Ombudsman
Fairness for all

Opinion

Unreasonable delay in residence application that warranted urgency

Legislation:	Ombudsmen Act 1975, ss 13, 22 (see appendix for full text)
Agency:	Ministry of Business, Innovation and Employment, Immigration New Zealand
Complaint about:	Delay in making decision on residence application
Ombudsman:	Dame Beverley Wakem
Reference number(s):	179838
Date:	11 April 2013

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Summary

The complainant and his family are living in a refugee camp in Kenya. The complainant's sister lives in New Zealand. On 22 January 2009, the complainant applied for residence in New Zealand under the Adult Sibling policy. Immigration New Zealand (INZ) placed his application in a managed queue. The application was still being processed three and a half years later when a complaint was made to me in July 2012 about INZ's delay in reaching a decision.

Based on the information before me, I have formed the opinion that INZ unreasonably delayed in processing the application, and failed to take into account the humanitarian factors favouring prioritising it.

In the course of this investigation I indicated in a provisional opinion to INZ that I proposed to recommend that it prioritise the application. Following my provisional opinion INZ did expedite the application and permanent residence has now been approved in principle for the applicant. However it continues to argue that other like cases should not be similarly prioritised.

I recommend that INZ puts in place processes to ensure that priority is given to *all* residence applications from persons facing particular hardship or deprivation.

Ombudsman's role

1. Under section 13(1) of the Ombudsmen Act (OA), I have the authority to investigate the administrative acts, decisions, omissions and recommendations of the Ministry of Business, Innovation and Employment, of which INZ is part.

2. My role is to consider the administrative conduct of INZ, and to form an independent opinion on whether that conduct was fair and reasonable (section 22(1) and (2) of the OA refer).

3. The relevant text of these statutory provisions is set out in Appendix 1.

4. My investigation is not an appeal process. I would not generally substitute my judgment for that of the decision-maker. Rather, I consider the substance of the act or decision and the procedure followed by INZ, and then form an opinion as to whether the act or decision was properly arrived at and was one that INZ could reasonably make.

Background

5. The complainant, his wife and young children are living in a refugee camp in Kenya, having fled from their country of origin. The complainant's sister is living in New Zealand. On 22 January 2009, the complainant applied for residence in New Zealand under the Adult Sibling policy.

Period prior to allocation to a case officer

6. On lodgement, the application was placed in a "managed queue" as it fell within a non-priority capped stream of work. The complainant was advised on 28 January 2009 that the application had been transferred to the Immigration Profiling Branch (IPB) for processing.

7. On 17 February 2010 an official from Hon Christopher Finlayson's Electorate Office emailed INZ expressing serious concerns about the complainant's safety:

> *"I was recently approached by a constituent regarding an immigration matter. She is a …. national living in New Zealand, whose brother is currently in a Kenyan refugee camp. He has applied for New Zealand residency, and as far as I know, the application is being approved. The issue is as follows: The application process is expected to take 18 months and* ***there are grave concerns for the brother's safety during this time****. The constituent, along with a refugee campaigner, expressed their concerns to me, and requested that we find some way of speeding up the process given that* ***the brother's situation is described as perilous and unsafe****." [emphasis added]*

8. The email was forwarded to the IPB and the Immigration Manager responded by email dated 18 February 2010. The Immigration Manager's email made the following key points:

   - That the application was number 165 in a managed queue;
   - INZ is "*required to adhere to the IAC 09/06 which determines the order and manner of processing residence applications*";
   - That while INZ could appreciate the concerns outlined, many applicants are in a similar situation.

9. A follow up letter was sent to INZ directly from Hon Christopher Finlayson on 11 July 2010 reiterating that the complainant was living in a refugee camp whilst awaiting the outcome of his application, advising of the difficulties in keeping a job offer open for him, and seeking an update.

10. On 17 August 2010 the Immigration Manager of the IPB wrote to Mr Finlayson advising that the complainant was now 13th in the capped managed queue. She again stated that she appreciated the sponsor's concerns. However she reiterated her earlier advice that INZ is "*required to adhere to the IAC 09/06 which determines the order and manner of processing residence applications*", and that many other applicants were in a similar situation.

11. The application was eventually allocated to a case officer on 10 September 2010.

Period between allocation to a case officer and national security check

12. A preliminary assessment of the application was completed by 3 November 2010. Communications from the complainant appear to have generally been responded to

promptly and the delays during this period appear to have been caused principally by an omission in the complainant's initial application and difficulties the complainant's representative had in communicating with the refugee camp where the applicant is residing.

National Security Check

13. The application was sent to an external agency for a national security check on 31 August 2011 and was still being processed at the time I wrote my provisional opinion on 20 December 2012. I understand that certain further material was subsequently sought by the external agency after the application was sent, due to parts of the application form having been left blank.

14. By the time the application had been sent to the external agency the complainant's representative had made a number of further submissions regarding the need for the application to be prioritised due to the precarious circumstances the complainant and his young children were facing in the refugee camp.

15. The IPB Immigration Manager's 26 June 2012 response to an email from the complainant's representative of the same day requesting that the matter be escalated was as follows:

> *"I can see no compelling reason to request urgency in this particular case when we have a large number of applicants that are in similar circumstances and are also awaiting the 3rd party check. These checks can take anywhere from 6/18 months to be completed. Its unfortunate but we have no control over these timeframes."*

Request to progress other parts of application

16. The complainant's representative asked INZ in an email to the allocated immigration officer dated 9 November 2011, and again on 20 January 2012, whether other parts of the application could be progressed while the external verification was being conducted to avoid further delay.

17. By email dated 24 January 2012 the immigration officer wrote to the representative as follows:

> *"Thank you for the email, unfortunately we cannot progress the application until after we receive the external verification back. I have discussed this with my manager and there is no way around this."*

Complaint

18. The complaint is that the delay by INZ in processing the residence application was unreasonable.

19. The complainant expressed concern that:

a. INZ unreasonably delayed in processing the application for residence under the Adult Sibling policy by taking three and a half years to process the application;

b. INZ failed to take into account the humanitarian factors favouring prioritising of the application, namely the fact that the complainant is in a refugee camp in Kenya and has young children;

c. INZ refused the request to advance the other parts of the application while awaiting the outcome of the (delayed) external verification thereby exacerbating the delays;

d. the requirement under the Adult Sibling policy for the complainant to have a valid job offer was unreasonable given the delays in processing the applications; and

e. INZ has decided that the Adult Child and Adult Sibling policies are flawed and has closed them, but has failed to remedy the situation for the complainant by prioritising his application and/or modifying the requirements of the (closed) instructions to expedite his application.

Investigation

20. On 6 August 2012, I notified the Ministry of the complaint. I requested a copy of the complainant's file and a report addressing the following matters:

    a. comments on the concerns raised;

    b. the number of applications awaiting processing under the Adult Child and Adult Siblings policies and the average time since the applications were lodged;

    c. what if any process INZ employs to prioritise outstanding applications with underlying humanitarian circumstances; and

    d. the procedures employed by INZ for verifying applications.

21. The Ministry provided the requested material on 24 October 2012.

22. I met with the complainant's representative on 26 October 2012 to further discuss the complainant's concerns.

23. The investigator assisting me in this case also contacted INZ on 27 November 2012 seeking clarification of certain matters. INZ responded on 27 and 28 November 2012.

24. After taking into consideration the information provided by both the Ministry and the complainant I formed a provisional opinion on the complaint. This was conveyed to the Ministry on 20 December 2012. I invited the Ministry to make any further comments before I decided whether to confirm my provisional opinion as final.

25. The Ministry responded on 15 February 2013.

INZ position prior to provisional opinion

26. Throughout the process INZ has not disputed the information provided by Chris Finlayson's office, and reiterated by the complainant's representative, regarding the very difficult or "*perilous*" circumstances in which the complainant is living in the Kenyan refugee camp.

27. INZ's position prior to my provisional opinion was that, while it was sympathetic to the plight of the complainant and his family, it considered itself constrained in its ability to expedite the process for the applicant or other similarly situated persons.

28. The perceived constraints were the rules in its internal policy IAC 09/06 purportedly requiring complaints to be considered chronologically prior to allocation to a case officer for processing, the number of other persons in a similar situation to the complainant, and INZ's inability to control the external agency which is currently performing a national security check.

29. INZ placed particular emphasis on the large number of similarly placed applicants in declining to expedite the complainant's application, both during the "managed queue" phase and during the period of processing by the external agency. As I understand it, INZ's position was that because there are a large number of applicants in a similar position it would not be appropriate to prioritise the complainant's application, or the applications of any other similarly placed applicants.

30. The Ministry further stated in its letter of 24 October 2012 that the only applications that IPB is prepared to expedite are cases which involve "*a critical life and death situation*". It stated:

> *"IPB advise that there is no set criterion to prioritise applications for applicants with underlying humanitarian circumstances. Many applicants are living in refugee camps awaiting the outcome of a residence application. IPB does not intervene (i.e. prioritise an application) unless there is a critical life and death situation."*

Provisional opinion and response

31. I communicated a provisional opinion to INZ on 20 December 2012 that INZ had acted unreasonably in its delays in processing the application. I said that I was proposing to recommend that it should both expedite the complainant's case and devise a broader system whereby all urgent cases are prioritised.

Standard for intervention

32. I formed the provisional opinion that the IPB's standard for intervention, that the only applications that warrant prioritisation are those that involve "*a critical life and death situation*" is unreasonably high. This is because there are plainly situations that fall short of the imminent death of the applicant that warrant urgency.

33. INZ did not directly address this part of my provisional opinion in its comments, although some of its general comments referenced below are relevant to the application of this standard.

IAC 09/06

34. I formed the provisional opinion that INZ's refusal to expedite the application during the period it was waiting in a managed queue, due to the alleged requirements of IAC 09/06 to process the applications in order, was unreasonable.

35. I stated that INZ did not have proper regard to its discretion in IAC 09/06 to afford urgency to the application when advising the complainant that his application could not be prioritised.

36. This is because while paragraph 5 of IAC 09/06 required the managed queue to be processed in order, paragraph 6 conferred a specific discretion on INZ staff to depart from that order where an applicant's circumstances warrant urgency. Paragraph 6 states:

> *"These instructions do not prevent visa and immigration officers according urgency to the processing of any particular residence application when the individual circumstances warrant that."*

37. Again INZ did not address this part of my provisional opinion directly in its comments although its general comments set out below are of relevance to this matter.

Number of similarly placed applicants and external agency relationship

38. I communicated in my provisional opinion to INZ that I did not accept that the number of applicants in difficult circumstances was a reason not to prioritise those applications. I questioned the number of applicants affected, based on statistics that appeared to suggest that the number of affected applicants was comparatively low. However I stated that even if the number was higher than those statistics indicated, this should not preclude the prioritisation of those applications.

39. INZ responded by providing me with a fuller set of statistics, being all residence applications from countries that require a national security check. INZ has separated the applicants into two groups: Group A, being applications from countries in which the applicants were likely to face "dire circumstances" and, Group B, applications from other countries. In 2012 applications from the "dire circumstances" group numbered approximately one sixth of the applications (797, compared to 4848). In 2011 the applications from "dire circumstances" group numbered approximately one eighth (638, compared to 5127).

40. INZ has stated, based on the fresh statistics, that "given the number of applicants who are likely in difficult circumstances, INZ cannot accept your provisional view … that it puts into place a process to give priority to applicants who "are suffering particular hardship or deprivation"". It has stated to do so would "amount to an undue administrative burden" on INZ. The administrative burden would, it argues, derive from the "definitional problems" such a process would create, the difficulties in assessing the

hardship level of each application, and the likelihood of "constant disputes with applicants and their agents as to whether an individual met the threshold".

External agency relationship

41. In my provisional opinion I stated that while INZ cannot dictate the processes of the external agency, there was nothing to preclude it from alerting the external agency to its view that an application warranted expeditious processing, and requesting that it be prioritised accordingly. I observed that while the external agency would not be bound by any such request, it would presumably make some endeavours to accommodate it if the reason for seeking priority was explained.

42. INZ advised that subsequent to my provisional opinion it did request the external agency for priority on the national security check, and that clearance was provided shortly after that.

43. While INZ appears to be no longer concerned about the independence of the external agency, it continues to express concerns about my proposal that the external agency be asked to prioritise other applications where the applicants were suffering particular hardship or deprivation. It has cited, variously, potential "relationship" difficulties, the unfairness to other applicants who would be "pushed back into the queue", and the anticipated problems of reprioritising the caseload in the event that particularly urgent applications were received.

Request to expedite case

44. INZ did not initially address the part of the complaint regarding its refusal to process the outstanding parts of the application while it was being processed by the external agency, apparently relying on its more general view that it was inappropriate for the matter to be treated with urgency.

45. As no reasons were advanced to the complainant's representative in the 24 January 2012 email from Mr Sorenson for INZ's inability to process outstanding parts of the application, I formed the provisional opinion on the information before me that there was no valid basis for not expediting the remainder of the application.

46. In responding to my provisional opinion, INZ now advises that it did in fact progress the application as far as it was able, and further that "almost all of the requirements appear to have been met and there was little or no processing to be done aside from waiting for the security clearance". It described its communications around this as "less than perfect". It acknowledged that it "could and perhaps should have alerted [the complainant's representative] to this fact".

47. INZ also acknowledged that "the language used by the respective officers [to describe the security checking process] may have confused [the complainant's agent]". This was because of the use of inconsistent technical terminology to describe the parts of the process.

Assessment of comments on provisional opinion

Creating priority pool

48. I commend INZ for contacting the external agency and facilitating a resolution of the complainant's individual case following my provisional opinion. However I am concerned that INZ is resisting applying a broader solution to prioritise the applications of other persons in like situations. I consider INZ's position with respect to similarly situated complainants to be untenable.

49. I confirm my opinion that the IPB's standard for intervention to prioritise a case, being a "critical life and death situation" was too high and that the IPB should intervene to prioritise cases where applicants are suffering particular hardship or deprivation.

50. I further confirm my opinion that INZ erred in its application of IAC 09/06. It was unreasonable of INZ to consider itself constrained by paragraph 5 of IAC 09/06 to process the complainant's application chronologically, in light of the specific discretion in paragraph 6 to depart from the queue where individual circumstances warranted urgency.

51. As noted above, INZ disputes prioritising other residence applications in the managed queue prior to allocation to a case officer due to concerns about the administrative burden this would create for INZ. The specific administrative burden derives from definitional problems, the difficulties of assessing the hardship level of each application, the likelihood of "constant disputes with applicants" as to whether the threshold was met, and the likely numbers affected.

52. I would first note that INZ's concerns have not precluded its adoption of policy IAC 09/06, paragraph 6 under which urgency can be accorded "when the individual circumstances warrant that" (although as stated above the policy was misapplied in this case).

53. I do not dispute that setting up a process for prioritising urgent applications that are waiting in the "managed queue" would be less straightforward administratively than the current approach, under which applications are processed chronologically. However I consider that the administrative challenges that may be involved in setting up such a procedure cannot justify retaining the status quo, under which the dire circumstances of complainants are simply ignored. Any administrative challenges that would result from prioritising the applications concerned would in my view be well outweighed by the advantages such a process would create for the applicants. To set up such a process would also be broadly in compliance with paragraph 6 of IAC 09/06 (although the policy is likely to need to be modified to operationalise this view).

54. Many of the obstacles that INZ anticipates in the creation of such a process could in my view be mitigated by a carefully devised system.

55. INZ's various concerns about excessive numbers, definitional issues as to "particular hardship and deprivation", the difficulties in assessing the hardship level of individual applicants, disputes with applicants as to whether they met the criteria, and disputes with the external agency would likely be minimised if INZ were to create as objective a

process as possible whereby particular classes of applications were considered to *prima facie* warrant priority.

56. One option for such an objective process could be for an initial formula be applied using a combination of country data (similar to that used to compile Group A statistics,) and family data (the existence of vulnerable family members such as very young, or ill or disabled persons). Applicants with one or more vulnerable family members, and who came from a country in Group A, could generally fall within the priority pool. It is noted that this data would likely be available on the face of the application, so assessment of the material would not generally require additional data or representations from the applicants. The system could be tailored if necessary to deal with exceptional cases that fell inside or outside the formula.

57. Any system to prioritise deserving cases would need to be sufficiently flexible to accommodate the prioritising of cases of extreme urgency.

58. I accept that this system will necessarily involve less urgent applications being treated as lower priority cases. I consider that this is a necessary and appropriate outcome of prioritising urgent cases.

Communication of priority cases to external agency

59. It is of significance that the external agency appears to have prioritised the complainant's application in response to a request by INZ following my provisional opinion. This is in spite of INZ's initial concerns that it had no control over the agency. Were INZ to make a more general request in the future for particular applications to be considered on a priority basis it might be assumed that the external agency would be similarly responsive.

60. I remain of the opinion that INZ's current approach, where the external agency is not advised of the applications that should be treated with priority, is unreasonable.

61. In my opinion INZ should routinely advise the external agency of cases that it wishes to have afforded priority. I acknowledge that communication and relationship management issues with the external agency could result from implementing my opinion. For this reason I recommend that INZ seeks to develop protocols with the external agency to facilitate the necessary communications and arrangements.

General comments

62. I acknowledge that that designing and implementing the suggested processes may create administrative challenges. However I consider those challenges would by no means be insurmountable. Retention of the status quo, in which applicants are required to wait for significant periods of time in dire circumstances due to the administrative inconvenience of a new system, is in my view untenable.

Chief Ombudsman's final opinion

63. For the reasons set out above, I have formed the final opinion that INZ has acted unreasonably in the following ways:

    a. The IPB applies an inappropriately high standard for intervening to expedite applications, being "*a critical life or death situation*."

    b. INZ wrongly cited IAC 09/06 in support of a decision not to intervene to prioritise the complainant's application when it was waiting in the managed queue, when paragraph 6 of IAC 09/06 provided it with a specific discretion to prioritise the application.

    c. INZ has unreasonably relied on the number of similarly situated applicants when declining to afford urgency to the complainant's case, and continues to do so with respect to other applicants facing particular hardship and deprivation.

    d. INZ failed to ask the external agency to prioritise the complainant's application, and continues to do so with respect to other applicants facing particular hardship and deprivation.

    e. INZ communicated unclearly to the complainant's agent in the context of a request that the remainder of the application be processed while awaiting the outcome of the security certificate.

Recommendation

64. Pursuant to section 22(3) of the OA, I recommend that:

    a. The IPB broadens its standards for affording urgency to applications beyond "*a critical life or death situation*" to include applicants that are suffering particular deprivation or hardship.

    b. INZ puts in place processes to ensure all current and future residence applicants who are suffering particular hardship or deprivation are dealt with on a priority basis, including those in managed queues.

    c. INZ routinely advises the external agency which applications it seeks to have afforded priority.

    d. INZ seeks to implement protocols with the external agency to manage communications surrounding the prioritising of the urgent caseload.

    e. INZ reports back to me on its implementation of recommendations a., b. and c. and d. within 20 working days of receipt of my final opinion and periodically thereafter if necessary on dates to be notified.

Appendix 1. Relevant statutory provisions

13. Functions of Ombudsmen

(1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the departments or organisations named or specified in Parts 1 and 2 of Schedule 1, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee, or member of any such department or organisation in his capacity as such officer, employee, or member.

(2) Subject to section 14, and without limiting the generality of subsection (1), it is hereby declared that the power conferred by that subsection includes the power to investigate a recommendation made, whether before or after the passing of this Act, by any such department, organisation, committee, subcommittee, officer, employee, or member to a Minister of the Crown or to any organisation named or specified in Part 3 of Schedule 1, as the case may be.

(3) Each Ombudsman may make any such investigation either on a complaint made to an Ombudsman by any person or of his own motion; and where a complaint is made he may investigate any decision, recommendation, act, or omission to which the foregoing provisions of this section relate, notwithstanding that the complaint may not appear to relate to that decision, recommendation, act, or omission…

22 Procedure after investigation

(1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—

appears to have been contrary to law; or

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

(b) was based wholly or partly on a mistake of law or fact; or

(c) was wrong.

(2) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.

(3) If in any case to which this section applies an Ombudsman is of opinion—

(a) that the matter should be referred to the appropriate authority for further consideration; or

(b) that the omission should be rectified; or

(c) that the decision should be cancelled or varied; or

(d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or

(e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or

(f) that reasons should have been given for the decision; or

(g) that any other steps should be taken—

the Ombudsman shall report his opinion, and his reasons therefore, to the appropriate department or organisation, and may make such recommendations as he thinks fit. In any such case he may request the department or organisation to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. The Ombudsman shall also, in the case of an investigation relating to a department or organisation named or specified in Parts 1 and 2 of Schedule 1, send a copy of his report or recommendations to the Minister concerned, and, in the case of an investigation relating to an organisation named or specified in Part 3 of Schedule 1, send a copy of his report or recommendations to the mayor or chairperson of the organisation concerned…