Immigration Amendment Bill (No.2)

22 August, 2003

Attorney-General

LEGAL ADVICE
IMMIGRATION AMENDMENT BILL (NO 2):
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990

INTRODUCTION

1. We have considered whether the Immigration Amendment Bill (No. 2) (the Bill) (PCO 5304/9) is consistent with the New Zealand Bill of Rights Act 1990 ("Bill of Rights Act"). This Bill was introduced into the House on 1 July 2003 and was assented to and commenced on 2 July 2003.

2. As we were asked to consider this Bill under some urgency, we provided you with preliminary advice that we considered that this Bill did not appear to be inconsistent with the Bill of Rights Act. We have now had further opportunity to consider the Bill, and remain of the view that the Bill does not appear to be inconsistent with the right and freedoms affirmed by the Bill of Rights Act. However, the Bill does raise certain issues that we wish to draw to your attention.

OVERVIEW OF THE BILL

3. The Bill amends the Immigration Act 1987 in three ways:

    - The Bill makes explicit that any policy of the Government dealing with temporary or limited purpose visas and permits is not to be treated as Government residence policy (Part 1, Clause 3, new subsection (1A) of Section 13B of the Act).
    - The Bill provides that the order and manner of processing any application for a visa or permit is a matter for the discretion of a visa officer or immigration officer. However, the chief executive may, from time to time, give general instructions (having regard to such matters as the chief executive thinks fit) to visa officers and immigration officers as to the order and manner of processing any application for a visa or permit. The question of whether or not an application is processed in an order and manner consistent with any such general instructions is a matter for the discretion of the officer and no appeal lies in respect of the decision to any person, Court or tribunal. In addition, no review proceedings may be brought in any Court in respect of that decision (Part 1, Clause 3, New Section 13BA).
    - The Bill provides for the lapsing of certain applications for residence visas or permits made under the general skills category before 20 November 2002. Certain types of general skills category applications may not be lapsed (for example, where the principal applicant has an

offer of "relevant" employment or has been issued with a work visa). The Bill provides that application fees must be returned where an application is lapsed, but that no associated costs are recoverable (Part 2, Clauses 5 and 6).

ISSUES OF CONSISTENCY WITH THE BILL OF RIGHTS ACT

4. As the Bill sets out a new procedure under which applications for visas and permits may be considered, we have considered whether the provisions of the Bill are consistent with the right to the observance of the principles of natural justice (section 27(1) of the Bill of Rights Act). In addition, the Bill excludes review proceedings in respect of various decisions made under it. We have therefore considered whether the provisions of the Bill are consistent with the right to apply, in accordance with law, for judicial review (section 27(2) of the Bill of Rights Act).

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

5. Section 27(1) provides that: Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

6. The Court of Appeal has stated that observance of the principles of natural justice is a flexible concept and is very much fact specific.[1] In *Kindler v. Canada (Minister of Justice)* [2] (in which the appellant challenged a decision to extradite him, without first seeking assurances that the death penalty will not be imposed, on the basis that to do so breached the protections afforded him by section 7 of the Charter) the Supreme Court concluded that in defining the fundamental justice (which is broader than, but analogous to, natural justice) relevant in the context of extradition, the Court must draw upon the principles and policies underlying extradition law and procedure. Using this approach then, in determining the scope of natural justice in relation to this Bill, we must look to the principles and policies underlying immigration.

7. In the case of *Canada (Minister of Employment and Immigration) v Chiarelli* [3] , the Court held that:

The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country: *R. v. Governor of Pentonville Prison,* [1973] 2 All E.R. 741; *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376.

8. Thus the Government has the right to adopt an immigration policy and, through Parliament, to advance legislation providing a framework for decisions by the executive about the conditions under which non-citizens will be permitted to enter and remain in New Zealand. It has done so in the Immigration Act 1987. In addition, Government immigration policy is expressed in the New Zealand Immigration Service's Operational Manual. The Manual sets out the criteria that applicants must meet, the evidence they must

produce to show that they meet the criteria, and the processes for assessment and verification of applications.

9. Part A1 of the Manual provides for fairness and natural justice in the treatment of applications. The introduction to this part provides:

a. Good decision-making (as well as looking at the merits) requires attention to process, to how the decision is made. A fair process is more likely to ensure a fair outcome. Decisions that are not made in the proper manner may be reviewed by the Courts or become a subject of complaint to the Ombudsman (see A9).

b. Making a decision in the proper manner involves acting on the principles of fairness and natural justice, which means:

1. giving the applicant a fair hearing, and
2. avoiding bias.

c. All visa and immigration officers must act on the principles of fairness and natural justice when deciding an application.

10. This part therefore captures the minimum requirements for natural justice, and reflects the requirements of article 14(1) of the International Covenant on Civil and Political Rights, which provides that:

everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

11. It would seem likely that the minimum requirements of natural justice protected by the Operational Manual are sufficient in the immigration context to protect the right in section 27(1) of the Bill of Rights Act. This is because applicants have no right to enter or remain in New Zealand; and decisions regarding the grant of visas or permits is closely connected with the exercise of state sovereignty and the ability of the state to determine who shall and shall not come to it.

12. Any additional protections, for example an opportunity to appeal a decision made under the new powers set out in the Bill, is not necessary to meet the minimum standards required by the Bill of Rights Act. So, while proposed new section 13BA(7)(a), clauses 5(2) and 6(6) of the Bill prohibit appeals against various decisions made pursuant to the Bill, this does not affect the overall assessment of the Bill as not inconsistent with section 27(1) of the Bill of Rights Act.

Section 27(2) the right to apply, in accordance with law, for judicial review

13. Section 27(2) of the Bill of Rights Act provides:

Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public

authority has the right to apply, in accordance with law, for judicial review of that determination.

14. A number of provisions in the Bill prevent review of decisions made under it. For example, proposed new section 13BA(7)(b) provides that no review proceedings may be brought in respect of: any general instruction given by the chief executive as to the order and manner of processing applications; the application of any such general instructions; any failure by the Minister or a visa officer or immigration officer to process or to continue to process an application for a visa or a permit; any decision by the Minister or a visa officer or immigration officer to process (including a decision to continue to process), or any decision not to process (including a decision not to continue to process), an application for a visa or permit. In addition, clause 5(3) of the Bill provides that no review proceedings may be brought in respect of any failure to process, or decision to process or not to process, an application for a visa or permit. Clause 6(7) of the Bill also provides that no review proceedings may be brought in respect of the lapsing of applications under the Bill.

15. In assessing these provisions' consistency with section 27(2) we consider that the key question is whether the decisions provided for in the Bill amount to a determination that affects a person's "rights, obligations, or interests protected or recognised by law".

16. In *Chisholm v Auckland City Council* [4] the Court of Appeal held that:

The word "determination" in its context has an adjudicative connotation… section 27(1) is not engaged unless the determination in issue is of an adjudicative character.

17. The decisions provided for in the Bill are unlikely to be considered adjudicative in nature. Decisions regarding the order and manner in which applications are processed does not "determine" the outcome of whether or not a visa or permit is issued. Similarly, the decision in part 2 of the Bill regarding the lapsing of certain applications are also not determinative. The effect of these decisions is to either process or not process an application at this time. Should an application be processed, it will be "determined" at the completion of the process. Should an application not be processed, an applicant can apply again to have his or her application "determined".

18. We also consider that the decisions provided for in the Bill do not affect a person's "rights, obligations, or interests protected or recognised by law". As set out above, non-citizens and non-permanent residents have no right to enter New Zealand and that the issuing of a visa or permit to enter New Zealand is a matter of discretion (see sections 8, 9, 9A and 10 of the Act). Therefore, the affect of any decision made under the Bill on a non-citizen or non-permanent resident's ability to enter or remain in New Zealand, which is not a right or interest protected or recognised by law, is unlikely to attract the protection of section 27(2).

19. We therefore consider that the provisions of the Bill that prevent review of certain decisions made under the Bill are also not inconsistent with the Bill of Rights Act.

CONCLUSION

20. We have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act. 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 Immigration, if you agree.

Val Sim
Chief Legal Counsel

Boris van Beusekom
Legal Adviser

cc
Minister of Justice
Minister of Immigration

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Footnotes

1. Drew v Attorney-General [2002] 1 NZLR 58
2. [1991] 2 S.C.R. 779, at page 848, per McLachlin J.
3. [1992] 1 SCR 711, per Sopinka J.
4. (CA32/02 29 November 2002)