

Unreasonable approach by INZ to the removal of the ability to support a Partnership Category visa for deemed perpetrators of family violence

Legislation	Ombudsmen Act 1975, section 22
Agencies	Ministry of Business, Innovation and Employment, Immigration New Zealand (INZ)
Ombudsman	Peter Boshier
Case number(s)	483973, 499243, 510042, 510292, 514753, 518775
Date	March 2021

Complaints concerning adequacy of INZ's approach to victims of family violence visa policy – INZ policy involves the automatic removal of ability to support a Partnership Category visa application for individuals accepted by INZ to have perpetrated family violence against their former partners – under INZ policy those individuals are not given the opportunity to comment on allegations of family violence before removal of their sponsorship rights – including individuals not previously aware of the allegations – Chief Ombudsman concluded that INZ's blanket approach was accepted practice, but that the practice did not meet the requirements of natural justice and was therefore unreasonable – consideration should be given to the requirements of natural justice on a case by case basis.

Ombudsman recommended INZ consider his opinion as part of its review of partnership policy and facilitate requests for ministerial intervention concerning affected complainants.

Background

In 2018, the Ombudsman received six complaints from New Zealand citizens and residence class visa-holders about Immigration New Zealand's (INZ's) application of the Victims of Family Violence (VFV) visa category.¹

¹ Immigration residence instructions are certified by the Minister of Immigration and are government policy.

The complainants were former partners of individuals who had obtained VFV visas, after their relationships with the complainants had ended.

The complainants all raised the same issue with the Ombudsman. They had sought to support a new partner's visa application but were then told by INZ they were ineligible to act in a support capacity. This was because their former partners had been granted VFV visas, on the basis that the complainants had perpetrated family violence. However, the complainants had not been informed by INZ that their former partners had received VFV visas. Nor had they been told that they were ineligible to act in a support capacity in future.

The complainants advised the Ombudsman that they would have disputed the allegations of family violence if the opportunity had been provided. They highlighted that the allegations were untested and not verified through any court or formal process.

Broadly speaking, the following process occurred:

- The complainants successfully supported their (former) partner's visa application based on their relationship. At some stage, the partnerships ended and in due course the complainants formed new relationships.
- The complainants' former partners applied for and obtained a VFV visa. During the application process, INZ accepted evidence that the complainants had perpetrated family violence against their former partners.²
- In accordance with INZ instructions, the complainants were not:
 - given the opportunity to respond to the evidence against them;
 - informed that INZ had accepted evidence that they had perpetrated family violence; or
 - advised that they were no longer eligible to act in a support capacity for any further partnership category visas.

Subsequently, the complainants' new partners applied for partnership category visas, based on their relationships with the complainants. At that stage, the new partners were advised by INZ that the application could not proceed. The complainants were not eligible to support a Partnership Category residence visa application, as INZ had accepted evidence, in the context of a separate VFV application, that that they had perpetrated family violence against their former partners.

² Under Immigration Instruction **S4.5.5 Evidence of family violence** acceptable evidence of family violence includes a final Protection Order under the family Violence Act 2018; a New Zealand family violence conviction; complaint of family violence investigated by the Police; or statutory declaration that family violence has occurred.

INZ family violence special residence visa

In summary, a person is eligible for a VFV residence visa, subject to health and character requirements, if:

- the partnership that was intended to form the basis for their residence application has ended due to family violence; and
- the person is unable to return to their home country.

The VFV visa category is intended to assist victims of family violence who do not have residence rights, and cannot return to their home country for financial, social or cultural reasons.³ The grant of a VFV visa means the person who has been accepted by INZ in terms of immigration instructions S4.5.5 to be the perpetrator of family violence becomes ineligible to support future visa applications under the partnership category.⁴

The VFV category was introduced in 2001, requiring the applicant to provide INZ with established evidence of family violence based on information from the courts or police. There was no requirement for INZ to contact the alleged perpetrator before or after the grant of a VFV visa to the applicant. In other words, there was a policy of '*non-notification*' to protect the safety of the victim.

In early 2009, immigration instructions were amended to expand the category of acceptable evidence to include non-judicial evidence of family violence. This included statutory declarations from the applicant and appropriate professionals.⁵ This change occurred because research indicated that very few victims of domestic violence pursued a formal complaint through legal channels. This meant that they were ineligible for the VFV residence visa despite falling within the policy objectives of assisting victims of family violence, in the absence of evidence from the courts or police about family violence.

In order to maintain the privacy and safety of victims of family violence, the '*non-notification*' aspect of those accepted to be perpetrators of violence was maintained. This approach meant that some individuals were unaware they were deemed perpetrators of family violence under INZ's immigration instructions and were therefore disqualified from sponsoring their new partners.

Investigation

The Ombudsman's investigation focused on INZ's approach of not providing individuals alleged to have perpetrated family violence an opportunity to comment, particularly when a VFV visa application was based on non-judicial evidence.

³ Refer to immigration instructions S4.5.

⁴ Refer to immigration instructions F2.10.10, WF2.5 and V3.15.5.

⁵ See fn 2, above for the types of acceptable evidence.

The Ombudsman considered whether INZ's approach was '*in accordance with a rule of law or any legislation or a practice that is or may be unreasonable*'.⁶

Natural justice

Natural justice requires that a person affected by a decision is provided with the opportunity to be heard, and that any decision is fair and unbiased. These principles are affirmed in section 27(1) of the New Zealand Bill of Rights Act.

The Ombudsman recognised the principles of natural justice are not absolute and are subject to reasonable limits prescribed by law.⁷ However, natural justice is such a fundamental right that the courts have held it can be restricted only in clear and unequivocal circumstances.⁸ The level of natural justice required in the particular case depends on the nature of the decision. In *Ali v Deportation Review Tribunal*, the High Court held that:⁹

The more significant the decision the higher the standards of disclosure and fair treatment. In cases involving immigration status, high standards of fairness are required by natural justice because of the profound implications for the lives of those affected.

The Ombudsman noted that the person accepted by INZ to have perpetrated family violence for the purpose of immigration instructions may already have had the opportunity to comment in the case of formal family violence processes in court. However, in other instances (such as when the evidence provided to INZ was a police statement or statutory declaration) that individual may have been unaware of an allegation of family violence against them until their new partner received a letter from INZ advising them that the individual was ineligible to be a sponsor. Unbeknownst to them, there had been a prior application process, whereby INZ had accepted evidence of violence under immigration instructions and granted a VFV visa to their former partner. That was precisely the position the complainants found themselves in.

The Ombudsman also acknowledged that Cabinet had considered the natural justice implications of the VFV policy in 2008. However, the advice provided to Cabinet represented a blanket approach that resolved all cases in favour of the applicant's privacy. In addition, the advice covered only the natural justice implications of notifying the deemed perpetrator after a VFV residence visa had been approved and the individual had already lost their right to support future applications prior to being contacted, having been accepted by INZ to have perpetrated family violence under the criteria provided for by immigration instructions.

Overall, the Ombudsman considered that INZ was required to balance the competing interests of the VFV visa applicant (privacy and safety) with those of the applicant's former partner (natural justice). This required case-by-case assessment of whether the former partner of the

⁶ Section 22(1)(b) of the Ombudsmen Act 1975.

⁷ See section 5 NZBORA.

⁸ See *Chief Executive of the Ministry of Social Development v L* [2019] 2 NZLR 135, at 52.

⁹ *Ali v Deportation Review Tribunal* [1997] NZAR 208, at 220.

VFV visa applicant should have the opportunity to comment on the allegation before INZ accepted they had perpetrated family violence, bearing in mind any risks to the applicant.

The Ombudsman acknowledged that not notifying alleged perpetrators may be warranted to protect the privacy or the safety of victims, including when a VFFV application was based on non-judicial evidence. However, if privacy or safety are not at issue and there is information showing the applicant is not likely to be harmed, the impact on a person's privacy or safety may not be seen as sufficient to limit the other individual's right to natural justice. In such cases, the former partner of the VFFV applicant should be given the opportunity to comment on the allegations before INZ accepted that they perpetrated family violence under the criteria provided by immigration instructions S4.4.4.

Outcome

In March 2021, the Ombudsman formed the final opinion that INZ's standard approach of not giving the former partners of VFFV applicants the opportunity to comment on allegations of family violence which could result in the former partners' being unable to act in a support capacity was unreasonable, and that a case-by-case assessment should be undertaken.

During the investigation, INZ advised the Ombudsman it was planning to review the partnership visa category and this would include consideration of:

1. the current practice of not providing the former partners of applicants with an opportunity to comment before making them ineligible to support relevant future visa applications; and
2. the definition of '*eligible to support a residence class visa application under the partnership category*' (specifically, instruction F2.10.10.a.iii).

INZ also advised that the current partner of one complainant had been granted residence by ministerial direction.¹⁰ It confirmed that the remainder of the complainants' partners could also seek ministerial intervention as a remedy for their ineligibility to act in a support capacity based on untested evidence of violence.

Based on this, the Ombudsman recommended that:

1. INZ proceed with its planned review of the wider partnership visa category, taking into account the Ombudsman's final opinion.
2. INZ facilitates¹¹ requests for ministerial intervention concerning four affected complainants and provide them with the opportunity to provide updated information to

¹⁰ Section 378 of the Immigration Act 2009 enables the Minister of Immigration to grant any type of visa on terms and conditions the Minister deems fit, outside policy requirements. The decision whether to consider a request or to grant a request by special direction is at the absolute discretion of the Minister (see section 11 Immigration Act 2009).

¹¹ The decision in each case will be one for the Minister to make having regard to the particular circumstances, but to '*facilitate*' means INZ will put the matter before the Minister with all relevant information.

the Associate Minister of Immigration (AMOI). That the same opportunity is provided to the other two complainants, should they wish to make a future request for ministerial intervention. The AMOI would be informed of the Ombudsman's final opinion.

INZ accepted the Ombudsman's recommendations. INZ agreed to include the Ombudsman's final opinion as part of the review of partnership visa category and ensure that it was referenced in relevant ministerial case notes.

In early 2023, INZ advised the Ombudsman that the review of immigration instructions was ongoing.¹² INZ noted that current immigration instructions do not require INZ officers to balance the competing interests with a case-by-case assessment of whether the former partners should have the opportunity to provide comment.

Agreed process for other complaints

In August 2021, INZ confirmed that any future complaints would be dealt with in a similar way. Reference to the Ombudsman's final opinion will be made in any ministerial case notes prepared for individuals ineligible to support their partner's application.

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.

¹² In the interim, in February 2023, INZ extended the VFV visa to include partners of temporary work visa holders, rather than limiting the VFV visa to partners of New Zealand citizens and residents. INZ's [Immigration Amendment Circular 2023-04](#) sets out the relevant operational changes.