New Zealand Association for Migration and Investment

Seminar - 3 September 2010

Ministerials and Complaints

1. Scope of Seminar

We will look at the tools available to advisers to resolve problem situations which are not otherwise provided by the Immigration Act or Policy, statutory appeals to the immigration tribunals, or to the Courts. These include specifically:

- Applications under s 35A Immigration Act 1987; and
- Applications for Special Direction to the Minister of Immigration;
- The INZ Complaints Process and use of the Office of the Ombudsman.

Section 35A applications are included here because they are nominally decided by the Minister of Immigration like special directions, and principles of broad discretion are similar.

A main focus of this paper is the equivalent provisions of the new 2009 Act. The Act will come into force on 29 November 2010 and advisers should be prepared to navigate the 2009 Act accordingly.

2. Absolute Discretion

This is a new term which appears in s 11 of the 2009 Act. It is a concept familiar from, for instance, s 35A of the 1987 Act and states that:

> (a) the matter or decision may not be applied for; and
> (b) if a person purports to apply for the matter or decision, there is no obligation on the decision maker to—
> (i) consider the purported application; or
> (ii) inquire into the circumstances of the person or any other person; or
> (iii) make any further inquiries in respect of any information provided by, or in respect of, the person or any other person; and
> (c) whether the purported application is considered or not,—
> (i) the decision maker is not obliged to give reasons for any decision relating to the purported application, other than the reason that this section applies; and
> (ii) section 27 of this Act [equivalent to s 36 of the 1987 Act) and section 23 of the Official Information Act 1982 do not apply in respect of the purported application.

For our purposes any request for a permit in special case (s 35A or s 61 of the new Act) and any request for special direction are both matters of absolute discretion.

It is important to bear in mind that if the decisionmaker does exercise the discretion to consider a matter to which absolute discretion applies, and gives reasons for the decision (as often happens) the decision is reviewable unless a clause in the legislation expressly bars review.[1] In the case of discretion exercised by the

[1] *Yan Sun v Minister of Immigration* [2002] NZAR 961

Minister directly (as in special directions rather than s 61 applications) the Courts will be loath to intervene unless it is clear that the exercise of the discretion was unlawful in administrative law terms.[2]

In the case of special directions, then, it is therefore worth considering whether a negative decision by the Minister should be taken to the Office of the Ombudsman (see below).

3. Applications under s 35A/s 61

People who are in New Zealand unlawfully may apply for a "permit in special case" under s 35A to the Minister. In reality all such cases are dealt with by immigration officers which Schedule 1 delegation. Any s 35A applications sent direct to the Minister will be returned with the statement that the Minister's office is not a processing branch.

Under the 2009 Act the same application may be made under s 61, with the proviso that most of the old s 35A provisions are now to be found in s 11 under the definition "absolute discretion" (see above). Of course, instead of applying for a permit one seeks the grant of a "visa" to someone who is unlawfully in New Zealand. Also remember that a s 61 application may not be made for someone who has had a deportation order served against them.

Although there is no obligation on the Minister (or INZ in most cases) to even look at the application, in reality most s 35As are considered. Apparently about 75% of s 35As are actually approved – quite a high percentage for a "special case" class of application.

The Policy makes clear that (Policy E8.1(c)):

> Officers must make decisions on the merits of the individual case balanced against the public interest, and current government policy is relevant but not a deciding factor.

This has received an additional gloss which we now see in s 35A decision letters and is taken from an Administrative Circular in 2008:

> As there is no right to apply for a permit under s 35A there is no specific policy criteria that must be met, meaning decisions are totally discretionary.[3]

With respect, this wording runs the risk of suggesting that decisions can be made in an entirely arbitrary manner on the whim of the case officer concerned. To say that someone has no right to apply for a visa or permit does not mean that they have no rights at all. In fact, once the decision is taken to consider the application the immigration officer must make a decision which is logical and reasonable based on the information before them.

Furthermore, although INZ can lawfully refuse to give reasons at all, once the case officer starts giving reasons they are also obliged to set these out in an understandable and consistent way. Just because they are not obliged to give reasons for their decisions does not mean that their standards of explanation of their decision are any lower for a s 35A application than for any other. An insufficient or inaccurate set of reasons can provide an opening to attack a decision as possibly having been made illogically or in reliance on incomplete information, for instance.

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[2] *Singh v Minister of Immigration* (HC Auckland, 18 July 1999); see discussion in Tennent, D, *Immigration and Refugee Law* (LexisNexis, 2010), 124-130

[3] *Internal Administrative Circular 08-06* (10 April 2008)

An application under s 35A/s 61 may not be the best solution for a client. Give serious consideration as to whether it is not better to advise them to leave New Zealand and apply again from offshore in the normal manner.

In order to make such an application there should be strong reasons why a "special case" application from inside New Zealand is preferable to an application in the normal way from the home country. It is necessary to balance factors such as:

- How long has the person been in New Zealand unlawfully? If it is only for a few days or weeks then INZ is likely to be more sympathetic than to someone who has languished here for 5 or 10 years and has simply not bothered to regularize their status;
- In a partnership or family situation, it may be harmful to young children if one of their parents has to leave for several months;
- Did the person become unlawful because of a previous decision which was made poorly? This could be used to suggest that INZ should set the matter right by giving them another chance;
- An application made after the client has left New Zealand can be assessed against normal Policy criteria, whereas a s 35A/s 61 application will always face the uphill battle of overcoming the person's continued unlawful presence in New Zealand.

The writer has seen many examples of clients who have made repeated applications under s 35A, as well as special direction applications in the past. The chances of success of yet another application for these people are usually very limited because INZ already has on record the prior failed applications, and officers will use that justification to issue another decline as a matter of course unless something in the client's circumstances has dramatically changed.

4. Special Directions

Under the 1987 Act the Minister's power to make special directions is set out at s 130:

> (1) The Minister may from time to time give to the [chief executive of the Department of Labour], or to any other immigration officer [or to any visa officer], either in writing or orally, a special direction in respect of—
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> (a) Any person, permit, visa, or document; or
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> (b) Any 2 or more persons, permits, visas, or documents where by reason of any specific event, occurrence, or unusual circumstances there is a common link between those persons, permits, visas, or documents,—
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> in relation to any matter for which such a direction is contemplated by any of the provisions of this Act or of any regulations made under this Act.

What is often not appreciated is that special directions can only be applied for where the Minister is empowered to issue a special direction by the Immigration Act. For instance, under the 1987 Act the Minister can only issue special directions for "any matter for which a special direction is contemplated by any of the provisions of this Act." (Interpretation, s 2) It is not a general residual power to grant anything and everything that may be asked for.

The circumstances in which the Minister may make a special direction are:

- to grant a permit to people otherwise caught by s 7:
- to exempt someone from the need to hold a permit (s 12);
- to issue an Invitation to Apply for Residence even though the person has not submitted an Expression of Interest (s 13E);

- to direct whether a person or class of persons should get a transit visa (s 14E);
- to refer a Residence visa or permit application to the Minister instead of an INZ officer (ss 14B, 17A);
- to cancel or vary any Residence condition (s 18A);
- to extend the validity of a temporary permit beyond the prescribed limit (s 26);
- to impose, vary or cancel any condition of a temporary permit (s 27);
- to specify or perhaps relax the specific purpose, or the maximum time period for any class of Limited Purpose Permit (s 34C);
- to exempt someone from having to pay a prescribed fee, or direct refund of a fee (s 149).

There are other special direction powers in respect of classes of persons, but we will not refer to these are they are not exercised in an individual case.

Note also that s 13C(2) opens the door for the Minister to grant a Residence Visa or Permit as an exception to Policy. This is usually exercised in the context of a recommendation from the Residence Review Board per s 18D(1)(f), but it could be used indirectly to ask the Minister to order INZ to grant Residence outright. In the *Ye* decision at the Court of Appeal (not the later Supreme Court decision) it was said that:

> Under that section, the minister had an unlimited discretion to give special directions in respect of "any person, permit, visa, or document". This was a means by which the minister could deal with "hard cases" where someone was seen as deserving of the right to be in New Zealand, even though that person might not come within existing immigration policy criteria.[4]

With respect, that overstates the breadth of the special direction power, although in reality the Minister has historically tended to intervene even when what was being asked for was outside the list of options set out above.

In the 2009 Act the special direction provisions are found at s 378, which also uses the "absolute discretion" definition (see above). The specific occasions to which special directions may be applied are:

- to grant a visa or entry permission to people otherwise prohibited from getting them (s 17):
- to issue an Invitation to Apply for Residence even though the person has not submitted an Expression of Interest (s 94);
- to refer a Residence visa or permit application to the Minister instead of an INZ officer (s 72);
- to impose, cancel or vary any Resident Visa condition (ss 50, 51) and do so at the time the person applies for entry permission (s 108);
- to impose, cancel or vary any temporary visa condition (s 109);
- to impose, vary or cancel any condition of a temporary visa (s 53);
- to exempt someone from having to pay a prescribed fee, or direct refund of a fee (s 395) or bond (s 396).

Unlike the 1987 Act, the Minister may delegate many of the powers to make special directions to immigration officers, except for decisions about transit visas and visa waivers (s 380). This raises the question of whether

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[4] *Ye v Minister of Immigration* [2009] 2 NZLR 596 at [438]

this makes an immigration officer's decision whether or not to issue a special direction more open to attack than if the Minister had made it. The writer's view is that the delegation in itself does not make it easier to review a bad special direction decision.

5. INZ Complaints Process

When Complaints Should be Made: The Complaints Process can most often be used to contest a declined visa or permit application where there is otherwise no right of reconsideration. Under the 1987 Act there is no right of reconsideration of a visa application, and no right of judicial review of such a decision (s 10(3)). However, there is a right of reconsideration of decisions on permits so long as the applicant still holds a current permit (s 31). There is also a right of judicial review of permit decisions (s 9(3)).

Under the 2009 Act, in which all endorsements are called "visas", reconsideration is available under s 185. This is fairly similar to s 31 of the 1987 Act but it should be noted that the reconsideration must be filed with INZ no more than 14 days after the applicant "received notice" of the decision. This is not 14 days after the date of the decision – see s 386 for the provisions relating to service of documents. In particular, subs (5) applies to people who hold temporary visas or are here unlawfully, and they are deemed to have received a decision sent by registered post 7 days after the date of posted (which is presumably the same as the date of the decision itself).

Note that if there is a right of reconsideration still available then it should be used rather than laying a complaint. This is because it gives the opportunity to "consider again" the application as if it had not been decided, rather than trying to find some error in the first decision. In the case of *Park* Heath J described the approach to reconsideration as:

> a fresh appraisal of the application having regard to all available information in light of the initial grounds for refusal.[5]

This is to be distinguished from the provision in Policy E7.35.1 that allows INZ to use its discretion to reconsider a visa application if "new and compelling information" is provided.

Complaints Process: This is set out in the published Client Complaint Resolution Process found on the INZ website. In summary the process is as follows:

1. Complaint to the Branch Manager – or perhaps more effectively, the Manager of the Temporary or Residence Team. A response should be produced within 15 working days of receipt of the complaint unless the relevant Manager notifies an extension of time;
2. If that does not resolve the problem then a complaint may be made to the office of the Deputy Chief Executive – Immigration in Wellington. The complaint must be acknowledged within 2 working days or receipt, and a response provided within 20 working days. Usually the complaints are handled by Regional Managers with support from INZ Resolutions. They may elect in certain cases to escalate the case to the Deputy Secretary – Legal.

The Process document indicates that INZ Resolutions will assess complaints that go direct to the Deputy Secretary or to the complaints email address. If the matter has not yet been seen at branch level then it will be sent back there for Branch managers to look at.

Grounds for Complaint: It is not really sufficient to simply be unhappy with the outcome of an application. For a complaint to be successful it should usually show (for example):

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[5] *Si Jong Park & Ors v Chief Executive Department of Labour* (HC Auckland, 29 May 2006) at [34]

- a significant flaw in the reasoning process used to reach the decision, or reliance on the wrong facts when making the decision;
- overlooking issues which were highly relevant to the case, or ignoring arguments put forward in response to PPI letters which are so important to the application that no reasonable person could have declined the application;
- deciding the application for reasons which were never put to the applicant in a PPI letter so that they did not have any right of reply;
- using the wrong part of Policy to make the decision.

Occasionally it may be appropriate to escalate a matter to senior management while an application is still in process and where it becomes apparent that the assigned case officer, their team manager or a Technical Adviser called in to look at the case is, for instance, misapplying the Policy in a fundamental way. The writer recommends however that this ability be used sparingly, because it can lead to significant delay in processing an application and may be seen as a form of "grandstanding" to push INZ to approve the case.

6. Complaints to the Ombudsman

If a satisfactory outcome is not obtained through completing both stages of the Complaints Process there is still the option of taking the matter to the Office of the Ombudsman. However, by this time it is necessary to find fault not just with the original decision, but also with the reasoning of INZ Management. If they have addressed the issues which were originally complained about in a proper way, but still found that there was insufficient basis to reverse the original decision or refer it back for reassessment, then it will be that much harder to convince the Ombudsman to find that there is something to investigate.

As with complaints to INZ, there must be something wrong with the *decisionmaking process* rather than just the *outcome* before an Ombudsman will intervene. Having said this, the Ombudsmen Act 1975 states that an Ombudsman may intervene if he or she forms the view that the decision:

(a) Appears to have been contrary to law; or

(b) Was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or

(c) Was based wholly or partly on a mistake of law or fact; or

(d) Was wrong.

The meaning of this last item is open, but in reality an Ombudsman will not normally seek to do the job of an immigration officer and re-decide the case afresh.

The Office of the Ombudsman has described itself as a "remedy of last resort" so that if other avenues have not been used and are still available – e.g., reconsideration, Complaints Process etc. – they may well refuse to become involved. In fact, s 13(7) Ombudsmen Act 1975 prohibits an Ombudsman from considering any case where there is a right of appeal or "review . . . on the merits of the case", whether or not that right of appeal etc. has run out. It is therefore damaging to a client's case to choose to complain to the Ombudsman instead of, say, filing a reconsideration or an appeal against removal/deportation.

However, especially in removal situations (now to be called "deportation" under the new Act) an Ombudsman complaint can be warranted in order to stop INZ from removing the person while a complaint is being considered. For instance, the use of the Complaints Process alone may not necessarily protect a client from removal/deportation action, although INZ tends to hold back from removing someone when a *bona fide* complaint to management is still in process.

Although in the past the Ombudsman's office fielded many immigration complaints – and even set up a dedicated immigration section to handle them – the Ombudsman has been cautious in recent years about interfering with INZ decisions unless there has clearly been a major abuse of process, misapplication of Policy or irrationality among the original decisionmaker and the managers.

Some aspects of the Ombudsman's relationship with INZ are set out at Policy A9, including the indication that where a matter is still before the Ombudsman the applicant's immigration status should be preserved and in particular (Policy A9.20):

> Where the Office of the Ombudsmen notifies INZ that an investigation is being made into a complaint against INZ, the complainant's immigration status will be preserved pending the outcome of the investigation and in particular:
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> 1. if the complainant is the holder of a temporary permit, INZ will grant a further temporary permit of the same type (subject to receipt of formal application and payment of the appropriate fee);
> 2. if the complainant is not the holder of a temporary permit and has not already been served with a removal order, INZ will not serve one before the investigation has been completed, (and then only if appropriate);
> 3. if the complainant has already been served with a removal order, INZ will not complete removal action before the investigation has been completed (and then only if appropriate), unless the complainant is in Police custody pending removal, in which case removal processes may continue.

However, this should not be seen as *carte blanche* to indefinitely delay a client's departure from New Zealand by filing repeated complaints to the Ombudsman and/or the Minister. Eventually such complaints will be turned around very swiftly and in the meantime INZ can put arrangements for departure in place so that, for instance, the client could be detained for removal while the Ombudsman's latest decline is being faxed to the adviser.

The Ombudsman may not investigate any decision made by a Minister including the Minister of Immigration because Ministers are not included among the classes of people whose decisions may be considered under s 13(1) Ombudsmen Act 1975. However, significantly, the advice given to the Minister by INZ can be reviewed.[6] If therefore the Minister has refused to assist in what appears to be a strong case, it may be worth requesting a copy of the recommendation prepared for the Minister under the Privacy Act and Official Information Act to see if, for instance, INZ has not put important facts into its summary prepared for the Minister's consideration.

7. Preparing a Submission for a Ministerial or a Complaint

Before setting about writing a complaint it is necessary to have as much relevant information as possible to hand. In the case of INZ decisions this may mean making a Privacy or OIA request for some or all of the client's immigration file. It is usually good practice to ask for a printout of the AMS electronic file because this may disclose file notes, alerts etc. which may give a clue as to the reasons why INZ declined the application.

It is worth seeking to keep a balance between the following competing pressures:

- The person investigating the complaint or considering the special direction has most likely not seen the file before, so they need to be made aware of the relevant background and to be shown the documents which assist their understanding. Do not assume that they can just go and dig the file out – they may be too busy to do that;

[6] Wakem, B, "What the Ombudsmen Can and Can't, Will and Won't, Investigate" (*Immigration Practitioners Bulletin* (2009)), 8

- Anyone assessing a complaint or special direction submission has limited time to review the materials. Still to what is relevant – e.g., don't supply copies of Medical Certificates when health is not an issue. Providing too much irrelevant material also has the disadvantage of obscuring the good arguments which could win the case.

In most cases the submission should comprise:

1. A letter which tells the story, sets out arguments and asks for a remedy;
2. A list of documents which are attached and which illustrate the case;
3. The supporting documents themselves, in order.

The covering letter is of course the key to the application/complaint and requires some care. It should contain:

- A concise background history of the application or the person's history. Tie in the supporting documents so that the reader can refer to them in the context in which they arise;
- (if a complaint) The problem with the decision being complained about – attempt to demonstrate what is technically wrong with the *decision* or the *process*, rather than being critical of the *person* who made the decision;
- (if a special direction) Arguments as to what is special about the person's situation such that they should receive particular assistance. Try to show what it is about the client's case that makes it unusual compared to other applicants;
- A statement of the outcome which is desired. It is important here to be realistic and not to ask for something which is unlikely to be given even if the request is successful.

In the case of complaints, the critical documents are usually the PPI letter(s) and the decision letter. Pay attention to any differences between these as the reasons for the decision may be different to those raised in the PPI and could give grounds for arguing that no right of reply was given for prejudicial concerns in the mind of the case officer.

Pay attention to providing a clear structure to the letter including headings and subheadings. The document may run to several pages and effective advocacy includes the ability to make it easy for the reader to get a feel for the points which can win the case, and the evidence which supports them.

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2 September 2010