

**RŌPŪ TAKE MANENE, TAKE WHAKAMARU
AOTEAROA**

Appellant:	CL (Partnership)
Before:	J Donald (Member)
Counsel for the Appellant:	A McClymont
Date of Decision:	1 October 2019

RESIDENCE DECISION

[1] The appellant is a 57-year-old citizen of Mexico whose application for residence under the Family (Partnership) category was declined by Immigration New Zealand.

THE ISSUE

[2] Immigration New Zealand declined the application because the appellant no longer had a supporting partner as her husband had died during the processing of the application. The Tribunal finds that Immigration New Zealand's decision was correct.

[3] The principal issue for the Tribunal is whether the appellant has special circumstances, arising primarily from her settlement in New Zealand, such as to warrant a recommendation that the Minister of Immigration consider granting residence as an exception to instructions.

[4] The Tribunal finds that the appellant has special circumstances.

BACKGROUND

[5] The appellant married her husband, a New Zealand citizen, in 2011. They initially spent time living together in Mexico and in the United States, where the husband worked. They decided to relocate to New Zealand. The appellant took some time to sell her belongings in Mexico and joined her husband here in August 2016.

[6] The appellant made her residence application on 6 January 2019.

[7] In March 2019, while visiting his adult children in the United States, the husband became ill and was hospitalised. He died on 25 March 2019. The appellant advised Immigration New Zealand of his death. By letter dated 8 May 2019, Immigration New Zealand explained to the appellant that she was no longer eligible for residence under the Family (Partnership) category. She instructed counsel, who advised Immigration New Zealand that the appellant intended to appeal to the Tribunal on the ground of her special circumstances and asked that it assess her health, character and partnership to assist in the determination of the appeal.

Immigration New Zealand Decision

[8] By letter dated 12 June 2019, Immigration New Zealand declined the appellant's application because she did not have a supporting partner.

STATUTORY GROUNDS

[9] 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.

[10] 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

[11] On 22 July 2019, the appellant lodged this appeal on the ground that her circumstances are special such that an exception to the residence instructions should be considered.

[12] Counsel makes submissions (30 July 2019) and produces the following new evidence relevant to the assessment of whether the appellant has special circumstances:

- (a) a letter from the appellant explaining her circumstances;
- (b) a copy of the appellant's husband's death certificate and records of his medical treatment in New Zealand;
- (c) evidence of the appellant's employment in New Zealand;
- (d) letters of support from members of the appellant's family, members of her husband's family, her employer, and the Church of Scientology of New Zealand;
- (e) photographs and other evidence of the appellant packing and selling her belongings and taking other steps prior to her departure from Mexico;
- (f) photographs of the ceremony attended by the appellant and her husband's family to scatter his ashes in New Zealand; and
- (g) copies of the appellant's visitor visa for the United States and her two adult sons' New Zealand work visas as religious workers.

ASSESSMENT

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

[14] While the appellant appeals only on the ground of her special circumstances, the Tribunal's jurisdiction requires that it first determine whether Immigration New Zealand's decision was correct. That assessment is set out below. It 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

[15] The application was made on 6 January 2019 and the relevant criteria are those in residence instructions as at that time. The relevant instruction in this case is F2.5.d.i (effective 8 May 2017), which provides that an application under the Family (Partnership) category will be declined if it is not supported by an eligible New Zealand citizen or resident partner. Immigration New Zealand declined the application because the appellant's husband had died and therefore she no longer had a supporting partner. Immigration New Zealand was correct to decline the application; it had no discretion to do otherwise.

Whether there are Special Circumstances

[16] 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.

[17] 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.

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

Personal and family circumstances

[19] The appellant is a 57-year-old widowed citizen of Mexico. The appellant married her New Zealand-citizen husband, AA, in 2011. He died in March 2019 of cardiogenic shock and ischemic cardiomyopathy while visiting the United States.

[20] The appellant first visited New Zealand with her husband in May 2011. The couple later decided to relocate here. The appellant arrived in New Zealand in August 2016. She was initially the holder of a visitor visa. She was granted a work

visa on the basis of her partnership in January 2018. Her current work visa is valid until January 2020.

[21] In November 2016, the appellant tried to make an application for residence under the Family (Partnership) category. That application failed to meet lodgement requirements. In January 2019, she successfully lodged a residence application. It appears that her application was delayed due to her husband's ill-health and poor advice, or her misunderstanding of advice, from Immigration New Zealand's call centre to the effect that she had to be living in New Zealand for two years before she could apply for residence.

[22] Immigration New Zealand was satisfied that the appellant and her husband were living together in a genuine and stable partnership. Her application was declined because her husband died during the processing of it, so she no longer had a supporting partner.

[23] Both the appellant and her husband have adult children from previous partnerships. She has two adult sons, aged 30 and 27, who are presently living in New Zealand as the holders of Work to Residence visas as religious workers. Instructions enable them to apply for residence under the Residence from Work (Religious Worker) category after holding Work to Residence visas for three years, provided they meet the requirements of that category. The older son was first granted a visa as a religious worker in May 2016. He has not yet applied for residence. His current visa expires in August 2020. The younger son arrived in New Zealand in January 2018 and was first granted a visa as a religious worker in December 2018. That visa expires in December 2020. He is not yet able to apply for residence. A letter of support from the Church of Scientology, which employs both sons in New Zealand, is produced on appeal.

[24] On appeal, the appellant also produces letters from each of her sons. Her older son advises that he intends to apply for residence shortly. He explains the challenges which the family faces as a result of his stepfather's death and his concerns for his mother should she have to return to Mexico City. The appellant's younger son emphasises that his stepfather was a great support for him, his mother and his brother; they are a close family and need each other now, more than ever. He also writes of his commitment to his role as a religious worker.

[25] The appellant's parents are deceased, her three siblings reside in Mexico. She is not close to two of them and the third is in the process of migrating to the United States. Evidence has been produced on appeal to demonstrate that the

appellant's siblings are not in a position to provide her with financial support or accommodation should she return to Mexico.

[26] The appellant has now been living in New Zealand for more than three years. She is employed here and has established close relationships with her sisters-in-law. The appellant's sons are working here and appear to each have a pathway to residence. She feels she has nothing to return to in Mexico. In her letter in support of her appeal, the appellant states:

"I can't go back to Mexico because my life is in New Zealand now, we were creating that for years, I have my kids here, they have a commitment with the church, they love their jobs, we have to be together, I don't want to [lose] my kids, work, friends, my family here, my relationships with my sisters in law, after the loss of my beloved husband, I can't afford that, is too much traumatic for me ...

... I don't want my family broken and forced to live separately after the enormous loss of my husband, [my sons] lose their father too (stepfather) they were so close to him and he was [their] mentor and adviser all time, we need each other now more than ever before."

Family nexus to New Zealand

[27] The evidence produced to Immigration New Zealand and to the Tribunal on appeal demonstrates that the appellant has close mutually supportive relationships with her husband's family in New Zealand. Her husband has six siblings. Each of the appellant's New Zealand sisters-in-law writes in support of the appeal. BB explains that the appellant cared for and nursed her brother (the appellant's husband) back to health each time he had a health crisis. The family relied on her to care for him and feel a huge debt of gratitude to her, particularly for her support during the period of hospitalisation leading up to his death. She states:

"To send [the appellant] back to Mexico now seems extremely unfair and cruel when she has made her home here and has nowhere to live in Mexico City. She has far more family here and reason to stay, has had steady work since she got her work visa and has always contributed and been involved in family occasions here. Even this coming weekend we have a family gathering of 40+ people to scatter [my brother's] ashes. [The appellant] needs to stay with us where his resting place is, she provides important links to our brother by our shared love and memory of him and her communication with our American niece and nephews and their children."

[28] CC describes the appellant as "a loving, loyal and hardworking mate" and supports her request for residence. DD observes that her brother and the appellant moved their entire lives to New Zealand and intended to remain here permanently. The appellant's family, job and life are now all here.

Employment

[29] On appeal, letters in support of the appellant are provided by EE, the director of ABC Ltd, FF, the company's organising and establishment manager, and GG, the company's production manager. EE explains that the appellant has been employed by the company to establish and run a nightshift packing operation to cope with increased orders. She is currently the nightshift and weekend shift manager and has up to eight staff members reporting to her. She has learned to operate complex electronic packing machines and has the ability to manage, organise and supervise packing production.

[30] FF advises that the appellant has worked for the company during 2018 and 2019 and has proven to be a most valuable employee. She is quick to learn and has taken on increasingly responsible roles. She has learned skills which require significant technical knowledge and ability. She operates in an environment which demands attention to detail and dedication to meeting strict deadlines. FF states:

"[The appellant] is a very energetic and valuable worker. Personally she is very brave, returning to her work duties with minimal time absence after the sad loss of her husband ...

[The appellant] is quite simply one of the most valuable staff members we have. She is an asset to the company and an asset to the country she chose to live in with her husband; New Zealand."

FF also speaks highly of the appellant's character and personal qualities.

[31] GG emphasises the trust placed in the appellant, her professionalism, technical ability and willingness to work hard. He describes her as his "right hand". He also states: "I know her family and I know how important it was for her husband to have his family living in New Zealand all together".

[32] Counsel for the appellant advises that the appellant earns NZD22 per hour in her employment. In Mexico, she worked for an insurance company for six years prior to her marriage to AA. Various letters of support express concerns that the appellant would find it difficult to secure employment in Mexico because of her age and gender and economic conditions there.

Health and character

[33] Immigration New Zealand found that the appellant met the health and character requirements of residence instructions. She has a clear New Zealand police certificate (28 August 2019).

Discussion of special circumstances

[34] The dilemma facing the appellant is that she sold up and left behind her life in Mexico more than three years ago to relocate to New Zealand with her New Zealand-citizen husband. Her two adult sons are living in New Zealand and have pathways to New Zealand residence. Her husband's death six months ago means she no longer has a pathway to residence. She has settled in New Zealand, has employment and the support of her husband's family. In Mexico, the appellant has no assets or home and her siblings are unable to offer her any practical support, were she to return. She anticipates, although there is no guarantee, that her sons will remain permanently in New Zealand. The appellant intended to settle in New Zealand with her husband near his family but the death of her husband derailed her residence application and, as her younger son puts it, the family has "no Plan B". The Tribunal is satisfied that, considered cumulatively, the appellant's circumstances are special and warrant consideration of an exception to residence instructions by the Minister of Immigration.

DETERMINATION

[35] This appeal is determined pursuant to section 188(1)(f) of the Immigration Act 2009. The Tribunal confirms the decision of Immigration New Zealand as correct in terms of the applicable residence instructions but considers there are special circumstances of this appellant that warrant consideration by the Minister of Immigration as an exception to those instructions.

[36] Pursuant to section 190(5) of the Immigration Act 2009, the Minister of Immigration is requested to make one of the two decisions set out below. Pursuant to section 190(6) of the Immigration Act 2009, the Minister of Immigration is not obliged to give reasons in relation to any decision made as a result of a consideration of the Tribunal's recommendation.

Order as to Depersonalised Research Copy

[37] 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.

"J Donald"
J Donald
Member

Certified to be the Research Copy
released for publication.

J Donald
Member