NZAMI SEMINAR
DEPORTATION AND CHARACTER

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1. INTRODUCTION

This paper sketches out the mechanisms which can lead to migrants becoming liable for deportation either for criminal offending or for other reasons relating to character, such as providing false information in an application. It also focuses on how professional advisers can add value in the processes leading up to deportation. It was inspired at least in part by a useful recent presentation on the Discharge without Conviction regime for criminal offending, and the impact of a conviction on liability for deportation.[1]

We will not address deportation appeals to the Immigration & Protection Tribunal ("IPT"). This is a detailed subject and is covered very well elsewhere.[2] Further, part of the aim here is to arm practitioners to avoid the need for an appeal at all.

2. RESIDENT DEPORTATION – CONVICTIONS

A person becomes automatically liable for deportation if they are convicted of an offence which brings them within the ambit of the various options set out in s 161 Immigration Act 2009 (copy attached in the Appendix to this paper). It is important to become familiar with the timeframes set out here. Key points to note:

1. Time runs from the date the offence was committed, and not from the date of conviction or sentence;

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1 Taghavi, S, "Criminal Conviction and Deportation Liability (NZAMI Seminar, September 2018)

2 See for instance Tennent, D & Ors, *Immigration and Refugee Law* (LexisNexis, 3rd Ed 2017), Ch. 11, and McBride, J, "Immigration Case Law Update" (13th Annual CCH Immigration Law Conference, 2015)

2. In the case of subs (1)(a) and (1)(b), the test is the *maximum* sentence that can be imposed for the offence, and not the sentence actually applied to the person concerned.

Almost all criminal offences (and most traffic offences) have a maximum tariff of 3 months or more, so that any criminal offending committed within 2 years of getting the first Resident Visa makes someone liable for deportation.

If assisting someone facing liability for deportation, it is therefore critical to obtain some or all of the following documents, depending on their availability:

1. Caption Summary (also called the Summary of Facts) issued by the Police which gives an account of the events around the offending, and the legal provision under which the person was charged;

2. Charging Document or Charge Sheet which also sets out the Act and sections under which the person was charged, sometimes more precisely than the Caption Summary; and

3. Sentencing Notes from the Court which convicted and sentenced the person, which should set out surrounding circumstances which influenced the decision on what sentence was finally given.

It is then necessary to look up the actual sections of, say, the Crimes Act or the Land Transport Act to find out the maximum penalty that the Court can impose, especially for the less serious class of offences. A comparison of these with the actual sentence handed down can sometimes be a useful argument in favour of cancelling deportation liability.

Those sentenced for drink driving offences within the first 2 years of holding a Resident Visa are caught by this provision, as the maximum sentence of imprisonment for a first offence is 3 months imprisonment.[3] They usually get a fine and mandatory 6-month disqualification, but this makes no difference to their liability.

If someone comes to you just after having been sentenced for an offence, but INZ has not yet approached them about it, then it is reasonable to advise them that this

will happen sooner or later. In recent years it has become apparent that INZ and the Police share information, and carry out cross-checks, on a regular basis to pick up people who may be liable.

Another frequent scenario is where a Resident has applied for a Permanent Resident Visa and their conviction has come to light owing to a routine INZ check of their NZ criminal record. While INZ may not grant a PRV to someone liable for deportation, they must issue a Variation of Travel Conditions on the existing Resident Visa.[4] They will then forward the matter to INZ Resolutions to begin deportation action.

All of the above should make it clear that a Resident, especially someone who has been granted their first Resident Visa only recently, should avoid having a conviction entered against their name if at all possible. People can be tempted to enter an early guilty plea to an offence in the hope of securing a lighter sentence. However, the consequences of doing so can be disastrous for their future here. If dealing with someone who has charges pending against them, recommend them to engage an experienced criminal lawyer who can identify if the case justifies an application for discharge without conviction under s 106 Sentencing Act 2002.[5] It should also be mentioned that for relatively minor offences (but not drink-driving) a person who has never been convicted of anything before may be eligible for diversion. Again, this results in no conviction being entered against their name.

3. RESIDENT DEPORTATION – CHARACTER AND IDENTITY

Residents are at risk of deportation if they are found to have given fraudulent, false or misleading information to INZ, or have concealed "relevant information", in the course of applying for any visa. This is set out at s 158 of the Act, attached in the Appendix. If they have been convicted of an offence where a Court has found as a fact that they have done so, then they only have a right of Humanitarian appeal to the IPT.

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3 Land Transport Act 1998, s 56
4 See Immigration Instructions RV2.1 and RV2.20
5 Again, see paper by Samira Taghavi *supra* at n 1

However, more commonly the Minister signs off on advice from INZ, that he or she "determines" that fraudulent activity, or concealment of information, has occurred. INZ chooses this approach because the test of "beyond reasonable doubt" in a criminal prosecution is hard to meet. On the other hand, to "determine" something means merely to conclude or to give a decision, which "imposes a low threshold".[6] Someone facing liability on this basis can also appeal on the facts – i.e., that, on the balance of probabilities, none of the information provided in their application was false, fraudulent etc.

Previously, the Act required that the provision of false information, or concealment, had been instrumental in the person getting a visa (the visa was "procured"). However, the 2015 Amendment widened the scope so that, if any information is found to have been false or misleading, this is enough to trigger liability for deportation even if it might not have changed the outcome of the application. By contrast, information that is concealed must still have been relevant to the application before it will trigger this section.

A situation that arises not infrequently is where someone gains Residence under Partnership, or is a sponsor for such an application, but then subsequently takes up a new relationship which involves a new Partnership application. A discrepancy in statements made about when the first relationship ended can lead to findings that the first Residence application was based on false or misleading evidence about the relationship which can be very messy to extricate. This is especially the case when a Dissolution of Marriage was obtained early by way of false declarations about the date of separation,

Although this arises more rarely, deportation because of the use of a false identity is a particularly tricky situation, referred to at s 156 of the Act which is found in the Appendix. Usually in such situations, the Resident has arrived some years ago on the false passport and has, naturally enough, continued to apply for visas under that identity in order to mask their duplicity. However, once they are found out and served a DLN, they have no right of appeal to the IPT. This is because s 156(4) deems them to have been unlawfully in New Zealand since their arrival on the false identity (or, if they later switched to using their true identity, the date of expiry of their

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6 *Minister of Immigration v Zhang* [2013] NZCA 487 at [42]

last visa under that true identity – even more rare). As with overstayers, they have 42 days from becoming unlawful in order to appeal, so that their appeal period will have expired long ago. Their only formal "appeal" rights are, if the Minister determines that they have used a false identity, to show good reason why deportation should not proceed within 14 days of service of the DLN, [7] and an appeal to the IPT to dispute the factual finding that they used a false identity to acquire a visa.

4. RESIDENCE PRE-DEPORTATION PROCESS

In the last few years, INZ has instituted a method to give Residents an opportunity to give reasons why they should not be deported, prior to serving a Deportation Liability Notice ("DLN"). This pre-emptively invokes the power of the Minister to cancel or suspend deportation liability per s 172 of the Act. The rationale for doing this may be:

1. To avoid forcing someone to lose their Residence when that outcome would be disproportionate to their offending; and

2. To identify cases where the person might have grounds to succeed in a Humanitarian appeal to the IPT, so that issuing a DLN would save the expenditure of time and resources on the part of MBIE and the Tribunal in going through the appeal process.

The cases originate from INZ Resolutions in Wellington which issues a letter notifying the Resident of the reason why they may be liable for deportation, and inviting a response within10 working days. The case officer sends a standard Questionnaire of the form shown in the Appendix. If instructed to assist someone facing such a situation, it is useful to gather their answers to the Questionnaire, as well as asking for other evidence to support their defence.

In preparing submissions on such a matter, consider the following:

- If criminal offending is involved:

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[7] Similar to the right of temporary visa holders facing deportation liability under s 157 of the Act.

- check the statutory provision under which the offence was committed and the maximum penalties;

- Compare these with the actual sentence given, look at the Sentencing Notes, and if necessary get the client to give an account of what took place, to see what mitigating factors can be highlighted;

- Where false information has been provided or information concealed:

  - Get the full INZ file, and ask for additional time to respond if necessary – Resolutions are usually accommodating if you can identify that there may be "more to this than meets the eye" or if their disclosure of the grounds for liability may be lacking in sufficient detail to afford the person a fair right of reply;

  - Interview the client carefully to establish, for instance, underlying reasons why false or misleading information was given;

  - Assess the real relevance of concealed information – and false/misleading information too. While there is no relevance test for provision of false information or documents, an argument that it was truly tangential to the application in question may sometimes be persuasive;

- Gather evidence of positive aspects of the client's life situation which could counterbalance the negative findings made against them, such as:

  - Employment and employment prospects (e.g., someone who secured Skilled Migrant Residence in an occupation on the Long Term Skill Shortage List);

  - Establishment of a successful business employing New Zealanders;

  - Family connections in New Zealand, including relatives and the person's own children who may have already spent the majority of their life here;

  - Contribution to the community, such as charity work;

- Particular detriment to others if the person was to be deported – e.g., loss of ongoing contact with children from a previous marriage.

- Consider submissions on the likelihood of success in a Humanitarian appeal based on the person's situation.

From experience, the kinds of outcomes which result from this process may be as follows:

Breach or Offence	***Decision***
Drink driving and less serious offences	DLN suspended 2 years
Offences involving violence, injury or dishonesty	DLN suspended 5 years
False information or concealment	DLN suspended 2 – 5 years

Deportation liability may also be cancelled entirely in some situations.

Where liability is suspended, this is notified in a letter which is accompanied by a signed DLN. Suspension is dependent on the Resident complying with conditions which are imposed – e.g., not being convicted of any further offence during the suspension period. At the end of the suspension period, deportation liability will be cancelled outright if those conditions have been met.

As a DLN has been issued, this invokes a right of appeal to the IPT.[8] Even though liability has been suspended, you should strongly recommend to your client to file a Humanitarian appeal within the statutory deadline for filing. The reason is that if a condition of suspension is breached, liability is reactivated and a Deportation Order may be served. If the appeal period has passed, then no late appeal may be filed and the client may face immediate expulsion from the country and loss of Residence.

One only needs to file a *pro forma* appeal with the form and the $700 fee. This will sit with the IPT until the suspension period has passed, after which you may file a

[8] Immigration Act 2009, s 171

notice of withdrawal. The IPT does not refund the fee, but it is a valuable form of insurance for the Resident to preserve their rights in the meantime.

To get some idea of the impact of the pre-deportation process, see the following set of figures obtained under the Official Information Act:[9]

	2015-16	% of DLNs	2016-17	% of DLNs	2017-18	% of DLNs
DLNs issued	561		702		556	
Suspensions	250	**45%**	213	**30%**	227	**41%**
Cancellations	41	**7%**	55	**8%**	51	**9%**
TOTAL Suspensions/Cancellations		**52%**		**38%**		**50%**

As every suspension or cancellation is accompanied by the service of a DLN, we may conclude:

- Up to half of DLNs are being suspended or cancelled over time;
- Cancellation is the less common outcome, amounting to about 15 – 20% of positive Ministerial interventions.

It is likely that a significant proportion of the DLNs actually issued have not involved the prior invitation to seek suspension or cancellation. For example, liability for those on a temporary visa is not likely to involve an initial approach by INZ before the DLN is actually served (see Section 6 below). This means that the pre-deportation mechanism is a highly effective method of preserving Residence status. It is also probably reducing the volume of Humanitarian appeals requiring determination by the IPT.

5. WHEN DEPORTATION ACTION MIGHT BE A GOOD THING

Section 167 provides that Residence class visa holders remain liable for deportation for 10 years following the arising of the liability for deportation. In the case of

[9] Response to OIA request dated 26 October 2018 by the General Manager, Compliance, Risk & Intelligence Services, kindly supplied by NZAMI member Pat Saull

criminal offences, time runs from the date the conviction was entered. Where the Minister has determined liability (for instance, under s 158), the operative date is the Minister's decision.

Particularly in the case of criminal matters, INZ sometimes does nothing about deportation for some time, even several years. On the other hand, cases involving false information or concealment can also sit unactioned with Compliance for several years. In both cases, the delay is not necessarily beneficial. People who become aware that they may be liable will avoid applying for a PRV for fear that criminal offending will come to light. They may also refrain from seeking a Variation of Travel Conditions, effectively preventing them from leaving New Zealand after existing Travel Conditions have expired without forfeiting their Residence.

In some situations, it may be appropriate to advise people to bring themselves to the attention of INZ in order to activate the pre-deportation assessment process. The reason for this is that, if deportation is finally cancelled, this brings the period of liability to an early end. Even suspension, leading to final cancellation, might shave several years off the period otherwise mandated by s 167.

Obviously, such advice must be considered carefully before it is given, because of the risk that deportation action could proceed nonetheless. It should therefore be reserved for situations in which the prospect of success in securing cancellation or suspension is clear-cut.

6. DEPORTATION ON TEMPORARY VISA

Those on Work or Student Visas, in particular, may become liable for deportation pursuant to s 157 of the Act, which is included in the Appendix. This arises if there is "sufficient reason" to deport. Apart from criminal offending and concealment of information, these reasons also include breach of visa conditions and "other matters relating to character". The latter phrase is probably meant to refer to the criteria which can make someone ineligible for a temporary visa unless granted a Character Waiver,[10] or which would result in them being an excluded person, such as being

[10] Instructions A5.45

likely to pose a threat or risk to public order.[11] The list of "sufficient reasons" is not exhaustive, but those set out in s 157 cover most situations.

In practice, INZ does not go to the trouble of issuing pre-deportation Questionnaires and inviting comment on whether deportation should not proceed for those who may be caught by s 157. First of all, they have not as a rule acquired the rights and established connections which Residents might have. Secondly, there is the ability to write to INZ within 14 days of service of the DLN to show why there might be "good reason" not to deport. However, instances when INZ does reverse the decision to deport appear to be rare.

As "good reasons" not to deport is a broad term, it is difficult to specify what criteria would meet the test. There are other things to note about the DLN process:

1. The DLN must be served in accordance with s 386A of the Act – i.e., either personally by an immigration officer, or by registered post (courier) to the visa holder's address or to their professional adviser. Sometimes DLNs have been emailed by way of purported service, but this does not meet the Act's requirements;

2. The "good reasons" assessment must be carried out by a different officer than the one who served the DLN[12] – check this when a decision comes back;

3. There is also a right of Humanitarian appeal to the IPT. While INZ is meant to be "mindful" of the deadline,[13] decisions on good reasons submissions often come only after the appeal deadline. As a result, an adviser should take instructions as to whether their client wishes to file an appeal as well even though INZ has not yet responded to submissions seeking cancellation of the DLN.

Liability for breach of visa conditions can arise in situations as simple as being dismissed from the employment which is specified on one's Work Visa. Situations where "the person's circumstances no longer meet the rules or criteria under which

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[11] Immigration Act 2009, ss 15 - 16
[12] Instructions D3.70
[13] Instructions D3.70(e)

the visa was granted" can include the end of a partnership which formed the basis of a Partnership temporary visa.[14]

Note that one of the criteria for deportation under s 157 is "criminal offending". Unlike the case of Residents who are caught by s 161, this extends to situations where the person has obtained a discharge without conviction from the criminal Court. The reason for this is that it is necessary to plead Guilty before the discharge will be granted, so that the offending itself becomes a legally recognised fact.

7. WATCH THIS SPACE

In an interesting recent development, it may be possible to judicially review INZ's decision to issue a DLN, either in the temporary or Resident space, without first having to exhaust appeal rights to the IPT. Until now, s 249 of the Act was taken to prevent an immediate review application because it states that:

> No review proceedings may be brought in any court in respect of a decision where the decision (or the effect of the decision) may be subject to an appeal to the Tribunal under this Act unless an appeal is made and the Tribunal issues final determinations on all aspects of the appeal.

It is also accepted law that the IPT may not consider the rightness of the underlying decision to issue the DLN, or its equivalent under the 1987 Act.[15] As a result, people are forced to file a Humanitarian appeal before taking a review, even if the appeal lacks any merit.

In the 2017 decision of *Li v Chief Executive of MBIE*, Palmer J granted leave to file judicial review proceedings against the decision to issue a DLN under s 157 (temporary entry). He declared:[16]

> I consider s 249(1) does not apply because the decision [to issue a DLN] may not "be subject to an appeal to the Tribunal under this Act". Accordingly, s 249 does not restrict the right to apply for judicial review of a decision about underlying liability to deportation where only a humanitarian appeal is available . . .

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[14] See examples referred to in Tennent *supra* at n 2, 481 - 484

[15] *L v Removal Review Authority* (HC Wellington, CIV 2005-485-1601, 7 December 2005) at [11]

[16] *Li & Ors v Chief Executive of the Ministry of Business, Innovation and Employment* [2017] NZHC 2977, at [26] – [27]

> Parliament cannot have intended to restrict the applicants' right to judicial review under s 27(2) of the Bill of Rights by requiring them to first take a hopeless appeal. Section 6 of the Bill of Rights, the principle of legality and common sense militate strongly against such an interpretation of s 249(1).

In that case, only a Humanitarian appeal was available; other cases allowing an appeal on the facts would arguably prevent review until the facts appeal under s 202 was determined by the IPT.

MBIE has been granted leave to appeal this aspect of the *Li* decision to the Court of Appeal, and a decision may issue by the end of the year. If Palmer J's finding stands, it would offer another avenue by which decisions to proceed with deportation action could be challenged.

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Appendix

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1. s 161 Immigration Act 2009
2. s 158 Immigration Act 2009
3. s 156 Immigration Act 2009
4. Sample Deportation Liability Questionnaire
5. s 157 Immigration Act 2009