

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 102/02

UNDER Section 115 of the Immigration Act
1987

IN THE MATTER of an appeal against a decision of the
Residence Appeal Authority

BETWEEN MOHAMMED ABUL HOSSAIN
Appellant

AND THE CHIEF EXECUTIVE OF THE
DEPARTMENT OF LABOUR
Respondent

Hearing: 20 June 2002

Appearances: D J Ryken for appellant
I Carter for respondent

Judgment: 21 June 2002

JUDGMENT OF DOOGUE J

Introduction

[1] This is an appeal against a decision of the Residence Appeal Authority (“the Authority”) made at Wellington on 18 March 2002 confirming a decision of the New Zealand Immigration Service (“NZIS”) to decline the appellant’s application for a residence visa. The Authority held that the decision of the NZIS was correct in terms of the Government residence policy that was applicable at the time the application for the residence visa was made (“the Government residence policy”).

[2] The appeal, under s 115 of the Immigration Act 1987 (“the Act”), is upon the ground that the Authority erred in law in interpreting the provision of the

Government residence policy contained in paragraph F2.1.10. That provision defines a New Zealand resident as meaning, among others, a person who holds a valid Australian passport. Under F2.1 a spouse of a New Zealand resident can qualify for residence within New Zealand and the New Zealand resident can sponsor the spouse's application for residence in New Zealand.

[3] At issue is the question of whether the holder of a valid Australian passport who is not and has not been resident in New Zealand has the necessary status to enable his or her spouse to apply for residence within New Zealand.

Background

[4] The appellant was born in Bangladesh on 22 April 1968. He holds a Bangladesh passport. In 1995 he travelled to Australia, where he met his wife, who is an Australian citizen. They married on 8 July 2000.

[5] On 3 November 2000 the appellant applied for a residence visa in New Zealand under the family category of the Government residence policy. He relied on his wife holding a valid Australian passport and her sponsoring his application. Under the Act, if he obtained a residence visa, that would enable him to apply for a residence permit when in New Zealand.

[6] The wife had visited New Zealand for six days at some time after the marriage. That appeared to be their only connection with New Zealand. Both the appellant and his wife made clear in the material supporting the appellant's application that they wished to permanently reside in New Zealand.

[7] It is common ground the application of the appellant was made on 3 November 2000. Further information was sent to the NZIS on behalf of the appellant in December 2000 and in February and May 2001.

[8] On 22 May 2001 the NZIS wrote to the appellant:

.... we have concerns that your spouse is eligible for sponsoring your application for residence.

According to the Policy your sponsor has a right of travelling to New Zealand visa free and remaining in New Zealand indefinitely as a permanent resident, however once she leaves New Zealand she is not automatically considered to be a New Zealand permanent resident as she was while in New Zealand.

Please read the following advice from our Legal Department regarding the above circumstances.

Relevant policy

- F2.1 How does a spouse qualify for residence?
 1. A spouse of a New Zealand citizen or resident meets spouse policy if he or she is married to a New Zealand spouse and the couple is living together in a genuine and stable marriage.
 2. In each case, the New Zealand spouse must support the application and, if requested by the NZIS, provide agreement that he or she will give financial support for the first 24 months of residence.
 3. ...
 4. ...

- F2.1.10 Definition of “New Zealand resident”

New Zealand resident means a person who holds:

1. a current New Zealand residence permit or current New Zealand returning resident’s visa, or
2. a valid Australian passport.

Advice

1. One interpretation of the Government residence policy definition of “New Zealand resident” is that it includes an Australian passport holder regardless of whether they live in New Zealand, Australia or anywhere else in the world.
2. On the other hand, however, and more in keeping with the object of the policy is that the definition of “New Zealand resident” relates to the rights an Australian citizen has to be in New Zealand as provided for in the Immigration Act 1987 and the Immigration Regulations 1999.

Section 12 of the Immigration Act enables regulations to be made to exempt classes of people from the requirement to hold a permit. That exemption lasts only for any period of time that a person with an exemption is actually in New Zealand, ie it expires once they leave New Zealand. Regulation 25 provides, as noted in Schedule 1, that

Australian citizens are exempt from the requirement to hold a permit. As noted above, that exemption expires when the Australian citizen leaves New Zealand.

The exemption under Regulation 25 does not endow Australian citizens with the rights set out in the Immigration Act (see for example section 4, 5 and 6) and generally associated with residence at all times, it only endows them with those rights from the time of their arrival in New Zealand until the time of their departure from New Zealand.

As residence policy operates in the context of New Zealand's immigration law, the definition of "New Zealand resident" as including a person who holds a valid Australian passport, only makes sense on the basis that the Australian passport holder is in New Zealand and via the exemption mechanism actually possesses the rights associated with residence.

For these reasons, an Australian passport holder who is not in New Zealand and does not normally reside in New Zealand does not qualify as a "New Zealand resident" for the purposes of sponsoring an overseas spouse for New Zealand residence. You will note that the requirement for "normally resides" aligns with that of persons to hold an RRV for them in turn to be able to sponsor their spouse. In the occasional case, a genuine Australian citizen normally resident in New Zealand may sponsor, from another country, a residence application for their spouse. A pragmatic approach should be taken in these cases.

We are bringing this information to your attention out of fairness to you, and to give you the opportunity to make any comments or provide an explanation in relation to this information which may affect the outcome of your application.

[9] The appellant responded on 25 May 2001 but did not endeavour to answer the advice of the NZIS legal department. He did, however, make it plain that he was relying upon the fact that his wife was entitled to be treated as a New Zealand resident, which could only be because she held a valid Australian passport.

[10] On 22 June 2001 the NZIS prepared a letter to the appellant which was not, however, sent until 28 August 2001. The letter recorded in part:

We are writing with regard to your application for residence which was accepted for consideration on 03 November, 2000.

We regret to advise that your application for residence in New Zealand under the Family (relationship) category is not able to be approved.

....

We have assessed your application and we must inform you that we consider your application is one where we are not able to approve residence to you on the basis of your relationship to a New Zealand resident or citizen.

....

... we still have concerns that your spouse is eligible to sponsor you for residence in New Zealand not being a resident of New Zealand herself, please refer to the explanation given on the basis of the legal Advice in our letter of 22 May, 2001.

As you do not meet the minimum policy requirements under the Family category, we are unable to approve your application.

[11] It is from this decision that the appellant appealed to the Authority.

Relevant Statutory and Regulatory Provisions

The Act

4. Requirement to hold permit, or exemption, to be in New Zealand

(1) A person who is not a New Zealand citizen may be in New Zealand only if that person is—

- (a) The holder of a permit granted under this Act; or
- (b) Exempt under this Act from the requirement to hold a permit.

(2) Any person who is in New Zealand in contravention of subsection (1) of this section is deemed for the purposes of this Act to be in New Zealand unlawfully.

....

8. Grant of residence permit a matter of discretion

(1) Except as provided in sections 18 and 18E and 52 of this Act,—

- (a) No person is entitled to a residence permit as of right; and
- (b) Any question whether or not—
 - (i) To grant a residence permit to any person; or
 - (ii) To impose any requirement on the holder of a residence permit in accordance with section 18A of this Act,—

is a matter for the discretion of the Minister or, subject to any special direction given under this Act and to section 13C of this Act, of the appropriate immigration officer.

....

10. Grant of visa a matter of discretion

(1) Except as provided in section 14C(2) of this Act,—

(a) No person is entitled to a visa as of right; and

(b) The question whether or not to issue a visa to any person is a matter for—

(i) The discretion of the Minister; or

(ii) Subject to any special direction given under this Act, and also to sections 13C and 18E(1) of this Act in the case of a residence visa [and section 14DA(2) in the case of a limited purpose visa], the discretion of the appropriate visa officer.

....

12. Persons may be exempted from requirement to hold permit by regulations or special direction

(1) Subject to section 7 of this Act, any regulations made under section 150 of this Act may exempt any class of person from the requirement to hold a permit.

....

13A. Government immigration policy generally

(1) The Minister shall from time to time publish the policy of the Government relating to the rules and criteria under which eligibility for the issue or grant of visas and permits is to be determined.

(2) Publication for the purposes of this section shall include, but is not restricted to, the insertion of that policy in the departmental manual of immigration instructions and the making available of that manual to the public, and the Minister shall ensure that copies of the manual are available or readily obtainable for inspection, free of charge, at—

(a) Offices of the Department of Labour; and

(b) New Zealand government offices overseas—

that deal with immigration matters.

....

13B. Government residence policy

(1) For the purposes of this Act, the term Government residence policy means policy of the Government in relation to residence visas and residence permits that—

- (a) Is of a kind referred to in subsection (3) of this section; and
- (b) Has been reduced to writing and certified by the Minister as Government residence policy in that written form,—

and any such policy shall take effect from such date as may be specified in that behalf in the certified policy (which date may not be earlier than the date on which the Minister certifies the policy).

....

(3) The kinds of policy that may constitute Government residence policy for the purposes of this Act are as follows:

- (a) Any rules or criteria for determining the eligibility of a person for the issue of a residence visa or the grant of a residence permit, being rules or criteria relating to the circumstances of that person:
- (b) Any general or specific objectives of Government residence policy:
- (c) Any statement of, or rules or criteria for determining, the number or categories or ranking of persons or classes of persons whose applications for residence visas or residence permits may be granted at any particular time or over any particular period:
- (d) Any matters relevant to balancing individual eligibility against the overall objectives or requirements of Government residence policy:
- (e) Any requirements relating to documentation or other evidence or information required to assess a person's eligibility:
- (f) Any statement of the requirements or types of requirements that may be imposed under section 18A(2) of this Act upon a person to whom a residence permit is granted, and the circumstances in which or classes of persons upon whom such requirements may be imposed.

....

13C. Immigration officers to comply with Government residence policy

(1) Where a visa officer or an immigration officer or, subject to subsection (2) of this section, the Minister makes any decision in relation to an application for a residence visa or a residence permit under this Act, that decision shall be made in terms of the Government residence policy that was applicable at the time the application was made and any discretion exercised shall be in terms of that policy.

....

14. Types of visas

The following types of visa may be issued under this Act:

- (a) Residence visas:
- (b) Returning residents' visas:

....

14B Residence visas

- (1) Every person who—
 - (a) Is outside New Zealand; and
 - (b) Wishes to come to New Zealand and be granted a residence permit; and
 - (c) Will not be exempt under this Act from the requirement to hold a permit,—

shall, before proceeding to New Zealand, apply in the prescribed manner for, and obtain, a residence visa, unless the person is exempt from this requirement by virtue of any regulations or any special direction made under this Act.

....

14C Returning residents' visas

- (1) The holder of a residence permit who intends to leave New Zealand temporarily may, before leaving, apply in the prescribed manner for a returning resident's visa.
- (2) A visa officer shall, on being satisfied that an applicant under subsection (1) of this section is the holder of a residence permit, issue to that person a returning resident's visa.

....

(4) A person who holds a returning resident's visa and who returns to New Zealand during the currency of that visa is entitled, upon application under section 18 of this Act, to the grant of a further residence permit.

....

16. Effect of residence permit

(1) A residence permit entitles the holder of the permit to be in New Zealand indefinitely.

....

17. Persons who may apply for residence permits

(1) The following persons may apply for a residence permit:

(a) Any person who is the holder of a residence visa and who arrives in New Zealand during the currency of that visa:

....

41. Permit or exemption deemed to have expired on departure from New Zealand

(1) When the holder of a permit leaves New Zealand, the permit shall be deemed to have expired.

(2) When a person who is exempt under this Act from the requirement to hold a permit leaves New Zealand, the exemption shall be deemed to have expired.

....

The Regulations

Immigration Regulations 1999 ("the Regulations")

[12] Under Regulation 25 citizens of the Commonwealth of Australia are exempt from the requirement to hold a residence or other permit under the Act.

Relevant Government Residence Policy Provisions

R1 Objective

- a. The objective of New Zealand's immigration policy is to contribute to economic growth through enhancing the overall level of human capability in New Zealand, encouraging enterprise and innovation, and fostering

international links, while maintaining a high level of social cohesion.

- b. This objective is achieved through selecting a broad mix of migrants on the basis of either their skills and experience or their family links to New Zealand.

....

F1 Objective

The objective of Family Category Policy is to allow individuals to maintain and be part of a family unit, while reinforcing the Government's overall objectives in immigration policy.

....

F2.1 How does a spouse qualify for residence?

- a. A spouse of a New Zealand citizen or resident* meets spouse policy if he or she is married to a New Zealand spouse and the couple is living together in a genuine and stable* marriage.
- b. In each case, the New Zealand spouse must support the application and, if requested by the NZIS, provide agreement that he or she will give financial support for the first 24 months of residence.

....

F2.1.10 Definition of "New Zealand resident"

New Zealand resident* means a person who holds:

- a. a current* New Zealand residence permit or current* New Zealand returning resident's visa, or
- b. a valid Australian passport.

....

F2.5.1 Evidence that spouse is New Zealand citizen or resident

- a.
- b. Evidence that a spouse is a New Zealand resident* may include but is not limited to original or certified copies of:
 - a current* residence permit, or

- a current* New Zealand returning resident's visa, or
- a valid Australian passport.

....

F3 De facto partner policy

[The provisions of this Part are in similar terms to those applying to a spouse.]

F4.1 How do parents qualify for residence?

- a. A parent meets parent policy if an adult child of the principal applicant* parent who is lawfully and permanently* in New Zealand sponsors the parent, ...

....

F4.1.1 Definition of "lawfully and permanently"

People who are lawfully and permanently in a country are either:

- a.
 - i citizens of that country, or have the right of, or permission to take up, permanent residence in that country, and
 - ii actually residing in that country;

....

F5 Dependent child policy

F6 Sibling and adult child policy

[The provisions of these Parts are in similar terms to those applying to parents in F4.1.]

The Authority's Decision

[13] The Authority traversed the background to the appeal in detail. The Authority then traversed the submissions for the appellant and assessed his case. The Authority went on to refer to relevant parts of the Government residence policy.

[14] The Authority went on in its assessment to deal with the proper interpretation of the provision in paragraph F2.1.10, which is at the heart of the case

[15] The Authority took the view that as the Government residence policy was subordinate to the legislation it had to be interpreted in a manner consistent with the Act and that should the policy be inconsistent with the Act then it would be ultra vires. The Authority noted that it was not open to it to move outside the ambit of the Government residence policy. The Authority went on to carefully analyse the provisions of the Act and, to the extent relevant, the Regulations. In the latter context the Authority noted that in effect the Regulations entitle the holder of an Australian passport to travel to New Zealand without first obtaining a visa of any description and to remain in New Zealand without having to satisfy the requirement of holding a residence permit.

[16] The Authority went on to deal with the relevant provisions of the Government's residence policy and to reach its findings in respect of those provisions and the argument for the appellant in respect of them. Pertinent findings by the Authority include:

1. Although an Australian citizen is exempt from the requirement to hold a permit within New Zealand, the right to reside requires the person to arrive in New Zealand. This is because the exemption in respect of an Australian citizen to hold a requisite permit only comes into effect once the person entitled to the exemption has arrived in New Zealand. That, the Authority said, is clear because under s 41(2) of the Act the exemption is deemed to have expired when the person leaves New Zealand.

2. The Authority rejected an argument based upon the proposition that if an Australian citizen proceeded to New Zealand without his or her spouse it would be impossible for the spouse to obtain entry as they would not be living together. The Authority was of the view that if a period of separation was caused solely by the requirements of the Government residence policy that could hardly be so.

3. The Authority rejected the appellant's arguments based solely upon the language of the Government residence policy having regard to the provisions of the Act and the Regulations. It took the view that there was nothing in s 13B of the Act which empowered the Government to formulate a policy in conflict in any respect with the Act. The essence of the Authority's decision was that the overall structure of the Act and Regulations clearly anticipated that for someone to become a New Zealand resident by virtue of being the holder of a valid Australian passport the person must have arrived in New Zealand to activate the residence permit exemption available to that person. In such circumstances the Authority could not see how the holder of an Australian passport could be deemed to be resident in New Zealand when outside New Zealand. The Authority concluded that it was satisfied that, in the context of the Act and the Regulations and the Government residence policy, paragraph F2.1.10 of the Government residence policy had to be interpreted as requiring that the holder of the valid Australian passport must be or have been resident in New Zealand in order to qualify for the definition of "New Zealand resident". As a result, the Authority found that the NZIS decision to decline the appellant's application for a resident's visa was correct.

Appellant's Case

[17] The appellant's case focuses, as it must, on the definition of "New Zealand resident" in F2.1.10.b of the Government residence policy.

[18] Both parties accepted the proper approach to the interpretation of the Government residence policy is as stated by the Court of Appeal in *Patel v Chief Executive of the Department of Labour* [1997] NZAR 264, 271:

Notwithstanding these difficulties, however, we believe that the rule is capable of a reasonable construction. 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. See *Alexander v Immigration Appeal Tribunal* [1982] 2 All ER 766, per Lord Roskill at 770; see also *R v Immigration Tribunal, ex parte Shaikh* [1981] 3 All ER 29, per Bingham J at 35.

Approached in this manner we consider that a sensible construction of the rule does not require a literal application of the words “conclusively proves”. The Government’s objective is relatively clear. [271]

....

It remains unsatisfactory to make a rule or impose a requirement which cannot be applied literally without difficulty, or at all. It is now mandatory for the Government to publish its policy relating to the rules and criteria under which eligibility for the grant of visa and residence permits is to be determined, and subs (2) of s 13A makes it clear that the policy is to be readily available to the public. It is therefore unsatisfactory for any uncertainty to attach to the meaning of the published policy. [274]

[19] What was said by Bingham J in *R v Immigration Tribunal, ex parte Shaikh* [1981] 3 All ER 29, 35, is pertinent to the case here:

.... But it does seem to me, as a matter of looking at these rules and seeking to give effect to what they say, that it is reading into para 12 language which is not there to read it as if it imposes on an applicant for extension a duty to satisfy the Home Office of something which does not, in terms, appear in the paragraph at all.

[20] It is noted for the appellant that, by virtue of s 13A(2) of the Act, one of the functions of the Government residence policy document includes the guidance of

persons interested in immigration to New Zealand and that only that document and not the Act or Regulations must be available to potential immigrants.

[21] It is said for the appellant, with particular reference to what was said by Bingham J in *R v Immigration Tribunal, ex parte Shaikh* that here the NZIS attempted to import words into F2.1.10 which are not there. It is submitted that the approach which should have been adopted by the NZIS and the Authority was to give effect to the plain meaning of the wording of the provision.

[22] The appellant contends that the policy document does not require the Australian passport holder to be resident in New Zealand before he or she qualifies under the rules contained in the policy to sponsor the spouse.

[23] It is submitted that there is nothing illogical about the proposition that an Australian passport holder may be deemed a New Zealand resident for the purposes of spousal and de facto cases, irrespective of whether or not they have obtained residence in New Zealand or even visited New Zealand.

[24] The appellant argues that the question of entry to New Zealand by an Australian passport holder has nothing to do with the rules governing the spouse's entry. Whether the spouse is within New Zealand or elsewhere is not the issue. Section 13C of the Act obligates the NZIS to grant a residence visa to anyone who comes within the written policy. Should that create problems for Government, then the policy should be changed rather than that the policy be interpreted in a manner contrary to its plain meaning.

[25] The appellant notes that the objective stated in F1 of the Government residence policy is directed towards maintaining family units.

[26] As an Australian citizen is exempt from the requirement to hold a residence permit and has free entry unless banned by the provisions of the Act, it is submitted that it is entirely logical that an Australian citizen who is planning to come to New Zealand should be able to sponsor her spouse in accord with the provisions of the Government residence policy to enable the spouse to enter New Zealand with her. It

is submitted that such an approach is consistent with the objective of the family category policy. It is submitted the NZIS's approach as upheld by the Authority, which would require the Australian spouse to first reside in New Zealand before the foreign spouse can enter, is entirely illogical. No-one, it is submitted, could read F2.1.10 as indicating that the sponsoring spouse had to actually reside in New Zealand at the time of sponsorship. Thus it is said that the approach upheld by the Authority requires words to be imported into the definition within F2.1.10 which were never intended and do not appear.

[27] It is also submitted for the appellant that the approach argued for is consistent with the general objective of the Government residence policy contained in R1. It is noted that for the spouse of an Australian citizen to be able to accompany her to New Zealand may well enhance her settlement within New Zealand.

[28] It is submitted that there is nothing inconsistent between the appellant's contentions in respect of the plain meaning of F2.1.10 and the objectives of the immigration policy generally in R1 and the objectives in respect of the family category policy in F1.

[29] It is further submitted for the appellant that the argument upheld by the Authority requiring it to be imported into F2.1.10 that the Australian spouse be resident within New Zealand requires writing into the Government residence policy language which actually appears in other parts of the policy. Thus, by inference, the policy could not have intended that the spousal sponsor should have to be residing in New Zealand at the time of the sponsorship. Reference is made in particular to the provisions of paragraphs F4.1, F5.1 and F6.1, all of which enable members of a family to qualify for residence if another member of the family is resident in New Zealand as the definition of "lawfully and permanently" in F4.1.1 requires the sponsor to actually reside in New Zealand. Thus the position in respect of spouses is clearly different from that relating to the other relatives covered by the other parts of the policy.

[30] Hence it is submitted for the appellant that an Australian passport holder for the purposes of paragraph F2.1.10 of the Government residence policy does not mean “an Australian passport holder who is or has been resident in New Zealand”.

[31] That that must be so is exemplified, it is said, by the fact that the provisions of the Government residence policy are silent as to what would constitute residence in New Zealand on the part of the spouse.

Case for the Respondent

[32] The submissions for the respondent adopted and emphasised the argument accepted by the Authority in its careful and considered decision.

[33] It was noted for the respondent that in *Patel* the Court of Appeal did not take a strict or literal approach to the language of the Government residence policy and that the Authority was equally entitled not to take such an approach in the present case. It was submitted that the Authority was fully entitled to look at the Government residence policy in the context of the Act and Regulations. In that context the Authority was entitled to take the view that something less than a literal interpretation of F2.1.10 should be adopted.

[34] It was in particular emphasised in the submissions for the respondent that F2.1.10 cannot be taken literally when an Australian passport holder is not resident within New Zealand and is not entitled to be in New Zealand except as the Authority found when the Australian passport holder is actually within New Zealand. Emphasis was placed on the provisions of s 41 of the Act and in particular that the Australian passport holder’s exemption from the provisions of the Act was deemed to have expired when the Australian passport holder left New Zealand.

[35] While it is recognised that other parts of the Government residence policy making provision for parents, children and siblings contain express provisions relating to residency, it is submitted that if one starts with the statutory background in respect of the position of Australian passport holders it is proper to imply that similar provisions are intended in respect of them in relation to F2.1.10.

[36] It was submitted that if the appellant and his wife wished to enter New Zealand the wife was entitled to enter as a result of having her Australian passport and he was entitled to apply for a temporary permit until they were resident within New Zealand, at which stage the wife could sponsor the appellant's application for a residence permit. I would note that is as may be. Whether the appellant would have been entitled to a temporary permit, or whether indeed the appellant would be entitled to some other form of entry to New Zealand is not the point. The issue is solely one of whether the appellant's wife can give him the status to obtain residence in New Zealand under the provisions of F2.1.

[37] It was submitted that the underlying need for sponsorship needs to be borne in mind and that, broadly speaking, the purpose of a sponsor is to provide some connection with New Zealand.

[38] It is submitted that it cannot have been intended that an applicant with no connection to New Zealand other than a spouse with a valid Australian passport can achieve residence in New Zealand simply because of that Australian passport. It is submitted that if it were otherwise New Zealand would be exposed to the risk that any holder of a valid Australian passport could sponsor their spouse into New Zealand, regardless of whether the sponsor came to New Zealand or not.

Reasons for Decision

[39] I cannot read F2.1.10 in the manner adopted by the Authority and supported by the respondent. I prefer the arguments for the appellant.

[40] To read into the language of F2.1 and F2.1.10, which are clear on their face, words which are not present and which are themselves ambiguous cannot be right.

[41] The argument for the respondent, based upon the decision of the Authority, relies almost entirely upon the provisions of s 41 of the Act and the status of an Australian passport holder for the purposes of that person's own entry into New Zealand. That is not the position that we are concerned with in the present case, which does not relate to the status of the appellant's wife in respect of her entry into

New Zealand or her position when she leaves New Zealand, as she might, but her ability to support her husband's application for residence in New Zealand.

[42] In any event, the argument that the wife's exemption from the requirements of a residence permit only applies while she is actually in New Zealand does not lead to the conclusion reached by the Authority. The wife, as the holder of a valid Australian passport, has a statutory right to claim the exemption the moment she sets foot on New Zealand soil. The right exists independently of its exercise. Section 41(2) makes it perfectly clear the exemption is "deemed to have expired" when she leaves New Zealand, not that the exemption does expire, as her right to re-enter remains.

[43] There are, in any event, in terms of R1 and F1, better policy reasons for enabling an Australian passport holder who is not resident in New Zealand to sponsor her husband's residence in New Zealand than there are to the contrary. It is consistent with the general policy contained within R1 and the family policy contained within F1 of the Government residence policy that a spouse who is entitled to come to New Zealand to reside by virtue of an Australian passport should have the right to sponsor his or her spouse to enter at the same time, or even before. To adopt an interpretation which would require the sponsoring spouse to first come to New Zealand to set up a residence before he or she could sponsor his or her spouse, contains an element of unreality in respect of human affairs inconsistent with the general policy expressed in R1 and F1 and with the apparent intent of paragraph F2.1. F2.1 enables spouses who otherwise comply with the Government residence policy and the Act and regulations to enter New Zealand at the same time. Why the Government should have a policy that prevents spouses from entering New Zealand at the same time when one of the spouses is entitled to arrive as of right has not been made clear. There is nothing in the Act, the regulations or the Government residence policy which would support such a position and it is inconsistent with other policy provisions.

[44] The Government residence policy clearly supports the argument advanced for the appellant. If the Government residence policy had as a requirement that the Australian passport holder should have to reside in New Zealand before that passport

holder is able to sponsor his or her spouse's residence in New Zealand, there would be no reason whatever why the provisions relating to spouses and de factos in Parts F.2 and F.3 should not reflect the same approach as contained with the succeeding parts of the Government residence policy relating to parents, children and siblings. Those parts have relatively clear and unambiguous statements as to the residence requirement of the sponsor. The very absence of any corresponding requirement in respect of spouses and de factos carries with it the strong inference that there is no corresponding obligation in those cases.

[45] The point just made is highlighted and emphasised by the fact that under F2.1.10 not only may an Australian passport holder act as a sponsor for a spouse but so might the holder of a returning resident's visa under s 14C of the Act. Such a person is a person who is resident within New Zealand but has obtained a returning resident's visa because he or she is leaving New Zealand but wishes to return. It inevitably follows that such a person will be outside New Zealand at the time that the application in respect of the spouse is sponsored.

[46] The Authority sought to answer this point by suggesting that the right to the returning resident's visa is dependent upon the person having already had a resident's permit. However, the valid Australian passport holder has a continuing right to enter New Zealand. He or she does not have to enter to obtain a returning resident's visa. Why an Australian with such a continuing right should be in a worse position than someone with lesser rights is not made clear. In any event, on the facts of this case the wife had entered New Zealand, if only for six days. That could equally be the case in respect of a person seeking to obtain a returning resident's visa for the purpose of qualifying his or her spouse for entry.

[47] An argument raised in respect of the possible abuse of the policy if the plain meaning is given to the provisions of F2.1.10 seems remote. This case has concentrated on the language of F2.1.10 because the Authority found that in every other respect the appellant was entitled to residence within New Zealand. However, it is also a requirement of F2.1.1 that the couple are living together in a genuine and stable marriage. Quite how that requirement could be achieved or satisfied if there was an endeavour to abuse the provisions of the policy contained in F2.1 in respect

of spousal entry is unclear. If there is any wish to control the entry of spouses of persons who are entitled to enter New Zealand, one would expect it to be spelt out in relation to tests such as that rather than a test dependent upon the sponsoring spouse having resided within New Zealand for a particular term. To require such a test, which would inevitably involve the spouses being separate and apart, would appear to be contrary to the whole philosophy underlying the provisions relating to spousal sponsorship or the sponsorship applicable to de facto relationships. It has to be remembered that the sponsorship can only be by someone who is entitled as of right to enter New Zealand for the purpose of residence.

[48] Therefore I can find no basis upon which even the most liberal interpretation of F2.1.10 of the Government residence policy could give rise to the result that it is read as requiring the holder of the Australian passport to be resident or living within New Zealand. Such a reading would be in conflict with the clear provisions not only of F2.1.10 but the latter provisions of the same chapter dealing with other family relationships. There is nothing in the Act which leads inevitably to such a conclusion. The argument which found favour with the Authority relies not upon a liberal approach to the language of the Government residence policy but upon a tenuous and technical approach to the status of the holder of the Australian passport under the Act. As I have found, that argument is not only misplaced but cannot be automatically translated to have consequences in relation to the appellant as his position is not dependent upon his wife's status if and when she enters and leaves New Zealand. His rights depend not upon her entry to New Zealand but upon her status as the holder of a valid Australian passport who is entitled to enter New Zealand. There is no basis for reading in to F2.1.10 a new and inevitably ambiguous requirement that the sponsoring spouse either resides or has resided in New Zealand.

Decision

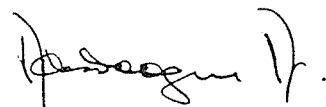
[49] The appeal is upheld. The appellant's wife as the holder of a valid Australian passport was entitled to sponsor the appellant under the provisions of F2.1 and F2.1.10 of the Government residence policy. The matter is remitted to the Authority under the provisions of s 115(3)(b) of the Act for the Authority to exercise its powers

under s 18D of the Act as if the present decision had been a decision of the Authority.

Costs

[50] The appellant is entitled to reasonable costs and disbursements to be fixed by the Registrar of this Court if they cannot be agreed. The costs are to be fixed in accordance with category 2 column B of the Second and Third Schedules of the High Court Rules. The disbursements are to include counsel's reasonable travel and accommodation expenses and the reasonable costs of preparation of the bundle of authorities.

Signed at 10.45 a.m./~~p.m.~~ this 21st day of June 2002

A handwritten signature in black ink, appearing to read "H. Segun J.", is written below the date line.

Solicitors

Ryken and Associates, Auckland, for appellant
Crown Law Office, Wellington, for respondent