

Appeal to Immigration's Removal Review Authority not dependent on timeliness of visa application process

Legislation	Ombudsmen Act 1975
Ombudsman	Mel Smith
Case number(s)	W49098
Date	2002

Delay in processing application for further visitor's permit does not hinder an appeal to the Removal Review Authority - Visitor lodged application for further visitor's permit on day his current permit expired – NZIS advised him 82 days later that his application was declined – also advised him that he should have lodged an appeal against removal 40 days ago – visitor aware of expiry date of original permit and of requirements when seeking a further permit – Ombudsman did not consider NZIS application process or advice was unreasonable – appeal rights to Removal Review Authority not dependent on timeliness of application process – no grounds for Ombudsman to investigate

A man was in New Zealand in 2002 on a visitor's permit and applied for a further visitor's permit on the day that his current permit expired. Nearly three months later, the New Zealand Immigration Service (NZIS) declined his application on the basis that he did not meet the requirement to be a bona fide visitor and had not provided evidence of outward travel arrangements to leave New Zealand. In its letter declining the application, NZIS advised the man that he had '42 days from the date [the] permit expired to lodge a section 35A request. This is a written request with evidence and reasons to support why you wish to apply for another permit'. The man was also advised in that letter that he could also lodge an appeal to the Removal Review Authority (RRA) within 42 days of the expiry of his permit. However, it had taken 82 days for the NZIS to process the application for the further visitor's permit. As a result, the man was no longer able to lodge an appeal to the RRA.

A complaint was made that NZIS failed to process his application in reasonable time and that this had prevented him from exercising his right of appeal to the RRA within the required time limit. The Ombudsman noted that:

- The application form makes it clear that *‘if you are in New Zealand and applying for a further permit, you need to allow sufficient time for a decision to be made on your application before your current permit expires’*. This would ensure that applications are processed well in advance of the expiry date;
- The Judge in the High Court decision of *Awan v Minister of Immigration* [2000] NZAR 655 noted that applications should be submitted to the NZIS *‘reasonably in advance of the expiry of the current permit’*. While the Judge did not comment further as to what constitutes *‘reasonably in advance’* he did note that it would be unreasonable to expect the NZIS to process an application that had been submitted for example *‘only a few days or hours’* before the current permit expired;
- The complainant would have been aware of the date on which his visitor’s permit expired, after which he would be in New Zealand unlawfully. In this regard, the Ombudsman also noted that the application form clearly states that *‘if your permit does expire, your application for a further permit does not make your stay in New Zealand lawful or give you the right to remain in New Zealand while your application is being considered’*; and
- Although the complainant alleged that the NZIS’s delay in processing his application effectively denied him the right to appeal to the RRA, there was in fact nothing preventing him from appealing.

In the circumstances of this case, the Ombudsman did not consider that there was reason for the NZIS to accord urgency to processing the man’s application for a further visitor’s permit. The Ombudsman did not think the man could reasonably expect NZIS to make a decision before his current permit expired later that day and it was very clear in the application form that it should have been lodged earlier, to allow a reasonable time for processing. As a result, the man’s only option for staying in New Zealand lawfully at that time was to rely on the appeal rights provided under the Immigration Act.

As the right to appeal to the RRA is not dependent upon any action or inaction taken by NZIS, including the processing of visitor permit applications, the Ombudsman did not consider there were any grounds upon which he could reasonably commence an investigation in the circumstances of this case.

Comment

The Ombudsman’s refusal to investigate in this case turned on the timing of the man’s original lodging of his application for a further visitor’s permit. Had he lodged it within a reasonable time period prior to the expiry date, a delay in processing the application may have warranted investigation on the basis that the applicant may then have reasonably expected the NZIS to process his application in a timely manner in order to avoid the need for an appeal.

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