# Overstaying - challenge followed by change

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*In this paper Yvonne Chan gives an outline of events on the overstayer issue since 1974, when the matter first caught the public eye, till mid-1980. The particular focus is on the offence of overstaying with regard to the various grounds upon which offenders have sought to have their convictions quashed. The paper highlights the interplay between the executive, legislature and judiciary in the various responses to dealing with the problem.*

## I. INTRODUCTION

New Zealand's policy on immigration is essentially motivated by economic considerations. It is stated to be tailored to the country's needs both in the areas of permanent and temporary entry. As regards temporary entry, consideration is given to safeguarding the employment opportunities of New Zealand citizens and permanent residents.[1] In view of this, controls are placed on the number of work permits issued and attempts are made to deal quickly with those people who have remained in New Zealand after their permits have expired.

It was said[2] in 1975 by the Labour government that most of these illegal immigrants were taking up employment which would otherwise be available to unemployed New Zealand workers. This belief, it is submitted, continues to be held by the present government.

The policy behind immigration is convincingly reflected in the statistics available. For the year ended 31 March 1974 New Zealand's population rose by a net gain of 27,477. By comparison, in the year ended 31 March 1978 there was a net loss of 26,708.[3] In the statistics of overseas visitors coming to New Zealand

* This paper was presented as part of the L.L.B.(Hons.) programme. Since this paper was written more overstayer cases have been before the courts; readers are referred particularly to *Mapa* v. *Dpartment of Labour* [1980] 2 N.Z.L.R. 21, and *Tifaga* v. *Department of Labour* [1980] 2 N.Z.L.R. 235.

1 *Immigration and New Zealand — A statement of current immigration policy.* (2nd. Ed., Immigration Division of the Dept. of Labour, Wellington, 1979) para. 4.

2 Minister of Immigration, Hon. F. Colman. Press Statement 25 June 1975.

3 Department of Statistics. *N.Z. Official Yearbook 1979* (84th Annual Ed., Dept. of Statistics, Wellington, 1979) 67.

temporarily for work or for working holidays there has been a similar trend. In the year ended 31 March 1974 there were 20,485 such people. Five years later, it had dropped by 56% to 9012.[4]

Temporary entry into New Zealand is governed by Part II of the Immigration Act 1964. Under section 14 a temporary permit may be issued for a period up to six months,[5] but extensions may be granted upon application to the Minister of Immigration.[6] It is an offence to remain in New Zealand after the expiration of a permit[7] and upon conviction a deportation order will be made.[8] However, under section 20A[9] a convicted person may apply to the Minister for an order that he be not deported from the country.

The offence created by section 14(5) is often described as 'overstaying' and the term 'overstayer' has become a catchword to describe those persons committing the offence. To most people 'overstayers' conjures up the image of Pacific islanders. This may be due to the fact that since 1974 news media attention has focussed on incidents involving Pacific island overstayers, and that of those being prosecuted, a large number happen to come from the South Pacific.

In 1978, after stating that he did not know why so many Polynesians were prosecuted for overstaying, the Minister of Immigration, Hon. F. Gill went on to say[10]

> One of the reasons more Polynesians are prosecuted is that, generally speaking, they tell tales on one another. A Polynesian will ring up and say that so-and-so works at such-and-such a job and lives at such-and-such an address; he is here illegally, and ought to go home. A Nuiean will perhaps put up the weights of a Samoan, or a Tongan will put up the weights of a Fijian. When a complaint has been made that the law has been broken it has to be followed up for example, by the Customs men or police.

Despite the introduction of work permit schemes for Tonga, Fiji and Western Samoa — the three Pacific island countries from which the majority of Pacific island overstayers come — overstaying from the Pacific continues. As part of the agreement to operate the official schemes, visitors' permits issued to persons from these three countries are generally only for the period of one month.[11] It is submitted that many of those coming to New Zealand on such permits, come in search of work and therefore it is not difficult, considering the short period granted, to overstay.

Conditions at home make it difficult to earn enough money to support families, send children to school or generally improve their standard of living. As a developed nation, New Zealand offers the attraction of high wages compared to those at home. It is possible to earn a relative fortune here in a matter of months.

4 Ibid. 826.
5 Section 14(1).
6 Section 14(4).
7 Section 14(5).
8 Section 20.
9 As inserted by s. 6 Immigration Amendment Act 1977. It is to be noted that persons convicted under s. 5(1)(a), that is, prohibited immigrants unlawfully landing in New Zealand, may also use this appeal procedure.
10 N.Z. Parliamentary debates Vol. 418, 1978: 1151.
11 Supra n. 1, para. 31.

But to make the visit worthwhile, one has to earn enough to recoup the costs of coming here and to return home — and more. The pressures on remaining in New Zealand after permits have expired are particularly heavy, and are aggravated by the fact that they are granted for such a short period.

## II. SOCIAL BACKGROUND

Considerable concern over the rapid growth of immigration to New Zealand began in the early 1970's when large numbers of permanent immigrants, particularly from the United Kingdom, were coming to settle here.[12] In the worsening economic climate there were fears that New Zealand could not adequately absorb such a large increase to her population without putting a strain on her housing, education and health facilities.[13] It was this factor which prompted the Labour government to undertake a major review of its immigration policy. Although primarily concerned with the area of permanent entry, the aspect of temporary entry was also affected by the review.

The underlying philosophy of that new immigration policy created by the Labour government, was that New Zealand could no longer afford to have unlimited numbers of people coming into the country. A controlled immigration policy working for the benefit of New Zealand was desirable. The number of immigrants should be regulated so that the economy could absorb the numbers without putting pressure on facilities or jeopardising employment opportunities for New Zealand citizens or permanent residents.

This was basically what the National Opposition also advocated.[14]

It was not, however, until 1974 that the problem of Pacific island overstaying surfaced as a controversial political issue. In March 1974 police visits were made on houses in Auckland where illegal immigrants were suspected of staying. These visits took place late at night were labelled by the press as 'dawn raids'. There were reports of the degrading and insensitive treatment being meted out to those people subjected to them.

These types of visits had in fact taken place over a long period of time, even before 1974. It was a normal procedure used in tracking illegal immigrants.[15] The Immigration Division of the Department of Labour preferred interviewing suspects at their homes rather than at their place of employment and considered[16] that the only times suitable to interview them was before the suspects went to work, that is, either very late at night or very early in the morning.

However, the public feeling aroused by the publicity justifiably condemned these procedures and the Minister of Immigration, Hon. F. Colman directed that the

12 N.Z. Parliamentary debates Vol. 389, 1974: 129.
13 N.Z. Parliamentary debates Vol. 389, 1974: 5. N.Z. Parliamentary debates Vol. 391, 1974: 2016, 2209.
14 N.Z. Parliamentary debates Vol. 391, 1974: 2016, 2221. N.Z. Parliamentary debates Vol. 397, 1975: 1394. N.Z. Parliamentary debates Vol. 401, 1975: 4301, 4418.
15 N.Z. Parliamentary debates Vol. 390, 1974: 1339. N.Z. Parliamentary debates Vol. 391, 1974: 2325.
16 Labour Department Official. Interview held 15 May 1980.

visits were to cease as they were 'alien to our way of life'.[17] Nevertheless, even today the visits have not ceased. The only change that has been made is that they no longer take place between the hours of 11 p.m. and 6 a.m..[18]

No concern had been expressed about the numbers of overstayers in New Zealand until then. Control over the number of people entering New Zealand temporarily had been very lax. There was no systematised effort to track down or prosecute people who had overstayed their permits. There was no way of knowing quickly how many people were involved or who or where they were. But this was to change with the new direction in government policy.

To tackle the problem a stay of proceedings for Tongans was announced in April 1974. The aim of the exercise was to get as many people as possible, who were illegally in New Zealand, to come forward and register themselves at the nearest Department of Labour office by 31 May in exchange for immunity from prosecution. Over 3000 Tongans registered.[19] Their periods of staying in New Zealand were extended till they were able to make the necessary arrangements to leave.

Another solution devised to ease the overstayer problems, was the introduction of a work permit scheme for Tongan workers which came into effect on 1 January 1975. Workers from Tonga were permitted to undertake employment in New Zealand only in response to specific job offers from employers. However, before the jobs were offered in the scheme the Labour Department checked to see whether local unemployed could take up the employment. As part of the agreement for the implementation of the scheme it was understood that visitor's permits would only be granted for a period of one month so as to protect the scheme and make it uneconomical for visitors to come to New Zealand on the off-chance of finding work.[20] In 1975, 386 Tongans came to New Zealand under the scheme.[21]

The scheme was subsequently introduced for Fiji[22] and Western Samoa.[23] In the year ending 30 April 1977, 788 permits were issued altogether.[24]

In the General Election of 1975, immigration was an election issue. Labour spoke[25] of the effectiveness of its immigration policy in terms of the reduced figures of net permanent gain. The National party put across the view that the social and economic problems of the country were due to the large influx of migrants from the South Pacific. However, the two major parties desired the same thing, that is, controlled immigration tailored to the needs of New Zealand.

17 Surprisingly some members of the Opposition did not think so. A question in the House read "Did the Minister of Immigration have the Prime Minister's approval in issuing instructions that there should be no more "dawn raids", and why should the police or the immigration authorities be impeded in this way in carrying out their responsibilities to uphold the laws of the land?" N.Z. Parliamentary debates Vol. 390, 1974: 1339.

18 Supra n. 16.

19 N.Z. Parliamentary debates Vol. 392, 1974: 3279.

20 Supra n. 1, para. 31.

21 De Bres & Campbell. *The Overstayers* (Auckland Resource Centre for World Development, Auckland, 1976) 9.

22 November 1975.

23 June 1976.

24 N.Z. Parliamentary debates Vol. 411, 1977: 1048

25 Labour Party Manifesto 1975

When National became the government in 1975, it was only natural for them as part of their pre-election policy commitment to continue regulating immigration as begun by the Labour administration in 1974. On 10 April 1976, the Minister of Immigration, Hon. F. Gill, announced a stay of proceedings for persons of any nationality who had arrived in New Zealand before that date and had subsequently remained in New Zealand after the expiry of their permits. In order to benefit from the immunity from prosecution, the people affected were to register by 30 June.

Each case was to be examined individually. There were three possible outcomes. A short extension could be granted to enable them to return home or a longer extension in order for them to settle their affairs in New Zealand and eventually return home and the final possibility was that they might be granted permanent residence.[26]

By 1 July 1976, 4647 overstayers had registered.[27] Hon. F. Gill said[28]

> There are substantial numbers who have chosen not to take advantage of the Government's offer of immunity from legal action. Presumably, these people are aware that they have slim prospects of being permitted to remain in this country legally.

However, after representations to the Minister, and most probably the public pressure generated by the exposure of 'random checks', it was decided to re-open the register from 20 December 1976 to 31 January 1977.[29]

Final figures for the register showed[30] that 5381 people were involved — 2507 Tongans, 2464 Western Samoans, 336 Fijians and 74 people of other nationalities. When applications were finally processed in 1977, 68.9% had been granted permanent residence — 3657 Pacific islanders and 55 people of other nationalities. 1650 Pacific islanders had their applications declined along with 19 others.[31]

In October 1976 controversy was once again sparked up by press reports[32] of persons suspected of overstaying, being stopped in the streets by police, questioned and asked for identification. There were allegations of discrimination, as the obvious difficulty with the police operation was deciding whether or not a person looked like an illegal immigrant. Inevitably, the majority of those being apprehended in the streets were persons not easily identifiable as New Zealanders.

The practice savoured of police state tactics and infringed civil liberties. Mere suspicion derived from the appearance of a person does not constitute ground for an arrest, or even for further questioning; there must be some more reliable ground.[33]

26 "Report of the Department of Labour for the year ended 31 March 1977" (Government Printer, Wellington, 1977) 11.
27 Minister of Immigration, Hon. F. Gill. Press Statement 1 July 1976.
28 Idem.
29 Minister of Immigration, Hon. F. Gill. News Media Release 1 December 1976.
30 Minister of Immigration, Hon. F. Gill. News Media Release 8 June 1977.
31 N.Z. Parliamentary debates Vol. 411, 1977: 1368.
32 *The Evening Post,* Wellington, 22 October 1976, p. 1. *The Evening Post,* Wellington, 23 October 1976, p. 1. *The Evening Post,* Wellington, 25 October 1976, p. 1.
33 N.Z. Parliamentary debates Vol. 407, 1976: 3323.

To aggravate matters, the Prime Minister denied that such checks had taken place.[34] An internal police inquiry was instigated.[35] This was followed by an admission that random checks had in fact occurred, and it was admitted that special police squads had been set up in Auckland, Wellington and Christchurch to detect overstayers.[36]

In terms of political controversy, 1976 was the climax of the overstayer issue. The Department of Labour has since then, improved its techniques in the detection and prosecution of suspected overstayers. Only now and then does news media attention focus on certain overstayers' cases. Much of the public controversy has ended.

Despite the large numbers occasionally cited[37] as estimates of the numbers of overstayers in New Zealand, prosecution and deportation figures remain surprisingly low. Official Justice Department statistics for overstaying prosecution are available only up to 1976.[38] More recent figures cannot be obtained.[39] However, in the Report of the Department of Labour for the year ended 31 March 1978 it was noted that due to 12,312 visits by field staff, 550 court cases were initiated leading to 367 deportations and 506 people being induced to leave the country. The department, it is submitted, seems to have greater success in inducing people to leave than in obtaining deportation orders against them.

With the introduction of a computer in October 1976, it became much easier for the Immigration Division to trace overstayers. A computer printout is made every fortnight. It contains information on people who have entered and departed from New Zealand. This information is taken from particulars filled in by people when they enter or depart from the country. No action is taken against anyone until their name appears on the printout three times, that is, at least a minimum of six weeks from when it first appears. This delay is to ensure that fewer errors are made and is to take into account the fact that relevant information may not be fed into the computer till after a printout is made.[40]

Once names are taken down, officers look at the arrival card of the person to obtain the correct address in New Zealand. If there is no address, the department

34 N.Z. Parliamentary debates Vol. 407, 1976: 3319. *The Evening Post,* Wellington, 25 October 1976, p. 1.

35 Minister of Police, Hon. A. McCready. Press Statement 1 November 1976.

36 *The Evening Post,* Wellington, 23 December 1976, p. 1. N.Z. Parliamentary debates Vol. 407, 1976: 3538.

37 Between 3000 to 4000 overstayers are in New Zealand at any one time. Minister of Immigration, Hon. F. Gill. Press Statement 1 November 1977. As at September 1980 there were over 5800 illegal immigrants: *The Evening Post,* Wellington, 8 September 1980, p. 8.

38 1973—134, 1974—145, 1975—322, 1976—472, Department of Statistics, *Statistics of Justice* for 1973, 1974, 1975 and 1976.
The available figures on deportation for overstaying: 1973—166, 1974—121, 1975—250, N.Z. Parliamentary debates Vol. 406, 1976:3103.

39 The Department of Statistics has not processed results held in the Wanganui Computer; there is a backlog of four years' statistics yet to be processed. The Department of Labour does not have available figures.

40 Labour Department official. Interview held 15 May 1980.

will go back to the original form filled in at the New Zealand post where the application for a temporary permit was first made. Once an address is obtained field staff try to contact the suspected overstayer.[41]

If a breach has been committed a prosecution will be initiated. The attitude taken by the department is that a breach of the law has been committed and therefore the proper course is to prosecute.[42] Although it was said no opportunity is given to the overstayer to return home voluntary, that is, given a chance to leave without a prosecution being mounted, the overstayer may nevertheless be 'induced' to go home. Possibly this means that once an overstayer knows a prosecution is being initiated against him, he makes his own arrangements to leave the country before the case is heard before a court.

In exceptional circumstances the department will regularise a person's status by extending his permit. One example given[43] of the type of case where an extension would be given was where a woman was in the late stages of pregnancy. She could not obviously not travel home in such a condition. However, this could create problems in the future, for the child born in New Zealand automatically becomes a New Zealand citizen. One solicitor said that in cases involving overstayers with children born in New Zealand, there had been emotional pressure put upon the parents and children involved to all leave New Zealand, despite the fact that the children had a right to remain in the country, and were likelv to have relatives here that could look after them.

In most cases application for bail will not be opposed,[44] but stringent reporting clauses had often been imposed, even though the prosecution had agreed that they were not necessary.

Once a conviction is entered, the defendant is taken into custody to be deported.[45]

Since 1 February 1978,[46] persons who have been convicted for overstaying have been able to apply to the Minister of Immigration for an order that they be not deported. The Minister may make such an order if he is satisfied, under section 20A(2) of the Immigration Act 1964, that because of exceptional circumstances of a humanitarian nature, it would be unduly harsh or unjust to deport a person from New Zealand.

In the first two months of its operation (1 February 1978 to 31 March 1978) 33 appeals had been made. None were approved, 6 were declined and 27 were under action.[47] For the year ending 31 March 1979, 565 appeals were received by the Minister, of these 169 were allowed, 251 were declined, 68 were rejected as

41 Idem.
42 Idem.
43 Idem.
44 Idem.
45 Section 20 Immigration Act 1964.
46 The coming into force of the Immigration Amendment Act 1977.
47 *Report of the Department of Labour for the year ended 31 March 1978* (Government Printer, 1978) 16.

not qualifying under section 20A and 77 appeals were still under consideration.[48] The sources for these figures give no indication at all of the reasons for the decisions. For the current yearly figures, i.e. the year ended 31 March 1980, it was estimated[49] that the Minister had allowed possibly as many as 40% of the appeals received by him.

The Department of Labour believes that the problem of overstaying is now under control. That is, it is at an acceptable level.[50] However, this has not been due solely to improvements in administrative procedures and the increase of field staff in the department. Amending legislation has also played a role in assisting to control the problem.

## III. LEGISLATION AND CASE LAW

The cases chosen for discussion highlight aspects of the law and show the effect the decisions have had on the legislature. They do not provide an exhaustive list of the grounds of challenge, nor do they represent the only means of challenge. Extra-judicial channels such as appeals to the Governor-General,[51] members of parliament and complaints to the Ombudsman[52] are also used in attempts to quash convictions. Furthermore, there are attempts to avoid the offence by means of legal adoption.[53]

### *A.* Towards Inflexibility

#### 1. *Strict liability*

In *Labour Department* v. *Aloua*[54] the issue arose whether section 14(5) of the Immigration Act 1964 created an offence of strict liability. The appellant had entered New Zealand on a temporary permit in 1970 and had relied on a friend to apply for extensions of it. His friend had done this on several occasions, till the final renewal expired on 31 December 1973. Despite his belief that his friend had, as on previous occasions arranged for another extension, Aloua was convicted of overstaying.

In a judgment delivered on 26 October 1974, Mahon J. on looking at the serious consequences of a conviction held that the offence was not one of strict

48 *Report of the Department of Labour for the year ended 31 March 1979* (Government Printer, 1979) 7, 26.

49 Supra n. 40.

50 Supra n. 40. Despite the fact that as at September 1980, there were 5829 illegal immigrants in New Zealand the situation was described by Mr. Malcolm, the Immigration Under-Secretary, as "clearly stable and under control" *The Evening Post,* Wellington, 8 September 1980, p. 8.

51 Through the prerogative of mercy.

52 See *Report of the Ombudsman for the year ended 31 March 1975.* (Government Printer, Wellington, 1975) 34. *Report of the Ombudsman for the year ended 31 March 1975.* (Government Printer, Wellington, 1976) 32. *Report of the Ombudsman for the year ended 31 March 1978.* (Government Printer, Wellington, 1978) 9. *Report of the Ombudsman for the year ended 31 March 1979.* (Government Printer, 1979) 38, 39.

53 *Re H* [1981] N.Z. Recent Law 144, though not an overstayer case, is indicative of the possibilities provided by the adoption process.

54 [1975] 1 N.Z.L.R. 507.

liability. If the defendant held an honest and reasonable belief that he had not committed an offence then the action would not lie. Mahon J. did not feel that this decision would hamper the prosecution. All the prosecution had to prove was that the permit expired and that the defendant had remained in New Zealand, then it was incumbent on the defendant to point to some evidence creating a reasonable doubt that he had a guilty mind.

The consequences of a conviction — deportation, and possibly imprisonment — are serious. A conviction also means that the offender has virtually no chance of re-entering New Zealand at a future date. A permit to enter is granted at the Minister's discretion and if a person has previously been convicted and deported for overstaying in New Zealand, then it is highly unlikely that the Minister will grant a permit. A finding, therefore, that the offence ought not to be a strict liability offence was a good one considering the seriousness of the consequences.

The decision, it is submitted, also attempted to balance the scales in the conflict. Under section 34(2)[55] of the Immigration Act 1964 the prosecution has only to produce a certificate containing certain statements in order to discharge its task. If the offence was of strict liability then conviction would be inevitable in every case. In real terms, however, the benefit of the decision is small. Once a defence is successful, the prosecution merely has to initiate another prosecution — in which case the defendant could no longer plead his defence that he had a reasonable belief that he had not committed an offence. The advantage given by the *Aloua* decision was therefore extremely limited in practice.

Nevertheless, the Department of Labour did feel hampered by this decision. In November 1976 the Immigration Amendment Bill was introduced.[56] One of the main amendments was a new section 14(5). The amendment overrode the *Aloua* decision; it clearly created an offence of strict liability. An offence would be committed whether or not the defendant knew he had overstayed his permit or that no application for an extension had been made on his behalf or granted.

The government defended[57] this amendment by stating that it had become normal practice for lawyers to advise clients to write for extensions to their permits. When the person was brought before the courts on charges of overstaying, the magistrate would accept that an application had been made for an extension and

55 Section 34(2) provides —
In any proceedings for an offence against section 5 of this Act or against any provision of Part II of this Act, a certificate signed by a Collector of Customs or by a person employed in the Department of Labour authorised by the Secretary of Labour, if it contains a statement, in relation to the defendant in the proceedings, that —
(a) He is not a New Zealand citizen; or
(b) He entered New Zealand before, on, or after a specified date; or
(c) He was not, at the time he entered New Zealand or at any other specified time, the holder of an entry permit; or
(d) He was the holder of a temporary entry permit that has expired or has been cancelled, . . .
shall, in the absence of proof to the contrary, be deemed to be proof of that statement.

56 N.Z. Parliamentary debates Vol. 408, 1976: 4321.

57 Ibid. p.4332.

would therefore dismiss the case. It was said that there had been so many of these instances that it was almost not worthwhile taking such a person to court.

2. *Production of certificates — section 34(2)*

Challenges have been made in respect of the certificates presented under section 34(2). In *R. Ali* v. *Department of Labour*[58] one of the grounds for appeal was that the person who signed the certificate had to show that he had authority to do so. Unless this was done, then the certificate was inadmissible as evidence. This submission was disposed of by Barker J. referring to section 34(4), which states that in the absence of proof to the contrary the person who signed the certificate shall be presumed to be authorised to sign it.

A similar argument was made in *Lama* v. *Department of Labour.*[59] Counsel for the appellant argued that the prosecution had to prove that the person signing the certificate was employed in the Department of Labour. Not unexpectedly, this argument was rejected. Finding support from Baker J's decision in *Ali,* Moller J. held that under section 34(4) it was sufficient if the person signing the certificate was described as an employee of the department, even though it was not a certified fact and there was no evidence as to his status.

Another line of challenge in *Lama* was that the certificate was defective in one of its elements and was therefore invalid for all purposes. The certificate stated that the appellant had entered New Zealand "on or about" 26 May 1975. Counsel argued that strict compliance with section 34(2) was required and the words "on", "before", or "after" should have been used. However, it was held that the phrase used was a "convenient and reasonable one to encompass the provisions of the section". In further support, it seems that because the certificate was not a prescribed form, the court was more ready to consider such a minor variation as being acceptable.

It is submitted, that the difference was very slight and therefore Moller J.'s approach was correct. It is also possible that the differences could be covered by the maxim de minimus non curat lex.

Finally, the Supreme Court has been asked to decide whether the witness who produced the certificate had to personally identify the person in court as the person named in the certificate. In *Gibson* v. *Eskielu,*[60] McMullin J. answered in the negative. He said that identification could be made in other ways. The important thing was for the prosecution to identify the person, to whom evidence was directed, as the defendant in the proceedings by the end of the case for the prosecution. Of

58 18 October 1977. Unreported. Auckland Registry. M1178/77 Barker J.

59 2 August 1978. Unreported. Auckland Registry. M355/78 Moller J.

60 10 September 1979. Unreported. Auckland Registry. M.1053/79 McMullin J. On the facts, it was held that because of the peculiarity of the name, Moli Esekielu, the defendant was sufficiently linked to the name in the certificate. However, this finding was upset in the Court of Appeal where it was held that there was insufficient evidence adduced by the prosecution to justify as a matter of law, an inference beyond reasonable doubt that the person named in the certificate was the same person as the defendant in the proceedings — See [1980] 2 N.Z.L.R. 229, 232 per Richmond P.

section 34(2) it was said[61] that the advantage should not be extended any further and that a certificate relating to factual matters which fell short on the issue of identification would receive no greater recognition in evidence than if matters were covered by oral evidence that had not been related to the defendant in court.

*B.* Administrative Improvements

In the Immigration Amendment Act 1977 the distinction was made[62] between working and non-working temporary permits for visitors to New Zealand. Visitors wishing to work have to apply for a work permit. Unless they are granted one, they are prohibited from seeking employment in New Zealand. Section 14(2A) and (2B) of the Immigration Act 1964 gives the Minister of Immigration considerable discretion in deciding whether or not to grant work permits. This was undoubtedly the purpose of the amendment, to issue work permits in consideration of the current domestic employment situation.

The amendment which caused[63] the greatest concern was the insertion of section 19A in the Immigration Act 1964. It is an offence for an employer to employ persons that he knows do not hold work permits. He is subject to a fine of $200 or $20 per day if the offence is a continuing one.

When the Bill was first introduced,[64] section 19A was worded

> who engages or offers to engage in any type of employment any other person who he has reason to know [does not hold a work permit]

The New Zealand Employers' Federation[65] was not happy with this wording. Its submissions on the Bill mentioned that the Minister of Immigration had revealed that the government's intention was to create an offence only where the employer had actual knowledge. Despite obtaining a legal opinion that said that the present wording could only be fulfilled by "actual knowledge", the Federation submitted that "[it] would better meet the Government's intention and better protect the interests of employers" if the word "knowingly" was used instead.

On the other hand, the Department of Labour felt[66] that the proposed section 19A was too easy on the employers as it stood, and in fact, wanted the offence to be a strict liability one. They were not successful, the requirement of actual knowledge prevailed.

To date there have been no prosecutions initiated for this offence. It has proved practicably impossible for the Department to prove actual knowledge, despite the suspicion that employers are contravening section 19A.

61 Ibid. 9.
62 s.2(1) Immigration Amendment Act 1977.
63 Submissions from N.Z. Employers' Federation, National Council of Women of N.Z. Inc, N.Z. Federation of Labour, Amnesty Aroha, Wellington Regional Pacific Islands Council, Inter-Church Commission on Immigration and Refugee Resettlement and the Public Questions Committee of the Methodist and Presbyterian Churches of N.Z. all expressed concern about the proposed section 19A.
64 N.Z. Parliamentary debates Vol. 415, 1977: 4112.
65 Submissions by thee N.Z. Employers' Federation on the Immigration Bill 1977.
66 Labour Department official. Interview held 15 May 1980.

Other submissions[67] on the Bill expressed concern that the government was imposing upon the employers the task of policing the immigration laws — a task better left to the appropriate branch of the executive. It was feared that employers would insist upon some form of identification of a prospective employee's status. This would ultimately affect people who by their accent or physical characteristics were not immediately identifiable as New Zealanders or people who had a right to be and be employed in New Zealand. Unless employers were prepared to insist on everyone's producing identification, checking only those who did not look like New Zealanders would result in discriminatory practices. Moreover, it would have adverse effect on employer-employee relations.

The 1977 amendment also created[68] the Minister's discretion to quash orders for deportation on exceptional humanitarian grounds. It is to be noted that any conviction entered still stands.[69] This provision was generally welcomed as an attempt to mitigate the harshness and rigidity of the Immigration Act 1964, however, it was felt that a more appropriate procedure would have been an independent appeal authority. An independent body would protect the individual from any arbitrary and unfair decision making by the Minister.

In the Immigration Amendment Act (No. 1) 1978 a Deportation Review Tribunal was set up, but exclusively for people committing an offence after residing in New Zealand for a certain period and for persons who constitute a threat to national security.

However, one provision relevant to the overstayers' problem was enacted. Section 33B,[70] inter alia, gives a policeman power to enter any premises without a warrant, by force if necessary, to render assistance to a person he believes is an immigration officer.

This amendment was in response to an incident which occurred in 1977.[71] An immigration officer had been invited to enter a house to interview an overstayer, who later locked herself into a room. The officer was unable to seek the assistance of a policeman, as a policeman would not have been able to enter the property without the occupier's consent, which in this case, was not forthcoming.

Section 33B aimed to remove this practical hurdle. Of the three submissions[72] on this Bill, only one commented on this section.[73]

> We deplore the new provision in Section 33B. It constitutes undue interference with civil rights and privacy of individual, families, homes and employment. Past history of searches and harrashment (sic) of Pacific Island homes in New Zealand should serve as a reminder to (sic) Police excesses and interference.

67 Those of the Public Questions Committee of the Methodist and Presbyterian Churches of the Wellington Regional Pacific Islands Advisory Council, and of Amnesty Aroha.

68 Section 20A as inserted by s.6 Immigration Amendment Act 1977.

69 Section 20A talks only of an order to be not deported. It does not refer at all to quashing conviction.

70 As inserted by s.8 Immigration Amendment Act (No. 1) 1978.

71 Comments by the New Zealand Police on the Immigration Amendment (No. 2) Bill 1977.

72 Amnesty Aroha, N.Z. Council for Civil Liberties, Wellington Regional Pacific Islands Advisory Council.

### C. The Problem Created by *Ngata*

On September 28, 1978, a case[74] was heard before Moller J. on appeal from a decision of the Magistrate's Court. The appellants had been convicted of overstaying and ordered to be deported. Counsel for the appellants submitted that one of elements of the offence that had been approved by the prosecution was that the defendant had been issued a valid entry permit. It was argued that in this case, the appellants had not been issued with valid permits. The form of their permits had been approved by the Minister of Immigration under regulation 3A of the Immigration Restriction Regulations 1930, which deemed the approved forms to be "prescribed" forms. Under section 38 of the Immigration Act 1964 the power to prescribe forms is given to the Governor-General only. It was contended that there had been a delegation of the Governor-General's own delegated legislative powers and that there could not legally be any such delegation.

The Crown argued that the power to prescribe forms was essentially an administrative power and not a legislative one. Hence, on the principle that administrative powers could be subdelegated, the power to prescribe forms as exercised by the Minister of Immigration under regulation 3A was valid, and accordingly the forms issued to the appellants were valid.

The judgment of Moller J. was delivered on 20 November 1978. He held that the power conferred on the Minister of Immigration was really one of prescribing the actual forms of permits and that this extended beyond administrative duties, powers and discretions. This led him to the conclusion that regulation 3A was invalid as it purported to sub-delegate to the Minister a legislative power.

The case, it is submitted, was rightly decided. It was the Minister who was prescribing the forms under regulation 3A. The whole power given to the Governor-General was being exercised by someone not authorised to do so. It did extend beyond mere administrative discretions and it is difficult to see how it could be considered otherwise.

But the legislature had not been unaware of the challenge made in *Ngata,* nor had it been watching passively. Anticipating the outcome of this case, on 4 October 1978 an amendment to the Immigration Act 1964 was introduced.[75] The amendment came in the form of a late addition to the Statutes Amendment Bill. It purported to validate all permits issued prior to 19 October 1978.

Statutes Amendment Bills are usually reserved for minor amendments to a large number of states. The amendments are considered either by the Statutes Revision Committee or the Lands and Agriculture Committee depending on the nature of the amendment — if any member of parliament objects to a particular amendment, the committee usually recommends that the clause in question be deleted.

73 Wellington Regional Pacific Island Advisory Council. Submissions to the Statutes Revision Committee on the Immigration Amendment Bill (No. 2) 1977, p.6.

74 *Ngata and others* v. *Department of Labour* [1980] 1 N.Z.L.R. 130 (Note)

75 N.Z. Parliamentary debates Vol. 421, 1978: 4154.

The committee also recommends the deletion of any clause considered to be controversial.[76]

On 3 October 1978 the Statutes Amendment Bill was introduced to the House.[77] The following day, Hon. J. McLay, while moving that the report do lie on the table, said[78] that, inter alia, an amendment to the Immigration Act 1964 had been considered by the Statutes Revision Committee and that it would accordingly be included in a Standing Order Paper.

The Labour Opposition expressed[79] its reluctance to pass such retrospective measures but added that it had agreed to the amendment because

> [I]t would be undesirable for thousands of people in this country who believe they have proper residential permits to suddenly discover overnight, as it were, that because of a court case their permits were not valid.

The Amendment was included in the Bill without any opposition.

In the early hours of 6 October 1978, the Statutes Amendment Bill 1978 was divided into separate bills[80] and was read for the third time.[81]

It is submitted that the amendment to the Immigration Act 1964 was of great importance and effect and that it should not have been rushed through as a late addition to the Statutes Amendment Bill. Retroactive legislation should be closely scrutinised. Very few members of parliament had copies of the Bill.[82] This meant, it is submitted, that the full implication of the amendment to the Immigration Act 1964 was not appreciated.

The true concern of the government, was not that people would worry that their permits were invalid under the *Ngata* decision but that, it is submitted, the government felt it was even more undesirable that had nothing been done to validate the permits, people who overstayed them could not be successfully prosecuted and deported.

Had the true import of the *Ngata* decision and its consequences been fully appreciated by the Labour Opposition, perhaps an objection may have been made to the last-minute amendment, and following usual practice it might have been deleted and introduced in a more normal manner for greater consideration and debate.

Despite the fact that the government could have forced the amendment through parliament, irrespective of any Labour Opposition, it is submitted that the passing of such an important amendment in such a form and in such haste is a disturbing and undesirable development. Unfortunately it is not the first time[83] that such action has been taken, nor probably will it be the last.

76 Ibid. 4061.
77 Idem.
78 Supra n.75.
79 Supra n.75, p.4155.
80 Supra n.75, 4270.
81 Supra n.75, 4272.
82 Supra n.75, 4155.
83 See G.P. Barton "Law and Orders: a case study" (1978) 9 V.U.W.L.R. 393.

## *D.* The Problems Created by the 1978 (No. 2) Amendment

The amendment, however, did not put an end to the matter. It spawned a large number of appeals based on the interpretation and meaning of the Amendment Act. Section 2 of that Act provides —

> (1) Notwithstanding anything in the principal Act or in the Immigration Restriction Regulations 1930, every entry permit granted or issued for the purposes of the principal Act before the commencement of this Act shall be deemed for all purposes to have been validly granted or issued if it was granted or issued in a form for the the time being approved by the Minister.
>
> (2) Nothing in subsection (1) of this section shall —
>
> (a) Affect the rights of the parties under any judgment given in any Court before the commencement of this Act, or under any judgment given on appeal from any such judgment, whether the appeal is commenced before or after the date of the commencement of this Act:
>
> (b) Apply in respect of any permit the validity of which is in issue before any Court at the date of the commencement of this Act.

### 1. *Section 2(2) (a)*

In *Y. Ali* v. *Department of Labour*[84] Barker J. considered whether the 'rights of the parties' under a judgment included a right of appeal. This, the appellant argued, would bring his case within the savings provision of subsection(2)(a). The *Ngata* decision would be directly applicable and therefore the prosecution would not lie as one of the elements of the offence could not be proven.

It was held that the right of appeal did not derive from statute but that[85]

> [T]he expression "rights under any judgment" must include the rights of appeal; if the expression is construed otherwise, it is difficult to see what any unsuccessful party would have under any judgment.

However, Mahon J., sitting on appeal dealing with the same issue in *Talanoa & Ors* v. *Department of Labour*[86] disagreed with the decision of Barker J. in *Ali.* He held that all rights of appeal were creatures of statute and that without any provisions in the Summary Proceedings Act 1957, there would have been no right of appeal from conviction for the defendant.

He added that the purpose of section 2(2)(a) was to preserve the finality of any conviction or acquittal entered before 19 October 1978 and in respect of which there is no appeal pending at that date.

This analysis, with due respect, does not take into account the second limb of paragraph (a). In Mahon J.'s terms paragraph (a), it is submitted, extends the purpose of the savings provision by preserving the finality of a decision in an appeal whether the appeal was commenced before or after 19 October 1978.

*Talanoa* was commenced after 19 October 1978, nevertheless there was no statutory provision to prevent Mahon J. from hearing the merits of the appeal.

84 11 December 1978. Unreported. Auckland Registry. M1499/78 Barker J.
85 Ibid. 6.
86 24 May 1979. Unreported. Auckland Registry. M.344/79 Mahon J.

The case definitely fell within the savings provision of the Immigration Amendment Act (No. 2) 1978.

Barker J. had the opportunity of reconsidering this issue in *Taufoou & Ors* v. *Attorney-General.*[87] This time he reluctantly concurred with Mahon J.'s view that rights of appeal were not rights under a judgment. The plain words were to be given effect even at the expense of "presumptions that operate in favour of the citizen" which the courts have developed when dealing with retrospective legislation. Unfortunately, Barker J. too, omitted to give full effect to the plain words in the second limb of paragraph (a).

The appellants in *Talanoa* filed a motion for leave to appeal to the Court of Appeal on 12 June 1979. But on 6 August, after the *Taufoou* decision was delivered, Mahon J. refused to grant leave. He found support on the basis that there was another decision in accordance with his own. Nevertheless, on application for special leave from the Court of Appeal to appeal, leave was granted.

In a single judgment delivered on 14 March[88] the court held that a right to appeal was not a right under a judgment. However, it went on to say that this was irrelevant as[89]

> The last limb . . . . is intelligible only on the footing that Parliament contemplates that appellate Courts will apply the ordinary rule that a change in the statute law after the decision at first instance does not affect the appeal.

It was clearly Parliament's intention to protect the rights of parties to an appeal as appellate courts were not required to treat the permits in question as validated by the amendment Act, the *Ngata* decision was still applicable in a small number of cases.

2. *Section 2(2) (b)*

The Court of Appeal in its discussion of the 1978 (No. 2) amendment also considered the purpose of paragraph (b). It was said that the purpose of this savings provision was to protect the position of defendants who were already being prosecuted but the validity of whose permits was still "in issue" before the courts. These cases would be decided without reference to the validating amendment.

The court referred to Supreme Court decisions where the meaning of "in issue" had been decided. However, it expressed no opinion on them. One such case was *Department of Labour* v. *Falala.*[90] The defendants had overstayed his permit and was arrested on 9 October 1978. He appeared in court the next day and was remanded without plea till 24 October. On the 24th, he pleaded not guilty. His

87 2 July 1979. Unreported. Auckland Registry. M235 & 602/79 Barker J.
88 *Alofa* v. *Department of Labour* [1980] 1 N.Z.L.R. 139.
89 Ibid. 145.
90 22 March 1979. Unreported. Auckland Registry. M59/79 Perry J.
(Overruled on 21 August 1980 by the Court of Appeal in *Mapa* v. *Department of Labour* [1980] 2 N.Z.L.R. 21 — Ed.).

counsel argued that the validity of the defendant's permit was in issue at the time the amending legislation came into force. Hence the case fell within the *Ngata* decision.

The magistrate felt that the validity of the permit came into issue at the laying of the information. However, Perry J., in the Supreme Court held otherwise. He held that an issue only arose when the defendant was asked how he pleaded. The decision, it is submitted is correct as what is contained in an information may not necessarily be an issue between the parties until it is made known whether the defendant intends to challenge it or not. That is, when he pleads.

By the unfortunate timing of not having pleaded before 19 October 1978, Falala fell outside the savings provision in paragraph (b).

3. *Section 2(1)*

There was more to come in the continuing saga of section 2. This time it was in relation to subsection (1). In *Feao & Ors* v. *Labour Department*[91] the appellants submitted that one of the elements of the offence that had to be proved by the prosecution was that the permit issued to the defendant had been in a form "approved" by the Minister, notwithstanding that it was a prescribed form.

This submission found favour with Barker J. He noted that the legislature had equated "approved" with "prescribed forms" whereas the *Ngata* decision had rendered "[*U*]*ltra vires* and ineffective the *only* provision which deems "approved" forms to be the same as "prescribed forms".[92]

Matters were complicated by a contrary decision in *Bulisea* v. *Department of Labour*.[93] Applying the words "for all purposes" in section 2(1) of the 1978 (No. 2) amendment, Speight J. held that the section validated all forms whether they were approved or prescribed.

This was reaffirmed in the Court of Appeal decision delivered on 20 February 1980.[94] The court unanimously held that a certificate produced pursuant to section 34 (2) of the Immigration Act 1964 was proof of the fact that the permit issued to the defendant was issued in a form "approved" by the Minister of Immigration.

Cooke J. added that if a defendant was able to show that his permit was not in a form approved by the Minister then this may be proof of the contrary of the statement contained in a certificate. Unless the prosecution could rebut this evidence, one of the elements of the offence had not been proved.

An attempt was made in *Filo* v. *Department of Labour*[95] to argue that the permit issued to the defendant did not comply with that "approved" by the Minister as gazetted in 1979.[96] There were two differences — the form approved read "On . . . for a period . . . . " whereas the permit issued specified the period

91 19 June 1979. Unreported. Auckland Registry. M595 & 600/79 Barker J.
92 Ibid. 8.
93 6 August 1979. Unreported. Auckland Registry. M977/79 Speight J.
94 *Department of Labour* v. *Feao* [1980] 1 N.Z.L.R. 124.
95 [1980] 1 N.Z.L.R. 135.
96 *N.Z. Gazette* 5 July 1979, 3040.

"from 20 March 1977 until 20 April 1977". The second difference was in the heading of the form approved — "Immigration Restriction Amt Act 1920, sec. 8" in contrast to "Immigration Act 1964" as found in the permit held by Filo.

In the Magistrate's Court, this submission was rejected. The magistrate held that section 5(i) of the Acts Interpretation Act 1924 was applicable. Slight deviations in form, not calculated to mislead did not invalidate the forms.

On appeal to the Supreme Court,[97] Thorp J. allowed the appeal. He decided that the permit issued was invalid, bearing in mind the principle that retrospective legislation should be construed strictly and should not be given greater effect than necessary.

This decision caused great concern to the department. Approximately 100 hearings pending at the time were affected by the decision. An estimate was given that 1000 unapprehended overstayers had been issued with the same type of permits.

The department was granted leave to appeal.

In the Court of Appeal,[98] it was held that the differences in the permit were immaterial and were within the scope of the maxim de minimus non curat lex. Cooke J. said[98a] it was common sense that the Minister of Immigration would have intended in 1963 that the form would be used with necessary modifications if the legislation then current was replaced by substantially similar legislation, as it had. Similarly, Richardson J. said that it was a "fair inference, and one that accords with the necessities of modern governmental administration. . . ."[98b]

The approach of the Court of Appeal was consistent with that of Moller J. in *Lama*.[99] It was a practical approach as the differences were very slight and no doubt forms used by other government departments probably also vary slightly from those "approved" under the relevant legislation. Perhaps too, an important consideration was that a contrary decision would have severely hampered the Department of Labour's task in successfully prosecuting overstayers.

### *E.* The Denouément

There were no provisions in the Immigration Act 1964 applicable to those persons who had overstaying charges against them dropped because of the *Ngata* decision. They had arrived legally in New Zealand, but on permits that had subsequently been held invalid. There was no power in the Immigration Act 1964 for the Minister to regularise their status. Nor was there any legal foundation upon which they could be deported from New Zealand. They had simply committed no offence in law. The only problems they would have had in respect of their status, or more correctly non-status, would have occurred if they had left New Zealand. Once they attempted to re-enter the country they would then have been subject to the normal process of applying for a temporary permit and the consequences if they overstayed their permits.

97 20 November 1979. Unreported. Auckland Registry. M1639/79 Thorp J.
98 Supra n.95.
99 Supra n.59.
98a Ibid. 137.
98b Ibid. 138.

But the government had not forgotten about the approximately 200 people affected. On 10 October 1979 an Immigration Amendment Bill was introduced.[100] The Minister of Immigration, Hon. J. Bolger explained[101] that these people were in a difficult position — they were neither permanent residents nor New Zealand citizens. This Bill aimed, inter alia, to remedy the "state of limbo" into which they had been placed.

Under proposed section 14B, these people had to apply to the Minister of Immigration for a temporary permit within 28 days of being notified of this requirement. Failure to do so constituted an offence.

In November, the Chief Human Rights Commissioner, Mr Pat Downey, advised the government that this piece of legislation was in violation of human rights. It breached article 13 of the International Covenant on Civil and Political Rights,[102] which provides —

> An alien lawfully in the territory of a state party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law

Section 14B created an offence which could only be committed by someone in this group of 200 or so people. It was said that the amendment was retrospective legislation which violated the right of immigrants living legally in New Zealand.[103]

The government insisted that the Bill was not restrospective.[104] On one view they were correct as the offence could only be committed in respect of future conduct — the failure to apply for a temporary permit within 28 days after the Bill came into force.

Despite support from Dr. Elkind of the Auckland University Law School, Mr. Downey, according to the government, had simply made a mistake.[105] However, it is submitted, that seen in a broader context the Bill was retrospective. It deprived a group of people of the benefit of a 'decision reached in accordance with law' which by implication had said that they were lawfully in New Zealand. The Bill, therefore, offended the spirit and intendment of article 13.

The Bill was subsequently passed into law.

### F. *Levave* v. *Department of Labour*

One of the more interesting grounds of challenge was argued in *Levave* v. *Department of Labour*.[106] The appellant was born in Western Samoa. It was contended that her father, born in 1926, by the relevant legislation in force at that time was a natural-born British subject and that by the British Nationality and New Zealand Citizenship Act 1948 the appellant became a New Zealand citizen by descent. Hence Part II of the Immigration Act 1964 did not apply to her.

The case turned upon the question whether under the Nationality and Status of Aliens Act 1923 (U.K.), the appellant's father was a British subject. If so, then this meant under subsequent legislation the appellant was a New Zealander.

100 N.Z. Parliamentary debates Vol. 426, 1979: 3425.
101 Idem.
102 Ratified by New Zealand on 28 December 1978.
103 N.Z. Parliamentary debates Vol. 427, 1979: 4237.
104 N.Z. Parliamentary debates Vol. 427, 1979: 4565.
105 Supra n.103, 4238.
106 [1979] 2 N.Z.L.R. 74.

Any person born within His Majesty's dominions and allegiance was deemed natural-born British subjects under section 1(1)(a) of the Imperial Act which was incorporated into the 1923 New Zealand Act.

Section 14(1) of the 1923 Act provided —

Subject to the provisions of this section, this Act shall apply to the Cook Islands and to Western Samoa in the same manner in all respects as if those territories were for all purposes part of New Zealand; and the term 'New Zealand' as used in this Act shall, both in New Zealand and in the said territories respectively, be construed accordingly as including the Cook Islands and Western Samoa.

Counsel for the appellant argued that section 14(1) operated to constitute Western Samoa an area within His Majesty's dominions and allegiance.

However, the Court of Appeal rejected this argument and said section 14 was concerned with the naturalisation of aliens residing in the Cook Islands and Western Samoa, and was not intended to accord the status of natural-born British subject to those born in either place after the statute of 1923 came into force. Adding weight to its view the court looked at the history of New Zealand's relationship with Western Samoa. Western Samoa had been a mandate, then a trust territory of New Zealand. Textwriters had said that occupants of these territories did not assume the nationality of that held by those people born in the country administering the mandate or trust.

Looking at the plain words of section 14(1), it is submitted that the decision was incorrect. The first limb of section 14(1) is subject to the provisions of the section. However, it is submitted that there is nothing in the remainder of section 14 which limits the deeming of Western Samoa as a part of New Zealand solely for naturalisation purposes. Section 14 provides the administrative procedures for naturalisation and vests the power to grant certificates of naturalisation on certain people. That is all it purports to do. Therefore, to give effect to the plain words "in all respects" and "for all purposes", Western Samoa could arguably be a part of New Zealand for citizenship purposes as well.

Even if the first limb is restricted as the Court of Appeal decided, then it is submitted the decision is still incorrect in view of the second limb of section 14(1). The second limb is, it is submitted, disjunctively separated from the restriction in the first limb by the semi-colon. In the plain meaning of the words, New Zealand is construed as including the Cook Islands and Western Samoa for the purposes of the Act.

Although, it was said that the New Zealand Parliament would not have intended "to legislate in a manner inconsistent with moral, if not legal, international obligations in this sphere",[107] it is submitted, even if there were such an inconsistency, if the words are clear then the court has no option but to give effect to them.

Perhaps underlying this decision was the fear that many Western Samoans might claim to be New Zealanders by descent and therefore have the right of unrestricted entry into New Zealand, if the result was otherwise.

107 Ibid. 79.

But the matter does not rest here. An attempt is now being made to have the issue decided through the civil process.[108] Meanwhile, abiding this possibility cases involving Western Samoan overstayers which may also be affected by the outcome are being adjourned.

## IV. CONCLUSION

It was a lack of direction in immigration policy and consequently the absence of any systematic and regular control of the numbers of immigrants coming to New Zealand that first brought about the problem of overstaying. There simply had been no concern about the large numbers of temporary or permanent immigrants to New Zealand till the economic climate began to worsen.

Heavy-handed government attempts to bring the problem under control generated a large amount of sympathy for the plight of the overstayers, and public outrage at the government's handling of the problem. However, since the controversy over "dawn raids" and "random checks" has died down, the government has consistently categorised overstaying as a breach of the law that cannot be tolerated.[109] This, it is submitted has distracted attention from the possible causes of the problem and has drawn public support for government action.

The attitudes of the Labour and National governments to overstaying have essentially been the same. An immigration policy working for the interests of the country cannot be effective if large numbers of short term visitors continue to overstay their permits unchecked. In the present world-wide unemployment crisis the governments have aimed to safeguard employment opportunities for New Zealand citizens and permanent residents and to ensure that housing, education and health facilities are not put under strain.

It is conceded that no country can afford to have an open door policy towards immigration. However, immigration involves people, therefore, it is submitted, a controlled immigration policy should have some built-in flexibility in its operation.

The use of "dawn raids" and "random checks" as means of controlling the problem was an unfortunate overreaction to the situation. They caused fear and anxiety amongst the Pacific island communities and were detrimental to New Zealand's relations with the countries of the South Pacific.[110] There were the inevitable allegations of racial discrimination in the implementation of immigration policy as it seemed that Pacific islanders were being singled out, despite the fact that not every overstayer was a Pacific islander. Widespread criticism of these

108 A certificate was sought from the Minister of Immigration that the party was a New Zealand citizen. This was declined by the Minister. An action on the matter has recently been unsuccessful in the Court of Appeal (*Lesa* v. *Attorney-General* (1981) 4 T.C.L. 15/5) and the matter is now likely to go on appeal to the Privy Council.

109 Minister of Immigration, Hon. F. Gill. Press statement 24 February 1976. News Release 13 June 1978.

110 *The Evening Post,* 26 October 1976, p.1 — Leader of the Opposition, Hon. W. E. Rowling, *The Evening Post,* Wellington, 20 November 1976, p.52 — Prime Minister of Western Samoa.

practices came from a variety of pressure groups — the New Zealand Council for Civil Liberties, CARE, church groups, V.S.A., trade unions, Amnesty Aroha[111] and, perhaps of the greatest immediate effect, the news media.[112]

However, since those episodes the Department of Labour has introduced better procedures and aided by a computer and additional staff has been able to bring down the numbers of overstayers to a level that has not aroused the concern evidenced in the years of 1974 and 1976.

Furthermore, since the public furore over the police involvement in 1976, the police have not played such a large role in the detection of overstayers. It is a Department of Labour task and police are only called upon, if necessary, to effect an arrest.

The problem of overstaying has created an arena where there has been interaction between the executive, judiciary and legislature. Where there has been challenge to administrative procedures and challenges to overstaying convictions, change has quickly followed in its footsteps. Practical difficulties encountered by the Department of Labour have resulted in amendments to the immigration legislation — the creation of a strict liability offence and wide police powers to enter property to assist immigration officers. In the courts, decisions such as *Aloua* and *Ngata,* felt by the executive to be threats to the efficient control of the problem, have been overridden by statute, and although there have been expressions of judicial sympathy for the plight of individual overstayers, judicial attitudes[113] have ultimately and inevitably been influenced by the government policy underlying the control of temporary entry.

111 Amnesty Aroha was formed as a direct response to the problem of overstaying. The purpose of this organisation is to campaign for a more human, open and certain immigration policy to be reflected in the legislation. It monitors new legislation and presents submissions to the government. It has also attempted to increase public awareness and knowledge in this area of government policy.

112 *The Evening Post*, Wellington, 21 September 1977, p.4 Doctor Robson, Director of Criminology at the Victoria University Institute of Criminology.

113 E.g. *Moevao* v. *Department of Labour* [1980] 1 N.Z.L.R. 464. This case involved an overstayer who was given to believe by officers in the Department of Labour that after a certain procedure was followed, he would be granted permanent residence. There was a breakdown in communication from the department, several letters did not reach the appellant, and meanwhile the appellant had been charged with assault. A prosecution for overstaying was then initiated. The appellant sought to challenge this conviction on the grounds that the prosecution was oppressive and an abuse of the process of the court. The appeal was dismissed by the Court of Appeal. It was said by Richmond P. at page 471 of his judgment —

> There can be no doubt that [the] appellant was guilty of the offence for which he was charged. There can also be no doubt that the legislature has deliberately placed in the hands of the Immigration Department a discretion to prosecute offenders under s.14(5) of the Act as a necessary weapon for the control of immigration.

And Richardson J. at page 482, in concluding that the prosecution was not an abuse of the process of the court, said —

> I cannot believe it is having regard to the public policies reflected in the immigration legislation. The enactment of s.14(5) in its present form in 1976 emphasises that there is no defence to a charge of overstaying.

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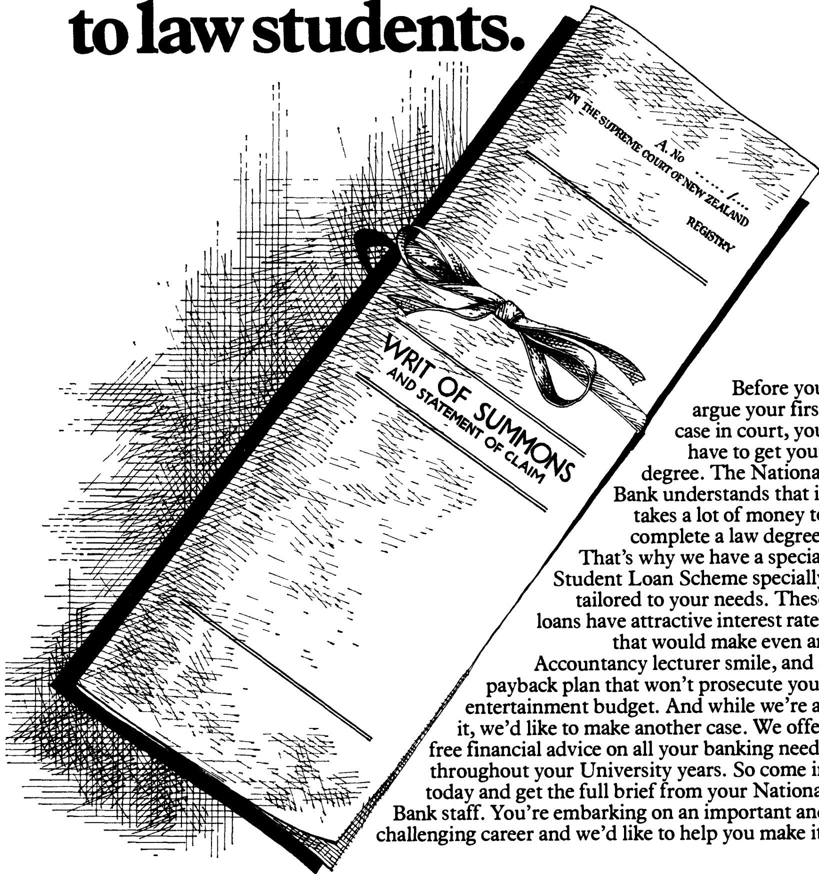


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