

**RŌPŪ TAKE MANENE, TAKE WHAKAMARU  
AOTEAROA**

**Appellant:** **JH (Partnership)**

**Before:** Judge P Spiller (Chair)

**Counsel for the Appellant:** S Shamia

**Date of Decision:** 19 May 2021

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**RESIDENCE DECISION**

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[1] The appellant is a 33-year-old citizen of Afghanistan living in Pakistan. His application for residence under the Family (Partnership) category of residence instructions was declined by Immigration New Zealand.

**THE ISSUE**

[2] Immigration New Zealand declined the appellant's residence application because he and his wife had not lived together for 12 months or more as required by immigration instructions.

[3] The principal issues for the Tribunal are whether Immigration New Zealand's decision was correct; and whether the appellant has special circumstances, arising primarily out of his relationship with his New Zealand-resident wife, the best interests of his two New Zealand-citizen children, and the significant difficulties that the wife and children will face if required to live in Afghanistan or Pakistan, warranting consideration by the Minister of Immigration as an exception to residence instructions.

[4] For the reasons which follow, the Tribunal finds that Immigration New Zealand's decision was correct. It also finds that the appellant has special circumstances.

## **BACKGROUND**

[5] In 2008, the appellant migrated to Pakistan from Afghanistan with his mother and was granted a visitor visa. In 2014, he met his wife in Pakistan. In June 2014, she became pregnant.

[6] In November 2014, the wife arrived in New Zealand with her family. In January 2015, she gave birth to twin boys in New Zealand. In April 2017, the wife went to Pakistan and then Afghanistan for their marriage, and they then lived together for about 10 weeks.

[7] In June 2017, the wife returned to New Zealand. She and the appellant have been separated since then.

[8] In November 2020, the appellant lodged an application for a resident visa under the Family (Partnership) category.

### **Immigration New Zealand Concerns**

[9] On 24 February 2021, Immigration New Zealand advised the appellant in writing that it had concerns about his application, as he and his wife had not lived together for 12 months.

### **Appellant's Response**

[10] On 25 February 2021, the appellant's counsel responded to Immigration New Zealand's concerns, and acknowledged that the appellant did not meet the living together requirements of instructions.

### **Immigration New Zealand's Decision**

[11] On 3 March 2021, Immigration New Zealand declined the appellant's application because he and his wife had not lived together for 12 months or more as required by immigration instructions.

## **STATUTORY GROUNDS**

[12] 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.

[13] 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](http://www.immigration.govt.nz)).

### **THE APPELLANT'S CASE**

[14] On 19 March 2021, the appellant lodged this appeal on the ground that the appellant has special circumstances.

[15] In support of the appellant's appeal, his counsel provides submissions (7 May 2021). Counsel submits that: the appellant is in a genuine and stable partnership with his New Zealand-citizen wife and they have two New Zealand-citizen children; the living circumstances for Afghans living in Pakistan are not safe and will have a negative impact on the wife and children; the wife has a strong family nexus and support in New Zealand; and the COVID-19 outbreak in Afghanistan and Pakistan is serious. The new information provided in support of these submissions is considered by the Tribunal, as appropriate, in its assessment of whether the appellant has special circumstances (section 189(3)(b)).

### **ASSESSMENT**

[16] 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.

[17] Although the appellant appealed only on the basis that the appellant has special circumstances, the Tribunal is required to assess first whether Immigration New Zealand's decision to decline the appellant's application was correct in terms of the applicable residence instructions. 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**

[18] The application was made on 17 November 2020 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because the appellant and his wife had not lived together for 12 months or more as required by immigration instructions. The relevant instruction in this case is:

**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.

...

*Effective 08/05/2017*

[19] The appellant and his wife have lived together for two and a half months since they were married in Afghanistan in April 2017. The wife has not returned to live with the appellant since then. Instruction F2.5.a provides that, to be granted a resident visa under the Family (Partnership) category, applicants must provide sufficient evidence to satisfy Immigration New Zealand 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. The appellant has not met the requirement of living together with his wife for 12 months or more, and so his residence application under the Family (Partnership) category had to be declined.

### *Conclusion as to correctness*

[20] Immigration New Zealand's decision to decline the appellant's application was correct in terms of immigration instructions, for the reasons set out above.

## **Whether there are Special Circumstances**

[21] 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.

[22] 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.

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

#### *Personal and family circumstances*

[24] The appellant is a 33-year-old citizen of Afghanistan. In 2008, he and his mother migrated to Pakistan from Afghanistan for security reasons, and he was granted a visitor visa.

[25] In February 2014, the appellant met his wife (now aged 27 years, also a citizen of Afghanistan) in Pakistan. In June 2014, she became pregnant.

[26] In August 2014, the wife was granted residence status in New Zealand under the Family (Sibling) category. In November 2014, she arrived in New Zealand with her family. In January 2015, she gave birth to twin boys in New Zealand, and they are New Zealand citizens. In January 2017, she was granted permanent residence status.

[27] In April 2017, the wife and her children went to Pakistan and then Afghanistan for their marriage, and the couple and their children then lived together for about 10 weeks. In June 2017, the wife and the children returned to New Zealand, and they have lived apart from the appellant since. The wife's projected return to Afghanistan in 2020 was prevented by the COVID-19 outbreak.

[28] In November 2020, the appellant lodged an application for a resident visa under the Family (Partnership) category, with his wife as supporting partner. This application was declined because the appellant and his wife did not satisfy the living together requirement of instructions. However, Immigration New Zealand was satisfied that the appellant met the health requirement, and his Afghanistan police certificate was clear.

[29] The husband has continued to live in Pakistan, where he has held a temporary visitor visa. If he is unable to renew his visitor visa, he will be required to return to Afghanistan. His parents are deceased, and he has no siblings in Pakistan or Afghanistan. He writes that his current income is approximately Rs25,000 a month, he lives in a one-bedroom unit, and he pays rental of Rs12,000 per month and gas and electricity of around Rs7,000 a month.

[30] The Tribunal notes the difficult position of Afghanis living in Pakistan, particularly in the COVID-19 environment, as is evidenced in the reports by Amnesty International *Afghanistan's Refugees: Forty Years of Dispossession* (20 June 2019); and A Latif "COVID-19: Afghan Refugees in Pakistan Seek World's Help" *Anadolu Agency* (3 April 2020). The European Asylum Support Office *Pakistan Situation of Afghan Refugees* (May 2020) reports:

[I]n recent years the Afghan refugee population in Pakistan has been associated with terrorism and security issues. This association influenced the opinion of the Pakistani population. The United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) reported in a Humanitarian Bulletin of September 2016 that 'many returnees cited increased pressures by authorities and host communities.' In a February 2017 report, Human Rights Watch reported about the hostility of the Pakistani community towards Afghan refugees.

[31] The Tribunal also notes the difficult environment in Afghanistan, should the appellant be required to return there, with or without his wife and children: see Human Rights Watch *World Report 2021: Afghanistan* (23 January 2021) and "Afghanistan: Targeted Killings of Civilians Escalate" *Human Rights Watch* (16 March 2021).

#### *The appellant's relationship with his wife*

[32] The appellant and his wife have been in a relationship since February 2014, they have two children together (born in January 2015), and they have been married since April 2017.

[33] The appellant and his wife have been absent from each other (except for a visit by the wife of around 10 weeks) since November 2014. However, they have maintained regular communication with each other. The appellant has provided photographs of the appellant and his wife as a couple, with their family and friends at various places and events; letters of support from family and friends showing public acknowledgment of their relationship; and evidence of their communication from 2017 to date.

[34] The Tribunal is satisfied, on the evidence available, that the partnership between the appellant and his wife is a genuine and stable one, despite their separation over several years.

#### *The appellant's wife*

[35] The wife suffers from depression. The appellant's immigration issues and her inability to live with the appellant in Pakistan or Afghanistan have negatively

affected her health. In her letter of support, she notes that she is suffering from stress-related disorders and depression that could get worse if she has to return to Afghanistan. She states that, when she visited there last, she and the children became sick due to the different environment. Her doctor confirmed in his letter that the wife has been suffering from stress-related disorder and depression because she is very far away from her husband and looking after her twins is a very hard job to do on her own without her husband's support and help.

[36] The wife has the emotional and financial support of her parents and siblings, who are New Zealand citizens. There are letters of support from her parents, two sisters, two brothers, brother-in-law, as well as a friend and the secretary of the Afghan Association of New Zealand.

[37] By contrast, the wife will face a hostile and difficult environment in Pakistan and Afghanistan, complicated by the current COVID-19 pandemic. The New Zealand Government website, "SafeTravel" reports:

#### **Afghanistan**

We currently advise that all New Zealanders do not travel overseas at this time due to the outbreak of COVID-19, associated health risks and widespread travel restrictions. ...

There is an ongoing and extreme risk of terrorism throughout Afghanistan. Suicide bomb attacks, roadside bombs, car bombs, rocket attacks and small arms attacks occur frequently. Attacks could occur at anytime, anywhere in Afghanistan. ... The threat to foreigners is extremely high and there are frequent attacks on foreign or Western interests and organisations. These attacks commonly target hotels, housing compounds, restaurants and other places that are frequented by foreigners.

#### **Pakistan**

There is an ongoing and significant threat from terrorism throughout Pakistan. ... Future terrorist attacks are expected, could be indiscriminate and could occur throughout Pakistan. ... There is a significant threat of kidnapping throughout Pakistan, ... Foreign nationals have been kidnapped in the past and killed or held captive for long periods of time. ... As there is no New Zealand High Commission in Pakistan, the ability of the government to assist New Zealand citizens is limited.

#### *The appellant's children*

[38] The appellant's two children are aged six years, were born in New Zealand, are New Zealand citizens, and have lived all their lives in New Zealand (except for a visit four years ago to Afghanistan for about 10 weeks). The Tribunal acknowledges that the 1989 *Convention on the Rights of the Child* provides at Article 3(1) that, in all actions concerning children aged under 18 years, their best

interests shall be a primary consideration — see also *Puli'uvea v Removal Review Authority* (1996) 14 FRNZ 322 (CA).

[39] The children's school reports confirm that they have both settled well into school routine, made good friends in class, and made progress in their learning and sporting activities. The children have the support of their maternal grandparents, aunts and uncles in New Zealand, and this is evident from the family photographs and letters of support. There is evidence that the appellant has continued to show considerable interest in the children, and that he is in regular contact by telephone and WhatsApp. However, the children's doctor wrote that it was very obvious that the children need their father's personal support, and without it, it was very likely that, they will develop psychological disorders in the future. The deputy principal of the children's school wrote that it was important for their wellbeing to be reunited with their father.

[40] The Tribunal considers the possibility for the appellant's children to move to Afghanistan or Pakistan to be reunited with him there. However, as New Zealand citizens, they have the right to grow up with the privileges that their country affords. Further, travelling to Pakistan or Afghanistan would create risks to the children's physical safety and wellbeing, as is indicated in the country reports noted above. Should the children relocate to Pakistan, they will be entitled only to a visitor visa valid for three months, and they are not entitled to any form of long-term residence in Pakistan. The appellant has written that, in Pakistan, the children will be exposed to theft, low quality of healthcare and a poor educational system. The wife has written that there are no free public schools in Pakistan for foreigners, and private schools' fees are not affordable for them at this stage. It can therefore be expected that, if the children are required to relocate to Afghanistan or Pakistan, they will experience considerable upheaval and a significant threat to their safety and wellbeing, and a decline in their living and educational opportunities.

[41] The Tribunal finds that the best interests of the children would be served by the appellant being reunited with them in New Zealand.

#### *Discussion of special circumstances*

[42] The appellant seeks to obtain residence in New Zealand having never lived here. The Tribunal is satisfied that the appellant and his New Zealand-resident wife are in a genuine and stable partnership, despite their lengthy separation. The best interests of their two New Zealand-citizen children are best served by them



being reunited with the appellant in New Zealand. The appellant's wife and children have a strong family nexus and support in New Zealand. By contrast, the appellant and his family have no realistic option to live together in a safe and secure environment outside New Zealand. They face significant difficulties in living together in Pakistan and Afghanistan, due to the security issues and health risks there, complicated by the current pandemic.

[43] Considered individually and cumulatively, the appellant's circumstances are special such as to warrant a recommendation to the Minister of Immigration for consideration of an exception to Government residence instructions.

### **STATUTORY DETERMINATION**

[44] Pursuant to section 188(1)(f) of the Immigration Act 2009, the Tribunal confirms the decision of Immigration New Zealand to be correct in terms of the applicable residence instructions but considers that the special circumstances of the appellant are such as to warrant consideration by the Minister of Immigration as an exception to those instructions.

[45] Pursuant to section 190(5) of the Immigration Act 2009, the Minister of Immigration:

- (a) is requested to consider whether a residence class visa should be granted to the appellant as an exception to residence instructions; and
- (b) may, if granting a resident visa, impose conditions on the visa in accordance with section 50 of the Act.

[46] Pursuant to section 190(6) of the Immigration Act 2009, the Minister of Immigration is not obliged to give reasons in relation to any decision made as a result of a consideration of the Tribunal's recommendation.

**Order as to Depersonalised Research Copy**

[47] 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, his wife and his children.

"Judge P Spiller"  
Judge P Spiller  
Chair

Certified to be the Research  
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Judge P Spiller  
Chair