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PARTNERSHIP APPLICATIONS WHERE THE APPLICANT OR SUPPORTING PARTNER IS ALREADY MARRIED OR IN A CIVIL UNION WITH ANOTHER PERSON

Instructions at F2.5(d)(iv) state that an application will be declined if an applicant applies for residence under the Partnership Category on the basis of marriage or civil union and either party is already married to or in a civil union with another person.

Previously Immigration New Zealand (INZ) took the approach that where an applicant initially applied under the Partnership category on the basis of a marriage, and where INZ determined that marriage to be void because one party was already married, the application must be declined even where the applicant subsequently requested the current partnership be assessed as a de facto relationship. It was understood that there was no discretion to consider the partnership on a basis different from the initial application. This approach had been upheld in previous decisions from the Immigration and Protection Tribunal (IPT).

IPT Decision 206122

A recent IPT appeal (206122) resulted in a different outcome. In this case, the applicant had made an application under the Partnership Category based on their marriage to a supporting partner while the supporting partner was still married to a previous partner. When INZ advised that it considered the marriage on which the application was based to be invalid, the applicant asked that their current relationship instead be assessed as a de facto relationship, which INZ refused to do, in line with the established approach noted above.

The IPT held that because the applicant had asked that their application be assessed on the basis of a de facto relationship with their supporting partner prior to a final decision being made, the Immigration Officer (IO) had an obligation to consider the application on the basis of the evidence provided in support of the de facto relationship now claimed.

Internal advice from MBIE has confirmed that INZ should adopt the approach as described by the IPT in appeal 206122.

Typical scenarios in which an IO may encounter these applications are where the Principal Applicant (PA) wishes to change the relationship relied on with their Supporting Partner (SP) from 'marriage' to a 'de facto relationship' after their application has been lodged. Another scenario is when the PA or SP is married to another person at the time of their marriage and lodgement of their application then subsequently divorces their previous partner and remarries the SP. When faced with these types of scenarios INZ has an obligation to assess all relevant information known to us at the time of assessment. This means that, where a couple who are initially caught by F2.5(d)(iv) request that their application instead be assessed as a de facto partnership (F2.5(b)(iii)), INZ is obliged to consider this request.

Further to this, and to maintain fairness to all applicants, where INZ considers that a marriage relied upon is not valid because either the PA or SP remained married to another person at the time of their marriage or civil union, INZ should make them aware of the ability to request assessment under de facto instructions prior to making a final decision on the application.

Process going forward

This process applies when an applicant has applied for residence under the partnership category on the basis of marriage or a civil union and INZ is concerned that the PA or their SP was still married or in a civil union to a previous partner at the time of their marriage or civil union.

Examples of where a PA has applied based on marriage include:

- declaring their SP as husband/wife or spouse;

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- declaring their partnership status as married; or
- including the date of marriage at J3 of the paper application form.

A PPI letter should still be sent outlining why INZ considers that F2.5(d)(iv) applies, however the following sentence should be included:

"*Please note, if you agree with our assessment that F2.5(d)(iv) applies, that is, if you accept that your marriage or civil union does not qualify under immigration instructions because of you or your partner's other marriage or civil union, you may request that we assess whether your current partnership meets the requirements of a de facto relationship at F2.5(b)(iii). Please ensure that you include reasons for this request in your response.*"

It is important to note that this approach does not permit bigamy[1].

If a PA does not want their application to be assessed under de facto instructions and is unable to prove that they or their SP were not married or in a civil union with a previous partner at the time of their marriage to their SP, the application may still be declined under F2.5(d)(iv).

In some cases, there may be a question of whether false and misleading information has been provided regarding previous relationships in the application. If you believe that the applicant may have provided false or misleading information, or withheld relevant information, as to their marriage or civil union, you will need to include the character instructions at A5.25(i) in the PPI letter in order to give them an opportunity to comment before it is determined whether a character waiver is required. If it is found that they have provided misleading information, or withheld relevant information, relating to their marriage or civil union, the applicant is still able to request an assessment of the claimed de facto relationship; however, the character waiver process will need to be followed.

There may be occasions as well where false, misleading, or withheld information is suspected regarding relationships in the context of prior visa applications, either by the PA or SP. In the case of the PA, a referral to Compliance should be considered. In the case of the SP, a section 158 referral to the Resolutions Deportation team should be considered.

[1] Bigamy, as defined in the Crimes Act 1961: https://www.legislation.govt.nz/act/public/1961/0043/latest/DLM329752.html