

VISA PAK ISSUE 459 — 22 JANUARY 2021

## SECTION 49 CONDITIONS ON RESIDENT VISAS – REQUESTS FOR VARYING OR REMOVING, AND FURTHER ADVICE ON BREACHES

Depending on the residence category, conditions can be imposed on a resident visa in accordance with section 49(1) of the Immigration Act 2009 (s49) and the relevant immigration instructions. This item provides general guidance on what to do when there are breaches or potential breaches of s49 conditions.

A visa holder can request that the s49 conditions be removed or varied:

- Requests for removal usually occur when the visa holder believes he or she has met the s49 conditions<sup>1</sup>
- Requests for variation normally occur when the visa holder has had trouble in meeting the s49 conditions but asks that they be varied to make it easier to meet them.

A number of cases have recently come to Operational Policy's attention where the requestor:

- has breached their s49 conditions, or
- has neither breached or met their s49 conditions (these can be called *not-yet-met* cases)

What follows is the recommended process to follow in both such instances.

### **Assess whether a breach has occurred, or whether condition(s) are simply not yet met**

The first step involves an assessment of several elements:

- a) What were the s49 conditions, and are we interpreting them correctly?
- b) What evidence is there that the conditions have not been met?
- c) If the assessment in steps a) and b) confirm one or more of the condition have not been met, then we must ask ourselves if there was a time limit or some other boundary on the condition such that there is now no possibility the person can meet the condition(s) in the future.

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<sup>1</sup> There are also instances where a resident visa holder applies for a PRV, not realising that first the matter of their s49 conditions needs to be addressed. In these cases, processing offices should ask that the applicant submit a 'removal of conditions' application which can then be assessed before proceeding to the PRV application.

If...	Then...	Notes
there is now <u>no possibility</u> the person can meet the conditions	Follow the steps in the next section: <i>Refer breaches to Resolutions</i>	A breach has occurred, as per the advice in <a href="#">Visa Pak 232 - Prescribed approach where section 49 conditions have been breached</a> . As this visa pak item explains, there is no authority under the Act to vary or cancel a condition that has been breached or has expired, and it is contrary to the intent of the Act to do so.
there is still a possibility (even a remote one) that the person can meet all of their conditions	Use the process under <i>Not-yet-met cases</i> .	A breach has not yet occurred, so there would be no use in referring the matter to Resolutions

### Refer breaches to Resolutions

In line with Visa Pak 232, when it has been identified a section 49 condition has been breached, any pending 'removal of conditions' (RoC) application must be declined, and the concern or matter must be referred to Immigration Resolutions. This is because there is a potential deportation liability of a resident visa holder that must be dealt with, even if the immigration officer or office referring the matter is of the view that the person is not at fault.

Visa Pak 426 provides general guidance and the referral template when referring resident deportation cases to Immigration Resolutions.

Where a RoC application is being declined, the following should be entered into the assessment notes:

*The applicant/advisor has made a request that the conditions on the visa be varied or cancelled. However, it appears the conditions have been breached. Therefore the applicant is potentially liable for deportation (pending a determination by the Minister or a DDM). Variation or cancellation of the conditions at this time is not warranted and the matter has been referred to Immigration Resolutions.*

### Not-yet-met cases

These cases refer to situations where the s49 conditions have not been met, but where there is still a possibility (even a remote possibility) that the applicant could meet the conditions in the future. It follows that a breach of conditions has not yet occurred, and so a referral to Resolutions should not be made at that point of time. The possible actions an immigration officer can take depend on the circumstances, as below:

Situation	Actions
<p>Mr Pierce was granted residence under SMC with current skilled employment (less than 3 months) as an accountant at ABC company in Dunedin. The s49 conditions was that he hold that job (or a similar job) for 12 months. Eleven months after he is granted residence, he requests the cancellation of his conditions, despite the fact (and he's aware of this) that he is one month short of meeting his conditions. He says his employer had just laid him off due to COVID-19.</p>	<p>Either:</p> <ul style="list-style-type: none"> <li>a) Vary or cancel the conditions<sup>2</sup> OR</li> <li>b) Decline the request, but advise he still has several years left to meet his s49 conditions (the visa pak item '<i>Section 49 conditions on resident visas under the Skilled Migrant Category</i>' explains why he has several years left).</li> </ul>
<p>Mrs O'Reilly from Ireland got residence under the Investor 2 Category. She has transferred her funds to New Zealand and on 1 January 2018 completed the placement of those funds into acceptable investments. As part of her s49 conditions, she was/is required to spend 146 days in each of the final 3 years of the 4 year investment period (i.e. 2019, 2020, and 2021) in New Zealand. In Jan 2020, she was determined to have met the conditions at the 2 year anniversary check. However, in May 2020, she advises INZ she is unable to travel to NZ from Ireland due to COVID-19, and so won't be able to meet her time-in-NZ conditions for 2020. She requests a variation of conditions, as she knows she will not meet all of the s49 conditions at the 4 year anniversary check in Jan 2022.</p>	<p>Either:</p> <ul style="list-style-type: none"> <li>a) Vary the conditions OR</li> <li>b) Decline the request, and advise the matter will need to be referred to Resolutions at the appropriate time.<sup>3</sup></li> </ul>

<sup>2</sup> See [s50\(3\) and 50\(2\)\(b\)](#) of the Immigration Act. See also [RA8](#) and [A15.5, schedule 3, power 3](#). [Ensure you refer to these powers in the AMS record.](#)

<sup>3</sup> In this and the previous SMC example, the b) option on the face of it would seem to be the less preferred one given the COVID-19 situation and its impact on each individual, though each case needs to be assessed on its own merits.