

**RŌPŪ TAKE MANENE, TAKE WHAKAMARU
AOTEAROA**

Appellant: QP (Skilled Migrant)

Before: Judge P Spiller (Chair)

Representative of the Appellant: I Singh

Date of Decision: 31 March 2021

RESIDENCE DECISION

[1] The appellant is a 31-year-old citizen of India. Her application for residence under the Skilled Migrant category of residence instructions was declined by Immigration New Zealand. The appeal included her 29-year-old husband, also a citizen of India.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it found that her employment was not genuine and that her skilled work experience was not a substantial match to the claimed ANZSCO occupation of an ICT Support Technician nec. As a result, the application could not succeed.

[3] The principal issue for the Tribunal is whether Immigration New Zealand fairly and correctly assessed the appellant's application.

[4] For the reasons which follow, the Tribunal finds that Immigration New Zealand did not fairly and correctly assess the appellant's application because it failed to have regard to relevant evidence, to consider only relevant information, to distinguish fact from opinion, allegation and assumption, and to give appropriate reasons for its decision. The application is therefore referred back to Immigration New Zealand for a new assessment.

BACKGROUND

[5] In India, the appellant completed a Bachelor of Computer Applications in 2010, and she completed a Master of Computer Applications in 2013.

[6] In June 2014, the appellant arrived in New Zealand and was granted a student visa. She completed a Graduate Diploma in Information Technology, Level 7. In June 2015, she was granted a work visa.

[7] From July 2016 to October 2017, the appellant was employed as an ICT support technician with ABC Ltd and was tasked mainly with providing solutions to software or hardware problems.

[8] From May 2018, the appellant was employed as an ICT support technician with DEF Ltd, a telephone repair business. She was required to attend to, among other things, the assessment and repair of hardware and software equipment.

[9] On 31 July 2018, the appellant applied for residence under the Skilled Migrant category. She claimed points for skilled employment as an ICT Support Technician nec, relying on her employment as an ICT support technician. She claimed a total of 170 points, including 50 points for skilled employment.

[10] In support of her application, the appellant attached her employment agreement which set out her job description. Her salary was listed as \$26 per hour.

Immigration New Zealand Verification

[11] On 26 November 2018, Immigration New Zealand received a completed employment questionnaire from the appellant, outlining the work that she currently performed.

[12] On 21 January 2019, Immigration New Zealand received a completed employment questionnaire from the appellant's employer, outlining the work that the appellant currently performed.

Immigration New Zealand's Concerns and the Appellant's Responses

[13] On 16 December 2019, Immigration New Zealand raised concerns about the appellant's application, in relation to the bonus points claimed for skilled employment.

[14] On 26 January 2020, the appellant's representative responded to Immigration New Zealand's letter of concern. The representative further submitted that the appellant qualified for 20 points (including bonus points) for having completed two years of skilled work experience in New Zealand and was suitably qualified. The representative provided evidence in support.

[15] On 21 February 2020, the immigration officer noted that she was satisfied that the appellant's employment was genuine, ongoing and sustainable, and a substantial match to an ICT Support Technician nec. She was also satisfied that the appellant's work experience met the requirements for the award of the points claimed. The immigration officer recommended that the appellant's application for residence be approved. The matter was then sent to another officer.

[16] On 26 June 2020, Immigration New Zealand requested, in relation to the appellant's current employer, copies of financial statements for the years ending March 2018, 2019 and 2020, IRD employer schedules for January–June 2020, and certified copies of the company's bank statements for January–June 2020. On 30 June 2020, this information was provided.

[17] On 13 October 2020, Immigration New Zealand raised concerns as to the genuineness of the appellant's employment, and as to whether she met the requirements for the award of points for work experience because of apparent discrepancies in the information provided.

[18] On 27 October 2020, the appellant's representative responded to Immigration New Zealand's concerns. Counsel submitted that the appellant's employment was genuine, and that she met the requirements for the award of points for work experience. Counsel provided further evidence in support of the genuineness of the appellant's employment and in support of her claim for points for work experience.

Immigration New Zealand's Decision

[19] By letter dated 8 January 2021, Immigration New Zealand declined the appellant's application.

[20] Immigration New Zealand advised that it had taken into account the information received. However, (1) it found that the appellant's employment did not meet the genuineness requirement under instructions to be considered as skilled employment; and (2) it was not satisfied that her work experience

substantially matched the description for an ICT Support Technician nec as required under instructions.

[21] Immigration New Zealand awarded the appellant a total of 100 points. As a result, her application could not succeed.

STATUTORY GROUNDS

[22] 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.

[23] 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

[24] On 3 February 2021, the appellant lodged this appeal on the ground that the decision of Immigration New Zealand was not correct. In support of her appeal, her representative provides submissions (15 February 2021). He submits that Immigration New Zealand unfairly and incorrectly assessed the appellant's application by not taking into account the evidence presented and engaging in speculation not based on the evidence. The appellant provides information provided to Immigration New Zealand and correspondence with Immigration New Zealand, which the Tribunal takes into account in assessing Immigration New Zealand's decision.

[25] The appellant also provides updated bank statements. In view of the outcome of this appeal, it is not necessary for the Tribunal to assess the admissibility of this evidence.

ASSESSMENT

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

[27] 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.

Whether the Decision is Correct

[28] The application was made on 31 July 2018 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because: (1) the appellant's employment did not meet the genuineness requirement to be considered as skilled employment; and (2) Immigration New Zealand was not satisfied that her work experience substantially matched the description for an ICT Support Technician nec.

[29] In terms of the ANZSCO, the occupation ICT Support Technician nec (313199), a Skill Level 2 occupation, falls within the Unit Group 3131 ICT Support Technicians. The description of this Group of occupations is that they "provide support for the deployment and maintenance of computer infrastructure and web technology and the diagnosis and resolution of technical problems". The occupations not elsewhere classified include Applications Packager, Computer Systems Technician, and Telecommunications Computer Systems Technician.

[30] The relevant instructions in this case are:

SM6.10.5 Skilled employment in an occupation included in the ANZSCO

Current employment in New Zealand or an offer of employment in New Zealand will be assessed as skilled if:

...

- e. an immigration officer is satisfied that the employment is:
 - i. genuine; ...

Effective 21/05/2018

SM7.10.1 Skilled work experience in an ANZSCO skill level 1, 2, or 3 occupation

Points are awarded for skilled work experience in a skill level 1, 2 or 3 occupation if an immigration officer is satisfied that:

- a. the work undertaken substantially matched (see SM7.10.5) the description for that occupation as set out in the Australia New Zealand Standard Classification of Occupations (ANZSCO); and
- b. the applicant was suitably qualified (see SM7.10.10 and SM7.10.15) for that work prior to the work experience for which points are claimed.

SM7.10.5 Assessment of 'substantial match'

- a. For the purposes of SM7.10.1 (a) above, an immigration officer must be satisfied that the applicant's work experience for which they are claiming points was in employment that is substantially consistent with the ANZSCO Occupation (6-digit) level description for that occupation.
- b. If an immigration officer is unable to determine a claimed substantial match to an ANZSCO occupation, they may request evidence of the tasks associated with that employment to assess whether the previous employment displays the characteristics of that occupation in terms of the relevant ANZSCO 'Unit Group' (4-digit) level description of tasks for that role.

...

Effective 19/02/2018

[31] Instructions also address the requirements of fairness in decision-making, at A1.5.a, relevantly as follows:

A1.5 Fairness

- a. Whether a decision is fair or not depends on such factors as:
 - whether an application is given proper consideration;
 - ...
 - whether appropriate reasons are given for declining an application;
 - whether only relevant information is considered;
 - ...
 - whether all known relevant information is considered.
- b. How much fairness an immigration officer must bring to bear in deciding an application may depend on the consequences of the decision for the applicant.

...

Effective 29/11/2010

A1.15 Practical steps towards achieving fairness and natural justice in decision-making

...

- b. consider all the facts, keeping an open mind towards all relevant forms of evidence; and

c. distinguish fact from opinion, rumour, allegation, assumption or report;

...

Effective 29/11/2010

Genuineness of employment

[32] In July 2018, the appellant claimed 50 points for skilled employment as an ICT Support Technician nec, relying on her employment as an ICT support technician. The appellant claimed that her current employment met the requirements to be awarded points for skilled employment, including that her employment was genuine.

[33] In February 2020, the immigration officer assigned to the appellant's application found that the appellant met the requirements to be awarded points for skilled employment, including that her employment was genuine. The officer noted that the employing company was incorporated in 2016, offering repair services and fault fixes for a wide range of ICT services. A google search of the company brought up the main company website as the first search hit and the website itself appeared to be regularly updated and was active. The appellant provided credible employment documents. Her employment documents and payslips had been sighted and these demonstrated that she had been paid in line with the hours that she had worked and according to the hourly rate. Based on all of this evidence, the officer was satisfied that the employment was genuine, ongoing and sustainable.

[34] In October 2020, Immigration New Zealand raised three points of concern as to whether the employment of the appellant was genuine, which are now addressed by the Tribunal.

(a) The invoices, provided as evidence, were not corroborated by the company's bank statements

[35] The invoices and bank statements in question were provided by the appellant, in response to Immigration New Zealand's request in June 2020, and related to her current employer. Immigration New Zealand stated that the lack of corroboration of the invoices by the corresponding receipt of money into the bank statements raised credibility issues; and it was not satisfied that it was enough to establish that the appellant was actually performing the tasks required for the occupation claimed.

[36] In response, the appellant's employer explained that the business accepted payments in different modes such as cash, EFTPOS, or direct bank transfer, and that banking of earnings was done at the end of the day. This was why the amounts on the invoices did not match up with the deposited amounts showing on the company's bank statements.

[37] In its decision, Immigration New Zealand found that, while the appellant's response might explain why the amounts charged for individual invoices did not show up on the company's bank statements, it did not definitively establish that the invoices provided as evidence were genuine and that the appellant had undertaken the service repairs recorded on the invoices. Thus, this explanation alone, without any supporting evidence, did not mitigate the concern that the invoices provided in connection with this application were not real and were created for the purpose of meeting immigration requirements.

[38] The Tribunal finds that Immigration New Zealand did not have a sufficient evidential basis for its concern. Immigration New Zealand's concern was based on its opinions and assumptions in relation to the bank statements and credibility of the invoices provided. Further, Immigration New Zealand overlooked the direct evidence already provided by the appellant and her employer, with supporting documentation. It did not explain why the evidence could not be accepted where another Immigration New Zealand officer had earlier accepted as being credible and consistent.

(b) *The photographs of the business premises showed only the shop floor where stock items are sold and the back room where the repairs are done*

[39] The photographs of the business premises were provided by the appellant in support of her application when it was initially lodged in July 2018, and did not appear to be a cause of concern until the objection raised in October 2020. Immigration New Zealand observed that these photographs were not enough to establish that the appellant was actually performing the tasks required for the occupation claimed, as the photographs merely showed that there was a section in the business premises for sales and a separate space for repairs.

[40] In response, the appellant agreed that the photographs of a workspace did not establish that the appellant was indeed carrying out the work, but at the same time requested that Immigration New Zealand consider this evidence and all the other information available.

[41] In its decision, Immigration New Zealand noted that it had considered all the information available, but, as it had concerns on other evidence as well, the photographs remained insufficient to support the genuineness of the appellant's employment.

[42] The Tribunal agrees that the photographs provided, in themselves, did not provide strong evidence of the genuineness of the appellant's employment. However, the photographs were relevant evidence, and, as such, needed to be taken into account when assessing whether the appellant's employment was genuine. There was no reason why the photographs should have been considered to be a cause for concern. They showed the existence of a repair workspace and this had to be taken into account with all relevant evidence.

(c) *The company bank statements showed that significant amounts were deposited to the company's account shortly before or after the appellant's salary was paid*

[43] The bank statements in question were provided by the appellant, in response to Immigration New Zealand's request in June 2020, and related to her current employer. Immigration New Zealand observed that the timing of the deposits raised concerns that the salary deposited to the appellant's account was being returned to the company.

[44] In response, the appellant provided her bank statements for the corresponding months, and stated that they showed no withdrawals corresponding to the deposits on the company's bank statements. She stated that there was no scope for her, after having met her living expenses, to have had the funds to return to the employer.

[45] In its decision, Immigration New Zealand noted from the appellant's bank statements that it appeared that she had other accounts for which corresponding statements had not been provided. Moreover, direct transfer of money between these two accounts was not the only way money could have exchanged hands. Thus, the deposits on the company's account remained unexplained and were still open to doubt.

[46] The Tribunal finds that there is no evidential basis to sustain Immigration New Zealand's concern that the genuineness of the appellant's employment was undermined by significant amounts being deposited to the company's account shortly before or after the appellant's salary was paid. Again, Immigration New

Zealand's concern was based on its opinions and assumptions in relation to the bank statements provided. Immigration New Zealand overlooked the evidence already provided by the appellant and her employer, with supporting documentation, that Immigration New Zealand's own officer accepted as being credible and consistent.

Whether appellant's work experience a substantial match to ANZSCO description

[47] In January 2020, during the processing of her residence application, the appellant claimed 20 points (including bonus points) for having completed two years of skilled work experience in New Zealand. The appellant submitted that:

- (a) The work that she had undertaken substantially matched the description for the occupation of ICT Support Technician nec as set out in the ANZSCO: her post-qualification work experience was for 15 months with the ABC Ltd (July 2016 to October 2017) and 19 months with the DEF Ltd, the appellant's current employer (May 2018 to date). The appellant submitted that her employment in her current and previous positions was a substantial match with the ANZSCO occupation of ICT Support Technician nec. In support, she provided: a summary of her post-qualification work experience; copies of her employment agreements dated 13 June 2016 and 16 March 2018, including position descriptions; bank statements showing salary payments from the two companies concerned; her salary slips; and IRD statements reflecting her salary payments from the two companies.
- (b) She was suitably qualified prior to the work experience for which points were claimed: she had completed a Master of Computer Applications, Level 9 (in April 2013) and a Graduate Diploma in Information Technology, Level 7 (in May 2015). Copies of her qualifications were provided.

[48] In February 2020, the immigration officer assigned to the appellant's application found that she was suitably qualified and that her employment in both her previous role and in her current role was a substantial match to an ICT Support Technician nec. Specifically, in relation to the appellant's current employment, the officer noted that, having considered the nature of the employer's business and the consistency of all other evidence and information provided, this

employment was assessed as a substantial match to an ICT Support Technician nec. The officer therefore recommended that the appellant be awarded 20 points for skilled work experience (including bonus points).

[49] In October 2020, Immigration New Zealand raised three points of concern as to whether the current employment of the appellant was a substantial match with the ANZSCO description, including core tasks, of the occupation of an ICT Support Technician nec.

(a) *Insufficient evidence*

[50] Immigration New Zealand observed that, while evidence on file appeared to show a past employment relationship between her and her present employing company, there was not enough evidence to establish a substantial match to the ANZSCO 6-digit level description of the occupation claimed (ICT Support Technician nec) (SM7.10.1.a and SM7.10.5.a).

[51] In response, the appellant pointed out that Immigration New Zealand had not undertaken full verification to establish a substantial match for the purposes of assessing the appellant's work experience.

[52] In its decision, Immigration New Zealand acknowledged that it had not done an interview of either the appellant or the previous employer. However, Immigration New Zealand stated that, by having raised its concerns through the letter of concern, the appellant had the opportunity to provide documentary evidence to show that her work experience with the company was a substantial match to the claimed ANZSCO occupation. Despite this "chance", however, she had not provided evidence to show that her work experience with the company was a substantial match to an ICT Support Technician nec. She had provided a printout of an email to her immigration adviser wherein she gave the mobile phone number of a former employee of the company. While Immigration New Zealand could interview the said former employee, the only information it would get would be an uncorroborated account of the appellant's role. Without any other evidence, it was not enough to establish that the appellant had indeed performed the core tasks that were listed in the ANZSCO for an ICT Support Technician nec. As such, its concerns would not be mitigated and so it would not pursue that verification path.

[53] The Tribunal finds that Immigration New Zealand did not provide adequate reasons to support its concern that there was insufficient evidence that the

appellant's current employment was a substantial match to her claimed occupation. Immigration New Zealand overlooked the evidence provided by the appellant and her employer, with supporting documentation, that had earlier satisfied an immigration officer that there was a substantial match. If it doubted that information, it could have indicated to the appellant that it expected her to provide the evidence herself from the former employer. Further, there was nothing in the instructions that required Immigration New Zealand to rely only on information from a *current* company representative or employee (see *NV (Skilled Migrant)* [2020] NZIPT 205860 at [48]).

(b) *Previous visa applications supported by the appellant's employer had been declined for not meeting the requirements of skilled employment for the ANZSCO occupation of ICT Support Technician nec*

[54] Immigration New Zealand observed that, based on this concern, and the lack of evidence to the contrary, it appeared that the appellant's claimed work experience for the employer could not be deemed skilled.

[55] In response to this concern, the appellant submitted that the grant or decline of another application from an employer was not enough to establish whether there was a substantial match with the appellant's work experience. The appellant noted that Immigration New Zealand had provided only generic information about the other applications, and the appellant was not in a position to respond to the nature of the concerns about these applications.

[56] In its decision, Immigration New Zealand noted that it had looked at past resident visa applications supported by the appellant's employing company wherein the applicants claimed that their employment substantially matched the ANZSCO occupation of ICT Support Technician nec around the same time as the appellant's claimed work experience. It believed that these were reasonable parameters to base the assessment on, as all the variables were directly relevant to the current application. The fact that all of the said applications were declined, as the employment was not considered skilled, logically led to concerns that the appellant's employment, claimed as work experience for this application, would likewise not meet the requirements to be considered skilled. Immigration New Zealand acknowledged that its concern might have been misplaced, but stated that it was nevertheless legitimate: "logic dictated that, if all of the other applications did not meet the requirements to be considered as skilled, then why would the appellant's role be considered any differently when all the variables were the same?".

[57] The Tribunal notes that it is well established that the assessment of whether an applicant's employment is a substantial match to an ANZSCO occupation requires a case-by-case assessment having regard to the specific characteristics of the appellant's actual employment (see, for example, *XF (Skilled Migrant)* [2017] NZIPT 203780 at [45]). This view should also apply to the assessment of a substantial match of the ANZSCO description of an occupation when determining whether work experience is skilled work experience, pursuant to SM7.10.1.a and SM7.10.5.a. Immigration New Zealand is required to keep an open mind towards all relevant forms of evidence produced by the particular applicant, consider only relevant information, and distinguish fact from allegation and assumption. It was incorrectly stated by Immigration New Zealand that there was a lack of evidence that the appellant's claimed work experience for the employer could be deemed skilled, a statement contrary to the earlier finding and which overlooked other relevant evidence.

Conclusion as to correctness

[58] Immigration New Zealand's decision to decline the appellant's application was incorrect because it failed to have regard to relevant evidence, to consider only relevant information, to distinguish fact from opinion, allegation and assumption, and to give appropriate reasons for its decision (A1.5 and A1.15). There was evidence that the appellant's employment was genuine, and that her current employment was a substantial match with the ANZSCO description of an ICT Support Technician nec and so qualified for points for skilled work experience in New Zealand, but this was overlooked, unfairly, by Immigration New Zealand.

DETERMINATION

[59] This appeal is determined pursuant to section 188(1)(e) of the Immigration Act 2009. The Tribunal considers the decision to refuse the visa was made on the basis of an incorrect assessment in terms of the applicable residence instructions. However, the Tribunal is not satisfied the appellant would, but for that incorrect assessment, have been entitled in terms of those instructions to the immediate grant of a visa.

[60] The Tribunal therefore cancels the decision of Immigration New Zealand. The appellant's application is referred back to the Chief Executive of the Ministry of Business, Innovation and Employment for a correct assessment by Immigration

New Zealand in terms of the applicable residence instructions, in accordance with the directions set out below.

Directions

[61] It should be noted that, while these directions must be followed by Immigration New Zealand, they are not intended to be exhaustive. There may be other aspects of the application which require further investigation, remain to be completed or require updating.

1. The application is to be assessed again by an immigration officer with no previous association with this application, in accordance with residence instructions in effect at the date the application was made and without the requirement to pay any further lodgement fee.
2. Immigration New Zealand shall seek confirmation from the appellant that she remains in the same employment on the same terms and conditions. The appellant is to be given a further opportunity to provide Immigration New Zealand with information relating to the genuineness of her employment, whether she should be granted points for skilled work experience, and any other aspect of her residence application. The Tribunal emphasises that it is the responsibility of the appellant to provide sufficient evidence in support of the submissions made by her and her employer.
3. Immigration New Zealand shall then undertake a new assessment having regard to all of the information previously provided to it by the appellant and to the Tribunal on appeal, and any additional material with which she chooses to update her application. Immigration New Zealand must ensure that all relevant evidence is properly considered and weighed in its determination of whether the appellant's employment is genuine, whether she should be granted points for skilled work experience, and whether she otherwise meets the requirements for the grant of a residence class visa.
4. If, at any stage in its reassessment of the application, Immigration New Zealand identifies potentially prejudicial matters which must be put to the appellant, it is to do so in clear and concise terms with reasons. The appellant is to be given a reasonable opportunity to respond.

5. Immigration New Zealand shall provide appropriate reasons for its decision, in relation to the genuineness of her employment, her skilled work experience and any other requirements for the grant of a residence class visa, and refer (as appropriate) to the evidence it took into account to reach its decision.

[62] The appellant is to understand that the reassessment of her application is no guarantee that she will be granted residence.

[63] The appeal is allowed in the above terms.

Order as to Depersonalised Research Copy

[64] 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 her husband.

"Judge P Spiller"
Judge P Spiller
Chair

Certified to be the Research
Copy released for publication.

Judge P Spiller
Chair