IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2022] NZIPT 206420**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**BF (Long Term Skill Shortage)**
Before:	M Avia (Member)
Counsel for the Appellant:	J Bensley
Date of Decision:	24 March 2022

RESIDENCE DECISION

[1] The appellant is a 58-year-old citizen of the United Kingdom, whose application for residence under the Residence from Work (Long Term Skill Shortage List (LTSSL)) category was declined by Immigration New Zealand. Included in the application are his 57-year-old wife and 23-year-old son.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because he did not have an acceptable standard of health and had not been granted a medical waiver.

[3] The principal issue for the Tribunal is whether Immigration New Zealand's decision to decline the appellant's application was correct. The Tribunal finds that the decision was not correct. While the appellant did not have an acceptable standard of health, the medical waiver assessment contained flaws which, taken together, mean that the medical waiver outcome must be set aside. The decision to decline the appellant's application is cancelled and the application is returned to Immigration New Zealand for a correct assessment.

BACKGROUND

[4] The appellant arrived in New Zealand in April 2015 as the holder of a Work to Residence (LTSSL) visa. His wife and son followed him three months later. In November 2017, the appellant was granted a second Work to Residence (LTSSL) visa. On 26 February 2020, the appellant made his application for residence under the Residence from Work (LTSSL) category of instructions.

[5] The appellant provided a chest X-ray to Immigration New Zealand on 5 March 2020. On 25 April 2020, an Immigration New Zealand medial assessor assessed the X-ray and confirmed that the appellant had previously had early stage cancer in his lower right lung lobe, which was treated by a lobectomy (removal of the affected lobe) in 2018. Survival rates post-treatment for patients suffering from lung cancer were 73 per cent at 24 months and 49 per cent at 60 months. However, the appellant's chance of survival after 24 months was likely greater because more than a quarter of patients died within the first 24 months of the 60-month period.

[6] The assessor considered that the appellant did not have an acceptable standard of health as he had a condition deemed to impose significant costs and/or demands on New Zealand's health services, that is, malignancies of organs, including past history of treatment, and further, the malignancy did not have a probability of recurrence of less than 10 per cent. As a result, the appellant had a listed condition and was not of an acceptable standard of health for the purposes of residence. Any recurrence could require further assessment or treatment likely to impose significant costs and high demands on New Zealand's health services.

Immigration New Zealand's Concerns and Appellant's Responses

[7] On 27 August 2020, Immigration New Zealand advised the appellant in writing that, in light of the medical assessor's report, he did not appear to meet the health requirements under instructions.

[8] On 23 September 2020, the appellant and his wife responded, explaining that they came to New Zealand because they wanted to contribute to the rebuild after the Christchurch earthquake. They had both given up good jobs in the United Kingdom and since their arrival in New Zealand, they had built a stable, new life in New Zealand.

[9] Immigration New Zealand received a letter (dated 15 September 2020) from the appellant's medical specialist, a respiratory physician. Citing a 2012 study, the conditional five-year relative survival rate for a person in the appellant's position (stage 1 non-small cell lung cancer, aged between 45 and 59 years, two years out from treatment), would be 70 per cent. Further, not all those who died after two years had died from a recurrence of lung cancer, but rather had died from other co-morbidities associated with smoking, such as chronic obstructive pulmonary disease (COPD) and cardiovascular diseases, and there was evidence that ongoing smoking increased mortality rates. Therefore, while the epidemiological data suggested only a 70 per cent survival rate, the respiratory physician considered that the appellant's prognosis would be better than that, given that he no longer smoked and did not have COPD.

[10] On 5 October 2020, Immigration New Zealand's medical assessor reviewed the information submitted by the appellant's specialist. The medical assessor considered the new medical information but again determined, for similar reasons as before, that the appellant was unlikely to have an acceptable standard of health. In particular, due to favourable prognostic factors (cessation of smoking and an absence of COPD), the appellant might have a lower recurrence risk; however, this did not demonstrate that the appellant's recurrence risk was below 10 per cent.

[11] Immigration New Zealand then referred the question of the appellant's health to a second medical assessor, who acted as medical referee. On 11 October 2020, the medical referee considered the information on file and the disputing information. The referee accepted that the appellant's estimated survival rate was in the vicinity of 70 per cent and that he did not have other co-morbidities. However, because the probability of recurrence was not less than 10 per cent, the referee confirmed the assessor's opinion that the appellant was unlikely to have an acceptable standard of health because he had a listed medical condition considered to impose significant costs and/or demands on New Zealand health services.

Appellant Found not to have an Acceptable Standard of Health

[12] On 3 November 2020, Immigration New Zealand wrote to the appellant and advised that it had concluded that he did not have an acceptable standard of health. The medical assessor's first opinion and the medical referee's opinion were set out. Immigration New Zealand said that, because the appellant did not

have an acceptable standard of health, this meant that his application would have to be declined unless he was granted a medical waiver. Information in support of a medical waiver could now be produced.

Submissions and Evidence in Support of a Medical Waiver

[13] On 15 February 2021, newly-appointed counsel provided submissions and evidence in support of the appellant's medical waiver. She submitted that because the appellant was deemed to have a medical condition that would impose significant costs on New Zealand health services, it was important to assess the tangible costs that would apply to the appellant if the malignancy were to occur. In an email dated 4 February 2021, the appellant's respiratory physician provided a breakdown of the likely costs:

Treatment	**Costs**
Palliative chemotherapy	10,000
Palliative radiotherapy:	3,600
Pleural effusion:	5,000
Hospice per day for 8 days (average length of stay)	12,800
CT scans and chest X-rays	1,000
Palliative care visits from medical professionals	1,500
Primary care such as doctor's visits: 10 visits each costing $100	1,000
Painkillers	Negligible
Total	**34,900**

[14] The respiratory physician also stated that, because a relapse could present in a number of different ways, the appellant would "almost certainly" not need every intervention and therefore, the total costs of any treatment would be less than $34,900. As a "very broad brush" the costs would be approximately $20,000 to $30,000.

[15] Counsel submitted that these costs were significantly less than $41,000, the sum above which, according to A4.10.2 of instructions, the appellant would impose significant costs on New Zealand's health services. Therefore, there would be little chance that, as a matter of fact, the appellant would impose significant costs and/or demands on New Zealand's health services and, given his continued good

health, it was likely any treatment required would be minimal. The medical assessor's assessment was mitigated by the respiratory physician's cost estimate. Further, the appellant's standard of health should be distinguished from a medical condition that required ongoing treatment as opposed to a recurrence of lung cancer that was only a possibility and might not ever eventuate.

[16] Counsel considered that there were other factors Immigration New Zealand should take into account: the family were well-settled in New Zealand and the difficulties that the couple would face returning to the United Kingdom, including the fact that the appellant's United Kingdom electrical registration had now elapsed. The couple made a significant contribution through their work in occupations that were facing skill shortages: electrician and cleaner. The couple set out this information in an attached statement.

Medical Waiver Conducted

[17] On 1 June 2021, Immigration New Zealand conducted a medical waiver assessment. The assessor concluded that the positive factors in favour of a waiver were outweighed by the potentially significant burden that the appellant presented to the New Zealand medical system.

Immigration New Zealand's Decision

[18] By letter dated 7 September 2021, Immigration New Zealand declined the appellant's application. Immigration New Zealand advised that it had taken into account the information received. However, the appellant did not have an acceptable standard of health and had not been granted a medical waiver.

STATUTORY GROUNDS

[19] 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.

[20] 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

[21] On 19 October 2021, the appellant lodged this appeal on both grounds in section 187(4) of the Act. Counsel makes submissions (28 October 2021) and includes a letter from the appellant and his wife, which the Tribunal treats as additional submissions.

[22] In addition to documents already before Immigration New Zealand, the appellant produces an email from his respiratory physician (4 October 2021), which explained the survival rate data in more detail. Now that the appellant is three years out from surgery, his conditional five-year survival rate has now risen to just under 80 per cent. Also provided is an updated report of the appellant's health status from his general practitioner (dated 29 October 2021) and references from the couple's respective employers.

[23] The new information (the specialist's report, the general practitioner's report, and the employer references) was not provided to Immigration New Zealand before it made its decision. Therefore, it cannot be considered by the Tribunal in its assessment of the correctness of Immigration New Zealand's decision to decline the appellant's application (section 189(1) of the Act) because the evidence, which did not exist at the time the decision was made, does not fall within the exception contained at section 189(3)(a) of the Act. Given the outcome of this appeal, this evidence can be taken into account by Immigration New Zealand, as permitted by instructions, in its reassessment of the application.

ASSESSMENT

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

[25] The application was made on 26 February 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 have an acceptable standard of health and had not been granted a medical waiver.

Health assessment instructions

[26] Applicants for residence under the Residence from Work category must meet the health requirements of instructions (SM3.5.1.a.i, effective 28 August 2017).

[27] Instruction A4.10 (effective 15 December 2017) sets out the requirements that applicants for residence must meet in order to be of an acceptable standard of health. Pursuant to A4.10.a, applicants for residence must have an acceptable standard of health unless they have been granted a medical waiver or fall within the refugee exception at A4.10.f. An application must be declined if any person included in the application is assessed as not having an acceptable standard of health and a medical waiver is not granted. Instruction A4.10.b.ii further provides that an applicant has an acceptable standard of health if they are unlikely to impose "significant costs" or demands on New Zealand's health system.

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

[29] Additionally, A4.10.2.a of instructions sets out the assessment of whether an applicant will be unlikely to impose significant costs on New Zealand's health services. The requirement will not be met if there is a relatively high probability that the applicant's medical condition or group of conditions will require either health services costing in excess of $41,000 or health services for which the current demand in New Zealand is not being met (A4.10.10.a).

[30] The Tribunal notes that where an immigration officer is not satisfied that an applicant has an acceptable standard of health, the officer must refer the matter for assessment to a medical assessor (A4.10.d). It must then invite the applicant to comment on the medical assessor's opinion and refer any disputing medical

opinion produced by the applicant back to the medical assessor for consideration (A4.40, effective 25 July 2011). Following this, an opinion is sought from a second medical assessor, acting as medical referee, whose opinion is final (A4.45.b, effective 29 November 2010).

Appellant not of an acceptable standard of health

[31] Relevantly, in the appellant's case, the medical conditions deemed to impose significant costs and/or demands on New Zealand's health services, which are listed in A4.10.1, include:

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

[32] During the assessment of the appellant's health, the medical assessor, confirmed by the referee, noted that the appellant had previously had early stage cancer in his lower right lung lobe, which was treated with the removal of that lobe (lobectomy). Further, there was no medical evidence to suggest that the appellant's condition had a less than 10 per cent probability of recurrence. Therefore, the assessor and the referee concluded that the appellant had a medical condition deemed to impose significant costs and/or demands on New Zealand's health services.

[33] The appellant's respiratory physician provided evidence, which the medical referee accepted, that the appellant's estimated five-year survival rate was currently in the vicinity of 70 per cent, because the appellant did not have other co-morbidities. However, no evidence was provided to demonstrate that the recurrence rate of the appellant's lung cancer was less than 10 per cent. Accordingly, the Tribunal finds that Immigration New Zealand correctly determined that the appellant did not have an acceptable standard of health as he had a medical condition deemed to impose significant costs and/or demands on New Zealand's health services (A4.10.1).

Medical waiver instructions

[34] Having found that the appellant did not have an acceptable standard of

health, Immigration New Zealand then proceeded to consider whether he was eligible to be considered for a medical waiver (A4.60, effective 24 April 2019). It found, correctly, that he was eligible to be considered.

[35] In accordance with A4.70 (effective 15 December 2017), when determining whether to grant a medical waiver, an immigration officer must consider the applicant's circumstances to "decide whether they are compelling enough to justify allowing entry to, and/or a stay in New Zealand" (A4.70.b). Factors that officers may take into account in making their decision include, but are not limited to, those set out in A4.70.c:

> i. the objectives of Health instructions (see A4.1) and the objectives of the category or instructions under which the application has been made;
>
> ii. the degree to which the applicant would impose significant costs and/or demands on New Zealand's health or education services;
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> iii. whether the applicant has immediate family lawfully and permanently resident in New Zealand and the circumstances and duration of that residence;
>
> iv. whether the applicant's potential contribution to New Zealand will be significant;
>
> v. the length of intended stay (including whether a person proposes to enter New Zealand permanently or temporarily).

[36] As A4.70.c.i sets out, the objectives of the health instructions in A4.1 (effective 29 November 2010) are relevant to this waiver, including A4.1.b:

> **A4.1 Objective**
>
> The objectives of Health instructions are to:
>
> …
>
> b. ensure that people entering New Zealand do not impose excessive costs and demands on New Zealand's health and special education services; and
>
> …

[37] An immigration officer must record decisions to approve or decline a medical waiver, and the full reasons for such a decision (A4.70.g).

[38] A1.5.a of instructions also addresses the requirements of fairness in decision-making (effective 29 November 2010):

> **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 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.

Assessment of Immigration New Zealand's medical waiver

[39] The medical waiver assessment conducted in this case began with a note that the appellant was not of an acceptable standard of health. Immigration New Zealand then listed nine factors that it took into account; three concerning the appellant's health, the five factors set out in A4.70.c, and "other considerations". This was followed by the heading "Weighing and balancing of factors" with three "positive factors" listed, and five "negative factors".

[40] Briefly, the positive factors were: the appellant's employment as an electrician (a LTSSL occupation) and his wife's occupation as a cleaner; that overall, the appellant was well; and the extent of the family's settlement in New Zealand. Three of the negative factors related to the appellant's health: that he had a condition that deemed him not to be of an acceptable standard of health; that the medical assessors made this finding after considering information from the appellant's respiratory physician; and the evidence about costs of treatment in which Immigration New Zealand noted that, in any event, the appellant was not of an acceptable standard of health. Another negative factor was the appellant's family nexus to the United Kingdom, that the family had been here only since 2015, and that the family could return to the United Kingdom where the appellant could obtain necessary medical treatment.

[41] A discussion followed which was, in effect, a summary of the points that had previously been recorded. Immigration New Zealand then concluded that the appellant's circumstances were not compelling enough to justify a medical waiver.

[42] The Tribunal finds that Immigration New Zealand did not properly take a balanced or fair approach to the consideration of the evidence or the factors listed as relevant to the medical waiver assessment. In finding that the appellant was not entitled to a medical waiver, it placed too much emphasis on the fact that the appellant was not of an acceptable standard of health and it failed to consider the mitigating factors of the appellant's actual health condition. In doing so, it did not

adequately weigh or balance the evidence when considering the factors listed in A4.70.c of instructions.

[43] The Tribunal has previously given guidance as to the general approach to be taken when conducting the balancing exercise in a waiver assessment. In *AK (Talent – Accredited Employers)* [2021] NZIPT 205977, the Tribunal (differently constituted) noted that:

> [50] The medical waiver instructions require that Immigration New Zealand move past the "not of acceptable health" finding and weigh the relevant factors which will include the circumstances of the particular applicant's medical condition and treatment. To simply list the fact of (either) the deemed condition or relatively high probability of costs does not involve an adequate assessment or the weighing or balancing of such relevant factors. It results in a circular argument which will result in an applicant being unlikely to be granted a medical waiver *because* they are not of an acceptable standard of health. What is required is a more nuanced approach which involves consideration of the actual medical condition of the particular applicant, and the prognosis and costs, and then an active weighing of the gravity of those factors with the other relevant factors.

[44] For clarity's sake, a summary of key points from the above paragraph follows:

(a) Immigration New Zealand should move past the "not of acceptable health" finding and weigh the relevant factors, which will include the circumstances of the particular applicant's medical condition and treatment.

(b) Simply listing the fact of the deemed condition is not an adequate assessment or the weighing or balancing of the relevant factors.

(c) A more nuanced approach, involving consideration of the actual medical condition of the applicant, the prognosis and the costs, is required.

(d) Following this, an active weighing of the gravity of those factors should be taken and balanced against other relevant factors.

[45] The Tribunal finds that Immigration New Zealand did not, as required by A4.70.c.ii, properly consider the degree to which the appellant would impose significant costs and/or demands on New Zealand's health or education services. Immigration New Zealand noted the evidence given by the respiratory physician about the costs of treatment and counsel's submissions on the issue. However, it then, as noted by counsel on appeal, "defaulted" to the fact that the appellant had a listed condition as a reason for not granting the medical waiver, rather than

considering what the actual costs were likely to be or analysing their importance in the context of the overall waiver exercise.

[46] When considering costs, there were a number of matters Immigration New Zealand should have considered. Here, while the appellant had a deemed condition that meant he was not of an acceptable standard of health, the costs would be, as best as could be ascertained, somewhere in the region of $20,000 to $30,000. A4.10.1 does not give a figure beyond which costs are deemed to be "significant". Nevertheless, some guidance can be sought from A4.10.2 of instructions, which notes that medical costs in excess of $41,000 would fail to meet the requirement of "unlikely to impose significant costs". Therefore, while the appellant might impose costs on the health system in the event of a recurrence of his cancer, Immigration New Zealand should have considered the degree to which those costs would impose significant costs on health services. Given the $41,000 threshold, the Tribunal considers that the degree to which $20,000 to $30,000 would impose *significant* costs is unclear.

[47] Immigration New Zealand assessed the appellant's potential contribution to New Zealand as moderately significant. He is employed in an occupation on the LTSSL and has a required professional qualification in the field. As such, his employment met the objectives of the Residence from Work category. Further, his wife works as a cleaner and the family has settled in their local community over the past six years. Counsel suggests that the potential contribution was more than "moderately significant". However, the Tribunal's principal concern is not the degree of potential contribution the appellant and his family will make, but the way Immigration New Zealand weighed this positive factor against all of the information related to the appellant's medical condition.

[48] The Tribunal accepts that the requirement of treatment for a serious medical condition can outweigh many individual positive factors and an accumulation of those positive factors. However, in the appellant's case, the likely costs of treatment, should it be necessary, would be under $41,000. Given the mitigating factors relevant to the appellant's particular health condition, Immigration New Zealand failed to explain how the appellant's health was sufficient to outweigh the positive factors recorded in the appellant's favour, particularly in relation to the appellant's contribution to New Zealand.

[49] Immigration New Zealand also noted in its assessment, that the appellant did not have any immediate family members who were lawfully and permanently residing in New Zealand. However, a lack of familial links to New Zealand should

have been weighed against the fact that the family has established a nexus to New Zealand in the last six years through the couple's work and through the links that they have established in the community.

[50] For the above reasons, taken together, the Tribunal finds that the medical waiver assessment was flawed.

Conclusion as to the correctness of the decision to decline

[51] The Tribunal finds that Immigration New Zealand correctly determined on the evidence before it that the appellant was not of an acceptable standard of health as he had a deemed medical condition (A4.10.c and A4.10.1). However, it did not conduct a fair and proper medical waiver assessment, which involved a proper balancing of the relevant factors in favour for and against the granting of a medical waiver. Accordingly, the Tribunal finds that the decision to decline was not correct.

DETERMINATION

[52] This appeal is determined pursuant to section 188(1)(e) of the Immigration Act 2009. The Tribunal considers the decision to decline the appellant's visa application 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 grant of a visa.

[53] 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

[54] 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 is to invite the appellant to update his application including by providing any relevant further information concerning his medical condition, within a reasonable timeframe. It shall then undertake a new medical waiver 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 which has been provided by the appellant.

3. In particular, Immigration New Zealand shall take account of the evidence and the Tribunal's assessment at [39]–[51] above. Immigration New Zealand must properly conduct the waiver exercise with all relevant factors being properly weighed and balanced.

4. Immigration New Zealand shall provide appropriate reasons for its decision as to the appellant's residence application.

[55] The appellant is to understand that the reassessment of his application is no guarantee that he will be granted residence.

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

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 or his family members.

"M Avia"
M Avia
Member

Certified to be the Research Copy released for publication.

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