] On 3 October 2017, Immigration New Zealand wrote to the appellant's husband. It was concerned because the Indian driver's licence he had previously provided in support of his Essential Skills work visa application (lodged 4 May 2017) had been verified as fraudulent. Immigration New Zealand's verification process had identified that the licence included several endorsements which differed from the endorsements for which the actual licence had been issued, and the dates on the licence did not match those issued by the issuing authority.

[14] On 16 October 2017, the representative responded, providing an explanation from the husband about the circumstances in which he had acquired the driver's licence. On 18 October 2017, Immigration New Zealand informed the husband that it did not consider his explanation addressed the inconsistencies it had identified, and it still considered the driver's licence to be false. It concluded that the husband did not meet good character requirements and sought information as to whether it should grant a character waiver. On 27 October 2017, the husband's representative responded.

[15] Around 25 October 2017, the husband was served with a deportation liability notice (DLN) on the grounds that he had provided false documents in support of an application. A subsequent request by the husband to Immigration New Zealand to review the decision to issue the DLN was declined on 27 November 2017.

[16] On 5 December 2017, after considering the information provided by the representative, Immigration New Zealand declined to grant a character waiver. On 6 December 2017, it declined the husband's work visa application (lodged on 27 July 2017).

[17] Around 7 December 2017, the husband's temporary visa was cancelled. He became unlawfully present in New Zealand.

[18] On 13 December 2017, the representative acknowledged that the husband was unlawfully in New Zealand and requested of Immigration New Zealand that the husband be excluded from the appellant's residence application, so it could continue

to be processed. Immigration New Zealand responded that it was unable to remove the husband from the application because of instructions at R5.115. The application could continue to be processed if he left New Zealand.

[19] The husband voluntarily departed New Zealand on 11 January 2018. His deportation appeal, lodged with the Tribunal on 17 November 2017, was deemed to have been withdrawn (section 239 of the Immigration Act 2009 (the Act)) because he left the country.

First decline of residence application and appeal

[20] On 23 February 2018, the appellant's residence application was declined on the basis that her employment was not a substantial match to the relevant *Australian and New Zealand Standard Classification of Occupations* (ANZSCO) description and core tasks.

[21] The appellant appealed that decision. On 14 November 2018, the Tribunal found that the decision was correct. However, a particular event had occurred – the appellant's new employment as a social worker – which meant that the application should be returned to Immigration New Zealand for a reassessment.

Immigration New Zealand's Concerns

[22] On 7 January 2019, as part of its reassessment, Immigration New Zealand wrote to the appellant. It was concerned that, because her husband had provided false information in the course of applying for an earlier visa, it appeared that the appellant (presumably, Immigration New Zealand meant her husband) did not meet the character requirements under the residence instructions (A5.25.i) and was ineligible for a residence class visa unless granted a character waiver. The appellant was invited to respond.

The Appellant's Response

[23] On the 21 January 2019, the representative responded. She requested that, because the husband no longer held a visa dependent on his relationship with the appellant, Immigration New Zealand should consider excluding him from the residence application and continue to process the application without him included. In the alternative, the representative submitted reasons why a character waiver should be considered and granted.

[24] On 5 February 2019, Immigration New Zealand informed the appellant that it had considered the response but had concluded that it was more likely than not that her husband had provided false information. As a result, he did not satisfy character instructions at A5.25.i. The appellant was invited to provide information to help Immigration New Zealand decide whether her circumstances justified waiving character requirements.

[25] As to the representative's request to exclude the husband from the application, Immigration New Zealand stated:

> "We note that you and your Immigration Advisor have requested Immigration New Zealand to consider removing your partner from the current residence application under the Skilled Migrant category. However, as per Immigration New Zealand's Instructions at R2.40.d it is mandatory for all dependents of the principal applicant, where they hold or have applied for a temporary entry class visa based on their relationship to the principal applicant, to be included in an application for [a] residence class visa. We noted that your partner has applied for and has held multiple temporary visas based on his relationship to you and, as such, we are unable to remove him from your current application for residence."

[26] On 27 February 2019, the representative provided submissions and supporting documents regarding the character waiver. She again raised the issue of removing the appellant's husband from the application (a request the appellant herself made to the Immigration New Zealand officer by email the same day). The representative stated (verbatim):

> "You have again reiterated as per INZ policy R2.40.d, that it is mandatory for all dependents cannot be removed if they have applied or hold a temporary class visa based on a relationship.
>
> Please note the INZ Policy Manual is quite generalised in that area. The applicant's partner had held a Visa and at present moment he is in India and no longer holding a Work Visa under the [appellant]. He had neither applied for a Visa. As far as how we read the policy, it is clear that he can be removed as R2.40.d does not apply to him anymore …
>
> Since the husband is no longer holding a dependent visa, [Immigration New Zealand] may consider excluding him from the residence application and continue to process this application."

Immigration New Zealand Decision

[27] On 10 April 2019, Immigration New Zealand declined the appellant's application. It did not address the appellant's request to remove her husband from the application. It concluded that her husband had not satisfied character requirements and was ineligible for a resident visa unless granted a character waiver. A character waiver assessment had been conducted (a copy was provided) but no waiver had been granted.

STATUTORY GROUNDS

[28] The appellant's right of appeal arises from section 187(1) of 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.

[29] 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

[30] On the 23 May 2019, the appellant lodged this appeal under both grounds under section 187(4) of the Act.

[31] The representative provides submissions (17 and 26 June 2019) along with copies of documents already on the Immigration New Zealand file, including the husband's re-issued driver's licence (November 2018). She also provides copies of two documents entitled "Information in Preparation for Parent Interviews" from the high school attended by the appellant's eldest children regarding their academic progress and behaviour at school.

[32] The new evidence presented on appeal, while inadmissible for the purposes of assessing the correctness of Immigration New Zealand's decision as per section 189(1) of the Act, is relevant to the question of whether the appellant has special circumstances as per section 189(3)(b) of the Act. The Tribunal considers this evidence, and all other evidence provided on appeal, in the discussion of special circumstances below.

[33] The representative submits that the husband is "truly innocent" and thought he had provided genuine documents to Immigration New Zealand. In the interest of fairness and natural justice, he should have been given a proper chance to demonstrate that he had not provided any false or misleading documents to Immigration New Zealand. He has been punished by having to live in India

without his wife and family. The representative requests the Tribunal to overturn the decision or "redirect it to the Minister of Immigration for a recommendation of approval".

ASSESSMENT

[34] The Tribunal has considered the submissions provided on appeal and the files in relation to the appellant's residence application and the husband's Essential Skills work visa application, which were provided by Immigration New Zealand.

[35] On 27 June 2019, the Tribunal sought submissions from the Ministry of Business, Innovation and Employment (MBIE) regarding the application of immigration regulations and instructions related to the removal of a secondary applicant from a residence application. MBIE's submissions were received on 18 July 2019 and forwarded to the appellant's representative, who was invited to provide her response by 2 August 2019. On 24 July 2019, the representative indicated she had no further submissions to make. MBIE's submissions are discussed below.

[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 which warrant consideration of an exception by the Minister of Immigration.

Whether the Decision is Correct

[37] The application was made on 27 July 2017 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because the appellant's husband did not meet character requirements and he was not granted a character waiver. The issue of whether the appellant's husband could be removed from the application was not addressed directly in the decision to decline.

[38] Applicants under the Skilled Migrant category must meet character requirements (SM4.10, effective 29 November 2010). Paragraph A5.1 (effective 29 November 2010) requires all applicants to be of good character.

[39] Paragraph A5.25 (effective 30 March 2015) provides, relevantly:

A5.25 Applicants normally ineligible for a residence class visa unless granted a character waiver

Applicants who will not normally be granted a residence class visa, unless granted a character waiver (see A5.25.1(b) below), include any person who has been:

…

i. in the course of applying for a New Zealand visa (or a permit under the Immigration Act 1987), has made any statement or provided any information, evidence or submission that was false, misleading or forged, or withheld material information; or

…

Note: When considering whether or not an applicant has committed an act that comes under A5.25 (i), (j) or (k) or (l) above, an immigration officer should establish whether, on the balance of probabilities, it is more likely than not that the applicant committed such an act … .

[40] However, as set out at A5.25.1 (effective 30 March 2015), Immigration New Zealand must not automatically decline an application on character grounds:

A5.25.1 Action

a. An immigration officer must not automatically decline residence class visa applications on character grounds.

b. An immigration officer must consider the surrounding circumstances of the application to decide whether or not they are compelling enough to justify waiving the good character requirement. The circumstances include but are not limited to the following factors as appropriate:

i. if applicable, the seriousness of the offence (generally indicated by the term of imprisonment or size of the fine);

ii. whether there is more than one offence;

iii. if applicable, the significance of the false, misleading or forged information provided, or information withheld, and whether the applicant is able to supply a reasonable and credible explanation or other evidence indicating that in supplying or withholding such information they did not intend to deceive INZ;

iv. how long ago the relevant event occurred;

v. whether the applicant has any immediate family lawfully and permanently in New Zealand;

vi. whether the applicant has some strong emotional or physical tie to New Zealand;

vii. whether the applicant's potential contribution to New Zealand will be significant.

…

d. Officers must make a decision only after they have considered all relevant factors, including (if applicable):

i. any advice from the National Office of INZ; and

ii. compliance with fairness and natural justice requirements (see A1).

e. Officers must record:

i. their consideration of the surrounding circumstances, (see paragraph (b) above), noting all factors taken into account;, and

ii. the reasons for their decision to waive or decline to waive the good character requirements.

Any decision to waive the good character requirements must be made by an immigration officer with Schedule 1-3 delegations.

Provision of false driver's licence

[41] The appellant's husband had, in his earlier Essential Skills work visa application, provided an Indian driver's licence in his name. Immigration New Zealand's verification with the relevant Indian authorities indicated that the licence number belonged to another person. Moreover, while the licence the husband had provided contained several endorsements (for example, for heavy vehicles), the records for that licence number had fewer and different endorsements, and different dates of issue and expiration.

[42] Immigration New Zealand put these concerns to the appellant and her husband. The husband's explanation was that his original driver's licence recorded an incorrect date of birth. He had approached the transport authority to correct his date of birth and was provided with a duplicate licence with the corrected date of birth, but was told it could not be changed in the online database. It was that licence that he had presented to Immigration New Zealand.

[43] The Tribunal finds Immigration New Zealand was correct to reject this explanation. It addressed only a differing date of birth; it did not address the inconsistencies in endorsements or the issue and expiration dates. Immigration New Zealand correctly concluded that it was more likely than not that the husband had provided a driver's licence to Immigration New Zealand which had been issued to a different person and falsified to reflect his own personal information.

Character waiver assessment

[44] Immigration New Zealand then correctly proceeded to invite the appellant to provide information on why a character waiver should be granted. This was duly provided by the representative.

[45] Immigration New Zealand began its character waiver assessment by noting that the appellant, her children and her husband met all other requirements under

instructions. It recorded the length of time the family had spent in New Zealand and noted that they had no other immediate family in this country. It went on to set out the circumstances surrounding the provision of the driver's licence, concluding that the husband's explanation did not appear credible and that, although he had "admitted" some fault, he had not openly acknowledged he had provided false information and appeared to maintain he had provided a genuine driver's licence. It noted that the husband had gained employment as a bus driver using a New Zealand driver's licence which he had obtained through providing his false Indian driver's licence.

[46] Immigration New Zealand also considered that the appellant had completed a postgraduate qualification in New Zealand, had 10 years of skilled work experience, and was now working as a social worker. Her husband had worked as a bus driver for nine months before he left New Zealand.

Weighing of factors

[47] Immigration New Zealand recognised as significant the appellant's contribution to New Zealand through her skilled employment as a social worker. However, on the balance of probabilities, it was more likely than not the husband had knowingly provided false information in his application. This was a serious offence because it undermined the integrity of the immigration system which relied on accurate, genuine and truthful documents and declarations from applicants. The appellants did not have strong ties to New Zealand.

[48] Immigration New Zealand concluded that it was not satisfied that the appellant's skilled employment and recognised qualifications, or the time the family had spent in New Zealand, were sufficient to mitigate the provision of false and misleading information. The character waiver was not granted.

The Tribunal's assessment

[49] Immigration New Zealand correctly considered the positive factors relating to the appellant's application, namely her qualifications, her contribution through her employment and the family's settlement in New Zealand. Balanced against those was the negative factor of the husband's provision of false information.

[50] The Tribunal finds that Immigration New Zealand's assessment correctly identified the factors relevant to a character waiver assessment. It balanced those

factors and arrived at a conclusion that was supported by the relevant information before it.

Removing an Applicant from an Application

[51] During the processing of the application, the appellant and her representative made several requests to Immigration New Zealand to remove her husband from the application. This was understandable given that, if her husband was unable to secure a character waiver, the application would fail for the whole family.

[52] Immigration New Zealand's response to this request was that R2.40 prevented the appellant from removing her husband from the application.

Removing a secondary applicant from an application

[53] Prior to 8 May 2017, instructions were silent about a principal applicant's ability to remove a secondary applicant (a partner or child) from a residence application. The Tribunal's position was that, *in some cases*, procedural fairness required that Immigration New Zealand give a principal applicant an opportunity to remove a secondary applicant where their continued inclusion would mean the application would fail (see: *ML (Partnership*) [2015] NZIPT 202638 and *KW (Parent)* [2016] NZIPT 203089).

[54] On 8 May 2017, immigration regulations and instructions were changed to address this issue.

[55] A new provision in the Regulations provided that:

> **20 Applications involving family members**
>
> (1) An application for a visa may relate to the applicant and—
>
> (a) any dependent children of the applicant:
>
> (b) the applicant's spouse or partner.
>
> …
>
> (2A) However,—
>
> …
>
> (b) if the spouse or partner of an applicant holds or has applied for a temporary entry class visa based on the spouse or partner's relationship to the applicant,—

> (i) an application for a residence class visa to which subclause (1)(b) applies must include the applicant's spouse or partner; and
>
> (ii) the name of the spouse or partner may not be removed from that application (whether by a variation of the application or the making of a new application) while the application is being processed, unless there is a change of circumstances that results in the applicant's spouse or partner ceasing to be his or her spouse or partner.
>
> …

[56] Residence instructions were then amended to reflect the Regulations. Section 20(2A)(b)(i) was reflected in R2.40 (effective 8 May 2017) requiring a partner, who held or had applied for a visa on the basis of their relationship with the principal application, to be included in the residence application:

> **R2.40 Mandatory requirements for lodging an application for a residence class visa**
>
> *See also Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010, Reg 5 & 20.*
>
> Unless RV1.10.10 applies, an application for a residence class visa made outside an immigration control area must:
>
> …
>
> d. include all dependants of the principal applicant where they hold or have applied for a temporary entry class visa based on their relationship to the principal applicant; and
>
> …

[57] Section 20(2A)(b)(ii) of the Regulations was reflected in R5.115 (effective 8 May 2017) (although without the nuance contained in the Regulation with respect to whether the partner held, or had applied for a temporary visa):

> **R5.115 Partners and dependent children who must be included in a residence class visa application**
>
> *See also Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010, Reg 5 & 20*
>
> A partner or dependent child of the principal applicant included in a residence class visa application cannot be removed from that application while the application is being processed, unless a change in circumstances results in the partner ceasing to be the applicant's partner or the child ceasing to be a dependent child.

[58] Following the promulgation of the Regulations and instructions, Immigration New Zealand also published several "Visa Paks", which are documents containing internal advice to staff about how to interpret and apply instructions. These included Visa Pak 341 (19 January 2018) which stated (emphasis added):

> VISAS BASED ON A RELATIONSHIP
>
> …
>
> R2.40 d – What is meant by 'has applied for a visa'?
>
> A residence class visa application must include any dependent children or partner of the principal applicant, where the child or partner holds or has applied for a temporary entry class visa based on their relationship to the principal applicant (Regulation 20 of the Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010 (the Regulations), which is reproduced at R2.40 d).
>
> 'Has applied for' means has applied for a temporary entry class visa at the time the residence class visa application is lodged. This means that the partner or dependent child(ren) who have an undecided application for a temporary entry class visa (which is based on a relationship to the principal applicant) being considered by Immigration New Zealand when the residence class visa application is lodged, must be included in that residence class visa application.
>
> A partner or dependent child who has applied in the past for a visa based on their relationship to the principal applicant for a residence class visa, but who does not currently hold a visa based on that relationship and does not have an application based on that relationship being processed, does not have to be included in the residence application under Regulation 20 (as reproduced at R2.40 d).

[59] As outlined above at [35], the Tribunal sought submissions from MBIE about this issue.

Application of the regulation and instruction

[60] In relation to the application of R5.115 to applications lodged prior to 8 May 2017, in light of section 72(1) of the Act, which requires that decisions must be made in terms of the residence instructions applicable at the time the application was made, MBIE submitted:

> Immigration instructions are the rules or criteria for determining the eligibility of a person for the grant of a visa or entry permission. They are statements of government policy.
>
> R5.115 is part of the Immigration New Zealand Operational Manual and summarises the regulation 20(2A) requirements. It is not an immigration instruction, that is, it is not a rule or criteria for determining the eligibility of a person for a visa. Examples of immigration instructions, being statements of government policy which determine eligibility for a visa, are character and health requirements. The reference to regulation 20(2A) in the immigration operational manual is simply a reference to the procedural legislative settings agreed to by Cabinet and promulgated through regulation.
>
> It follows that section 72(1) of the Immigration Act 2009, which provides that decision on the application for a resident visa must be made in terms of the residence instructions applicable at the time the application was made, does not apply because R5.115 is not an immigration instruction.

[61] The Tribunal does not accept MBIE's submission that section 72(1) does not apply to R5.115 because R5.115 "is not a rule or criteria for determining the eligibility of a person for a visa" and is therefore not an "immigration instruction".

[62] Section 4 of the Act defines instructions as those certified under section 22 of the Act, including residence instructions, temporary entry instructions, and transit instructions.

[63] Section 22(5) then sets out the various matters that may constitute instructions. Section 22(5)(b) includes "rules or criteria for determining the eligibility of a person for the grant of a visa", but paragraphs (a) and (c) through (i) provide several other matters which also constitute instructions: for example, "any general or specific objectives of immigration policy" (section 22(5)(a)); "any indicators, attributes, or other relevant information or matters that may or must be taken into account in assessing a person's eligibility for a visa or entry permission" (section 22(5)(c)); and "any matters relevant to balancing individual eligibility for a visa or entry permission against the overall objectives or requirements of immigration instructions" (section 22(5)(f)).

[64] Section 22(6) then states that, without limiting section 22(5), "any rules or criteria relating to eligibility for a visa or entry permission" may include *inter alia,* matters relating to health, character or a person's immigration status.

[65] Contrary to MBIE's submissions, section 22(5) does not restrict immigration instructions to only "rules or criteria for determining the eligibility of a person"; it also includes several other categories of matters which can be considered instructions (paragraphs (a) through (i)).

[66] The Tribunal recognises Immigration New Zealand's Operational Manual as the most accessible repository of most instructions. Under the heading "How the Manual is organised", several sections are marked with an asterisk, which indicates that "some chapters of these sections *do not* constitute Government immigration instructions as described in section 22 of [the Act]" (emphasis added). Sections marked with an asterisk include Border Entry, Administration and Appendices, although the specific chapters which are *not* considered instructions are not identified. The "Residence" section of the Manual, where R5.115 is located, is not marked with an asterisk, which indicates R5.115 is considered part of immigration instructions.

[67] The Tribunal also rejects MBIE's position that R5.115 is not "a rule or criteria for determining the eligibility of a person for a visa". To the contrary, the requirement that a person included in the application cannot later be removed can be central to whether a person (the principal applicant, for example) is eligible for a visa.

[68] The Tribunal finds that R5.115 is an immigration instruction and is part of residence instructions.

[69] As to its application, in accordance with section 72(1), R5.115 applies to applications lodged on or after 8 May 2017.

[70] The Tribunal accepts MBIE's submission in relation to the application of regulation 20(2A) to applications lodged prior to 8 May 2017, namely:

> "It is submitted that Regulation 20(2A) is prospective [in] its application. That is, it applies to acts in the future (removal of partners from a residence application which has been lodged) but does not have an effect on what happened in the past. Therefore, while a partner did not have to be included before 8 May 2017, if the partner was included, then they cannot be removed while the residence application is being processed."

[71] The Tribunal observes that there may be situations where an applicant has applied for residence prior to 8 May 2017 and included a dependent partner or child. If, at some point after 8 May 2017, while the application was still being processed, the applicant wishes to remove their partner or child, they will be prevented from doing so by regulation 20(2A), despite the inapplicability of R5.115 (which was not in force at the time of the application, and because of section 72(1), cannot apply).

[72] While such situations are unlikely to occur, (and increasingly so, given the passage of time since May 2017) the Tribunal notes it is far from ideal that this contradiction exists between the applicability of the regulations and the instructions.

Who is caught by regulation 20(2A)?

[73] In relation to whether regulation 20(2A) affects only individuals who currently hold or have applied for a temporary visa based on their relationship with their partner (and the application is being processed), or whether it was intended to *also* capture a person who, *at any time in the past,* has either held or applied for a temporary visa on the basis of their relationship with their partner, MBIE submitted that there were two possible interpretations. The first, the "broad interpretation", was based on a purposive approach to the provision:

> "… the regulation [20(2A)] was intended to affect individuals who currently hold or have applied for a temporary visa based on their relationship with their partner (and the application is being processed), and also capture a person who, at any time in the past, has either held or applied for a temporary visa on the basis of their relationship with their partner."

[74] In contrast, the advice outlined in the Visa Pak 341 (19 January 2018) indicated a "narrow interpretation" because it defined "holds or has applied for" as affecting only a person who holds a visa, or has an undecided application pending. A person who has applied for (or held) such a visa in the past (but does not currently hold, and has not applied for a visa at the time of lodgement) does not have to be included in the application.

[75] As such, MBIE noted there were two possible interpretations of 20(2A):

> "The narrow interpretation of regulation 20(2A)
>
> i. This refers to a person who holds a temporary entry class visa or has a visa currently being processed both of which are based on their relationship with the principal applicant, or
>
> The broad interpretation of regulation 20(2A)
>
> ii. Alternatively, this refers to a person who holds or has applied for a temporary entry class visa or has a visa currently being processed, based on their relationship with the principal applicant, or has applied in the past for a temporary entry class visa based on their relationship with their partner."

[76] Faced with these conflicting interpretations, MBIE submitted that:

> "While the policy intent referred to [above] could better be achieved by taking a purposive broad interpretation to regulation 20(2A), the Visa Pak 341 and 358 guidance on the interpretation of the clause is consistent with the narrow interpretation of the regulation.
>
> In all the circumstances, it is submitted that the Ministry is bound by the interpretation it has advanced in the Visa Paks and will therefore look for the next legislative opportunity to amend regulation 20(2A) to reflect the policy intent. Such an amendment would be to unequivocally ensure that the regulation provides a clear criteria for those secondary applicants who should be included (and cannot be removed) in an application based on their relationship with the principal applicant."

[77] The Tribunal rejects MBIE's submission that it is "bound" by the interpretation it has outlined in the Visa Paks. As the Tribunal (differently constituted) has previously observed, Visa Paks are not part of instructions and cannot fetter Immigration New Zealand's obligations to determine applications in accordance with instructions: see *RQ (Skilled Migrant)* [2015] NZIPT 202289 at [39]. Furthermore, they do not determine the meaning of the regulations.

[78] If MBIE considers that the Visa Paks do not correctly reflect the purpose of the regulation, then the solution is to amend the Visa Paks to ensure that the

meaning and policy intent of the regulation and instructions is correctly reflected in Immigration New Zealand's advice to its staff.

Application to the appellant

[79] The appellant lodged her application for residence on 27 July 2017, some months after the regulation and instruction came into effect on 8 May 2017.

[80] At the time the appellant lodged her residence application, her husband *held* a visa based on his relationship with her (a work visa on the basis of his partnership with a worker). As per regulation 20(2A)(b) and R5.115, he could not be removed from the appellant's application (unless a change of circumstances resulted in him ceasing to be the appellant's spouse).

[81] The fact that the husband no longer holds a temporary visa and currently lives offshore does not affect the applicability of the regulation and instruction because, at the time the application was lodged, he was the holder of a visa dependent on his relationship with the appellant.

[82] Immigration New Zealand was correct to advise the appellant that she could not remove her husband from her residence application.

Correctness of Decision

[83] The Tribunal finds that Immigration New Zealand's decision to decline the appellant's application was correct. The appellant's husband did not satisfy character requirements, and he had not been granted a character waiver.

Observation regarding the wording of the regulation

[84] In its submissions, MBIE addressed the intent of regulation 20(2A):

> "Taking a purposive approach, the policy reasoning behind regulation 20(2A) is that visa applications should be able to be comprehensively assessed, including looking at all the applicants' health and character. This is to ensure applicants meet New Zealand's character requirements and to protect New Zealand from significant costs imposed on publicly funded services, including health care and special education services.
>
> A small number of families with dependent children and partners who have character issues or high cost health conditions, and therefore do not meet character and health requirements, attempt to circumvent immigration requirements. The dependents or partners are either excluded in the first instance or withdrawn from the family's resident visa application to ensure a positive decision for the other applicants.

> This behaviour undermines the integrity of the immigration system, because character issues and health needs of all the members of the family cannot be assessed and balanced against the other considerations that must be looked at when determining the visa applications of the family unit.
>
> …
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> In such cases where dependents and partners are not included, or are later withdrawn, this results in a split immigration outcome with all but one member of the family getting residence and the excluded person often facing the prospect of leaving New Zealand or becoming unlawful."

[85] The Tribunal accepts that the intention of the regulation is to prevent "split immigration outcomes" whereby an applicant fails to include a family member who is unlikely to satisfy instructions in a residence application (or removes them from an application in which they are included) to ensure that the rest of the family members' applications will succeed. These "split" outcomes leave Immigration New Zealand in the invidious position, often several years later, of processing subsequent applications from that excluded family member, and having to assess their circumstances now including a number of New Zealand-based family members and a corresponding high level of settlement in this country.

[86] Given that intention, the Tribunal recognises why MBIE sees the broader interpretation of regulation 20(2A) as reflecting the purpose of the regulation (see above, at [73]): any spouse or child who has ever applied for, or held, a visa dependent on their relationship with the principal applicant will have to be included in a residence application and cannot be removed.

[87] However, as it currently reads, the wording of the regulation (and the way it is reflected in the associated instructions) fails to clearly articulate this policy intent. Rather, the current wording raises uncertainty both in terms of to whom it applies and how it can cease to apply (i.e. when circumstances result in an applicant's spouse or partner "ceasing to be his or her spouse or partner"). This last matter was not addressed in this appeal (as it was not relevant on the facts) but is one which is deserving of clarification.

[88] It is desirable that such uncertainty be resolved. This would likely require a comprehensive review to ensure any redrafted regulation clearly articulates to whom it should apply, when, and how it would cease to apply. The associated instructions (and if necessary, Visa Paks) should then mirror the language used in the Regulations so that they all reflect a common intention and purpose and avoid conflicting interpretations.

Whether there are Special Circumstances

[89] 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.

[90] 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

[91] The appellant first arrived in New Zealand in February 2015 as the holder of student visa. Since then, she has held several temporary visas. Her most recent work visa is valid until January 2021. During her time in New Zealand, the appellant has made four departures from this country, each of less than one month.

[92] The appellant's youngest child arrived in New Zealand in February 2016 and her teenage twins in May 2016. The three children, whose student visas are also valid until January 2021, left New Zealand for a six-month period between June 2018 and January 2019. The appellant's husband arrived in New Zealand in May 2015 and left in January 2018. He has not returned.

[93] According to the appellant's residence application form, both her and her husband's parents and siblings live in India.

Settlement and potential contribution

[94] The appellant graduated with a Master of Social Work from an Indian university and received a Postgraduate Diploma in Health Management (Level 8) from a New Zealand institute. In India, she worked for 10 years as a junior health inspector while in New Zealand, following graduation, she worked as a community support worker. Since late 2018, she has been employed as a social worker, earning a salary of $64,000 per year. Immigration New Zealand found that her role was skilled employment under instructions. A letter of support from a colleague provided to Immigration New Zealand (19 February 2019) describes the appellant as a talented social worker working in a field "where good social workers are difficult to find".

[95] The appellant's husband worked in India as a truck and bus driver. While in New Zealand, he worked for nine months as a bus driver.

[96] While the Tribunal recognises that social workers provide a valuable service in New Zealand, the appellant's contribution to New Zealand through her employment cannot be considered uncommon or out of the ordinary.

Health and English language requirements

[97] Immigration New Zealand was satisfied that the appellant met the English language requirements for the category because she had gained a Level 8 qualification after one year of academic study in New Zealand. Her husband was to pre-purchase English tuition for speakers of other languages.

[98] The appellant, her husband and their children were all considered to have an acceptable standard of health.

Character

[99] As set out above, the appellant's husband did not meet character instructions because he had provided false documentation in support of a work visa application. The Tribunal acknowledges several character references from individuals in India which were provided to Immigration New Zealand, stating the husband was an honest, genuine, and hard-working person. It also recognises that the appellant provided Immigration New Zealand with a newly issued Indian driver's licence which Immigration New Zealand verified as genuine.

[100] However, the Tribunal is reminded that the High Court has repeatedly emphasised the importance of maintaining the integrity of New Zealand's immigration system in decisions concerning the abuse of that system. This was made clear by the High Court in *Prasad v Deportation Review Tribunal* (HC Auckland, CIV-2007-404-8059, 19 February 2008), where Lang J stated at [56]:

> "The immigration authorities depend upon applicants being scrupulously honest in disclosing their personal circumstances. Often these will be difficult to verify, so the integrity of the application process depends very much on a system of voluntary compliance with the obligations of disclosure. Those obligations … lie at the heart of the process by which Immigration New Zealand grants permits to those who wish to live here. If they are disregarded, the integrity of the process is destroyed."

[101] The provision of false and misleading information by the appellant's husband is a negative factor weighed by the Tribunal in this assessment of whether special circumstances exist.

Best interests of the appellant's children

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

[103] The appellant's twins are currently in year 11 at their local high school. Reports from parent teacher interviews provided on appeal indicate that both are progressing well, and their own comments on the appeal form indicate that they would like to continue to study in New Zealand to have a better future. The youngest son attends primary school.

[104] While the Tribunal assumes that the children, especially the older twins, will have made friends and formed relationships while living in New Zealand, it also notes that they recently returned to India for six months during the New Zealand school year, presumably to spend some time with their father. The letter to Immigration New Zealand from the appellant's colleague noted that the children suffered from a sense of insecurity living without their father, and that the appellant also struggled with the uncertainty of their immigration status. The colleague notes that "the family really should have to stay together for the better future of the children".

[105] While it was the intention of the appellant and her husband to remain permanently in New Zealand, decisions to migrate can result in families being separated. Since the husband returned to India, the couple have elected to remain apart, with the appellant and the children remaining in this country. The family appear to be managing this arrangement, at least on a temporary basis. Despite the challenges involved, the appellant requests that, if her husband is not granted residence, she and the children be allowed to remain here permanently.

[106] While accepting that the appellant's preference is for the family to be reunited together here in New Zealand, there is no obvious impediment to the appellant and her children returning to India so the family can live together again. There is no evidence that any of the children have particular vulnerabilities that would make a return to India difficult; indeed, they recently spent six months there.

[107] The Tribunal finds there is no compelling reason why the children's best interests require a grant of residence.

Discussion of special circumstances

[108] 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.

[109] The appellant has lived in New Zealand for four-and-a-half years; her children have been here for around three years. Since late 2018, the appellant has worked as a social worker, an important and valuable role, for which she is well-qualified, and earns $64,000 per year.

[110] Given the time she and the children have spent in this country, the Tribunal presumes that the family is reasonably well-settled and will have made friends and formed relationships within their school, workplace, and local community. The appellant wishes to remain in New Zealand with her children to give them the best possible future and the opportunity to continue to higher education, even if that means currently being separated from her husband. However, wanting to remain in this country to access better educational opportunities for children is not an uncommon or unusual motivation for migrants.

[111] The appellant has no family nexus to New Zealand. The Tribunal considers her husband's provision of false information as a negative factor in its weighing of the appellant's circumstances.

[112] The Tribunal finds that the appellant's circumstances, considered individually and cumulatively, are not special such as to warrant a recommendation that the Minister of Immigration consider making an exception to residence instructions.

DETERMINATION

[113] 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.

[114] The appeal is unsuccessful.

Order as to Depersonalised Research Copy

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

"L Wakim"
L Wakim
Member

Certified to be the Research Copy released for publication.

L Wakim
Member