

# Immigration New Zealand’s consideration of a section 61 visa request reasonably considered

<b>Legislation</b>	Ombudsmen Act 1975, Immigration Act 2009
<b>Agency</b>	Immigration New Zealand
<b>Ombudsman</b>	Chief Ombudsman Peter Boshier
<b>Case number(s)</b>	435079
<b>Date</b>	September 2017

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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 including whether it had considered the complainant’s submissions about the active role he had in raising his New Zealand citizen partner’s daughter—Chief Ombudsman concludes INZ’s consideration of the request 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 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 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 the complainant was in a relationship with a New Zealand citizen who had a daughter from a previous marriage. The complainant took an active part in providing care and support to his partner and her daughter. The complainant was in New Zealand unlawfully and had applied for a visa under section 61 of the Immigration Act, based on partnership grounds. In making the request, he noted that he was in a stable relationship, and asked that INZ consider the relevant International Conventions when making a decision on the request. However INZ refused the request.

The Chief Ombudsman considered that INZ had not acted unreasonably in this matter. His investigation made it clear that the decision maker has taken account of all relevant law and facts, and has appropriately identified applicable international obligations, including recognising the application of the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention on the Rights of the Child (UNCROC). The Officer concluded that there were no compelling reasons preventing the complainant from departing New Zealand and applying for a visa offshore. The complaint was not upheld.

*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.*