



IMMIGRATION NEW ZEALAND
INTERNAL ADMINISTRATION CIRCULAR NO: 13/08

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| To: | Immigration New Zealand, all Managers | Date: 30 September 2013 |
| | Immigration New Zealand, all Staff | |

SECTION 61 - IMMIGRATION ACT 2009

Please **READ** this information and ensure that all staff members who may be affected are aware of what is required of them.

Purpose

1. This circular supersedes IAC NO: 11/10 dated 14 November 2011. Its purpose is to provide information to all managers and immigration officers holding schedule 3 (and above) delegations as specified at A15.5 of the Immigration New Zealand (INZ) Operational Manual in relation to section 61 of the Immigration Act 2009 – “Grant of a visa in special case”.

Background

2. The grant of a visa in a special case under section 61 involves the exercise of a power characterised as being one of ‘absolute discretion’. This circular clarifies expectations for customers and staff when the section 61 provisions are applied. In particular, it situates the application of the section 61 power of absolute discretion within the broader scheme of the Immigration Act 2009 as but one component of a single comprehensive system for dealing with the circumstances of non-New Zealand citizens wishing to come to and stay in New Zealand.

Legal Framework

3. The meaning of an enactment must be ascertained from its text and in light of its purpose¹. Accordingly, the Immigration Act 2009 (the Act) needs to be viewed in its entirety and section 61 viewed against this whole – that is, part of a comprehensive statutory scheme that manages immigration in New Zealand.
4. The purpose of the Act is set out in section 3 of the Act. It is “to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals”.

¹ Section 5, Interpretation Act 1999.

Subsection (2) goes on to set out how the Act aims to achieve this purpose through establishing an immigration system that (amongst other things) –

- “(a) requires persons who are not New Zealand citizens to –
- (i) Hold a visa to travel to New Zealand; and
 - (ii) Hold a visa and be granted entry permissions to stay in New Zealand; and ...
- (e) includes mechanisms to ensure that those who **engage with the immigration system** comply with its requirements, including mechanisms that –
- ...
- (ii) prescribe the system for the deportation of people who are not New Zealand citizens and who fail to comply with immigration requirements, commit criminal offences, or are considered to pose a threat or risk to security.”
- (emphasis added)

5. The statutory scheme incentivises compliance through providing greater rights (including procedural protections) for people who are lawfully in New Zealand (and enfranchised and engaged with the system). For example, those people lawfully in New Zealand generally have rights, often subject to strict statutory time limits, to –

- Make applications for further visas, including of a type of their choice
- Receive reasons for decision making
- Apply for reconsideration of an unfavourable decision
- Work and study in New Zealand, consistent with the conditions of their visa
- Remain in New Zealand in accordance with their visa
- Seek a humanitarian exception by appeal to the Immigration and Protection Tribunal, with associated procedural protections and entitlement to a written, reasoned decision
- Appeal to the higher courts on points of law

6. By contrast, persons who are unlawfully in New Zealand have very limited rights and are disenfranchised from the system with the effect that they –

- Have an obligation to leave New Zealand;
- May not apply for a visa;
- May not work in New Zealand;
- May not study in New Zealand (except in compulsory education); and
- Are liable for deportation.

7. The only rights provided by the Act to persons who are unlawfully in New Zealand are, –

- In some circumstances, a right to appeal to the Immigration and Protection Tribunal, within 42 days of becoming unlawful, on humanitarian grounds against the requirement to leave New Zealand; and
- If served with a deportation order, the right to have cancellation of the deportation order formally **considered** if the person “provides information ... concerning his or her personal circumstances, and the information is relevant to New Zealand’s international obligations” (section 177 of the Act); and
- The right to, at any stage, make a claim for refugee or protection status.

8. The restrictions on rights are intended by the statute to achieve a high level of compliance with immigration law and, in particular, ensure that persons who do not meet immigration rules and procedures are not advantaged over those who do comply with the system. The restriction of rights in “absolute discretion” decision making (discussed below) also reflect the need for finality in immigration decision making in respect of individuals on whom the scheme of the Act has imposed an obligation to depart New Zealand and who are positioned for deportation processes.

Section 61

When does section 61 apply?

9. A visa can only be granted under section 61 to a person who is:
- unlawfully in New Zealand, and
 - not subject to a deportation order, or otherwise excluded.
10. If the requestor is a person to whom section 61 does not apply, an immigration officer should return the request with a letter setting out that INZ is unable to consider the request.
11. A decision to grant a visa under section 61 is in the “absolute discretion” of the decision maker. This means that no person has the right to request a visa under section 61, and if a person purports to do so:
- the Minister or delegated immigration officer is not obliged to consider the request, and
 - the Minister or delegated immigration officer is not obliged to inquire into the circumstances of the person or make any further inquiries regarding the information provided by the person, and
 - whether a request is considered or not, the Minister or delegated immigration officer is not obliged to give reasons for any decision on it, other than the reason that section 11 of the Act applies and
 - section 27 of the Immigration Act 2009 (concerning the reasons for refusing to grant a visa to be given in writing if requested) and section 23 of the Official Information Act 1982 (concerning the right of access to reasons for decisions) do not apply to the request.
12. In simple terms people who make requests under section 61:
- have **no right** to apply for a visa under it
 - have full responsibility for ensuring that any and all information that might potentially be considered in any exercise of the section 61 discretion is put forward with their request
 - have **no right** to have their request considered
 - if their request is considered or not, have **no right** to be told why a particular decision was made

- if their request is considered, have **no right** to have it considered against any particular immigration instructions.

Receiving a section 61 request

13. From 16 September 2013, any Immigration New Zealand office that receives a request for a visa under section 61 must forward the request to the Section 61 Team. A member of that team will decide whether to consider the request, and if it is considered, decide whether to grant a visa.

Processing a section 61 request

14. Requests for visas under section 61 are not “applications” within the scheme of the Act – there is no right to apply, no lodgement requirements or time limits that must be met and no immigration instructions that apply when considering a request.
15. The Ministerial power to grant, or refuse to grant, a visa under section 61 is delegated to immigration officers holding Schedule 3 delegations as specified at A15.5 of the Immigration New Zealand (INZ) Operational Manual. Ministerial expectations are that officials will ordinarily decide cases where section 61 applies. There is, therefore, no expectation that persons whose requests have been declined will approach the Minister.
16. Section 61 enables the grant of **any** type of temporary entry class visa (visitor, work, student or limited visa), or a residence class visa.
17. The grant of a visa under section 61 is essentially a request for a dispensation to be made from rules and processes that would otherwise apply. A relevant consideration which immigration officers may take into account when determining a request is that the requestors, as persons unlawfully present in New Zealand and liable to deportation (although not yet subject to a deportation order), have the following options under the Act:
- to voluntarily depart from New Zealand at any time under their statutory obligation to do so, and are free to apply for a visa from outside of New Zealand in accordance with the usual rules and processes, or
 - to cooperate in being interviewed by an immigration officer to obtain a Record of Personal Circumstances before a deportation order is made and served. The immigration officer may determine, after obtaining a Record of Personal Circumstances, whether or not the deportation process under sections 175 to 178 should continue.

Refusing to consider a request

18. There is no obligation to consider a request made under section 61. An immigration officer may refuse to consider the request given the information provided. Equally, however, they may consider a request and may ask for more information or evidence to be provided to do so.

19. Where an immigration officer refuses to consider a request they need not record reasons for doing so, (other than the reason that section 11 of the Act applies), in either notes against the file or in the communication with the client.
20. The requestor should be sent a letter setting out that INZ has refused to consider the request. The immigration officer must complete the s61 template by indicating they have refused to consider the request, then sign it and attach it to the file. Any matters an immigration officer chooses to record in relation to the request may be recorded on the file.
21. If an immigration officer asks for more information or evidence then the request has been considered and the process set out below under *Considering a request* must be followed.

Considering a request

22. If the immigration officer decides that there are grounds to consider the request based on the evidence and submissions provided by the requester, he or she should consider the request.
23. There are no specific immigration instructions that must be met as decisions are a matter of absolute discretion.
24. During the consideration of a s61 request, an immigration officer is not obliged to request any further information or to seek comment prior to an adverse immigration decision being made. A decision can be made solely on the basis of the facts available and the submissions provided with the request. However, this does not preclude an immigration officer requesting further information (such as a medical or police certificate) to assist him or her in considering the request.
25. In considering a s61 request immigration officers should also consider whether or not the matters put forward for the grant of a visa are best dealt with by the applicant exercising one of their rights under the Act; for example, by way of an appeal on humanitarian grounds against the requirement to leave New Zealand to the Immigration and Protection Tribunal (if such appeal is available).
26. Decisions under s61 are still subject to the general requirement of fairness that is derived from public law principles. However, what fairness requires in a particular case must be determined having regard to all the circumstances including the particular statutory provisions under which the decision is made, the overall statutory scheme, what is known of the requestor's circumstances and the consequences of the decision.
27. Consistent with this approach, the courts have described language similar to the definition of "absolute discretion" in section 11 as conferring "rights which ... are very limited" and noted that the denials of procedural protections in the language were to be contrasted with the protections made available elsewhere in the immigration legislation. In the particular context of discretionary decisions made under s61, the scope and content of fairness is governed by the express language of s11 and the definition of "absolute discretion", which must be read in the context of the overall scheme of the Act, as described above.
28. As a person making a request for a visa under s61 is unlawfully in New Zealand and requests the exercise of absolute discretion as an exception to the usual rules governing those unlawfully

present in New Zealand and liable to deportation, it is for the person making the request to put forward their case. There is no obligation for an immigration officer to seek further information, although an immigration officer may exercise his or her discretion in a particular case to seek further information, in the same way as described above.

29. New Zealand's international obligations may also be a relevant consideration to be taken into account when assessing a request under section 61.
30. The file notes should state that the officer has considered the request. Any matters an immigration officer chooses to record in relation to the request may be recorded on the file.

Considering requests for residence class visas under section 61

31. As noted in paragraph 15 above, s61 enables the grant of a visa of **any** class or type including a residence class visa. Decision makers need to be open to the possibility of issuing a residence class visa if there is sufficient justification.
32. If an Officer with Schedule 3 delegations is proposing to grant a residence class visa under section 61 to a person who has not previously held a residence class visa, the case must be escalated to their Market Manager.
33. A Market Manager should consider further escalating a case where the grant of a residence class visa is being seriously contemplated in relation to any person with the issues or concerns described below:
 - character issues, in particular any with criminal convictions and/or where a character waiver would not normally be granted; **or**
 - health issues, especially those where residence instructions do not allow for the grant of a medical waiver, or where a medical waiver would not normally be granted; **or**
 - any other concerns that the grant of the visa may not be in the interests of New Zealand which include, but are not limited to, instances where:
 - i. there is a potential security risk, or
 - ii. there is a risk to New Zealand's international reputation, or
 - iii. the requestor has applied for and been granted welfare assistance under the Social Security Act 1964.

Outcome of the consideration

34. Immigration officers considering section 61 requests should briefly record their reasons for decisions on the file.
35. The decision to grant or not to grant a visa following the consideration should be clearly recorded. If the request is approved, the type and duration of visa to be granted should be stated.

36. Unlike an ordinary application, the reasons for the decision need not be recorded in communication with the client. That, however, is a matter for the officer concerned. If the officer exercises his or her discretion to not give reasons to the requestor, he or she **must** however expressly record that section 11 of the Act applies.

If an immigration officer chooses not to provide reasons to the requestor in reliance on section 11, consideration should be given to withholding these reasons if a request is received under the Privacy or Official Information Acts on the basis that to disclose this information would be contrary to section 11 of the Immigration Act (section 18(c)(i) of the Official Information Act and section 7(2) of the Privacy Act).

General

37. Immigration officers can help limit the likelihood of people becoming unlawful in New Zealand by ensuring that any visa granted does not expire on a Saturday or Sunday.

38. If this IAC is inconsistent with any previous IAC, information or instruction, this IAC prevails.

Nigel Bickle
Deputy Chief Executive - Immigration