

VISA PAK ISSUE 416 — 13 SEPTEMBER 2019

## IMPLICATIONS OF RECENT HIGH COURT DECISION ON HOW WE DETERMINE IF A PERSON ‘EXCLUDED’ FROM ANOTHER COUNTRY IS SUBJECT TO S.15(1)(F) OF THE IMMIGRATION ACT 2009 (THE ACT)

Section 15(1)(f) of the Act provides that no visa or entry permission may be granted, and no visa waiver may apply, to any person who has, at any time, been removed, excluded, or deported from another country. It has therefore long been INZ’s position that a person, who has been prohibited from applying, or made ineligible to apply, for a visa to enter a country at any point in time has been excluded from that country and that section 15(1)(f) applies. INZ therefore declined a residence application under SMC due to the applicant’s exclusion from Australia. The applicant appealed to the NZIPT who found – decision at link below that the applicant was not excluded from Australia. [https://forms.justice.govt.nz/search/Documents/IPTV2/Residence/res\\_20170920\\_204065.pdf](https://forms.justice.govt.nz/search/Documents/IPTV2/Residence/res_20170920_204065.pdf)

INZ appealed to the High Court.

On 13 August 2019 Cooke J delivered his judgment in the decision *Chief Executive of the Ministry of Business, Innovation and Employment v EM and Immigration and Protection Tribunal* [2019] NZHC 1966.

The High Court found:

- To be “excluded” from another country, the Act contemplates a prohibition on re-entry into that country, as opposed to a restriction on re-entry ([31] and [36]). In cases where the prohibition is not absolute or for a stated period of time, the question of “exclusion” will unavoidably turn on a factual assessment of the restriction in the foreign country ([32] and [36]).
- EM would have been excluded if ([42]-[43]):
  - There was a total prohibition on him re-entering Australia;
  - He tried, but failed (because of the overstay which led to the original restriction on re-entry), to obtain re-entry under the remaining avenues available to him; or
  - In reality, he would not have been able to obtain re-entry under any of the remaining avenues.
- In reviewing the relevant Australian legislation, EM did not fall under any of the above categories and consequently was not “excluded”.