New Zealand Immigration and Protection Tribunal Decision: VS (Partnership) [2018] NZIPT 204708 (14 May 2018)

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Wellington: New Zealand ***Immigration*** and Protection Tribunal has issued the following ***decision***: ***IMMIGRATION*** AND PROTECTION TRIBUNAL NEW ZEALAND [2018] NZIPT 204708 AT AUCKLAND Appellant: VS (Partnership) Before: Judge P Spiller Counsel for the Appellant: R Sathiyanathan Date of ***Decision***: 14 May 2018 RESIDENCE ***DECISION*** [1] The appellant is a 35-year-old citizen of the Philippines. His application for residence under the Family (Partnership) category of residence instructions was declined by ***Immigration*** New Zealand. THE ISSUE [2] ***Immigration*** New Zealand declined the appellant's residence application because he did not meet the requirements of good character and was not granted a character waiver. [3] The principal issues for the Tribunal are whether ***Immigration*** New Zealand's ***decision*** was correct; and whether the appellant has special circumstances warranting consideration by the Minister of ***Immigration*** as an exception to residence instructions. [4] For the reasons which follow, the Tribunal finds that ***Immigration*** New Zealand's ***decision*** was correct.

However, it also finds that the appellant has special circumstances. BACKGROUND [5] In October 2007, the appellant applied for a visitor visa to come to New Zealand. In the application, it was claimed that he had a partner who was living in the United States of America, and that he was residing in the Philippines caring for their child. The application was declined. The appellant later denied this information and that he himself had supplied it. [6] Between September 2008 and August 2011, the appellant lived in the United Arab Emirates (UAE), before returning to the Philippines. [7] In November 2011, the appellant and his partner, a New Zealand citizen, were married in Sri Lanka. They had a son born in February 2012, who automatically acquired New Zealand citizenship. [8] In June 2014, the appellant, his wife and their son came to New Zealand. In June 2015, the daughter of the appellant and his wife was born in New Zealand. She is a New Zealand citizen. [9] On 1 April 2016, the appellant lodged an application for a resident visa under the Family (Partnership) category. In the application form, when asked to list the countries where he had lived for 12 months or more in the last 10 years, he did not declare that he had lived in the UAE. ***Immigration*** New Zealand Initial Concerns [10] On 4 August 2016, ***Immigration*** New Zealand advised the appellant in writing that it had concerns about his application. [11] ***Immigration*** New Zealand noted that, in his visa application in 2007, it was claimed that he had a partner who was living in the United States of America, and that he was residing in the Philippines caring for their child, but that he later denied this information and that he himself had supplied it. It therefore appeared that he had provided information that was false or misleading and that he was normally ineligible for a resident visa unless the character requirement was waived. Appellant's Response [12] On 16 August 2016, the appellant's counsel responded to ***Immigration*** New Zealand's concerns. [13] Counsel stated that the appellant had been in a relationship with a United States' citizen but they were never married and did not have a child together. The appellant did not provide the wrong information to his agent, who filled in the appropriate documents. Counsel accepted that it was ultimately the appellant's responsibility to ensure that correct details were provided in an application, that he had prima facie provided false and misleading

information, and that he needed to obtain a character waiver. Counsel provided submissions and documents in support of a character waiver. ***Immigration*** New Zealand's Further Concerns [14] On 30 August 2016, ***Immigration*** New Zealand advised that it had noticed in the information supplied by the appellant that he and his wife had met in Dubai before he left for the Philippines. ***Immigration*** New Zealand asked the appellant to confirm how long he had resided in the UAE. [15] On 7 September 2016, the appellant provided information about his period in the UAE. On 8 September 2016, his counsel stated that he had not provided this in his application form as he had been confused about the question in the form and thought it referred to countries where they were permanent residents. Counsel also noted that he would require a police clearance certificate from the UAE and had advised the appellant to obtain this. [16] On 15 December 2016 and 24 February 2017, ***Immigration*** New Zealand queried whether the appellant had received the police clearance certificate. On 2 March 2017, the appellant stated that he was unable to provide the certificate. [17] On 18 April 2017, ***Immigration*** New Zealand advised the appellant in writing that it had further concerns about his application. It noted that the appellant had acknowledged that he had lived in the UAE between 2008 and 2011, and so ***Immigration*** New Zealand had requested a police clearance certificate from the UAE. The appellant stated that he was unable to provide such a certificate, but no information or evidence was provided in support of this claim. It therefore appeared that he was unable to show that he met the requirements of good character. Appellant's Further Response [18] On 26 April 2017, the appellant's counsel responded to ***Immigration*** New Zealand's concerns. Counsel submitted that, in February 2016, the appellant lodged an application for a police clearance certificate with the UAE embassy. On 29 January 2017, he was advised that the police had refused to issue him with a certificate. He had never been charged with or convicted of an offence in the UAE. The only option was for him to travel to the UAE in person, but he would need to seek leave from his employer, and purchase flight tickets and accommodation. He therefore sought a waiver from the requirement to provide a police clearance certificate. Counsel provided, in support, a statutory declaration from the appellant and evidence of his police clearance certificate application. [19] On 5 October 2017, ***Immigration*** New Zealand received an email from its Dubai office that "the UAE authorities have come back and advised 'has no objection in UAE and he is ***clear*** with no criminality records', ie there is no record for him being wanted in the United Arab Emirates". ***Immigration*** New Zealand's Character Waiver Assessment [20] On 4 December 2017, ***Immigration*** New Zealand conducted a character waiver assessment. It was not satisfied that the benefits of granting the appellant a character waiver outweighed the negative aspects. It therefore decided to decline the character waiver. ***Immigration*** New Zealand's ***Decision*** [21] By letter dated 5 December 2017, ***Immigration*** New Zealand declined the appellant's application. [22] ***Immigration*** New Zealand was not satisfied that the appellant met the requirements of good character, and the character requirements were not waived. A copy of the character waiver assessment was attached. STATUTORY GROUNDS [23] 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. [24] The residence instructions referred to in section 187(4) are the Government residence instructions contained in ***Immigration*** New Zealand's Operational Manual (see *www.**immigration**.govt.nz*). THE APPELLANT'S CASE [25] On 18 December 2017, the appellant lodged this appeal on both grounds in section 187(4). [26] In support of the appellant's appeal, his counsel provides submissions (9 January 2018). She submits that ***Immigration*** New Zealand did not carry out a character waiver assessment properly, in that: no ***clear*** ***decision*** was set down; it failed to provide any proper basis for disbelieving the appellant's explanation for the false information presented in the visitor visa application; it failed to balance the factors applicable, including the strong positive factors in the case; and it improperly penalised him for not providing a police clearance certificate when ***Immigration*** New Zealand obtained the equivalent information. [27] Counsel also submits that the appellant has special circumstances. ASSESSMENT [28] The Tribunal has considered the submissions provided on appeal and the file in relation to the appellant's residence application which has been provided by ***Immigration*** New Zealand. [29] 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. This is followed by an assessment of whether the appellant has special circumstances which warrant consideration of an exception by the Minister of ***Immigration***. Whether the ***Decision*** is Correct [30] The application was made on 1 April 2016 and the relevant criteria are those in residence instructions as at that time. ***Immigration*** New Zealand declined the application because the appellant did not meet

the requirements of good character and was not granted a character waiver. The relevant instructions in this case are: A5.25 Applicants normally ineligible for a residence class visa unless granted a character waiver Applicants who will not normally be granted a residence class visa, unless granted a character waiver (see A5.25.1(b) below), include any person who: ... i. in the course of applying for a New Zealand visa (or a permit under the ***Immigration*** Act 1987), has made any statement or provided any information, evidence or submission that was false, misleading or forged, or withheld material information ... Note: - When considering whether or not an applicant has committed an act that comes under A5.25 (i), (j) or (k) or (l) above, an ***immigration*** officer should establish whether, on the balance of probabilities, it is more likely than not that the applicant committed such an act. ... A5.25.1 Action a. An ***immigration*** officer must not automatically decline residence class visa applications on character grounds. b. An ***immigration*** officer must consider the surrounding circumstances of the application to decide whether or not they are compelling enough to justify waiving the good character requirement. The circumstances include but are not limited to the following factors as appropriate: ... iii. if applicable, the significance of the false, misleading or forged information provided, or information withheld, and whether the applicant is able to supply a reasonable and credible explanation or other evidence indicating that in supplying or withholding such information they did not intend to deceive INZ; iv. how long ago the relevant event occurred; v. whether the applicant has any immediate family lawfully and permanently in New Zealand; vi. whether the applicant has some strong emotional or physical tie to New Zealand; vii. whether the applicant's potential contribution to New Zealand will be significant. ... Effective 30/03/2015 [31] The appellant applied for a resident visa under the Family (Partnership) category, based on his relationship with a New Zealand citizen. An application under this category will be declined if the applicant does not meet the character requirements of instructions (F2.5.d.v, effective 19 August 2013). [32] An applicant who will not normally be granted a residence class visa, unless granted a character waiver, includes any person who has, in the course of applying for a New Zealand visa, made any statement or provided any information or evidence that was false or misleading, or withheld material information (A5.25.i). The appellant has accepted that false and misleading information was provided when he applied for a visitor visa in October 2007; and that he failed to declare in his residence application form that he had lived in the UAE for 12 months or more in the last 10 years. He thus provided false information and withheld material information. He therefore became ineligible for a residence class visa unless granted a character waiver. [33] In conducting the character waiver assessment, ***Immigration*** New Zealand was required to consider the surrounding circumstances of the appellant's application to decide whether or not they were compelling enough to justify waiving the good character requirement of instructions (A5.25.1.b). ***Immigration*** New Zealand took into account most of the circumstances which the instructions required to be taken into account. These included: (a) The significance of the false, misleading or forged information provided, or information withheld, and whether the applicant was able to supply a reasonable and credible explanation or other evidence indicating that in supplying or withholding such information they did not intend to deceive ***Immigration*** New Zealand: (i) In relation to the visitor visa application, ***Immigration*** New Zealand noted that the appellant had claimed by email to have had a partner who was living in the USA and that he was residing in the Philippines to care for their mutual child. He later accepted that he had been in a partnership with an American citizen, but denied that they had had a child together. In explaining the inconsistency, he stated that he did not personally sign or see any ***immigration*** application forms, and that he did not send the email which disclosed his partnership to his previous partner and their "child". He claimed that he had no intention to mislead ***Immigration*** New Zealand as he was not aware up until 2014 that the ***immigration*** advisor had even made an application to ***Immigration*** New Zealand on his behalf. He added that he had openly declared this information on his subsequent visa application. ***Immigration*** New Zealand, in assessing this explanation, said that the appellant had not provided any evidence of paying the said ***immigration*** advisor at that time, and all correspondence regarding the application was sent to the appellant's email address. The applicant's explanations that he was not aware of the false information submitted to ***Immigration*** New Zealand in October 2007 appeared neither credible nor reasonable, given that ***Immigration*** New Zealand records at that time showed that he was working for the alleged ***immigration*** advisor, and there was written email confirmation from his account. As to the significance of the false information, this carried significant weight around incentives to return after visiting New Zealand, and could carry significant weight towards satisfying ***Immigration*** New Zealand that the relationship with his wife was genuine and stable. (ii) In relation to the resident visa application, ***Immigration*** New Zealand noted that the appellant did not declare in section G1 that he had lived in the UAE in the first instance, which would require him to provide a police certificate from there. The appellant admitted his time in the UAE only after the ***immigration*** officer further assessed the details of his partnership.

Immigration New Zealand was concerned as to the appellant's intention to withhold the information in Section G1 in his residence application that he lived in the UAE for over 12 months in the last 10 years. He was subsequently required by the ***immigration*** officer to submit a police certificate from the UAE after the officer established this. The appellant then requested ***Immigration*** New Zealand to waive the police certificate requirement. (b) How long ago the relevant event occurred: ***Immigration*** New Zealand noted that the visa application occurred over nine years before, but that the failure to declare occurred in his present application, and was admitted after further inquiries by ***Immigration*** New Zealand. (c) Whether the applicant has any immediate family lawfully and permanently in New Zealand, and whether the applicant has some strong emotional or physical tie to New Zealand: ***Immigration*** New Zealand noted that the appellant was married to his New Zealand-citizen wife, had two New Zealand-citizen children from the marriage, the relationship was genuine and stable, and the decline of this character waiver might cause significant negative impacts on the well-being of the two children. [34] Overall, ***Immigration*** New Zealand was not satisfied that the benefits of granting the character waiver outweighed the negative aspects. It found that it was against the public interest for ***Immigration*** New Zealand to grant character waivers to applicants who intentionally provided material false and misleading information during the course of applying for a New Zealand visa, as this behaviour potentially undermined the integrity of ***immigration*** instructions. [35] The Tribunal has considered ***Immigration*** New Zealand's character waiver assessment of the appellant. The Tribunal notes that ***Immigration*** New Zealand did not consider the significance of the information withheld as to his time in the UAE, and whether the appellant was able to supply a reasonable and credible explanation or other evidence indicating that in withholding this information he did not intend to deceive ***Immigration*** New Zealand. [36] The Tribunal also notes that ***Immigration*** New Zealand did not consider whether the appellant's potential contribution to New Zealand would be significant (in terms of A5.25.1.b.vii). The submissions made by his counsel on this point were that he was committed to providing for his family, and he worked hard and contributed to the New Zealand workforce, and so his potential contribution to the New Zealand workforce would therefore likely to be significant. In support, there was evidence that, from August 2015, the appellant had worked as a despatch assistant and later team leader for aluminium roller blinds firms. From September 2014 to August 2015, he had worked as a temporary contractor for an employment agency. From this evidence, the Tribunal concludes that the appellant's contribution to New Zealand would be modest rather than significant, and so would not materially have affected the outcome of the character waiver assessment. [37] In response to the submissions made by the appellant's counsel, the Tribunal bases its findings on the copy of the character waiver assessment dated 4 December 2017, in the ***Immigration*** New Zealand file. The Tribunal finds that a reasonably ***clear*** ***decision*** was set down by ***Immigration*** New Zealand; it provided a reasoned basis for disbelieving the appellant's explanation for the false information presented in the visitor visa application; it balanced most of the factors applicable, including strong positive factors in the case; and there is no evidence that it improperly penalised the appellant for not providing a police clearance certificate when ***Immigration*** New Zealand obtained the equivalent information. [38] The Tribunal concludes that ***Immigration*** New Zealand followed the proper procedure and came to a conclusion which it was entitled to reach. It considered most of the circumstances of the appellant's false and withheld information, weighed and balanced relevant factors, and provided an explanation, with supporting reasons, as to why the surrounding circumstances of the appellant's application were not compelling enough to justify waiving the good character requirement of instructions. Conclusion as to correctness [39] ***Immigration*** New Zealand's ***decision*** to decline the appellant's application was correct. It correctly found that the appellant did not meet the character requirements for a residence class visa unless granted a character waiver, and that a character waiver should not be granted. Whether there are Special Circumstances [40] 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. [41] 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. 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. While very limited evidence was provided with this appeal in support of the special circumstances of the appellant, the Tribunal has been provided with further evidence in the deportation non-resident appeal which was lodged on 4 April 2018. Personal and family circumstances [42] The appellant is a 35-year-old citizen of the Philippines. According to information provided by the appellant, his parents live in the Philippines, although it

appears that he has long had no contact with his father. Between 2005 and 2008, he worked as a marketing manager in a studio business owned by his aunt. [43] Between September 2008 and August 2011, the appellant lived in the UAE, and worked as a merchandiser for a clothing business. In May 2011, while there, the appellant met his future wife, who was working for a clothing business. She is a Sri Lankan-born New Zealand citizen now aged 36 years, who (as a child) lost contact with her father in Sri Lanka, and whose mother is a New Zealand citizen and sister and brother-in-law are permanent residents. The wife came to New Zealand in August 1998 and was granted residence status, and later citizenship. [44] From August 2011, the appellant and his partner lived together in the Philippines. In November 2011, the couple moved to Sri Lanka and were married there. They had a son, a New Zealand citizen, born in Sri Lanka in February 2012. In March 2013, the couple and their son moved back to the Philippines because they were unable to find full-time employment. [45] In June 2014, the appellant, his wife and their son came to New Zealand, having been unable to find employment in the Philippines. In June 2015, the daughter of the appellant and his wife was born in New Zealand. She is a New Zealand citizen. [46] In New Zealand, the appellant held a work visa on the basis of his partnership with his wife, and this was subsequently renewed. He worked as a temporary contractor for an employment agency, and then as a despatch assistant and later team leader for aluminium roller blinds firms. His employers have noted that he has shown initiative and a good attitude, he is honest and hard-working, and his industry, punctuality and integrity have been excellent. He has been unemployed since March 2018 on account of his unlawful status, but his previous employer has stated that the appellant would be taken back without hesitation. [47] The appellant, his wife and two children are active members of their church community, and their parish priest notes that the appellant and his wife are very trustworthy, hard-working people, and loving parents to their children. Decline of the appellant's resident visa application [48] In assessing the appellant's application for a resident visa under the Family (Partnership) category, ***Immigration*** New Zealand was satisfied that he and his wife were living in a genuine and stable relationship. ***Immigration*** New Zealand noted that the appellant and his wife had shown that they had been living together for the required duration (set by instructions), there had been no periods of separation, they had provided evidence of a committed and stable relationship which was likely to endure, and they were married and had a New Zealand-born child of the relationship, and they were of similar ages and culture. The Tribunal is satisfied, on the basis of the evidence provided, that the appellant and his wife are living in a genuine and stable relationship. [49] However, the appellant's application was declined because ***Immigration*** New Zealand found that he did not meet the requirements of good character, and that he should not be granted a character waiver. The appellant's work visa application was later declined on the same basis and he became unlawfully in New Zealand after this. [50] As noted above, the Tribunal has found that ***Immigration*** New Zealand's ***decision*** to decline the appellant's resident visa was correct in the sense that ***Immigration*** New Zealand followed the correct procedure overall and reached a ***decision*** that it was entitled to reach. However, the Tribunal notes that the information in support of his visitor visa application was supplied 11 years ago, and the long-term significance of this information is very limited. The Tribunal also notes that the appellant's failure to declare his time in the UAE is also of very limited significance, particularly as ***Immigration*** New Zealand has received confirmation that there is no recorded criminal offending on the appellant's part in the UAE. [51] Nevertheless, although the appellant and his wife are in a genuine and stable relationship, any future application for residence on the basis of his partnership will require character waiver considerations. Health and character [52] ***Immigration*** New Zealand was satisfied that the appellant met the health requirements of instructions. His New Zealand police certificate (10 May 2018), his Filipino and Sri Lankan police certificates, and the certification of his police record in the UAE, were ***clear***. However, ***Immigration*** New Zealand was not satisfied that he met the requirements of good character, and the character requirements were not waived (for the reasons noted above). The best interests of the appellant's children [53] The appellant's son is aged six years and his daughter is aged nearly three years. The Tribunal acknowledges, in relation to them, that the 1989 Convention on the Rights of the Child provides at Article 3.1 that, in all actions concerning children, the best interests of the child shall be a primary consideration – see also Puli'uvea v Removal Review Authority (1996) 14 FRNZ 322 (CA). [54] The appellant's children are both New Zealand citizens, their mother being a New Zealand citizen. The son was born in Sri Lanka and lived the first 13 months of his life there, the next 15 months in the Philippines, and the ensuing nearly four years in New Zealand. He has attended pre-school and begun school in New Zealand. He has been thriving in his school, as is evidenced by the awards, reports and certificates that he has achieved. The daughter has lived all of her life in New Zealand, and is due to begin pre-school in June 2018. The children's maternal grandmother, uncle and aunt live permanently in New Zealand. [55] If the appellant is

required to leave New Zealand, his children will face one of two situations, neither of which is conducive to their best interests. One option is for the appellant to return to the Philippines without his wife and children. The best interests of the appellant's children, at their young age, is to have the ongoing love and support of both their parents, which they have at present. This will obviously no longer be the case if the appellant is physically absent from them. [56] The other option is for the children to accompany the appellant and his wife to Sri Lanka or to the Philippines. The reality is that, as New Zealand-citizen children, they will experience a significant decline in their living and educational opportunities, at least in the immediate future. The appellant and his wife have attempted to live as a couple in both countries without employment opportunities, undermined by the lack of citizenship rights of the appellant and his wife in one or other of the two countries. The house where the appellant and his wife and son lived in Sri Lanka has now been demolished, and the house occupied by the appellant's mother and grandmother in the Philippines has no room for anyone else. [57] The Tribunal is satisfied that the best interests of the appellant's two New Zealand-citizen children are that the appellant should be granted residence status so that he can continue to live with his New Zealand-citizen wife and children here on a permanent basis. The children have the right to reside here permanently, and to access all of the benefits, including funded healthcare, education and welfare support, that comes from being New Zealand citizens. Discussion of special circumstances [58] The Tribunal acknowledges that the appellant's resident visa application was correctly declined on character grounds, although on issues which appear to have limited long-term significance. [59] However, the Tribunal notes that the appellant has lived in New Zealand for nearly four years. During his time in New Zealand, he has lived with his New Zealand-citizen wife and two New Zealand-citizen children, and they have settled well into their local church and wider community. He was employed (until two months ago) and worked to the satisfaction of his employers, and has the promise of future employment. While his mother and extended family live in the Philippines, his wife's family live in Sri Lanka and in New Zealand. His application for a resident visa was based on his partnership with his wife of six-and-a-half years, and ***Immigration*** New Zealand found that they have a genuine and stable relationship which is likely to endure. The Tribunal is satisfied that it is in the wife's interests, and the best interests of the appellant's two young New Zealand-citizen children, that he be granted a resident visa. [60] Having considered the totality of the appellant's circumstances, particularly the interests of his New Zealand-citizen wife and the best interests of his New Zealand-citizen children, the Tribunal considers it appropriate for the Minister of ***Immigration*** to consider whether the appellant's circumstances warrant consideration of an exception to residence instructions. DETERMINATION [61] This appeal is determined pursuant to section 188(1)(f) of the ***Immigration*** Act 2009. The Tribunal confirms the ***decision*** of ***Immigration*** New Zealand as correct in terms of the applicable residence instructions but considers there are special circumstances of this appellant that warrant consideration by the Minister of ***Immigration*** as an exception to those instructions. [62] Pursuant to section 190(5) of the ***Immigration*** Act 2009, the Minister of ***Immigration*** is requested to make one of the two ***decisions*** set out below. Pursuant to section 190(6) of the ***Immigration*** Act 2009, the Minister of ***Immigration*** is not obliged to give reasons in relation to any ***decision*** made as a result of a consideration of the Tribunal's recommendation. Order as to Depersonalised Research Copy [63] 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, his wife and their children. "Judge P Spiller" Judge P Spiller Chair Certified to be the Research Copy released for publication. Judge P Spiller Chair

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