Case Law Update - IPT Residence Appeals

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RESIDENCE APPEALS – CURRENT LANDSCAPE

Since last year's conference there have been 235 decisions fully uploaded to the Immigration and Protection Tribunal's website (covering the period 1 May 2017 – 31 October 2017).

Of those, the Tribunal:

- Confirmed 120 decisions of Immigration New Zealand;
- Cancelled 12 decisions of Immigration New Zealand - referred back due to new information;
- Cancelled 74 decisions of Immigration New Zealand - referred back because decision was incorrect;
- Referred 29 appeals to the Associate Minister of Immigration to consider grant of a residence visa.

Accordingly, on average, Immigration New Zealand wrongly decided 31% of the decisions appealed during the period 1 May 2017 – 31 October 2017. A similar picture is provided for in the Tribunal's annual report published for the period 1 July 2016 - 30 June 2017. There, the Tribunal provides 609 residence appeals were decided, of which it:

- Confirmed 348 decisions of Immigration New Zealand;
- Allowed 189 appeals;
- Referred 72 appeals to the Associate Minister.

Again, this provides, on average, Immigration New Zealand wrongly decided 31% of the residence decisions that were appealed. Those figures are repeated in earlier reports of the Tribunal.

Therefore, despite year-on-year being advised that a 3rd of its decisions are wrong, Immigration New Zealand do not appear to be learning from its mistakes. While applicants have the right of appeal against a residence decision, it can take 6 months for the Tribunal to determine the appeal and a further 6 months for Immigration New Zealand to reassess the application once referred back. .

These delays clearly puts the applicant at a disadvantage. It raises the further concern that if Immigration New Zealand are routinely wrongly deciding a 3rd of residence applications that the same (if not worse) outcome is being achieved with temporary visas, which are, of course, not generally susceptible to independent oversight without costly judicial review proceedings.

CORRECTNESS OF DECISION-MAKING

The Tribunal's first jurisdiction in relation to residence applications is whether or not the Immigration New Zealand was correct to decline it. As noted above, 31% of Immigration New Zealand's declines of residence applications were referred back under section 188(1)(e) as being incorrect and requiring reassessment.

The Tribunal's approach to drafting its decisions is methodical and fairly robust as a result. As far as we know, there have been no instances of Tribunal decisions under section 188(1)(e) being overturned on appeal by the Crown. The correlating result is that appellants who appeal to the High Court on a point of law are often dismissed on their leave application having failed to overcome the considerable hurdle for leave to appeal.

Typically, the Tribunal's approach in drafting its decisions is to first traverse the history of the application chronologically and then set out the appellant's right of appeal, which arises from section 187(4)(a) of the Immigration Act 2009 (the Act):

> *(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;*

The Tribunal then proceeds to set out its assessment of Immigration New Zealand's decision first by recording the relevant instructions and then discussing INZ's treatment of the evidence in light of those instructions.

FAIRNESS ABOVE ALL

We surveyed all fully published residence decisions on the Tribunal's website since the last conference where the Tribunal determined the appeal under section 188(1)(e), of which there were 74.

The vast majority of the Tribunal's decisions under section 188(1)(e) consist of criticism of how INZ carries out its duty to be fair, with a particular emphasis on *procedural* fairness. It is important to remember that the rules of fairness (or natural justice) are expressly set out at the beginning of the INZ Operational Manual and therefore have formal status as immigration instructions relevant to all of INZ's dealings with its clients. The Tribunal notes this in almost all of its decisions with a paragraph like the following at the beginning of its assessment:

> *All Immigration New Zealand decisions must be made fairly and in compliance with the requirements of natural justice (A1.1.c). To achieve this, Immigration New Zealand is obliged to give every application before it proper consideration (A1.5.a).*

The Tribunal in *AY (Pacific Access)* [2017] NZIPT 204005 noted that the degree of fairness to be brought to bear in deciding an application must depend on the consequences of the decision for the applicant, in accordance with A1.5.b.

During the survey period, the following issues of fairness commonly appeared. Some are general matters of fairness in a particular context (in brackets) while others are specific to certain instructions (SMC, partnership and character).

Issue	Appeal No.	Excerpt
General issues (with context in parentheses)		
Accepting an application for processing that did not meet mandatory lodgement requirements and not responding to a direct request from client (Refugee Family Support Category)	204109	[32] The sponsor registered her father as principal applicant and mistakenly listed not only the appellant and her mother and dependent children, but five other siblings who were over the age of 24 years and therefore not dependent children. … [34] When the sponsor discovered her error, she requested that the correct individual, her father, be given the opportunity to apply instead of her siblings. For an unknown reason, Immigration New Zealand did not respond to this request. It proceeded to decline the application on the basis that the appellant was not entitled to apply for residence as she was not the principal applicant on the registration. [35] In doing so, Immigration New Zealand did not follow a fair process. First, it

Issue	Appeal No.	Excerpt
		incorrectly applied the instructions relating to mandatory lodgement requirements. It should not have accepted the appellant's application for processing.
Unreasonably refusing to grant an extension of time to submit documents (Residence from Work, LTSSL requirements)	204052	[45] In refusing to grant an extension of time, Immigration New Zealand failed to address the nature and complexity of the IPENZ knowledge assessment process. To provide a summary of his academic knowledge and the knowledge and skills he had gained in the workforce, the appellant had to complete a detailed and thorough review of his work history and provide a written account with examples of his work activities and samples of his work to IPENZ together with his completed IPENZ Knowledge Assessment forms (KA01 and KA02). In response, an IPENZ assessor had to be available and then complete an assessment and, once that assessment was completed, there had to be a peer review by another assessor.
Providing misleading or incorrect advice (Pacific Access Category, job offer)	204005	[30](c) Immigration New Zealand advised the appellant on three different occasions that she could produce an alternative job offer, implying that such an alternative would mean that she and her husband would thereby meet the requirements of the PAC category.
Unsubstantiated concerns (SMC, genuine employment)	204027	[41] Immigration New Zealand expressed concern that the appellant's wages were being used to keep his employer's business afloat. The Tribunal finds no evidence on the Immigration New Zealand file to substantiate its concern. In the absence of financial reports indicating that the business was not in a good financial position, there was no basis for Immigration New Zealand to state that the appellant's monies were being held to sustain the business.
Unsubstantiated concerns (medical waiver)	203910	[36] However, the Tribunal can find no basis for Immigration New Zealand's statement that "the potential further deterioration in health will affect the applicant's ability to continue being employed …". There was no evidence before Immigration New Zealand that the appellant had health concerns. Furthermore, the transport business in his wife's name did not require much active involvement from her. This was therefore an irrelevant factor that was not supported by the facts, and should not have been weighed as a negative factor.
Failure to inform of potentially prejudicial information and provide an opportunity to respond (SMC, substantial match)	204000	[34] In reality the bases for Immigration New Zealand's decision were its fresh concerns. Those concerns were never put before the appellant which, given they formed the basis for Immigration New Zealand's decision, it was required to do as per the requirements of A1.5 of instructions. Immigration New Zealand's failure to place its new concerns before the appellant deprived her of an opportunity to respond to them, which was unfair.
Failure to inform of potentially prejudicial information and provide an opportunity to respond (partnership)	204190	[45] Immigration New Zealand's approach was unfair because had it clearly expressed its concerns and outlined the evidence that it sought to address them, the appellant may have been able to produce further evidence of her and her husband's lives together. She could have produced information of their shared bank accounts and photographs taken during the 30 years of their marriage. However, she did not have the opportunity do so.
Inadequate verification (dependent child)	204186	[45] The Tribunal is mindful that … it is the responsibility of an applicant to ensure that the evidence provided demonstrates that they meet the applicable instructions. However, Immigration New Zealand also has a general obligation to take "such steps as are necessary or appropriate to verify any documentation or information relevant to any decision under immigration instructions" (R5.10.b). Given the weight that appears to have been attached to the information from the anonymous source, which was highly prejudicial to the appellant's case, there was a heightened need in this case to engage in a robust verification exercise in respect of the allegations contained within. Some general enquiries with the consultancy or a site visit could well have established whether or not the daughter remained employed by the consultancy.
Failure to take into account all relevant evidence (partnership)	204088	[32] Immigration New Zealand appears to have focussed on certain of the factors which have a bearing on whether the appellant and his partner were living together in a genuine and stable partnership, to the exclusion of others. Immigration New Zealand was required to consider all the facts, keeping an open mind towards all relevant forms of evidence (A1.15.b). It was required to give the appellant's application proper consideration; consider all known relevant information, and give appropriate reasons for declining his application (A1.5.a).
Failure to take into account all relevant evidence (employer compliance)	204027	[40] Another shortcoming with Immigration New Zealand's decision was its failure to consider the fact that the employer had paid the appellant all the monies he had put into the saving scheme. Evidence had been provided that the appellant had received all of his savings from his employer, which amounted to over $16,000.

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		This was relevant information that prima facie showed that the appellant had not been underpaid. In declining the application, Immigration New Zealand did not appear to take this information into account.
Failure to take into account all relevant evidence (medical waiver)	203910	[38] Immigration New Zealand considered its assessment in light of New Zealand's international obligations citing the International Covenant on Economic, Social and Cultural Rights. However, what was absent from the medical waiver assessment was consideration of the child's best interests and the impact on the child on the family's return to Fiji. If international covenants were going to be considered by Immigration New Zealand, it should also have considered the United Nations Convention on the Rights of the Child, at least in essence. There was information before Immigration New Zealand that the appellant's daughter came to New Zealand when she was about 20 months old and her experience of Fiji has been limited to some brief visits there. She has attended school in New Zealand and this year will be in Year 9 at a secondary school.
Taking into account irrelevant considerations (character waiver)	204005	[30](e) In its character waiver assessment, Immigration New Zealand weighed essentially irrelevant 'positive' considerations (the appellant and her husband's lack of criminal history or time spent in prison) against negative factors which comprised several re-statements of how the appellant and her husband had provided job offers which Immigration New Zealand had decided to be "false and misleading information".
Failure to give reasons (character waiver)	204005	[30](g) Immigration New Zealand did not give its reasons for declining a character waiver, failing to attach a copy of its waiver assessment to the decline letter.
Issues relating to the SMC		
Conflating genuine employment and substantial match enquiries	203989	[33] In this case, there was no doubt that the appellant's job existed. At the time of Immigration New Zealand's decision, she had been employed in the same job with DEF Ltd for three years. As her payslips, IRD summary of earnings and bank statements showed, she was paid for that work. There was no suggestion that her employment records misrepresented the true state of affairs in respect of her employment. Therefore, the appellant's employment was genuine. Immigration New Zealand was incorrect to find that it was not. … [41] The Tribunal concludes that Immigration New Zealand was correct to raise concerns about the credibility of the conflicting evidence provided. However, it determined that the credibility of the evidence impacted on whether the appellant's employment was genuine, when other issues arose from the evidence, notably whether the appellant's employment was a substantial match to the ANZSCO occupation of a Secretary.
Conflating genuine employment skill level and substantial match enquiries	204314	[64] It is possible that the duties the appellant was required to perform were not comparable with what could be expected from a farm manager. This was the implication (no records exist of the specific concerns) from the verification with ABC Ltd undertaken by Immigration New Zealand during the processing of the appellant's first application. However, an analysis of whether the appellant's role was a substantial match to the ANZSCO description of a Dairy Cattle Farmer, which has a specific description and core tasks which Immigration New Zealand must be satisfied the appellant performs in order to satisfy instructions, is an entirely separate question as to whether the appellant accurately described his "job title/position held" in the EOI.
Conflating employment skill level and substantial match enquiries	204101	[62] Instructions implicitly recognise that within any occupation there will be a broad range of skill levels. However, only those able to demonstrate that they can competently perform the occupation, by way of relevant work experience or qualification, will be entitled to points for their employment. [63] The Tribunal finds that Immigration New Zealand misdirected itself by essentially conflating the two separate enquiries. In its decision, it imported a skill level requirement into its substantial match enquiry, which it was not entitled to do. Immigration New Zealand assessed not only whether the appellant undertook each of the relevant core tasks, but also whether the work he undertook required a skill level commensurate with someone who held a New Zealand Register diploma or had three years' relevant experience. This was incorrect.
Failure to properly assess ANZSCO occupation with no overall occupation	204000	[53] When assessing the appellant's application, Immigration New Zealand did not address whether he organised and controlled the business operations, nor did it explain why it considered that the business did not offer a "service" to the public or its customers. It did not address why the appellant's employment could not be

Issue	Appeal No.	Excerpt
description (e.g. Hospitality, Retail and Services Manages NEC)		constituted as a service manager. It simply stated that the nature of the business and its "context" did not fall within the hospitality, retail or service sectors, or the "title" of the positions (occupations) in the occupation group. In taking this approach, Immigration New Zealand failed to give proper consideration to the appellant's application.
Failure to consider another ANZSCO occupation	204127	[36] The Tribunal has consistently found that where an appellant's employment position more clearly fits an alternative ANZSCO occupation to that chosen by an applicant, fairness requires that Immigration New Zealand substantively assess the application against the more appropriate occupation. It cannot simply rely on the erroneous selection of an ANZSCO code by the applicant: see WM (Skilled Migrant) [2017] NZIPT 203766, at [42].
	204004	[41] ... if there is enough information before Immigration New Zealand, it should consider whether the employment is a substantial match to any other ANZSCO occupation. Previous Tribunal decisions have reinforced this: see for example, *OK (Skilled Migrant)* [2013] NZIPT 200869 at [33] and SY (Skilled Migrant) [2015] NZIPT 202219 at [25]. By failing to consider whether the appellant's employment was a substantial match to a Hardware Technician, Immigration New Zealand did not properly consider the application as required by A1.5 of instructions.
Issues relating to partnership		
Failure to properly articulate concern	204190	[43] The appellant was not represented during the processing of her application. It is apparent that she did not understand the importance of providing further evidence in support of the marriage... Further, it was unlikely that the appellant understood that her application would be declined if her husband remained as a secondary applicant. Given these circumstances, Immigration New Zealand was obliged to clearly and explicitly inform the appellant of the reasons for its concerns about her partnership. However, consideration of Immigration New Zealand's letter of concerns indicates that it simply stated that it remained unsatisfied that the appellant and her husband's relationship was genuine and stable and that the couple had been living together for 12 months.
Failure to consider interview	204147	[30] In all of the circumstances, Immigration New Zealand should have considered whether an interview had the potential to advance its assessment of the appellant's partnership with her husband. These circumstances include: the fact that the couple had been in a relationship for over 10 years and married for nine years; that they had an eight-year-old daughter together; the statutory declarations from the couple, family members and a friend; and other documentary evidence indicating that the couple met the requirement of living together in a genuine and stable relationship. These circumstances indicate not only the importance of Immigration New Zealand interviewing the appellant and her husband, they also indicate that Immigration New Zealand's assessment – that the appellant's partnership was not genuine and stable – may well have been against the weight of evidence.
Issues relating to character		
Predetermination	204005	[30](b) Immigration New Zealand predetermined the character issue by assuming that the appellant and her husband were complicit in the payment for a job offer by failing to establish when they discovered a payment had been made … and, as noted above, by failing to inquire whether the appellant and her husband expected to work for the horticultural company. Accordingly, no proper determination was made as to whether, on a balance of probabilities, the appellant and her husband had intended to deceive Immigration New Zealand.
Failure to investigate to determine whether false information on balance of probabilities	204073	[32] At no time did Immigration New Zealand investigate the relevant question of whether the appellant believed that the offers to her and her husband were genuine. In fact, the appellant made it clear to the compliance officer that she and her husband intended to work for the company when they came to New Zealand… This was never taken into account, despite Immigration New Zealand's obligation to establish whether, on the balance of probabilities, it was more likely than not that the appellant intended to supply false information…
Failure to advise of considerations INZ is obliged to take into account for character waiver assessment	204005	[30](d) While it allowed time in its letter of 13 January 2017 for the appellant to provide further information, Immigration New Zealand failed to advise her of the considerations it was obliged to take into account (in terms of A5.25.1) to determine whether or not her circumstances were compelling enough to justify a character waiver.
	204073	[35] Immigration New Zealand also failed to give the appellant sufficient warning that a character waiver assessment was to take place in terms of the instructions at

Issue	Appeal No.	Excerpt
		A5.25.1. The invitation to her on 13 January 2017, to "make any comments and submit any additional evidence or information in relation to these issues" … did not constitute proper notice in terms of the instructions. Immigration New Zealand failed to advise the appellant of the considerations set out in A5.25.1, which it is obliged to take into account in determining whether or not an applicant's circumstances are compelling enough to justify a character waiver.
Failure to give appropriate weight	204005	[30](f) Also in its character waiver assessment, Immigration New Zealand failed to give any weight to the appellant's family nexus to New Zealand (in that her parents are residents) or to the couple's new job offers, despite telling the appellant she could obtain alternative offers.
Failure to attach copy of character waiver assessment to decline letter	204005	[30](g) Immigration New Zealand did not give its reasons for declining a character waiver, failing to attach a copy of its waiver assessment to the decline letter

THERE MUST BE PREJUDICE

Note that as the Tribunal's jurisdiction is to determine whether or not INZ's decision was correct, the appellant needs to be prejudiced by any unfairness. In other words, there must be a causal connection between the unfairness and the decision to decline the application.

For example, the correct procedure for INZ when dealing with character issues is to put its concerns to an applicant first and, only after it considers any response and determines that an applicant is not of good character, should it invite the applicant to apply for a character waiver. This avoids any suggestion that character is being predetermined. In *UB (Partnership)* [2017] NZIPT 204281, INZ subsumed its character concerns and invitation to provide submissions in support of a waiver into the one letter. While strictly speaking this was procedurally unfair, the Tribunal found that an appellant would not be prejudiced in any way in circumstances such as in *UB (Partnership)* where there could be no doubt that the appellant was caught by the character instructions.[1]

MAKE NO MISTAKE

"Proper consideration" of an application also means that INZ should not make factual mistakes when determining an application. A subset of the Tribunal decisions in our survey based on fairness include instances where INZ has made a mistake of fact or misapplied instructions (a mistake of law).

- In *AK (Skilled Migrant)* [2017] NZIPT 203792, INZ (read: the immigration officer) misunderstood the nature of the ANZSCO occupation description relevant to the appellant's employment, which resulted in a flawed assessment of whether the appellant's role as a pipeline operator substantially matched the ANZSCO description of Gas or Petroleum Operator.

- In *SU (Partnership)* [2017] NZIPT 203946, INZ declined the appellant's application because it was not satisfied that New Zealand was her husband's primary place of established residence, citing instruction F2.10.5.b.i. It failed to recognize that F2.10.5.b.i only applied to Australian citizens who do not hold a New Zealand residence class visa and the appellant's husband had in fact held one at all relevant times.

- In *FN (Skilled Migrant)* [2017] NZIPT 204055, INZ declined the appellant's application due to her husband's health issues and determined that he fell within the class of people who were not eligible for a medical waiver because an INZ medical assessor had indicated that he would require dialysis treatment within five years. The Tribunal noted that INZ had misinterpreted the medical assessor's opinion, which was that the husband was likely to progress to end-stage renal disease and dialysis within 8 to 15 years, which was not within the five-year timeframe specified in the instructions.

[1] The appellant in *UB (Partnership)* was ultimately successful because the Tribunal found that INZ had failed to properly undertake his character waiver assessment.

- In *CV (Skilled Migrant)* [2017] NZIPT 204027, the Tribunal found that INZ had overlooked a deduction clause in the appellant's employment agreement, which addressed a concern it had with the employer's compliance with employment law. INZ also misinterpreted the law, which made it clear that having such a clause in the employment is but one means by which written consent can be provided by a worker for a deduction. The appellant also had a savings agreement separate from the employment agreement, which was prima facie evidence of the appellant's written consent or of his written request for his employer's deductions of his wages.

- In *ES (Skilled Migrant)* [2017] NZIPT 204144, the Tribunal dealt with the issue of what an employer's "history of compliance" meant as per SM7.20.b (a topic that will be addressed in further detail below in this paper). The appellant's employer had been paying the appellant an hourly rate while her agreement stipulated she would be paid by salary, which was a breach of employment law. In response the agreement was amended to rectify the breach but INZ considered the rectification failed to address the history of non-compliance and declined the application. The Tribunal found that INZ's interpretation of SM7.20 was wrong because such an absolute interpretation would permanently rule out any employer who had not complied with any relevant employment or immigration laws, no matter how trivial, unintentional or historical the non-compliance had been.[2]

- In *FC (Skilled Migrant)* [2017] NZIPT 204210, INZ declined the appellant's application because he had provided false or misleading information in his Expression of Interest relating to the salary he claimed for his employment. The Tribunal noted that much of the evidence provided by the appellant indicated that he was, in fact, being paid a salary in accordance with his employment agreement. However, the evidence also showed that the appellant's employer had continually conflated the appellant's *gross* and *net* income figures in the appellant's payslips and incorrectly completed the Employer Monthly Schedules by repeatedly providing the appellant's *net* salary figures when the form required his *gross* monthly earnings. INZ failed to pick up on this and its decision was therefore incorrect.

IT'S A MATERIAL WORLD

As with issues of fairness, a mistake made by INZ will only result in a successful appeal if the mistake has caused the decision to be incorrect. That is, only a material mistake will invalidate INZ's decision. Therefore, when a mistake is identified in a residence decision, practitioners should consider the materiality of the mistake before advising a client on their grounds for appeal.

NO DICE FOR MISTAKE IN A CONCURRENT WORK VISA APPLICATION

Also note that a mistake made by INZ for a work visa application does not invalidate INZ's decision for a residence application based on the same employment, even if the work visa decline had a clear effect on the residence application. For example, in *GM (Skilled Migrant)* [2017] NZIPT 204046, the appellant was declined a work visa because INZ found that a fraudulent loan disbursal letter had been produced in support of the appellant's earlier student visa application and she was therefore not of good character. Without a work visa, the appellant could not continue in the employment for which she had claimed points for her residence application.

The Tribunal assessed the work visa application and found that INZ appeared to have misunderstood the requirements of the character instructions. The Tribunal noted that there was nothing to suggest that INZ had considered the *mens rea* requirement in *Chiu* along with the explanation and relevant evidence produced by the appellant.[3] INZ instead insistently maintained that the appellant was not of good character despite accepting it was likely she had no knowledge of the fraudulent loan disbursal letter.

Ultimately however, the Tribunal found that while INZ's decision to decline the appellant's work visa application may been wrong, the decision to decline that application was not the subject of the appeal. This is of course consistent with the Tribunal's statutory jurisdiction at s 187(4)(a), which requires that the

[2] Citing *HD (Skilled Migrant)* [2015] NZIPT 202764.
[3] *Chiu v Minister of Immigration* [1994] 2 NZLR 541.

Tribunal determine the correctness of Immigration New Zealand's *residence* decision in terms of the applicable *residence* instructions.[4]

Interestingly, the Tribunal also found that in this case even if the unfairness which arose as a result of INZ's decision were to constitute special circumstances, it was not satisfied that it warrants a recommendation that the Minister of Immigration consider an exception to residence instructions. In other words, a mistake made by INZ in a related application of the appellant will not on its own be enough for a successful special circumstances appeal, even if the mistake was the only reason the residence application was declined, like in *GM (Skilled Migrant)*.[5]

GOOD TO KNOW: UNIQUE CASES

INZ's use of general policy wording (such as "aim and intent" instructions)

FI (Skilled Migrant) [2017] NZIPT 204125

The appellant's employment was with the New Zealand branch of a multinational company that was headquartered in Australia. INZ's decline decision turned on its determination that the appellant's employer was not a "New Zealand employer" (SM7.1.a.i). INZ cited the SM7.1 "aim and intent" instruction, which prefaces all other skilled employment provisions and refers to "New Zealand employers".

The Tribunal referred to the decision of *NX (Skilled Migrant)* [2013] NZIPT 200958, where the Tribunal (differently constituted) discussed the term "New Zealand employer":[6]

> *Foreign entities trading in New Zealand can, unquestionably, be New Zealand employers. One only has to think of the majority of trading banks and fast-food chains in this country. … [T]hese entities have franchise or corporate and tax structures which mean they are trading as New Zealand employers.*

The Tribunal noted that the company which employed the appellant was registered with the New Zealand IRD and pays PAYE and KiwiSaver for all its New Zealand-based employees in accordance with New Zealand regulations. The company also had a significant physical presence in New Zealand. As such, the Tribunal found that the employer appeared to be a New Zealand employer, in accordance with *NX (Skilled Migrant)*.

In making this finding, the Tribunal referred to the interpretation of Government residence policy (now termed instructions) that was provided by the Court of Appeal in *Patel v Chief Executive of the Department of Labour* [1997] NZAR 264 at 271, where the Court stated:

> *A policy document, such as the one in issue, is not to be construed with the strictness which might be regarded as appropriate to the interpretation of a statute or statutory instrument. It is a working document providing guidance to immigration officials and to persons interested in immigrating to New Zealand or sponsoring the immigration of a person to this country. It must be construed sensibly according to the purpose of the policy and the natural meaning of the language in the context in which it is employed, that is, as part of a comprehensive and coherent scheme governing immigration into this country.*

Tribunal's jurisdiction in relation to excluded people (s 15)

EM (Skilled Migrant) [2017] NZIPT 204065

INZ declined the appellant's application because it found he had failed to declare that he had previously been excluded from Australia and was therefore ineligible for a visa or entry permission under section 15 of the Act. His failure to declare it also meant that he had provided false or misleading information in his Expression of Interest.

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[4] *GM (Skilled Migrant)* at [22].

[5] While the outcome for the residence appeal went against the appellant, the Tribunal provides the appellant with some assistance at [44]: "The Tribunal has given careful consideration to the correctness of Immigration New Zealand's decision to decline a work visa primarily because it concerned the appellant's character and is likely to have ongoing consequences for the appellant in her dealings with Immigration New Zealand. Should the appellant apply for a visa of any kind in the future, Immigration New Zealand will need to properly assess whether she satisfies the character instructions."

[6] *NX (Skilled Migrant)* at [34].

The principal issue for the Tribunal was whether it had jurisdiction to hear the appeal. The Tribunal noted that in order to answer this question, it would first have to assess whether INZ's decision to decline the application on the ground that the appellant was an excluded person was correct. If it was not correct, then the Tribunal would have jurisdiction to hear the appeal.

The Tribunal ultimately found that the decision was incorrect and it did therefore have jurisdiction. If it was correct, the Tribunal would have had to dispense with the appeal as being out of its jurisdiction, despite already having exercised half of its jurisdiction to make an assessment as to the decision's correctness.

INZ's obligation to consider eligibility for visa category not nominated by applicant

SR (Partnership) [2017] NZIPT 203923

INZ declined the appellant's application because it was based on his relationship with his New Zealand-citizen wife, who had originally obtained residence in New Zealand as the appellant's partner in his previous residence application. The principal issue for the Tribunal was whether INZ should have assessed whether the appellant was eligible for a second or subsequent resident visa (SSRV).

The Tribunal noted instructions at R5.20, which provides that immigration officers need only assess applications under the category nominated by the principal applicant. However, R5.20(c) requires immigration officer to request further information where information contained in the application form or accompanying documents clearly indicates that the applicant may be eligible under any other category.

Information contained in the appellant's application and accompanying documents clearly indicated that the appellant was potentially eligible for a SSRV (RV4.20.1.a.ii). The appellant's wife was a New Zealand citizen and the couple had been married for 27 years, during which time they had maintained their relationship by travelling frequently. Accordingly, the Tribunal found that INZ should have assessed the appellant's application against the requirements for a SSRV even though that was not what the appellant had applied for.

SOME STATS

Represented appellants: 77%

Countries	***No.***	**%**
India	19	26
China	9	12
Pakistan	7	9
Afghanistan	5	7
Philippines	5	7
Fiji	4	5
Tuvalu	4	5
Kenya	2	3
Nepal	2	3
Samoa	2	3
South Africa	2	3
South Korea	2	3
Sri Lanka	2	3
Vietnam	2	3
Other (<1) (American Samoa, Brazil, Chile, Ireland, Jordan, UK (Isle of Man), Uzbekistan)	7	9

Categories	***No.***	**%**
SMC	48	65
Partnership	9	12
RFSC	6	8
PAC	4	5
Dependent Child	4	5
Residence from Work	2	3
Investor	1	1

CORRECTNESS OF DECISION – IN-DEPTH VIEW ON EMPLOYER COMPLIANCE

As discussed above, the IPT may send a residence application back to Immigration New Zealand to be reconsidered where it finds that the decision maker erred in its application of the law. One of the reasons that INZ can decline a residence application is because it is not satisfied that the employer has good workplace practices and has a history of compliance with the relevant immigration and employment laws. This requirement for employer compliance is set out in section SM 6.35 (previously SM7.20) and R5.110 of the Operational Manual. An employer is automatically considered to be non-compliant if it has been included in the Labour Inspectorate's non-compliant employers list.

APPEAL STATISTICS

In the period of 1 May 2017 – 31 October 2017, the Tribunal heard 20 residence appeals in which INZ has, at least in part, declined the appellant's Skilled Migrant Category residence application due to the employer not having a history of compliance. Of these appeals, 11 were allowed and the application was sent back to INZ for reconsideration. The most common reason for INZ's incorrect decision was a failure to consider relevant information. 8 out of the 11 appeals were allowed on this ground (mainly as INZ had not considered evidence of the employer rectifying the breach). This ties in with what has been discussed above with regard to the IPT being very focussed on procedural fairness.

With regard to employer compliance decisions, the IPT went even further in *QT (Skilled Migrant)* stating:[7]

> *They [the SM7.20 instruction] are instructions which sit apart from most Skilled Migrant category requirements as, barring collusion by an applicant with an employer to create an employment position which is not genuine, there will rarely be anything an applicant can do to influence an employer's past or present compliance with immigration and employment laws and policies. As such, they are instructions which must be applied with the utmost fairness to an applicant when it becomes apparent to Immigration New Zealand that an employer's actions might impact negatively on an application.*

The above extract clearly shows how seriously the Tribunal considers allegations of employer non-compliance and requires INZ to have thoroughly investigated the allegations,[8] and give proper and full reasons for its decision.[9]

Quick precedent debrief

One of the most important Tribunal decisions to do with employer compliance is *HD (Skilled Migrant)*.[10] This IPT decision sets out the test which INZ must apply in determining whether the employer is non-compliant and/or has a history of non-compliance. This is as follows.[11]

> *[T]o determine whether any non-compliance amounted to not having a history of compliance, a number of factors should be examined, including, the reasons behind any non-compliance and the seriousness of it, whether other employment law requirements had been breached, whether or not the non-compliance had been rectified, and the effect of the non-compliance on the appellant or other employees.*

The decision also unequivocally adds that it is unlikely that an absolute interpretation of (the then) SM7.20 provision was intended as if it would "permanently rule out any employer who had not complied with any relevant employment or immigration laws, no matter how trivial, unintentional or historical the non-compliance had been."[12]

In *JL (Skilled Migrant)*, the Tribunal labelled the approach taken by INZ where any small inadvertent breach is concluded to contribute to a history of non-compliance as "absolutist" and against the precedent set in *HD (Skilled Migrant)*.[13]

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[7] *QT (Skilled Migrant)* [2015] NZIPT 202225 at [26].
[8] *EW (Skilled Migrant)* [2017] NZIPT 204171 at [40].
[9] *GV (Skilled Migrant)* [2017] NZIPT 204163 at [23].
[10] *HD (Skilled Migrant)* [2015] NZIPT 202764.
[11] *HD (Skilled Migrant)* at [37].
[12] *HD (Skilled Migrant)* at [37].
[13] *JL (Skilled Migrant)* [2016] NZIPT 202940 at [33].

In *OK (Skilled Migrant)*, the Tribunal cautioned INZ against taking an "overly strict" approach to employer non-compliance, reaffirming that not every trivial or inadvertent error amounts to non-compliance.[14]

Analysis of recent interesting appeals

There are a few decisions over the research period which are of particular interest.

There were three decisions relating to the association of the employer with a previously non-compliant company. In *CA (Skilled Migrant)*, INZ had declined the appellant's residence application due to the affiliation of the employer's company ABC Ltd with companies run by his wife, DEF Ltd and GHI Ltd. All three companies were run under the same branding and email address.[15] The Labour Inspectorate had a concern about DEF's payment of holiday pay to two employees. The Tribunal held that INZ was incorrect to regard the lack of compliance by DEF as attributable to ABC. They were separate companies, and did not share directors or shareholders, nor did they have any financial links.[16] The appeal was allowed.

CA (Skilled Migrant) was applied in *GJ (Skilled Migrant)* where it was held that INZ erred in its decision as there was no evidence to show that an umbrella company was involved in the management of its franchisee company, and that having directors in common with a non-compliant company alone is not sufficient to show that a company does not have good work place practices.[17]

In *FZ (Skilled Migrant), CA (Skilled Migrant)* was once again applied however, in this case the Tribunal held INZ's decision to be correct.[18] The differing facts were that in *FZ (Skilled Migrant),* the two companies had a director in common who was involved in the operations of both companies, and the appellant was employed by both companies consecutively without showing any distinction between the two in the time and wage records held by the employer. Therefore, the Tribunal concluded that the business operations of both the companies, particularly in relation to payment of wages, were linked.[19]

The Tribunal in *FZ (Skilled Migrant)* and *GJ (Skilled Migrant)* considered *CA (Skilled Migrant)* as the precedent in this particular issue of the non-compliance of one company being attributable to another company. From the above cases, it seems the key for INZ to successfully make this connection is to show that the financials and the operations of the companies are directly linked.

Another case that is of particular interest is *ZN (Skilled Migrant)*.[20] One of the concerns INZ had in this case was that the employer had created new time and wage records as a response to INZ's PPI letter. The Tribunal held:[21]

> *Documents are created in response to Immigration New Zealand's concerns can raise doubts about an applicant's credibility, if the attempt to alter previous evidence. However, in this case, any such doubts were unwarranted because the new documents were produced as evidence that the employer recognised the mistake and took steps to comply with the relevant requirements. Therefore, Immigration New Zealand should not have regarded the new records in a negative light. In any event, practically speaking, once Immigration New Zealand raised the concern, there was little else the employer could do in response except to rectify the problem by documenting the information in a compliant format.*

It is important to note however, that the new time and wage records were based on previously provided (incomplete) records and did not provide contrary evidence. And so it is likely that if an employer had indeed manufactured time and wage records that were contrary to evidence previously provided that this would be a serious breach and the Tribunal would not allow the appeal.

[14] *OK (Skilled Migrant)* [2016] NZIPT 201448 at [34].
[15] *CA (Skilled Migrant)* [2017] NZIPT 203958.
[16] *CA (Skilled Migrant)* at [27] – [28].
[17] *GJ (Skilled Migrant)* [2017] NZIPT 204189 at [28].
[18] *FZ (Skilled Migrant)* [2017] NZIPT 204192 at [31].
[19] *FZ (Skilled Migrant)* at [32].
[20] *ZN (Skilled Migrant)* [2017] NZIPT 203925.
[21] *ZN (Skilled Migrant)* at [38].

The final case that is of interest is *ES (Skilled Migrant).*[22] The appeal involved the incorrect payment of wages by the employer. The employment agreement stated that the appellant would be paid a salary, however, she was being paid an hourly wage instead. In applying *HD (Skilled Migrant)*, the Tribunal found that while the incorrect payment was indeed a breach of employment law, the appellant had been aware of the change to an hourly rate, and the hourly rate in fact had a positive effect for the appellant as she would be paid $5,152 more than on salary.[23] The Tribunal considered that while the breach was unfortunate, it did not affect anyone else, it was unintentional and it did benefit the appellant, and so the appeal was allowed.

Takeaways

From analysing the case law above, it can be submitted that the crux of employer non-compliance is not whether the employer has ever committed a breach but whether that breach has been immediately rectified and processes have been put in place to ensure that it does not happen again. The Tribunal has shied away from the strict approach taken by INZ and has instead focussed on the intention behind the breach. As discussed, inadvertent and unintentional breaches do not lead to non-compliance. Long term breaches that go to the very core of employment law (such as paying minimum wage) are much less likely to be excused and will lead to the employer not having good workplace practices and a history of non-compliance.

Handy hints

An employer is likely to be non-compliant if they consistently breach employment law and do not seek to immediately rectify breaches. Examples are:

- Failing to keep proper records;
- Paying below minimum wage;
- Breaching visa conditions;
- Not rectifying breaches;
- Not paying correct holiday pay.

Examples that do not amount to a history of non-compliance, as long as the breach is not for an extended period of time, rectified immediately after it is brought to the attention of the employer, and the employer makes changes to ensure it does not happen again:

- Paying the incorrect salary/wages (not below minimum wage);
- An outdated term in employment agreement;
- Haphazard (but correct) records kept;
- A breach of visa conditions, if not that of a direct employee but that of a subcontractor and if the breach was unknown despite employer exercising due diligence;
- Semantic errors in contracts/pay slips etc.

[22] *ES (Skilled Migrant)* [2017] NZIPT 204144.
[23] *ES (Skilled Migrant)* at [24] – [27].

SPECIAL CIRCUMSTANCES

Where the Tribunal finds that Immigration New Zealand were correct to decline a residence application, it has the statutory power to consider whether there are special circumstances that warrants the Tribunal making a recommendation to the Minister of Immigration to grant residence. The Tribunal will make such a determination even where no submissions are made on the special circumstances. In some cases, it will be acknowledged by counsel that in terms of policy, Immigration New Zealand were correct to decline the decision and solely concentrate on the special circumstances of the appellant.

In all residence appeals the Tribunal typically states:

> *The Tribunal has power pursuant to section 188(1)(f) of the Act to find, where it agrees with the decision of Immigration New Zealand, that there are special circumstances of an appellant that warrant consideration by the Minister of Immigration of an exception to the residence instructions. Whether an appellant has special circumstances will depend on the particular facts of each case. The Tribunal balances all relevant factors in each case to determine whether the appellant's circumstances, when considered cumulatively, are special.*

The Tribunal also invariably states that special circumstances are: "circumstances that are uncommon, not commonplace, out of the ordinary, abnormal". Citing, *Rajan v Minister of Immigration* [2004] NZAR 615 (CA) at [24] per Glazebrook J.

SPECIAL IS AS SPECIAL DOES

Rajan concerned the definition of special circumstances as it appeared in s 146A of the Immigration Act 1987, in relation to the special circumstances that would allow approval of an out of time judicial review application to be filed with the courts.

What *Rajan* and the case cited therein, *Cortez Investments Ltd v Olperhert & Collins* [1984] 2 NZLR 434, both assert is the term "special circumstances" needs to be interpreted in its own particular statutory context. Therefore, the "special circumstances" needed to empower a District Council to revise a bill of costs under s 151 of the Law Practitioners Act 1972 (as in *Cortez*) or to allow an out of time judicial review application to be heard under s 146A the Immigration Act 1987 (*Rajan*), may well be different to what is required under s 188(1)(f) of the Immigration Act 2009. This is because it is context specific.

Parliament made a deliberate choice is seeking only special circumstances – if it wanted exceptional it would have said so. Therefore, we must remain vigilant against a creep towards exceptional circumstances as opposed to special. In the refugee context we talk of an asylum seeker having a "real chance" of persecution – see, *Refugee Appeal No 70074* (17 September 1996). This is a lower test than the balance of probabilities. Similarly, special is a lower threshold than exceptional.

MINISTERIAL DECLINES

Since our last conference, the Tribunal has fully published 235 searchable residence decisions on its website (covering 1 May 2017 – 31 October 2017). Of those, 29 were referred to the Minister of Immigration because the Tribunal determined them to have "special circumstances".

The previous Minister declined to follow the recommendation of the Tribunal in 3 cases. The decline rate of 10% here is non-typical. On average 12% of residence appeals are referred to the Minister by the Tribunal as having "special circumstances", of which, the Minister on average declines 6% of those referred.

The Minister of Immigration does not provide reasons why they decline to follow the recommendation of the Tribunal in such cases. Therefore, we can merely speculate.

Ministerial Decline Analysis

It is submitted that the driving reason behind the Minister's refusal to follow the Tribunal's recommendation in *BL (Skilled Migrant)* [2017] NZIPT 203903, is the fact that it was a borderline case to begin with, and the appellant had appeared in court on charges for domestic violence. This calls into question the appropriateness of the Minister being required to effectively sign-off on a Tribunal decision. It may not always be politically expedient to do so because it may cause political embarrassment if the case were to be made public. Whereas, ostensibly, the Tribunal does not need to concern itself with such matters.

The second decline of the Minister, *NP (Parent)* [2017] NZIPT 203828 is worthy of greater consideration. Here, an elderly mother in New Zealand on series of visitors visas granted by previous Ministers on intervention over a 14 year period, applied for residence under Tier 2 of the Parent Category. It was declined by Immigration New Zealand on health grounds. This was confirmed by the Tribunal.

In its special circumstances assessment, the Tribunal at [68] distinguished its role in assessing special circumstances as opposed to exceptional humanitarian circumstance on deportation, before going on to point out to the Minister the reason for its recommendation:

> *[69] The Tribunal draws to the Minister's attention that a grant of residence would entitle the appellant to access the publicly-funded services and facilities that are available to New Zealand citizens and/or residents. Given her chronic health condition, the burden the appellant presents in terms of costs and demands on already overburdened health services is potentially significant and is a negative factor that weighs against her in this assessment of special circumstances. Furthermore, the appellant will have been warned repeatedly that there was never any guarantee that she would be granted residence.*
>
> *[70] Notwithstanding that, the most singular aspect of the appellant's special circumstances is the unusual number of successful ministerial interventions that have enabled her to remain in New Zealand since her arrival in late 2002. Her last visitor visa was valid until 1 December 2016 and, according to Immigration New Zealand records, she is presently unlawfully in New Zealand. The length of time the appellant has been living in New Zealand on successive temporary visas, approved at ministerial level, albeit with no guarantee of permanent residence, is now more than 14 years.*

It is submitted that the Minister opted to decline to follow the Tribunal's recommendation because they did not want to give the impression that a person can use the Minister's office to gain residence.

It is submitted that *SG (Partnership)* [2017] NZIPT 203939 is an atypical special circumstances case that the Tribunal routinely approves. Here, the three children of the appellant were New Zealand residents; the appellant was in a genuine and stable relationship with a New Zealand citizen; there was a strong family nexus to New Zealand; the appellant provided assistance to an unwell New Zealand husband, and assisted her adult children by looking after the grandchildren so they could work; the appellant was well-settled; the appellant provided valuable community engagement. In addition, the appellant's adult daughter (included in application) required full-time care because of her significant intellectual disability, and potentially presented a significant burden to New Zealand through social security entitlements.

As above, the Minister declined to follow the Tribunal's recommendation to grant residence. The reason for that decision is unclear. It would be easy to suggest that it was due to the economic burden that potentially arose from the adult child's claim to social security entitlements, but similar cases have been approved. See, for example, [2018] NZIPT 204475 (not yet reported) which was approved by the Minister despite intellectual disability and potential burden, of an adult child included in the application, on state; albeit this was a post-refugee residence application (and involved a new Minister).

What can be surmised from these declines of the former Minister is that if the grant of residence could pose a problem to the Minister (or cause governmental embarrassment) it will be declined even though the Tribunal considers the appellant to have special circumstances. This suggests that the statutory framework is in need of revision because political expediency should not factor in such determinations. It also means that we should be alive to considering judicial review proceedings in such cases.

REVIEW/APPEAL OF MINISTERIAL DECLINE

While all three decisions discussed above could have been judicially reviewed, it is unlikely that such a course of action would have been productive because the courts have said that to win such a case you need to show *Wednesbury* unreasonableness. See, *Singh v Chief Executive, Ministry of Business, Innovation and Employment* [2015] NZCA 592; *Feifei Ning v Minister of Immigration* [2016] NZHC 1856.

Further, because the Minister typically takes 3-4 months to make a decision, by that point, the appellant is out of time to appeal the Tribunal's decision. Therefore, where there is a potential point of law appeal to be made from the Tribunal's decision, consideration needs to be given to either lodge an appeal with the High

Court within 28 days of the Tribunal's decision or to take the chance that the High Court would grant leave to hear an out of time appeal.

WHAT ARE SPECIAL CIRCUMSTANCES?

In making its determination of special circumstances, the Tribunal routinely refers to the following aspects of the appellant and their family:

- Personal and family circumstances;
- Health, character and English language;
- New Zealand settlement and nexus; and
- Qualifications and work experience.

The Tribunal typically takes a cumulative approach to special circumstances. Below are listed those typically found to be special by the Tribunal. In most cases they will not be found to be special in isolation. There will need to be a combination of factors.

Special
Strong nexus to New Zealand
New Zealand citizen partner and/or children
Strong negative impacts on others
Unable to access necessary medical treatment in home country
Exceptional humanitarian circumstances
Vulnerability of appellant
Key skills needed by New Zealand
Positive contribution to New Zealand through employment, employability, community input
New Zealand citizen needs to be cared for by appellant
Appellant needs cared for by New Zealand citizen - no support in home country
Provincial employment
Providing employment to New Zealanders
Best interests of New Zealand citizen child for appellant to remain
Long time with same employer with skills; albeit, not ones that meet SMC
Unusual skill set
Special contribution to the New Zealand workforce or economy
Long duration of stay in New Zealand overall
Could aid New Zealand's next Winter Olympic Snow Sports team. See: *AE (Skilled Migrant)* [2017] NZIPT 203891

THE CONVERSE POSITION – NOT SPECIAL

On their own, without some of the above factors, the Tribunal typically considers the following to fail special circumstances test.

Not special
Desire to remain to continue working and to make a life here with family
New Zealand qualifications
Family or partner non-residents or non-citizens
Centre of gravity of family outside of New Zealand
Short duration of time in New Zealand
Temporary visa that would allow person to remain and potentially support later residence application

Typical, non-special circumstance cases involve single people who have come to New Zealand as international students, who have gained qualifications that has enabled them to obtain post-study work visas, and then to apply for residence under the Skilled Migrant Category in an occupation not deemed particularly desirable e.g. Retail Manager. See for example, *FZ (Skilled Migrant)* [2017] NZIPT 204192:

> *[51] The Tribunal acknowledges that the appellant has made good use of his time in New Zealand through study and employment. However, there is nothing uncommon about his circumstances to distinguish him from many other people who come to New Zealand to study and work and wish to*

stay and establish themselves more permanently. Further, although the appellant has a family nexus to New Zealand, he has a strong family nexus to India through his parents and his brother.

[52] When all the circumstances of the appellant are considered, there is nothing to suggest that they are out of the ordinary or uncommon. Therefore, the Tribunal finds that his circumstances are not special such as to warrant a recommendation to the Minister of Immigration for a consideration of an exception to residence instructions.

See also, *GA (Skilled Migrant)* [2017] NZIPT 204204 at [61]: "The Tribunal acknowledges that the appellant has made constructive use of his time in New Zealand [resided in NZ for 5.5 years, obtained level 5 business and worked in petrol station manager] and has, according to his employer, made a valued contribution through his work. However, there is nothing uncommon about his circumstances to distinguish him from many other individuals who come to New Zealand to study and work and wish to stay and establish themselves more permanently."