The Ombudsmen and immigration

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This article was originally submitted in 1981 as a seminar paper for an Honours seminar course on the Ombudsman. In it Helen Bowie focuses particularly on the extent to which the ombudsman may investigate matters of policy while examining "matters of administration".

I. INTRODUCTION

Immigration policies are generally formulated and amended in the public interest to accommodate inter alia, changes in economic growth rates, unemployment figures and the availability of housing and social services. This is well illustrated by New Zealand's experiences in the seventies. Early in the decade the emphasis had shifted from the intake of mainly European immigrants to a policy involving large numbers of Pacific Islanders who entered New Zealand on temporary permits and provided a much needed pool of labour. The subsequent decline of economic fortunes in the seventies however, led to restrictions on permanent and temporary entry[1] and the government's attitudes towards persons who overstayed their permits became more stringent. The rights of the individual in this economic climate became secondary to the implementation of sweeping policies. The executive made full use of the broad unfettered powers conferred by the legislation. The courts were reluctant to perform an active role in procedural and substantive aspects of review in individual cases.[2] The legislature did not hesitate to remove loopholes from the legislation which might frustrate the smooth execution of the administration of the Act.[3]

In the early and mid-seventies the ombudsman provided the sole effective means of recourse for aggrieved immigrants. This note assesses the jurisdictional limitations and suitability of the ombudsman in this role. In addition, the ombudsmen's

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1 Department of Labour, *Immigration and New Zealand — a Statement of Current Immigration Policy* (2 Ed., Immigration Division of the Department of Labour, Wellington, 1979) paras 2 and 4.

2 *Pagliara* v. *Attorney-General* [1974] 1 N.Z.L.R. 86; *Tobias* v. *May and another* [1976] 1 N.Z.L.R. 509.

3 See, for example, the Immigration Amendment (No. 2) Act 1978 which was enacted to nullify the possible effect of *Ngata* v. *Department of Labour* [1980] 1 N.Z.L.R. 130; cf. Y. Y. F. Chan "Overstaying — Challenge followed by Change" (1981) 11 V.U.W.L.R. 211, 223.

office is considered in the light of recent and ongoing changes in legislative and judicial attitudes towards procedural safeguards. The extent to which these developments have confined the ombudsmen's activities in respect of immigration laws is examined.

This analysis will be conducted in relation to three powers conferred under the Immigration Act 1964. They are —

(a) powers to grant and renew entry permits, (section 14(1)-(4), as amended by the 1976 and 1977 Amendment Acts);

(b) the power to revoke temporary permits (section 14(6)) and the power to bring proceedings against overstayers (section 14(5) and section 14(6)); and

(c) the power to deport persons who have committed offences or threatened national security (section 22, as amended by the 1978 (No. 1) Amendment Act).

II. POWERS RELATING TO ENTRY

Section 14(1) provides that any person to whom the Act applies, not being a prohibited immigrant,[4] may be granted a temporary permit. The 1977 Amendment Act provided for the differentiation between working and non-working permits (section 14(2A)) to enable tighter control in a worsening unemployment situation.

These provisions give no indication of the criteria which are to be applied in the decision-making process and confer no procedural safeguards such as the opportunity for the applicant to be heard and the need for the decision-makers to give reasons. Also, prior to 1977, the legislation provided no right of appeal against entry decisions. The underlying rationale of these unfettered ministerial discretions is that aliens have no right to enter a sovereign state, which has the power to determine the composition of its population as it sees fit.

The ombudsmen's reports show fewer cases relating to entry are investigated than other types of immigration decision.[5] Three examples in the 1974 Ombudsman's report are useful.

Case No. 6896 involved alleged discrimination against Chinese nationals who applied for visitor's permits. The department's requirement that these immigrants sign an undertaking not to apply for an extension of the permit under section 14(4) was found by the Ombudsman to be contrary to the law,[6] and department practice was changed accordingly.

Case No. 7908 involved poor facilities for application for entry permits at New Zealand House in Samoa. The Ombudsman's discussion of the matter revealed that the department was taking active steps to deal with the problem.

4 See Part I of the Immigration Act 1964 and in particular s.3 which lists the exceptions to Parts I and II of the Act.

5 See *1974 Annual Report* Case Nos. 6896, 7493, 7908, and *1969 Annual Report* Case No. 3588.

Arguably, in the 'entry' field, the ombudsmen should be confined to the type of problems dealt with and the action taken in these two cases. Case No. 7493 however, suggests that the ombudsmen may define their role in broader terms, especially when dealing with a case which involves an application to renew an entry permit or a request for permanent residence. In these situations, it can be contended that the complainant, who may have resided in New Zealand for some time, has a better right to more extensive recourse against a decision.

Case No. 7493 involved a complaint against the policy of the Immigration Division of the Department of Labour relating to visitors' permits which were being issued for three month periods with a minimum period of twelve months between each visit. The complaint was lodged with specific reference to the complainant's eighty year-old father, a Fijian, whose family were living in New Zealand. The application of the policy to the father's situation would have caused him hardship, the travelling to and from New Zealand for visits being detrimental to his health. The Ombudsman approached the case as one requiring consideration by the department on humanitarian grounds. The case was passed to the Minister for reconsideration and permanent residence was eventually granted. While not handling the case as an attack on policy, the Ombudsman showed that he was prepared to look to the merits of the individual decision which has been largely influenced by policy considerations.[7]

A recurring theme which arises in relation to the ombudsmen's investigatory powers in all immigration decisions is the jurisdictional question of where the ombudsman draws the line between 'matters of administration'[8] and policy. Definitions of these terms have limited usefulness in determining the theoretical limits of jurisdiction. In practical terms, however, it would seem that the ombudsmen would be left with few powers if they were to exclude from their jurisdiction the investigation of any immigration decision which was influenced by policy. Indeed, the broad reference in section 22(1) and (2) of the Ombudsmen Act 1975 to unreasonable, unjust, improperly discriminatory or wrong decisions, and decisions exercised for improper purposes or on irrelevant grounds, seems to indicate that the legislature envisaged that the ombudsmen must have some regard to matters of policy. This view gains support from Sir Guy Powles, who argued that since there is nowhere in the Act an express prohibition of the scrutiny of policy, an assumption could be made that an act which related to both policy and administration could be examined.[9]

Further, as Walter Gellhorn said in his book *Ombudsmen and Others*:[10]

6 Section 22(1)(a) Ombudsmen Act 1975. Straight questions of law and fact might also arise from cases involving the issue of whether the applicant falls within the exceptions to Parts I and II of the Immigration Act (s.3). See for example, *1979 Annual Report* Case No. W12955.

7 See also *1969 Annual Report* Case No. 3588.

8 See s.13(1) Ombudsmen Act 1975.

9 Speech given by Sir Guy Powles to New Zealand Institute of County Clerks 22.12.75 (unpublished), also quoted by W. G. F. Napier, "Ombudsmania Revived: The Local Government Complaints" (1980) 10 V.U.W.L.R. 413 at 416, n.13.

10 Gellhorn W., *Ombudsmen and Others* (Harvard University Press, 1967) 109.

> Perhaps a "policy" is transmitted into a "matter of administration" when a general principle is administratively applied to a specific person or body of persons in his or its personal capacity . . . . When, however, an issue is of concern to the public at large, as distinct from identifiable individuals upon whom it particularly focuses, then possibly it should be left to political controls rather than to the Ombudsman's evaluation.

In the writer's opinion, this view provides a sensible rationale for the ombudsman's investigation of cases such as Case No. 7493 in the immigration field.

The use of the Ombudsman's Office as the main 'review' body for 'entry' decisions (apart from the section 20A review which has limited application) has some advantages. Although some would advocate a formal appeal structure to vindicate individual rights, arguably the informality and accessibility of the Ombudsman's Office provides an appropriate service for complainants who are in the country for limited periods or are seeking recourse from abroad. The problems which the ombudsmen have encountered with complainants who apply to them in the hope of prolonging their stay while the investigation proceeds, have been overcome by instituting 'fast track' procedures in these cases.[11] Using these procedures the Ombudsman's Office, with the co-operation of the Immigration Division, can adduce within 48 hours whether the complaint made is one which has any merit and warrants further investigation.

III. POWERS TO REVOKE TEMPORARY PERMITS AND TO BRING PROCEEDINGS AGAINST OVERSTAYERS

Section 14(6) provides: "A temporary permit granted under this section may at any time be revoked by the Minister." An offence is committed by those who do not leave the country after the revocation is made within the time prescribed by the Minister. It was the policing of this section and section 14(5)[12] which gave rise to the "overstayers" controversy which attracted major publicity in 1974 and subsequently.

Section 14(6) empowers the exercise of an unfettered discretion. The courts, till recently, had shown reluctance in importing into these sorts of powers any additional procedural safeguards.[13] This judicial attitude left recipients of revocation orders (which were often given without reasons) with few alternative forms of recourse. Prior to the introduction of section 20A of the Immigration Act 1964, Ministerial reconsiderations were usually undertaken only on the recommendation of the Ombudsman.[14] Other remedies, such as an appeal to the Governor-General to exercise his prerogative of mercy where a conviction had been made, and the use of legal adoption, were only appropriate in some circumstances and less used.

11 For a discussion of this procedure in another context see Napier in this issue.

12 Section 14(5) provides that an offence is committed by persons who remain in New Zealand after the expiry of their permit.

13 *Pagliara* v. *Attorney-General* supra n.2 at 95.

14 Crowder G. E. *Problems of New Zealand Immigration and Deportation Law* (LL.B (Hons) Legal Writing V.U.W. 1976), 13.

It follows that many grievances involving section 14(6) revocations fell into the hands of the ombudsmen for investigation. Again the decisions investigated could be defined as matters relating to policy. It is perhaps for this reason, together with the fact that the ombudsmen are of course prohibited from looking at the Minister's decision itself, that the ombudsmen have generally concentrated on the procedural aspects of decision-making rather than substantive matters. For example, in Case No. 10545,[15] the Ombudsman focused his attention on the practice of giving warnings to grantees who were in danger of having their permits revoked, and on the completeness of the report made by the Immigration Division for the Minister.[16] The concluding remarks of the case report, which point out the Minister's preference for a more rigorous approach to the criterion of acceptable standards of behaviour, indicate the degree of policy content in the original decision. The Chief Ombudsman's introductory remarks in his *1978 Annual Report*[17] also show a tendency on the part of the ombudsman to avoid the merits of the decision. His concern in investigating departmental committee decisions arising from a stay of proceedings against overstayers, was to ensure that all information which might affect the complainants' cases was put before the committee. He also recommended the publication of the criteria which the committee were using in decision-making, an action which had the effect of reducing the number of subsequent complaints to the ombudsmen.

In the *Suzanne Teipel* case,[18] which the Ombudsman initiated on his own motion,[19] the investigation was again confined to a consideration of whether the Parliamentary Under-Secretary had available to him all the relevant information in making his decision. However, here, the putting to one side of the substantive aspects of the case can be attributed to the fact that the ombudsman's jurisdiction did not extend to an investigation of the Rotary Club's original decision, which was crucial to the revocation order. The Ombudsman's finding in the *Teipel* case was that the complainant should have been given an opportunity to be heard before the revocation was made. This type of recommendation would seem appropriate to an exercise of power affecting an individual who has established an 'expectation' to be allowed to stay in the country for the duration of his or her permit. Indeed, the importance of this 'legitimate expectation' had been noted by the courts in previous United Kingdom immigration cases,[20] although the New Zealand judiciary

15 *1976 Annual Report* 32.

16 See also *1975 Annual Report* Case No. 9158.

17 *1978 Annual Report* 9.

18 *1979 Annual Report* Case No. W14240. See also, New Zealand Chief Ombudsman, *Report on the Investigation into the Actions of the Department of Labour in Relation to the Ministerial Decision to Revoke the Temporary Permit of Miss Suzanne Teipel.*

19 Section 13(3), Ombudsmen Act 1975.

20 *Schmidt* v. *Secretary of State* [1969] 2 Ch. 149 at 170 (per Lord Denning). For contrasting views on the subject see also *Salemi* v. *Minister of Immigration and Ethnic Affairs* (No. 2). (1977) 14 A.L.R. 1, 7 (per Barwick C.J.); 34 (per Stephen J.).

had been slower to recognise such rights.[21] The Ombudsman can be seen here to be stepping in where the courts felt themselves unable to act.[22]

On the international front, immigration laws are regulated by international covenants which states may become party to, although there is no obligation for them to do so. Article 13 of the United Nations Covenant on Civil and Political Rights 1964 states that an alien:[23]

> shall except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Although this covenant is directed toward deportation laws, it has some relevance to the power to revoke a permit (which can be seen as an indirect means of expulsion). Prior to 1977, the ombudsman, as the sole effective means of review in the revocation area, would seem to have been inadequate to satisfy the article's requirements.

New Zealand signed the United Nations Covenant in 1968 but it was not ratified until 1978. In 1977, section 20A of the Immigration Act 1964 was enacted as one attempt to comply with article 13. Section 20A provides that where a person faces deportation following conviction for, inter alia, overstaying the validity or his or her permit, an application may be made to the Minister for a review of the decision to deport. An order not to deport may be made by the Minister if he is satisfied that, because of exceptional circumstances of a humanitarian nature, it would be unduly harsh or unjust to deport the offender from New Zealand.

How far has this section confined the scope of the ombudsmen's jurisdiction? Because the Minister's reconsideration can only be used as a remedy of last resort, it is submitted that the ombudsman still plays an important part as a review body for revocation cases and decisions to prosecute. This is supported by the Ombudsman's treatment of Case No. W13522.[24] The case involved the prosecution of the complainant for overstaying his temporary permit. The Ombudsman's investigation revealed that the officer in the department who had been responsible for initiating the prosecution, had been unaware of on-going discussions between the department and the complainant regarding an extension of the permit and an application for permanent residence. The department later discovered this mistake, but proceeded with the prosecution, relying on the fact that the section 20A remedy

21 *Tobias* v. *May* supra n.2.

22 In defence of the Immigration Division, Mr. Malcolm, then the Immigration Under-Secretary, criticised the Ombudsman's recommendations on the grounds that the Ombudsman had wrongly represented departmental practices. Mr. Malcolm also noted that if the Immigration Division regularly extended an opportunity to be heard to holders of temporary permits whose continued entitlement to the permits was considered to have lapsed, then the work of immigration staff would have to be increased ten-fold. See *The Evening Post,* Wellington, 29 March 1979, p.6.

23 Res. 2200 (XXI) 1966.

24 *1979 Annual Report* 39. See also D. J. Shelton "The Ombudsman and the Court" in *Proceedings of the 5th Conference of Australasian and Pacific Ombudsmen* (Wellington, 1982).

would ultimately give relief to the complainant. In his report, Mr Laking noted—[25]

> While the Minister might well decide to exercise his discretion in the complainant's favour, this would not alter the fact that the complainant would have a conviction recorded against him.

Indeed, under section 20A there is no power to quash a conviction, but only a power to prevent deportation. Mr Laking's comments indicate that the ombudsmen are prepared to intervene before a prosecution and not allow the combined effect of section 20A of the Immigration Act 1964 and section 17(1) of the Ombudsmen Act 1975 to limit their jurisdiction.

In Case No. W13522 the Ombudsman's recommendation was that the department seek the leave of the court to withdraw the information against the complainant. This recommendation was accepted by the department. It is interesting to compare this case with a case involving a similar set of facts which recently came before the New Zealand Court of Appeal. In *Moevao* v. *Department of Labour,*[26] the appellant argued before the court that his prosecution for overstaying should be dismissed on the grounds that the department had improperly exercised its discretion to prosecute him. The argument failed. It was held that in a criminal jurisdiction the court had no power to examine the exercise of the discretion of the executive to bring a prosecution. The court is solely concerned with whether the accused is guilty of the charges set out in the information. This comparison shows on the one hand the ombudsman's power to look at the circumstances which resulted in the charge being laid and to make recommendations on the basis of his view of those circumstances. The courts, on the other hand, will only be concerned with the circumstances surrounding the laying of the charge as a mitigating factor in sentencing of the accused. The circumstances are irrelevant to the conviction itself.

The courts however, like the legislature, have not remained ineffective in all areas in providing some safeguards against the rigours of ministerial and departmental discretion. Recent cases show an increased willingness of the courts to require some procedural and possibly substantive fairness in ministerial decision making under the Immigration Act.[27] In *Daganayasi* v. *Minister of Immigration,*[28] a case which specifically examined the section 20A review, the Court of Appeal found a duty on the Minister's part to disclose information relevant to the appellant's case, so that she might have an opportunity of answering the allegations against her. In addition, Cooke J. attacked the Minister's decision on the grounds that it contained a mistake of fact and was therefore invalid.[29]

The decision in *Daganayasi* resembles closely the type of recommendation that the ombudsmen made in 1978 regarding the need for a complete file to be placed before the Minister,[30] and the recommendations made in Case No. 9158[31] regarding the Secretary of Labour's report, which the Ombudsman found to be based on

25 Ibid. 40.
26 [1980] 1 N.Z.L.R. 464.
27 See *Movick* v. *Attorney-General* [1978] 2 N.Z.L.R. 545, 549 (per Woodhouse J.); 551 (per Richardson J.).
28 [1980] 2 N.Z.L.R. 130.
29 Ibid. 145-49.
30 Supra n.17.
31 *1975 Annual Report,* 35.

incomplete information. It is indeed possible that the ombudsman's role in immigration will be confined if the current judicial trends toward the necessity of procedural and substantive fairness continue.

IV. POWERS TO DEPORT UNDER SECTION 22

In response to article 13 of the United Nations Covenant on Civil and Political Rights, the legislature enacted in 1978, new laws governing the deportation of immigrants who had committed offences (section 22(1)), acts threatening to the national security (section 22(2)) or acts of terrorism (section 22(3)). A Deportation Review Tribunal (section 22C) was established to handle appeals against deportation orders made under section 22(1) and terrorists who had been issued with deportation orders were given a right of appeal to the High Court (section 22(3). Section 13(7) of the Ombudsmen Act 1975 prevents[32] the ombudsmen from carrying out an investigation into these types of deportation cases while the appeals are ensuing.

It can be argued that the procedures and informality of the ombudsman's investigation do not provide the most appropriate type of recourse for complainants with deportation problems. Of the powers considered in this paper, the power to deport under section 22 carries with it the greatest element of individual interest. This type of decision is made less frequently and involves grave consequences for the immigrants who may have already resided in New Zealand for up to five years and who are then faced with the prospect of being prohibited from entering other countries as a result of their deportation. The judicial nature of the review by the tribunal (section 22D) and the court can be seen to be preferable for these cases.

Under the Immigration Amendment Act 1978, no right of appeal is granted to persons who are deported on the grounds that they constitute a threat to national security.[33] The courts have been unwilling to grant relief on review to persons in this category.[34] The ombudsmen's jurisdiction in such cases is obviously limited because of the high policy content involved. There is also a procedural prohibition to a full investigation of this area by the ombudsman.[35]

V. CONCLUSION

The above discussion shows something of the interaction between the ombudsman, the judiciary, the legislature and the executive in the field of immigration. It is submitted that the ombudsmen maintain an important role in the review of decisions affecting aggrieved immigrants despite the more active role of the judiciary and the legislature in this field. The Ombudsman's Office provides an accessible point of assistance for persons seeking recourse, who may be disadvantaged by their unfamiliarity with New Zealand procedures, linguistic problems, and the urgent attention which their grievances require.

32 But see the proviso to s.13(7)(a).
33 However, note the additional safeguard that it is the Governor-General who exercises the power, not the Minister.
34 See *R* v. *Secretary of State for Home Affairs. Ex Parte Hosenball* [1977] 1 W.L.R. 766.
35 Sections 20 and 21 Ombudsmen Act 1975.