Ombudsman
Fairness for all

Case note

Unreasonable failure to ensure immigration detainee advised of right to lawyer

Legislation	Ombudsmen Act 1975, Immigration Act 1987, Immigration Act 2009
Agency	Department of Labour—Immigration New Zealand
Ombudsman	Dame Beverley Wakem
Case number(s)	178226 (W60143)
Date	April 2013

Summary

The Chief Ombudsman considered a complaint that Immigration New Zealand (INZ) had failed to take reasonable steps to ensure that an individual detained by the Police under immigration powers was informed of his right to contact a lawyer while detained and prior to his removal from New Zealand.

The complainant, who was already in Police custody, was not informed of his right to contact a lawyer when he was served with a removal order and detained thereafter by the Police under the Immigration Act 1987 (1987 Act). The Chief Ombudsman formed the opinion that INZ was required by the 1987 Act (section 140(4)) and by immigration policy (D4.15.1.a of INZ's Operational Manual) to take reasonable steps to ensure that the complainant was aware of his rights to representation with respect to his immigration matters and, in the circumstances of this case, that INZ had failed to do so.

The Chief Ombudsman noted that, at the time of her investigation and review, the Immigration Act 2009 (2009 Act) was in force. She considered the application of that Act as it relates to the arrest and detention of individuals unlawfully in New Zealand and confirmed that the principles in this case could apply to the current legislation.

INZ accepted the Chief Ombudsman's opinion and undertook to review its procedures to ensure not only that a detainee has been advised of the right to contact a lawyer but also that there is adequate record of this.

By way of remedy for the complainant, INZ agreed to cancel the removal order and to waive the complainant's liability for the costs of removal.

In addition, INZ later agreed that, should the complainant lodge an application for residence, any such application would be afforded priority and outlined the steps it had taken to improve its policies and procedures.

Background

1. On 14 November 2007, the Police made an arrest for trespass and, later that day, notified INZ of the arrest and made enquiries about the individual's immigration status. The Police were responsible for ensuring that he was advised of his right to legal representation.

2. INZ confirmed that the person the Police had arrested—the complainant in this case—was a Tongan national and was liable for removal. It was arranged that the Police would detain him on police charges until an INZ officer was able to come to the Police station to serve him with a removal order.

3. The removal order was duly served at 7.43pm on that same day. At that time, the complainant's detention status changed from criminal to immigration related as it was clear that the Police did not intend to pursue its charges against him. From then, until his removal from New Zealand on 17 November 2007, the complainant was detained by Police at the request of INZ under the Immigration Act 1987 (1987 Act)—section 128(5) refers.

4. Prior to his removal, an INZ compliance officer conducted a humanitarian interview, on 15 November 2007. Also present was a person who had assisted the complainant with previous permit applications, acting as interpreter.

5. At the start of the interview, the complainant confirmed that he did not have an agent and provided information about his familial circumstances.

6. The compliance officer concluded that there were no compelling reasons to allow the complainant to remain in New Zealand, having regard to his personal circumstances, his ineligibility for a permit under current immigration policy and the period of his unlawful status. The complainant was removed from New Zealand on 17 November 2007.

7. Subsequently, in a statement on behalf of the complainant dated 26 May 2008, it was submitted that he had asked to see a lawyer but this was denied.

8. Through a New Zealand based legal representative, the complainant sought an investigation of the events by the Chief Ombudsman.

Investigation

9. The Chief Ombudsman was concerned about two specific matters relating to the complaint about access to a lawyer. These were:

   a. whether the complainant requested to see a lawyer and, if so, whether the compliance officer told him that there was no point in getting a lawyer; and

   b. whether INZ took reasonable steps to ensure that the complainant was informed of his right to consult and instruct a lawyer.

Refusal of direct request for access to a lawyer

10. In response to the Ombudsman's request for comment on this aspect of the complaint, INZ stated that it had no record of the complainant having asked, through his interpreter, to speak to a lawyer.

11. INZ said that, at the start of the humanitarian interview, the compliance officer who was very experienced in his role, asked directly whether the complainant had an agent and he said that he did not.

12. INZ reported that the compliance officer did not recall the interview, given the passage of time, but that he said that he would never inform someone that they could not have a lawyer. INZ reported the compliance officer as saying:

> *... clients are given the opportunity to terminate the interview at any time if they are not happy with the situation. Further, if a client asks to speak with their lawyer or consultant and if a telephone is not available at the police station, [the compliance officer] always offers his cellphone so that the client can call their lawyer.*
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> *[The compliance officer] categorically denies ever having told a client that 'there was no point of getting a lawyer because he or she would not have the power to keep me in New Zealand.' He notes that he would gain nothing by refusing to allow a client to speak to their lawyer.*

13. INZ went on to note that neither the individual who had lodged the complaint in May 2008—who contended that she had been recorded as agent on a prior application, despite there being no record of this—nor the complainant had raised any issue either at the time of the interview nor for some time afterwards. Both had signed the humanitarian interview record which, INZ said, did not indicate any concern.

14. As such, INZ did not accept the claim that the complainant asked to see a lawyer but had this request refused.

15. The Chief Ombudsman noted that this issue involved, on the one hand, the complainant's assertion—supported by another—that the compliance officer persuaded him that there was *'no point'* getting a lawyer when he requested one. On the other

hand, INZ asserted that although the compliance officer could not recall the interview, he was adamant that any such request would not have been denied.

16. In the circumstances, however, there was little independent evidence to support either party—there was no reason to doubt either account. The Chief Ombudsman said that, in the absence of some further information to verify the details of what was said at the time, it was not possible for her to form any conclusive opinion on the matter as the information to hand simply did not provide a sufficient degree of certainty on which to form an opinion.

17. Accordingly, the Chief Ombudsman advised the complainant that she would be unable to progress this aspect of the complaint further and proposed to discontinue this part of the investigation but said that she would consider any further comment that the complainant might wish to make.

18. Although the complainant, through his legal representative, did make further submissions in this regard, the Chief Ombudsman remained of the opinion that there was insufficient evidence on which to form a conclusive opinion and this aspect of the complaint was formally discontinued.

Failure to ensure that the complainant was advised of his right to access a lawyer concerning his immigration matters

19. Leaving aside the issue of whether he had asked to speak to a lawyer, through his legal representative in New Zealand, the complainant alleged that INZ had breached sections 23(1)(b) and 27 of the New Zealand Bill of Rights Act 1990 (BORA) by failing to let him know that he could speak to a lawyer without delay with respect to his immigration matters.

20. The Chief Ombudsman accordingly considered the provisions in the 1987 Act and relevant immigration policy relating to the right to consult a lawyer.

21. Section 140(4) of the 1987 Act provides that:

> *Where any person (in this subsection referred to as the detainee) is held in custody under this Act (whether pursuant to a warrant of commitment or otherwise), the person responsible for the detainee's custody shall inform the detainee of the detainee's right to contact a solicitor or counsel…*

22. Policy D4.15.1.a provided that:

> *Any person detained in custody under the Immigration Act 1987 has the right to contact a solicitor or counsel or any responsible adult, parent or guardian, and must be informed of that right. Immigration officers must ensure that members of the Police who are detaining a person are aware of their responsibility to advise the person of this right.*

23. The Chief Ombudsman considered this aspect of the complaint against these provisions which were in force at the time the decision was made.

Provisional opinion of the Chief Ombudsman

24. In notifying INZ of the complaint, the Chief Ombudsman asked INZ what steps it had taken to comply with the requirements of section 140(4) of the 1987 Act and D4.15.1.a of INZ's Operations Manual. In response, INZ contended that, as the complainant was initially detained by Police on criminal matters, responsibility for advising him of his right to a lawyer following his arrest lay with Police, not with INZ.

25. INZ acknowledged that there was no written record that INZ ensured that the Police officers '*were aware of their responsibility to advise him of his right to contact a lawyer but noted that the complainant had been given the opportunity to contact a support person, in this case the interpreter*'. INZ also noted that the removal order itself contained a statement that '*the person had the right to contact a solicitor or counsel or other advisor*'.

26. From this, the Chief Ombudsman inferred that the immigration officers proceeded on the basis that the advice given to the complainant by the Police on arrest on criminal charges was sufficient to discharge their own, immigration, obligations under the 1987 Act.

27. The Chief Ombudsman did not take issue with whether, when the Police arrested the complainant, he was properly advised of his right to contact a lawyer. The issue, however, was whether it was unreasonable for INZ, when he was subsequently served with the removal order and detained under immigration powers, under the 1987 Act, not to have taken steps to ensure that he was re-advised of this right.

28. The Chief Ombudsman considered this a necessary question as, at the point he was served with a removal order, the basis for the complainant's detention changed, notwithstanding his having remained in Police custody.

29. The Chief Ombudsman made reference to the Brooker's commentary on BORA which INZ provided with its report. At para BR23.15 of the commentary it states that:

> *When reasons for arrest or detention, although initially properly given, later change, the suspect may be entitled to be afforded the advice under s 23(1)(b) again. It is a matter of circumstance whether an enforcement officer should, and how often, repeat the advice.*

30. The Chief Ombudsman also noted the discussion of this issue in *The New Zealand Bill of Rights Act: A commentary*, (LexisNexis, Wellington, 2005: p685) which notes instances where the Courts have held that there will be a duty on the detainer to remind a detainee of this right. One of those circumstances arises when:

> *…a person has been arrested or detained in relation to a particular charge or incident, but the focus of police questioning shifts from that charge or incident to another (usually more serious) charge or incident.*

Even where a detained person has previously waived the right to a lawyer, the authors consider that the Courts' approach has been to ensure that a detainee '*…had an*

opportunity, in light of the new circumstances, to revisit the question of a waiver.' (p 686).

31. The Chief Ombudsman said that, if the duty to re-advise a person of the right to consult a lawyer can arise in circumstances where a detained person is being questioned throughout the period of detention about criminal matters, consideration should be given to whether such a duty could arise where the basis for detaining a person changes from the criminal context to the immigration context. While it was not the Chief Ombudsman's role to determine the existence of a legal duty, she considered whether INZ's approach was an administratively reasonable one to adopt in the circumstances.

32. In this particular case, when the complainant was served with a removal order with the consequence that he was held in detention under the 1987 Act, he became subject to a change in his legal circumstances. At this stage, there was a possible risk that, even if he had understood his right to consult a lawyer at the time of his arrest, the complainant may not have realised that he was also entitled to contact a lawyer when he was detained as an '*overstayer'*.

33. The Chief Ombudsman considered that, although he might have known that he could contact a lawyer in relation to criminal charges, there could be no certainty that he knew he could consult with a lawyer in relation to his immigration status unless this advice was explicitly given.

34. Further, the Chief Ombudsman was not satisfied that a statement explaining a person's right to contact a lawyer in the removal order itself could be regarded as an adequate explanation. In assessing whether the duty to advise a detained person of the right to a lawyer has been satisfied, the Chief Ombudsman noted that the approach of the Courts had been to require that any such advice is adequately explained and understood (BR23.14 refers). In the circumstances of this case, the Chief Ombudsman said she could not be certain that the complainant read the small print of the removal order and, even if he had attempted to do so, could understand its contents—particularly given his need for the assistance of an interpreter at the humanitarian interview.

35. In these circumstances, the Chief Ombudsman formed the provisional opinion that it was unreasonable for INZ not to have ensured that the complainant was re-advised of his right to consult with a lawyer in relation to his immigration issues when he was served with the removal order.

Change to administrative instructions and practice

36. Having provisionally formed the opinion that INZ should ensure that people detained under the 1987 Act, subsequent to being detained in relation to police matters, are re-advised of their right to consult with a lawyer about their immigration matters, the Chief Ombudsman also considered that policy D4.15.1.a should be amended to clarify for immigration officers what their responsibilities are in these circumstances.

37. The Chief Ombudsman also considered it would be good administrative practice, when someone is detained for immigration purposes, for immigration officers to **record** that

the right to access legal advice has been explained. The Chief Ombudsman noted that such a practice would not only ensure that the advice was given but would also minimise the risk of complaints being made that access was denied by INZ.

INZ's response to the provisional opinion

38. The Chief Ombudsman invited comment from the parties on her provisional opinion.

39. In assessing the complaint, the issue for the Chief Ombudsman was whether INZ had a duty, under the 1987 Act and/or policy, to ensure that the complainant was re-advised of his right to contact a lawyer at the time the removal order was served—that is, at the point at which his detention changed from criminal detention to immigration detention.

40. In response to the Chief Ombudsman's provisional opinion, INZ referred not only to provisions in the 1987 Act but also to the 2009 Act, setting out its reasons for not accepting the opinion formed. INZ focused its submissions on whether the compliance officer was subject to the duty imposed by section 140(4) of the 1987 Act but did not address, however, the requirements of the policy which was applicable at the time, namely D4.15.1.a of INZ's Operational Manual.

41. INZ's response may be summarised as follows.

    a. The compliance officer did not have a duty under the 1987 Act to ensure that the complainant was informed, or reminded, of his right to contact a lawyer when he was served with a removal order and consequently detained under 1987 Act. As he was detained by the New Zealand Police, any duty to advise the complainant of his right to contact a lawyer lay with the detainer not the compliance officer.

    b. Therefore, as the compliance officer acted in a manner that was consistent with the 1987 Act, he cannot be said to have acted unreasonably by failing to re-advise the complainant of his right to consult a lawyer in relation to his immigration issues.

    c. Where a person is detained for the purposes of removal, the right to consult with a lawyer could only relate to the immigration detention itself. The term '*immigration issues*' was too broad a term to use in this context and lacked clarity.

    d. The duty to advise of this right is not triggered by service of a removal order itself where a person is in custody. This is because the removal order does not change the nature of the detention as a person could continue to be detained on criminal matters. A duty to re-advise would arise only at the point when the detention changed from criminal detention to immigration detention.

Outcome

42. Having carefully considered these further submissions, however, the Chief Ombudsman formed the final opinion that INZ failed to ensure that the complainant, who was already

in Police custody, had been informed of his right to contact a lawyer with respect to his immigration matters when he was served with a removal order and detained thereafter under the 1987 Act.

43. In summary, the Chief Ombudsman's reasons for this view were as follows.

    a. In so far as section 140(4) of the 1987 Act imposed the duty to inform a detainee of the right to contact a lawyer on '*the person **responsible** for the detainee's custody*', this duty could extend to an immigration officer who was responsible for having the detainee detained by the Police or sought the committal of the detainee under the 1987 Act.

    b. However, even if this were not correct, immigration policy D4.15.1.a of INZ's Operational Manual imposed an obligation on immigration officers to ensure that the '*members of the Police who are detaining a person are aware of their responsibility to advise a person of this right*'. This policy is consistent with the duty imposed by section 140(4) of the 1987 Act.

    c. When the removal order was served on the complainant and he was detained thereafter under the 1987 Act, there was a duty on '*the person responsible'* for his custody to **re**-advise him of his right to contact a lawyer about his **immigration** issues.

    d. Regardless of whether the duty to advise the complainant lay with the Police, the compliance officer, or both, the Chief Ombudsman was not satisfied that, in the circumstances of this particular case, INZ complied with its obligations under policy D4.15.1.a.

    e. As to INZ's view that the right to contact a lawyer is limited to advice *'in relation to the immigration <u>detention</u> itself*', the Chief Ombudsman noted that the right to contact a lawyer on being detained under the 1987 Act must be for the purpose of seeking advice relating to that detention. However, this would appear to include not only advice about the detention itself, but also about any rights, remedies or other steps, that may be available, or may need to be taken.

Remedy

44. The remaining issue was therefore that of remedy to be provided to the complainant. In discussion with the Chief Ombudsman, INZ proposed that, in addition to reviewing its policies and procedures:

    a. the removal order be cancelled; and

    b. any liability for the costs of removal be waived.

45. However, the complainant's representative disputed the adequacy of the proposed remedy in the circumstances. In particular, it was noted that the residence category which had been open to the complainant to apply under had closed during the course of the investigation—and in fact whilst the Chief Ombudsman was awaiting a response from

INZ on her provisional opinion. It appeared, therefore, that the complainant had lost his opportunity to apply under an available category of residence.

46. In response to this concern, INZ said:

> *The Ministry advises that in December 2011 a process was promulgated internally to staff whereby INZ is able to accept residence applications that do not meet a specific category as long as the minimum lodgement requirements are met. This process allows for an appeal to the Immigration and Protection Tribunal (IPT) once the application is declined. (...).*
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> *The Ministry is not prepared to authorise a work visa to [the complainant's wife] under section 61 of the Immigration Act 2009. She and two of her children have been unlawfully here since January 2004 and September 2003. Accordingly, INZ's remedy offer stands as is. The Ministry notes that during the humanitarian interview of 17 November 2007 [the complainant] stated that 'his family (would) follow him to Tonga by the end of November 2007 when they (had) raised sufficient funds to travel'. They have not fulfilled this undertaking. Unless they depart from New Zealand they will not be able to be included in [the complainant's] residence application. The Ministry is also not prepared to offer legal costs. INZ has already offered to waive the removal costs and believes this is an adequate remedy.*

47. Accordingly, INZ's offer of remedy remained to cancel the removal order and waive the removal costs. However, INZ also authorised, as part of the current offer, the prioritisation of the complainant's application for residence should he lodge one. This would mean immediate allocation to an officer for processing once lodged.

48. The complainant accepted this offer and the investigation was concluded on this basis.

Comment

The Chief Ombudsman's opinion concerned the application of the 1987 Act and associated policies. However, she stated that the findings in this case were equally applicable to the 2009 Act as the relevant principles remained unchanged and were of general application.

In particular, the Chief Ombudsman said that an immigration officer should ensure that a detainee who has been detained by the Police is advised of the right to contact a lawyer about their immigration matters at the point when it is determined that they should continue to remain in detention under immigration powers. A record should also be made of the date and time that this advice was given. Such steps would ensure not only that the requirements in the 2009 Act and associated policy were complied with, but also that the detainee was fully aware of their statutory right to contact a lawyer about their relevant immigration matters at all relevant times.