

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)	449538
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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 the complainant had legitimate concerns about his alleged safety if he was to return to his home country—Ombudsman concludes INZ’s decision making 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 unlawfully in New Zealand following the decline of an application for refugee and protection status in New Zealand. He is in a relationship with a New Zealand

permanent resident and they were married prior to the complainant submitting a request for a visa under section 61 of the Immigration Act 2009, based on the complainant's partner's status and the concerns for the safety the complainant held, if he returned to his country of birth. INZ refused the request and the complainant complained that this decision was unreasonable, claiming that INZ did not consider how the complainant's rights may be affected by his deportation and that INZ may not have considered and identified any international obligations for example, the International Covenant on Civil and Political Rights.

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 it is clear that the submissions made by the complainant were taken into account. The Immigration Officer recognised the application of the International Covenant on Civil and Political Rights (ICCPR), and the rights of the complainant's New Zealand resident partner. There is no suggestion that the relationship was not accepted or was seen as irrelevant to the consideration of the request. However, the Immigration Officer concluded that there were no compelling reasons preventing the complainant from departing New Zealand and applying for a visa offshore.

INZ confirmed to the Chief Ombudsman and provided appropriate documentation to demonstrate, that the request was properly considered before the decision to refuse was made. The Chief Ombudsman was satisfied that INZ appropriately identified all relevant considerations based on the information that had been provided and the complaint was not upheld.

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