

Identity (Citizenship and Travel Documents) Bill

11 March 2003

Attorney-General

Legal Advice

Consistency with the New Zealand Bill of Rights Act 1990:
Identity (Citizenship and Travel Documents) Bill

1. We have considered whether the Identity (Citizenship and Travel Documents) Bill (the "Bill") (PCO 5514/10) is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that this Bill is to be considered by the Cabinet Legislation Committee on Thursday, 18 March 2004.
2. The Bill does not appear to be inconsistent with the rights and freedoms affirmed by the Bill of Rights Act. However, the Bill does raise a number of issues in relation to sections 18(3), 19(1) and 27(1) of that Act.
3. The following summary provides you with:
 - a brief overview of the contents of the Bill,
 - a note of the provisions of the Bill which appear to raise issues under one of the sections of the Bill of Rights Act, and
 - our conclusion as to the Bill's consistency with the Bill of Rights Act.
4. This summary is followed by a fuller analysis which discusses each of the issues raised under the Bill of Rights Act noting, where relevant, the justificatory material in each instance.

SUMMARY

Overview of the Bill

5. The Bill would amend the Citizenship Act 1977 and the Passports Act 1992 to ensure that – given the recent increase in international terrorism and people smuggling – there are no preventable risks to national security.
6. The amendments to the Citizenship Act include changes to the various requirements that migrants must satisfy in order to obtain a grant of citizenship. These include increases to the minimum period of residence in New Zealand that grant applicants must meet, and strengthening the good character requirements. The Bill, for example, introduces a provision that applicants with serious criminal convictions cannot generally receive a grant, and applicants with less serious convictions cannot generally receive a grant within specified periods from conviction.
7. The Bill also removes distinctions on the basis of age and marital status in the Citizenship Act that are inconsistent with the Human Rights Act 1993, and

amends the citizenship by descent and deprivation of citizenship provisions to prevent people becoming stateless. This will enable New Zealand to accede to the 1961 UN Convention on the Reduction of Statelessness.

8. With the objective of preventing the successful misuse and forgery of New Zealand travel documents and improve border security, the Bill amends the Passports Act to:
 - provide for the disclosure of New Zealand travel document information for the purpose of aiding border security, facilitating the processing of passengers, or verifying the identity of a travel document holder;
 - reduce the maximum validity of new passports; and
 - provide for the Minister of Internal Affairs to refuse to issue, or cancel, a New Zealand travel document on grounds of national security, and provide for the Court – when sentencing a person for a terrorism related offence – to make an order forbidding the issue of a passport.
9. The Bill also amends the Passport Act to provide for the issue, renewal, and cancellation of refugee travel documents. This measure will thus ensure that New Zealand meets its obligations under the 1951 UN Convention Relating to the Status of Refugees and the 1967 Optional Protocol to that Treaty.

Issues of consistency with the Bill of Rights Act

Amendments to the Citizenship Act

Section 19(1): the right to be free from discrimination

9. Clause 5 of the Bill extends the presumption of parentage to persons who were in a de facto relationship with the mother of a child between the child's conception and birth. For the purpose of this provision, a person who has attained the age of 16 but is younger than 18 years may be treated as having a de facto relationship with another person only if the person's parents and guardians have consented to that relationship. This requirement appears to give rise to an issue of discrimination on the grounds of age.
10. In our opinion, however, the requirement is justified in terms of section 5 of the Bill of Rights Act. In reaching this view, we have taken into account the responsibilities and obligations that parents and guardians have towards persons younger than 18 and that they are best placed to determine whether a young person is mature enough to enter into a de facto relationship. Moreover, we note that a young person who fails to obtain parental consent may apply to be placed under the guardianship of a Court and request that Court to consent to the relationship.
11. Clause 8 of the Bill provides that applicants for a grant of citizenship will need to have, amongst other matters, a sufficient knowledge of the English language. We are of the opinion that this requirement constitutes a "justified limitation" on the right to be free from discrimination. This is because the language requirement is intended to enable applicants to assimilate into the New Zealand community and ensure that they can fully access educational, health and social services in this country. Further, it may be waived if an

applicant, because of his or her age or standard of education, would suffer undue hardship if compliance on this requirement were insisted upon.

Amendments to the Passports Act

Sections 18(3): the right to freedom of movement

12. Clauses 23, 26, 30, 33, and 34 provide for the refusal of issue or cancellation of New Zealand travel documents (passports, certificates of identity, emergency travel documents, and refugee travel documents). The aim of these clauses is to prevent a person that the Minister believes on reasonable grounds is a danger to the security of New Zealand from leaving New Zealand to travel overseas on a New Zealand travel document to commit a terrorist or similar activity. We consider that the legislation gives rise to a *prima facie* issue of inconsistency under section 18(3) of the Bill of Rights Act.
13. In our opinion, however, the requirement appears to be justified in terms of section 5 of the Bill of Rights Act. In reaching this view, we have taken into account the objective of the Bill to ensure that there are no preventable risks to national security and have noted the numerous procedural and substantive safeguards that are incorporated therein to ensure that an individual's rights are impaired as little as possible. These safeguards include the requirements that (i) the Minister believes that the person is a danger to the security of New Zealand, (ii) preventing a person from leaving the country on a New Zealand travel document is the only way to avert the danger, and (iii) these measures will prevent or effectively impede the ability of that person to carry out the intended action. The Bill also sets out a time limit on any cancellation (with application to the High Court for any extension), provides for the issuance of emergency travel documents, and contains appeal rights including the provision of a summary of information (where the information involved is classified security information).

Section 27: the right to natural justice

14. Clause 37 (new section 29AB) operates to allow, in proceedings involving classified security information, this information to be heard by the Court in the absence of the person affected, his or her lawyer, and members of the public. We consider that the legislation gives rise to a *prima facie* issue of inconsistency under section 27(1) of the Bill of Rights Act.
15. In our opinion, however, the requirement appears to be justified in terms of section 5 of the Bill of Rights Act. In reaching this view, we have taken into account the objective of the Bill and the various safeguards that are incorporated therein. The clause provides clear indication of the sorts of information that may be considered classified and the circumstances in which it may be withheld. Although the person affected will not have access to classified security information, it will be available to the Minister, the Attorney-General and the High Court. A summary approved by the Court will be available to the person affected.
16. The provisions that restrict available information to a summary reflect a balancing exercise between the importance of protecting classified information and the need to preserve an individual's right to natural justice.

Combined with the appeal provisions outlined above, we consider that this section provides a person with an adequate opportunity and ability to gain access to all relevant material relied on in reaching a particular decision, and ensures that the person has a reasonable opportunity to challenge that material.

Conclusion on consistency of the Bill with the Bill of Rights Act

17. We have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act.

FULLER ANALYSIS: THE BILL OF RIGHTS ACT ISSUE RAISED BY THE BILL

Amendments to the Citizenship Act

Section 19: The Right to be Free from Discrimination

Section 19 of the Bill of Rights Act

18. We have considered whether clauses 5 and 8 of the Bill could give rise to various issues of discrimination under section 19 of the Bill of Rights Act. Section 19(1) of the Bill of Rights Act provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993 (the 'Human Rights Act'). These grounds include, *inter alia*, age, disability, ethnic and national origin, and race.

19. In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19 exists are:

- i. Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
- ii. Does the distinction involve disadvantage to one or more classes of individuals?

20. If these questions are answered in the affirmative, we consider that the legislation gives rise to a prima facie issue of "discrimination" under section 19(1) of the Bill of Rights Act. Where this is the case, the legislation falls to be justified under section 5 of the Bill of Rights Act.

Parental Consent and Possible Discrimination on Grounds of Age

21. Clause 5 of the Bill amends section 3 of the Passports Act, which relates to parentage, to provide that a person will be presumed to be the father of a child if, at any time between the child's conception and birth, he was in a de facto relationship with the mother of the child. For the purpose of this provision a person who has attained the age of 16 but who is younger than 18 years may be treated as having a de facto relationship with another person only if the person's parents and guardians have consented to that relationship. In our view, this requirement appears to give rise to an issue of discrimination on the ground of age.

22. We understand that the requirement that a person under 18 years of age needs parental consent to live in a de facto relationship with another person acknowledges the responsibilities and obligations that parents and guardians have towards young persons. It also recognises that they are best placed to determine whether a young person is mature enough, both financially and emotionally, to enter into a de facto relationship. In our opinion, the identified discrimination appears to be justified in terms of section 5 of the Bill of Rights Act. In reaching this view, we note that a young person who fails to obtain parental consent may apply to be placed under the guardianship of a court and request that court to consent to the relationship.

Language Requirement and Possible Discrimination on Grounds of Ethnic or National Origin and Race

23. Clause 8 of the Bill amends section 8 of the Citizenship Act by providing that applicants for a grant of citizenship will need to have, amongst other matters, a sufficient knowledge of the English language. Neither the Bill of Rights Act nor the Human Rights Act includes "language" as a prohibited ground of discrimination. Nonetheless, the language requirement appears to give rise to an issue of direct discrimination on the grounds of ethnic or national origin, and race as it disadvantages applicants who come from ethnic, national and racial communities where English is not the native language.
24. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of that Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and the objective.
25. We note that the purpose of the language requirement is to enable migrants to assimilate into the New Zealand community and, more importantly, to ensure that they can fully access educational, health and social services in this country. We consider that these are significant and important objectives and, therefore, the first limb of the section 5 inquiry is satisfied.
26. We note that the degree of language proficiency is not set at an unreasonably high level. Applicants are only required to have a sufficient knowledge of English, as opposed to being fluent in the language. Moreover, in recognition of the difficulties that certain applicants may have learning English, the Bill provides that the Minister of Internal Affairs may waive the language requirement in certain circumstances. These being when an applicant, because of his or her age or standard of education, or for any other reason personal to the applicant, would suffer undue hardship if compliance with this requirement were insisted upon. In our view, the measures are rationally and proportionally connected to the above-mentioned objectives.
27. We consider that, although the language requirement raises an issue of inconsistency with section 19(1) of the Bill of Rights Act, it is justifiable in terms of section 5 of that Act.

Amendments to the Passports Act

Section 18: Right to freedom of movement

28. We have considered whether clauses 23, 26, 30, 33, and 34 of the Bill could give rise to an issue of inconsistency under section 18(3) of the Bill of Rights Act. This section guarantees the right of freedom of movement, specifically the right to leave New Zealand. We note that this is one of the fundamental rights recognised by international human rights treaties. For instance, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), to which New Zealand is a party, confirms that everyone shall be free to leave any country, including his or her own.¹ However, the ICCPR permits certain restrictions on this right, including where it is necessary to protect national security, public order, or the rights and freedoms of others.²
29. As outlined above, clauses 23, 26, 30, 33, and 34 provide for the refusal of issue or cancellation of New Zealand travel documents (passports, certificates of identity, emergency travel documents, and refugee travel documents). The aim of these clauses is to prevent a person that the Minister believes on reasonable grounds is a danger to the security of New Zealand from leaving New Zealand to travel overseas on a New Zealand travel document to commit a terrorist or similar activity. We therefore consider that the legislation gives rise to a *prima facie* issue of inconsistency under section 18(3) of the Bill of Rights Act.

Is this a justified limitation under section 5?

30. The operating principle behind the Bill is to amend New Zealand's passport legislation to ensure that there are no preventable risks to national security, given concerns over recent reports of increases in international terrorism. We consider that this is a significant and important objective and, therefore, the first limb of the section 5 inquiry is satisfied.
31. In our opinion, the retention or cancellation of existing travel documents on the grounds of national security is rationally connected to the aim of ensuring that there are no preventable risks to national security. There are a number of safeguards built into the Bill that illustrate this connection. For instance, clause 26 of the Bill (new section 8A) sets out the types of safeguards that are provided in relation to passports (which are replicated for other travel documents in the other clauses):

1. The Minister may, by notice in writing, recall any New Zealand passport, and cancel it or retain possession of it, if the Minister believes on reasonable grounds that:

(a) the person is a danger to the security of New Zealand because the person intends to engage in or facilitate,-

i. a terrorist act as defined in section 5 of the Terrorism Suppression Act 2002; or

ii. the proliferation of weapons of mass destruction; or

iii. any unlawful activity designed or likely to cause devastating or serious economic damage to New Zealand, carried out for the purposes of commercial or economic gain;

(b) the danger to the security of New Zealand cannot be effectively averted by any other means; and

(c) the cancellation of the passport, or its retention by the Minister, will prevent or effectively impede the ability of that person to carry out the intended action.

32. The requirement – as set out in new section 8A(1)(a) – that the person be a ‘danger to the security of New Zealand’, has been explored in both the Canadian Supreme Court case of *Suresh v Canada (Minister of Citizenship and Immigration)*³ and the recent New Zealand High Court decision in *Zaoui v Attorney-General*.⁴ The *Suresh* case considered the phrase ‘danger to the security of Canada’ and held that: “a person constitutes a ‘danger to the security of Canada’ if he or she poses a serious threat to the security of Canada, whether direct or indirect, bearing in mind that the security of one country is often dependent on the security of other nations. The threat must be ‘serious’, grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.”⁵ We note that this interpretation was considered favourably by Judge Williams in his decision in the recent *Zaoui* case. Accordingly, a qualification can be read into the requirement so that the passport can only be withheld if the cancellation will prevent or effectively impede the ability of the passport holder to carry out the intended action.
33. The Bill defines what will be considered a danger to the security of New Zealand under new sections 8A(1)(a)(i) to (iii). Under new sections 8A(1)(b) and (c), it must be shown that the Minister believes that preventing a person from leaving New Zealand on a New Zealand travel document is the only way to avert the danger, and will prevent or effectively impede the ability of that person to carry out the intended action. There is also a safeguard in the requirement under new section 8A(3) that the Minister must apply to the High Court for an order to further extend a cancellation or retention of a passport after a 12 month period. Under new section 8A(4), the Judge must – when granting such an order – be satisfied that the information is credible and supports a finding that new sections 8A(1)(a) to (c) still apply. We therefore consider that these requirements provide adequate safeguards to ensure that the exercise of this power will be rationally connected to the aim of the Bill.
34. We also consider that the refusal to issue, cancellation or retention of existing travel documents on the aforementioned grounds is proportionately connected to the aim of ensuring that there are no preventable risks to national security. There are a number of safeguards built into the Bill to ensure this connection. Clause 26 of the Bill (new section 8A) illustrates the types of safeguards that are provided in relation to passports (which are replicated for other travel documents in the other clauses).
35. The safeguards include the requirements of new section 8A above; namely that the Minister must believe on reasonable grounds that: the person is a danger to the security of New Zealand; that this danger cannot be effectively averted by any other means; and that the refusal to issue, cancellation or

retention will prevent or effectively impede the ability of the person to carry out the intended action.

36. There are also a number of procedural safeguards in the Bill to ensure that the power of refusal, cancellation or retention of a travel document remains proportionately connected to the aim of the Bill. For example (using new section 8A as a model), these include:

- the Minister must notify the person in writing of a decision to cancel or retain a passport (new section 8A(2)(a));
- cancellation or retention of a passport is valid for 12 months, and this period may only be renewed upon application by the Minister to the High Court for an order to extend the period (new section 8A(3));
- the Judge must be satisfied that the information supporting such an application is credible, and that the requirements of new section 8A(1)(a)-(c) still apply (new section 8A(4)).
- a person who has had his or her passport cancelled under new section 8A may apply for an emergency travel document to allow that person to leave and return to New Zealand, or to return to New Zealand, or to complete a specific journey (clauses 31 and 32 of the Bill);
- affirmation of the appeal rights of a person who is dissatisfied with any decision of the Minister (clause 35);
- affirmation of the appeal rights of a person who is dissatisfied with the decision of the High Court to extend an order (clause 36);
- a person must be provided a summary of the information against him or her upon which a decision to cancel or retain a passport is based (new section 27AB).

37. We therefore consider that these requirements provide adequate safeguards to ensure that the exercise of this power will be proportionately connected to the aim of the Bill.

38. In our view, although these provisions raise an issue of inconsistency with section 18(3) of the Bill of Rights Act, they are justifiable in terms of section 5 of that Act.

Section 27(1): Right to the observance of the principles of natural justice

39. We have considered whether clause 37 (new section 29AB) of the Bill could give rise to an issue under section 27(1) of the Bill of Rights Act. Section 27(1) provides the right to the observance of the principles of natural justice, including the right to have access to all relevant material relied on in reaching a particular decision, and have an opportunity to challenge that material.⁶

40. As outlined above, clause 37 (new 29AB) operates to allow, in proceedings involving classified security information, this information to be heard by the Court in the absence of the person affected, his or her lawyer, and members of the public. This provision may result in a New Zealand citizen (who may not have committed a criminal offence) being denied his or her right to a passport without knowing, or with limited knowledge of, the evidence on which the passport retention or cancellation was based (if the information is classified security information). While the person could appeal the Minister's decision to the High Court, he or she would not have access to this information and

therefore may not be able to adequately defend themselves against the allegations. We therefore consider that the legislation gives rise to a *prima facie* issue of inconsistency under section 27(1) of the Bill of Rights Act.

Is this a justified limitation under section 5?

41. We have already noted that the aim of the Bill, to ensure that there are no preventable risks to national security, is an important and significant objective, and therefore the first limb of the section 5 test outlined above is satisfied.
42. We consider that the provisions to protect classified security information by allowing the Court to hear such information in the absence of the person affected or his or her lawyer is rationally connected to the aim of ensuring that there are no preventable risks to national security. There are a number of safeguards built into the Bill that illustrate this rational connection, which are contained in clause 37 of the Bill (new sections 29AA and 29AB).
43. New sections 29AA(5) to (7) set out the definition of 'classified security information'. This includes information that is:
 - relevant to whether there are or may be grounds for believing that the person is a danger to the security of New Zealand; that the refusal to issue, or the retention or cancellation of the passport will prevent or effectively impede the ability of the person to carry out the action; that the danger to the security of New Zealand cannot be effectively averted by any other means; and
 - held by an intelligence or security agency or by the Police; and
 - the head of the agency or Police has certified that the information cannot be disclosed because the nature of the information means disclosure would be likely to:
 - prejudice the security or defence of New Zealand; or
 - prejudice the entrusting of information to New Zealand by another Government or agency of another Government; or
 - prejudice the maintenance of law; or
 - endanger the safety of any person.

This section provides a clear indication of the kind of information that may be considered classified and the circumstances in which this information may be withheld.

44. In our view, the provisions that protect classified security information by allowing the Court to hear such information in the absence of the person affected or his or her lawyer are also proportionately connected to the aim of ensuring that there are no preventable risks to national security. There are a number of safeguards built into the Bill that illustrate this proportionate connection, which are contained in clause 37 of the Bill (new sections 29AA and 29AB). These include:
 - In hearing an appeal, the Court must be satisfied of the credibility of the information that led to the decision, having regard to its source or sources (new section 29AA(2)(a)); and that the information supports a finding that the person is a danger to the security of New Zealand, that

the action by the Minister will prevent or effectively impede the ability of the person to carry out the action, and that the danger to the security of New Zealand cannot be effectively averted by other means (new section 29AA(2)(b));

- The person affected must be provided with a summary of the information upon which a decision has been made (29AB(2)(b)). This summary is provided by the Attorney-General, and must be approved by the Court (29AA(2)(a)).

45. Although the person affected will not have access to classified security information it will be available to the Minister, the Attorney-General, and the High Court. Moreover, a summary approved by the Court will be available to the person affected.⁷ We note that the principles of fairness do not require that the passport-holder has unrestricted access to the evidence against them. So long as all the information is available to the High Court in approving the summary released to them, their right to 'confront the evidence against them' is respected.
46. In our view, the provisions restricting available information to a summary reflect a balancing exercise between the importance of protecting classified information and the need to preserve an individual's right to natural justice. Combined with the appeal provisions outlined above, we consider that this section provides a person with an adequate opportunity and ability to gain access to all relevant material relied on in reaching a particular decision, and ensures that the person has a reasonable opportunity to challenge that material.
47. We consider that in light of the numerous safeguards incorporated in the proposal, the limitation is justified in terms of section 5 of the New Zealand Bill of Rights Act.

Conclusion

48. We consider that the provisions in the Bill do not appear to be inconsistent with the rights and freedoms contained in the Bill of Rights Act.
49. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. A copy is also attached for referral to the Minister of Internal Affairs, if you agree.

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Minister of Justice

CC: Minister of Internal Affairs

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Footnotes

1 Article 12, International Covenant on Civil and Political Rights (ICCPR); Article 13, Universal Declaration of Human Rights.

2 Article 12, ICCPR.

3 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R.3

4 *Zaoui v Attorney-General and Ors* HC Auckland CIV-2003-404-5872 [19 December 2003]

5 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R.3, para 90.

6 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130; *Taito v R* (2002) 19 CRNZ 224, (2002) 6 HRNZ 539; *R v Durval* (1995) 13 CRNZ 215.

7 The right of a person to a summary of information (where classified security information is involved) outlining the allegations against them as satisfying the right to natural justice was reflected in comments by Williams J in the recent decision of *Zaoui v Attorney-General and Ors* HC Auckland CIV-2003-404-5872 [19 December 2003].