

Immigration New Zealand's decision on section 61 visa request reasonably considered

Legislation	Ombudsmen Act 1975, Immigration Act 2009
Agency	Immigration New Zealand
Ombudsman	Chief Ombudsman Peter Boshier
Case number(s)	417695
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Whether the approach taken by Immigration New Zealand (INZ) about the exercise of absolute discretion when determining requests for a visa under section 61 of the Immigration Act 2009 was reasonable—in this case whether INZ considered relevant considerations regarding international conventions that protect the rights of a child—Ombudsman concluded INZ's decision-making process was reasonable

The Ombudsman receives many complaints about decisions made by INZ regarding requests for a visa under section 61 of the Immigration Act 2009. The section confers a wide discretion on INZ in the context of an individual who has become unlawful in New Zealand and is not entitled to apply for a visa in the ordinary manner. It allows for the grant of a visa by request only and at the absolute discretion of the decision maker. Section 61 contemplates the possibility of a visa request being refused without any consideration and without the requirement to provide reasons for such rejection.

An issue was before the Court of Appeal relating to the exercise of absolute discretion under the Immigration Act 2009 (*Fang v Ministry of Business, Innovation and Employment* [2013] NZCA 190). The Chief Ombudsman determined that he would await the outcome of that decision and reasons before deciding what steps should be taken in this complaint. Following the decision, the Chief Ombudsman determined the approach that he would take to complaints about the exercise of absolute discretion and in the present case, formed the provisional opinion that INZ did not act unreasonably in refusing the complainant's request.

The complainant was in a relationship with a New Zealand citizen and they were married in the month that the complainant's visa expired. The couple had a New Zealand born child. The complainant had been in New Zealand with his family from a very young age and had spent his formative years here. He claimed that by refusing to grant him a visa under section 61 of the Immigration Act 2009, INZ failed to have regard to '*relevant international conventions that protect the family*' (although the complainant did not identify any of those obligations).

When considering a complaint such as this, an Ombudsman must be satisfied that the exercise of power by INZ pursuant to that provision has been done in a fair manner. The Chief Ombudsman was therefore concerned with establishing that the decision maker has: turned his or her mind to the law and international obligations that may apply; considered the factors put forward by the complainant; and recorded how the individual factors are linked to the relevant law and international obligations. Establishing that there has been appropriate consideration of those factors requires that INZ has made an adequate record of decision.

The Chief Ombudsman's investigation was not concerned with determining whether or not he would have reached a different decision. The absolute discretion afforded by section 61 imports a lesser degree of scrutiny and as long as an Immigration Officer has conscientiously considered the request, an Ombudsman will not intervene with respect to the merits of the decision.

Where it is clear the decision maker has taken account of all relevant law and facts, and has appropriately identified applicable international obligations, an Ombudsman would not form the opinion that the discretion afforded by section 61 has been exercised unreasonably. The discretion is such that the presence of particular circumstances cannot mandate a particular outcome.

In this instance it is clear that the submissions made by the complainant were taken into account. The Immigration Officer recognised the application of the ICCPR and UNCROC, and noted the complainant's relationship and child. However, the Immigration Officer concluded that there were not sufficiently compelling reasons preventing the complainant from departing New Zealand and applying for a visa offshore. The Chief Ombudsman was satisfied on the basis of the material provided to him that the request was properly considered and all relevant considerations were identified and taken into account before the decision to refuse was made. The complaint was not upheld.

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