NOTE: ORDER SUPPRESSING THE IDENTITY OF THE APPLICANT AND THE PARTICULARS OF HIS CLAIM, PER SECTION 151(1) OF THE IMMIGRATION ACT 2009.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-1065
[2019] NZHC 2870

BETWEEN	H Applicant
AND	THE MINISTER OF IMMIGRATION Respondent

Hearing: 1 April 2019

Appearances: R E Harrison QC for Applicant
R A Kirkness & A P Miller for Respondent

Judgment: 5 November 2019

JUDGMENT OF PAUL DAVISON J
[Redacted Version]

This judgment was delivered by me on 5 November 2019 at 3:00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Jessie & Associates, Auckland
Crown Law Office, Wellington

Introduction

[1] The primary issue for determination in this proceeding is whether an immigration instruction contained in the Immigration New Zealand Operations Manual, which relevantly provides that applicants for a residence class visa who have had an association with or membership of any group or agency that has advocated or committed gross human rights abuses are to be normally ineligible on character grounds for a visa, is ultra vires s 22 of the Immigration Act 2009 (the Act).

[2] [Redacted].

[3] [Redacted].

[4] H has since made two applications for a residence class visa, both of which were declined. He now brings this proceeding seeking judicial review of an INZ[1] decision dated 3 May 2018 which declined his application for a residence class visa on the basis that he does not meet the requirements under the immigration instructions relating to character contained in A5.30 of the INZ Operational Manual (the Manual), because he poses a risk to New Zealand's international reputation by reason of being a member of the PSB between 1982 and 1996, it being considered to be an organisation responsible for the commission of gross abuses of human rights.

[5] The applicant seeks a declaration that the immigration instruction in A5.30 of the Manual is unlawful and invalid by reason of being ultra vires s 22 of the Act.

Background

[6] [Redacted].

[7] [Redacted].

[8] [Redacted].

[9] [Redacted].

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1 Immigration New Zealand.

[10] [Redacted].

[11] [Redacted].

[12] [Redacted].

[13] [Redacted].

[14] [Redacted].

[15] [Redacted].

[16] [Redacted].

[17] [Redacted].

[18] H made his first application for refugee status on 8 May 1997. In that application he made no mention of the true circumstances under which he had come to be in New Zealand, and instead advanced a fictitious claim. Due to the significant backlog of applications awaiting consideration he was granted an interim work permit. He used the opportunity presented by this delay to set up a business. On 11 April and 9 May 2000, he was eventually interviewed by an immigration officer in relation to his application for refugee status. The immigration officer was not satisfied that his story was plausible and on 27 October 2000 his application was declined. While that decision was not appealed, H made an application to the Minister of Immigration for a special direction that a residence permit be granted. On 27 February 2001 that application was declined. On 20 June 2001, the Minister of Immigration determined that H was required to leave New Zealand.

[19] Thereafter a lengthy period of inactivity by INZ elapsed until 10 January 2007 when an order for H's removal was eventually made. On 15 January 2007 the applicant was taken into custody. On 17 January 2007, he appeared before the District Court and that same day his counsel gave notice to Immigration New Zealand that H intended to lodge a further application for refugee status. The second application was filed on 24 January 2007.

[20] This second claim for refugee status was declined on 29 June 2007. [Redacted]. The refugee status officer determined that he was excluded from the protection of the Refugee Convention, and considered there were serious reasons for considering that he had committed a crime against humanity [redacted]. H appealed.

[21] His appeal was successful. In a decision dated 22 November 2007 the RSAA found that H was not excluded from the protection of the Refugee Convention by reason of there being serious concerns that he had committed a crime against humanity. While the Authority accepted that accomplices and parties to crimes against humanity are excluded from the protection of the Convention, [redacted], it was not satisfied that the evidence presented to the Authority established any complicity on H's part in such crimes.

[22] Having being granted refugee status in November 2007, H has since been able to renew his temporary work visa year by year, and thus able to remain and work in New Zealand. [Redacted]. However, without a residence visa he remains in New Zealand in what may be termed "immigration limbo". Although permitted to remain in New Zealand and be able to renew his temporary visas annually, he is otherwise restricted. He cannot exercise the ability of a residence visa holder to travel to New Zealand at any time and be granted entry permission and to work, study, and stay in New Zealand as provided for by s 73 of the Act. He is unable to apply for New Zealand citizenship, and thus unable to apply for a New Zealand passport for travel purposes.

[23] In February 2008, H made the first of his two applications for a residence visa. It was declined by Immigration New Zealand on 11 December 2009. The basis for the decision being that H did not satisfy the character requirements in A5.26 of the relevant immigration instructions at the time.[2] Specifically, INZ determined that H had worked [redacted] an organisation responsible for having committed gross human rights violations, and that his role in that organisation was not minimal or remote. H sought a review of that decision by the Residence Review Board (RRB).

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[2] That immigration instruction is materially similar to immigration instruction A5.30, which the applicant challenges the validity of in this proceeding.

[24] The RRB agreed with INZ's decision as regards H being ineligible for a residence visa by virtue of immigration instruction A5.26, however the Board exercised its power to refer the matter to the Minister for consideration as to whether an exception to immigration policy should be made in the circumstances. In its decision of 21 July 2010, the Board said:

> [114] Counsel for the appellant contends that the appellant does not, *in fact,* pose any risk to New Zealand's reputation. While not relevant to determining whether the appellant meets policy, it must be an important consideration here. It seems to the Board that if he poses no *actual risk,* there would be no reason not to accord him permanent residence. In the absence of risk, *in fact,* there is no public interest imperative in denying him this status. Absent a compelling reason not to grant him residence, there is a good reason to do so and that is regularising, permanently, the immigration status of someone accorded refugee status, who has nowhere else to go to be able to settle down.
>
> …
>
> [116] The appellant points out that his background as refugee status is a confidential process and cannot be publicly disclosed, even though his permanent residence here would be a matter of public fact. [Redacted] That is so, but it seems to the Board that even if his background was public knowledge, there would be no loss of public confidence in the immigration system and no injury to New Zealand's international reputation, given his refugee status and the absence of evidence of personal responsibility for human rights abuses.
>
> [117] It would therefore seem to the Board that granting residence to the appellant would not put at risk, in any material way, the international reputation of New Zealand. However, that is pre-eminently a matter for the Minister to assess.

[25] The Minister, however, did not consider any such exception should be made.

[26] H also pursued an appeal against the decision of the Residence Review Board, but that too was unsuccessful.[3]

[27] H made a second application for a residence visa on 3 September 2014. On 12 July 2016, INZ notified him that his application had been declined because he did not meet the requirements of the relevant immigration instructions. In particular, the applicant was informed that he did not meet the character requirements set out in A5.30. [Redacted]:

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3 *AB v Chief Executive of the Department of Labour* [2011] 3 NZLR 60 (HC).

[Redacted].

[Redacted].

[28] H appealed to the Immigration and Protection Tribunal and was successful.[4] [Redacted].

[29] The Tribunal referred the matter back to INZ for reconsideration. By letter of 3 May 2018, INZ declined H's application for a residence visa, stating:

[Redacted].

[Redacted].

[30] Following receipt of that letter, the applicant filed this proceeding for judicial review.

[31] The applicant also appealed to the Immigration Protection Tribunal against the decision of 3 May 2018 declining his residence application. Although the appeal was dismissed the Tribunal exercised its discretion to refer the matter to the Minister for consideration as to whether an exception to the immigration policy should be made in the particular circumstances.[5] By letter of 14 February 2019, the Minister declined to make any such exception.

Residence visas

[32] There is no entitlement to residence in New Zealand. The Immigration Act 2009 (the Act) provides:

> **45 Grant of visa generally matter of discretion**
>
> (1) No person is entitled to a visa as of right.
>
> …

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4 *IPT Residence Decision* [2017] NZIPT 203647.
5 *IPT Residence Decision* [2018] NZIPT 205054.

[33] Decisions to grant a residence visa, whether made by the Minister of Immigration or an immigration officer, are generally a matter of discretion, unless the Act provides otherwise.[6]

[34] Under the Act, applications for residence are ordinarily determined by immigration officers in accordance with the relevant immigration instructions.[7] Those instructions are statements of policy certified by the Minister pursuant to s 22 of the Act,[8] and they play a central role in the Government's management of New Zealand's immigration system. As expressed in s 3(1), the purpose of the Act is to:

> …manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals.

To achieve that purpose, the Act provides for the development of immigration instructions to meet objectives determined by the minister.

[35] Section 22 is the core provision under which immigration instructions are developed and certified. It relevantly provides:

> **22 Immigration instructions**
>
> (1) The Minister may certify immigration instructions relating to—
>
> (a) residence class visas, temporary entry class visas, and transit visas:
>
> …
>
> (5) The kinds of matters that may constitute immigration instructions for the purposes of this Act are as follows:
>
> (a) any general or specific objectives of immigration policy:
>
> (b) any rules or criteria for determining the eligibility of a person for the grant of a visa of any class or type, or for entry permission, being rules or criteria relating to the circumstances of that person or of any other person (a *third party*) whose circumstances are relevant to the person's eligibility, including (without limitation) rules and criteria about how any status or approval may be obtained or lost by the third party:

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6 Immigration Act 2009, ss 45(2) and (3).
7 Immigration Act 2009, s 72(1).
8 Immigration Act 2009, ss 22(1) and (8).

(c) any indicators, attributes, or other relevant information or matters that may or must be taken into account in assessing a person's eligibility for a visa or entry permission:

(d) any statement of, or rules or criteria or process for determining, the number or categories or ranking of persons or classes of persons whose applications for visas of any class or type or entry permission may be granted at any particular time or over any particular period:

(e) any rules or criteria for the lapsing of applications in respect of which no decision to grant a visa has been made:

(f) any matters relevant to balancing individual eligibility for a visa or entry permission against the overall objectives or requirements of immigration instructions:

(g) any requirements relating to documentation, consultation, or other evidence or information required to assess a person's eligibility for a visa or entry permission:

(h) any statement of the conditions or types of conditions that may be imposed upon a visa of any particular class or type, and the circumstances in which or classes of persons in relation to whom the conditions may be imposed:

(i) the nature and extent of the discretion that immigration officers may exercise in making a decision on any visa.

(6) Without limiting subsection (5), any rules or criteria relating to eligibility for a visa or entry permission—

(a) may include matters relating to—

…

(ii) character:

…

[36] The instructions include A5.30, which relevantly provides that a person will ordinarily not be granted a residence visa if he or she has been associated with an organisation responsible for gross abuses of human rights. The policy underpinning that instruction is that to grant residence to such a person would pose a risk to New Zealand's international reputation. A5.30 provides:

A5.30 Applicants normally ineligible for a residence class visa

a. Applicants will not normally be granted a residence class visa, unless in accordance with A5.30.1 below, where an applicant would pose a risk to New Zealand's international reputation.

b. In particular (but not exclusively), applicants are considered to pose a risk to New Zealand's international reputation if they have or have had an association with, membership of, or involvement with, any government, regime, group or agency that has advocated or committed war crimes, crimes against humanity and/or other gross human rights abuses.

c. A5.30(b) does not mean that an applicant cannot be considered to pose a risk to New Zealand's international reputation for any other reason.

d. Applications to which this provision applies must be determined in accordance with A5.30.1 below.

[37] Instruction A5.30.1 sets out the mechanism by which A5.30 is to be applied to individual residence applications. A5.30.1(a) provides an immigration officer with a discretion to decline residence applications under A5.30 on character grounds. A5.30.1(b) applies when A5.30(b) applies, and provides that the immigration officer may consider the nature and extent of the applicant's association with the organisation, and if satisfied the nature and extent of their association with the organisation was minimal or remote, may grant a residence visa to the applicant. A5.30.1 provides:

A5.30.1 Action

a. An immigration officer may decline residence class visa applications under A5.30 on character grounds. In determining whether to decline an application under A5.30 the surrounding circumstances of the application, including any family connections the applicant might have to New Zealand, are to be disregarded for the purposes of the decision.

b. Where A5.30(b) applies, an immigration officer may consider the nature and extent of the applicant's association with, membership of, or involvement with, the government, regime, group or agency. If the immigration officer is satisfied beyond doubt that the nature and extent of the association, membership or involvement was minimal or remote then the officer may grant a residence class visa to the applicant provided all other Instructions requirements are met.

c. An immigration officer must make a decision in compliance with fairness and natural justice requirements (see A1).

d. An immigration officer must record the reasons for their decision on this aspect of the character requirements.

e. Any decision to determine the application in accordance with A5.30 must be made by an immigration officer with Schedule 1-3 delegations.

The applicant's challenge

[38] As noted the applicant's challenge is principally directed at the legality of immigration instruction A5.30.

[39] Dr Harrison QC for the applicant first submits that immigration instruction A5.30 was developed and certified in accordance with s 22 of the Act to purportedly create a test of character. In support he refers to s 22(6)(a)(ii), which provides that immigration instructions may include matters relating to character; that the relevant immigration instruction is found in part A5 of the Operation Manual, entitled "Character Requirements"; that at the time of the introduction of the immigration instruction, which is now found in A5.30, it is clear that the new policy was explicitly being introduced by way of an amendment to character requirements; and finally, that A5.30.1(a) explicitly states that an immigration officer may decline residence visa applications under A5.30 on character grounds.

[40] The thrust of Dr Harrison's submission is that, although purportedly a character test, A5.30 quite plainly has nothing to do with an individual applicant's personal character. He submits that it is neither directly, nor indirectly, a test of character, and is therefore ultra vires the Minister's power to certify immigration instructions pursuant to s 22 of the Act.

[41] The applicant also pleaded various other grounds related to that first submission that did not receive the same emphasis in submissions, but are as follows:

(a) mistake of fact or law that posing a risk to New Zealand's international reputation is relevant to an applicant's character;

(b) an applicant's risk to New Zealand's international reputation is an irrelevant consideration to the assessment of his or her actual character;

(c) that the immigration instruction is arbitrary/unreasonable/unfair or disproportionate given the lack of connection between an applicant's character and his or her potential to pose a risk to New Zealand's international reputation; and

(d) that the immigration instruction is arbitrary/unreasonable/unfair or disproportionate by reason of its vagueness as a test of character.

[42] As is clear, those secondary challenges all turn on essentially the same point. That is whether the immigration instruction can be properly classified as a test of character.

[43] The second of Dr Harrison's submissions is that the effect of A5.30(b) of the immigration instructions is to deem an applicant for a residence visa, with a background such as is the case with Mr H, to be considered as posing a threat to New Zealand's international reputation, even where the residence visa applicant does not in fact pose such a risk. He submits that such a deeming provision is ultra vires, as the statutory scheme of the Act is predicated on discretionary decision making by immigration officers and an assessment of an applicant's individual character.

[44] In essence, counsel submits that in order for the assessment of an applicant's character to properly form the subject of an immigration instruction, the instruction should direct the immigration officer to consider and assess the applicant's actual character. However as the immigration instruction deems a person to possess a character which renders them ineligible for a residence visa on the basis that they pose a "threat to New Zealand's international reputation", the instruction is ultra vires the Act.

[45] As part of that submission, Dr Harrison further submits that the words "…have or have had an association with, membership of, or involvement with… regime, government or agency…" are unacceptably vague. He submits that such vagueness also supports a conclusion that the immigration instruction is ultra vires the Act.

[46] The applicant also pleaded various other grounds related to that second submission that did not receive the same emphasis in counsel's submissions, but which are as follows:

(a) that an applicant's deemed character is an irrelevant consideration to the assessment of his or her actual character; and

(b) that the immigration instruction is arbitrary/unreasonable/unfair or disproportionate when mandated by the deeming effect given the lack of connection between an applicant's actual character and his or her deemed risk to New Zealand's international reputation.

[47] The third of Dr Harrison's principal submissions is that immigration instruction A5.30.1(b) imposes upon the applicant the burden of a reverse onus of proof to satisfy the immigration officer "beyond doubt" that the nature and extent of his or her association, membership or involvement with the impugned organisation was minimal or remote. Dr Harrison says it is not even clear to what standard the applicant is required to satisfy the immigration officer "beyond doubt". He argues that it is not apparent whether the standard of proof to be applied is the civil standard or even the criminal standard of beyond reasonable doubt. He argues that it could even be read as requiring the immigration officer to be satisfied beyond all doubt.

[48] Dr Harrison submits that this creates a very high standard for an applicant to meet, and moreover, it is uncertain and vague. He says that this vagueness is compounded by the requirement that the immigration officer be satisfied the applicant's association with the organisation was "minimal or remote".

[49] Dr Harrison's final submission is that when developing the challenged immigration instruction, A5.30, the Minister responsible for the instruction, failed to have regard to the special position of recognised refugees such as the applicant, given the rights such persons enjoy under Article 34 of the United Nations Convention Relating to the Status of Refugees.[9]

[50] Dr Harrison submits that the s 22(1) power to certify immigration instructions must be exercised in a proportionate manner, consistent with both specific provisions and the overall purposes of the Act. He says that those purposes include managing immigration "in a way that balances the national interest, as determined by the Crown, and the rights of individuals",[10] and determining "to whom [New Zealand] has

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9 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954).

10 Immigration Act 2009, s 3(1).

obligations under the United Nations Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees".[11]

[51] Dr Harrison says that in the case of a recognised refugee, those obligations must include recognition of Article 34 of the Convention, which provides:

> **Article 34 - Naturalization**
>
> The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

[52] Dr Harrison says that in light of New Zealand's obligation to refugees, an immigration instruction directed at addressing the risk to New Zealand's reputation ought to have made specific provision for the situation of recognised refugees. However, says Dr Harrison, the policy development documentation plainly shows that this was not the case, and the challenged immigration instruction fails to facilitate the naturalisation of refugees.

The respondent's submissions

[53] In response to the first of the applicant's four submissions (that A5.30 purports to set out a character test that does not in fact relate to an individual's character), the respondent says that the applicant's interpretation of A5.30(a), relying on the phrase "to pose a risk to New Zealand's international reputation", divorces that phrase from the context of the whole immigration instruction.

[54] The respondent argues that a sensible construction of A5.30(a) needs to be adopted. The respondent submits that in light of the context in which that phrase is used and the purpose of A5.30, it is clear that A5.30(a) establishes that a person will normally not be granted a residence class visa if, as a result of his or her character, the granting of a residence visa to that person would pose a risk to New Zealand's international reputation. The respondent submits that is consistent with the purpose of A5.30 which is to ensure that the Crown, though its immigration officers, is able to

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[11] Immigration Act 2009, s 124(a).

control the grant of residence to individuals whose character means that granting them residence may pose a risk to New Zealand's international reputation.

[55] The respondent submits that immigration instruction A5.30(a) clearly falls within the scope of s 22 of the Act – being "… rules or criteria for determining the eligibility of a person for the grant of a visa…",[12] including matters relating to character.[13]

[56] In response to the applicant's second submission (that A5.30(b) is contrary to the Act, unreasonable and unfair, because it deems an applicant who is associated with an impugned organisation to pose a risk to New Zealand's international reputation), the respondent submits that neither s 22 or any other provision of the Act prevents the Crown from developing an immigration instruction that deems a person's association with an organisation that commits gross human rights violations to pose a risk to New Zealand's international reputation. The respondent submits that on the contrary, the Act provides that immigration instructions are to be developed as a means to set out the rules and criteria for granting visas in a manner that meets any objectives determined by the Minister.[14]

[57] The respondent also submits that the deeming effect is neither unreasonable nor unfair. Its effect is also ameliorated and qualified by A5.30.1(b), which gives an immigration officer the discretion to grant a residence class visa to an applicant who falls within the scope of A5.30(b), if the immigration officer is satisfied the applicant's association with the organisation was minor or remote.

[58] In response to the applicant's third submission (that A5.30.1(b) is unreasonable because it imposes an onus of proof on applicants caught by A5.30(b) to satisfy an immigration officer beyond doubt that their association was minimal or remote), the respondent submits that the argument is misconceived, as A5.30.1(b) does not place a reverse onus on an applicant falling within A5.30(b). The respondent submits that the instruction simply provides that the immigration officer may consider the extent of an

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12 Immigration Act 2009, s 22(5)(b).
13 Immigration Act 2009, s 22(6)(a)(ii).
14 Immigration Act 2009, s 3(2)(b).

applicant's association with the impugned organisation, and if satisfied beyond doubt that such association was minimal or remote, grant the applicant a residence visa. The respondent submits that the extent to which that threshold is met is solely a matter for the immigration officer's evaluation, and the reference to an onus of proof is inapt in the circumstances.

[59] As to the applicant's fourth submission (that A5.30 is void because of the alleged failure on the part of the Minister, or whoever else was responsible, to have regard to New Zealand's obligations under the Refugee Convention in formulating and certifying the immigration instruction), the respondent submits that the applicant's position is again misconceived.

[60] The respondent submits that article 34 of the Refugee Convention only imposes a qualified obligation on New Zealand to facilitate the assimilation and naturalisation of refugees, as far as possible. The respondent submits that article 34 only requires New Zealand to give good-faith consideration to the possibility of naturalisation and nothing more. The respondent relies on the observation of James Hathaway, a professor of law at the University of Michigan:[15]

> …Art 34 is intended to promote, rather than to compel, access to naturalization. Refugee status does not give rise to an entitlement to access to citizenship, even after the passage of a long period of time. But the Refugee Convention does commit governments to assisting refugees to access whatever opportunities for naturalization may exist under the host state's general laws.

[61] The respondent submits that New Zealand meets its obligations to refugees by making them eligible for naturalisation on the same terms as any other person, and says that the fact that a refugee does not meet the criteria that every other person is expected to meet, does not mean that New Zealand has failed in its obligations.

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15 James C Hathaway *The Rights of Refugees under International Law* (Cambridge University Press, 2005) at 977ff.

The first challenge – the character test in A5.30

[62] I accept, as does the respondent, that immigration instruction A5.30 was developed and certified in accordance with s 22 of the Act with the intent of creating a test of character.

[63] In May 2005, a paper was prepared for, inter alia, the Minister of Immigration and the Prime Minister, titled "Immigration Applicants who May Pose a Risk to New Zealand's International Reputation". The genesis of that paper was the entry into New Zealand of two Iraqi individuals who had ties to the Saddam Hussein regime. Their entry revealed to Immigration New Zealand a gap in the then current immigration system. Until that time, an immigration officer would make a decision regarding an individual applicant's character based on issues such as whether they possessed criminal convictions and whether they presented a security risk. The paper recognised the need for revision of the immigration system, by putting screening processes in place to limit the risk of individuals gaining entry to New Zealand who are or have been associated with governments, regimes, groups of agencies that have committed human rights abuses that do not accord with the values of New Zealand and where their presence in New Zealand would pose a risk to our international reputation.

[64] Thereafter a second paper was prepared for the Minister of Immigration dated 27 May 2005 entitled "Amendments to Character Requirements in Government Residence Policy and Government Immigration Policy". That paper stated that it sought the Minister's agreement to new character requirements in immigration policy regarding the assessment of high risk applications. The key proposed amendment was to ensure that:

> …character requirements for both temporary entry and residence applications are sufficiently robust to manage the risks associated with applicants (including those from high risk countries) who pose a risk to New Zealand's international reputation…

[65] The version of the policy submitted to and approved by the Minister then became immigration instruction A5.26 in the version of the Operation Manual that ceased to be effective on 29 November 2010. Since that date the current immigration instruction A5.30 has been in effect. It is in substance identical to its predecessor.

[66] Immigration instruction A5.30 is located in the section of the Operation Manual entitled "Administration", and falls under subpart A5, which is headed "Character requirements". Immigration instruction A5.1 is titled "Requirement of good character" and provides that:

> Applicants for all visas must:
>
> a. be of good character; and
>
> b. not pose a potential security risk.
>
> If any person included in the application fails to meet the necessary character requirements and the character requirements are not waived, the application may be declined.

[67] Immigration instruction A5.15 sets out three classes of applicants who are not considered to be of good character, and classifies them as follows:

> a. applicants who will not be granted a residence class visa (see A5.20); or
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> b. applicants who will not normally be granted a residence class visa (see A5.25) unless a character waiver is granted; or
>
> c. applicants whose applications for a residence class visa will usually be deferred (see A5.35).

[68] Immigration instruction A5.30, based on its introductory words, clearly falls into the second category, despite not being specifically referred to in A5.15(b).

[69] The real question to be determined is whether A5.30(a) actually imposes a test of character, or whether, as the applicant contends, it has nothing to do with the individual character of the applicant. If that is the case, the applicant contends that the immigration instruction is ultra vires the Act, because the Minister having purported to exercise a statutory power to create a test of character cannot exercise that power for any other purpose, such as to create a test which is not directed towards an applicant's character.[16]

[70] In my view, however, immigration instruction A5.30(a) does in fact establish a test that relates to and informs an assessment of an applicant's individual character.

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[16] *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [50] – [55].

[71] As the respondent correctly submits, policy documents need to be construed according to the purpose of the policy and the natural meaning of the language employed in its context. Policy documents are not to be construed with the same strictness that a Court would employ when considering a statute or statutory instrument.[17] The Court of Appeal in *Patel v Chief Executive of the Department of Labour* said:[18]

> A policy document, such as the one in issue, is not to be construed with the strictness which might be regarded as appropriate to the interpretation of a statute or statutory instrument. It is a working document providing guidance to immigration officials and to persons interested in immigrating to New Zealand or sponsoring the immigration of a person to this country, It must be construed sensibly according to the purpose of the policy and the natural meaning of the language in the context in which it is employed, that is, as part of a comprehensive and coherent scheme governing immigration into this country.

[72] Dr Harrison, in making his argument to the contrary, relies solely on the wording to immigration instruction A5.30(a) that an applicant will not be granted a residence class visa where they "…would pose a risk to New Zealand's international reputation". He says that a risk presented by a person to New Zealand's international reputation is not a test of personal character at all. He says that character, either good or bad, has a well-established meaning, and is limited to the personal attributes possessed by the individual concerned, or, as the Oxford English Dictionary puts it "the collective qualities or characteristics, esp. mental and moral, that distinguish a person or thing."

[73] However, when the whole of immigration instruction A5.30 is read, it is clear that it is both intended to be, and meets the objective of establishing a test of character.

[74] Firstly, A5.30.1(a) provides that an immigration officer may decline residence visa applications under A5.30 on character grounds. Thus, character is the means through which the officer either grants or declines the residence visa. An applicant's involvement in or association with an agency or organisation responsible for the commission of gross abuses of human rights, rationally informs an assessment of that person's character, and the granting of a residence visa to a person who has had

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17 *Patel v Chief Executive Department of Labour* [1997] NZAR 264 (CA) at 271.
18 At 271.

involvement or association with an agency or organisation responsible for the commission of gross abuses of human rights, risks New Zealand's international reputation. That is the concern that the immigration instruction is directed towards resolving.

[75] Adopting a sensible construction of A5.30, it is clear that its purpose is to give INZ discretion to decline an application for a residence visa where it considers that having regard to the character of the applicant, granting them a resident visa would pose a risk to New Zealand's international reputation.

[76] Dr Harrison attacks this construction on two grounds.

[77] First, he submits that the wording of A5.30(a) is clear and does not contain a qualification to the effect that a residence visa will not be granted because an applicant's character poses a risk to New Zealand's international reputation. However, as I have already noted, the whole of the immigration instruction needs to be read together, and a sensible approach to its construction needs to be adopted. When the entirety of the immigration instruction is read together it is clear that A5.30.1(a) provides that applications may be declined on character grounds.

[78] Second, Dr Harrison submits that A5.30.1(a) explicitly excludes a person's personal character from consideration. The relevant part of the instruction he relies on states:

> …the surrounding circumstances of the application, including any family connections the applicant might have to New Zealand, are to be disregarded for the purposes of the decision.

[79] However, I do not agree that A5.30.1(a) excludes a person's personal character from consideration. Although the instruction directs an immigration officer to ignore the surrounding circumstances of the application, it specifically provides that an immigration officer may decline residence class visa applications on character grounds. The reference to family connections the applicant might have to New Zealand is an example of the kind of surrounding circumstances the officer is directed to ignore. To interpret the instruction as directing the immigration officer to ignore the character

of the applicant when deciding whether to decline their application on character grounds would render the instruction nonsensical.

[80] Furthermore, I do not accept the submission that a person's more than minimal or remote involvement in, or association with or membership of a regime, group, or agency that has advocated or committed gross human rights abuses, has no bearing on the issue of their character. In my view, any such association directly informs an assessment of the character of those persons involved with such an organisation. By virtue of their association or membership of such an organisation it is reasonable to assume that they will have necessarily involved and aligned themselves with its philosophies and practices to some degree at least, irrespective of their particular role and responsibilities in the organisation. Unless their involvement with the organisation or group was minimal or remote, it rationally reflects on their character, and A5.30 provides that where it is determined that an applicant has had such an association, they are considered to pose a risk to New Zealand's international reputation and are normally ineligible for a residence class visa.

The second challenge – the deeming effect of A5.30(b)

[81] The applicant further contends that A5.30(b) is contrary to the Act as it deems an applicant who has associated with organisations that have committed gross human rights abuses to pose a risk to New Zealand's international reputation. Dr Harrison submits that the overall scheme of the Act is predicated on discretionary decisions being made by immigration officers, and that a deeming provision, such as A5.30(b), casts a wide and undiscriminating net which captures individuals who have never been involved in the commission of human rights abuses.

[82] However, there is nothing in the Act which prohibits the Minister from certifying an immigration instruction having a deeming effect. On the contrary, s 3(2)(b) provides that immigration instructions are to be developed as a means of setting out the rules and criteria for granting visas in a manner that meets any objectives determined by the Minister. Section 22(5) of the Act also provides that the kinds of matters that may constitute immigration instructions include general and specific objectives on immigration policy. In the present context, it was a specific

objective of immigration policy to tighten up New Zealand's residence visa criteria to ensure that people who had been associated with foreign organisations that were implicated in the commission of gross human rights abuses would not ordinarily be eligible for a residence visa.

[83] Once it is determined that an applicant has had involvement in or association with an organisation considered responsible for the commission of gross abuses of human rights, the use of a deeming provision that renders them normally ineligible for a residence visa recognises the practical difficulties confronting INZ of obtaining reliable information as to the specific role and actions of the applicant during the time when they were a member of that organisation. The obtaining of reliable information regarding the specific activities of any individual within such an organisation is inherently problematic having regard to the nature of the activities of any such organisation. In this context it is in my view therefore reasonable and rational for an immigration instruction to provide that involvement or membership of such an organisation will normally render an applicant ineligible for a residence visa, with the qualification that where an immigration officer is wholly satisfied that the applicant's involvement was minor or remote, they have a discretion to grant the application.

[84] Therefore, I agree with the respondent's submission that it is within the Minister's power to certify immigration instructions that have a deeming effect in this context.

[85] I also agree that immigration instruction A5.30(b) is not unreasonable, disproportionate or unfair. The deeming effect is limited and relates only to those persons who have been associated with foreign organisations which have engaged in actions which are clearly, inconsistent with New Zealand's standards as regards human rights. Those persons' ability to gain a residence visa in New Zealand is limited by reason of their association with organisations of that kind. The impact on New Zealand's international reputation of such persons being granted residence visas is a legitimate risk, and the identification of that risk and the establishment of criteria which identify those who pose that risk is a matter that falls within the Crown's expertise.

[86] Furthermore, A5.30.1(b) provides an exception to the deeming effect of A5.30(b) and provides an immigration officer with the ability to grant a residence visa to an applicant otherwise caught by the deeming provision where the immigration officer is satisfied that the applicant's association was minor or remote. If the immigration officer is not so satisfied, then I do not see how it can be said to be unfair that Immigration New Zealand retains to itself the entitlement to refuse a residence visa to that person, considering the impact their prior association could have on New Zealand's international reputation as recognising and upholding principles of universal human rights.

[87] I also disagree with Dr Harrison's submission to the effect that there is a degree of vagueness inherent in the words "…have or have had an association with, membership of, or involvement with any government, regime, group or agency…". In my view the meaning of those words is clear, and they have been drafted to ensure that any, other than minor, involvement by an applicant in an organisation such as described in A5.30(b) will result in them normally being ineligible for a residence class visa.

The third challenge – satisfaction beyond doubt required by A5.30.1(b)

[88] Dr Harrison submits that the exception afforded by A5.30.1(b), whereby an immigration officer can grant an applicant a residence visa if satisfied their association was minimal or remote, is unreasonable because it imposes a reverse onus of proof on an applicant to satisfy the immigration officer to an extremely high standard that their association with the impugned organisation was minimal or remote.

[89] However, in my view A5.30.1(b) does not impose a reverse onus of proof on an applicant. What that instruction does is provide that an immigration officer may consider the nature and extent of the applicant's association with the unacceptable organisation, and if satisfied "beyond doubt" that it was minimal or remote, may grant a residence visa to the applicant. The "beyond doubt" standard by which the immigration officer is directed to be satisfied that an applicant's association with the organisation or group was minimal or remote reinforces the otherwise disqualifying consequence of such an association. Whether that high standard is met or not is

however, entirely for the immigration officer's evaluation. Nothing in A5.30.1(b) implies that an applicant bears an onus of satisfying the immigration officer on any matter regarding the extent of their association notwithstanding that it is obviously in their interests to do so if they can. In any event, as noted in *AL v IPT*, in the immigration context, where the question involves an assessment of objective fact, reference to either side bearing an onus of proof is inapt.[19]

[90] As to whether the "beyond doubt" requirement amounts to a standard of proof, *AL v IPT* also repeats the observation made in *Jiao v Refugee Status Appeals Authority,*[20] that in the immigration context, issues for determination are not sensibly amenable to a standard of proof, and it is a mistake to try and define a standard of proof.[21]

[91] I also consider there to be nothing unreasonable about an immigration officer being required by the relevant instruction to be "satisfied beyond doubt" that an applicant's association with an impugned organisation is minimal or remote before they are willing to grant a residence visa. The risk of damage to New Zealand's international reputation should people with past associations with organisations or groups, such as described in A5.30(b), be granted residence in New Zealand, is considered to be sufficiently serious as to require an immigration officer to be satisfied to a high standard before granting a residence visa to an applicant where A5.30(b) is engaged.

The fourth challenge – the position of refugees as recognised in Article 34

[92] Dr Harrison's final submission was that when developing the challenged immigration instruction, A5.30, the minister failed to have proper regard to the position of refugees, and specifically Article 34 of the Refugee Convention.

[93] A very similar argument was addressed by Moore J in *CF v Attorney-General (No 2)*,[22] in which an Iranian refugee, who had previously served with the Iranian

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19 *AL v IPT* [2014] NZHC 1810, [2014] NZAR 1079 at [26].
20 *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA) at [12] – [14].
21 At [26] and [28].
22 *CF v Attorney-General (No 2)* [2016] NZHC 3159, [2017] NZAR 152.

State Prison Organisation and which it was accepted routinely tortured inmates, was declined a residence visa pursuant to A5.30. It was argued that the application of A5.30 denied the applicant his rights under the Convention, including his right to naturalisation. Moore J noted that taking the argument to its natural conclusion meant that Immigration New Zealand would be compelled to grant a residence visa to every person on whom refugee status is conferred.[23] He held that the Convention is not intended to grant unqualified rights on refugees, instead its purpose is to require states to make refugees eligible for permanent residence on the same basis as any other foreign national.[24] New Zealand does this by granting refugees the ability to apply for residence through the same processes as anyone else is obliged to follow, and A5.30 is a criteria applicable to all foreign nationals who apply for residence class visas.[25]

[94] The immigration instructions formulated under s 22 of the Act must take into account New Zealand's obligations to refugees under the Convention. I consider it to be reasonable to assume in the circumstances that as refugees are entitled to seek residence on the same basis as any foreign national, that the Minister when certifying A5.30 had sufficient regard to the Convention, and the rights of refugees to seek naturalisation consistently with its provisions.

Conclusion

[95] The applicant has failed on each of his four challenges to satisfy me that immigration instruction A5.30 is either wholly or in part ultra vires the Act, or otherwise unreasonable, disproportionate or unfair.

[96] The application for judicial review is accordingly dismissed.

[97] The respondent is entitled to costs on a 2B basis. The parties are invited to determine costs between themselves. In the event that they cannot, the respondent is to file a short memorandum of no more than three pages, not including any annexed schedules, no later than 20 working days after the date of this judgment. The applicant will have five working days in which to file a short memorandum of no more than

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23 At [80].
24 At [81].
25 At [82] – [83].

three pages, not including annexed schedules, in response. I will thereafter determine the matter on the papers.

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Paul Davison J