

VISA PAK ISSUE 493 — 17 DECEMBER 2021

MITIGATING THE RISK OF VISA APPLICANTS BECOMING UNLAWFUL WHILE AWAITING A DECISION ON THEIR TEMPORARY ENTRY CLASS VISA APPLICATION

When an applicant's interim visa is due to expire, please consider if a decision can be made on the substantive application or if a temporary visa may be granted as a matter of discretion under s79(5).

There is previous advice on people in New Zealand where circumstances in their home country have changed to the extent that they may not be able to return immediately (see Visa Pak 248). This advice concerns visa applicants who have, or are due to, become unlawful due to the expiry of their interim visa and circumstances outside their control that have led to delays in the processing of their visa application.

When determining an application for visa applicants in this situation, which may include cases where the applicant has been unable to access the required documentation to be granted a visa, please take an empathetic and pragmatic approach.

This issue has arisen more frequently because of challenges raised by the response to COVID-19. For instance, an applicant may be currently unable to obtain a police certificate because that service is suspended in their home country.

If an applicant's interim visa is due to expire, please consider if a decision can be made on the substantive application immediately, including whether granting a visa as an exception to immigration instructions is justified.

If an applicant's substantive visa application cannot be approved (including as an exception to instructions), it may be appropriate to consider granting a visa under s79(5) of the Immigration Act 2009 to ensure the applicant remains lawfully in New Zealand while their substantive application continues to be processed.

When granting a visa under s79(5), please take into account the applicant's circumstances to determine the appropriate visa type and duration. For example:

- A person with work rights on their interim visa may be granted a work visa;
- A person applying for a visitor visa should may be granted a visitor visa;
- A person who needs to wait another month to obtain their police certificate should be granted enough time for the police certificate to arrive (at least a month), and additional time to allow the immigration officer to undertake an assessment of the new information, including the Potentially Prejudicial Process, if required.

Any decision made under s79(5) must currently be made by a schedule 2 officer. Applicants should be notified that they have been granted a further visa to allow them to remain lawfully in New Zealand while their substantive application continues to be processed.

AMS notes should state "visa granted under s79(5) of the Immigration Act to allow applicant to remain lawfully in New Zealand while his/her substantive visa application continues to be processed. The visa is granted because the applicant's interim visa is soon to expire due to circumstances outside the applicant's control, and a visa is necessary to maintain the applicant's lawful status".



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Additionally, when processing a subsequent visa application from someone who had an unlawful period, please consider whether the period of unlawfulness was due to circumstances outside the applicant's control.