IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2021] NZIPT 206100**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**JS (Partnership)**
Before:	S A Aitchison (Member)
Representative for the Appellant:	A Sabharwal
Date of Decision:	28 May 2021

RESIDENCE DECISION

---

[1] The appellant is a 34-year-old citizen of the United Kingdom 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, having been convicted for possession of cannabis for the purpose of supply, he did not meet the character requirements of the instructions and was not eligible for a character waiver.

[3] The principal issue for the Tribunal is whether Immigration New Zealand conducted a fair and balanced character waiver assessment. For the reasons set out below, the Tribunal finds that it did not. The decision to decline is cancelled and the application is returned to Immigration New Zealand for a correct assessment.

BACKGROUND

[4] The appellant has lived in New Zealand since May 2017 as the holder of successive work visas. His most recent work visa expired on 24 April 2021.

[5] The appellant met his partner, an Australian citizen and a New Zealand resident, in New Zealand. They began dating in June 2018, and in May 2019, they commenced living together.

Residence Application

[6] On 7 July 2020, the appellant made his application for residence under the Family (Partnership) category.

[7] In his application, the appellant provided a copy of his United Kingdom police certificate, issued on 23 April 2019, which recorded one conviction for driving with excess breath alcohol on 18 November 2008, for which he was convicted and sentenced on 26 November 2008 to a fine of £200 and disqualified from driving for a period of 18 months.

[8] On 26 August 2020, the appellant's representative wrote to Immigration New Zealand advising that, on 25 August 2020, the appellant had entered a guilty plea to a charge of possession of cannabis (a Class C Controlled Drug) for the purpose of supply. On 21 October 2020, the representative further advised Immigration New Zealand that the appellant had been convicted and sentenced on 19 October 2020 for that offending to 175 hours' community service and 12 months' supervision.

Character Concerns

[9] By letter dated 3 December 2020, Immigration New Zealand informed the appellant that, in view of this offending, he did not meet the good character requirements for a residence class visa unless he was granted a character waiver. It advised that he was caught by the instruction at A5.25(b) which applies to any person who has been convicted of any offence involving prohibited drugs.

[10] The appellant was invited to provide comments or information to assist Immigration New Zealand decide whether his circumstances justified waiving the good character requirement. He was informed of the non-exhaustive list of factors that Immigration New Zealand needed to consider in its character waiver assessment.

Appellant's Response

[11] On 15 December 2020, the appellant's representative responded to Immigration New Zealand's concerns and provided a copy of the appellant's

Department of Corrections, probation officer's report (1 September 2020); drug and alcohol counselling report (8 December 2020); drug screening result from the Drug Detection Agency (29 September 2020); copies of character references, including a reference from the appellant's new employer; and a volunteer worker's agreement, as evidence of the appellant's performance of his community work sentence.

[12] In his submissions, the representative addressed the relevant factors set out in A5.25.1(b) of instructions as applicable to a character waiver assessment. He stated that the appellant's offending was at the low end of seriousness, as he had not been sentenced to imprisonment. Further, there was only one offence under consideration. Although the appellant's United Kingdom police certificate recorded one conviction in 2008 for driving with excess breath alcohol, this was a historical offence of no relevance to the character instructions. The representative acknowledged that the offending of July 2020 was recent, but qualified that the appellant's probation officer had recorded in his report that the appellant was undergoing counselling for a drug addiction, and assessed that there was "a low likelihood" of the appellant reoffending.

[13] The representative also submitted that the appellant had immediate family living lawfully and permanently in New Zealand, as his partner had been living here since 2014, and the couple had married on 20 February 2021. In addition, he and his wife had strong emotional ties to close friends in New Zealand, several of whom had provided character references. He stated that the appellant was making a significant contribution to New Zealand through his ongoing employment and payment of taxes. Owing to his conviction for drug offending, he had been forced to resign from his employment as a supervisor at a large chain home improvement store, but had since been employed as a property maintenance expert in a property services company. His employer had stated in an email of support that "hard workers like him are really rare and almost impossible to come by".

Character Waiver Assessment

[14] Immigration New Zealand conducted a character waiver assessment on 29 January 2021. It was concluded that the appellant's circumstances were not compelling enough to warrant waiving the good character requirement.

Immigration New Zealand Decision

[15] On 4 February 2021, Immigration New Zealand declined the appellant's residence application because he did not meet the character requirements. He had

been considered for a character waiver, but this had been declined. The appellant was provided with a copy of the character waiver assessment.

STATUTORY GROUNDS

[16] 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.

[17] 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

[18] On 13 April 2021, the appellant lodged this appeal on the ground that the decision of Immigration New Zealand was not correct in terms of the applicable residence instructions.

[19] In support of his appeal, the representative provides submissions (10 March 2021) and material already contained on the Immigration New Zealand file.

ASSESSMENT

[20] 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.

[21] 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

[22] The application was made on 7 July 2020 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because the appellant did not meet the character requirements and he was not granted a character waiver.

Character

[23] The character requirements are contained in chapter A5 of the Operational Manual. Instruction A5.25 guides an assessment as to whether or not an applicant is of good character and provides, relevantly:

> **A5.25 Applicants normally ineligible for a residence class visa unless granted a character waiver**
>
> Applicants who will not normally be granted a residence class visa, unless granted a character waiver (see A5.25.1(b) below), include any person who has been:
>
> …
>
> b. convicted at any time of any offence involving prohibited drugs; or
>
> …
>
> f. convicted (whether in New Zealand or not) of an offence committed at any time when the applicant was in New Zealand unlawfully or was the holder of a temporary entry class visa or held a temporary permit under the Immigration Act 1987 or was exempt under that Act from the requirement to hold a permit, being an offence for which the court has power to impose imprisonment for a term of three months or more; or
>
> …
>
> *Effective 30/03/2015*

[24] There is no dispute that the appellant required a character waiver if he was to be granted a residence class visa. He had been convicted in 2020 for possession of cannabis for supply which fell within A5.25.b. He was also caught by A5.25.f of instructions, having been convicted of an offence committed when in New Zealand as the holder of a temporary visa.

[25] Immigration New Zealand put its concerns to the appellant, and having determined that he was not of good character, told him that he required a character waiver. It invited the appellant to put forward information and evidence in support of a character waiver so that it could determine whether his surrounding circumstances were compelling enough to justify waiving the good character requirement.

Character waiver assessment

[26] Immigration New Zealand must conduct a character waiver assessment in terms of A5.25.1 which provides:

> **A5.25.1 Action**
>
> a. An immigration officer must not automatically decline residence class visa applications on character grounds.
>
> b. An immigration officer must consider the surrounding circumstances of the application to decide whether or not they are compelling enough to justify waiving the good character requirement. The circumstances include but are not limited to the following factors as appropriate:
>
> i. if applicable, the seriousness of the offence (generally indicated by the term of imprisonment or size of the fine);
>
> ii. whether there is more than one offence;
>
> ...
>
> iv. how long ago the relevant event occurred;
>
> v. whether the applicant has any immediate family lawfully and permanently in New Zealand;
>
> vi. whether the applicant has some strong emotional or physical tie to New Zealand;
>
> vii. whether the applicant's potential contribution to New Zealand will be significant.
>
> …
>
> d. Officers must make a decision only after they have considered all relevant factors, including (if applicable):
>
> …
>
> ii. compliance with fairness and natural justice requirements (see A1).
>
> …
>
> *Effective 30/03/2015*

[27] Paragraph A5.25.b provides a non-exhaustive list of factors for Immigration New Zealand to consider when determining whether the surrounding circumstances of an application are compelling enough to justify waiving the good character requirement.

[28] Of further relevance, when conducting a character waiver assessment, Immigration New Zealand must act in accordance with the principles of fairness and natural justice (A1.1.c of instructions, effective 29 August 2012). Relevant factors relating to fairness are:

> **A1.5 Fairness**
>
> a. Whether a decision is fair or not depends on such factors as:
>
> - whether an application is given proper consideration;

- whether the applicant is informed of information that might harm their case (often referred to as potentially prejudicial information);
- whether the applicant is given a reasonable opportunity to respond to harmful information;
- whether the application is decided in a way that is consistent with other decisions;
- 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

Surrounding circumstances

[29] The Immigration New Zealand technical adviser undertaking the character waiver assessment considered the appellant's surrounding circumstances.

[30] As to the seriousness of the appellant's offending, the technical adviser recorded that the appellant had been convicted of an offence carrying a potential prison sentence of eight years. He had been given a sentence of 175 hours' community service and a one-year supervision order. While the sentence imposed was at the lower end of the scale, he was given a significant period of community work to complete. The offence would have been classed as "of some significance" based on the punishment provided. The adviser then went on to consider the appellant's views as expressed in the police summary of facts, where he had claimed to have possession of the cannabis for personal use, but reasoned that this was not credible as evidence obtained by the police during the search of his premises supported a charge of supply, not possession.

[31] As to whether the appellant had been convicted of more than one offence, the technical adviser recorded that he had only one conviction for possession of cannabis for the purpose of supply. The adviser then went on to record how the drug and alcohol counselling report recorded that the appellant had been a regular user of cannabis since his 20s, and as such, had been offending for over 10 years by taking illegal drugs. Further, his consumption had increased to daily use at the time of his arrest. In addition, following his arrest, he had replaced his cannabis use with an increased dependence on alcohol. The adviser further remarked that, had

the appellant not been arrested, he would have continued with his daily offending. He stated that, while it was a positive factor that the appellant had begun to address his cannabis use, it was of concern that this had led to an increased dependence on alcohol.

[32] Concerning whether the appellant had provided or withheld false, misleading or forged information from the application, the technical adviser recorded concern that the appellant had disclosed his conviction to Immigration New Zealand a month after lodging his application. He recorded the appellant's explanation for the delayed disclosure, where he claimed that he had believed he would only be charged with the offence when he appeared in court. The adviser recorded that this was not the appellant's first interaction with the judicial process given his prior offending in the United Kingdom and that "his explanation is somewhat lacking". He then recorded that, "despite this", the immigration officer was satisfied that there had been no intention to mislead.

[33] As to how long ago the relevant event occurred, the technical adviser stated that the offending was very recent, having been committed in July 2020 with the conviction entered in October 2020.

[34] In terms of whether the appellant had any immediate family lawfully and permanently in New Zealand, the technical adviser noted that the appellant's wife had been lawfully and permanently in New Zealand since 2014 when she arrived from Australia, but qualified that his wife's residence was purely based on her Australian citizenship and that she had been convicted of the same offence as the appellant. He stated that his wife would lose her residence upon leaving New Zealand, and that her conviction for supply of cannabis might also have a detrimental effect on her return and subsequent re-instatement of her residence. The adviser also recorded that the couple had no other family living lawfully or permanently in New Zealand.

[35] As to the question of whether the appellant had strong emotional or physical ties to New Zealand, the technical adviser stated that he had been living here since May 2017 and had been with the same employer until after his conviction when he changed employment. He had been in a relationship with his wife since June 2018 and living with her since May 2019. The adviser noted that the appellant's wife was not a New Zealand citizen and that the couple had no other family in New Zealand. It found that the appellant's emotional and physical ties to New Zealand were not significant.

[36] In terms of the appellant's potential to contribute to New Zealand, it was noted that the appellant was working as a property maintenance expert for a property services company and had previously worked as a supervisor in a large home improvement store.

Immigration New Zealand's character waiver assessment

[37] For the reasons which follow, the Tribunal concurs with the representative's submission that the technical adviser performing the character waiver assessment failed to clearly identify the relevant factors and attribute proper weight to them, and also took into account irrelevant considerations. As such, the Tribunal is not satisfied that the salient positive and negative factors in this assessment were accurately depicted to enable a proper weighing exercise.

[38] While the technical adviser engaged with the question of the seriousness of the offending in question, he failed to measure it correctly and ultimately resolve the issue. The adviser first identified the sentencing range for the offence, and that a maximum sentence of eight years' imprisonment could be imposed. He then reflected that the appellant's sentence of 175 hours' community service and a one-year supervision was at the lower end of the sentencing scale. However, he then went on to reason that "a significant period of community work" had been imposed, before ultimately concluding that the offence could be categorised as "of some significance".

[39] By this method, the technical adviser ended up with a rather vague assessment of the seriousness of the offending in question. The representative submits that the adviser was incorrect to classify the term of community work imposed as "a significant period", and then to deduce that the sentence itself was "of some significance". He states that the adviser failed to appreciate the range of community work that a court can impose in sentencing (with a prescribed minimum of 40 hours, and a maximum of 400 hours). The representative states that, had the technical adviser done so, he would have more precisely identified that the imposition of a sentence of 175 hours of community service was within the median or average range for a sentence of community service, with the qualification that a sentence of community work fell below more significant sentencing options such as imprisonment. The representative refers to the tariff decision for cannabis supply of *R v Terewi* [1999] 3 NZLR 62 which identifies three bands of seriousness for offending: where band one offending generally applies to non-commercial supply, attracting sentences lower than imprisonment; band two offending generally

concerns small-scale drug supplies, attracting a starting point of 2–4 years' imprisonment (lower if sales are limited/infrequent); and band three concerns large-scale commercial operations, which can attract a starting point anywhere between 4–8 years' imprisonment.

[40] In qualifying the seriousness of the offence in question, the technical adviser needed to have regard to the hierarchy of applicable sentences, and to the range within those sentences. Whilst the sentence imposed was more restrictive than a discharge without conviction or a fine, it was less restrictive than available sentences of intensive supervision and community detention; a sentence of home detention; or a sentence of imprisonment. A sentence of 175 hours' community service/supervision fell within the median number of hours that can be imposed for community service and, overall, reflected a moderate sentence at the lower end of a range of seriousness for convictions for cannabis supply.

[41] When looking at the seriousness of the offending, the technical adviser also strayed into areas which fell outside the scope of the waiver exercise. He assessed the credibility of the appellant's assertions in the police summary of facts that he had purchased cannabis for his personal use (as to whether the appellant possessed cannabis for personal use or for supply) when the relevant factor to consider was whether or not he was convicted of possession for supply. The reality was, that the appellant had pled guilty to the charge of possession of cannabis for the purpose of supply, and it was the fact of his conviction and sentence that had direct relevance to the character waiver exercise, in particular, the question of the seriousness of the offending. While it is not apparent that this shortcoming resulted in any prejudice to the appellant, it emphasises the Tribunal's concern that, throughout the waiver exercise, the technical adviser failed to correctly focus on relevant factors.

[42] The Tribunal shares further concerns with the appellant's representative. The representative rightly asserts that the technical adviser's finding as to whether the appellant had intended to mislead Immigration New Zealand through his late disclosure of his offending, is obscure.

[43] The appellant lodged his residence application on 7 July 2020, six days after a warrantless search was conducted by the police on his residence. The technical adviser recorded in the waiver exercise that the appellant failed to mention being arrested and charged for this offending when lodging his residence application, and only subsequently informed Immigration New Zealand of this matter on 14 August 2020. He records the appellant's explanation that he was waiting to be brought before the court to be formally charged and enter a plea, then reflected that

this “explanation is somewhat lacking”. He then concluded that “despite this” the immigration officer processing the application was satisfied that there had been no intention to mislead Immigration New Zealand.

[44] The representative is concerned by the ambiguity of this reasoning. It is also not apparent to the Tribunal whether the technical adviser placed any negative weight on this factor. It may be assumed that the adviser deferred to the immigration officer’s opinion on this issue, but the Tribunal cannot be certain. Such comments are of concern and further illustrate the lack of precision, overall, in the technical adviser’s decision.

[45] While the representative is also concerned that the technical adviser mentioned the appellant’s prior historical offending in the United Kingdom, which had no relevance to the waiver exercise, the Tribunal finds no error here. The technical adviser did mischaracterise the prior offending in the waiver exercise by mentioning the appellant’s “previous convictions” in the United Kingdom when, in fact, there was only one prior offence in 2008. However, the adviser acted reasonably in disclosing his knowledge of that offence and recording in transparent fashion his intention not to place any weight on this fact. There is no basis upon which to infer from this, as suggested by the representative, that the adviser put improper weight on this matter.

[46] The representative does, however, validly assert that the technical adviser failed to place any weight on the fact that the probation officer had assessed a low likelihood of the appellant reoffending. Instead, the adviser made an independent prognosis of risk based upon material in the drug and alcohol counselling report concerning the appellant’s historic drug use. The adviser recited from that report the fact that the appellant had been a regular user of cannabis since his 20s and emphasised that such demonstrated that he had been offending for over 10 years by taking illegal drugs. The adviser recorded that the appellant had been a daily user up until his recent arrest, and how he was concerned that he had now replaced his cannabis use with an increased dependence on alcohol. He also mentioned that the appellant would have kept on offending had he not been arrested. In so reasoning, the technical adviser stepped outside the bounds of the waiver exercise, which called upon him to give due weight to the probation officer’s assessment of the low likelihood of the appellant’s reoffending, without drawing unfounded and negative inferences – such as his independent view that the appellant had been offending for 10 years prior to his conviction and sentence, and had an increased dependence on alcohol. The technical adviser also failed to place any weight on

the fact that, under a sentence for supervision, the appellant had been referred for drug and alcohol counselling.

[47] Another salient concern, as identified by the representative, is the technical adviser's failure to give due weight to the appellant's emotional and physical ties to New Zealand, as a lead factor with positive weight in this waiver exercise. While the adviser recognised the fact of the appellant being in a relationship with a New Zealand resident for 30 months and that they had lived together for 18 months, he qualified this factor by irrelevant considerations, such as, the fact that the wife's residence was "based solely on her Australian citizenship", the view that she would likely leave New Zealand with the appellant (an assumption that he was not entitled to make), and the incorrect assumption that the wife could lose residence upon leaving New Zealand.

[48] According to applicable instructions, the appellant's wife could apply for a variation of travel conditions should she chose to leave New Zealand and be eligible for a 24-month variation of travel conditions enabling her to retain residence for a 24-month period; see RV3.20.1 (effective 22 August 2016). If she were to spend more than 184 days in New Zealand over a 12-month period before lodging a permanent resident visa application, she could attain a permanent resident visa enabling her to return to New Zealand at any time; RV2.5 (effective 21 November 2016). Further, RA2.5 (effective 29 November 2010) provides that Australian citizens are exempt from the requirement to have a resident visa to enable travel to New Zealand unless they are caught by section 15 or 16 of the Immigration Act 2009, provisions that do not apply to the appellant's wife.

[49] The technical adviser also incorrectly placed weight on the fact that the appellant's wife had been convicted for the same offence as the appellant, which was an irrelevant factor, as she would meet the character requirements for a supporting partner in a Family (Partnership) category residence application (see R5.95, effective 23 December 2019) and she would not fall within any of the character exclusions as a returning resident set out in RV2.1 (effective 11 April 2016) or RV4.1.b of the instructions (effective 11 April 2016).

[50] The technical adviser also failed to take into account evidence provided of the appellant's friendships and connections in the local community. The appellant provided many references from friends and colleagues conveying how he and his wife had formed close ties in their community. However, the technical adviser did not engage at all with this evidence.

[51] For the reasons given, the Tribunal considers that the character waiver exercise was unfair and incorrect.

Conclusion as to correctness

[52] The Tribunal finds that Immigration New Zealand's decision was unfairly reached. The technical adviser took into account irrelevant factors, and failed to place proper weight on salient relevant considerations in the waiver exercise as required by instructions A5.25.1 and A1.5.

DETERMINATION

[53] 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.

[54] 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

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

1. The application is to be reassessed by an Immigration New Zealand officer not previously associated with the application in accordance with the instructions in existence at the date the residence application was made. No further lodgement fee is payable.

2. The appellant is to be invited to update his application within a reasonable time frame.

3. Immigration New Zealand is to ensure that, in reassessing the appellant's application, it considers all information on his file, and any new information produced to it; and that it complies with the fairness requirements of instructions (A1.5 and A1.15).

4. Immigration New Zealand is to proceed on the basis that the appellant does not meet the character requirements of instructions, in particular on the basis of A5.25.b and f.

5. Immigration New Zealand shall invite the appellant to make submissions and produce information in support of a character waiver and, after considering any additional material produced, proceed to determine whether to grant a character waiver. The Tribunal directs the attention of Immigration New Zealand to paragraphs [29] to [50] above.

8. If Immigration New Zealand does not grant the appellant a character waiver, it shall decline his residence application. If it does grant him a character waiver, it shall continue processing his residence application and determine whether he meets all other requirements under the Family (Partnership) category of instructions.

[56] The appeal is successful in the above terms. The appellant is to understand that the outcome of this appeal is no guarantee that his application will be successful.

Order as to Depersonalised Research Copy

[57] 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 partner.

Certified to be the Research Copy released for publication.

S A Aitchison
Member

"S A Aitchison"
S A Aitchison
Member