IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2021] NZIPT 206161**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**UM (Skilled Migrant)**
Before:	L Wakim (Member)
Counsel for the Appellant:	M Hua and A James
Counsel for the Respondent:	A Miller and G La Hood
Date of Decision:	31 August 2021

RESIDENCE DECISION

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[1] The appellant is a citizen of China whose application for residence under the Business (Entrepreneur Residence Visa) category was declined by Immigration New Zealand. His application includes his wife, and the couple's two children.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it determined that the appellant and his wife were likely to be a threat or risk to New Zealand's security. As a result, they were considered "excluded" persons under section 16 of the Immigration Act 2009 ("the Act") and were not eligible for the grant of a visa, unless granted a special direction. No special direction was granted.

[3] The principal issue for the Tribunal is whether it has jurisdiction to determine this appeal.

[4] For the reasons set out below, the Tribunal finds that it does not have jurisdiction to hear the appeal. Immigration New Zealand considered the information available and concluded that the appellant was an "excluded person" under section 16 of the Act. Section 187(2)(b) of the Act provides that there is no

right of appeal to the Tribunal in respect of a decision to refuse to grant a residence class visa to an excluded person.

BACKGROUND

Entrepreneur Work Visa

[5] On 15 February 2016, the appellant was granted an Entrepreneur Work Visa (Interim) on the basis of his intention to establish a New Zealand based company. The company was incorporated in July 2016.

[6] On 17 October 2017, Immigration New Zealand granted the appellant the balance of his Entrepreneur Work Visa, valid until 15 February 2019.

Residence Application

[7] On 30 July 2018, the appellant made his application for residence under the Business (Entrepreneur Residence Visa) category of instructions.

[8] On 4 December 2018, while his residence application was being processed, the appellant made an application for an Entrepreneur Work (Renewal) visa.

[9] In July 2019, while both of these applications were being processed, the appellant applied for, and was granted, a Specific Purpose work visa, valid until 13 September 2020.

[10] On 16 September 2020, the appellant applied for a second Specific Purpose work visa. On 26 September 2020, he was granted a six-month interim visa as the processing of his applications for residence, and the Entrepreneur Work (Renewal) and Specific Purpose work visas, were all ongoing.

[11] The appellant's interim visa expired on 26 March 2021. He is currently unlawfully in New Zealand.

Immigration New Zealand's Concern

[12] On 24 November 2020, Immigration New Zealand wrote to the appellant, raising concerns about his application for an Entrepreneur Work visa (Renewal).

[13] Immigration New Zealand had completed an assessment of his application and considered that it had reason to believe that the appellant and his wife were

subject to section 16(1)(a)(ii) of the Act. This provided that no visa may be granted to a person whom the Minister (or an appropriately delegated immigration officer) had reason to believe is or is likely to be, a threat or risk to security. This finding was based on information that had been provided to Immigration New Zealand by the New Zealand Security Intelligence Service (NZSIS) which stated:

> NZSIS assesses [the appellant and his wife] have almost certainly knowingly assisted the People's Republic of China Intelligence Services (PRCIS). Additionally, NZSIS assesses [the appellant and his wife] have deliberately obfuscated the amount of contact they have maintained with the PRCIS. Therefore, NZSIS assesses that [the appellant and his wife's] presence in New Zealand presents an enduring national security risk as we cannot discount that [the appellant and his wife] may seek to assist the PRCIS again in the future.

[14] Immigration New Zealand concluded that it appeared that the appellant and his wife were ineligible for visas and the application could be declined. The appellant was invited to comment.

The Appellant's Response

[15] On 15 January 2021, Mr James, counsel for the appellant responded. He submitted that Immigration New Zealand had provided no evidence that the appellant and his wife had any current or intended engagement with the PRCIS. Nor had any evidence been provided which indicated the couple were engaged in any ongoing activity that was relevant to the national security of New Zealand.

[16] Counsel explained that, during 2019, the appellant had been interviewed on two occasions by the NZSIS. He had participated on a voluntary basis, co-operated and provided the information requested. He had explained to the NZSIS that, in his previous work for a private company in China, he had had legitimate contact with the PRCIS because he had assisted overseas employees of the company to obtain visas to enter China for business purposes. This involved passing on to the PRCIS copies of the employees' CVs, passports and other details as part of the visa vetting process, to facilitate the issue of visas.

[17] The appellant had provided his mobile telephone to the NZSIS, which contained the names and telephone contact details of four PRCIS staff members with whom the appellant had had contact through his work in China. He had not maintained contact with them since coming to New Zealand. No New Zealand nationals had been involved and there was no issue relating to the security of New Zealand. The appellant's connections to the PRCIS were limited to what he had disclosed to the NZSIS, which had been a legitimate work requirement and

did not involve any form of espionage. Counsel also noted that the appellant's wife had never been interviewed and it appeared she was considered a risk to security simply by her virtue of marriage to the appellant.

[18] Counsel stated that the appellant and his wife "had not been involved in the Chinese Communist Party (CCP) and they are not employed in any role with the PRCIS". They had no involvement in any community or political organisations in New Zealand and their profile was of no value to the PRCIS or the CCP.

[19] Counsel concluded that Immigration New Zealand must be "satisfied beyond doubt" that each of the appellants was a threat and/or risk to the security of New Zealand and its failure to disclose evidence was a breach of those principles and made it difficult to present a response.

Immigration New Zealand Decision

[20] On 29 March 2021, Immigration New Zealand declined the appellant's residence application. The same day, it also declined his Entrepreneur Work (Renewal) visa and Specific Purpose work visa applications.

[21] Immigration New Zealand had considered the appellant's response to its letter of concerns, but concluded it had reason to believe that he and his wife were likely to be a threat or risk to New Zealand's security as per section 16 of the Act. He was therefore an excluded person, to whom no visa may be granted unless in accordance with a special direction. No special direction had been granted. Immigration New Zealand wrote:

> In making decisions under the Act, an Immigration Officer may take into consideration advice and information provided by other appropriate government agencies. In respect of risk to security, it is entirely appropriate to consider the views of the NZSIS. As set out in our letter to you, the NZSIS have assessed your … presence in New Zealand presenting 'enduring national security risk'. It should be noted that for section 16 to apply, an Immigration Officer does not need to be 'satisfied beyond doubt that each of the applicants are a threat and/or risk to security'. The threshold, as set out in section 16 is 'reason to believe'. It is my view, based on the information on hand that this threshold has been met.
>
> Please note [that] as this decision was made under section 16 of the Act (and not in terms of residence instructions) it is our view that you have no right of appeal to the Immigration and Protection Tribunal.

STATUTORY GROUNDS

[22] As indicated on his completed appeal form, the appellant claims that his right of appeal arises from section 187(1)(a)(ii) of the Act:

> **187 Rights of appeal in relation to decisions concerning residence class visas**
>
> (1) There is a right of appeal to the Tribunal against a decision concerning a residence class visa in the following circumstances:
>
> (a) an applicant for a residence class visa may appeal against—
>
> …
>
> (ii) a decision by the Minister not to grant a residence class visa if classified information has been relied on in making the decision:
>
> …

[23] 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.

[24] 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

[25] On 30 April 2021, the appellant lodged this appeal on both grounds in section 187(4).

[26] On 15 June 2021, in response to an application for an extension to file submissions, the Tribunal directed that both the appellant and respondent should provide submissions, including as to the jurisdiction of the Tribunal to hear the appeal.

[27] Submissions from counsel for the appellant (Mr James) were received on 30 June 2021; from counsel for the respondent, the Ministry of Business,

Innovation and Employment (MBIE) on 14 July 2021; and a response from Mr James on 28 July 2021. These are summarised below.

Correspondence Between the Parties After the Decision

[28] It is also useful for the Tribunal to record additional correspondence between the appellant and New Zealand authorities subsequent to Immigration New Zealand's decision.

[29] According to documents provided on appeal, on 29 and 30 March 2021, counsel for the appellant made a request to Immigration New Zealand under the Privacy Act 2020, requesting a complete copy of the appellant's files, including:

> [A]ny documents not previously disclosed, including copies of any reports provided to the minister including any internal or external legal reports, correspondence from Alistair James and Davidson Legal. Please also advise whether the minister was provided with any classified information as defined in section 7 of the Immigration Act, if so please also provide us with a copy.

[30] On 28 April 2021, MBIE provided a partial response. On 7 May 2021, it provided a second and final response. AA, a business advisor in Immigration New Zealand's Operations Support unit provided, along with other documents:

(a) a copy of the full MBIE "Intelligence Notification" assessment report (1 October 2020). This report included the (previously disclosed) paragraph from the NZSIS, and MBIE's observation that the appellant may be subject to section 16 of the Act and that an appropriately delegated decision maker should make that assessment; and

(b) a letter dated 7 May 2021 from Immigration New Zealand's general manager of Border and Visa Operations ("the general manager's letter"), which stated:

> I can advise that there is no information held by Immigration New Zealand regarding [the appellant] that has been classified as defined in Section 7 of the Immigration Act 2009. In regards to your request for a copy of any classified information provided to the Minister of Immigration, I can advise that no information exists.

[31] On 18 June 2021, counsel for the appellant made a subsequent request under the Privacy Act 2020 to the NZSIS, a part of which was transferred to MBIE for a response:

> [W]e now request whether or not security classifications 'in-confidence' and 'Restricted' as set out in the MBIE Intelligence Notification Report (attached) denote that the information held by your agency is 'classified information'.

[32] On 28 June 2021, Immigration New Zealand's AA, now a senior business advisor, responded to counsel ("the advisor's email") stating:

> I can advise that documents at INZ which are classified as anything other than 'UNCLASSFIED' is considered classified. This includes documents classified as In-Confidence, Sensitive, and Restricted. …

Submissions from the Appellant

[33] For the appellant, counsel submits that the information that the NZSIS provided to Immigration New Zealand was classified information under section 7(1) of the Act, despite not being certified by the chief executive of any relevant agency. As a result, he argues that the Tribunal has jurisdiction to hear the appeal under section 187(1)(a)(ii).

[34] In support of this submission, counsel refers to the advisor's email of 28 June 2021. Although this conflicts with the earlier letter from the general manager, the advisor's email makes clear that Immigration New Zealand's decision was made on the basis of "information of a classified nature". Counsel submits that Immigration New Zealand then failed to follow the specific procedures set out in the Act regarding the use of classified information in decision making, which means that the decision should be cancelled as *ultra vires*. He also submits that decisions involving classified information are to be made by the Minister of Immigration, or a delegated decision maker, of which the officer who made the decision was neither.

[35] Counsel submits that it is incompatible with the purpose of the Act for Immigration New Zealand to avoid the certification of classified information under section 7 to avoid complying with the special procedures regarding classified information set out in the Act.

The Respondent's Submissions

[36] On the matter of jurisdiction, counsel for the respondent (MBIE) submits that, under section 187(2)(b), the appellant, as an excluded person, has no right of appeal to the Tribunal.

[37] On the matter of classified information, counsel submits that there was no "classified information", as defined by section 7 of the Act, relied upon in the appellant's application. In support of his submissions, he provides two affidavits:

(a) An affidavit from BB, the immigration officer who made the decision. His affidavit explains that he has delegated authority to make decisions relating to section 16 of the Act. The information upon which he relied to make his decision was provided to Immigration New Zealand by the NZSIS as "restricted" information, following a national security check. BB annexes a copy of the MBIE Intelligence Notification report that includes the NZSIS information to his affidavit, noting that the NZSIS information is labelled as "restricted". It was not "classified information" as defined by section 7 of the Act, which is certified by the chief executive of a relevant agency as being unable to be disclosed under the Act. Rather, the information he relied upon to make his decision was disclosed to the appellant, and his lawyers provided a response. Because the information was not classified information under the Act, BB was not required to make his decision using the processes described in the Act for making decisions using classified information.

(b) An affidavit from AA, Immigration New Zealand's senior business advisor, regarding her communications with counsel. She confirms her email of 7 May 2021 to the appellant, to which she attached the MBIE Intelligence Notification report and the general manager's letter. She explains that, in her subsequent email on 28 June 2021, she was referring to MBIE's internal privacy and policy classifications for information it held. She had not stated that the NZSIS report was "classified information" under section 7 of the Act, and if that was the interpretation taken from the email, it would be incorrect.

[38] Counsel submits that the NZSIS information was classified as "restricted" under the government's national classification system which meant it was able to be disclosed and therefore did not require certification by the chief executive. The information was, in fact, disclosed to the appellant. It therefore did not meet the requirements under the statutory definition of "classified information" under section 7 of the Act because classified information under section 7 cannot be disclosed. The appellant was incorrect in submitting that "clearly the information was very much classified information". Because the NZSIS information was not "classified information" under section 7 of the Act, the other procedural requirements in the Act relevant to classified information were not engaged.

[39] Counsel submits that a fair process was followed: the information had been provided to the appellant, and the appellant had responded. Because the decision did not rely on classified information, and the appellant had been found to be an excluded person under section 16, the appellant had no right of appeal to the Tribunal. If the appellant believed that Immigration New Zealand's decision was not correct or had been unfairly made, that was a matter to be determined by the High Court through judicial review of the officer's decision.

Response from Counsel for the Appellant

[40] In response to the respondent's submissions, Mr James submits that MBIE was being "disingenuous" in its claim that the decision was not based on classified information:

> The appellant's position is that information that is classified as 'restricted', 'in-confidence, or 'sensitive' is in fact classified information as defined in section 7(2) and 7(3) of the Act. The description of 'sensitive' described as 'the compromise of information which is likely to damage New Zealand's interests or endanger the safety of its citizens', very much aligns with section 7(3)(a) and (d) of the Act.

[41] Mr James submits that the appellant maintained a right to appeal to the Tribunal under section 187(1)(a)(ii) and that MBIE had purported to make their decision under section 16 of the Act to avoid the statutory requirement to follow the special procedures under the Act required for decisions which have relied upon classified information.

ASSESSMENT

[42] The Tribunal has considered the submissions and documents provided on appeal from both the appellant and the respondent; along with the files in relation to the appellant's residence application and his Entrepreneur and Specific Purpose work visa applications, all of which have been provided by Immigration New Zealand.

Jurisdiction

[43] The central issue for the Tribunal is whether it has jurisdiction to hear this appeal.

Relevant legislation

[44] Section 187(2)(b) precludes an applicant from lodging an appeal if they are considered an "excluded person" under section 16 of the Act:

> **187 Rights of appeal in relation to decisions concerning residence class visas**
>
> …
>
> (2) However, no appeal lies under this Act in respect of—
>
> …
>
> (b) a refusal of the Minister or an immigration officer to grant a residence class visa or entry permission to an excluded person; or
>
> …

[45] An "excluded person" is defined by section 4 of the Act as "a person to whom section 15 or 16 applies". Relevant to the appellant, section 16 of the Act provides:

> **16 Certain other persons not eligible for visa or entry permission**
>
> (1) No visa or entry permission may be granted, and no visa waiver may apply, to any person who—
>
> (a) the Minister has reason to believe—
>
> (i) is likely to commit an offence in New Zealand that is punishable by imprisonment; or
>
> (ii) is, or is likely to be, a threat or risk to security; or
>
> (iii) is, or is likely to be, a threat or risk to public order; or
>
> (iv) is, or is likely to be, a threat or risk to the public interest; or
>
> (b) is a member of a terrorist entity designated under the Terrorism Suppression Act 2002.
>
> (2) This section is subject to section 17.

[46] However, section 187(1)(a)(ii) provides a right of appeal against a decision by the Minister not to grant a resident visa if classified information has been relied on in making the decision.

> **187 Rights of appeal in relation to decisions concerning residence class visas**
>
> (1) There is a right of appeal to the Tribunal against a decision concerning a residence class visa in the following circumstances:
>
> (a) an applicant for a residence class visa may appeal against—
>
> …

(ii) a decision by the Minister not to grant a residence class visa if classified information has been relied on in making the decision:

…

[47] Section 7 of the Act defines classified information:

7 Meaning of classified information and proceedings involving classified information

(1) In this Act, **classified information** means information that the chief executive of a relevant agency certifies in writing cannot be disclosed under this Act (except as expressly provided for) because—

(a) the information is information of a kind specified in subsection (2); and

(b) disclosure of the information would be disclosure of a kind specified in subsection (3).

(2) Information falls within subsection (1)(a) if it—

(a) might lead to the identification, or provide details, of the source of the information, the nature, content, or scope of the information, or the nature or type of the assistance or operational methods available to the relevant agency; or

(b) is about particular operations that have been undertaken, or are being or are proposed to be undertaken, in pursuance of any of the functions of the relevant agency; or

(c) has been provided to the relevant agency by the government of another country, an agency of a government of another country, or an international organisation, and is information that cannot be disclosed by the relevant agency because the government, agency, or organisation from which the information has been provided will not consent to the disclosure.

(3) Disclosure of information falls within subsection (1)(b) if the disclosure would be likely—

(a) to prejudice the security or defence of New Zealand or the international relations of New Zealand; or

(b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of another country, an agency of a government of another country, or an international organisation; or

(c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or

(d) to endanger the safety of any person.

(4) In this Act, **proceedings involving classified information** means any proceedings in which classified information—

(a) was relied on in making the decision appealed against or subject to review proceedings (including a decision of the Tribunal); or

> (b) is first raised or proposed to be raised in the course of an application to the Tribunal or on appeal or in review proceedings; or
>
> (c) is raised in an application under Part 9.
>
> (5) A chief executive of a relevant agency must not delegate to any person the ability to certify information as classified information under subsection (1).
>
> …

[48] The Act includes a section entitled "Reliance on classified information in decision making" (sections 33 to 42). Section 33(1) states that classified information can be relied on in making decisions if the Minister determines that the classified information relates to matters of security or criminal conduct:

> **33 Classified information relating to security or criminal conduct may be relied on in decision making**
>
> (1) Classified information may be relied on in making decisions or determining proceedings under this Act if the Minister determines that the classified information relates to matters of security or criminal conduct.
>
> …

[49] The remainder of that section (sections 34 to 42) make specific provision for various procedures and safeguards in the decision-making process where reliance is placed on classified information. Other sections in the Act provide further provisions for proceedings involving classified information (see "Special procedure where classified information involved" (sections 240 to 244); "General provisions relating to proceedings involving classified information" (sections 252 to 262); and "Special advocates" (sections 263 to 271) .

Jurisdiction – Section 187(2)(b)

[50] In accordance with this provision, the Tribunal finds that it does not have jurisdiction to determine the appellant's appeal. On the evidence before the Tribunal, it is satisfied that a properly delegated immigration officer concluded that he had reason to believe that the appellant was a person who "is, or is likely to be, a threat or risk to security" under section 16(1)(a)(ii) of Act. The appellant was therefore an "excluded person" and not eligible for a visa or entry permission (absent a special direction granted under section 17). The Tribunal is specifically precluded from hearing appeals from "excluded persons" under section 187(2)(b).

[51] The Tribunal concurs with the submission from counsel for the respondent that the High Court's decision in *Chief Executive of MBIE v EM* [2019] NZHC 1966 has some relevance. In that decision, the Court discussed the limits of the

Tribunal's jurisdiction in relation to "excluded persons" under sections 15 and 16 of the Act. In that case, the High Court agreed with the Tribunal's conclusion that EM had not, in fact, been 'excluded' from Australia. As a result, he was not an "excluded person" for the purposes of section 15 of the Act, and the Tribunal had jurisdiction to hear the appeal.

[52] In contrast, the assessment as to whether the appellant in this case is an "excluded person" under section 16 of the Act is not a purely factual enquiry. Rather, it is based on an assessment by the immigration officer that there is 'reason to believe' that the appellant constitutes a threat or risk to security. This is a matter of judgement to be made on the available evidence. The Act specifically precludes the Tribunal from hearing such appeals and assessing the correctness or procedural fairness of such decisions: in those cases, the remedy lies through a judicial review to the High Court of the officer's decision.

Jurisdiction – Section 187(1)(a)(ii)

[53] It is also necessary to address Mr James' submission that the appellant retains a right to appeal to the Tribunal under section 187(1)(a)(ii) because the decision involved "classified information" as defined by section 7 of the Act.

Categorisation of classified information

[54] It is accepted that systems exist by which official information held by the Government is categorised to protect it from unauthorised disclosure. The Tribunal has been assisted by the Government website, Protective Security Requirements, which sets out the Government's approach to managing information security, and from which the Tribunal summarises the following general principles relating to the classification of official information.

[55] The Government protects its official information through a security classification system which specifies how information must be protected. It is designed to protect official information from disclosure or access that would be harmful to New Zealand citizens, the New Zealand Government, or government organisations.

[56] Official information that does not need a security classification is called "unclassified" information, and most official information fits this category. While "unclassified" is not a security classification, it is used as a protective marking

because it shows that the impact from unauthorised disclosure or misuse has been assessed.

[57] For information that does require protection, security classifications are divided into two types of information: policy and privacy information; and national security information. Classifications for material that should be protected because of public interest or personal privacy are "in confidence" or "sensitive". Classifications for material that should be protected because of national security are "restricted", "confidential", "secret" and "top secret": see Protective Security Requirements *Overview of security classifications* (5 August 2019) at www.protectivesecurity.govt.nz.

Legislative references to classified information

[58] Beyond this categorisation system, various pieces of legislation also include their own definitions of the term "classified information" (or sometimes "classified security information"), including the Crimes Act 1961, the Passports Act 1992, the Terrorism Suppression Act 2002, and the Immigration Act 2009.

[59] The definition of "classified information" in section 7 of the Immigration Act applies specifically "*in this Act*". It refers to information, the source of which cannot be identified for certain reasons, which, if disclosed, could: prejudice the security or defence or international relations of New Zealand; prejudice the entrusting of information to New Zealand by the country or organisation which has provided the information; prejudice the maintenance of law; or endanger the safety of any person.

[60] The Tribunal has not previously addressed section 7 in any of its decisions, nor is there much guidance from the higher courts, although the High Court in *Zaoui v Attorney General* [2004] 2 NZLR 339 (HC) addressed questions of access to classified information under similar provisions in the Act's predecessor legislation (section 114 of the Immigration Act 1987 ("the 1987 Act")), in relation to a claimant found to be a refugee.

[61] The drafting history of the Act indicates that one of key changes from the 1987 Act was to increase the use of classified information (referred to as "classified security information" in the 1987 Act) in a wider range of immigration decision-making situations, including the issue of visas, arrivals and departures, and deportations, all while ensuring sufficient safeguards. As summarised in

New Zealand Parliament *Immigration Bill 2007: Bills Digest No 1538* (16 August 2007) at pp1–2:

> Classified information may be used in immigration and refugee and protection decision making. Such decisions can be appealed if an appeal is ordinarily available, but the Bill enables the information to remain protected.
>
> Natural justice safeguards in classified information appeals include requiring broad reasons to be given for a decision using classified information, and a non-classified summary of the information to be disclosed where the court considers that possible. Appeals can be heard by a panel of up to three District Court Judges on the Immigration and Protection Tribunal (the Tribunal), and special advocates are able to represent the individual's interests.

[62] More recently, the Law Commission addressed the use of security information in crown proceedings in its report *National Security Information in Proceedings* (May 2015) at [1.21], noting that:

> [1.21] National security information may of course also be relevant to administrative decisions in respect of a person's rights, obligations or interests. New Zealand law provides for information of this nature to be relied upon when making certain decisions under the Immigration Act 2009, [and various other Acts] ….
>
> Given the nature of these decisions, reaching a properly informed decision may require taking into account national security information that cannot be disclosed to the person affected (for example, if an individual is refused a visitor visa because of concerns that they have been involved in terrorist activities).

[63] The same report goes on to observe, at [1.25] and [4.8], that the Immigration Act 2009 is the best example of legislation in New Zealand that contains a special procedure to be used where national security information is relevant. The Act places controls on the way in which "classified information" (as defined by section 7) can be used by the Minister or a refugee and protection officer for the purposes of making certain decisions. However, before information can be used, the Minister must first determine if the information relates to matters of security or criminal conduct, as per section 33(1). The report then describes the relevant safeguarding provisions, including during appeal proceedings (see [1.25–28] and [4.9–11]).

[64] The Tribunal notes that reliance on section 7 has been used sparingly, if at all. Nevertheless, it allows decision makers to rely on classified information to make decisions, with certification by the chief executive of the relevant agency being required to alert the applicant that the material is not disclosable, and to trigger the additional provisions designed to ensure a fair process ensues. The power of the chief executive of the relevant agency to certify is a non-derogable power, signifying the gravity of the decision.

Application to the appellant's case

[65] The Tribunal does not accept counsel for the appellant's submission that the information upon which Immigration New Zealand made its decision was "classified information" as defined by section 7 of the Act.

[66] First, the general manager's letter of 7 May 2021 contained an unequivocal and specific declaration that Immigration New Zealand held no information about the appellant "that has been classified as defined in Section 7" of the Act. Counsel's reliance on the subsequent email from the business advisor is a misinterpretation of the context of her statement, which clearly addressed the generic categorisation of government information into various classifications, and was not made with specific reference to the definition of "classified information" in section 7 of the Act.

[67] Second, "classified information" as defined by section 7 is, as correctly identified by counsel for the respondent, not disclosable to the appellant. That is why certification by the chief executive of the relevant agency is required and why significant other procedural provisions exist to balance the individual's right to prepare a defence or respond to the allegations. In the appellant's case, Immigration New Zealand disclosed to the appellant the information it had received from the NZSIS and gave him an opportunity to respond. There was no certification from any chief executive required because the information was disclosed. MBIE was not attempting to avoid its obligations under the additional provisions by avoiding certification. Because it disclosed the information, there was no need for it to certify (and withhold) the information and the additional provisions simply do not apply.

[68] The Tribunal notes that counsel for the respondent, and both AA and BB, refer to the NZSIS information as being classified as "restricted". However, it appears to the Tribunal from the MBIE Intelligence Notification report that the NZSIS information was classified as "(IC)" (In confidence), while various other paragraphs in the report were classified as either "(R)" (Restricted) or "(U)" (Unclassified). Whichever it might be, it makes little difference, as neither classification indicates that the information is "classified information", as defined by section 7 of the Act.

Conclusion as to jurisdiction

[69] The appellant is a person to whom section 16 of the Act applies and whom Immigration New Zealand did not grant a special direction. He is an excluded

person and, as set out in section 187(2)(b) of the Act, has no right of appeal. Further, because no classified information, as defined by section 7 of the Act, was relied upon in deciding his application, the appellant has no right of appeal under section 187(1)(a)(ii).

DETERMINATION

[70] For the reasons given above, the Tribunal has no jurisdiction to consider the appellant's appeal.

[71] The appeal is dismissed on this basis.

Order as to Depersonalised Research Copy

[72] 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 his family members.

"L Wakim"
L Wakim
Member

Certified to be the Research Copy released for publication.

L Wakim
Member