

Delegated Decision Makers – obligation to record reasons for decision

Legislation	Ombudsmen Act 1975, ss 13, 22; Immigration Act 1987, s 35A; Immigration Act 2009, ss 11, 61
Agency	Ministry of Business, Innovation and Employment
Ombudsman	Judge Peter Boshier
Case number	277752
Date	February 2016

Background

A complaint was made to the Ombudsman about the decision of Immigration New Zealand, part of the Ministry of Business, Innovation and Employment, to refuse requests made under section 35A of the Immigration Act 1987.

The complainant was a Fijian national residing in New Zealand who, following the expiry of his student permit, remained in the country unlawfully. His unlawful status necessitated the request of a grant for a permit under section 35A of the Immigration Act 1987 (now section 61 of the Immigration Act 2009).

Requests were made to the Associate Minister of Immigration (AMOI) for a student permit pursuant to section 35A. Those requests were considered and refused by Departmental Decision Makers (DDMs), who did not record reasons for their decisions. The complainant approached the Ombudsman with concerns that the DDMs had failed to take into account his circumstances and familial considerations when refusing his requests.

Investigation

1. The Ministry was advised of the Chief Ombudsman's intention to investigate the complaint, and comment was requested. The Ministry initially suggested that DDM's, acting on behalf of the AMOI, were not required to record reasons, and that in the absence of recorded reasons the complaint could not be substantiated.

2. The Chief Ombudsman considered the Ministry's comments, and those of counsel for the complainant's immigration advisor, having regard to relevant case law relating to the delegation of decision-making authority.

Chief Ombudsman's opinion

3. The Chief Ombudsman formed the provisional opinion that because the DDMs had failed to record reasons, it could not be determined that all relevant considerations had been addressed and that therefore the Ministry's decisions were unreasonable. The Chief Ombudsman considered that the case notes prepared for consideration of the complainant's requests were insufficient to demonstrate that the decision was properly reached, and that any process omitting to record reasons for a decision was administratively unsound.
4. With respect to the position of the DDM, the Chief Ombudsman formed the provisional opinion that no viable distinction could be drawn between the obligations to record reasons placed on immigration officers who are not DDMs, and those who are, when exercising '*absolute discretion*' under section 35A. The Chief Ombudsman was not persuaded that the need to record reasons was affected by the fact that the AMOI referred a request for ministerial intervention to a DDM for decision. Case law did not support the contention that the DDM was assuming the position of the delegator – in this case the AMOI – or was beyond the jurisdiction of the Ombudsmen Act 1975.
5. The Chief Ombudsman considered that – except in rare cases – it was unlikely that any reliable inference could be drawn from a case note as to how a particular decision was reached by the DDM. The majority of complaints do not lend themselves to making assumptions about why the DDM to decide one way rather than another and, in most cases, the reasons for the decision will not be self-evident from the case note provided. A decision-maker should make a sufficient record to show why they reached the decision that was made.
6. For the purposes of accountability and transparency, good administrative practice requires that proper records of decision-making processes should be created and retained. This is particularly important where decisions are made that may have significant impact on the person(s) concerned, such as the ability to remain in New Zealand. The Chief Ombudsman saw no reason why the decision of a DDM on a request for ministerial intervention should be considered by an Ombudsman in a different way to that of other Ministry officials exercising absolute discretion, to ensure that good administrative practice is observed consistently.
7. The Chief Ombudsman determined that the adequacy of any record made by a DDM will be a question of fact and degree - there can be no prescriptive requirement. However, the record should enable an internal or external reviewer to understand why the decision was made. It would be expected that the record would usually specify what information was relied upon, any resulting factual findings and what persuaded the decision maker to make the particular decision.

8. The Chief Ombudsman acknowledged that the Immigration Act explicitly removes the rights of persons to receive reasons for decisions, and considered that records need only be sufficient for internal departmental purposes or for the purposes of external review. It is not an exercise in justifying the decision or an inflexible requirement permitting of no exceptions. However, the record should demonstrate both that the DDM has read and considered any case note provided, and the reasoning by which the decision was reached.
9. The Chief Ombudsman considered that where reasons were not provided, or were inadequate, a number of practical consequences were likely to arise, including:
 - a. the commencement of investigations into complaints where recorded reasons may otherwise have satisfied the Ombudsman that the discretion was properly exercised;
 - b. a need to interview the decision maker; and/or
 - c. adverse conclusions being reached about the decision.
10. The Chief Ombudsman did not accept that the increase in workload as a result of changing practice would be unduly burdensome. Creating a record merely requires recording in writing the assessment that has already taken place in the mind of the decision maker. Such expectations are no different to those placed on the majority of decision makers in central and local government agencies and, accordingly, the Chief Ombudsman would not regard the additional work involved in recording reasons as a justification for departing from good administrative practice.
11. The Chief Ombudsman gave the Ministry an opportunity to comment on the provisional opinion.
12. The Ministry reviewed its position and agreed that steps would be taken to immediately commence the recording of reasons by DDMs considering requests under section 61 of the Immigration Act. A remedy was also offered to the complainant.

Outcome

13. The Chief Ombudsman concluded that the Ministry had acted unreasonably in failing to record reasons for the decisions of DDMs, but in light of the remedial action taken by the Ministry, no recommendation was necessary.