IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2020] NZIPT 205833**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**GI (Partnership)**
Before:	T R Cook (Member)
Representative for the Appellant:	The appellant represents himself
Date of Decision:	2 October 2020

RESIDENCE DECISION

---

[1] The appellant is a 36-year-old citizen of South Africa whose application for residence under the Family (Partnership) category was declined by Immigration New Zealand.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it was not satisfied that he and his New Zealand-citizen wife had lived together for 12 months or more at the time he lodged his application. The principal issue for the Tribunal is whether Immigration New Zealand's decision to decline the application was correct.

[3] For the reasons that follow, the Tribunal finds that Immigration New Zealand's decision was correct. While the couple had spent periods of time together through reciprocal visits and holidays, they commenced living together only nine months before the appellant lodged his residence application.

[4] Further, the Tribunal finds that the appellant does not have special circumstances, arising from the genuine and stable nature of his partnership and the inconvenience of having to lodge a further residence application, such as to warrant a recommendation to the Minister of Immigration for consideration of an exception to residence instructions.

BACKGROUND

[5] On 13 October 2019, the appellant made his application for residence under the Family (Partnership) category, which was supported by his wife. The appellant's wife is a South African-born New Zealand citizen. She obtained residence in New Zealand in 2004, under the Family (Dependent Child) category.

[6] The residence application was accompanied by documentary evidence to support the genuine and stable nature of the couple's partnership, including a letter from the appellant in which he outlined the timeline of his relationship with his wife.

[7] The appellant explained that he and his wife met in April 2016 in South Africa, while she was visiting her family. At the time, the appellant was employed and had a son living in South Africa for whom he was providing financial support. The couple decided to commence a long-distance relationship, and between 2016 and 2018, the appellant visited his wife in New Zealand on five occasions, once with his son, while his wife visited South Africa on three occasions. The couple also met in Thailand in mid-2017. In April 2017, they married in South Africa.

[8] The appellant stated that the couple had not decided whether they would live together in South Africa or New Zealand until late 2017, at which time they decided on New Zealand. In November 2017, he and his wife signed a tenancy agreement for a rental property in Auckland. According to the appellant, "this is the date we consider to have formally started living together". However, at this time the appellant was still in South Africa and contracted to his employment. It was decided that the appellant would finish his contract, which had a significant financial benefit to the family, while the couple would endeavour to spend as much time together as possible. Having completed his contract in December 2018, the appellant relocated to New Zealand in January 2019.

[9] In the Partnership Support Form for Residence completed by the appellant's wife, in response to the question "on what date did you and your partner begin living together?", the wife wrote "11/11/2017", which was the date that the couple's joint tenancy commenced.

[10] On the information provided by the appellant to Immigration New Zealand, and using Immigration New Zealand's record of travel movements for the appellant and his wife, the time the couple spent together (and the milestones in their relationship) prior to the date the appellant lodged his residence application on 13 October 2019, are as follows:

Date	Event	Maximum days couple spent together
Late April 2016–12 May 2016	Relationship commenced in South Africa	c.15
20 August–10 September 2016	Appellant in NZ	22
30 December 2016–16 January 2017	Appellant in NZ	18
January 2017	Couple become engaged	
28 March 2017–16 April 2017	Wife in South Africa	20
2 April 2017	Couple marry	
27 July 2017–15 August 2017	Meet in Thailand	20
11 November 2017	Couple sign tenancy agreement	
12 December 2017–9 January 2018	Appellant in NZ (with son)	29
17 March 2018–9 April 2018	Appellant in NZ	24
17 June 2018–9 July 2018	Appellant in NZ	23
9–29 October 2018	Wife in South Africa	21
December 2018	Appellant finishes employment in South Africa	
15 January 2019–14 June 2019	Appellant in NZ	151
6 July 2019–13 October 2019 (date of residence application)	Appellant in NZ	100

Immigration New Zealand Commences Assessment of Application

[11] On 3 June 2020, Immigration New Zealand requested that the appellant provide further, recent documentary evidence in support of the couple living together in New Zealand, and a more detailed explanation of how the appellant and his wife met, how their relationship developed, and any significant dates or milestones in their relationship prior to their marriage in April 2017.

[12] On 4 June 2020 the appellant responded. He attached further documentary evidence and, in a letter of the same date, provided further details about the early stages and development of the couple's relationship.

[13] The appellant explained that, having met in April 2016, the couple's feelings for each other were such that they agreed to commence a long-distance relationship. Thereafter, they were in continual communication through telephone and video calls and messages. In August 2016, the appellant made his first visit to New Zealand to spend time with his wife, and during this visit the couple toured New Zealand. During his second visit to New Zealand, in January 2017, the appellant proposed. The appellant informed Immigration New Zealand that the couple's relationship was most certainly genuine; he had left behind a well-paying job that he enjoyed and his son in South Africa to make a life together with his wife in New Zealand.

[14] The appellant also attached letters he had previously written to Immigration New Zealand (30 September 2017 and 20 August 2018) in support of his temporary visa applications, in which he sought to explain the "unique circumstances" of the couple's relationship.

[15] In his letter of September 2017 which had accompanied his partnership-based visitor visa application of October 2017, the appellant informed Immigration New Zealand that he wanted "nothing more than to live under the same roof as my wife, but under our current circumstances, it quite simply is not possible". He explained that he was contracted to his employment until December 2018, which precluded him from joining his wife in New Zealand at the time. His wife shared custody of her son in New Zealand with the son's father, and her employment and support network was in New Zealand. In the meantime, the couple made every effort to spend as much time together as possible, within the limits of their leave and financial ability. The appellant concluded by stating that he hoped that his letter "amply justifies the reasons why my wife and I currently don't reside together".

[16] In the letter of August 2018, which had accompanied his partnership-based work visa application of the same date, the appellant reiterated that his contract expired in December 2018, after which time his plan was to relocate to New Zealand in January 2019 and be permanently united with his wife. The appellant wrote, "it may not be considered as such, but I like to view my situation as already living in New Zealand, yet working in South Africa to make money and see out my contract".

Interviews

[17] On 24 June 2020, Immigration New Zealand conducted a telephone interview with the appellant and his wife separately. The couple were asked questions about how they met, how their relationship developed, how they maintained a long-

distance relationship, the time that they had spent together, when they began living together, when they moved into the property for which they signed a joint tenancy agreement in November 2017, and whether the appellant contributed to household expenses in New Zealand whilst he was living in South Africa.

[18] The appellant informed Immigration New Zealand that on his first trip to New Zealand the couple did "touristy" things, while his second trip involved meeting his wife's family. The appellant knew by this stage that he and his wife were "very committed", and they had discussed their future living arrangements.

[19] When asked when he and his wife began living together permanently, the appellant replied, "what do you consider permanent?". When asked to respond with what he considered permanent, the appellant replied that in his mind, they were living together permanently once they had signed the tenancy in November 2017. The appellant signed the tenancy agreement online, as he was in South Africa and completing his contract of employment. He explained that on each visit to New Zealand he would leave items, and that after selling his house in South Africa he kept the funds in his bank account, "knowing that I would come to New Zealand". When asked whether he had contributed to household expenses in New Zealand, such as rent and utilities, the appellant stated that he had done so on a couple of occasions when his wife was short of money, and he had paid for her trips to South Africa. Otherwise, "I was seeing to the South African side and she would see to the New Zealand side".

[20] When the wife was asked when the couple began living together permanently, she responded that the appellant was living with her from his first visit. The appellant's name was on the tenancy agreement of November 2017 because the wife wanted the landlord to know that the appellant was also living at the property. The wife explained that the appellant had his own house in South Africa that he had to sell, in order to settle with his ex-wife.

Immigration New Zealand Outlines Concerns

[21] On 26 June 2020, Immigration New Zealand wrote to the appellant and outlined its concerns with his residence application. Immigration New Zealand stated that it was not yet satisfied that the appellant and his wife had been living together for 12 months at the date the appellant lodged his residence application. Residence instructions specifically required an applicant to have lived together with their partner for 12 months or more at the time an application is lodged.

[22] Immigration New Zealand acknowledged that it was satisfied that the appellant and his wife were in a relationship that was genuine and stable and was likely to endure. However, the relationship timeline provided by the couple and the records of their travel movements suggested that the appellant did not permanently relocate to New Zealand until 15 January 2019. In reaching this conclusion, Immigration New Zealand explained that it had considered the joint tenancy agreement of November 2017. However, it appeared that the couple had maintained two separate residences until January 2019.

[23] Immigration New Zealand referred to the following factors in support of its conclusion that the couple were not living together prior to January 2019: there was little evidence that the appellant had been residing in New Zealand from November 2017; he appeared to have maintained his own residence in South Africa while he completed his contract of employment; the trips the appellant made to New Zealand during the intervening period (namely, 29 days in November 2017–January 2018, 24 days in March–April 2018, and 23 days in June–July 2018) were not for longer than a month and were more akin to visits to his wife; the couple had indicated that while the appellant may have left some items in New Zealand during these visits, he brought his personal belongings to New Zealand in January 2019; and that while he had sent some money to his wife on occasion, the couple's expenses in New Zealand were looked after by the wife, while the affairs in South Africa were looked after by the appellant.

[24] As a consequence of the above, Immigration New Zealand informed the appellant that the couple appeared to have lived together from 15 January 2019 to 31 October 2019, which was a period of 9 months and 17 days. (The Tribunal observes that the latter date was meant to be 13 October 2019 (the date the residence application was made), which would equate to 8 months and 28 days).

Appellant Responds

[25] On 7 July 2020, the appellant responded to Immigration New Zealand's concerns. He referred to the provisions of both residence and temporary instructions which stated that evidence of living together may include a joint tenancy agreement. This, the appellant submitted, was logical, as a tenancy agreement carried with it legal liability. However, instructions did not exclude the possibility of a couple having a second home; rather, the "important factor is that [the couple's] name is on the mortgages or tenancy agreements of the homes they live in".

[26] The appellant submitted that, given Immigration New Zealand had seen fit to grant him partnership-based temporary visas, it had set a precedent by having found that the couple were living together in a genuine and stable relationship. When asked during the telephone interview when he and his wife had started living together, he provided the date of the tenancy agreement. The appellant acknowledged that there had been large periods of separation between the couple, and he reiterated the reasons for this, which should be considered compelling. Nonetheless, he considered the couple "to be living together in New Zealand". In response to other factors identified by Immigration New Zealand in its letter of concern, the appellant rebutted Immigration New Zealand's statement that it was *his* residence in South Africa and *the wife's* residence in New Zealand. Rather, it was the couple's residence in New Zealand. How the couple chose to arrange their finances was irrelevant.

[27] The appellant explained that he chose to apply for residence when he did because he held his second partnership-based temporary visa, which would end his "two-year allotment". Having contacted Immigration New Zealand and been informed of processing times, he was advised to apply for residence as soon as possible. The appellant noted that, had he not applied when he did, he would not have been "allowed to get an extension on my allotment beyond two years". Assuming that Immigration New Zealand was correct and that the appellant and his wife were not living together until January 2019, the appellant advised that this finding would contradict Immigration New Zealand's findings in respect of his temporary visa applications. Such a conclusion would have required that he leave New Zealand (on the basis that he had exhausted the time allowed on a partnership-based temporary visa), which would then have made it impossible for the couple to live together.

[28] The appellant referred to Immigration New Zealand's letter of 3 June 2020 which requested further recent evidence in support of the couple living together. According to the appellant, this request indicated that his application had not been lodged in the prescribed manner. If this was the case, then it followed that the lodgement date of his residence application could be adjusted to the date that Immigration New Zealand received the last outstanding documents (4 June 2020) and this could be used "as a vehicle" to process the application, if Immigration New Zealand was not to accept his explanation of when the couple commenced living together.

[29] Finally, the appellant referred to a number of additional factors that were relevant to the couple's situation. The family had suffered trauma, having been stuck overseas due to the pandemic, and were allowed re-entry only at great cost, which indicated that New Zealand recognised the appellant as "a part of New Zealand". The appellant's wife had been made redundant, and the appellant had had to apply for another temporary visa which involved funds that could be better spent at home. Should the residence application be declined, the appellant would have to make another application, thereby involving more cost, adding to the family's stress and adding to the growing number of applications before Immigration New Zealand.

Immigration New Zealand Decision

[30] On 21 July 2020, Immigration New Zealand declined the appellant's residence application. It was not satisfied that the appellant had lived together with his wife for 12 months at the date he lodged his residence application.

[31] Immigration New Zealand found that the evidence provided and the couple's travel movements showed that they had maintained individual residences over the 14 months from November 2017 (the date of the tenancy agreement) to January 2019. Over this period, the appellant had spent 76 days in New Zealand. The tenancy agreement was a legally binding document that showed the couple's commitment to one another; however, the appellant was not physically residing in the property at that time. The couple's responses regarding their household expenses and financial interdependence reinforced the other evidence supplied and suggested to Immigration New Zealand that they were maintaining two different residences prior to January 2019.

[32] Immigration New Zealand stated that while the couple's periods of separation appeared to be genuine and compelling, in the appellant's case there was no time spent living together that preceded these periods of separation. As such, the couple had lived together for nine months prior to the residence application being lodged, not 12 months as required.

[33] In respect of the appellant's other submissions, Immigration New Zealand acknowledged that it had seen fit to grant the appellant partnership-based temporary visas. Assessment of these applications noted that the couple had spent significant time apart. After a holistic assessment of the current application, Immigration New Zealand was not able to establish that the couple had lived together prior to January 2019. Further, as the appellant's residence application had been lodged in

the prescribed manner and Immigration New Zealand's requests for further information related to the processing of the application, the lodgement date of the appellant's application remained 13 October 2019.

STATUTORY GROUNDS

[34] 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.

[35] 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

[36] On 2 September 2020, the appellant lodged this appeal on both grounds in section 187(4).

[37] In support of his appeal, the appellant makes submissions (31 August 2020) and provides a copy of the couple's marriage registration document, recording the same residential address in South Africa.

ASSESSMENT

[38] 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.

[39] 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

[40] The application was made on 13 October 2019 and the relevant criteria are those in residence instructions as at that time.

[41] For an application under the Family (Partnership) category to be successful, Immigration New Zealand must be satisfied that a couple is living together in a genuine and stable partnership. In the present case, Immigration New Zealand advised that it was satisfied that the appellant and his wife were in a relationship that was genuine and stable. Immigration New Zealand declined the application because it found that the appellant and his wife had not lived together for 12 months at the date the appellant lodged his residence application. The relevant instructions in this case are set out below.

Family (Partnership) category instructions

[42] Instruction F2.5 is the starting point for ascertaining whether an applicant qualifies for residence under the Family (Partnership) category. Instruction F2.5.a makes it clear that in order to be granted residence under the Family (Partnership) category, applicants must satisfy Immigration New Zealand that they and their New Zealand partner have lived together for 12 months or more at the time the application is lodged. Instruction F2.5.d sets out six different bases on which an application under the Family (Partnership) category will be declined. Of particular importance to the appellant's application is F2.5.d.iii:

> **F2.5 How do partners of New Zealand citizens and residents qualify for a residence class visa?**
>
> a. To be granted a residence class visa under Partnership Category applicants must provide sufficient evidence to satisfy an immigration officer that they have been living together for 12 months or more in a partnership that is genuine and stable with a New Zealand citizen or resident.
>
> …
>
> c. In each case the onus of proving that the partnership on which the application is based is genuine and stable lies with the principal applicant and their New Zealand partner.
>
> d. An application under Partnership Category will be declined if:
>
> i. the application is not supported by an eligible New Zealand citizen or resident partner; or

ii. an immigration officer is not satisfied that the partnership on which the application is based is genuine and stable; or

iii. **the applicant and New Zealand citizen or resident partner have not lived together for 12 months or more at the time the application is lodged**; or

iv. the application is based on marriage or a civil union to a New Zealand citizen or resident and either that New Zealand citizen or resident, or the principal applicant is already married to or in a civil union with another person; or

v. both the principal applicant and the New Zealand citizen or resident partner cannot satisfy an immigration officer they comply with the minimum requirements for recognition of partnerships (see F2.15); or

vi. the applicant(s) does not meet health and character requirements (see A4 and A5).

Effective 08/05/2017

[43] Instruction F2.30 sets out the four discrete elements of which Immigration New Zealand must be satisfied when determining if a couple are living together in a partnership that is genuine and stable, one of which is "living together":

F2.30 Determining if the couple is living together in a partnership that is genuine and stable

a. When determining if the couple is living together in a partnership that is genuine and stable the immigration officer will take into account those factors set out at F2.20(b) and must consider, and be satisfied, there is sufficient proof, (from documents, other corroborating evidence, or interviews) of all four of the following elements:

i. 'Credibility': the principal applicant and the partner both separately and together, must be credible in any statements made and evidence presented by them.

ii. **'Living together': the principal applicant and partner must be living together unless there are genuine and compelling reasons for any period(s) of separation** (see F2.30.1).

iii. 'Genuine partnership': the principal applicant and partner must both be found to be genuine as to their:

- reasons for marrying, entering a civil union or entering into a de facto relationship; and
- intentions to maintain a long term partnership exclusive of others.

iv. 'Stable partnership': the principal applicant and partner must demonstrate that their partnership is likely to endure.

b. A residence class visa must not be granted unless the immigration officer is satisfied, having considered each of the four elements in (a) above (both independently and together) that the couple is living together in a partnership that is genuine and stable.

Note: The onus of satisfying an immigration officer that the partnership is genuine and stable lies with the principal applicant and their partner (see F2.5(c)).

Effective 29/11/2010

[44] Instruction F2.20 sets out factors that have a bearing on whether a couple are living together in a partnership that is genuine and stable, and instruction F2.20.15 provides examples of evidence that that may be produced in support of a couple living together and in relation to any periods of living separately:

> **F2.20 Evidence**
>
> …
>
> b. Factors that have a bearing on whether two people are living together in a partnership that is genuine and stable include but are not limited to:
>
> i. the duration of the parties relationship;
>
> ii. the existence, nature, and extent of the parties' common residence;
>
> iii. the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
>
> iv. the common ownership, use, and acquisition of property by the parties;
>
> v. the degree of commitment of the parties to a shared life;
>
> vi. children of the partnership, including the common care and support of such children by the parties;
>
> vii. the performance of common household duties by the partners; and
>
> viii. the reputation and public aspects of the relationship.
>
> …
>
> **F2.20.15 Evidence of living together in partnership that is genuine and stable**
>
> a. Evidence that the principal applicant and partner are living together may include but is not limited to documents showing shared accommodation such as:
>
> i. joint ownership of residential property
>
> ii. joint tenancy agreement or rent book or rental receipts
>
> iii. correspondence (including postmarked envelopes) addressed to both principal applicant and partner at the same address.
>
> b. If a couple has been living separately for any period during their partnership, they should provide evidence of the length of the periods of separation, the reasons for them, and how their relationship was maintained during the periods of separation, such as letters, itemised telephone accounts or e-mail messages.
>
> …

Appellant's submissions on appeal

[45] On appeal, the appellant reiterates the history of his New Zealand visa applications and submits that Immigration New Zealand failed to consider the nature and development of the couple's relationship, the statutory status of their relationship, and that it failed to assess his residence application in a fair and holistic manner. The appellant states that he had demonstrated a clear "transition" from South Africa to New Zealand. He owned a house in South Africa (which he sold after the couple commenced a relationship) and he never purchased another property because he was selling off his assets and "systematically cutting ties" in South Africa, as the couple's plan was to continue their life in New Zealand. In December 2018, he completed his contract of employment, terminated the lease of the property he was renting, and spent a month with his son and other family before coming back to New Zealand in January 2019. At the time he lodged his residence application, he and his wife had been in a relationship for three-and-a-half years and married for two-and-a-half years.

[46] The appellant contests the basis for Immigration New Zealand's decision to decline the application. He notes that there is no specific definition of "living together" in instructions, and submits that there is nothing to suggest that "living together" is a physical presence test. Rather, logic dictates that at least 12 months of a partnership must exist, and, if periods of separation occurred, they must be justified to prove that the relationship is in fact genuine and stable. The appellant states that he provided ample evidence in respect of the couple's periods of separation and he also satisfies most of the factors listed in instructions that are said to have a bearing on whether a couple are living together in a partnership that is genuine and stable (F2.20.b). The appellant notes that the only difference between temporary instructions and residence instructions is that the latter adds the additional criterion of a 12-month period. Logic dictated that the definition of living together would not change, and Immigration New Zealand had been satisfied the couple met this criterion when it saw fit to grant the appellant partnership-based temporary visas.

[47] The appellant refutes Immigration New Zealand's conclusion that it was unable to consider the couple's periods of separation when calculating the time that they had spent living together because the periods of separation were prior to when he and his wife began living together. According to the appellant, Immigration New Zealand's was adding subjective, fictitious criterion not supported by instructions

when deciding whether “periods of separation” applied, and when “calculating the time” spent living together.

[48] The appellant maintains that he was domiciled in New Zealand from the date of the tenancy agreement in November 2017. However, if Immigration New Zealand was to interpret living together as meaning physical presence, he submitted that the date the couple commenced living together should be found to be the date of their marriage (2 April 2017). The couple were clearly physically together on this date, and their marriage registration records the same address for them both, so they were living together from this date onwards, albeit with genuine and compelling periods of separation. On this basis, the couple had lived together for over 12 months at the time the appellant lodged his residence application.

[49] The appellant refers to Immigration New Zealand’s Operational Manual, which states that the Manual “is not a replacement for the legislation that governs INZ operations” and should be read “in conjunction with the relevant provisions of the Immigration Act 2009, the Immigration Regulations 2010, and other applicable statutes”. The appellant submits that his partnership is based on a statutory relationship status (citing as an example the Property (Relationships) Act 1976), and points to decisions of the New Zealand courts that have determined that the criteria of “living together apart” and “a mutual commitment to another person” are relevant when ascertaining what constitutes “living together” in a partnership relationship.

[50] Finally, the appellant submitted that there were justifiable grounds for Immigration New Zealand to have adjusted the date of lodgement of his residence application.

Requirement of 12 months’ living together

[51] Instruction F2.5.a requires an applicant to have been “living together for 12 months or more” in a genuine and stable partnership with a New Zealand partner, in order to be granted residence. Instruction F2.5.d.iii makes it mandatory, *at the time the application is lodged*, for an applicant and their partner to have lived together for at least 12 months. It is clear that the 12-month requirement must be met at the time the application is lodged and that an application will be declined if the requirement is not met. As the Tribunal (differently constituted) has previously found, the wording of F2.5.d — that an application *will* be declined, rather than *may* be declined, if any of the F2.5.d requirements is not met — means that Immigration New Zealand has no discretion to do otherwise: see *WT (Partnership)* [2018] NZIPT 205006 at [17]–[20] and *WL (Partnership)* [2018] NZIPT 204848 at [61].

[52] The current version of F2.5.d came into effect on 8 May 2017. It differs from the previous instruction F2.5.d (effective 19 August 2013) and earlier variations by the addition of F2.5.d.iii. Also from 8 May 2017, instructions removed F2.35 which previously enabled Immigration New Zealand to defer the final decision on a residence application if the partnership is genuine and stable but of less than 12 months' duration. These changes were outlined in Immigration New Zealand's *Amendment Circular No 2017/05* (21 April 2017) which stated at page 2:

> **Discontinue 'partnership deferral' policy for Partnership Category residence applications**
>
> …
>
> *F2.5 How do partners of New Zealand citizens and residents qualify for a residence class visa?*
>
> Immigration instructions are amended in line with a Cabinet decision to discontinue the 'partnership deferral' policy. Instead, minimum partnership requirements must be met at the time that the assessment is made. No provision is given to delay a decision to allow applicants to meet the 12-month time requirement for living together in a genuine and stable relationship.

[53] "Living together" is not defined in immigration instructions. While residence instructions frequently refer to "living together in a partnership that is genuine and stable", thereby conflating the elements of living together, genuineness and stability, instructions F2.5.d.ii and iii and F2.30 make it clear that "living together" is a discrete element.

[54] Instructions confirm that, as a general rule, an applicant under the Family (Partnership) category must be living together with his or her supporting partner at the date the residence application is being assessed, and they must have lived together throughout the course of their partnership. Instructions acknowledge that the 12 months of living together does not have to be continuous and provide for how to assess periods of separation: see F2.30.1 (effective 29 November 2010).

[55] However, while F2.30.1 removes the need for a couple to have lived together on a continuous basis, provided genuine and compelling reasons exist for any period(s) of separation, an applicant must still demonstrate that he or she and their supporting partner have lived together for 12 months or more at the time the residence application is lodged: F2.5.d.iii. Genuine and compelling reasons for a couple's periods of separation do not ameliorate this requirement: see *CS (Partnership)* [2019] NZIPT 205537 at [31]–[32] and *AQ (Partnership)* [2019] NZIPT 205304 at [44].

[56] In *LP (Partnership)* [2015] NZIPT 202826, Immigration New Zealand accepted that the appellant and her partner had a genuine and stable relationship.

However, it declined the residence application because it did not accept that the couple were living together. The Tribunal found that Immigration New Zealand's assessment of the application was flawed, as it failed to address whether the couple met the "living together" requirement before proceeding to consider the reasons for the periods of separation:

> [30] First, putting aside the question of the reasons the appellant and her partner maintained separate residences, Immigration New Zealand failed to ask itself whether the amount of time the couple spent together did in fact constitute "living together".
>
> …
>
> [35] … While Immigration New Zealand went on to consider whether the appellant's reasons were compelling enough for the periods of separation, it failed to first ask itself whether in fact the couple could be said, given the circumstances, to be "living together". This will need to be the first question that is asked on reassessment.

[57] The Tribunal considers that the 12 months' living together required by instructions is effectively a baseline; a benchmark against which Immigration New Zealand can measure the relationship. Whereas other requirements of the Family (Partnership) category involve subjective, qualitative assessments to be made by Immigration New Zealand, such as whether a relationship is "genuine" and "stable", or whether the couple are "credible" in the evidence they present and statements they make, the 12 months of living together is by-and-large an objective requirement, removing some of the subjectivity inherent in Immigration New Zealand's assessment of an applicant's partnership. It is a minimum requirement.

Meaning of "living together"

[58] As stated above, Immigration New Zealand was satisfied that the appellant's relationship was both genuine and stable. It was also satisfied that the reasons for the periods of separation between the couple could be considered genuine and compelling. The appellant's application was declined because he and his wife had not lived together for 12 months at the date the residence application was lodged. On appeal, the meaning of "living together" is put squarely in issue.

[59] While "living together" is not defined in immigration instructions, the Tribunal finds that an ordinary meaning of these words, when read together, suggests a permanence (as exemplified by use of the term "living", and not "staying") and being in once place (from the word "together"). If a person is living together with their partner for the purposes of establishing a genuine and stable relationship under residence instructions, it would be expected that they had established a home with each other; they would share a physical residence and be part of the household. As

such, living together is more than visiting or staying for a period in the household of the other person.

[60] Contrary to the appellant's submission, the Tribunal finds that living together is, essentially, a "physical presence test". This can be extrapolated from the fact that instructions allow for period(s) of separation. Use of the term "separation" in this context clearly refers to physical separation (see F2.20.15.b, above at [44]). In addition, the natural meaning of "separation" implies that there must have been an initial integration or joining; a person or thing cannot be separated if it was not a whole or one unit to begin with.

Whether the couple had lived together for 12 months at time of application

[61] The Tribunal finds that Immigration New Zealand was correct when it concluded that the appellant and his wife only commenced living together, as this term is used in instructions, on 15 January 2019. Its reasons follow.

[62] The appellant and his wife informed Immigration New Zealand that they commenced a long-distance relationship in April 2016, and that their relationship continued in this manner for the next few years, including after their marriage in April 2017. The appellant provided Immigration New Zealand with what it accepted were genuine and compelling reasons for the couple continuing to live in separate countries, while they continued to spend as much time together as they were able, through reciprocal visits.

[63] However, up until the appellant's return to New Zealand in January 2019, the couple had spent no more than 29 days together at any one time. The appellant informed Immigration New Zealand that in late 2017 the couple had decided to make a life together in New Zealand, and that his plan was to relocate to New Zealand at the end of his contract and be "permanently united" with his wife.

[64] The Tribunal does not accept that the couple could be found to be living together from the date of their joint tenancy agreement in November 2017. The appellant was not physically present in New Zealand when the agreement was signed and, when he returned to New Zealand on 12 December 2017, he was physically present for only 29 days before departing. Over the following 12 months, until January 2019, he stayed in New Zealand for three periods of between 21 and 24 days each. The Tribunal considers that the tenancy agreement indicates no more than that the appellant and his wife entered into a legally binding agreement to rent a property in November 2017. The appellant spent far more time "living" in

South Africa where, at that time, his employment and his primary household and belongings remained.

[65] The Tribunal acknowledges that, if the date of the tenancy agreement was considered to be the date the couple began living together, then the appellant would have met the 12-month living together requirement. This is because the number of days that the couple had spent together from November 2017 (using the table above at [10] as a reference) would have amounted to 348 days. While the appellant was out of New Zealand for 22 days (between 14 June and 6 July 2019), these 22 days could also be counted towards the couple living together, and not a "period of separation", for two reasons. First, by this time the couple were clearly living together, the appellant having permanently relocated to New Zealand. Second, the fact that the appellant was on a 22-day holiday or stay elsewhere did not equate to a period of separation. Just as the appellant's prior visits to New Zealand did not constitute him living together with his wife in New Zealand, his temporary stay overseas did not equate to a period of separation from his wife. When the 22 days are added to 348 days, the appellant would have demonstrated that he had lived together with his wife for a total of 12 months and 5 days. However, for the reasons above, this was not the case.

[66] The Tribunal does not accept the appellant's submission on appeal, that he and his wife should be found to have lived together from the date of their marriage. The couple's marriage of 2 April 2017 reflected their commitment to a legal partnership; it did not indicate that they were living together. The marriage certificate did record the same address in South Africa for the couple. However, the wife departed South Africa on 16 April 2017 and returned to her commitments in New Zealand, which included her employment and joint custody of her son.

[67] On appeal, the appellant states that he had demonstrated a "transition" from South Africa to New Zealand during the course of the couple's relationship. However, this transition did not result in the appellant living together with his wife in New Zealand until January 2019. The reality was that the appellant only really began living together with his wife on 15 January 2019, in New Zealand. This was the time at which he had completed his contract of employment, terminated the lease of his rented accommodation, packed his personal possessions and relocated, on what he intended was an ongoing and permanent basis, to New Zealand.

[68] The appellant informed Immigration New Zealand that he liked to consider himself living in New Zealand while seeing out his contract of employment in

South Africa. How the appellant chose to characterise his place of residence prior to his arrival on 15 January 2019 had no bearing on whether he could be found, on any ordinary meaning, to have been living together with his wife. The fact is that he was not physically present in New Zealand, and the couple were not physically present together, on an ongoing (or any lengthy) basis until January 2019. From the appellant's arrival in January 2019 until the lodgement of his residence application on 13 October 2019, the appellant had been living together with his wife for a total of 8 months and 28 days.

[69] The appellant provided evidence that he and his wife were both legally and emotionally committed, and highlights that their relationship was found both genuine and stable. The couple's commitment to their partnership is not in question. However, for reasons the Tribunal has articulated above, 12 months of living together is an independent, minimum requirement of residence instructions. It must be met at the date a residence application is lodged, and the term "living together" should be given an ordinary meaning.

[70] In this respect, the Tribunal's observations in *WT (Partnership)* [2018] NZIPT 205006 are also apt to the appellant:

> [21] In the present case, where Immigration New Zealand found the appellant's relationship to be genuine and stable, this leads to a somewhat anomalous result in that, if the appellant and her husband had waited […] to lodge her application, there would have been no issue with the appellant meeting the 12-month living together requirement. Nonetheless, as it stands, the appellant simply did not and could not meet the requirement to have lived together with her partner for 12 months at the date she lodged her application. Immigration New Zealand had no choice but to decline the application.
>
> [22] The appellant will need to lodge another application ….

Relevance of temporary visas

[71] On appeal, the appellant submits that Immigration New Zealand had set a precedent by granting partnership-based temporary visas, which indicated that it was satisfied that the couple met the living together requirements. The Tribunal rejects this submission for two reasons. First, there is no precedent set, and no legitimate expectation, that simply because an applicant has been granted a temporary visa(s) that they will therefore be found to meet the (substantially similar) requirements of instructions for residence. In the High Court decision of *Kaur v MBIE* [2016] NZHC 2595, Hinton J dismissed a claim of legitimate expectation, finding that:

> [57] For a successful claim in legitimate expectation, there has to be a commitment by promise or policy and reliance on that commitment, which reliance has to have been reasonable.

[72] As the appellant correctly noted, the partnership category residence instructions are substantially similar to temporary instructions. However, they are entirely separate sets of instructions. Section 72 of the Act mandates that Immigration New Zealand determine residence applications in accordance with residence instructions, and there can be no expectation that an application will be decided in a manner inconsistent with those instructions.

[73] Second, as the Tribunal has observed in previous decisions, applications made under temporary instructions are not necessarily subject to the same level of scrutiny and assessment as applications made under residence instructions.

[74] The appellant's submission, that he applied for residence when he did because he believed he would not have been eligible for a further partnership-based temporary visa, is acknowledged. However, the possibility that a further partnership-based temporary visa may not have been granted did not absolve the appellant from being required to satisfy the residence instructions in force at the time he lodged his residence application. Further, the Tribunal observes that the appellant had spent relatively little time in New Zealand with his wife whilst holding partnership-based visas. In these circumstances, where the appellant's earlier short-term stays had been for genuine reasons, and he was seeking to fulfil the 12-month living together requirement of residence instructions (not looking to eke out a further stay after having remained in New Zealand for the preceding two years), Immigration New Zealand may well have seen fit to exercise its discretion to grant a further temporary visa as an exception to instructions.

Relationship status and living together

[75] The appellant's submission, that his partnership is based on a statutory relationship status and that Immigration New Zealand should have had recourse to criteria identified by the New Zealand courts when attempting to define "living together", is rejected. The fact that the courts have been prepared to find that "living together apart" and "mutual commitment" are relevant factors when ascertaining what constitutes a partnership relationship, does not require that these factors be adopted by Immigration New Zealand. Moreover, it was not the appellant's relationship status that was in issue; it was his living together with his wife. As the Tribunal has identified above, 12 months' living together means exactly that; a year of living *together*, which is the express requirement of residence instructions.

[76] On appeal, the appellant cites the Tribunal's decision of *BM (Partnership)* [2019] NZIPT 205419 in support of the fact that periods of separation occurring prior to lodgement of a residence application could be considered by Immigration New Zealand, and that calculating the time "to the day" that a couple had lived together, was not required. While this may be correct, the facts in *BM (Partnership)* can be clearly distinguished from those of the appellant. In that case, the Tribunal found there was "abundant evidence" that the couple lived together from the inception of their relationship in 2009 until October 2014, when their periods of separation began (see *BM (Partnership)* at [42]).

Deferral of lodgement

[77] Lastly, the appellant maintains that Immigration New Zealand failed to exercise its ability to defer the date of lodgement of his residence application. This is incorrect. As Immigration New Zealand stated in its decline decision, at the date the appellant lodged his residence application, all mandatory lodgement requirements had been met: see instruction R2.40 (effective 7 May 2018). As such, Immigration New Zealand had no discretion to alter or postpone the lodgement date of the application. Immigration New Zealand's requests for further information and evidence during the processing of the application were unrelated to these mandatory requirements.

Conclusion on correctness of decision to decline

[78] Immigration New Zealand's assessment of whether the appellant met the 12-month living together requirement was conducted in a procedurally fair manner, and its conclusion on this issue was correct.

Whether there are Special Circumstances

[79] 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.

[80] 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

[81] The appellant is a 36-year-old citizen of South Africa who commenced a relationship with his New Zealand-citizen wife shortly after their meeting in South Africa in April 2016. The couple married in April 2017.

[82] The appellant has a son, aged 11, who has visited New Zealand on two occasions. He remains living in South Africa in the care of his mother. The appellant declares that his widowed mother and a brother live in South Africa, while another brother lived in the Netherlands.

[83] The appellant's wife is a 35-year-old South African-born New Zealand citizen. She obtained residence in New Zealand in 2004, when aged 19, under the Family (Dependent Child) category. The wife's father, stepmother and two siblings are also New Zealand citizens and reside in New Zealand, while her mother, stepfather and a step-sibling remain living in South Africa. According to the appellant, the wife shares custody of her primary school-aged son with the child's father.

[84] At the time the couple commenced their relationship, the appellant's established life was in South Africa, while his wife's was in New Zealand. They each had a son from their prior relationships for whom they were jointly responsible with the child's other parent. Significantly, the appellant held a fixed contract of employment in South Africa, which made the prospect of their living together, in the short-term, difficult. As a consequence, the couple conducted a largely long-distance relationship for the next few years, making reciprocal visits to South Africa and New Zealand as time and their finances allowed.

[85] The appellant first applied for a partnership-based visitor visa in October 2017, after which time he made three visits to his wife in New Zealand. In August 2018, the appellant was granted a work visa based on his partnership and his first arrival on this visa was in January 2019.

[86] In January 2019, having completed his contract of employment, the appellant permanently relocated to New Zealand. He and his wife have lived together since this time. Realising that his work visa was due to expire in January 2020 and that he would have held partnership-based temporary visas for the maximum duration available under instructions, and having been informed by Immigration New Zealand that residence applications were taking some time to process, the appellant elected to make his residence application in October 2019.

[87] During its assessment of the residence application, Immigration New Zealand accepted that the couple's partnership was genuine and stable, and that they had maintained a relationship throughout the significant time they spent apart. Immigration New Zealand also found that the appellant met the health and character requirements of instructions. However, the application was declined because the couple had not been living together for 12 months or more at the time the appellant lodged his residence application.

[88] The appellant has subsequently been granted work visas as an exception to instructions, to await the outcome of the processing of his residence application. His most recent work visa is valid until 17 July 2021.

[89] The appellant provided Immigration New Zealand with evidence that he is currently employed with a wiring manufacturing business, while completing his New Zealand occupational recertification. In his letter to Immigration New Zealand of 7 July 2020, he stated that the family had suffered "immense trauma" during 2020. The appellant, his wife and her son had departed New Zealand on 12 March 2020 to attend a family wedding in South Africa when the global pandemic resulted in the borders closing. The family were finally able to re-enter New Zealand, at great expense, on 23 May 2020. His wife was subsequently made redundant from her employment.

Discussion of special circumstances

[90] 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.

[91] The appellant's residence application was declined because, although the couple had been in a relationship for four years by that time, they did not meet the 12-month living together requirement of instructions at the time the application was lodged. Immigration New Zealand accepted that the couple's relationship was genuine and stable. However, without meeting the "living together" requirement, the application was required to be declined. The fact that the appellant appeared to meet all other requirements of the Family (Partnership) category, and that the couple have now lived together for well in excess of the 12 months required by instructions, are not circumstances that can be described as uncommon or out of the ordinary. Meeting instructions during the processing of the residence application, when they were required to be met at the time the application was lodged, does not automatically create special circumstances. This is particularly so in a case such

as this, where the appellant holds a temporary visa valid until July 2021, and there is no impediment to him lodging another residence application while remaining in New Zealand lawfully. The fact that he will have to lodge a new residence application, while inconvenient, does not make his circumstances special.

[92] Considered cumulatively, the circumstances of the appellant and his wife are not special such as to warrant a recommendation to the Minister of Immigration for consideration of an exception to instructions.

DETERMINATION

[93] 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.

[94] The appeal is unsuccessful.

Order as to Depersonalised Research Copy

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

Certified to be the Research Copy released for publication.

T R Cook
Member

"T R Cook"
T R Cook
Member