IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2021] NZIPT 205993**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**HY (Partnership)**
Before:	S A Aitchison (Member)
Counsel for the Appellant:	R Taer
Date of Decision:	15 March 2021

RESIDENCE DECISION

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[1] The appellant is a 40-year-old citizen of the Philippines 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 she did not have an acceptable standard of health and was not eligible to be considered for a medical waiver because, as per the instructions, she had been eligible for inclusion in her partner's earlier application for residence but was not included or declared.

[3] The principal issue for the Tribunal is whether the appellant has special circumstances, arising from the reason why she was not included or declared in her partner's application and her nexus to New Zealand through her New Zealand-permanent resident partner, such that warrant consideration by the Minister of Immigration of an exception to Government residence instructions.

[4] For the reasons that follow, the Tribunal finds that Immigration New Zealand was correct to decline the application, and that the appellant does not have special

circumstances that warrant consideration by the Minister of Immigration of an exception to Government residence instructions.

BACKGROUND

[5] The appellant arrived in New Zealand on 20 February 2015 as the holder of an Essential Skills work visa.

[6] The appellant met her partner, a temporary visa holder from the Philippines in April 2015 and they began living together in June 2015. Eight months later, in February 2016, the appellant's partner applied for a resident visa under the Skilled Migrant category. The appellant was not declared or included in that application as a partner, as the couple considered that their relationship of just eight months would not be considered by Immigration New Zealand as genuine and stable.

[7] On 7 October 2016, the appellant's partner's application for a resident visa was approved.

[8] In June 2018, the appellant was diagnosed with breast cancer and she underwent medical treatment, including surgery and chemotherapy, in New Zealand for this condition.

[9] On 9 October 2018, the appellant's partner applied for a permanent resident visa. In this application, he declared the appellant as his partner. On 19 October 2018, he was granted a permanent resident visa.

[10] On 11 June 2019, the appellant lodged a resident visa application under the Family (Partnership) category.

Immigration New Zealand Outlines its Concerns

[11] On 30 December 2019, Immigration New Zealand advised the appellant that her medical and chest X-ray certificates had been referred to a New Zealand medical assessor. It recited the medical assessor's report on her condition, namely, that she had been diagnosed with breast cancer in July 2018; had undergone a radical mastectomy and chemotherapy; and required three-monthly checks with her oncologist and maintenance endocrine therapy. Her oncologist recommended that she complete 12 months of this treatment.

[12] Immigration New Zealand also recited the medical assessor's opinion that the appellant's medical condition was likely to impose significant costs or demands on New Zealand's health services and that she did not have an acceptable standard of health.

[13] On 5 February 2020, the appellant responded to Immigration New Zealand's concerns and provided a certificate from the Auckland District Health Board (24 January 2020) recording the treatment she had undergone for her condition, including neoadjuvant chemotherapy, followed by mastectomy and axillary node sampling for left-sided breast cancer.

[14] The appellant also provided medical reports from her treating physician in the Philippines (June 2019 – January 2020), depicting her treatment history for her condition and conveying that she did not currently present with any symptoms suggestive of breast cancer recurrence and that she was continuing with recommended endocrine therapy. A report from a general surgeon, Dr Lim (30 January 2020) was also produced, advising that the appellant appeared to be in remission and estimating that she had an 8.1 per cent risk of cancer recurrence at 5 to 10 years, provided she was recurrence-free for 5 years after endocrine therapy.

[15] On 6 March 2020, Immigration New Zealand again wrote to the appellant advising that the medical information she had provided had been submitted to the medical assessor for further review. The medical assessor maintained that she had a listed condition likely to impose significant costs and/or demands on New Zealand health services. According to the medical assessor, given that it was less than two years from diagnosis of her condition, the risk of recurrence of her breast cancer was estimated as not likely to be less than 10 per cent, a key indicator required by instructions. In the report, the medical assessor acknowledged the opinion of the general surgeon, Dr Lim, who had depicted the risk of recurrence of the appellant's cancer at 8.2 per cent. However, it concluded that no weight could be placed on this opinion as it had been calculated on the basis that the appellant could demonstrate that she had been recurrence free for five years after endocrine therapy, whereas the appellant was less than two years post-endocrine therapy.

[16] Immigration New Zealand advised that it regarded the appellant's breast cancer to be a condition listed at A4.10.1 of instructions, which included malignancy of an organ where the interval since treatment is such that the probability of recurrence is not less than 10 per cent; and that she was not eligible

to be considered for a medical waiver because she had not been included in her partner's earlier residence application when she was eligible to be included.

[17] On 19 March 2020, the appellant's representative responded that the couple had misconstrued the definition of a partnership when the appellant's partner applied for his resident visa and did not conceive that the appellant was eligible to be included in the application.

[18] On 22 September 2020, Immigration New Zealand advised that it had completed a final assessment of the appellant's application, and concluded that she did not have an acceptable standard of health. It reiterated that the appellant's breast cancer was an A4.10.1 condition and she was not eligible to be considered for a medical waiver because she had not been declared in her partner's residence application when she was eligible to be included.

[19] On 20 October 2020, the representative responded and provided additional material in support.

Immigration New Zealand Decision

[20] On 24 November 2020, Immigration New Zealand declined the appellant's residence application on the basis that she did not have an acceptable standard of health and she was not eligible for a medical waiver as she had not been included or declared in her partner's resident visa application.

STATUTORY GROUNDS

[21] 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.

[22] 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

[23] On 23 December 2020, the appellant lodged this appeal on both grounds in section 187(4).

[24] In support of the appeal, counsel makes submissions (23 December 2020) and provides material in support, including a copy of the biodata page of the appellant's passport; a statement from the appellant (18 December 2020); and a statutory declaration from the appellant's partner (23 December 2020).

ASSESSMENT

[25] 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.

[26] 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

[27] The application was made on 11 June 2019 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because the appellant did not have an acceptable standard of health and was not eligible for consideration of a medical waiver. The relevant instructions in this case are set out below.

Family (Partnership) category instructions

[28] The appellant's application for residence was made under the Family (Partnership) category. Applicants under this category must meet the health requirements of instructions at F2.5.d.vi (effective 8 May 2017).

Health requirements of instructions

[29] Instruction A4.10 (effective 15 December 2017) sets out the health requirements of instructions for applicants for residence. The central provision is

located at A4.10.a, which states that applicants must have an acceptable standard of health unless they have been granted a medical waiver or fall within the refugee exception at A4.10.f.

[30] Instruction A4.10.b states that applicants are considered to have an acceptable standard of health if they are assessed as being, among other things, unlikely to impose significant costs or demands on New Zealand's health services or special education services.

[31] Instruction A4.10.c states that the conditions listed in A4.10.1 are considered to impose significant costs and/or demands on New Zealand's health and/or special education services. Where Immigration New Zealand is satisfied, as a result of advice from a medical assessor, that an applicant has one of the listed conditions, that applicant will be assessed as not having an acceptable standard of health. Relevantly, A4.10.1 includes:

> - Malignancies of organs, skin (such as melanoma) and haematopoietic tissue, including past history of, or currently under treatment. Exceptions are:
>   - Treated minor skin malignancies
>   - Malignancies where the interval since treatment is such that the probability of recurrence is < 10 percent
>
> …
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> *Effective 15/12/2017*

The appellant did not have an acceptable standard of health

[32] The appellant's health has been subjected to extensive assessment by the medical assessor, who has concluded that the appellant has an A4.10.1 condition. The Tribunal finds that Immigration New Zealand was correct to determine that the appellant did not have an acceptable standard of health pursuant to A4.10.c, and also notes that this finding is accepted by counsel on appeal.

The appellant was not eligible for consideration of a medical waiver

[33] Immigration New Zealand had regard to A4.60 of the instructions during its assessment of whether or not the appellant was eligible for consideration of a medical waiver. This provision relevantly provides:

> **A4.60 Medical waivers (applicants for residence class visas)**
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> …
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> b. Medical waivers will also not be granted to people who:

> i. are applying for residence under one of the Family Categories; and
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> ii. were eligible to be included in an earlier application for a residence class visa (or a residence visa or residence permit issued or granted under the Immigration Act 1987) as the partner of a principal applicant or the dependent child of a principal applicant or their partner; and
>
> iii. were not declared in that earlier application; or
>
> iv. were not included in that earlier application; or
>
> v. were withdrawn from that earlier application.
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> …
>
> d. An applicant who is the partner or dependent child of a New Zealand citizen or residence class visa holder, who would otherwise meet the criteria for residence under Partnership (see F2.5(a)) or Dependent Child (see F5.1(a)) instructions, will be granted a medical waiver unless (a) or (b) above apply.
>
> …
>
> *Effective 24/4/2019*

[34] Immigration New Zealand found that the appellant, whose application for residence was made under the Family (Partnership) category, was eligible to be included in her partner's earlier application for residence. As she was not declared, Immigration New Zealand found that she was not eligible for consideration of a medical waiver due to the operation of A4.60.b.iii.

[35] Relevantly, A4.60.b specifies that medical waivers will not be granted to persons who are applying for residence under one of the Family Categories (in this instance the Partnership category) and who were eligible to be included as the partner of a principal applicant, and who were not declared in that earlier application.

[36] Counsel submits that Immigration New Zealand erred by failing to apply the correct instructions which provide that a partner is only eligible to be included in the partner's resident visa application if the couple have been living together in a genuine and stable relationship for at least a year, as per R2.1.15 and R2.1.15.1 of instructions (effective 7 May 2018). He refers to the Tribunal's decision in *AX (Skilled Migrant)* [2017] NZIPT 203997 at [25], where it stated: (emphasis added):

> To determine whether an applicant is entitled to claim points for his or her partner's qualification, an applicant must satisfy Immigration New Zealand that the partner can be included in the application. *To be included in the application, an appellant and his partner must meet the partnership instructions in R2.1.15.*

[37] These submissions necessitate some clarification of the applicable instructions.

[38] First, there is a fundamental distinction between eligibility for inclusion in an application and eligibility for the grant of a resident visa.

[39] The lodgement of an application constitutes a prerequisite step on the pathway to residence, which can involve, at times, a lengthy assessment process. The satisfaction of prerequisite factors for the lodgement of an application, is not the same as satisfaction of the mandatory requirements of instructions which lead to the grant of residence. This important point of distinction has long been recognised by the Tribunal, and its predecessor, the Residence Appeals Authority, where prior to any application being accepted, there is no requirement that an applicant demonstrate that they are "capable of satisfying the actual requirements of the [instructions]"; *Residence Appeal No AAS13405* (25 March 2003) at [27].

[40] While A4.60.b does not define a partnership, R2.1.10.b of instructions puts it beyond doubt that a reference to a "partner" in residence instructions means a partner as defined in R2.1.10.a (effective 7 May 2018); see *AE (Partnership)* [2019] NZIPT 205275 at [33]. In similar terms, F2.5.b of instructions (effective 8 May 2017) defines a partnership as either a legal marriage, a civil union, or a *de facto* relationship. These instructions mirror the definition of partnership set out in the generic instructions above. The term *de facto* relationship is not further defined in residence instructions. Nevertheless, "given that such a relationship is included in the partnership instructions, it must refer to a couple who live together in a partnership in the absence of legal sanction such as a marriage or a civil union"; see *FW (Partnership)* [2020] NZIPT 205742 at [39].

[41] As such, it is not necessary to satisfy the substantive eligibility criteria for "partnership" (including that the couple have been living together in a genuine and stable relationship for 12 months or more) as depicted at F2.5.d (effective 8 May 2017) or as in the generic residence instructions R2.1.15 or R2.1.15.1 (effective 7 May 2018) referred to by counsel, in order to be eligible to be included as the partner of a principal applicant in an earlier application for residence.

[42] Notably, F2.5.d.iii has the effect of making it mandatory, at the time the application is lodged, for an applicant and their partner to have lived together for at least 12 months. Previously, if an application was made when a couple had not lived together for at least 12 months, but the couple could show they lived together for at least 12 months before Immigration New Zealand's processing was finalised

(as was the case in the present application), the application would have met the 12-month living together requirement in F2.5.a; see *WT (Partnership)* [2018] NZIPT 205006 at [19]–[20].

[43] Turning to the case at hand, the fact the appellant was in a *de facto* relationship with her partner at the time her partner lodged his application for residence was sufficient for her to be declared and included as a partner in his application. The anomaly that the appellant could not have satisfied instructions had she been included in the application at that time is noted. However, 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.

[44] Underpinning A4.60.b of instructions is the broader policy objective to protect the immigration system from abuse; partners who might otherwise fail to meet instructions in other aspects (such as in health and character requirements) and hence jeopardise an application by their inclusion, might be excluded from the principal applicant's application, then later lodge an application with an anticipation of success.

[45] The simplicity of A4.60.b, precluding the grant of residence to persons "eligible for inclusion" in a prior application lodged by their partner (as defined in R2.1.10.a and F2.5.b of instructions) is demonstrative of this rationale. The ease with which the instructions could be flouted through persons being omitted from a partner's residence application, then a later application being made by that person is patently clear.

[46] Notably, in this case, however, the appellant's illness developed some years after her partner lodged his application for residence. There is nothing to suggest that she was intentionally excluded from the application to avoid this situation. On the contrary, there appears to have been no advantage to the couple in not including the appellant in the application, who may have benefited at the time it was determined.

[47] It is accepted that the appellant and her partner were of the mistaken belief that the appellant was not eligible to be included in her partner's application given the relatively short duration of their relationship, their having only lived together for eight months at that point. However, the effect of the instructions is clear. The

appellant was eligible to be included in her partner's resident visa application at that time.

Correctness of decision to decline

[48] For the above reasons, the Tribunal finds that Immigration New Zealand was correct to decline the appellant's application pursuant to A4.10.a.

Whether there are Special Circumstances

[49] 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.

[50] 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.

[51] 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, family and immigration history

[52] The appellant is a citizen of the Philippines, aged 40 years. She arrived in New Zealand on 20 February 2015 as a holder of an Essential Skills work visa and she remained in New Zealand until 3 May 2019, with the exception of one departure between May and June 2017. Since her departure from New Zealand in May 2019, she has not returned.

[53] During her stay in New Zealand, the appellant held a further Essential Skills work visa valid between February 2016 and February 2019. Her application for a partnership-based work visa, lodged on 11 December 2018, was declined by Immigration New Zealand on 16 April 2019 on the basis that she did not have an acceptable standard of health and was not eligible to be considered for a medical waiver. Her later application for a partnership-based resident visa, lodged on 11 June 2019 was declined on 24 November 2020.

[54] The appellant's partner, also born in the Philippines, is aged 39 years. He arrived in New Zealand in May 2014, and has departed New Zealand for short periods, on three occasions, since this time. In July 2018, the partner became a New Zealand resident, and in October 2018, he became a permanent resident of New Zealand.

[55] The appellant's parents are deceased, and she has seven brothers and one sister living in the Philippines. She has one sister living in New Zealand as a permanent resident.

The appellant's health

[56] The appellant was diagnosed with breast cancer in 2018 and underwent a mastectomy surgery and chemotherapy treatment, in addition to other medication regimes.

[57] In 2020, Immigration New Zealand's medical assessor estimated the risk of recurrence of the appellant's breast cancer was not likely to be less than 10 per cent. As such, the appellant would present potentially significant costs to the health system through the medical treatment she would require.

[58] The Tribunal finds that the appellant presents a potentially significant burden to New Zealand's health system. While the appellant presented independent medical opinion, this was appropriately qualified by the medical assessor as conditional on prospective, unknown factors. The Tribunal must proceed on the basis of the risk that the evidence currently suggests exists.

Nexus to New Zealand and consequence of possible separation from partner

[59] The appellant's parents are deceased, and she has eight siblings living in the Philippines. One of her sisters is a permanent resident in New Zealand. In this appeal, no evidence has been presented by the appellant or her sister concerning their relationship. However, it is accepted that this relationship strengthens the appellant's nexus to New Zealand.

[60] The appellant has been in a relationship with a New Zealand permanent resident for the past five-and-a-half years. It is a long-term and ongoing relationship, and the couple have maintained their relationship while living separately in different countries for almost two years. The appellant commenced her relationship with her partner in mid-2015 and they lived together until the

appellant departed New Zealand in May 2019. Both write on appeal how they enjoy a genuine and stable relationship and seek to pursue a future life together.

[61] The challenge of being in a long-distance relationship, compounded by COVID-19 related travel restrictions which prevent either visiting the other abroad at this time are acknowledged. No doubt, the emotional effects of separation will be keenly felt. At the same time, the couple have demonstrated their adeptness for long-distance communication and their relationship continues as a genuine and stable one. The fact that the appellant's partner is also a national of the Philippines will present choices for the couple in the future as to where they choose to live and conduct their relationship.

Discussion of special circumstances

[62] The appellant's permanent resident partner and a sibling live in New Zealand. The appellant's relationship of more than five years with her partner has been conducted long-distance over the past two years while she lives in the Philippines and her partner lives in New Zealand. It is understandable that they seek to live together and have some certainty as to their future. However, the appellant retains a strong family nexus to the Philippines where eight of her siblings continue to live and where, relevantly, her partner is also a national.

[63] The appellant's application for residence was not successful as her medical history of having had breast cancer, and the prognosis for recurrence of this condition, meant that she did not have an acceptable standard of health, and she was not eligible for a medical waiver. The evidence suggests that there remains a greater than 10 per cent chance of cancer recurrence. In the event of recurrence, the appellant would likely require costly medical intervention, and would potentially place demands on an already overburdened oncology and breast speciality services in New Zealand. While the risk of recurrence may further reduce over time, the Tribunal must proceed on the basis of the evidence as it currently stands.

[64] The situation that the appellant finds herself in is a distressing but not uncommon one. The appellant and her partner face emotional distress over their continued separation, and they have difficult choices that they will need to make. The fact of the partner being a national of the Philippines will, no doubt, broaden the possibilities for the couple. Weighing against these factors, is the potentially significant burden the appellant presents to the New Zealand health system.

[65] Having considered, cumulatively, the appellant's circumstances, the Tribunal finds that they are not special, such as to warrant a recommendation to the Minister of Immigration for consideration of an exception to residence instructions.

DETERMINATION

[66] 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.

[67] The appeal is unsuccessful.

Order as to Depersonalised Research Copy

[68] 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 members.

"S A Aitchison"

S A Aitchison
Member

Certified to be the Research Copy released for publication.

S A Aitchison
Member