

IMMIGRATION LAWYERS ASSOCIATION OF AUSTRALASIA

The Role of Policy in Immigration Law in Australia and New Zealand:

Two different approaches in the administrative law context

David Ryken
Ryken and Associates
Barristers & Solicitors
P O Box 501, DX CP20540
AUCKLAND 1140
TEL: 09 356 7370
FAX: 09 356 7372
EMAIL: David@rykenlaw.co.nz
WEBSITE: www.rykenlaw.co.nz

Introduction

The view held by many is that Australia is the better destination for immigrants around the globe with higher average wages and lower taxes. A closer look however indicates that Kiwis can stand tall. We can also be proud of our immigration system. There are expat Australians working within the Department of Labour who have indicated they specifically do *not* want to go down the Australian path.

We are often made to feel that life in Australia is cheaper, the health and education systems are better, the climate is sunnier and life is better. New Zealand cannot compete with Australia's mineral resources and our exports are commodity driven (agricultural products) which leads to higher susceptibility to the ups and downs in international markets and currency fluctuations. Australians might be surprised to know however that New Zealand has a larger percentage of manufacturing per GDP (15%)¹ than does Australia (11%). We spend more of our GDP on education (6.7%) and 95% of our 4-year-olds are in kindergarten (compared with 65% in Australia). We look after our old people better with 2% of retired Kiwis with incomes less than half the median income, compared with Australia at 27%.

We are less well off with child poverty with 15% of our children living in relative poverty compared with 12% in Australia and 6% in Scandinavian countries. Whilst behind on income and social welfare spending, New Zealand is ahead in other areas, with an efficient economy, plenty of food and water, and our old people seem to be better off. We drink less alcohol, our divorce rates are lower and our average marriages last longer (13 years compared with 8). We regularly reach the top 10 places in surveys of the best places to live, the least corrupt and the happiest place to live. Some 14,500 Australians (two thirds of whom were once New Zealanders) came to live here in 2009, the highest since 1999. As the title of this paper suggests, not everything that is Australian deserves to be copied in New Zealand. Our countries are simply different, and so too are our immigration systems.

The role that written policy rules play in New Zealand's immigration law is markedly different from Australia. This paper will examine some of these distinctions within the context of New Zealand's existing case law and with a sideways look at our new Immigration Act 2009, yet to come into force.²

In writing this paper special acknowledgement should be given to the assistance given in Maria Jockel's paper presented at the 36th Australian Legal Convention in September 2009: "The Collision of Law and Policy: Department of Immigration and Citizenship's Administrative Decision-Making Powers and the Law."

The first and most marked difference in the New Zealand immigration system is that residence policy (but note, not temporary policy) has a binding character to it. Currently this is found in section 13C (1) of the Immigration Act 1987:

"Where a visa officer or an immigration officer, or subject to sub-section (2), 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 Government residence policy that was applicable at the time the application was made and any discretion exercised shall be in terms of that policy."

¹ *By the Ditched Divided*, Dr Jennifer Curtin and Mark Broatch, Sunday Star Times, 31 January 2010.

² At the writing of this paper the dates for implementation are yet to be announced but should be known shortly.

Section 13C (2) then goes on to allow an exception to be made, but only by the Minister of Immigration.

The “policy” is now referred to as the Operational Manual though that includes residence as well as non-residence policy.

In 2003 after losing the battle in the NZAMI proceedings³ the Labour Government introduced into the Immigration Act 1987 a lapsing provision enabling it to lapse classes of residence applications that it no longer liked (section 13BB). This enabled it to lapse all those applications affected by the proceeding which were caught up in the backlog needing job search visas, but without 6.5 on the IELTS. The lapsing provisions have, as far as is known, not been used since but clearly involve a mechanism that the Government can use if it changes its mind and is constrained by s 13C (1). However it must “lapse” a class of applications and not an individual’s application.

That having been said, all residence cases fall to be considered on the basis of the policy provisions at the time of filing, and accordingly policy is read as if it is regulation or statute and is enforceable either through an appeal to the Residence Review Board or on a further appeal or review to the High Court. No commentary to the policy is promulgated, although when policy changes the amending circular or the government’s media release may assist in interpreting these changes (as extrinsic aids in the search for meaning, to clarify the purpose of the amendment and to sort out any residual ambiguity). The only authoritative commentary available is the case law both at the Tribunal and at the High Court. There are also office internal directives promulgated within Immigration New Zealand and in addition to that several branch offices have produced a set of guidelines with their take on various documentary requirements, but these are all unofficial and do not have the *imprimature* that the Operational Manual has.

This very brief description can be compared with the Australian system where the policy rules are found in regulation and with a set of officer guidelines (called PAMs) exceeding all up, in excess of 3,000 pages.⁴

As in Australia the judiciary have articulated a wider interpretative approach to policy rules.⁵

³ *New Zealand Association for Migration and Investments v A.G.* [2006] NZAR 45 High Court, Randerson J. The Government tried to extinguish a long backlog of applicants by increasing the English language requirements for a “job-search” visa from IELTS 5.0 to 6.5. The Court held that the job search visa which was only granted to residence applicants who had enough points but for a job offer, was part of residence policy and that the change therefore offended s 13C (1) and was therefore unlawful. The lapsing provisions were pushed through overnight 6 weeks after the Court’s ruling.

⁴ Jockel, Commonwealth Legal Convention Paper, *The Collision of Law and Policy: Department of Immigration and Citizenship’s Administrative Decision-making Powers and the Law*, p. 1.

⁵ *Patel v Chief Executive of the Department of Labour* [1997] NZAR 264. Full Bench Court of Appeal, 264 at 271: “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 however *Chiu v Minister of Immigration* discussed infra.

Nevertheless in New Zealand there is a quite clear tradition of treating immigration policy as akin to black letter law. See *Hossain v Chief Executive of the Department of Labour*, Wellington High Court, 21 June 2002, Doogue J. The case, in which the writer was counsel, involved the question of whether an Australian citizen could sponsor a spouse without having settled first in New Zealand. The wording of the policy rule made no mention of first being domiciled but the officers at the Sydney branch had inferred the requirement into the rule arguing that it was implicit. The Residence Appeal Authority (as it then was) held that the broad intention of immigration policy indicated domicile should be required. The High Court however overruled the RRA by simply returning back to the plain text and upheld the appeal by looking at the plain meaning and refusing to imply domicile. The rule was soon after changed and now expressly requires that an Australian citizen must be domiciled in New Zealand before they become eligible to sponsor their partners.

Within New Zealand's immigration scheme, moreover, there is a built-in mechanism for dealing with exceptional cases that fail some aspect of a policy rule. As officers cannot make an exception the case will fail and one then invokes an appeal to the Residence Review Board's (RRB) discretionary power to recommend an out-of-policy grant to the Minister (to which the Minister is not bound but in practice normally follows). There is no need to attack the immigration officer's exercise of a discretionary power by way of judicial review, because he has no such power under s 13C. A power lies with the Minister under s 13C (2) to make an exception, but normally the Minister will not process a residence application. An alternative approach is to engage the Minister directly under s 13C (2) prior to filing (see discussion below).

New Zealand's primary visa/permit qualifying rules therefore lie in our "policy" rules contained within the Operational Manual and not within statute or regulations. Our Immigration Act is expressed as "framework" legislation.⁶ Of course the legislation defines who is for example potentially subject to deportation but there is very little guidance on how our immigration tribunals (soon to become one super-tribunal under the 2009 Act) apply fairly broad legislative tests. The detail for immigration officers processing temporary and residence visas lies in the policy instructions.

Under the new act the Operational Manual will become, under s 22 of the 2009 Act "immigration instructions." We join Australia in doing away with the distinction of visas and permits. Immigration instructions are defined as statements of governmental policy (s 22 (8)) and are *not* regulations, however s 13C under the 1987 Act is now found in s 72 but in slightly different terms. Section 72 (1) states:

"Where the Minister or immigration officer makes any decision in relation to an application for a residence class visa, that decision must be made in terms of the residence instructions applicable at the time the application was made and any discretion exercised must be in terms of those instructions."

Subsection (3) then goes on to preserve the Minister's "absolute discretion" to make an exception in any particular case.

The new Act also preserves the recommendatory power to grant an exception by the tribunal (now to be called the Immigration and Protection Tribunal) on the basis of "special circumstances": s 188 (1) (f). It is heartening to note the threshold for an exception remains at "special" circumstances rather than "exceptional" circumstances.

⁶ It is understood this description is also used in Australia. But in New Zealand the Operational Manual, at least the residence chapters is binding whereas PAMs is not though it is treated as such.

The most notable distinction between the Australian and New Zealand immigration systems therefore is that in Australia the primary visa rules are contained in legislation and policy is then a question of defining how the rules apply to particular applications. In New Zealand the primary rules are contained in what will soon be called Immigration Instructions, which however are binding in residence matters. In New Zealand, the Minister of Immigration can alter the instructions, close a visa class or open a new one, overnight, if necessary, without the need to comply with any of the normal legislative change mechanisms, including select committees and the time involved in the passage of legislation through three readings and debate in the House of Representatives. In New Zealand for example we make no mention of spousal visas in either the Act or in Regulation. Neither do the words “Skilled Migrant Category” appear anywhere in the Act. The Act does not concern itself with the decision processes involved in discriminating (who may be granted a visa or not) except in broad terms (an overstayer may not etc).

In some classes of visa (Skilled Migrant Category and in some business investor cases) there is the added rampart against judicial review and appeals during the Expression of Interest stage. A decision whether or not to “invite” a residence application or not, has no right of appeal or review (though many at the bar including the writer are keen to challenge the privative clauses). That is carried over from the 2003 post-NZAMI case amendments into the new Act.

Although the right of judicial review is preserved in residence cases by s 187 (8), this only applies to onshore applications. Query however whether the Court will issue a remedy where an appeal right to the Tribunal was not exercised.

The new Act continues to apply the normal rules of natural justice in that applicants for temporary entry are entitled to reasons where refused: s 27 (1), but only where the person is onshore and the reasons are not the subject of classified information. It will be interesting to see whether the practice of providing reasons to temporary visa applicants offshore will continue as it currently operates (without a statutory requirement to do so).

As New Zealand picks up under the new Act (coming into force dates have not yet been announced at the writing of this paper), it is anticipated the residence policy rules will continue much as they are. As in Australia there are areas of controversy. Questions of interpretation however are likely to remain “black letter” questions of textual interpretation. This is in spite of the occasional broader statement by the judiciary that immigration policy is not as “rigid” as statutory instruments may be. In the majority of cases the plain meaning applies and inferences are not to be implied. This difficulty that often arises however is that the Operational Policy itself is poorly drafted and at times difficult to follow.

The fundamental point is that the soon-to-be-called “immigration instructions” are arguably not departmental *guidelines*, but a binding set of rules.

Given the volume of immigration litigation in Australia one might be forgiven for supposing that the system in New Zealand is less prone to contention. In times of crisis the Minister can shift criteria overnight by amending the instructions but preserving the rights of those that have already applied. At other times a whole class of applicants could be “lapsed”, though one would hope that this escape valve is not opened too often (so far it was only used in 2003). In the writer’s view the lapsing provisions are a serious intrusion into the rules of natural justice as they could be used to disenfranchise

bona fide applicants who have a legitimate and binding expectation as a result of s 13C (now s 72) to a particular outcome. Perhaps however at some future point nuclear free New Zealand will need to cut off a deluge of unwanted nuclear physicists. The whim of government to disentitle an individual with a previous statutory entitlement to a particular legal outcome however takes us back to pre-Magna Carta days.⁷

The exercise of discretion within immigration instructions generates similar problems in both jurisdictions. The problems surrounding whether a position matches the description in ANZSCO for example and whether the decision-maker considers and weighs up all the information provided will be matters the new Tribunal will need to continue to correct. The special circumstances jurisdiction must also remain unfettered by any of the actual policy provisions.⁸

The problem the New Zealand system has is that, with at times three layers (Expression of Interest, residence application and appeal) processing deserving cases can sometimes be lengthy and time-consuming. Provided there is a compelling case for an exception to policy the Minister may from time to time be approached under s 13B (2) for a ruling on an exception. From the writer's practice, the Associate Minister recently waived the centre of gravity test for a parent for example, but whilst issuing the policy waiver direction the Minister will normally then require the application to be filed in the normal way (to test all other criteria). There appears to be no reason why the Minister could not continue this practice under s 72 (3) of the new Act though strictly speaking these provisions discuss the power to make *residence decisions* by the Minister rather than to make a decision concerning a component criterion or criteria. It is hoped the Minister will continue to examine individual cases with a view to making exceptions to policy if deserving. A Somali refugee paraplegic with special needs who wants to sponsor a relative to be his caregiver might be an example.

Any discussion comparing our two immigration systems would not be complete without noting the differences in the two approaches to administrative law in the two countries. Without embarking on a detailed analysis the striking feature is the collapse in New Zealand of the jurisdictional error/non-jurisdictional error in *Bulk Gas Users Group v A-G* [1983] NZLR 129 (CA) which, while not closing the door entirely, essentially asserts that the High Court is the arbiter of error of law (following Lord Diplock's lead in *Racal Communications Ltd* [1981] AC 374 and follows the UK developments and therefore diverges from *Hickman* etc and Dixon J's position and the ensuing Australian line of cases.

Appearing in the courts in New Zealand, in a judicial review immigration case of any sort, once you can bring your case within error of law you are home. The Court will intervene. The judiciary truly do see their position as independent, although deference will be given when reviewing a specialist tribunal. The collapsing of the writs into one process in 1977 in the Judicature Amendment Act may have given the courts in New Zealand wider powers than in most other jurisdictions (see Joseph, *Constitutional and Administrative Law in New Zealand* at paragraph 20.4.2). Harder to review is an outcome which is within the range of possible outcomes and accordingly review still

⁷ For a discussion of the right to a determination and the interplay with Magna Carta see: *Unitec v A.G.* [2006], NZLR 65, Miller J, overruled on another point by the Court of Appeal, see also *Fitzgerald v Muldoon* [1976] 2 NZLR 615 where the newly elected Prime Minister Muldoon purported to abolish the compulsory superannuation scheme without having convened Parliament. Wild C J declared Muldoon's actions were illegal.

⁸ *Martin v Chief Executive of the Department of Labour*, HC Auckland, 4 November 1998, Cartwright J, unreported.

does not become appeal, or at least in theory. As an avid reader of the administrative law decisions of the Courts in Australia one cannot help but wonder whether Cooke P (later Lord Cooke of Thorndon) was being prophetic when he called his paper, which he gave in his February 1986 address at the University of Auckland (see *Judicial Review of Administrative Action in the 1980s*, Oxford University Press, ed. Taggart) *The Struggle for Simplicity in Administrative Law*. Cooke's simplicity of course was that the decision maker must act in accordance with law, fairly and reasonably, and that fair means fair and reasonable means reasonable (as opposed to Lord Diplock's tripartite legal standard in judicial review in the *CCSU* case of illegality, irrationality and procedural impropriety).

Of course one of the distinguishing features of New Zealand immigration administrative law is the role of international human rights instruments which create a mandatory relevant consideration: see *Tavita v Minister of Immigration* [1994] 2 NZLR 257, but also now *Ye and Qui v Minister of Immigration* [2009] NZSC 76 and the implicit acceptance in the judgement of Elias CJ on the role of international obligations at paragraph 5. The concurring majority (Blanchard, Tipping, McGrath and Anderson JJ) also accept the point implicitly, so well written into New Zealand's legal framework has this become (any avid reader of the discussions of the upper courts in Australia is aware of the amount of ink expended on this topic). The High Court of Australia seems to sit alongside the occasional majority in the US Supreme Court islands in the sea of opposing world-wide opinion.

One of the growing areas or focal points in New Zealand perhaps under the rubric of fairness is the duty to act consistently. Misinterpreting policy guidelines may induce a failure to act consistently but also as seen above, in the context at least of residence policy, misinterpreting the policy rules should fold over into error of law given s 13C etc. In *Chiu v Minister of Immigration* [1994] 2 NZLR 541 the Court of Appeal ruled that the consequence of misconstruing policy rules or guidelines will usually vitiate the decision.

Conclusion

In conclusion, "policy" in the New Zealand immigration context includes a textual set of rules which are binding on residence officers. With regard to temporary visa decisions the new Act preserves a right of reconsideration for those onshore who currently hold an unexpired visa. As under the current Act for temporary entry there are no rights of appeal and judicial review is ousted to applicants overseas but not onshore (s 186) (for both residence and temporary). Although temporary visa instructions will also be promulgated, and although there is no provision saying they are binding, temporary onshore decisions remain amenable to judicial review and an applicant will continue to be able to argue error-of-law where the policy is misapplied or misunderstood. There is a growing recognition too that mistake of fact may in some circumstances found judicial review,⁹ though re-filing might often be a cheaper and quicker remedy.

⁹ *Zafirov v Minister of Immigration* [2009] NZHC 419 (7 April 2009) Mallon J.