UPDATE ON IMMIGRATION LAW, POLICY AND PROCEDURE

LEGALWISE IMMIGRATION SUMMIT – MARCH 2021

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INTRODUCTION

At the time of writing, and in the current environment, it is hard to say much of value about big-picture developments in the New Zealand immigration scene. The suspension of much offshore visa processing, and of the Skilled Migrant and Parent category selections, has limited our ability to discern trends in practice. Instead, for the last year the theme has been constant changes in visa instructions by way of reaction to the border closure, and adjustments in processes as everyone – Immigration New Zealand included – has been trying to work out how to navigate these strange times.

There have been some noises about reopening the SMC Expression of Interest selections, and suggestions that the "3-gated" employer assisted Work Visa scheme is still going to be rolled out later this year. In the meantime, calls for action to resuscitate the export education market or to facilitate the entry of high-net-worth investors have not been answered by concrete Government initiatives.

As a result, the following represents a grab-bag of isolated issues which have come to the writer's attention in recent times, and which might be of some use to practitioners.

1. PARTNER ENTRY PATHWAYS

In the following, some knowledge is assumed about the sources of information and the mechanisms that have developed since the COVID-19 closures:

- Restricted Temporary Entry Instructions H5 and H6;
- The online Request for Travel form, which serves multiple purposes in addressing the various types of exemptions that are available.[1] Confusingly, this is in fact the expression of interest referred to in the Instructions; and
- The public COVID-19 section of the INZ website.[2] As the Operational Manual largely addresses the processing of visas, it does not explain who can enter without first applying for a visa or a Request for Travel. It is therefore necessary to refer to this content alongside the Instructions in order to get a full picture. For instance, it is

[1] https://www.immigration.govt.nz/formshelp/request-for-travel-to-new-zealand
[2] https://www.immigration.govt.nz/about-us/covid-19/border-closures-and-exceptions/border-entry-requirements

useful to be able to find the list of critical purpose reasons for travel,[3] which is otherwise buried at Instructions H5.25.15.

One of the few classes of migrants who can apply to come to New Zealand from offshore, and whose applications will be processed, are partners of New Zealand Residents or Citizens. This tranche of people is further subdivided as follows:

1. Generally, those who already hold a Partnership-based visa – they do not need to make a Request for Travel;
2. Partners from visa-waiver countries – they can make a Request for Travel resulting in an Invitation to Apply ("ITA") to apply for a temporary visa. Their pathway is explicitly provided for by a whole section of the Restricted Temporary Entry Instructions, being the whole of H6;
3. Those coming in with their New Zealand supporting partner – they may need to file a Request for Travel, and the online Request form anticipates this, although the public domain information does not spell this out as it does for (say) those from visa waiver countries. Instead, it seems that they could take the chance of arriving at the airport carrying sufficient evidence of their relationship, and take their chances with a border official's assessment of the same;
4. Australian Citizens or Residents in a relationship with a New Zealander - need to file a Request for Travel;
5. (for the sake of completeness) Partners of Work or Student Visa holders, who already hold a temporary visa and are "ordinarily resident in New Zealand" – appear to need to make a Request for Travel.

An obvious corollary to the above is that anyone not from a visa-waiver country, who does not otherwise meet one of the other criteria, must make a full Partner visa application. Hence, we see the "fetch and fly" phenomenon whereby the New Zealand-based partner returns to the home country so that the couple can build up time together before putting forward a fully-documented case. As has been pointed out in the media, this practice exposes someone from New Zealand to coronavirus infection abroad.[4]

What we will focus upon here is those who are from visa-waiver countries, who are catered for by the Request for Travel followed by an ITA to apply for a temporary visa. If their case is clear-cut, and they can express it clearly in the online Request, then this is simple enough. However, the Request for Travel gives little opportunity for one to describe the relationship with the supporting New Zealand partner. The whole story must be condensed into a text field of just 3000 characters.

There are situations in which this method may not deliver a good outcome – for example, health or character issues, or a relationship involving significant periods of separation. People in genuine relationships can fail to get an ITA, even after multiple attempts. In that case, they do at least have the option of filing a full Partner temporary visa application and awaiting the outcome. While it will take considerably longer to get an answer, this has the advantage of enabling the applicant to fully document their history, and have it weighed in light of the relevant Instructions. It is thus a valid option to put before a prospective client whose chances of success on a bare Request for Travel look doubtful.

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3 https://www.immigration.govt.nz/opsmanual/#73513.htm

4 https://i.stuff.co.nz/business/prosper/advice/300250252/why-fetch-and-fly-is-the-hottest-thing-in-immigration-right-now

There is another strategy worth considering, which the writer's firm has deployed on several occasions. This is to prepare and file the full Partner visa application, immediately followed by a Request for Travel with a clear cross-reference to the online application itself. This enables someone processing the Request to have access to the supporting evidence already uploaded to INZ Online in order to help them consider whether to grant an ITA. One senses that INZ staff may actually prefer this approach, as it has resulted in positive outcomes – sometimes more quickly than would have been achieved by lodging the visa application alone.

Support for this strategy may be found at H5.5 which at (b) describes the two-step process of Request for Travel followed by the ITA. This part of the Instructions goes on to state:

> e. Despite (b) above, where a person has applied for a temporary entry class visa an immigration officer may grant that visa if the applicant meets relevant immigration instructions (or the visa is granted as an exception to instructions) and impose a visa condition that the holder carries out a critical purpose while in New Zealand if the applicant meets the requirements at H5.25.15.

where H5.25.15 enumerates the list of critical purposes, including partnership with a New Zealander. On one reading, this simply says that filing a visa application on its own is permissible, so long as one is coming to fulfil a critical purpose, as defined. However, from the experience of the last few months, filing both the visa application and the concurrent Request for Travel does sometimes deliver a significantly quicker result. The outcome is somewhat inconsistent, in that the applicant may simply be issued an ITA, and might even file the 6-month Visitor Visa application, only to have INZ switch to approving the main Partner Work Visa application instead.

2. REACTIVATION OF DEPORTATION LIABILITY

The mechanism for issuing a Deportation Liability Notice ("DLN") upon both temporary visa holders and Residents should be familiar to many. The cancellation and suspension of deportation liability, most commonly for the benefit of Resident Visa holders, is also a well-trodden process. This is a Ministerial discretion under s 172 Immigration Act 2009 ("the Act"). Importantly, conditions are normally imposed on the visa holder for up to 5 years. For example, if deportation liability arose out of a criminal conviction or offending, then the visa holder must not incur any subsequent convictions during the suspension period.

The power to suspend is accompanied by the power to resume deportation action if the person breaches the condition of suspension in any way. The relevant portions of s 172 are set out below:

> (2) The Minister may at any time, by written notice (a suspension notice), suspend a residence class visa holder's liability for deportation—
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> (a) for a period not exceeding 5 years; and
>
> (b) subject to the visa holder complying with any conditions stated in the notice (which take effect from the date specified in the notice, being a date not earlier than the date of notification).
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> . . .
>
> (3) Where a person fails to comply with the conditions stated in a suspension notice,—
>
> (a) the Minister may reactivate the person's liability for deportation by causing a deportation liability notice (a **reactivation notice**) to be served on the person that sets out the grounds of the reactivation; and
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> (b) subject to section 175A(4), the person has 28 days from the date on which the reactivation notice is served to—

> (i) lodge an appeal with the Tribunal on the grounds specified in section 155, 156, 158, 159, 160, 161, or 162, if the person deferred lodging an appeal under section 173A(2); or
>
> (ii) leave New Zealand.

The first point to note is that the decision to reactivate deportation liability is discretionary. Once a breach of suspension is identified, a Delegated Decision Maker acting with Ministerial delegation is entitled to consider the surrounding circumstances to determine whether, in spite of the breach, the suspension should be left untouched. This is normally initiated by writing to the person for comment, along with a standard questionnaire which traverses their domestic situation, family ties and reasons for wishing to remain. It mirrors the process followed when INZ is first alerted to someone's potential liability for deportation, which can be called the "pre-DLN stage".

However, someone who had violated the conditions of suspension faces a higher hurdle to having the suspension left in place. The starting-point for any assessment would be the breach of trust implied in the grant of the suspension in the first place. What might also carry some weight is how far through the suspension period the breach took place. Take, for example, the case of Pasiaka Mahina who was convicted of domestic assault and threatening language, and who secured a 5-year suspension. Unfortunately, he was again convicted of assault so that a fresh DLN, or reactivation notice, was issued upon him. The Tribunal found exceptional circumstances because of the consequences of deportation upon his family, and observed *inter alia*:[5]

> [38] While regard must be had to the disappointing failure of the appellant to comply with the terms of his suspension, the Tribunal does not overlook that, at the time of the second incident, he was only three months short of completing a five-year period of suspension. It does serve to moderate the gravity of the breach of suspension somewhat.

Those whose deportation liability is reactivated, and who receive a second DLN, fall into two cohorts. This arises from an addition introduced in the Statutes Amendment Act 2019, which came into force on 24 October 2019, allowing someone whose DLN was suspended to defer filing an appeal to the IPT pursuant to s 173A(2) until they are served with a reactivation notice. Prior to this time, everyone served a DLN had to either file an appeal within 28 days of service, or forfeit that right at their own risk. The Tribunal ended up with hundreds of *pro forma* appeals on its books, which were simply not determined because there was no need to do so if liability was eventually cancelled at the end of the suspension period. With the passage of time, this number is diminishing.[6]

A. <u>The Pre-Amendment Group</u> who filed an appeal as a form of insurance would have it heard in the usual way. However, it is likely that many whose liability was suspended did not pay the $700 to lodge a *pro forma* appeal. By the time they face deportation action once more, their appeal right has long since passed. They must therefore leave New Zealand within 28 days of being served the reactivation notice, as stated starkly at s 172(3)(b)(ii).

Whatever visa they hold is cancelled by the reactivation. Section 175A(4) of the Act specifies that:

> (4) Where a person has breached the conditions stated in a notice or order suspending his or her liability for deportation under section 172(2) . . . , the first day on which a deportation order may be served on the person is the later of—

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5 *Pasiaka Mahina* [2019] NZIPT 504398 (28 March 2019)

6 According to the Tribunal's *Annual Report 2018-19* (August 2019), 113 appeals involving suspended liability remained on hand. The next year's *Report* (August 2020) disclosed 91 such appeals.

> (a) the day that is 28 days after service of a deportation liability notice on the person under section 172(3) . . .;
>
> (b) [only applicable to someone retaining a right of appeal.]

Section 64A establishes that a visa is deemed to be cancelled the day after the first date on which a deportation order may be served on the person under section 175A. That is, the visa will be cancelled 28 days after service of the reactivation notice.

Pasiaka Mahina, mentioned above, did not file an appeal with his suspension.[7] In fact, his Resident Visa was cancelled simultaneous with delivery of the second DLN, because of the operation of the Act prior to the 2019 Amendment. Fortunately, he secured a right of appeal because the Minister directed the grant of a 1-day temporary visa, upon the expiry of which he gained a fresh right of appeal as an overstayer. Advisers who assist people in this class should ask for the 1-day visa as a fall-back option, if they are at all in doubt that the client will get their suspension reinstated.

B. The Post-Amendment Group who are permitted to defer the filing of an appeal can then do so after the service of the reactivation notice, per s 172(3)(b)(i). As noted above, the earlier breach of the conditions of suspension will weigh against their success on appeal. See for instance the case of Hyacinth Demus Ochibulu whose deportation liability for multiple driving offences was initially suspended for 5 years. It was reactivated owing to fresh convictions for importation and supply of methamphetamines. Again, the IPT referred to the second chance given to the appellant that had been flouted, resulting in long-term imprisonment:[8]

> Despite the opportunity given to the appellant to remain in New Zealand, within less than two-and-a-half years of his suspended liability, he engaged in extremely serious offending. He and four others were involved in a network responsible for the importation and possession of over 2.5 kilograms of methamphetamine for supply. . .
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> [72] The Tribunal acknowledges that the appellant has expressed remorse for his offending, has received positive reports of his compliance with his prison sentence and has completed constructive programmes while in prison. However, the Tribunal views with considerable concern the fact that the appellant chose to engage in offending of significant magnitude while on a period of suspension following his not insignificant earlier offending.

The interests of his 4 children were a key concern for the Tribunal; but the fact that they had apparently "thrived and done well" in the last few years while the appellant had spent most of that time away from them in prison,[9] was influential in findings both as to the lack of exceptional circumstances, and that it was not unduly harsh to deport him.

Something should also be said about the Tribunal's jurisdiction to hear applications by the Minister (via INZ) to reactivate deportation for those for whom it was suspended by the Tribunal upon allowing a humanitarian appeal, per s 212(1) of the Act. This power is limited to Residents or Permanent Residents:

> (2) If a person's liability for deportation has been suspended by the Tribunal under subsection (1), the Minister may subsequently apply to the Tribunal for a determination on whether the person has failed to meet any condition imposed by the Tribunal.
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> (3) If the Tribunal determines that the person has failed to comply with any condition,—

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7 At n 5

8 *Hyacinth Demus Ochibulu* [2019] NZIPT 500449 (17 May 2019) at [71] – [72]

9 Ibid at [66]

> (a) the Tribunal may reactivate the person's liability for deportation by causing an immigration officer to serve a deportation liability notice on the person that sets out the grounds of the reactivation; and
>
> (b) the person has 28 days from the date the notice is served to leave New Zealand before he or she may be deported.

Again, the use of the term "may" renders the decision whether to reactivate deportation liability discretionary, as mentioned in *Minister of Immigration v Vili*:[10]

> [77] The Tribunal has a broad decision-making discretion where a person has failed to comply with a condition imposed on suspension of deportation liability: the Act provides that "the Tribunal may reactivate the person's liability for deportation" (section 212(3)(a)). In the absence of any guidelines or criteria in this provision, the Tribunal is required to decide whether to reactivate deportation liability in terms of the overall purpose of the Act. This purpose is stated to be: "to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals" (section 3(1)). To achieve this purpose, the Act established an immigration system that, inter alia, "provides a process for implementing specified immigration-related international obligations" (section 3(2)(d)).

While the breach of a suspension condition clearly strikes at the integrity of the immigration system, it is not determinative. The Tribunal will traverse the personal circumstances to determine whether the usual international obligations are invoked, such as the Convention on the Rights of the Child. In the case just cited, this did deliver a positive outcome for Mr Vili.

It did not for Mr Horne, whose deportation liability was suspended for sexual offending, only to be reactivated by the Tribunal following a further incident within 2 years of the suspension. Despite him being deaf, it was determined that, on balance, reactivation should proceed:[11]

> [43] First, the Tribunal notes the significance of the respondent's conviction for his recent offending having occurred during the period when his deportation liability was suspended. The Tribunal (differently constituted), in allowing the respondent's appeal against deportation, noted the importance of the integrity and credibility of the immigration system in the eyes of reasonable members of the public. The Tribunal noted that suspending the respondent's liability for deportation, in this case, would give him every incentive to continue with his rehabilitation, and would also signal to him that any further offending would not be tolerated by the New Zealand public. Yet, within 22 months of the Tribunal's decision, the respondent re-offended.

The second key factor for the Tribunal in that case was the gravity of the second offence, being indecent assault on a 12-year-old girl. Although he was sentenced to only 5 months' home detention, less than for the previous offence, this was seen as a sufficient indicator of the seriousness of the crime.

The visa holder whose liability is reactivated in this way has no further right of appeal to the Tribunal, consistent with the intent behind the scheme of the Act to limit the number of appeals of the same class available to any one person.

A quick search of the Tribunal database shows that only 8 cases of reactivated liability have come before it; and 5 of those have been decided since January 2019. This suggests that the process will be used with greater frequency in the future.

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[10] *Minister of Immigration v Vili* [2019] NZIPT 600661 (8 July 2020) at [77]
[11] *Minister of Immigration v Horne* [2019] NZIPT 600201A (30 January 2019) at [43]

3. SMC GROUP APPEALS – DÉJÀ VU ALL OVER AGAIN

Our firm recently secured approval of 9 almost identical Skilled Migrant Residence Appeals for staff at a major insurance company. The IPT determined that INZ's assessment of whether the appellants performed the occupation of Insurance Agent was flawed for multiple reasons, and referred them back for reassessment. What was notable about these cases is that they shared striking similarities with another group of appellants whom we worked for just 3 years before.

One sample case will suffice for the purposes of demonstration, being *PJ (Skilled Migrant)* [2021] NZIPT 205817 (9 March 2021).[12] The appellants worked in a call centre environment, taking inbound enquiries, proposing insurance products, calculating premiums using the company's bespoke system, and so on. While INZ accepted that PJ carried out 5 of the 9 Core Tasks listed under the relevant ANZSCO Unit Group 6112, it found that they did not perform the other Tasks and, importantly, that the job was not sufficiently skilled to equate to "skilled employment" for the award of points.

The IPT identified many defects in the decision, including:

- reliance upon a generic site visit (which INZ claimed not to rely upon) which did not address the specific work of the appellants concerned, and which influenced the outcome;[13] and
- a failure to consider the job in the context of the working environment, and assumptions made about the job which coloured its conclusions about whether certain Tasks were performed.

We will consider two specific errors which may have broader significance for those working in this field – because they have come up before, and no doubt will come up again, as will be explained.

A. Use of Knowledge Management ("KM") Systems: Core Task 4 of Unit Group 6112 states that Insurance Agents are involved in "calculating premiums and establishing method of payment". PJ and the other appellants used the employer's IT applications to input data so as to generate the necessary calculations. In INZ's view, this meant that PJ did not perform this task – it was done for them. The IPT pointed out that INZ's own site visit report and other evidence on file showed that, in fact, employees needed to have and to apply knowledge of numerous products and processes in order to carry out this aspect of the work, so that the mere fact of using a computer system to help with that did not invalidate their performance of this task. It cited an earlier decision of *JC (Skilled Migrant)* in which two key points were made:[14]

- It is unrealistic to suggest that any employee will not be constrained to a greater or lesser extent by the technology choices of their employer. To hold otherwise would be to ignore the reality of most employment in a corporate environment; and
- Company-specific KM systems are often inextricably intertwined with companies' everyday operations and their employees' roles. While in-house company systems might provide some assistance, such a situation should not necessarily mean that an applicant's ability to perform the relevant core tasks is constrained because it is still

[12] At the time of writing, publication versions of this and the other decisions have not yet been released.
[13] *PJ (Skilled Migrant)* [2021] NZIPT 205817 (9 March 2021) at [81] – [83]
[14] Ibid at [58], citing *JC (Skilled Migrant)* [2017] NZIPT 204151 at [73] – [74]

> necessary for an applicant to utilise his or her own skills and expertise to use such systems.

As so many employment situations involve leveraging in-house IT tools to get the job done, the wider application of this finding should be clear.

B. Importing Skill Level into Substantial Match Assessment: A repeated refrain in INZ's decisions for PJ and the other appellants was that their work did not "demonstrate any specialist, technical or management expertise or the level of skills or expertise required of an Insurance Agent." This view was buttressed by the fact that the entry requirements of the job did not specify prior insurance-related qualifications or work experience, for example. This view influenced the erroneous finding that the appellants did not discharge Core Task 4 of calculating premiums mentioned above.

The Tribunal readily disposed of this by referring to Instructions SM6.10.5 which stipulate what qualifies for skilled employment, including the substantial match between the job and the corresponding ANZSCO description, and that the applicant is "suitably qualified by training and/or experience for that occupation" – meaning that they meet the indicative skill level for the ANZSCO occupation:[15]

> However, none of the requirements state that an applicant must be undertaking work of at least a certain difficulty or with a minimum level of skill. Nowhere in the instructions does it specify that an applicant must be solely responsible for undertaking a task, without limitations, or have a certain level of seniority or responsibility to be considered to be undertaking the tasks.
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> . . . although SM6.10.5.b and SM6.10.5.1 require applicants to demonstrate that their employment is substantially consistent with the ANZSCO occupation description and relevant core tasks, the instructions do not specify a skill level in undertaking the tasks, *just that an applicant is undertaking them*: see for example, *WB (Skilled Migrant)* [2015] NZIPT 202536 at [23]; *MP (Skilled Migrant)* [2018] NZIPT 204409 at [47]; *JC (Skilled Migrant)* at [64]. [*italics added*]

In one of the other Insurance Agent cases, the appellant's former representative at first instance explicitly brought to INZ's attention the Tribunal's findings in some of the earlier cases cited above.[16] The hint was not taken, however. In that case, the appellant's role was somewhat different to that of the others, although not so much as to prevent the Tribunal largely adopting the findings in *PJ*. It went on to say:[17]

> Because he was represented by a different representative during part of the assessment of his application, the submissions in response to its letter of concern were different, as were the documents he provided in response. That representative clearly highlighted the differences in the appellant's role, as opposed to those company employees working in the contact centre, and clearly raised her concerns about Immigration New Zealand's failure to engage in the different context that the appellant's employment presented. However, despite this, Immigration New Zealand's decline letter mostly failed to engage with those submissions and was largely identical to other applicants' decline letters. This does little to dispel the impression of predetermination and creates an impression that it approached the appellant's application with a closed mind.

Readers may note the repeated reference to *JC (Skilled Migrant)*, which brings us to the reason why the above two criticisms of the INZ decisions are important. This is because exactly the same issues were traversed and disposed of in another set of over 15 identical appeals determined in the appellants' favour at the end of 2017 and early 2018, of which *JC* was one. The earlier cases involved ICT Technical Support staff working in a call centre for

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[15] Ibid at [75] – [76]
[16] *PM (Skilled Migrant)* [2021] NZIPT 205992 at [22]
[17] Ibid at [62]

a multinational client of their employer. The appellants were ultimately granted Residence following a somewhat fraught reassessment.

One might have thought that having a significant tranche of visa decisions overturned in this way might have prompted INZ to take note and provide guidance to staff about how to approach future applications which raised the same points of contention. Evidently, this was not the case. Even the templated form of the decisions in the insurance cases showed that some thought and planning had gone into seeking to defeat the applicants *en masse*, in what was ultimately a doomed exercise.

One function of an appellate body is to provide guidance to decisionmakers at first instance. The corollary to this is that such guidance should be digested and followed. The failure to do so in this instance has led to wasted effort by appellants, INZ officers and members of the IPT.
