

Applying Administrative Law to citizenship applications

Introduction Administrative law is the name given to the area of law that is concerned with the investigation and review of the actions of government departments. Approximately 85% of Administrative Law is concerned with intervention in the decision making process by lawyers, the Ombudsman, or others.

The actions of Citizenship that are most likely to be contested are the advice and recommendations given to the Minister in submissions. Although the decision to put an applicant onto a schedule is also open to investigation, an applicant who has been approved will seldom complain.

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Policy and legislation requirements

Judicial review

Judicial review, is a review of administrative action by the courts. A judicial review will usually be based on established grounds. These grounds are also relevant to the way in which the Ombudsman investigates the actions of government departments.

Ombudsman

The Ombudsman is an officer of Parliament who is appointed by the House of Representatives, and has wide powers of investigation. The Ombudsman may investigate any decision or recommendation regarding a 'matter of administration'. This may include, for example, the recommendation made in a submission to decline the grant of citizenship. The Ombudsman cannot investigate the actions of ministers of the Crown, but has the authority to investigate the actions of ministerial advisors and government departments. The Ombudsman is the person Citizenship will deal with most often regarding administrative law. Judicial Review by the courts is costly and time consuming. The Ombudsman will, however, investigate a complaint by a member of the public for free, and in a relatively short period of time.

The Court's view

The courts are generally concerned that officials act lawfully, fairly and reasonably. These constitute the three potential grounds for a review.

The Ombudsman is not confined to these criteria when making a recommendation regarding work done by Citizenship, but they will often refer to them, to make general comments and to indicate the standard of conduct that is desirable. It is important to understand how these criteria may be applied to the work of Citizenship.

Illegality

Illegality broadly covers ways in which a decision maker can get the law wrong, and includes decisions:

- not authorised by the legislation (errors of law)
 - motivated by an improper purpose
 - which take into account irrelevant matters and/or fail to take into account relevant matters
 - influenced by wrong facts (errors of fact)
 - where a predetermined policy is applied without regard to the facts
 - where the authorised decision maker acts under dictation from another
 - made pursuant to an invalid delegation.
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Policy and legislation requirements, Continued

Errors of law A decision made on incorrect legal grounds is said to be 'ultra vires', i.e. outside of the law. A recommendation based on an error of law is not valid, and is open to review. To avoid errors of law, the law should be stated as it appears in the Act. The correct subsection(s) should be applied to the application, and care should be taken to accurately quote terms used in the legislation.

Example:

Citizenship cannot recommend the approval of an application pursuant to either section 8(4), or section 9(2) of the Citizenship Act 1977, because the Minister has no authority under either of those sections to approve the grant of citizenship. A decision to approve the grant under either of those sections would be void in law.

Errors of fact A recommendation made in a submission, which is based on an error of fact or an assumption, is not valid and is open to review. To avoid errors of fact, it is essential that an applicant has the opportunity to put forward their view of their ability to fulfil a requirement, as well as the facts the decision will be based on.

All the relevant facts should be clearly and completely outlined in the submission. It may be necessary at times to use the applicant's own words to ensure there is no risk of changing their meaning by paraphrasing.

Example:

Citizenship cannot assume an applicant becomes ordinarily resident in their country of origin whenever they go there for a visit. The applicant may simply be visiting the country, rather than setting up a permanent base.

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Policy and legislation requirements, Continued

Improper purpose

Citizenship cannot make a recommendation regarding an applicant to the Minister for an improper purpose.

Example:

Citizenship cannot recommend to the Minister that an applicant be declined because Citizenship does not like the applicant's political stance.

Irrelevant matters

Any factor that has no relevance to the applicant's ability to fulfil the requirements should not be put into a submission, unless it forms part of general background information. Irrelevant matters cannot legally form a part of either Citizenship's recommendation, or the Minister's decision, and should never be taken into account when making a recommendation.

If a submission seems to be based on an irrelevant consideration, the decision by the Minister on that application could be subject to review.

Example:

The former section 8(2)(a) of the Citizenship Act 1977, specifically sets the ordinary residence period as the three years immediately preceding the date of application (fee paid date). The fact that an applicant, at the time of the submission has been resident in New Zealand for three years, is irrelevant. Including such information clouds the issue and makes the submission more difficult to read.

Unreasonable -ness

Unreasonableness relates to the:

- Minister's decision, i.e. was the decision so unreasonable that a reasonable person could not possibly, with the same information and knowledge, have made that decision?
 - submission, i.e. was the recommendation so different from the facts outlined in the submission that a reasonable person could not possibly have made that recommendation?
 - investigation into the file, i.e. was some avenue not investigated that a reasonable person could not have, armed with the same facts and degree of knowledge, neglected to investigate?
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 - If it is unclear whether more investigation should be done, or it is uncertain whether a recommendation is completely and logically supported by the body of the submission, the file should be re-examined, or discussed with a submission checker before the submission is sent to the Minister.
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Policy and legislation requirements, Continued

Fairness

Fairness relates to the manner in which a decision is reached. The underlying principles are that:

- people affected by a decision have a proper opportunity to comment on their case there should be no bias, including the appearance of bias.
- Fairness to an applicant will involve:
 - conducting investigations impartially and fully
 - giving the applicant the chance to comment on any adverse information which the office holds
 - giving the applicant the opportunity to provide information which could support their application
 - accurately and fully representing the applicant's circumstances in the submission
 - consistently, but not over-rigidly, applying policies and guidelines.

Example:

The policy guidelines on stand-down periods, for applicants with convictions, should be assessed in each case to determine whether the guidelines are appropriate.

Citizenship can make a recommendation outside the guidelines, in order to take account of mitigating or aggravating factors, but it must take care to fully support its recommendations.
