

**IMMIGRATION AND PROTECTION TRIBUNAL  
NEW ZEALAND**

**[2016] NZIPT 203435**

**AT AUCKLAND**

**Appellant:** **BU (Migrant Investor)**

**Before:** Z N Pearson (Member)

**Representative for the Appellant:** J Shang

**Date of Decision:** 29 September 2016

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**RESIDENCE DECISION**

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[1] The appellant is a 38-year-old citizen of the People's Republic of China ("China"), whose application for residence under the Business (Migrant Investment – Investor 2) category was declined by Immigration New Zealand.

**THE ISSUE**

[2] Immigration New Zealand declined the appellant's application because it was not satisfied that her nominated investment assets, two Chinese antiques, had been earned or acquired legally.

[3] The principal issue for the Tribunal is whether Immigration New Zealand's decision, that the appellant had not demonstrated she owned the antiques relied upon as her nominated investment assets, was correct. For the reasons that follow, the Tribunal finds that Immigration New Zealand's decision was correct. Further, the Tribunal finds that the appellant does not have special circumstances such as to warrant a recommendation that the Minister of Immigration consider an exception to residence instructions.

## **BACKGROUND**

[4] The appellant lodged an Expression of Interest (EOI) under the Business (Migrant Investment – Investor 2) category on 26 September 2014. The appellant declared that she would invest NZD1.5 million in New Zealand and retain an additional NZD1 million as settlement funds. Her nominated investment and settlement assets were comprised of two Chinese antiques (RMB10 million) and real estate in China (RMB5.6 million). She did not distinguish between which were to be her nominated investment assets/funds and which were to be her settlement funds.

[5] The appellant claimed the antiques that she owned had been gifted to her by her grandfather. She had used her income from salary, which for the previous five years had been RMB120,000 per annum, to purchase the real estate.

[6] On 1 October 2014, the appellant was invited to apply for residence.

### **Application for Residence**

[7] The appellant made her application for residence on 4 February 2015. She provided photographs of the two antiques she wished to rely on as part of her nominated investment and settlement assets. She also provided an appraisal report prepared by an asset appraisal company, which provided a market value for the two antiques of RMB9 million (15 January 2015).

### **Immigration New Zealand's Concerns**

[8] On 23 February 2016, Immigration New Zealand advised the appellant that it was not satisfied she had demonstrated that she had legally earned or acquired her nominated investment assets. Specifically, she had not explained or provided reliable and objective evidence to demonstrate how she acquired the two antiques. It acknowledged that historical documents might be difficult for her to obtain, but this reason alone was not sufficient to remove the requirement she demonstrate that she had legally earned or acquired the antiques.

[9] Immigration New Zealand requested further evidence of her acquisition of the antiques, including but not limited to, a valuation of the antiques from a reputable art collector/valuer, insurance records and details for the antiques, ownership documents demonstrating ownership of the antiques, and any other evidence, including how her grandfather had obtained the antiques.

[10] Immigration New Zealand also requested additional information concerning how the appellant had lawfully acquired her real estate assets; and evidence of her business experience. Immigration New Zealand was ultimately satisfied with the appellant's response in relation to her business experience and that the funds used to purchase the real estate in China were lawfully earned; the Tribunal does not address these two issues further in the discussion below.

### **Appellant's Response**

[11] On 14 March 2016, the appellant's representative responded to Immigration New Zealand's concerns. Regarding the antiques, the representative stated that these had been handed down to the appellant by her family. The representative provided a declaration from the appellant (4 March 2016), which had been witnessed by a lawyer, certifying that she had inherited the two antiques, which were from the Han dynasty, in 2004 from her grandfather.

[12] A further statement from the appellant (8 March 2016) explained that her grandfather had inherited the antiques himself from his father, the appellant's great-grandfather. The appellant described this man as a "level nine carpenter" who made furniture for aristocratic families and became wealthy. He passed all his assets, including the two antiques, to his only son, the appellant's grandfather. The appellant stated that before 1949 many of the family's treasures had been damaged or stolen due to the "turbulent nature of Chinese society" at the time. Further, many valuable antiques were destroyed by the Red Guards in 1966, during the Cultural Revolution in China. Fortunately, the appellant's grandfather's house was not in the capital city Beijing and he was therefore able to save his antiques. When her grandfather died in 2004, all his valued items were divided between his children and grandchildren; she had inherited the two antiques she nominated as her investment assets, as well as other items.

[13] The representative stated that insurance for antiques was rare in China. Only highly valuable and "famous" antiques were covered by commercial insurance and most people simply kept their antiques secret to keep them safe. The representative reiterated that the appellant had already submitted a valuation report and explained that in China, such a valuation had to be done by an asset appraisal company, rather than an art collector or valuer, who could not officially value antiques on their own.

## **Immigration New Zealand Decision**

[14] On 23 March 2016, Immigration New Zealand declined the appellant's application because it was not satisfied that her nominated investment assets had been earned or acquired legally. While it accepted that she had legally acquired the funds to purchase her nominated real estate, it was not satisfied that she had demonstrated that she had legally earned or acquired the two antiques nominated as her investment assets. It recorded the information she had provided regarding inheriting the antiques from her grandfather. However, it was unable to accept this information alone and there was no reliable or objective evidence to support the appellant's claims regarding the antiques. She had therefore not met the requirements of instructions that the nominated investment assets had been earned or acquired legally.

## **STATUTORY GROUNDS**

[15] 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.

[16] The residence instructions referred to in section 187(4) are the Government residence instructions contained in Immigration New Zealand's Operational Manual (see [www.immigration.govt.nz](http://www.immigration.govt.nz)).

## **THE APPELLANT'S CASE**

[17] On 28 April 2016, the appellant lodged this appeal on the ground that the decision of Immigration New Zealand was not correct in terms of the applicable residence instructions.

[18] The representative makes submissions (25 April 2016) on appeal.

## ASSESSMENT

[19] The Tribunal has considered the submissions and documents provided on appeal and the files in relation to the appellant's residence application, which have been provided by Immigration New Zealand.

[20] 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. Although not relied upon as a second ground of appeal, the Tribunal also assesses whether the appellant has special circumstances that warrant consideration of an exception by the Minister of Immigration.

### Whether the Decision is Correct

[21] The application was made on 4 February 2015 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because the appellant had not demonstrated that her nominated investment assets had been earned or acquired legally.

#### *Business (Migrant Investment – Investor 2) category instructions*

[22] The appellant made her application for residence under the Business (Migrant Investment – Investor 2) category of instructions. Paragraph BJ5.5.b provides:

#### **BJ5.5 Approval of applications under the Investor 2 Category**

...

b. For an application under the Investor 2 category to be approved:

...

- vi. the principal applicant must nominate investment funds and/or assets equivalent in value to at least NZ\$1.5 million; and
- vii. the principal applicant must nominate NZ\$1 million of settlement funds; and
- viii. the principal applicant must demonstrate ownership of the nominated funds and/or assets and that they have been legally earned or acquired.

...

*Effective 29/11/2010*

[23] Paragraphs BJ5.40 to BJ5.40.5 provide:

**BJ5.40 Investment funds**

...

- c. The principal applicant must:

...

- iii. demonstrate that the nominated funds and/or assets have been earned or acquired legally (see BJ5.40.1 (c) below).

...

**BJ5.40.1 Ownership of nominated funds and/or assets**

...

- c. The principal applicant may only nominate funds and/or assets that they earned or acquired legally, including funds and/or assets which have been gifted to them unconditionally and in accordance with local law. Where nominated funds and/or assets have been gifted to the principal applicant a business immigration specialist must be satisfied that the funds and/or assets being gifted were earned lawfully by the person/s gifting the funds and/or assets.

...

**BJ5.40.5 Definition of 'funds earned or acquired legally'**

- a. Funds and/or assets earned or acquired legally are funds and/or assets earned or acquired in accordance with the laws of the country in which they were earned or acquired.
- b. Business immigration specialists have discretion to decline an application if they are satisfied that, had the funds and/or assets been earned or acquired in the same manner in New Zealand, they would have been earned or acquired contrary to the criminal law of New Zealand.

*Effective 25/07/2011*

[24] Finally, BJ5.40.20 is the evidence provision for this part of the instructions, and provides:

**BJ5.40.20 Evidence of the principal applicant's nominated funds and assets**

...

- b. Principal applicants must provide evidence to the satisfaction of a business immigration specialist that the nominated funds and/or assets were earned or acquired legally.

...

- d. A business immigration specialist may seek further evidence if they:
- i. are not satisfied that the nominated funds and/or assets were earned or acquired legally; or

...

- iv. consider that the nominated funds and/or assets fail in some other way to meet the rules for investment funds.

*Effective 25/07/2011*

[25] The majority of the appellant's nominated investment (and settlement) assets were made up of two Chinese antiques. She claimed these antiques were from the Han dynasty and had been gifted to her by her grandfather, who had inherited them from his father, her great-grandfather. Her great-grandfather had been a wealthy man as a result of his carpentry business and had acquired the assets during his lifetime. The appellant explained to Immigration New Zealand, when requested to provide evidence that the antiques had been lawfully earned or acquired by her, that her grandfather had kept the antiques safe during his lifetime and these had been passed down to her when he died in 2004.

[26] On appeal, the representative argues that while the instructions do give Immigration New Zealand power to request evidence that assets had been legally earned or acquired, this power to request information should be used reasonably. In requesting further evidence regarding the appellant's acquisition of the antiques, Immigration New Zealand had been unreasonable and requested evidence that was simply unobtainable. The representative submits that the appellant had provided an adequate valuation of the antiques and that it was uncommon for people to insure their antiques in China. There were no such things as ownership certificates for antiques and given the age of the antiques, it was not possible to show the origin of these items. The representative submits that if the antiques had not been legally earned or acquired, common sense suggests that the appellant would not be likely to take them for valuation and highly unlikely to intend to sell them, because she would not be able to do so easily.

[27] The fact that there is very little documentation relating to how the appellant acquired the two antiques is a fundamental problem for her. The antiques formed by far the largest part of her nominated investment assets, and Immigration New Zealand was entitled to request further information to satisfy itself that the assets had been legally earned or acquired. The Tribunal is satisfied that Immigration New Zealand did not act unreasonably when it requested further information to demonstrate that her assets had been earned or acquired lawfully.

[28] While the appellant may well have legally earned and acquired these assets in the manner in which she described, the instructions clearly stipulate that Immigration New Zealand must be satisfied, on the basis of evidence provided, that this is the case. The appellant's own declaration was insufficient to confirm

that she had obtained the assets in the manner in which she said she had, in the absence of other evidence, such as, for example, statements from other family members; old photographs of the antiques; or any records of the division of the assets at the time of her grandfather's death. Without further documentation the appellant could not satisfy the requirements of instructions. That does not mean, of course, that the appellant acquired the antiques unlawfully. It simply means that she was unable to satisfy the requirements of instructions.

#### *Correctness of decision*

[29] The Tribunal finds that Immigration New Zealand was correct to decline the appellant's application. The appellant did not demonstrate that the two antiques, which made up the majority of her nominated investment assets, had been earned or acquired legally.

#### **Whether there are Special Circumstances**

[30] 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.

[31] 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.

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

#### *Personal and family circumstances*

[33] The appellant is a 38-year-old citizen of China.

[34] The appellant resides in China. Information in her application indicated that her parents and sister also reside in China.

[35] The appellant has made six short visits to New Zealand as the holder of a visitor visa since July 2011.



*Work and business experience and potential contribution*

[36] The appellant's application states that she has completed three periods of study at an institute in China, where she obtained a diploma and two bachelor degrees. It is not specified what these qualifications were but the institution in which she studied specialised in finance and economics. She has worked as a client manager for two banks in China since 2006 and is currently responsible for corporate business and marketing at the bank.

[37] In addition to her employment, the appellant has established and run two companies. Her first business, a retail business, was established in April 2006 and closed in December 2008. She established her second business in May 2012 and she continues as general manager of that business. It is a wine import/export business; several of her trips to New Zealand have been business trips to grow this business. The information provided to Immigration New Zealand indicated that the annual income for this business was approximately RMB6 million and the business had shown significant growth. The appellant also owns real estate in China valued at approximately RMB4 million and two Chinese antiques, valued at RMB9 million. It remains to be established that the majority of the assets that the appellant would rely on to invest in New Zealand, namely the two Chinese antiques, have been earned or acquired legally.

[38] The appellant has not disclosed any particular employment ambitions in New Zealand nor provided any details of business plans she might have if granted residence.

*Health, character and English language requirements*

[39] The appellant met the health and character requirements of instructions. She also met the English language requirements for the Business (Migrant Investment – Investor 2) category, presenting an International English Language Testing System (IELTS) certificate from June 2014, showing an overall band score of 3.0.

*Discussion of special circumstances*

[40] The appellant wishes to reside and invest in New Zealand, relying on the minimum investment amount set under the Business (Migrant Investment – Investor 2) category (NZD1.5 million). However, she has not established that the bulk of the assets she would rely on to fund an investment had been earned or

acquired legally, which impacts on the weight the Tribunal can place on this factor when assessing whether special circumstances exist.

[41] The appellant has no familial nexus to New Zealand; her familial nexus remains to China, where her immediate family members reside. While she has made six short trips to New Zealand, primarily for business purposes, she has not demonstrated any other connection to New Zealand.

[42] Having considered, on an individual and cumulative basis, the appellant's circumstances, the Tribunal finds that her circumstances are not special, and do not warrant a recommendation that the Minister of Immigration consider an exception to instructions.

## **DETERMINATION**

[43] This appeal is determined pursuant to section 188(1)(a) of the Immigration Act 2009. The Tribunal confirms the decision of Immigration New Zealand to decline the appellant's application for residence as correct in terms of the applicable residence instructions. The Tribunal does not consider that the appellant has special circumstances that warrant consideration by the Minister of Immigration as an exception to those instructions under section 188(1)(f) of the Immigration Act 2009.

[44] The appeal is unsuccessful.

## **Order as to Depersonalised Research Copy**

[45] 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.

Certified to be the Research  
Copy released for publication.

Z N Pearson  
Member

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