Ombudsman
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Case note

Immigration New Zealand's consideration of a section 61 visa request deficient

Legislation	Ombudsmen Act 1975, Immigration Act 2009, Public Records Act 2005
Agency	Immigration New Zealand
Ombudsman	Chief Ombudsman Peter Boshier
Case number(s)	447247
Date	September 2017

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 including whether it had considered the complainant's submissions about the health of his New Zealand citizen child—Chief Ombudsman concludes aspects of INZ's decision-making processes were deficient

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 arrived in New Zealand on a student visa which expired. He requested a visa under section 61 of the Immigration Act 2009 on the basis of his alleged special circumstances, namely that he was married to a New Zealand citizen and was actively involved in caring for his two New Zealand citizen step-children, one of whom has dyslexia. INZ refused the request.

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 so 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 I 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 was apparent that the complainant had advised INZ that he supported the children '*especially the younger son who is suffering from dyslexia'.* The Chief Ombudsman found that the record of decision was not sufficient to demonstrate that the decision maker took account of all relevant factors when refusing the request. In particular, the reference to the child's dyslexia or the UNCRPD. To this extent, the Chief Ombudsman concluded that the record may be said to be deficient and the possibility that this may have adversely affected the handling of the request could not reasonably be discounted.

However, while the Chief Ombudsman considered the record to have been deficient in this regard, the Ministry subsequently clarified that the UNCRPD was not considered to be plausibly engaged, which indicated that the child's dyslexia had been considered but was not viewed to be sufficiently persuasive to warrant the grant of a visa. On that basis, and on balance, the Chief Ombudsman did not consider it necessary to make any formal recommendation in this case. However, for the sake of completeness, and in the interests of good administrative practice and compliance with the requirements of the Public Records Act, the Ombudsman urged the Ministry: to make an AMS or other record of the fact that consideration had been given to the possible application of the UNCRPD in this case; and to remind decision-makers of the need to record those matters that are considered in the decision-making process.

This case note is published under the authority of the Ombudsmen Rules 1989. It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.