Our ref 426057
Contact David Scott

11 November 2016

Ombudsman
Fairness for all

Mr Harmon Wilfred

By email: harmon@wilfredholdings.com

Dear Mr Wilfred

**Ombudsmen Act investigation**
**Immigration New Zealand**

I refer to your recent email communications with Senior Investigator David Scott concerning your complaint of behalf of your wife Mrs Carolyn Wilfred against Immigration New Zealand (INZ), part of the Ministry of Business, Innovation and Employment. I have received a report from INZ on your complaint, and I have now had an opportunity to consider that report. Having considered all the issues raised, I have now formed a provisional opinion on your complaint.

**Summary**

The complaint arises from the decision of INZ, on 5 September 2015, to suspend Mrs Wilfred's ability to participate in the visa waiver scheme between New Zealand and Canada, and the subsequent decline of her visitor visa. You submit that Mrs Wilfred was not previously '*unlawfully*' in New Zealand. You consider it is unfair for INZ to penalise Mrs Wilfred for remaining in New Zealand (after the expiry of her work permit) when INZ Compliance had indicated that her plans to depart were appropriate. You consider that the suspension of Mrs Wilfred's visa waiver status on her departure was a predetermined decision intended to encourage you to depart New Zealand.[1]

In essence, my provisional opinion is that the decisions of INZ to suspend Mrs Wilfred's ability to participate in the visa waiver scheme between New Zealand and Canada and to subsequently decline her visitor visa application were not unreasonable.

**My role**

I have authority under the Ombudsmen Act 1975 to investigate the administrative conduct of INZ and to form an independent opinion on whether that conduct was fair and reasonable. My investigation is not an appeal process. I would not generally substitute my judgment for that of the decision-maker. Rather, I consider the substance of the act or decision and the procedure

[1] You are subject to a deportation order which INZ has been unable to carry out due to your status as a stateless person. This matter is the subject of a separate complaint to this Office, our ref: 356501 (allocated to the backlog team).

followed by INZ, and then form an opinion as to whether the act or decision was properly arrived at and was one that INZ could reasonably make.

## Background

The background to this matter is set out in the Appendix to this letter.

## Discussion

### Suspension of visa waiver status

Under regulations made pursuant to section 400 of the Immigration Act 2009 (the Act) the requirement to hold a visa to enter New Zealand is waived for Canadian citizens. However, section 69(2)(d) of the Act provides that the Minister may, by special direction, suspend visa waiver rights in any individual case. A person who has their visa rights suspended must apply for a visa before travelling to New Zealand. The decision to issue a special direction is a matter of absolute discretion (defined in section 11 of the Act). There are no particular criteria in terms of immigration instructions that apply to determine whether a special direction should be issued.

You are concerned that the decision of INZ to suspend Mrs Wilfred's visa waiver status did not comply with the statutory requirements of the Act. In turn, INZ acknowledge that the suspending Mrs Wilfred's visa free status did not comply with the administrative requirements of the Act. INZ accept that the special direction had no legal effect until on 10 September 2015 when an appropriately delegated immigration officer made the special direction in writing (as required by section 378(4) of the Act), recorded the reasons for suspending Mrs Wilfred's visa free status, loaded another information warning on AMS, and advised Mrs Wilfred's agent by letter dated 11 September 2015. Overall, I am satisfied that the procedural flaw with the issuing of the special direction was appropriately rectified by INZ and there appears to have been no undue prejudice to Mrs Wilfred as a result.

You complain that INZ did not provide Mrs Wilfred with any notice about the decision to suspend her visa waiver status. You state that Mrs Wilfred found out about the decision inadvertently on 8 September 2015 (when an INZ Business Migration Manager spoke to her legal representative Mr Ballantyne about Mrs Wilfred's residence application) and was unable to consider her options prior to her departure. However, there was no statutory obligation on INZ to notify Mrs Wilfred of the suspension of her visa waiver status. Under the Act, the suspension of the waiver of the requirement to hold a visa may occur at any time without consulting those affected even though this may be inconvenient to the individual concerned. I do not consider that INZ was obliged to warn Mrs Wilfred before her visa waiver rights were suspended. INZ advised Mr Ballantyne on 8 September 2015 that Mrs Wilfred's visa waiver status was suspended and that she would require a valid visa to return to New Zealand. Nothing more was required.

You also consider that it was unreasonable for INZ to regard the period that Mrs Wilfred was unlawfully in New Zealand (from 24 July 2015 until 5 September 2015) as a negative factor. You believe that Mrs Wilfred complied with all lawful directions from INZ between 2001 and her departure in 2015. You note that INZ Compliance decided to monitor Mrs Wilfred until the 42-day timeframe to make an appeal to the Immigration and Protection Tribunal (ITP) had expired

and did not express concerns about her plan to depart New Zealand on 5 September 2015. You also consider the decision was unreasonably influenced by your immigration status.

In response, INZ disagrees that Mrs Wilfred complied with all lawful directions from INZ up to her departure. The last visa granted to Mrs Wilfred stated '*You must leave before visa expiry or face deportation*'. She was advised to leave when that visa expired on 17 July 2015 and repeatedly advised that she was unlawfully in New Zealand and liable for deportation. INZ also note that the record of the special direction shows that your unlawful status in New Zealand had no bearing on that decision. The decision to suspend Mrs Wilfred's visa waiver status was taken because she was unlawfully in New Zealand after the expiry of her interim visa. INZ state that:

- It is standard practice for INZ to consider suspending the visa waiver status of clients who depart after remaining unlawfully in New Zealand. If a client has previously remained in New Zealand unlawfully, this may cast doubt as to whether they are a bona fide applicant for a future temporary entry class visa; and
- It is more appropriate to consider bona fide concerns as part of a properly considered visa application made offshore, rather than as part of an application made in the border environment, which may result in a turnaround if the application is unsuccessful.

I acknowledge that there appears to have been an understanding that Mrs Wilfred would not be deported given her undertaking to depart voluntarily. However, this does not mean that Mrs Wilfred was entitled to be in New Zealand after the expiry of her interim visa on 24 July 2015. I consider that it had been made clear to Mrs Wilfred by INZ that she was under an obligation to leave New Zealand. The availability of a 42-day period to appeal to the IPT, her request for a visa under section 61 of the Act and her undertaking to INZ compliance to depart were all matters which did not excuse her unlawful status.

As noted above, the decision to issue a special direction is a matter of absolute discretion. Given the wide breadth of that discretion, any decision would have to be demonstratively flawed before I would consider intervening. In this case, the decision to suspend Mrs Wilfred's visa waiver status appears to have been reasonably made. It also did not create any impediment to Mrs Wilfred lodging a visa application from off-shore to allow her bona fides to be fully assessed (thus avoiding any possible turnaround at the airport).

Overall, I do not consider that the suspension of Mrs Wilfred's visa waiver rights by INZ was unreasonable. The procedural error with the special direction was promptly rectified and INZ was not required to provide Mrs Wilfred with the opportunity to comment. There is nothing to suggest that INZ were not entitled to question Mrs Wilfred's bona fides on the basis of her period of unlawfulness.

**Decision to decline visitor visa**

You consider that the decision of INZ not to grant Mrs Wilfred a visitor visa on the basis of her bona fides was unreasonable. You emphasise that there are no personal circumstances that would encourage Mrs Wilfred to overstay or breach her visitor visa conditions, particularly with her residence application on appeal. You state:

> *Also with my stateless status as unable to leave, it is clear that any breach of conditions would not only jeopardise her residency application but would also eliminate her opportunity to visit me either now or in the future. Why would she do that! In any case she needs to return to Canada by August, 2016 to finish up the court case to complete the sale of her assets. Also, with all NZIM applications, she has always worked diligently through her attorney to cooperate closely with NZIM to assure that conditions have never been circumvented.*

In response, INZ state:

- Mrs Wilfred's need to return to Canada for court proceedings was not considered relevant to whether she should be granted a temporary visa to visit New Zealand. Having a residence application lodged was part of Mrs Wilfred's personal circumstances, but was not a reason in favour of granting a visa to visit New Zealand;
- The visitor visa assessment clearly shows that a range of information concerning her personal circumstances was used to assess her bona fides. It included the fact she stayed unlawfully in New Zealand, that she appeared to have limited family ties to Canada and that her husband remained unlawfully in New Zealand; and
- There is no evidence your status in New Zealand pre-determined the decision, but it was an important factor because you were unlawfully in New Zealand and had been since November 2004. Mrs Wilfred has no family normally resident in New Zealand and hence no reason to visit New Zealand for the purpose of visiting family.

Immigration instructions at E5.1 and E5.5 require all applicants for temporary entry class visas to be '*bona fide*', in that they must show they '*genuinely intend a temporary stay in New Zealand for a lawful purpose'* (E5.5(b)). When assessing Mrs Wilfred's bona fides INZ was entitled to take into account any relevant information held about whether she had previously breached visa conditions, the strength of any family ties in the home country and New Zealand, the nature of any commitments in the home country, and any circumstances that may discourage her from returning to their home country when any visa expires.

INZ did not identify Mrs Wilfred's need to return to Canada for court proceedings as a relevant factor, as part of her personal circumstances. (Mr Ballantyne's letter dated 29 April 2016 which accompanied Mrs Wilfred's visitor visa application noted that INZ already held the record of his strong objections to the visa waiver suspension of the basis of Mrs Wilfred's bona fides. This included a letter dated 23 December 2015 stating that Mrs Wilfred was required to be back in Canada in March 2016 to complete oral discovery and thereafter for a trial to be fixed in early April 2016.) However, no clear evidence was submitted with the visitor visa application to show that Mrs Wilfred had outstanding commitments in Canada which she was obliged to return to. Nor did Mrs Wilfred seek to rely on her prior claim that she needed to return to Canada when making her visitor visa application. In these circumstances, I do not consider that INZ was obliged to treat it as a relevant factor when assessing the request. Similarly, I consider that the claim that Mrs Wilfred had every incentive to comply with immigration law due to her residence application was not a factor that INZ were obliged to identify and address due to its generalised nature.

I am satisfied that INZ were entitled to identify Mrs Wilfred's period of unlawfulness in New Zealand and her relationship with you as negative factors concerning her bona fides, together with her unfavourable immigration history, her limited family ties in Canada and the risk she was intending to work in New Zealand. I consider that INZ did not take a predetermined approach to assessing the visitor visa application and identified the key relevant factors to be weighted. Given the deportation order against you, INZ's view that Mrs Wilfred has no reason to come to New Zealand to visit family who are normally resident appears to be one which is reasonably open to INZ to hold. In the circumstances, and given the strength of the concerns INZ identified concerning Mrs Wilfred's bona fides, I do not consider that INZ acted unreasonably in declining her visitor visa application.

**International obligations**

You consider that the decisions made by INZ in relation to Mrs Wilfred's bona fides gave insufficient consideration to relevant international obligations, including the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. In response, INZ note that New Zealand is not a signatory to the Convention relating to the Status of Stateless Persons. INZ also state that your United States citizenship was not taken from you due to circumstances beyond your control. New Zealand has not undertaken any action to deprive you of your nationality to render you stateless.

Overall, I do not consider that INZ ignored any relevant international obligations when making decisions about Mrs Wilfred's bona fides.

**My provisional opinion**

My provisional opinion is that, for the reasons discussed above, INZ has not acted unreasonably in suspending Mrs Wilfred's visa waiver rights and declining her visitor visa application. I invite you to comment before I consider the matter further. If you do wish to comment, please respond by 8 December 2016.

Yours sincerely

Judge Peter Boshier
Chief Ombudsman

cc: David Ballantyne: david@canterburylegal.co.nz

## Appendix

### Background

Mrs Wilfred was in New Zealand on various visas since 2001, including partnership/essential skills, long-term business and entrepreneur work visas (and visitor visas). Her residence applications (under the entrepreneur and investor categories) were unsuccessful.

Mrs Wilfred was granted a work visa valid from 8 December 2014 until 17 July 2015. The label stated:

> *Stay subject to grant of entry permission. You must leave before visa expiry or face deportation. Financial support evidence not required. Return/onward ticket not required. The holder may only work as self-employed owner/operator for Wilfred Holdings in Christchurch.*

On 9 June 2015, Mrs Wilfred applied for a visitor visa for a 6-12 month period. The purpose of the visa was '*visiting husband and checking on business investments in NZ to prepare for business application*'. (Mrs Wilfred's application for residence under the long term Business visa had been declined. She signalled her intention to apply again for residence under the Business Investor category).

On 3 July 2015, INZ sent a Potentially Prejudicial Information (PPI) letter to Mrs Wilfred stating that no evidence was provided that she needed to be in NZ for the purposes of business consultation (required for a business category visitor visa). In response, Mrs Wilfred provided information about a number of business investment proposals.

On 17 July 2015, on the expiry of her work permit, Mrs Wilfred was granted an interim visa by INZ which was valid until a decision was made on her visitor visa.

On 24 July 2015, INZ declined Mrs Wilfred's visitor visa application and her interim visa expired. INZ did not consider Mrs Wilfred was required to be in NZ to await investment proposals from Bellamys Real estate and Prenzel Distilling Company. There was no need for her to remain in NZ for the operation of Wilfred Holdings. On 25 July 2015, INZ advised Mrs Wilfred that:

- The interim visa had expired and she was now unlawfully in New Zealand and liable for deportation;
- If deported from New Zealand she would be unable to return until the end of the deportation period. If she departed voluntarily she may still be deemed to be deported; and
- If she wished to appeal against her liability for deportation on humanitarian grounds, she may do so within 42 days.

The AMS records describe Mrs Wilfred as a high risk applicant for the following reasons:

- she has an interest in the business category but has a poor business history (four out of five companies had been put into liquidation including an investigation by the charities commission);
- her prolonged ties to you (as an 'overstayer') raised serious concerns about her bona fides;
- She has indicated that she could be a substantial investor but there were issues with the Canadian Revenue Agency and no guarantee that funds would be released to her; and
- She was granted time in NZ to allow her to make an application under the investor category and does not require further time in New Zealand for this purpose.

The Officer recorded:

> *I acknowledge that she has business affairs in New Zealand, however, I am not satisfied that she is required to be in the country to carry these out or that she has the means of engaging in the proposals. On face value it appears the applicant is requesting a visa to remain in NZ to be with her husband who is not on a valid visa and to await the outcome of her sale of shares in Canada which has been ongoing which is not the purpose of this category.*

On 17 August 2015, INZ wrote to Mrs Wilfred about her immigration status, and reiterated that she was liable for deportation but may still depart voluntarily if she left before the expiration of the 42 day appeal period.

On 18 August 2015, Mrs Wilfred applied for residence under the investor 1 category –she sought approval in principle and a 12 month multiple entry work visa. Mrs Wilfred requested an interim visa while her application was processed. Alternatively, Mrs Wilfred requested a visa under section 61 of the Act. Mr Ballantyne also confirmed to INZ that Mrs Wilfred had booked a one-way ticket to Toronto on 5 September 2016. This was within the 42-day appeal period for the decline of her visitor visa.

On 19 August 2015, INZ Compliance confirmed by email that it would continue to monitor the case until the 42-day appeal period expired. If no visa was granted before the end of the appeal period the matter would be passed to a compliance officer who would make contact to discuss options.

On 28 August 2015, INZ declined Mrs Wilfred's request for a visa made under section 61 of the Act (13769042). No reasons were provided. The letter stated:

> *As your visa has expired you are now unlawfully in New Zealand and must leave New Zealand immediately. If you do not leave New Zealand voluntarily you will be liable for deportation.*

On 31 August 2015, INZ confirmed by email that it would hold the residence application until Mrs Wilfred departed (instead of returning it to her because of her unlawful status).

On 5 October 2015, INZ sent PPI letter concerning Mrs Wilfred's residence application. This was followed by various communications over the next months, including tax matters and court proceedings in Canada concerning the sale of shares.

On 5 September 2015, Mrs Wilfred left NZ. Shortly before her departure, INZ suspended Mrs Wilfred's rights to participate in the visa waiver scheme between New Zealand and Canada. The AMS record (made at 5pm on 4 September 2015) includes an information warning stating:

> *This client has remained in New Zealand unlawfully since the expiry of her interim visa when her substantive visa application was declined on 23 July 2015. Should this client depart New Zealand and attempt to return she is not permitted to travel to or through New Zealand visa waiver. Her visa waiver is now suspended pursuant to section 69(2) of the Immigration Act 2009. Should she attempt to return to New Zealand she … should be referred to the nearest INZ representation/VAC to apply for a visa to test her eligibility to travel to/through New Zealand.*

On 8 September 2015, Mr Ballantyne was advised by an INZ Business Migration Manager that the residence application would be allocated to an officer shortly, and that Border alert had placed an alert on AMS suspending of Mrs Wilfred's visa waiver rights.

Mr Ballantyne asked INZ Compliance to explain why this occurred and when it would be lifted. In response, on 11 September, INZ confirmed that the suspension of Mrs Wilfred's Canadian visa waiver rights had been made by an appropriately delegated officer but the special direction required to give effect to the suspension was not made in writing, as required. The special direction had now been formally completed (by Officer Turner) and the visa waiver suspension was confirmed effective from 11 September 2015. INZ advised that the decision was made on the following grounds:

- Mrs Wilfred had previously been unlawfully in NZ;
- Her visa application 13769042 was declined as a section 61 request; and
- INZ stated that Mrs Wilfred may not be a bona fides visitor and her eligibility would be best tested by a visa application made offshore. INZ noted that lifting the suspension would be reconsidered at the point the residence application was considered.

On 14 September 2015, Mr Ballantyne complained to the Regional Manager of Compliance that there was no reasonable basis for concluding Mrs Wilfred was not a bona fides visitor as she had complied with all lawful directions from INZ. She had reserved her right to lodge a humanitarian appeal to the IPT against the decision to decline her visa and was within the 42-day appeal period when she departed voluntarily. Mr Ballantyne also queried whether Mr Wilfred's status had an impact on decision.

On 30 October 2015, INZ advised that no conclusion had been reached on bona fides. Rather, the possibility has been raised that Mrs Wilfred may not be bona fides, as she had remained in NZ following the expiry of her interim visa (after the decline of her visitor visa application).

On 16 December 2015, INZ explained (by email) that the decision was not taken lightly and Mrs Wilfred would need to provide compelling reasons why visa suspension should be lifted. In response, on 23 December 2015, Mr Ballantyne complained that there were no grounds to suggest Mrs Wilfred might not be a bona fides visitor and that it would be inappropriate to take Mr Wilfred's stateless circumstances into account (and it has previously been confirmed by INZ

that his status would not affect the application). Mr Ballantyne stated that Mrs Wilfred was required to be back in Canada in March 2016 to complete oral discovery and thereafter for a trial to be fixed in early April 2016.

In January 2016, the Associate Minister of Immigration (AMOI) advised that he would not intervene as INZ was currently considering the request to lift visa waiver and Mrs Wilfred had the option of applying for a visa.

On 22 January 2016, INZ Compliance confirmed that INZ did not intend to uplift the visa waiver suspension. INZ stated that Mrs Wilfred can apply for a visa off-shore to allow her circumstances to be fully tested.

On 26 February 2016, INZ received a further complaint from Mr Ballantyne.

On 17 March 2016, INZ confirmed that the visa waiver was suspended because Mrs Wilfred may not be a bona fides visitor based on her previous immigration history. Mrs Wilfred was invited to apply for a visitor visa in order that her circumstances may be properly assessed. INZ also noted that visa waiver status is suspended under section 69(2) of the Act, which involves an exercise of absolute discretion.[2]

On 29 April 2016, Mrs Wilfred made a visitor visa application. The visitor visa application was not based on her partnership with Mr Wilfred. The purpose of the travel was '*family and social visits*'. This was accompanied by a letter from Mr Ballantyne which set out the details of the circumstances of Mrs Wilfred being declined a visitor visa on 24 July 2015. Mr Ballantyne noted that he had strongly objected to the visa waiver suspension and drew attention to the exchange of correspondence where he put forward various grounds for the immediate lifting of the suspension.

On 13 May 2016, INZ declined Mrs Wilfred's resident visa application. INZ were not satisfied that she had assets worth more than $10 million due to the lack of valuation. There also a concern about a claim by the Canadian Revenue Authority.

On 17 May 2016, INZ declined Mrs Wilfred's application for a visitor visa on the basis that she was not a bona fide applicant. INZ stated that Mrs Wilfred's personal circumstances may '*discourage you from returning to your home country if the opportunity of staying in New Zealand arises at the end of your stay and the risks that you may overstay or breach our visa conditions are not acceptable'.* INZ stated that the relevant factors considered during the assessment included: the purpose of the visit; partnership status and strength of family commitments; financial ties and previous immigration history with INZ.

The AMS records identified the following relevant factors:

- the applicant had a long and sometimes unfavourable immigration history;

[2] Section 378(8) of the Act says that the decision whether to grant a special direction is at the absolute discretion of the Minister.

- you were currently unlawful in New Zealand after renouncing your US citizenship. You are stateless and without a county to be deported to. This connection appears to create doubt about Mrs Wilfred's bona fides and genuine intent. It shows strong ties to New Zealand and might indicate a motive for remaining in New Zealand;
- there is a lack of credible reason for Mrs Wilfred remaining in New Zealand unlawfully from 24 July 2015 until 5 September 2015 and it appears the risk is too high that this may occur again;
- it appears that Mrs Wilfred owes around $8 million dollars to the Canadian tax department and she appears to have limited family ties in Canada (being in the process of suing her brothers for a share of her family owned company); and
- the risk is too high that the applicant was intending to work while in New Zealand due to the proposal submitted with her previous visitor visa application and her current residence application.

INZ also noted that further assessment was needed of the character issues, including verification of police certificates and the non-declaration of her full immigration history. (Mrs Wilfred had only acknowledged the recently declined visitor visa whereas AMS records shows three declined visas, a declined section 61 request, and a declined ministerial.)

The INZ Officer recorded:

> *The evidence provided raises doubt regarding her genuine intent and lawful purpose as a visitor in New Zealand. The onus on providing information that would tell us otherwise lies with the applicant. Therefore, I am not satisfied that the application is a bona fide applicant to New Zealand and the risks that she will breach her visa conditions or become unlawful in New Zealand are not acceptable.*

On 1 July 2016, Mrs Wilfred lodged an appeal of the decline of her residence application with the IPT.