

# Internal prioritisation criteria for Skilled Migrant Category applications and Employment Visa Escalation scheme

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| <b>Legislation</b>    | Ombudsmen Act 1975   |
| <b>Agency</b>         | Immigration New Zealand, a part of the Ministry of Business, Innovation and Employment                                 |
| <b>Ombudsman</b>      | Peter Boshier  |
| <b>Case number(s)</b> | 517513, 520437, 520490, 520652, 520725, 520762, 521293, 521606, 525075, 520597, 526634, 526641, 529519, 531153, 532405 |
| <b>Date</b>           | 16 April 2021  |

## Summary

*Complaints about prioritisation of Skilled Migrant Category (SMC) applications and decision-making under Employment Visa Escalation (EVE) scheme – creation of priority criteria was unreasonable as it was outside authority and lacked transparency – EVE scheme a genuine means of escalation, but reasons for decision should be recorded – Chief Ombudsman recommended apology, fee refund, and practice review – INZ proactively decided to record reasons for EVE decision.*

## Background

The Chief Ombudsman received 15 complaints about Immigration New Zealand's (INZ) decision to allocate Skilled Migrant Category (SMC) residence visa applications in accordance with internal priority criteria. The complainants claimed that:

- INZ was 'cherry-picking' certain SMC applications and allocating these ahead of other applications;
- these prioritisation criteria were inconsistent with the immigration instructions;
- INZ had not been transparent with applicants and prospective applicants about the criteria.

A secondary issue was the Employment Visa Escalation (EVE) scheme, which INZ used to consider individual requests for urgency. Two complainants raised concerns that INZ had not properly considered their requests for escalation.

Four complaints (one of whom also complained about the EVE scheme) were resolved or withdrawn prior to the Chief Ombudsman forming a final opinion.

## Investigation

The Chief Ombudsman notified INZ of his intention to investigate the complaints. His investigation considered INZ's:

1. prioritisation criteria for the allocation of SMC residence visa applications for processing; and
2. decision-making under the EVE scheme.

### Complaint 1 – the prioritisation criteria

#### Relevant law and policy

Section 26 of the Immigration Act 2009 (the Act) gives immigration officers the discretion to determine the order and manner of processing any visa application, unless there are Immigration Instructions giving such direction.

Section 26(4) further provides:

*However, the chief executive may give general instructions to immigration officers and refugee and protection officers on the order and manner of processing any application or claim, or specified classes of application or claim, and, if so, an immigration officer or refugee and protection officer must process an application or claim in accordance with those instructions.*

General instructions given pursuant to section 26(4) are presently set out in A16.1 of the INZ Operational Manual. These instructions are updated from time to time, and, in accordance with section 26(6), can take effect retrospectively.

#### Details of the criteria

At the time the complainants lodged their SMC applications (between December 2018 and August 2019), A16.1 stated:<sup>1</sup>

- a. *First priority will be given to the following types and categories of applications for residence class visas in preference to applications under other types and categories:*

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<sup>1</sup> A16.1 General Instructions as to the order of processing visa applications (30/07/2012) and A16.1 General Instructions as to the order of processing visa applications (24/04/2019).

- i. *Skilled Migrant Category (SMC) applications with job offers will have priority.*

In mid-2018, INZ adopted informal priority criteria to manage the allocation of residence visa applications. Priority was given to SMC applications where:<sup>2</sup>

- the principal applicant's salary was equal to or over twice the median wage;
- the principal applicant worked in an occupation that required occupational registration; or
- the employer was a government department.<sup>3</sup>

INZ advised that the criteria were developed by the residence management team and discussed with the National Manager at the time.

Subsequently, on 24 February 2020, the general instructions in A16.1 were updated to formalise the priority criteria (Amendment Circular 2020/4):<sup>4</sup>

- a. *First priority will be given to the following types and categories of applications for residence class visas in preference to applications under other types and categories:*

...

- ii. *Skilled Migrant Category (SMC) applications with job offers; and within this category, priority will be given to:*

- *Applicants with an hourly rate equivalent to or higher than twice the median wage (currently \$51.00 per hour or an annual salary of \$106,080 or more);*
- *Applicants with current occupational registration where registration is required by immigration instructions;*

In light of this background, the Chief Ombudsman split his assessment of the prioritisation criteria into:

- the period from 24 February 2020 onwards; and
- the period from July 2018 to 23 February 2020.

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<sup>2</sup> Priority was also accorded to Residence from Work (RfW) – Talent (Accredited Employer) applications. The allocation of RfW applications is outside the scope of the present investigation.

<sup>3</sup> This criterion was subsequently removed.

<sup>4</sup> Similar criteria were formalised for RfW applications.

## Assessment

### Period from 24 February 2020

Section 26(5) of the Act gives a broad discretion to the chief executive when giving general instructions:

*In giving any instructions, the chief executive may have regard to such matters as the chief executive thinks fit.*

Where a decision is discretionary, the Chief Ombudsman's focus is on whether the discretion was exercised fairly and appropriately. He looks into the decision-making process and whether the decision was made conscientiously.

The decision to amend A16.1 was made by the Deputy Chief Executive – Immigration (the Deputy CE), acting under delegated authority. The Chief Ombudsman viewed the advice provided to the Deputy CE and the matters he took into account when he issued the general instructions, and formed the view that the decision was consistent with the wide discretion provided by the Act.

Accordingly, the Chief Ombudsman considered that the Deputy CE's decision to give the general instructions in February 2020 was reasonably open to him. He also found that there was nothing in the information at hand to suggest that INZ acted unreasonably by implementing those general instructions.

### Period from July 2018 to 23 February 2020

The situation was different for the period between mid-2018 to 23 February 2020. At this stage, A16.1 gave first priority to SMC applications with job offers.

The question before the Chief Ombudsman was whether INZ was entitled to create a sub-category of priority within that first priority. He formed the opinion that INZ's creation of the informal priority criteria was unreasonable for two main reasons – it exceeded the limits of authority, and lacked transparency.

### Limits of authority

The Act sets out the framework for determining the order and manner in which applications should be processed. As indicated above, the authority to give general instructions lies with the chief executive (or her delegates).

Section 26(4) of the Act provides that, where general instructions have been given, an immigration officer '*must process an application ... in accordance with those instructions*'. The instructions in A16.1 at the time were for applicants with job offers to be given first priority. There was nothing in the instructions to suggest further stratification of priority should take place. A16.1 also permits immigration officers to prioritise applications on a case-by-case basis, where '*the individual circumstances so warrant that*'.

The Act does not permit immigration managers to issue general instructions. Nor did A16.1 authorise managers to create internal, informal priority criteria that superseded the general

instructions. There is a fine line to walk between a reasonable exercise of managerial discretion, within the limits of delegated authority, and exceeding that authority. In this case, the Chief Ombudsman considered that the line had been crossed.

The Chief Ombudsman noted that if INZ considered that the general instructions were not fit for purpose, the proper process would have been to advise the chief executive or her delegate accordingly, and to propose an amendment.

### **Lack of transparency**

The Chief Ombudsman considered that there was a lack of transparency surrounding the informal priority criteria. The informal criteria were not published nor communicated with applicants or potential applicants. Applicants were left in the dark, wondering what was happening to their applications as estimated allocation timeframes came and went (in some cases, by a year or longer).

INZ advised the Chief Ombudsman that it had adopted a number of measures to manage the expectations of applicants. These included the removal of allocation timeframes in acknowledgement letters and referring applicants to its website for updated timeframes, the publication of 'front of the queue' dates on the website (updated fortnightly), and engagement with stakeholders.

INZ did not advise the Chief Ombudsman when it started taking these measures. However, based on the information available, it appeared that INZ only began proactively informing applicants and potential applicants of the criteria after its formalisation in A16.1 in late February 2020.

The Chief Ombudsman understood that prior to this, applicants became aware of the informal priority criteria only through discussions with other applicants and immigration advisers on social media, and through Official Information Act 1982 (OIA) requests.

The Chief Ombudsman contrasted this with general instructions issued under section 26(6), which are transparent and published in the Operational Manual. These instructions could then be used by applicants and their advisers to inform their decisions on whether to apply, manage expectations and make plans. There was no need to make repeat enquiries about timeframes with INZ and/or piece together responses from OIA requests.

### **Outcome**

Having formed the opinion that INZ's creation of the informal priority criteria was unreasonable as it exceeded the limits of authority and lacked transparency, the Chief Ombudsman recommended that INZ should:

1. apologise to the complainants;

2. refund the application fee (minus reasonable administration costs) to affected applicants who no longer wish to proceed with their applications and want to withdraw;<sup>5</sup> and
3. report back on the steps it intends to take to prevent similar issues from occurring again.

## Complaint 2: The EVE Scheme

The Chief Ombudsman considered the broader operation of the EVE scheme, as well as INZ's decision-making in relation to the individual complaint received.

### Details of the EVE scheme

The EVE scheme was established in July 2019, in order to centralise requests for priority in one location, to ensure better consistency. INZ advised that all individual requests for priority allocation (that do not meet the criteria set out in A16.1) now go through the EVE process. Requests received through the mailbox that meet the A16.1 criteria are removed from the EVE process and sent to the SMC queue management for review.

The prioritisation of an application under the EVE scheme is a discretionary decision. There is no set criteria for the decision beyond the three '*exceptional circumstances*' listed in INZ's online EVE information: 1) compelling personal circumstances; 2) humanitarian factors; and 3) matters of national interest.<sup>6</sup> EVE requests are determined on a case-by-case basis, taking into account the information put forward by the applicant.

### Assessment

#### Overall EVE process

Given the broad, undefined EVE criteria, the Chief Ombudsman asked INZ to provide details on how consistent decision-making, and adequate record-keeping, were maintained.

INZ advised that only a very small number of INZ staff make EVE decisions, and decisions are calibrated to ensure that they are consistent. Each time a new staff member joins the EVE team, further calibration is carried out and an initial team member provides coaching for several days. Where a decision is considered 'difficult', it is referred to another decision-maker for their views to ensure consistency. Requests and outcomes are recorded on a master list.

Between October 2019 and March 2020, INZ approved about 23 percent of EVE residence visa requests. INZ provided the Chief Ombudsman with a sample of requests that were approved under each of the three categories, as well as its reasons for declining a number of other requests (including the one that was subject to the present investigation).

Where an agency makes a discretionary decision, the Chief Ombudsman's focus is on ensuring that the discretion was exercised fairly and appropriately. Based on the information provided,

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<sup>5</sup> In the event, INZ opted to refund application fees in full.

<sup>6</sup> Available at: [www.immigration.govt.nz/about-us/media-centre/newsletters/korero/korero-july-2019/employment-visa-escalations-eve](https://www.immigration.govt.nz/about-us/media-centre/newsletters/korero/korero-july-2019/employment-visa-escalations-eve)

the Chief Ombudsman accepted that the EVE process is a genuine route for achieving escalation of a residence visa application, if the circumstances credibly meet at least one of the three EVE criteria. He was satisfied that the decision-making process was appropriate and that there were adequate safeguards to ensure fairness and consistency. He had no concerns about the decisions made in the sample cases provided by INZ.

While the criteria are broad and undefined, the Chief Ombudsman took the view that this left room for discretion to be exercised, as opposed to shackling the decision-maker to a rigid set of definitions. This was consistent with the ability to accord urgency to individual cases in A16.1.

However, the Chief Ombudsman was not satisfied with INZ's record-keeping on EVE decisions. He noted that the master list did not state the reasons for the decision, nor were the reasons communicated to requestors. While the Chief Ombudsman was mindful of the need for a streamlined process, he considered that it is a matter of good administrative practice for reasons for decisions to be recorded.

### **Complaint about individual request**

The Chief Ombudsman considered one individual complaint about INZ's decision on a request to escalate a SMC application. The basis of the complainant's request was that he was from Wuhan, China, which was the epicentre of the COVID-19 pandemic. Due to the prevailing circumstances, he was unable to return to Wuhan in the foreseeable future. He also outlined his work and study experience in New Zealand, and the awkwardness he felt about being from Wuhan.

The complainant submitted his EVE request at 8.30pm and INZ refused it at 8.27am the next morning.

The complainant raised concerns about the speed of the refusal and whether INZ had properly considered his request.

INZ explained that the EVE request was refused because there was nothing in the information provided that showed why it should be escalated ahead of its place in the queue.

Having reviewed the request and the information submitted, the Chief Ombudsman was unable to criticise INZ's decision. He could not see anything compelling or exceptional in the request that would realistically meet any of the three criteria.

One aspect of the complaint was the speed with which the decision was made. However, the Chief Ombudsman considered that there was nothing in the request that would have required lengthy consideration. Once the request had been read and considered, and the decision made, there was no reason to delay communicating it to the complainant.

### **Outcome**

INZ advised the Chief Ombudsman that it would record EVE decisions on its Application Management System (AMS). Further, it would develop a process to communicate to individuals the reasons for declined requests.

In light of this, the Chief Ombudsman did not make any recommendations in relation to the EVE scheme.

### Disclaimer

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