

Unreasonable implementation of s 35A processes in relation to the residual places policies

Legislation:	Ombudsmen Act 1975, s 35A Immigration Act 1987
Agency:	Immigration New Zealand, previously part of the former Department of Labour, now part of the Ministry of Business, Innovation and Employment
Ombudsman:	Chief Ombudsman Dame Beverley Wakem
Case reference:	177864
Date:	2012 (2010)

Implementation of residual places policies by Immigration New Zealand in 2004-2005 to enable Pacific residence quotas to be filled - guidance for immigration officers on s 35A processes relating to policies was late and unclear - inconsistent advice was consequently given to some overstayers - creation of, and failure to manage, erroneous expectation that the policies represented an opportunity for overstayers to change their immigration status - departmental acknowledgment of systemic failings - relevant actions of Immigration New Zealand were considered to be unreasonable – remedy provided to affected people.

Introduction

An investigation was made into whether certain Pacific people who were in New Zealand without permits had been disadvantaged by the way in which Immigration New Zealand dealt with their requests for permits between 15 November 2004 and 31 March 2005.

Since the conclusion of the investigation, the Chief Ombudsman has held discussions with the Department, and with its successor, the Ministry of Business, Innovation and Employment, on the appropriate remedy to be offered to affected people.

Background

On 13 August 2004, a press release by the then Minister of Immigration, Hon Paul Swain, announced:

“ ... a series of measures the New Zealand Immigration Service would be taking to enable Pacific Island quotas to be filled.”

The residual places policies - comprising the Residual Quota Places Policy and the Residual Pacific Access Category Places Policy - came into effect on 15 November 2004. The policies' objective and criteria for residence were set out in policies S1.11 and S1.41 of Immigration New Zealand's Operational Manual.

Policy S1.11.a provided:

S1.11 Residual Quota Places Policy (15/11/2004)

- a. *If the annual quota of places available under the Samoan Quota is not filled by applicants drawn from the ballot, the NZIS will call for residence applications from applicants who:*
- i. *are Samoan citizens (having been born in Samoa or born overseas to a Samoan citizen who was born in Samoa); and*
 - ii. *are lawfully in New Zealand at the time their application for residence is made; and*
 - iii. *have an acceptable offer of employment or have a partner, included in the application, who has an acceptable offer of employment (see S1.10.5); and*
 - iv. *are aged between 18 and 45 inclusive; and*
 - v. *meet a minimum level of English language ability (see S1.10.15); and*
 - vi. *meet the minimum income requirement (see S1.10.10) if they have dependants; and*
 - vii. *meet health and character requirements.*

Policy S1.41.b provided:

S1.41 Residual Pacific Access Category Places Policy (15/11/2004)

- b. *If the annual quota of places available for each country under the Pacific Access Category is not filled by applicants drawn from the ballots, the NZIS will call for residence applications from applicants who:*
- i. *are citizens of the countries that have unfilled places; and*
 - ii. *are lawfully in New Zealand at the time their application for residence is made; and*
 - iii. *have an acceptable offer of employment, or have a partner, included in the application, who has an acceptable offer of employment (see S1.40.30); and*
 - iv. *are aged between 18 and 45 inclusive; and*
 - v. *meet a minimum level of English language ability (see S1.40.40); and*

- vi. *meet the minimum income requirement (see S1.40.35) if they have dependants; and*
- vii. *meet health and character requirements.*

The deadline for submitting applications under the residual places policies was originally 31 January 2005 but was extended to 31 March 2005.

Immigration New Zealand's Pacific Division was established in January 2005. Shortly thereafter, a series of community meetings was held to explain and promote the residual places policies to relevant Pacific communities.

The Chief Ombudsman understood that these meetings were open to all, and not just to those who were lawfully in New Zealand even though lawful status was a requirement for applying under the residual places policies. Those who attended claimed to have been told that they could request a temporary permit under s 35A if they were not lawfully in New Zealand but nevertheless wished to be able to apply under the policies.

Section 35A provided:

35A Grant of permit in special case

1. *The Minister may at any time, of the Minister's own volition, grant a permit of any type to a person who—*
 - a. *Is in New Zealand; and*
 - b. *Is required under this Act to hold a permit to be in New Zealand; and*
 - ba. *Does not hold a permit to be in New Zealand; and*
 - c. *Is not a person in respect of whom a deportation order is in force; and*
 - d. *Is not a person in respect of whom a removal order is in force.*
2. *Nothing in subsection (1) of this section confers on any person the right to apply to the Minister for a permit, and where any person purports to apply for a permit under this section,—*
 - a. *The Minister is under no obligation to consider the application; and*
 - b. *Whether the Minister considers the application or not,—*
 - i. *The Minister is not obliged to give reasons for any decision relating to the application, other than the reason that this subsection applies; and*
 - ii. *Section 36 of this Act and section 23 of the Official Information Act 1982 shall not apply in respect of the application.*

Internal instructions and guidelines, in addition to those already in force, were issued to managers and staff to assist in the determination of s 35A requests. Officers provided

information, both at the community meetings and in response to written or personal approaches made to branches, on the procedures involved in making a s 35A request and/or an application under the residual places policies.

One instruction was the *Section 35A Customised Service Process (CSP)*. The CSP sought to “[e]ncourage genuinely settled people to present for consideration including people who are overstayers or are unsure of their status and prospects”. It stated that it wished such persons to be confident that “their full circumstances will be considered openly and fairly” and it sought to facilitate the process by which well-settled overstayers might “gain productive work and enhance the quality of their lives”. In this regard, it provided for certain steps to be taken by Visa & Permit, and Pacific Division, officers where overstayers had approached Immigration New Zealand either at a community meeting, or by presenting themselves to a branch and demonstrating a genuine commitment to requesting a s 35A permit.

Complaints

The Chief Ombudsman received complaints about the manner in which Immigration New Zealand’s branches and the Pacific Division dealt with:

- s 35A requests tendered by people during the relevant period who wished to regularise their status in order to apply for residence under the residual places policies; and
- purported applications for residence submitted under those policies.

A common theme running through the complaints was a lack of understanding and certainty among members of the relevant Pacific communities as to the relationship between the s 35A processes and the residual places policies – specifically, the requirements and deadlines that had to be met by overstayers who wished to become eligible for residual places.

Complainants also believed that there were inconsistencies in Immigration New Zealand’s decision-making which deprived them of the opportunity to regularise their status at a time when Immigration New Zealand appeared to be actively encouraging well-settled overstayers to come forward, as well as an alleged loss of a “*pathway to residence*” under the residual places policies.

The number of complaints received raised the question of whether the procedural concerns complained of might have been indicative of wider systemic shortcomings.

On the information to hand, the Chief Ombudsman decided to investigate a complaint that Immigration New Zealand had acted unreasonably:

- by dealing with s 35A requests in a manner that did not give sufficient regard to its own internal instructions and/or conflicted with its advice to requesters; and
- by returning applications for residence unactioned on the grounds that the applicants in question were unlawfully in New Zealand, without first determining their s 35A requests for temporary permits.

The Chief Ombudsman duly wrote to the Chief Executive of the Department to notify him of her intention to conduct such an investigation.

Investigation

At the time, the investigation differed from others that Ombudsmen had undertaken to the extent that it was not concerned with the merits of the individual cases, or with whether any, or all, of the decisions in those cases could reasonably be supported on the facts.

The investigation instead focused on the wider systemic issues that the Chief Ombudsman had identified. Accordingly, while some of the complaints that the Chief Ombudsman had received were included in the investigation as examples of the systemic issues in question, not every complaint received was included.

At the time, aspects of the Department's immigration operations were being investigated by a number of other agencies, including the Office of the Auditor-General and the States Services Commission. As there appeared to be a degree of commonality between the issues raised by the Chief Ombudsman's investigation and those raised by the Auditor-General's inquiry, the Chief Ombudsman agreed to the Department's proposal that it should defer its response to her pending the completion of that inquiry.

The report that the Chief Ombudsman received from the Department summarised the Auditor-General's findings and related them in broad terms to the main concerns that the Chief Ombudsman had identified:

- The Department accepted the Auditor-General's finding that guidance for officers on s 35A processes relating to the residual places policies was late and unclear, with the consequence that people were likely to have been given inconsistent information.
- Insofar as the Auditor-General also noted that there was confusion among staff about how the residual places policies were intended to apply in practice, this was likely to have resulted in officers giving inconsistent advice to clients and their advisers.
- To the extent that many people in the community gained an erroneous expectation that the residual places policies represented an opportunity for those unlawfully here to change their status, Immigration New Zealand had not successfully managed this expectation and its equivocal actions may in some respects have contributed to it.

However, the Department also saw the following points as being relevant:

- The Government had decided that only people who were lawfully in New Zealand were eligible for residence under the residual places policies. This was clearly stated in the policies themselves.
- The residual places policies were not intended as an opportunity for those unlawfully here to change their status (although, as noted above, the Department acknowledged that it had not successfully managed this expectation).

- While the Department accepted that Immigration New Zealand's actions may in some ways have contributed to that expectation, it considered that such expectations, even if legitimately held, could not give rise to a de facto policy or be converted into a substantive right.
- Although the giving of inconsistent information was unfortunate, this did not create an entitlement to a permit under s 35A, or a right to consideration of a request for such a permit, or a right to have a residence permit application held until such time as a temporary permit might be granted under s 35A.
- The residual places policies were expressly not intended to be generally open to persons unlawfully in New Zealand and any variation in Immigration New Zealand's advice to people could not operate to bind decision-makers in the exercise of their discretionary powers on individual requests.

Nevertheless, in view of the misconceptions that arose, the Department accepted that a remedy should appropriately be offered to the complainants and advised that it was willing, pursuant to s 35A, to consider the grant of permits *"based on a consideration of their particular current circumstances"*.

Outcome

On the available information, and to the extent that the Department acknowledged that there had been systemic failings in the manner in which s 35A processes relating to the residual places policies were implemented, the Chief Ombudsman considered the complainants' concerns in this regard to have been justified and the relevant actions of Immigration New Zealand to have been unreasonable.

This conclusion did not, however, extend to Immigration New Zealand's actions in returning applications for residence unactioned in cases where the applicants were unlawfully in New Zealand. The Chief Ombudsman agreed with the Department that any instructions or advice that were inconsistent with legislation and policy could not give rise to any entitlement – for instance, that Immigration New Zealand would accept and hold an application for residence pending the processing of a s 35A temporary permit request. While some complainants may have acted in reliance on such representations, the Chief Ombudsman was not persuaded that this could create any entitlement to effect being given to those representations. The fact that some officers wrongly gave undertakings that were outside their statutory powers did not provide grounds for sustaining a complaint that it was wrong for the applications in question to have been returned.

The Chief Ombudsman's investigation was concluded on the above basis.

Remedies offered

The investigation focused on the wider systemic issues that the Chief Ombudsman had identified. Following its conclusion, the Chief Ombudsman has held ongoing discussions with the Department, and its successor, the Ministry, on the remedies that should appropriately be offered to those who were affected by Immigration New Zealand's deficiencies.

Those whose complaints were included in the investigation

With respect to these people, it was agreed that Immigration New Zealand would consider the grant of permits based on a consideration of their particular current circumstances.

Those who were not included in the investigation but who had complained to the Chief Ombudsman before 18 November 2011

With respect to these people, it was agreed that where the relevant requirements were met, Immigration New Zealand would invite people to submit a visa request for consideration under s 61 of the Immigration Act 2009 (which had in the interim replaced s 35A).

Those who have not complained to the Chief Ombudsman but who consider that they were affected by the deficiencies identified by the investigation

As the Department accepted that there had been systemic failings, the Chief Ombudsman considered that it would be artificial to limit any remedy solely to those who had complained to her.

Following a series of discussions with the Department and the Ministry, it has now been agreed that a remedy should also be offered to any other individuals who may have been affected by Immigration New Zealand's actions at the time.

Under the terms of this remedy, Immigration New Zealand will invite people who meet the requirements set out below to submit a visa request for consideration under s 61.

The current remedy

In order to be considered for inclusion in this remedy, the individual:

- must meet the following criteria:
 - he or she must be in New Zealand with unlawful status; and
 - he or she has to have made a request to Immigration New Zealand under s 35A between 15 November 2004 and 31 March 2005 and the request was refused by a branch; and
 - he or she has to be from Tonga, Samoa, Tuvalu, Kiribati or Fiji; and
 - he or she has to have been aged between 18 – 45 years as at 31 March 2005; and
 - he or she has to have had a job offer or to have been in paid employment at the time the s 35A request was made;

and

- must not fall within one of the following groups:

- people who were outside New Zealand between 15 November 2004 and 31 March 2005; or
- people who were subject to removal orders or otherwise subject to s 7 of the Immigration Act 1987 at the time the s 35A request was made; or
- people whose last permit, prior to requesting a s 35A permit during the relevant period, had been a limited purpose permit; or
- people who were granted permits during or after the 15 November 2004-31 March 2005 period and who subsequently overstayed again; or
- people who have had their circumstances considered by the Associate Minister of Immigration (AMOI), or by a Departmental Decision Maker (DDM), after their 2004-2005 s 35A request was refused by INZ; or
- people who are currently receiving AMOI or DDM consideration, or consideration of a separate immigration complaint by the Chief Ombudsman; or
- people to whom s 61 is not applicable because they are either outside New Zealand, hold a current visa, or have been served with a deportation order.

If individuals wish to be considered for inclusion in the remedy, they will need to consider the **Notification of remedy** and complete the **Remedy assessment form**, which can both be found at www.ombudsman.parliament.nz