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**THE CANCELLATION OF IMMIGRATION STATUS AND
CITIZENSHIP**

ADDENDA:

1. Paragraph 4.3 “sic” should be “six”
2. Paragraph 2.8 final sentence: s158(3) of the 2009 Act provides that a person who has lost citizenship has 28 days to appeal to the IPT after service. It appears service is required, though it should also be noted an appeal may not be available *until* service.

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THE CANCELLATION OF IMMIGRATION STATUS AND CITIZENSHIP

1.0 Introduction

- 1.1 The law currently in force provides for four types of cancellation:
- i. The revocation of residence (appeal to the Deportation Review Tribunal (DRT)).
 - ii. The cancellation of refugee status (appeal to the Refugee Status Appeals Authority (RSAA)).
 - iii. The deprivation of citizenship (appeal to the High Court).
 - iv. The revocation of temporary permits by Immigration New Zealand (review only by the High Court).
- 1.2 Recent legislative reform has not addressed the interplay between refugee status and citizenship and some problems that currently exist will remain until further legislative reform. In some cases the loss of citizenship will arise without full consideration of humanitarian circumstances.
- 1.3 Under the new Act (Immigration Act 2009) yet to come into force (at the time of writing this paper a date remains to be announced but is widely rumoured to be November 2010) revocations and refugee cancellation proceedings, the first two above, will be absorbed within the jurisdiction of the Immigration and Protection Tribunal (IPT).
- 1.4 How complex the law is in this area can be exemplified by looking at what follows on after a refugee cancellation proceeding. In the case of a resident who may have obtained refugee status through fraud etc, the second stage will be a revocation enquiry and possibly an appeal before the DRT (soon to be the IPT), which has a humanitarian discretion to quash the notice of revocation. A citizen, however, (see discussion below) has been in a worse position because, once a deprivation enquiry by the Department of Internal Affairs is complete there is currently no humanitarian jurisdiction held by the High Court or for that matter by anybody, to consider humanitarian matters during the deprivation proceeding.¹

¹ This distinction will be lost with the amalgamation of the deportation test and the removals test. There is a right of appeal against removal exercisable within 42 days after the order depriving citizenship. See discussion below however re the running of time under the 2009 Act, and the fact that some persons may be excluded from having an appeal.

- 1.5 Moreover, given a recent ruling of the RSAA,² during the refugee cancellation proceeding the RSAA will not now re-examine a citizen's current refugee status if it finds that refugee status may have been procured by fraud etc, as New Zealand citizenship invokes cessation of refugee status. This is because the erstwhile refugee, now a citizen, has protection from refoulement by virtue of his NZ citizenship. Perhaps a potential citizen refugee cancellee may be better off renouncing citizenship (unless there has been meaningful and enduring régime change in the home country, in which case it will not make much difference), so that the RSAA can consider his or her status (as a refugee) notwithstanding the fraud. Otherwise they will have to wait for a decision of the Minister of Internal Affairs, after which they can appeal against removal (under the 1987 Act) or against deportation under the 2009 Act, raising the refugee issues afresh. The above suggests that the area is complex and requires careful consideration and research. It is rather a pity that the 2009 reform did not sweep up citizenship and residence appeals into one super-régime.
- 1.6 There is of course an underlying interest that the state has in ensuring that those who provide false information do not benefit from their fraud. Although deterrence may be an underlying rationale for revoking and cancelling in certain circumstances, including refugee-type situations, push factors are likely to eclipse any deterrence that arises out of a later loss of status. In talking to clients, even from communities where there have been repeated refugee cancellation cases (the Iranian community for example), it is doubtful that cancellation cases that have gone before deter future asylum seekers from providing false information any more than prosecutions do. Rather, what needs to be built up is a relationship of trust between those seeking protection and our processing organs. Of course those who are lying about their origins need to be weeded out. More often the problem lies however in assessing whether, but for the falsity involved in the case, the person is a genuine refugee, or in the case of a resident, has a genuine ongoing ground for residence. What happens, for example, to the individual having falsely claimed refugee status, who then withdrew and obtained residence on genuine marriage grounds, and who now has two children. Similar issues can also arise in citizenship deprivation cases (see discussion of the *Wang* case below).
- 1.7 The fact that citizens may have citizenship deprived without due consideration of their wider circumstances is unsatisfactory. One might have thought that the longer an individual was in the country the deeper his or her roots, and the greater the safeguard should be for protecting the status of the individual concerned (or family members who will be affected). It may come as a surprise to some that such is not the case.
- 1.8 Currently, revocation of a temporary permit leads to an administrative process where the person has a short timeframe to show cause. Judicial

² *Refugee Appeal No 76377*, M A Roche, 27 April 2010

review lies to the High Court but not to the Removal Review Authority on the ground of legality unless there are also exceptional humanitarian circumstances. Residents on the other hand currently can challenge their revocation and have a *viva voce* hearing before the DRT (or under the 2009 Act the IPT, where the right of appeal basically remains, but with different thresholds etc). A citizen however has no humanitarian appeal at all except after the event. Judicial review of the Minister of Internal Affairs' discretion is limited, though post-deprivation there may be some rights of appeal back to the IPT, but in many cases involving identity fraud the IPT will not have jurisdiction (see below and the discussion concerning the running of time for lodgement of appeal). The question that obviously arises is whether New Zealand in its treatment of its own citizens in this area is potentially in breach of the ICCPR and other human rights conventions.

2.0 Revocation of Residence

2.1 Currently residence revocation appeals come before the DRT under s22. The tribunal has a broad jurisdiction³ based around the words “unduly harsh or unjust.” It may also quash a revocation order “as it thinks fit,” a power that it does not have in deportation order cases involving criminal offenders.

2.2 The fact that the new jurisdiction of the IPT will shift from “unduly harsh and unjust” and will have the added words of “exceptional circumstances of a humanitarian nature” has already been commented upon at earlier conferences.⁴ Under the 2009 Act there will be one category of deportation (merging removals with deportation). Section 207 arguably has a higher threshold (at least for deportations). The test that will apply is:

207 Grounds for determining humanitarian appeal

(1) The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that—

- (a) there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and
- (b) it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

(2) In determining whether it would be unjust or unduly harsh to deport from New Zealand an appellant who became liable for deportation under section 161, and whether it would be contrary to the public interest to allow the appellant to remain in New Zealand, the Tribunal must have regard to any submissions of a victim made in accordance with section 208.

Compare: 1987 No 74 ss 47(3), 105(1A)

³ See however Miller J, High Court *Minister of Immigration v Vilceanu* CIV 2007-485-377, 11 December 2007, at paragraph 49 that the power is not unfettered but must be deployed to promote the policy and objects of the Act.

⁴ Doug Tennent, LexisNexis Conference 2007: *Hot Spots in the Immigration Act Review*.

- 2.3 Under the 2009 Act, gone is the slightly freer “as it thinks fit” jurisdiction under s22. For those who hold residence, liability for deportation may arise in a number of ways. Identity fraud, once established, is one basis, irrespective of whether there is a criminal conviction. The Minister may determine the person holds a visa under a false identity (s156(1)(b)) at which point he or she becomes liable for deportation. Section 156(2)(b) suggests that such a person has 14 days to lodge an appeal, after service of a deportation liability notice, but curiously section 156(4) deems the date at which a person arrived in New Zealand using a false identity as the date from which unlawfulness runs (and for which the time for appeal runs).
- 2.4 Interestingly, under s156(1)(a) where the person is convicted of an offence where a false identity is established, the date may in fact be the date of arrival (potentially years before) and so effectively there will be no appeal right. This raises ICCPR⁵ or CORC⁶ issues particularly where the individual has established a family or a partnership or there are other strong ties. Restricting appeal rights by pushing back deemed “start” dates clearly ousts from consideration important concerns that New Zealand has promised to meet in its international agreements. These breaches need to be brought before the UN Human Rights Council at its next periodic review, if by then they have not been addressed.
- 2.5 Where an individual has assumed an alias therefore and been in the country for many years and perhaps had children, no right of appeal will be permitted, unlike the current circumstances where the DRT can not only look at the length of time the person has been in the country but also his or her family etc and their rights and interests. Under the current Act all time considerations run from the service of Notice of Revocation, and so at least fall for consideration.
- 2.6 For residence holders any conviction concerning the false procurement of residence will also lead to liability for deportation (s158(1)(a)(i)). Derivative visas (dependant spouse and children for example) are covered by s158(1)(a)(ii). The Minister may also make such a determination without a conviction, but in such circumstances there is, in addition to a humanitarian appeal, also an appeal on the facts (s158(3)(b)) to the IPT. This may be a slight improvement to the 1987 Act where there was an appeal to the DRT on humanitarian grounds only and an appeal on the facts only to the High Court. When a matter proceeds therefore on a Ministerial notification without a prosecution the IPT will be able to revisit the factual basis for the allegations. Obviously, where a matter involves a criminal conviction there is a factual finding either by trial or by plea or sentencing hearing in the criminal court. Presumably however the matter need not be established in accordance with the criminal evidentiary test of “beyond reasonable doubt.”

⁵ International Covenant on Civil and Political Rights, article 23 and the right to family.

⁶ Convention on the Rights of the Child.

- 2.7 The current threshold of “unduly harsh or unjust” becomes the same as the previous removal test of “exceptional circumstances” of a humanitarian nature. Although the writer preferred the approach of Elias CJ in *Ye*⁷ where she read “exceptional circumstances” as the flip side of the same coin to “unduly harsh or unjust,” the majority view and therefore binding view of the Supreme Court is that the phrase “exceptional circumstances” takes us to a higher level than “unduly harsh and unjust” when the two phrases appear alongside each other. The insertion of the “exceptional circumstances” rule in deportation law as indicated brings removals and deportations into line with one another.
- 2.8 Under the current Act the time for removal starts ticking under s45(2) from the point of their deprivation of New Zealand citizenship. The notice provided and served by the Minister of Internal Affairs does not need to warn the deprivee of his right to appeal against removal, or the fact there is a time limit to lodge such an appeal under the other Act. Section 75 of the 2009 Act deems deprivees to be residents. Under s158(2) however such a resident is liable for deportation where the deprivation has occurred under s17 of the Citizenship Act (fraud, false representations etc) and where that fraud etc occurred in procuring the immigration status. Under both the 1987 and the 2009 Act there is no mechanism for the citizen who has received his deprivation notice to be made aware of the appeal time limits. No service of such notice is required.

3.0 Cancellation of Refugee Status

- 3.1 Currently refugee status can be cancelled under s129(1)(b) of the 1987 Act where refugee status *may* have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information [emphasis added]. The word *may* remains in s145(b)(i) of the 2009 Act.
- 3.2 Not all false or incorrect information provided in the course of a refugee case *procures* refugee status. Each case has to be determined individually. Apparently, according to an unpublished Crown opinion, the word “may” provides an obstacle to later citizenship deprivation proceedings as the term falls short of *establishing* that fraud has in fact occurred (see discussion below).
- 3.3 Enquiries made of the Department of Internal Affairs by the writer of this paper confirms that so far, there has been no deprivation of citizenship proceeding (there have been enquiries) involving refugee cancellations without involving a conviction. See discussion below.
- 3.4 Under the 2009 Act it is also noted that a refugee cancellee who is not a citizen now becomes liable for deportation upon cancellation (s146 and

⁷ *Ye and Ors v Minister of Immigration and Anor* SC 53/2008 [20 July 2009].

s162(1)) but then has 28 days to lodge an appeal. Where there is a conviction there is an appeal on humanitarian grounds alone. In other circumstances there is an appeal on the facts and on humanitarian circumstances. Accordingly there is an appeal both on the facts and on humanitarian grounds when an immigration officer cancels refugee status (as there is at present), just as there is when residence is revoked under the new Act without an underlying conviction.

- 3.5 Refugee cancellation cases have been brought for quite weak reasons at times. A return home to the country of origin years later is an example. An example of a case based at least, in the case of one of the two brothers, almost exclusively on a return to the home country is *Refugee Appeal Applications 75985 and 75986* 19 June 2009. The Authority held that the travel back does not necessarily impugn the grant of refugee status. It went on however to hold that the one brother's lies about a return prior to the determination of the other brother was a procurement. The Authority went on to find however that he was nevertheless currently a refugee. Neither does obtaining a passport from the home country impugn a grant of refugee status on its own: see *Refugee Appeal No. 76288*, 22 May 2009.
- 3.6 Although the mode of departure of a claimant may be a relevant factor in a claim (*Refugee Appeal No. 75989*; *Refugee Appeal No. 75802*) this does not necessarily mean, if it transpires that the mode of departure (through the airport), if incorrectly described in the first case, procured refugee status necessarily. (*Refugee Appeal 76288* at paragraph 49).
- 3.7 In the case of Iran it has sometimes been the case that information arising out of the issuing of a passport by the Iranian authorities might conflict with evidence provided during the refugee claim (such as relating to place and mode of the refugee's departure). For example the newly-issued passport might have a stamp on it that the person last exited Iran through a particular airport. Or it might be that re-entry through an airport since the grant of refugee status might itself establish an earlier inconsistent case if for example evidence had been brought that there was an arrest warrant issued, prior to the grant of refugee status. Being wanted by one part of the security apparatus in a country which has a disjointed system might however not necessarily raise the inference. Further the effluxion of time might itself render any such inference meaningless. See *Refugee Appeal 76267 and 76268*, 10 March 2009, where cancellation was not upheld.
- 3.8 There might of course be other reasons why fraudulent or false information is sometimes given in the course of a refugee claim. For example, it might be that the applicant fears that information will not be kept confidential. Generally the protection applicant faces severe repercussions for not trusting the inbuilt confidentiality within the system guaranteed by s129T (now s151 of the 2009 Act). One thing the Tribunal

cannot be asked to do, is reassess the case as it *was*.⁸ Accordingly a refugee who has used a fake identity or concealed part of his or her history cannot do the old case over, based now on alleged true facts. The RSAA (and now the IPT) is faced only with resolving whether the falsity was determinative and may have “procured” refugee status and then the second part of its jurisdiction on cancellation cases is whether the person is *now* a refugee (at the time of determination of the cancellation proceeding).

- 3.9 The underlying premise is that a Tribunal cannot be requested to determine whether a person at some point in time in the past was a refugee.
- 3.10 The cancellee who falls to have his refugee status re-determined in the current circumstances has the added practical burden however of re-establishing his or her own credibility given the past fraud. One lie does not necessarily establish that all else is lies however, and neither does a finding of fraud in an earlier case necessarily establish that all evidence is false. See *Refugee Appeal AB72273/2000* where an asylum seeker who had an adverse credibility determination in one case and to whom s129O(1) therefore applied, and was repatriated, was able to have the subsequent events after his arrival assessed as credible. This case appears not to be on the RSAA website. The appellant returned to New Zealand with whip marks on his back alleging he had been placed in Evin prison and later escaped whilst being transported, making his way back, a second time to New Zealand. The RSAA granted refugee status based on the events between repatriation and return.
- 3.11 Credibility always remains at large, and in addition is not always dispositive in any event (as the person might be a refugee because of the class of persons to which he belongs and in spite of his evidence). See *Sakran v Minister of Immigration*, William Young J (as he then was), CIV 2003-409-001876, 22 Dec 2003.
- 3.12 Further, the earlier lies might have been prompted by the advice of others, a fear of information being given to authorities in the home country, or in some cases a fear of other family members of persons involved in the process. For example a wife might fear the repercussions of an abusing husband where both are co-appellants and their cases are being heard together. Lies are not always black and white.
- 3.13 The 2009 Act now has a special provision entitling the cancellation of a New Zealand citizen’s recognition as refugee or a protected person: s145. At least with regard to the refugee status limb, *Refugee Appeal 16377* (footnote 2 above) renders the provision effectively defunct since that ruling, if correct, which establishes that the acquisition of New Zealand

⁸ *Refugee Appeal No. 76079* (6 January 2009) paragraphs 70 and 71, discussed in *Refugee Appeal No. 75574* [2009] NZAR 355 at paragraph 84.

citizenship lapses refugee status in any event. Interestingly the cancellation of a citizen's refugee status does not render him or her liable for deportation as it does in all other cases: section 146(2). A citizen's cancellation case proceeds under a separate section 145, leaving the liability for deportation to arrive at the later stage discussed above (at notice of deprivation).

- 3.14 Presumably a deprivation proceeding is still necessary. The threshold for cancellation "may have been procured" where it is not supported by a conviction may therefore continue to create a legal hurdle for the Department of Internal Affairs. It will be interesting to see what may happen should the IPT rule beyond its jurisdiction that refugee status *had* been procured by fraud etc, going beyond the necessary threshold. Of course even where the Tribunal has strong views it would not normally rule beyond its "may have been procured" test. If it did so in any event the ruling would be *obiter dicta*. The writer knows of no ruling where the RSAA has ruled beyond its jurisdiction.
- 3.15 The question of whether or not a particular fact or an event such as a trip home establishes that the earlier claim was procured by false information or falsely in some way etc is a vexed question. Clearly the matter needs to be determined by a process which is fair and reasoned involving an opportunity to be heard. The ramifications for the applicant however are serious. Sponsorships are suspended during the enquiry. Many such litigants suffer enormous anxiety and loss of self-worth. Their position in society is under serious question. Where a community has been the subject of numerous cancellation cases, many have thought that they are better placed to migrate to Australia (before travelling back to their home country). Accordingly, unless there is going to be what could be called a "chilling effect," the Department needs to bring only clear cases.
- 3.16 When examining the refugee cancellation jurisprudence a helpful place to start is the seminal decision of *Refugee Appeal 75574* [2009] NZAR 355.
- 3.17 In that case the Authority held that there must be a causal connection between the *procuring* and the alleged fraud, forgery or false or misleading representation or concealment of relevant information. The case involved a refugee from Iran who although he had been in New Zealand since 1996 was determined to be a refugee in 2002. Soon after his grant of refugee status he obtained an Iranian passport from the embassy in Wellington which had on it a last departure date of 5 June 1996 "from Mehrabad". The evidence suggested that the inference was that the refugee had therefore departed legally and not illegally as alleged in his refugee claim. There was however evidence that a nominal "departure date" can be fictitiously inserted into a record. The Authority was satisfied that there was "mere suspicion" but no more, and accordingly cancellation was not upheld.

- 3.18 In *Refugee Appeal 76175* 30 April 2008, the fact that an appellant who had obtained refugee status on sexual orientation grounds but had later married, did not take the case above the “mere suspicion” level. That case however involved an individual who after his grant of refugee status had adopted a conservative Christian belief and had genuinely come to disapprove of his past and his sexual preferences. There was no evidence to establish he was not previously homosexual nor that at the time of his refugee appeal he did not intend to continue to be homosexual, or that his sexuality did not compel him in that direction.
- 3.19 This can be contrasted with *Refugee Appeal 75376* 11 September 2006 where it was discovered that the appellant, at the time of his first appeal was in fact living in a de facto relationship with a woman, and with whom he had (according to the evidence) a robust sexual relationship. The relationship had come to light as a result of a police family violence report in respect of a complaint made by the, at the time, de facto partner. The Authority held that the existence of the heterosexual relationship was a material factor as the refugee grant was based not only on the sexual orientation claimed, but on the likelihood that the sexual orientation would be maintained (even if the appellant was bisexual) after refoulement to Iran.

4.0 Loss of Citizenship

- 4.1 As discussed the process engaged with determining the loss of citizenship does not involve any opportunity for the full consideration of humanitarian factors unless exercisable within the Minister of Internal Affairs’ discretion within the word “may” as set out in s17 (2):

“Subject to section 19 of this Act, the Minister *may*, by order, deprive a New Zealand citizen to whom this section applies of his New Zealand citizenship if he is satisfied that the registration, naturalisation, grant, or any grant requirement was procured by fraud, false representation, or wilful concealment of relevant information, or by mistake. [Emphasis added]

Section 17(3):

The Minister may not deprive a person of New Zealand citizenship under subsection (2) if—

- (a) the citizenship was acquired by mistake; and
- (b) to deprive the person of that citizenship would leave the person stateless.”

- 4.2 There is a statutory interpretation problem with s17(3) and whether citizenship can be deprived where the person will be otherwise stateless or whether that only occurs where a mistake has occurred. The author’s view is that the connecting word “and” between s17(3)(a) and (b) has the meaning “or” or “and/or” as it sometimes does. So far no case has been

brought on appeal to the High Court involving a person who will end up stateless since the 2005 amendment, though under this régime some of the previous persons who have had their citizenship deprived might not have been deprived: see *Wang* discussed below. The dual possible interpretations of the word “and” as either conjunctive or disjunctive was recently discussed in the Court of Appeal in *DA Constable v Auckland District Law Society*, [2010] NZCA 237, 8 June 2010, where it was held that “and” meant “and/or”. The point is that the “and” here means “and/or” and any deprivation that takes place cannot go ahead if it will leave the citizen stateless. The question will be however whether the person is truly stateless where they may have lost their status as a citizen by virtue of acquiring their New Zealand status, but where they may normally re-apply and re-obtain their citizenship of birth. In the case of Sri Lanka, for example, the answer may be that re-acquisition is available whereas a different answer may apply to former citizens of the People’s Republic of China. Added to this complexity however is the simpler possibility that the home country does not in fact recognise the right of their citizens to acquire a new nationality (Iran), and that they do not cease to be citizens even when this is prohibited in the national law. Stateless cases need to be prepared carefully. It may be better for example to lodge an application for re-acquisition in order to establish that re-acquisition is not possible.

- 4.3 Deprivation cases are few and far between. Since 1990 there have been approximately 40 averaging out at no more than two a year.⁹ There have been only approximately six that have gone on appeal to the High Court.¹⁰
- 4.4 I have argued elsewhere that the deprivation of citizenship cases could have been brought under the one umbrella and that the setting up of the new IPT provided an opportunity for that to occur. The assessment of overseas evidence is a highly specialised process. With experience built up over years, the existing immigration Tribunals and their Members are amply equipped for these tasks. The High Court appropriately, for example, gives deference to the RSAA, which is without a doubt a tribunal with a world-wide reputation. Its cases have been cited in the upper appellate courts including for example the House of Lords.
- 4.5 In *Wang*¹¹ which came before the Court in 1997, the High Court heard the evidence of three officials from the Peoples’ Republic of China who

⁹ Email from Bruce Ross of 13 May 2010 available on request.

¹⁰ i. *Heng v Minister of Internal Affairs* (unreported, Auckland M16/95 24 April 1996)
ii. *Lama v Minister of Internal Affairs* (unreported, Auckland M1268/95 18 June 1997)
iii. *Rajan v Minister of Internal Affairs* (unreported, Auckland High Court M1151/95 etc 31 July 1995)
iv. *Hao v Minister of Internal Affairs* [2009] CIV-2009-404-005610.
v. *Wang v Minister of Internal Affairs* [1998] INZLR 309
vi. *Yan v Minister of Internal Affairs* [1998] INZLR 450.

¹¹ Supra footnote 10.

were specially flown in by the Department of Internal Affairs, to confirm the fact that a divorce certificate had not been properly obtained in 1992. Mr Wang had come to New Zealand and had obtained residence on the basis of his marriage with a New Zealand citizen. He asked a friend in China to arrange his divorce with his first wife who remained in China. His friend duly sent him his divorce certificate which was sent then to Mr Wang who filed it in his application for residence. This all happened in 1992. He then acquired citizenship in 1994. The estranged first wife got wind of what had happened and was not happy at being left out and so complained that she had not been served with any divorce application and that therefore the divorce was fraudulently obtained. No charge was ever brought of bigamy, undoubtedly because there was no evidence that Mr Wang had *intended* any irregularity. Mr Wang of course had already lost his PRC citizenship upon acquisition of his New Zealand citizenship in 1994 here, so arguably s17(3)(b) would now apply (unless re-acquisition is possible).

- 4.6 Underlying the whole case however and not argued before Randerson J, was the fact that Mr Wang could and should have been granted residence on the basis of his co-habitation with his New Zealand partner, even if she only had the status as a de facto partner. I am deeply concerned that the New Zealand taxpayer funded an argument to deprive citizenship based on the status of a document that at the end of the day may have been irrelevant to the actual grant of residence (and then citizenship). Remember however that at the time citizenship could proceed on (two years) marriage rather than residence. But that too, by 1997, was also moot, given that by 1997 Mr Wang had met the separate (and later only) route to citizenship through the three-year residential requirement.
- 4.7 In my view the case was poorly handled. As with all cancellation of status cases the question remains whether the document or evidence that was in fact irregular or false *procured* the status. It is argued that there must or ought to remain a jurisdiction that can look around the corner of such irregularities, in appropriate cases, provided on the evidence the irregularity is truly not operative. It is rather a shame that this slightly wider view of things which was contained within the DRT's jurisdiction "as it thinks fit"¹² has been lost. It seems to the writer that if there is an irregularity in the course of a residence or citizenship process, but where the foundation stone upon which the status rests, persists, that legal processes cancelling such status etc are nothing less than a "beat up". Mr Wang essentially did not do much wrong, arguably. The case however should be a careful lesson to applicants to ensure that the documentation that they file is obtained regularly. I doubt however whether the case deters others or whether at the end of the day anything much was achieved, except by punishing Mr Wang for not ensuring that his friend in China had obtained the divorce correctly.

¹² The writer does not agree with Miller J's characterisation in *Minister of Immigration v Vilceanu* that the "as it thinks fit" jurisdiction was tied to the policy and purposes of the Immigration Act.

5.0 Revocation of Permits: Judicial Review or Humanitarian Appeal

- 5.1 The revocation of permits is an area where judicial review can easily play a role but surprisingly few cases have been brought. Immigration officers will sometimes revoke the work permits of workers without any due process but on the word of an employer, who may, after all, be in breach of his obligations of fairness to his worker.
- 5.2 For example a chef at a restaurant may have a bona fide dispute with his employer for any number of reasons. Annually the writer's practice deals with several such cases where a revocation notice has been sent out to a worker often at residential premises also owned by the employer in circumstances where the worker has left the employment for legitimate reasons and is in the process of filing a variation of conditions, in order to work for someone else. Some employers coerce their employees by suggesting they have the power to "cancel" their employees' permits. Immigration officers hand this power to employers by carrying out such a revocation at the behest of the employer, without first discussing it with the employee. The summary revocation of permits without actual notice to the worker is an insidious practice that throws away every scintilla of due process. It is not enough to say that the cancellee can reapply. What then happens is that a war of words develops, and the worker may be obliged in order to establish the bona fides of his dispute to file a case in the Employment Relations Authority. Fairness requires that both sides be heard.
- 5.3 It is not enough to simply provide for a period of time during which the permit holder can show cause before the revocation of the permit. Especially for low-paid workers, even if the revocation notice comes to his or her attention (which is often not the case) the onus is then placed on the shoulders of the worker to obtain immigration legal assistance. Such matters can be complex. Furthermore, there is no appeal to a judicial body or tribunal, apart from judicial review to the High Court. A compliance officer is invited to review the matter where "just cause" is challenged, but where a variation of conditions or a fresh permit has been filed the processing officer will note the revocation and the underlying ground for the revocation which then becomes an inbuilt reason to decline the application for a fresh permit or a variation of conditions.
- 5.4 The usual standard revocation letter makes no mention of the right to challenge the lawfulness of the revocation notice by way of judicial review (High Court) but curiously refers to the right to appeal against removal (within 42 days of the revocation becoming effective) on humanitarian grounds. Of course the Removal Review Authority is not a reviewing Court. It is of concern that advice as to one appeal right is tendered by the Department of Labour but not the other. This is not a quibble. The Removal Review Authority has complained about the way in which sometimes clearly judicially reviewable cases come before it,

where review has not been filed, but instead an appeal against removal, in cases where there are simply no humanitarian factors but a blatantly wrong revocation decision has thrown the individual's permit out the window.

- 5.5 Faced with a 3-month time limit to file in the High Court, there is also never time to do both. Confronted with the often negligent advice to file an appeal against removal, and the revocation letter also seeming to give this advice to appeal to the RRA, one can readily understand the client's confusion. Further, of course, legal aid is generally not available to an unpermitted person to challenge a decision under the Act (except for a refugee decision). It is available to residents having their status challenged.
- 5.6 An example of a case that backfired because it was filed in the wrong forum is *Removal Appeal No. 46694*, 29 May 2008. After a complicated history of revocations and High Court action the appellant's work permit was revoked for a third time.¹³ The RRA however was unable to consider the lawfulness of the revocation.
- 5.7 In cases involving workers who have been deprived of their permits, of relevance is Article 16 of the Migration Employment Convention (Revised) 1949. Article 6 ensures that Member States (New Zealand is a Member) must not discriminate against migrant workers in relation to the access to matters involving *inter alia* their remuneration where such matters are the subject of the control of administrative authorities. A worker without a permit has no access to the ERA if he is the subject of removal or cannot work during his ERA/Employment Court enquiry. It is noted that this particular convention is not one that is referred to elsewhere in the immigration context but the right to a permit whilst pursuing a collateral legal right is of fundamental importance. Of course it is also not unrelated to Article 7 of the ICCPR (International Covenant of Civil and Political Rights), the right to be free of inhuman or degrading treatment, not to mention Article 8 and the right to be free from slavery and servitude. Arguably unpaid workers or workers being forced to work, for example, for an extra 20 hours a week, without pay, amounts to degrading treatment and possibly also servitude. Couple this with the fear of many such workers, often reasonably held, that if they attempt a change in their employment that INZ will cancel their permit summarily at their employer's behest, and it is clear that there is an absence of due process. Of course the worker will have access to legal aid to assist with the employment case but not with the judicial review revocation challenge or Ministerial to preserve or obtain a permit so that he may take the employment case. Hopefully his new employer or a lawyer willing to act pro bono will help out.

¹³ *L v Removal Review Authority and the Chief Executive of the Department of Labour*, High Court Wellington, CIV 2005 485 1601, 3 March 2006, Ronald Young J.

Case study 1

A student arrives and feels that after two days the institution at which he has a permit to study does not come up to the mark, and so he finds an alternative. In particular he does not like the rules of the institution which provide for a fine, should he fail any paper. Within the time permitted under the Education Act he applies for a refund and immediately sets about applying for a Variation of Conditions to enable his new-found institution to be named on his student permit. The first institution refuses to make the refund. The student appeals the refusal to the IEAA and succeeds. In the meantime the new institution, without a fee, allows the student to attend classes. Immigration finds out the student is studying without having had the Variation of Conditions finalised and so revokes the permit, citing the fact that the permission to study was to study at the first institution and good character grounds based on study (at the new institution) without a permit. On the “good cause” decision INZ refuse to grant a permit to allow study at the second institution (the Variation of Conditions having failed because the course at the second institution was of a different duration which meant a fresh application and not a VOC should have been filed). The officer dealing with the good cause submission knows of the successful outcome of the IAAE.

Case study 2

Two chefs decide they are fed up with the extra hours they are expected to work. They talk to another employer who is willing to take them on. Knowing that their current boss might get precious, they secretly file their Variations of Condition so that when they come to resign they will already have that in their hands. Having set the wheels in motion they hear of another chef who was assaulted by the boss. Still attending work their boss somehow gets wind of their intentions to resign and rings INZ to claim they were AWOL. They had been attending at work. The notice was faxed to their accommodation where they lived with eight or nine other chefs (and who therefore all now know that INZ now carry out summary revocations). The two go to the Immigration counter and try to show cause explaining their employment issues but in bad English. The officer refuses to consider the employment issues and filenotes a failure to show cause decision. During the notice of revocation period the two continue to attend work and are paid. The Variation of Conditions finally arrives on an officer’s desk who then writes to the lawyer who filed it that the VOC cannot now be considered (though it was filed first) because the permit has been revoked. A full (written) submission and narrative statement are then filed with Compliance still within the revocation notice period, who then respond by email saying that there has been an “appeal” already (the over-the-counter plea) and a second one was not available. This is in spite of the fact that the information in the written submission (with declaration, evidence attached etc) was filed within the two weeks allowed to show cause.

6.0 Transitional Provisions under the new Act

- 6.1 The question arises as to what will occur under the 2009 Act where there are rights of appeal and/or review of decisions that are made prior to the Act coming into force. Will for example the four immigration tribunals continue for a time alongside the IPT?
- 6.2 Notably the IPT deals with appeals under the 2009 Act: 184(b). The 2009 Act applies to appeals from the IPT (s184(c)). The repeal of the old Act occurs as a result of section 404 which comes into force when the 2009 Act comes into force. It is not a provision that is postponed by section 2. Through section 407 certain matters are carried over from the 1987 Act, such as an obligation to leave if unlawfully in New Zealand, lawful detention, or where a person is subject to a removal order or deportation order. Immigration policy in force is carried over by s 409(1) and (2).
- 6.3 Appeals that are not determined at the time the 2009 Act comes into force are however determined by the IPT in terms of the old Act: s446(2). The IPT has all of the powers of the former tribunals (s446(2)(b)). A crossover however occurs if the matter has been allocated to a Member or in the case of the DRT, set down for hearing. Otherwise the matter is allocated to the IPT which in accordance with s446(2)(a) is determined by the IPT under the relevant provisions of the 1987 Act.
- 6.4 Different rules apply to appeals before the RSAA where it is not the setting down point but the lodgement of the appeal itself (and if caught during the notice period that period continues). Accordingly the time for lodgement of an appeal under the old Act will still apply, and once lodged, before or after the 2009 Act comes into force the case continues as if the 1987 Act applies throughout.

7.0 Conclusion

- 7.1 Although the drawing together of the immigration tribunals into one may prevent repeated appeals and to a certain extent will streamline some aspects of cancellation cases there remains a disconnect between the cancellation of refugee status and citizenship except where criminal charges are also brought. The 2009 Act in my view takes a step back by peeling off those who have been involved with identity fraud by boxing them out of an appeal right by the mechanism of the start up of the time for lodging appeal. Sometimes there is a good reason for the misuse of an identity and sometimes the interests of others are at stake who may also be innocent, such as children, parents or partners.
- 7.2 More importantly, questions regarding the efficacy of cancellation processes of whatever type have been raised. Weak refugee cancellation cases based on tenuous inferences ought never to be brought. Weak

cases simply bring the legal system into disrepute, and create unnecessary anxiety. Although the Tribunal may inevitably come to the rescue, the refugee and/or protected person may have lost all desire to live in this country. Refugees do return home for genuine reasons, sometimes ignoring their own personal risk, in order to spend time with sick or dying relatives, to find a partner, or sometimes to protect their property rights. A trip home on its own ought not to be the basis for a cancellation case, except in the clearest of cases. Information entered into a passport issued by a country well-known for its own internal fraud, also ought not to be taken at face value.

- 7.3 Provided that weak inferences are regarded as not taking the procurement question above the “mere suspicion” level then the Tribunal can rectify over-zealous cancellations. The writer has noted, coinciding with the publication of *Refugee Appeal 75574* last year, a greater willingness on the part of the Department of Labour to put *some* cancellation enquiries aside and to issue a warning where appropriate. Although there needs to be a deterrence I question the effect of cancellation cases in New Zealand upon persons caught up in events on the other side of the planet.
- 7.4 Further, the refugee cancellation process itself (as also the citizenship deprivation process) do not consider humanitarian circumstances. That is still left to a second enquiry. Clients who decline to participate in a refugee (or as it will be soon called a protection) cancellation proceeding, simply because they are citizens may in fact be playing with fire. It is far better not to risk being the first refugee deprivation proceeding where “may have been” is asserted to mean “has obtained”. It is surely important not to lose the opportunity to separate out the wrongful act (if there was one) from the “procurement”.
- 7.5 Similarly it may be far better to submit humanitarian circumstances, if they do exist, to the Minister of Internal Affairs and to ask him not to deprive citizenship in exercise of his “may” discretion. Some causes of action under Judicial Review will not arise unless the information and evidence in support of the fairness or reasonableness argument is submitted to the decision-maker.
- 7.6 Potentially the better place to determine whether a person is “stateless” or not in terms of s17(3)(b) of the Citizenship Act would have been the IPT rather than the High Court on a deprivation proceeding. It would be dangerous to leave that to the subsequent IPT process because statelessness might not necessarily amount to exceptional circumstances of a humanitarian nature that would make deportation unduly harsh or unjust. It would be better to put the information before the Minister of Internal Affairs and to take on review or appeal to the High Court against deprivation under the Citizenship Act.
- 7.7 These are just some of the issues that lie ahead. Suffice it to say that not only is immigration decision-making at the Tribunal level a complex and

specialist area, but moreover cancellation cases of all types, are particularly complex. They inevitably require an enquiry into whether impugned acts or documents were truly material to the decision to grant (a temporary visa, a residence visa, refugee (protection) status or citizenship). Such matters require a careful analysis of evidence in the immigrant context after calling upon an evaluation of often unsworn evidence alongside personal testimony, but more importantly an evaluation of information coming from the home countries involved, where fraud and misinformation is internally, common. Perhaps the *Zaoui* refugee appeal is the best example of the fact that the assessment of information about a person sourced back to a persecuting or highly corrupt country such as Algeria was, needs careful evaluation by experts (and not by SIS officers reading material on the internet and taking it at face value after an hour or two of research). Of greater concern to the writer was the manner in which our former Prime Minister queried the findings of the RSAA publicly in relation to the *in absentia* findings of certain courts in Europe against Ahmed Zaoui. Had the Prime Minister taken the time to read the decision of the RSAA, then she would have known that the Tribunal had thoroughly dealt with the issue in a carefully reasoned manner over dozens of pages. Moreover the government was able to present information to the Tribunal, and had counsel present. The matter was fully traversed and argued. At which point the normal deference to Courts or Tribunals should have applied.

- 7.8 Arguably there is at least 18 or 19 years of expertise on each or the 4 current tribunals (the Deportation Review Tribunal of course dates back before the 1987 Act or the 1991 amendments and the RSAA although not initially statutorily based had its first hearings in June 1991). It has to be the hope of us all that this expertise will be retained and developed on the soon-to-be-formed Immigration and Protection Tribunal.

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