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IMMIGRATION POLICY-MAKING:

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THE ROLE OF IMMIGRATION POLICY IN NEW ZEALAND LAW

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THE ROLE OF IMMIGRATION POLICY IN NEW ZEALAND LAW

1. New Zealand has a unique immigration system. It has framework legislation in the form of the Immigration Act 2009 (which replaces the 1987 Act on 29 November 2010). Beneath the driving legislation there are regulations which describe what documents are required for an application to be lodged, what fees are payable, the processes involved in lodging appeals and other rules relating to mechanisms and *process*.

2. Apart from statute and regulations, the distinguishing feature of our immigration legal system is that the rules that describe who may or may not be granted residence and who may or may not be granted work, study or visitor entry are set out in policy rules currently called the Operational Manual.[1] This was originally the office manual but as a result of our freedom of information legislation has been available in one format or another to advisers since about 1982.[2]

3. In the case of the residence policy rules however these are elevated to the status of being binding rules by section 72(1) (formerly section 13C of the Immigration Act 1987). If an immigration officer does not precisely follow the text of the Immigration Instructions or misunderstands its application, then an appeal will lie to the Immigration and Protection Tribunal (IPT). At least with regard to residence matters therefore policy rules have a very strong hue of statute law. In passing one should also contrast the non-binding nature of temporary entry rules, however, temporary entry decisions where they are made onshore are still amenable to judicial review (but not an appeal to the IPT).

Law-making in New Zealand

[1] From 29 November these become Immigration Instructions.
[2] The Official Information Act 1982

4. New Zealand inherited many of its democratic institutions from its (former) mother country Great Britain but took a different path from that followed by many of the other Commonwealth and former Commonwealth countries such as Australia and Canada. New Zealand does not have as yet a written constitution or charter and neither does it have a federal structure or bicameral parliament. It does however have a *constitution*, shaped by practice, ancient statutes such as the Magna Carta and the 1688 Bill of Rights Act as well as our own New Zealand Bill of Rights Act 1990. Our courts also draw on the well of the common law for guidance either where statute law does not apply or in interpreting statutory law. Arguably also the Treaty of Waitangi representing the 1840 agreement between the chiefs of the majority of the Maori tribes and the Crown attracts constitutional status.

5. The Executive is operated by the cabinet, including the Chair, the Prime Minister and the Ministers of the Crown. Occasionally an individual ministerial portfolio might be allocated to an individual outside of Cabinet. This happens from time to time as part of a coalition agreement where the supporting party might be given a ministerial post, but is not part of Cabinet. It is the Minister of Immigration however who determines matters under the Immigration Act (and not the Prime Minister or Cabinet) though of course on all matters relating to policy any individual Minister would not act outside of the wishes of his or her cabinet colleagues, or the Prime Minister. The Prime Minister can sack a Minister at will.

6. Framework legislation such as the Immigration Act 2009, is passed through Parliament in three stages called three readings. The first reading is the presentation of the legislation in its bald form. This is promulgated throughout the country and interested groups or even private citizens are then invited to make submissions, to the Select Committee. The Select Committee is comprised of MPs from all of the parties

represented in Parliament and then usually holds hearings. Submissioners are given the opportunity to speak to the Select Committee either in person or more often these days by video-link.

7. The writer of this paper has appeared several times before Select Committees and has found that generally the members have read the submissions and are interested in the points that have been made. There is always a healthy dialogue in an around-the-table setting, with the government officials responsible for the legislation taking notes. After the submissions have been fully heard (although the time to speak given to individual submissioners may be limited), the Select Committee (which is normally, but not necessarily chaired by an MP from the ruling party or coalition) then makes its recommendations.

8. Some of the members of the Select Committee might dissent from the majority recommendations and that is also recorded. As a result of the recommendations the parliamentary draftspersons then re-draft the legislation for presentation to Parliament on the second reading. Bill No 2 is published and when the second reading occurs before the House of Representatives the changes are then explained one by one. Sessions are televised throughout the country. Each section is discussed and there is significant opportunity for debate. Even when the legislation receives bi-partisan support, as in the case of the Immigration Act 2009, the process can still take a year or more.

9. The debate in the House of Representatives on the second reading involves careful scrutiny. Slip mistakes may then be picked up during this process. Normally the process between the second and third readings is more of a pro forma exercise but occasionally as a result of the debate in the House there might well be some last minute major changes. There have been some last minute changes sometimes in immigration legislation made between the second and third read without full public

debate and that has always been an area for criticism. In 1999 for example the Minister inserted in s129U of the 1987 Act between the second and third readings, prohibiting asylum seekers from obtaining residence on other grounds. There was absolutely no public debate.

10. Nevertheless most legislation, before it is passed, goes through a fairly robust system of public scrutiny with the opportunity for frank discussion coming from the public, through the Select Committee process. This is often an important counterbalance against the particular government department promoting the legislative first reform, which may have also consulted widely before introducing the Bill. Individual MPs may also promote Private Members' Bills which might not survive the first reading but again would normally then progress through to a Select Committee for submissions and hearings.

11. The Minister and in the case of immigration the Minister of Immigration has, under the statute, various powers to make regulations. Regulations are supposed to involve operational rules which do not require public debate but, for example, set filing fees and approve the documents that are required for filing purposes etc. By convention, regulations are presented by the Minister of Immigration to the Governor-General who is the Queen's New Zealand representative (yes, Queen Elizabeth II is the Queen of New Zealand too) who by convention consents to the regulations presented by the appropriate Minister of Immigration, as he or she also does with Acts of Parliament. Constitutionally of course the Monarch (and her representative) retain the power to refuse to give assent to legislation (Acts of Parliament or regulations) but in theory would only do so where there was a clear breach of the rule of law involved. Should the Governor-General refuse to give assent to an Act of Parliament or to the passing of regulations, this would of course cause a major constitutional crisis.

12. The Immigration Instructions which were originally internal "departmental guidelines" (Immigration New Zealand is a division of the Department of Labour) are promulgated simply by the Minister of Immigration, who gives his or her assent (rather like the Governor-General). It is therefore a set of rules which can be changed at whim by the Minister of Immigration, overnight if necessary, undoubtedly always acting on behalf of Cabinet (the Executive and *not* Parliament). The only opportunity for public debate would however involve weekly parliamentary question time at which point, by drafting the appropriate questions, issues can be put forward to the Minister of Immigration by opposition MPs. The Minister must then answer the questions in an appropriate manner. At the end of the day however this is only after the fact. The Opposition however can force a debate on a particular issue involving the Immigration Instructions, but that is all. Apart from that, public debate and the media remains a tool that a lobbyist can employ but that is all a source of potential complaint. It is also of course possible to challenge in court the Minister's rules by judical review as unlawful or *ultra vires*.

13. The Immigration Act now contains a bad-governance safeguard in the form of a power to lapse a category of applications. It could happen for example that thousands of unwanted applications are filed which clog up the whole immigration processing system. The last time that a lapsing occurred was in 2003 in the General Skills category, when the power was introduced into the 1987 Act. The reason the 2003 lapsing was necessary however was as a result of changes that the Government at the time wanted to make to the General Skills category by lifting the English language requirement. Effectively the change and then the lapsing of the applications which were lodged amounted to retrospective legislation and a derogation of the "fixing rule" discussed above, which requires residence applications to be determined on the rules current at the time of filing.

14. It is noted that recently Australia has also found it necessary to introduce a "lapsing" power. The exercise of the lapsing power is however largely recognised as a major destabilising factor in our immigration processes and hopefully will only be used sparingly. It is the writer's own view that in fact the burgeoning queue that arose in 2002 (mainly at the New Delhi office) could have been better handled by closing the category when the queue began to get too large. What in fact happened was that the Government, and possibly also the Minister of Immigration at the time, thought that they could simply alter the English language requirement in a retrospective manner, and get rid of the queue. This was challenged in the High Court and the High Court ruled that the changes to the policy rules were unlawful.[3] As a result, rather than argue the matter on appeal, the Government introduced overnight emergency legislation to give itself the lapsing power (per category).[4] The legislation went through readings one, two and three without any public debate, in one evening.

15. As can be seen by this, the Government in a unicameral Parliament can act outside of "public debate" if it decides to do so under emergency. Undoubtedly the Labour Government at the time thought that it had the support of the electorate (as indeed it probably did), because otherwise the problem that had arisen with the number of new immigrants lacking sufficient English was going to increase rather than be resolved, with the existing queue. My point has always been, however, that the issue is how the queue got so large to begin with, while officials and the Minister remained inactive (apparently the queue began in February 2002 and grew throughout the year). The retrospective language changes occurred in November 2002, with High Court proceedings being filed soon after. It is the writer's own view that the binding nature of s13C and its

[3] *New Zealand Association for Migration and Investment v A. G.* [2006] NZAR, 45.
[4] Immigration Amendment Act (no 2) 2003, 2 July 2003.

implications were poorly understood, and that the need to act arose far earlier.

16. Lacking a written constitution (apart from the unentrenched New Zealand Bill of Rights Act, and convention, Magna Carta and the 1688 Bill of Rights Act), there is a certain degree of flexibility within our parliamentary system. While the country is served by politicians who have the true interests of the country at heart, and who respect the rule of law, the system works quite well. Many of us however fear that the lack of a fully entrenched written constitution enabling offending legislation to be struck down by the courts is a weakness in New Zealand's democratic system.

17. With regard to immigration policy, the rules which describe who may apply for residence and be granted residence (whether it is the Skilled Migrant category or a Business Investor category or Family Reunion categories) are determined without any form of discussion outside of the Government. It is true that there are consultative committees and that the Department of Labour and the Minister of Immigration him or herself regularly meet with ethnic and immigrant groups, attend conferences and so on. Again while we are served by dedicated men and women who have the true interests of the country at heart, this works well. There is however no formal process involved in the promulgation of residence or temporary entry rules, or changes. They are simply drafted and authorised by the Minister of Immigration's signature. That having been said, there is one area where the decision-maker's hand may be forced to a degree outside of policy rules and that is where international conventions apply.

18. The role of international conventions in New Zealand is also unique. Since *Tavita,*[5] which came before the Court of Appeal, it has been well-recognised within New Zealand that obligations under international conventions[6] are relevant mandatory considerations. The New Zealand Government cannot therefore refuse to offer protection to an individual who establishes to the sufficient degree required that he or she is in need of protection under one or other of the protection conventions (the ICCPR, the Torture Convention and Refugee Convention). Furthermore the interests and children are a primary consideration under the Convention on the Rights of the Child, and therefore their interests are not to be just dismissed where an overstayer parent is about to be deported.

19. This position differs from that reached in other jurisdictions. Compare this for example with Australia where it has long been held that international convention law is not a mandatory relevant consideration.[7] The issue has of course also bedevilled the Supreme Court of the United States of America.[8] In that regard New Zealand is probably in a similar position to Europe, the UK[9] Canada[10] and India.[11]

20. Although interested groups, including ethnic groups, refugee groups and groups of immigrants are indeed able to lobby both the Department of Labour and the Minister of Immigration and Government for changes to the immigration rules and what lies within the Immigration Instructions

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[5] *Tavita v Minister of Immigration* [1994] 2 NZLR 257, confirmed in *Zaoui v A-G* (No 2) [2006], NZLR 289 (SONZ) at 382.

[6] Convention on the Rights of the Child, the ICCPR, the Convention Against Torture or the Refugee Convention to name but a few.

[7] *Al-Kateb v Godwin and others* 208 ALR 124, but see Kirby J's dissent and paragraphs 184-185; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128ALR 353.

[8] *Atkins v Virginia* 536 US 304 (2002) at 316; *Lawrence v Texas* 539 US 558 (2003) at 576-7 (the Texas sodomy law case) but see now *Medellin v Texas* 552 US 491 (2008) the Mexican death-row case, but the recent clarification in *Graham v Florida*, 560 US (2010) 17 May 2010, striking down indefinite detention for life without parole for juveniles, clarifying that judgments of other nations and the international law are supportive but not dispositive.

[9] *Pratt v A-G for Jamaica* [1994] 2 AC 1

[10] *Suresh v Canada* [2002] 1 SCR 3 at 31-32 [46], 38 [60]

[11] *Vishaka v State of Rajasthan* 1997 AIR SC 3011 at 3015

there is no formal structure for any mechanism to force a public debate or to put up amendments. Another problem that arises with regard to the current system is that the policy rules are unfortunately not drafted by the team of career Parliamentary draftspersons (who draft statutes) and accordingly the drafting is inevitably deficient. At times the rules lack definitions and at other times it is hard to know what was truly intended, and at other times there are internal inconsistencies that are hard to reconcile.

21. In the case of residence policy this of course however is potentially rectified by the appeal mechanism. The former Residence Review Board and now the IPT not only conduct a review of the case and can determine the meaning of policy rules and its application to the particular case on appeal but also can recognise any insufficiencies in an individual case through its special power to make a recommendation to the Minister of Immigration to make an exception to the policy rules. On an appeal it is possible to argue that an exception should be made even if the immigration officer has nonetheless appropriately determined the case negatively.

22. Under the new 2009 Act this power, the power to make an exception, will also be held by certain senior immigration officers, largely branch managers, who will hopefully, in clear cases at least, remove the need to go on appeal, and who can make a departure. This is a welcome improvement from the 1987 Act. It is a little unclear how on an ordinary application one would invoke the out-of-policy jurisdiction held by a senior officer or branch manager. One would assume that this would be done by reference to any issues raised in the enclosing submissions. As normally happens whenever one has an "exception" category in any immigration system it is hoped that this provision will not be abused by persons who clearly do not meet immigration residence rules and who inundate the branch managers with special requests for exceptions,

thereby clogging up the system. Such "clogging" it appears occurs in almost all immigration systems as is evident from the papers and presentations of my IBA colleagues.

Research

23. The Department of Labour commissions itself research in the immigration sector, including longitudinal outcome studies.[12] In addition to that there are independent population studies and papers.

Conclusion

24. New Zealand does not suffer from the prolix disease that its neighbour on the other side of the Tasman has, in its immigration legislation with rules and commentaries extending to several thousands of pages, and with more than a hundred different routes to residence. It has a fairly straightforward framework legislation with supporting regulations and a fairly changeable but therefore adaptable set of residence and temporary entry policy rules. The residence policy rules are given a higher degree of certainty within the overall immigration sector by establishing that the rules that apply are the rules at the time of filing, and are binding. Of course it may happen that a client can be advised that they meet the policy rules and while the supporting documentation is being gathered the rules then change. There is probably nothing that can be done about that.

25. Nevertheless, immigration law practitioners are able to divine whether or not a person is likely to obtain residence at any point in time. This is important because a lot can be at stake. In that regard New Zealand's

[12] Immigration Migration Settlement and Employment Dynamics is a division of the Department of Labour and produces regular research on the economic and source impact of immigration into New Zealand. Its papers are available online. See for example "Immigration Selection and the Returns to Human Capital in New Zealand and Australia, Steven Stillman (Waikato University) and Malathi Velamuri (Vietnam University), 2010.

rules are more stable or predictable than some other jurisdictions where rules can be altered mid-stream. Although they should not do so until they have obtained final approval, applicants often begin the process of selling their homes, investing money in their target country and at least preparing themselves emotionally for the move. Except for a class-wide lapsing, the outcome can be predictable in most cases. Where the outcome is uncertain, then there can be a tribunal appeal (from 29 November 2010, to the IPT). The rate of overturn at the Tribunal level however has traditionally been quite high which is an indication of some poor decision-making at the immigration officer level. Some of that poor decision-making, as indicated above, arises because of a poorly drafted base document which needs ongoing improvement. Sometimes appeals are successful where there are special circumstances for a policy departure, and not because the primary decision was wrong. That has been discussed above. Class lapsing, should it ever occur again, given that it destabilises our system of predictable immigration decision-making and given that it probably is an intrusion into the rule of law itself, will hopefully never happen again. It has only occurred once, in 2003 over the IELTS shift from 5.0 to 6.5.

26. Overall, New Zealand's rules are definable but there is little opportunity for true and meaningful public debate over what those rules are or should be. Without a written constitution it is also almost impossible to challenge statutory and regulatory requirements though of course a regulation might be held by a court to be *ultra vires*, and struck down, as can also the policy rules themselves.

27. Although not clear, many commentators are of the view that the judiciary could refuse to follow a statute of Parliament in the right circumstances. However it is a feature of our system that our judiciary do not make the laws but apply the laws to the individual case. That having been said we have a robust law of judicial review which enables the decisions of

tribunals and government officials to be quashed in certain circumstances. Normally however the Court refrains from making a replacement decision (though it can do so) but refers the matter back for reconsideration where a decision is tainted by bias, unreasonableness or unfairness (the main but not the only grounds for judicial review).

28. Throughout this discussion it will be clear to the reader that the writer's view is that New Zealand would be better placed with an entrenched Bill of Rights or written constitution or charter which would enable legislation to be properly scrutinised by the courts. Without fully entrenched rights (currently we have a New Zealand Bill of Rights Act which provides a legislative presumption but only a presumption), there always remains a possibility that the future government could behave undemocratically and get away with it. Much needs to be done to improve the way we make laws in general and the way in which immigration rules and policy is drafted and approved in particular.

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