

COMMENTARY ON RESIDENCE AND SPONSORSHIP ISSUES

Simon Laurent, Principal, LaurentLaw Barristers & Solicitors

RESIDENT VISAS AND PERMANENT RESIDENT VISAS

Loss of Citizenship

Under s 75 of the 2009 Act any person who renounces or is deprived of Citizenship is deemed to hold a Resident Visa. This addresses a lacuna in the current scheme, as there is no such provision in the 1987 Act and anyone who loses Citizenship not only has no permit to remain in New Zealand, but invariably will have no right of appeal to the Removal Review Authority as their last permit would have expired many years before. The grant of a Resident Visa with conditions not only preserves their lawful status in New Zealand, but accords the holder a residual right of appeal to the Immigration and Protection Tribunal ("IPT").

This latter right is vital in most cases because people who lose Citizenship for fraud etc. are likely to face deportation proceedings upon the same grounds. For example, refugees who have acquired Citizenship but whose refugee status is cancelled under ss 145 or 147 of the 2009 Act will most likely lose their Citizenship for the same reason. It is to be expected that INZ (through the Minister) would then seek to deliver the *coup de grace* by ordering deportation pursuant to s 158(2) of the 2009 Act. Under the new regime the ex-Citizen may still appeal to the IPT on humanitarian grounds via s 206 of the 2009 Act (see also Tennent, D, *Immigration and Refugee Law*, (2010), 78, 378-9).

Cabinet's proposal to issue a Resident Visa with two-year travel conditions apparently applies irrespective of whether the person:

- renounced Citizenship after acquiring another country's citizenship by virtue of s 15 Citizenship Act 1977; or
- is deprived of Citizenship by acting contrary to the interests of New Zealand (s 16 Citizenship Act); or
- is deprived of Citizenship if it was procured by fraud, false representation etc. (s 17 Citizenship Act).

There appears to be no principled basis for issuing only a Resident Visa ("RV") rather than a Permanent Resident Visa ("PRV") to these classes of people. The main distinction between an RV and a PRV is the imposition of travel conditions which are currently spelt out in a Returning Residents Visa ("RRV"). RVs are intended to be the initial visas issued to "new residents" in order for them to prove that they can settle in New Zealand before qualifying for the PRV. Citizens, on the other hand, have already demonstrated their settlement in New Zealand in order to gain Citizenship in the first place. For instance, acquisition by grant now requires 5 years' presence in the country as a Resident (s 8 Citizenship Act 1977). In most cases they would have held a PRV (or indefinite RRV) prior to gaining Citizenship. The two Acts are administered by two different Government departments and cover different aspects of personal status. As a matter of logic the loss of Citizenship should restore the person to the status they held under the Immigration Act before they acquired Citizenship.

Nor does it seem reasonable to treat people who renounce Citizenship by acquiring another nationality as equivalent to those who have apparently acted in bad faith toward New Zealand or its administrative system. The free choice to acquire the nationality of another country which does not recognise dual citizenship is not the fault of the person concerned, yet their equation with those who have "acted badly" appears to stigmatise them.

It is also not clear why the two-year travel condition would serve any purpose in respect of people facing deportation arising from deprivation of Citizenship for fraud etc.. If they win the IPT Appeal on

humanitarian grounds then they have presumably made out their case for being allowed to retain their Residence. The standard of proof of such an Appeal (s 207(1)) is the familiar formula:

The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that—
 (a) there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and
 (b) it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

This is the test currently applied by the Removal Review Authority, with the addition that the IPT must be "satisfied" that the criteria are met. It has rightly been described as a "stern test" (*Rajendra Patel v Removal Review Authority*, [2000] NZAR 200, 204). By definition then, a successful appellant would have shown very good reasons to want to stay, and the ongoing existence of travel conditions serves no discernible purpose.

Conversely, if the appeal fails then the person loses Residence altogether and the issue of travel conditions is irrelevant anyway.

It is recognised that s 75 of the 2009 Act specifies the grant of RVs only to people who have lost Citizenship, and that only an amendment to the Act can cure the wrong identified above. However, the imposition of conditions is a matter for Residence Instructions and is not dictated by the legislation. The Department of Labour and Cabinet should consider revising the present proposal to remove the imposition of two-year travel conditions, thereby rendering the RV similar to a PRV. Alternatively, Residence Instructions should at the very least set conditions which distinguish between those who have renounced Citizenship and those who have been deprived of it.

SPONSORSHIP

Residence

A significant new liability arises for sponsored visa holders under the 2009 Act. Section 55 provides firstly that it is a "condition" of the visa that the Sponsor must meet their sponsorship obligations. The corollary of this, also set out in s 55, is that if the Sponsor "fails to comply with the undertaking" then the visa holder is deemed to have breached the conditions of the visa. The fault of the Sponsor will probably be paid for by the visa holder by revocation of the visa.

Note that this risk extends to Resident Visas as well as temporary visas. However, the liability of Sponsors ends when a Resident Visa holder obtains their Permanent Resident Visa.

Sponsorship requirements for Residence were never enshrined in the 1987 Act and were a creature of Government Residence Policy. The ability to sponsor Residents, and the attached obligations, are now enshrined in the 2009 Act. The sponsorship provisions which were once enforceable only as an aspect of Policy now have the force of primary legislation.

We will see a new class of Residence revocation proceedings in which the reason for revocation does not relate to the action or omission of the visa holder, but of their Sponsor. What under the 1987 Act was termed "revocation" is now, like "removal", gathered into the concept of deportation. Section 159 of the 2009 Act allows the Minister to order a resident's deportation if "the conditions of his or her visa have not been met." The use of the passive voice is important because it is not necessary for there to be a direct nexus between the breach of conditions and the visa holder. This clearly envisions deportation in a case where the Sponsor has not met a sponsorship obligation.

As a consequence, Sponsors may become important witnesses in deportation appeals in order to defend or explain their apparent omission. Interestingly, they may also decide to become a party to

appeals or to review proceedings because their perceived failure to honour the sponsorship undertaking renders them ineligible to sponsor anyone else, according to Mr Albury's presentation. Because bodies corporate may now act as Sponsors and may (in the case of employers in particular) have a strong vested interest in preserving their ability to sponsor in the future, such engagement in litigation is likely.

It is respectfully suggested that the Department of Labour must approach any imputation of bad faith or breach of undertaking on the part of a corporate sponsor with considerable caution. Companies and societies are likely to have deeper pockets to fund the costs of litigation than individual visa applicants, and thus less averse to heading for Court if their fidelity is called into question.
