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Avenues of Appeal
in
New Zealand's Deportation Legislation

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I. INTRODUCTION

The deportation legislation of New Zealand has undergone major changes since 1977. In particular, there has been the enactment of appeal procedures for persons liable to be deported. These changes are a reflection of the changing attitudes towards the obligation of a state in respect of its powers to deport a non-national, and of the changing judicial attitudes as to the courts' power to review the making of a deportation order. The developments are also welcome safeguards for persons liable to be deported and act as a restraint on previously unfettered and wide ministerial discretions in this area of law.

There is the growing recognition that the consequences of deportation are serious. It is a 'drastic sanction'[1] and

> ... it imposes a severe penalty and may inflict considerable hardship. It may adversely affect the person deported in personal and business relationships, employment and other ways.[2]

Under the Immigration Act 1964, there are four categories of person that are liable to be deported. Briefly, they are prohibited immigrants and persons who have committed offences against Part II of the Act, persons who have resided in New Zealand for a number of years and have committed offences punishable by imprisonment, persons who have links with terrorist organisations or acts of terrorism, and finally, persons whose continued presence in New Zealand constitute a threat to national security.

1 Daganayasi v. Minister of Immigration. [1980] N.Z.L.R. 130,144.
H.W.R. Wade Administrative Law (4th ed, Clarendon Press, 1977) 483.
G.S. Goodwin-Gill "The Limits of the Power of Expulsion in Public International Law" (1974-75) 47 B.Y.I.L. 55,155.
G.S. Goodwin-Gill International Law and the Movement of Persons Between States (Oxford Univ. Press, 1978).

2 In re Mackellar, ex p. Ratu (1977) 51 A.L.J.R. 591, 601

By far the greatest number of people deported from New Zealand are prohibited immigrants and persons who have committed offences against Part II of the Immigration Act 1964.[3] Part II deals with the permit system under which temporary visitors to New Zealand are subject. That is, it provides for the grant, extension and revocation of permits allowing persons to enter the country temporarily.

In the last five years, an average of 304 such persons per year have been deported from New Zealand.[4] In contrast, there has been an average of 41 persons deported per year for committing offences after having resided in New Zealand for a number of years.[5] Further, as at time of writing, no persons have been deported on the other two grounds provided in the Immigration Act 1964.[6]

It is the aim of this paper to examine the avenues of appeal against deportation (if any) which are available to each of these groups. In order to do so, it is worthwhile discussing the climate of opinion as it has evolved from traditional beliefs, the persons liable to be deported and the process of making a deportation order. The focus of this paper, however, will be on an evaluation of the machinery of appeals that have been provided by the Immigration Amendment Acts of 1977 and 1978. This paper will begin its discussion with the more extensive rights of appeal, progress through to the lesser or more restricted rights and finally examine the situation where there are no appeal provisions at all.

3 See Appendix B, Table C.

4 Idem.

5 See Appendix A, Table B.

6 Interview with Department of Labour Official August 1981.

II. CLIMATE OF OPINION - A BACKGROUND TO CHANGES IN DEPORTATION LEGISLATION

A. Judicial Attitudes

The significance of the enactment of appeal procedures in the deportation legislation of New Zealand, can only be fully appreciated by having an awareness of the change in attitudes that has evolved in the last few decades from the traditional views.

In a number of English cases[7] in the late 1910's and early 1920's, the deportation of aliens was held to be a matter entirely within the absolute discretion of the Secretary of State, that is, the person authorised by the legislation to exercise the power to deport. The exercise of this discretion could not be called into question in any court of law[8] unless there had been a 'misuse of power'.[9]

However, this ground of challenge was very difficult to establish and the writer has been unable to find a case in which this argument has succeeded. In R. v. Governor of Brixton Prison, ex p. Soblen[10] the appellant challenged the order for deportation made against him on this ground. He argued that the order was being made for an unlawful purpose, that is, it was made to extradite him rather than to deport him. Deportation could only be used to expel an alien from a country. However, it was argued[11] that it was being used

7 R. v. Secretary of State, ex p. Duke of Chateau Thierry. [1917] 1 K.B. 922;
R. v. Governor of Brixton Prison, ex p. Bloom. [1920] All E.R. Rep. 153;
R. v. Inspector of Leman St Police, ex p. Venicoff. [1920] 3 K.B. 72.
See also R. v. Governor of Brixton Prison, ex p. Sarno [1916] 2 K.B. 742;
R. v. Chiswick Police Station Superintendent ex p. Sacksteder [1918] 1 K.B. 578;
R. v. Home Secretary, ex p. Bressler [1924] All E.R. Rep. 668.

8 Thierry, supra n. 7 p. 932.

9 Bloom, supra n. 7 p. 157.

10 [1963] 2 Q.B. 243.

11 Ibid, 283.

to surrender the appellant to a foreign government to serve a sentence of imprisonment, and this could only be lawfully done by invoking the machinery of the Extradition Acts 1870 to 1935.[12]

The court said[13] that if there was evidence on which it could reasonably be supported that the Home Secretary used the power for an unlawful purpose, then the court would require the Home Secretary to answer the charge. A failure to do so would enable the court to upset his order.

However, the court, at the same time said[14] that it could not compel the Home Secretary to disclose the materials upon which he had acted. Hence, the evidentiary burden on an appellant was very heavy if he tried to challenge a deportation order on the grounds of a 'misuse of the power' to deport.

In Soblen, the English Court of Appeal held that the deportation order was not a sham and had not been made for an unlawful or ulterior purpose.[15]

It has also been held that the principles of natural justice do not apply to the exercise of the discretion to deport.[16] Emergency legislation was involved, enabling the Executive to move quickly, therefore the obligation of holding an inquiry could not be imposed to defeat the purpose of the legislation.

Although these early cases dealt with 'emergency legislation', the principles they expounded were readily approved and applied by Lord Denning M.R. in Soblen.

12 See P. O'Higgins "Disguised Extradition : The Soblen Case" (1964) 27 Mod.L.Rev. 521.

13 Supra n. 10 p. 302.

14 Idem. Note however this case was before the case of Conway v. Rimmer [1968] A.C. 910 and the more recent developments in respect of public interest immunity.

15 Supra n. 10 p. 305.

16 Venicoff, supra n. 7 pp. 80,81.

The language in the 1953 legislation duplicated that found in the 'emergency legislation', and there was therefore a reasonable assumption that Parliament accepted the earlier cases as good law.[17] It was said[18] that in the case of deportation, much of the purpose of the legislation would be defeated if an alien had a right to be heard before a deportation order was made.

It was this body of case law which was held to state the law for this country in Pagliara v. Attorney - General,[19] a case in which a deportation order was made under Section 14(1)(b) of the Aliens Act 1948. Section 14(1)(b) provided:

> (1) The Minister may, by order signed by him, order any alien to leave New Zealand in any of the following cases, that is to say: ...
> (b) If the Minister is satisfied that it is not conducive to the public good that the alien should remain in New Zealand, and the making of the order is approved by the Governor-General in Council.

Quilliam J stated[20] that the purpose of the Act was to enable the Minister to have a person removed, who had no right, in any event, to remain in the country. Further, it was noted[21] that the intention of the legislature was to confer on the Minister a wide discretion, and to fetter it by importing additional requirements, viz, the need to give a hearing, would be contrary to that intention.

It is interesting to note that Quilliam J, however, had some doubts. He said[22] that 'in case he was wrong', there had, on the facts, been no breach of natural justice.

17 Supra n. 10 p. 298.

18 Idem. However it was noted that the situation might be different in respect of a hearing after the initial decision to deport - see pp 298 - 299.

19 [1974] 1 N.Z.L.R. 86.

20 Ibid, 95.

21 Idem.

22 Ibid, 96.

A meeting with minister took place, the minister heard representations and it appeared that he had not refused any request for information.

Furthermore, in the case Schmidt v. Secretary of State for Home Affairs, [23] which was cited by Quilliam J, there were murmurings that the courts might no longer be prepared to continue to hold the view that natural justice principles were not applicable. Lord Widgery said:

> ... there is no obligation upon the Secretary of State to give reasons which are consistent with the legislation or to act fairly in this case. [i.e. the refusal to extend the duration of a permit] Of course, very different considerations may arise on the making of a deportation order. An alien in the country is entitled to the protection of the law as is a national, and a deportation order which involves an interference with his person or property may raise quite different considerations.

Even in Soblen, Lord Denning raised the possibility that after a deportation order was made and before it was executed, an alien might in some circumstances have a right to be heard. But this point did not have to be discussed further in that case because the Home Secretary had stated his willingness to hear and consider any representations which the deportee desired to be made.[25]

In the recent case of R. v. Home Secretary, ex p. Santillo[26] it was said[27] by Templeton L.J. in the English Court of Appeal, that the appellant, who had been ordered to be deported on the grounds of having committed some crimes of violence, had a right to make representations to the Secretary of State, and that the Secretary of State had the responsibility of treating the appellant fairly. While it was impossible and undesirable to lay down hard and fast rules, it was, however, fair in that case for the

23 [1969] 2 Ch. 149.

24 Ibid, 173.

25 Supra n. 10 pp.298-299.

26 [1981] 2 W.L.R. 362.

27 Ibid, 377.

Secretary of State to disclose information which the deportee was unaware and which the Secretary considered to be persuasive to ordering deportation.

Similarly, in two Australian cases, Murphy J., dissenting in Salemi v. Minister of Immigration and Ethnic Affairs[28] and Ratu[29], has said that he did not read the section empowering the Minister to deport, as enabling the Minister to exercise his discretion in bad faith, without regard to the interests of the person affected, and in a manner which denied the principles of natural justice. In his opinion, natural justice had to be applicable when exercising the decision to deport.

The move towards a requirement to act fairly in proceedings appears more strongly in cases involving other aspects of immigration law. For example, in Re H.K.[30] it was said that an immigration officer was obliged to act fairly when dealing with a person seeking entry into the country. Woodhouse J. had reservations in Movick v. Attorney-General [31] about the claim that a Commonwealth visitor who had lawfully entered the country would have no standing or right to be heard by the minister before a decision had been made against him not to renew his temporary permit. Finally, in Chandra v. Minister of Immigration,[32] Barker J. held that in considering an application for permanent residence, the minister had to exercise his discretion fairly.

It is to be noted that there appears now to be no distinction between the requirement to act fairly and the requirement to observe the principles of natural justice. Cooke J. in Daganayasi v. Minister of Immigration[33]

28 (1977) 51 A.L.J.R. 538, 562.

29 Supra n. 2 p. 600.

30 [1967] 2 Q.B. 617.

31 [1978] 2 N.Z.L.R. 545, 550.

32 [1978] 2 N.Z.L.R. 559.

33 Supra n. 1 p. 141, quoting from Furnell v. Whangarei High Schools Board [1973] 2 N.Z.L.R. 705, 718.

said that 'natural justice is but fairness writ large and juridically, fair play in action.' Hence, it may be said that 'fairness' and 'natural justice' are merely synonyms for the one concept of 'fair play in action'. Any difference is purely semantic.

From the cases, it could be said that there is now a greater willingness on the part of the courts to review a minister's decision when there are allegations that there has been unfairness in the decision-making process, which is of a procedural nature.

B. International Law

In public international law there is a recognition by states and commentators,[34] that the power to expel a person is limited by the requirement to deport 'in accordance with the general standards which international law has established for the treatment of aliens" and that "due regard must be paid to the dignity of the individual and to his basic rights as a human being".

The "standards of international law favour a system of appeals", and this has been embodied in Article 13 of the International Covenant on Civil and Political Rights 1966.[35] Article 13 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 and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

34 H.W.R. Wade op. cit.
G.S. Goodwin-Gill op. cit.

35 Res. 2200 XXI (1966).

States ratifying the Covenant are under an obligation to provide a right of appeal for persons liable to be deported who are lawfully within the territory of the state. However, there is no such obligation where a person is deported on the grounds of national security.

Countries of the European Economic Community are obliged to provide minimum procedural safeguards for deportees under Arts 8 and 9 of the Council Directive 64/221/EEC. The applicability of this directive to Common Market countries and its effects are discussed in R. v. Santillo.[36]

Further, it has been said[37] that the European Convention on Human Rights, indirectly, at least, gives some protection against deportation. For example, if deportation of an alien returned him to a state in which he will be tried for a political offence, the deportation may be contrary to Article 3 which guarantees freedom from 'inhuman ... treatment'. Another hypothetical situation may be where deportation breaches Article 8 which guarantees 'the right to respect for family life'.

These particular treaties are, it is submitted, evidence of the evolving customary international law that a state's power to expel an alien is not unfettered, but that it is a power which is limited by the need to observe some principles of fairness, or that it must be exercised, having regard to the rights and dignity of the individual involved.[38]

36 [1980] 2 C.M.L.R. 308, 326-327.

37 F.G. Jacobs The European Convention on Human Rights (Clarendon Press, 1975) 59, 129.

D.J. Harris "Immigration and the European Convention Human Rights" (1969) 32 Mod. L. Rev. 102, 105-106.

38 Cf however J.P. Dietz "Deportation in the United States, Great Britain and International Law" (1973) 7 Int. Lawyer 326, 349.

Changes in deportation legislation have been made in other countries as well as New Zealand, whether due to the obligation to make domestic law conform with international standards or otherwise. In Canada, the Immigration Appeal Board Act 1966-67 established an independent body to hear appeals.

In the United Kingdom, the Report of the Committee on Immigration Appeals (the Wilson Committee)[39] had little difficulty in reaching the conclusion that there should be a right of appeal against deportation orders. This report led to the enactment of the Immigration Appeals Act 1969 (now superseded by the Immigration Act 1971) which set up the Immigration Appeal Tribunal.

In Australia, certain decisions to deport, made under the Migration Act 1958 have been made subject to an appeal right to the Administrative Appeals Tribunal.[40]

These examples are, it is submitted, evidence of the growing practice of states to provide a system of appeals for persons liable to be deported, and give support to the view that customary international law is developing to the point that a state's power to expel non-nationals is not unfettered, but controllable.

C. The Position of Aliens

It is particularly notable that in the New Zealand context, the position of aliens, that is, a person who is not a British subject, a British protected person, or an Irish citizen, has been vastly improved since the Immigration Amendment Act 1978.[41]

In the legislation prior to 1978, distinctions were

39 (1967; Cmnd. 3387).

40 Jurisdiction is conferred by Schedule Pt XXII Administrative Appeals Tribunal Act 1975.

41 s. 2 Aliens Act 1948 - definition of 'alien'.

made between aliens and non-aliens. The latter were in a "privileged position".[42] Deportation provisions pertinent to aliens were found in the Aliens Act 1948. Under section 14 of that Act, the Minister of Internal Affairs could order an alien to leave New Zealand if a court certified that the alien had been convicted of an offence punishable by a term of imprisonment exceeding 12 months and recommended deportation. The Minister could also deport if he was satisfied that it was not conducive to the public good that the alien be allowed to remain in New Zealand, and the deportation order was approved by the Governor-General in Council. These powers were exercisable irrespective of the length of time in which the alien had remained in New Zealand.

Under section 22 of the Immigration Act 1964, persons not being New Zealand citizens, nor aliens, could be deported by the Minister of Immigration, if they had committed offences in New Zealand, punishable by a term of imprisonment exceeding 12 months, within five years of their arrival in New Zealand. But in the case of an offence committed outside New Zealand, for which a New Zealand court could impose a term of imprisonment exceeding 12 months, no such period limitation existed.

In 1976[43], subsection (1A) was inserted in section 22. It was applicable to 'any person', that is, both aliens and non-aliens. If such a person was convicted of an offence committed in or outside New Zealand for which a court could impose any term of imprisonment, within two years of his arrival in New Zealand, he would be liable to be deported.

There were advantages in being a British subject, protected person or Irish citizen. Firstly, there was the period limitation whereby if such a person committed an offence after five years of his arrival in New Zealand,

42 N.Z. Parliamentary debates Vol.416, 1977 : 5343.

43 Immigration Amendment Act 1976.

he could not be deported. An alien in the same position did not have that protection. However, this advantage was limited by the definition of 'arrival' in section 22 (2). A person who had arrived in New Zealand on more than one occasion was deemed to have arrived in New Zealand on the date on which he last arrived in New Zealand before the commission of the offence. Hence, if a person went overseas for a short time and returned, the five year period ould have had to start running again from his latest arrival date only.

Only an alien was subject to be deported on the grounds that it was not conducive to the public good that he should remain in New Zealand. Courts also tended to view aliens in a less favourable light, mainly because under the common law aliens had no rights of entry into British dominions or allegiance, whereas British subjects did, except where statute removed this right.[44]

However, in neither the case of aliens or non-aliens, were there any provisions for appeal against deportation, and it was rare for anyone to try and challenge an order.[45]

With the ratification of the International Covenant on Civil and Political Rights by New Zealand, an obligation was undertaken under Article 13 to provide a right of appeal for aliens being deported. The resulting changes in the deportation legislation were made applicable to all non-New Zealand citizens. Thus, under the present situation, the same provisions apply. Aliens and Commonwealth citizens are subject to the same criteria for deportation, and both

44 Schmidt supra n.23.
F.M. Brookfield "Case and Comment" [1979] N.Z.L.J. 18,19.

45 It appears that Pagliara is the only case, challenging the validity of an order, that has been reported during the lifetime of the Aliens Act 1948. The writer has been unable to find any case challenging an order made under s.22 Immigration Act 1964.

have the same opportunities to appeal against their deportation.[46]

It is in this setting of changing judicial and international opinions that New Zealand's deportation legislation has been vastly reformed. There has been a move away from the situation of wide and unfettered Ministerial discretions in this area. Instead, the legislation has moved to give protection to persons liable to be deported, through the safeguard of appeal machinery.

46 It has been suggested that there may be residual benefits for Commonwealth citizens. Brookfield suggests that in exercising discretionary powers, the Minister and other immigration officers may be under a duty to act fairly in the case of Commonwealth citizens only.
Brookfield op. cit.

III. DEPORTATION PROCEDURES UNDER PART IV IMMIGRATION ACT 1964

The Immigration Amendment Act 1978 repealed Part IV of the principal Act and the Aliens Act 1948. In their place, it substituted a new Part IV which contained extensive provisions dealing with the deportation of persons convicted of offences after residing in New Zealand for a certain period, terrorists and persons whose continued presence constitute a threat to national security. The Amendment Act also provided for rights of appeal in respect of the first two groups of people.

Before examining each group separately and the different provisions which apply to each of them, this paper will examine the various procedural provisions common to all groups.

Firstly, if a deportation order is made under section 22, it must contain the information required by subsection (11). The order must state the provision under which it was made, the ground(s) on which it is made and notice of any rights of appeal and the manner in which it is to be exercised. This subsection was added to the Immigration Amendment (No. 2) Bill after it was reported back from the Statutes Revision Committee. It is not clear why this provision was added,[47] however, it is a welcome requirement in the interests of fairness.

The usefulness of the requirement to state the ground(s) on which the order was made may be limited by the ambiguity of the meaning of 'ground(s)'. If the ground(s) stated are merely repetitious or a paraphrase of the statutory provision under which the order is made then the requirement to state ground(s) will not be very helpful. That is to say, a deportee really needs to know the actual reasons why he is being deported so as to more

47 The Labour Department official (Immigration Division) interviewed by the writer was not aware of the reasons for adding this provision.

effectively utilise his rights of appeal or review. It would place a heavy evidentiary burden on him when seeking review to show, for example, that there was a failure to take into account relevant considerations, if he does not know what facts the Minister relies on in the first place, to deport him.

There is the argument that the word 'ground(s)' was intended to be used in its narrow sense. That is, it applies in the situation where there is a decision to be made out of a finite number of alternative grounds fixed by law, and the decision must indicate which of the grounds forms the basis of the decision, even though no reasons need be stated.[48]

In support of this contention, it could be said that the use of both the words 'ground(s)' and 'reasons' in the same amending Act showed an intention to use them differently.[49]

However, this narrow definition of 'ground(s)' does not apply in the section 22 (2) situation where there is only one ground for deportation and not a number of alternative grounds.

In any case, in practice, the Immigration Division will state the facts on which the deportation order is made, linking those facts with the relevant statutory provision.[50]

48 R. v. Sykes (1875) 1 Q.B.D. 52.

49 Clause 7(1) Fifth Schedule "Every decision of the Tribunal shall be given in writing, with a statement of the Tribunal's reasons for the decision." Cf however the reverse usage of the words 'grounds' and 'reasons' in the Official Information Bill. e.g. cls 15,17, where 'grounds' are used to mean 'reasons' and vice versa. This peculiar usage arises because of the codification of 'reasons' used in the Bill.

50 Supra n.6.

There is no provision stating that the deportation order is to be actually served on the deportee. This is only implicit from sections 22A(1) , 22C(2) and 22G(2). However, of course, in practice notice is served on the deportee. In most cases, as the deportee is serving a prison sentence, notice of the order made against him is sent to the Superintendent of that prison. In other cases, it is sent by registered mail to the deportee.[51]

The situation of notifying a person of a deportation order made against him is unsatisfactory. In some instances, notice has been given months and even a year after the order has actually been made.[52] In the case where a person is serving a term of imprisonment, it would be considerate, if not fair, for notice to be given as soon as an order to deport is made.

The person liable to be deported is given 28 days to leave the country voluntarily under section 22A(1). The 28 days are calculated from the day on which the order or a copy of it is served on him.

It is clear from the plain words of section 22A that this period cannot be calculated from the date on which a "written notice" of the order is served on the deportee. The words "written notice" only appear in the sections providing an appeal. It is only after an appeal has been filed, heard and dismissed that the period of 28 days is deemed to commence after the date when the written notice is given to the deportee.[53]

Thus, it appears, that where an appeal has taken more than 28 days to be lodged and heard from the date that notice of the order is given, and is ultimately dismissed, then the 28 days' 'grace' given to the deportee has automatically expired. The deportee-appellant has no opportunity to leave voluntarily and is subject to the deportation procedures in section 20.

51 Idem.

52 Pe'a v. Minister of Immigration (1979) Deportation Review Tribunal. DRT 8/79.

53 S.22H(2).

Where an appeal is in the process of being heard, the order is suspended until the final determination of the appeal.[54] (Note that there is no appeal right for deportation on national security grounds, hence, only section 22A(1) is applicable to this situation.)

On an application for review, an interim order may be applied for by the applicant under section 8 Judicature Amendment Act 1972 (as amended). In order to preserve the position of the applicant, the court may declare that the respondent (that is, the Department of Labour) ought not to take any further action pending the outcome of the substantial application.

In cases involving people who have remained in New Zealand after their temporary permits have expired, courts have refused to grant an interim order on the grounds that such a person has no right to remain in New Zealand.[55] They have no 'position' to preserve. However, it is submitted that a person who is resident in New Zealand is in a different situation. He has an expectation of remaining in New Zealand. Therefore, if a deportation order is made against him and he seeks review his chances of obtaining an interim order with the effect of delaying his deportation till after the review proceedings, are greater.

Finally, the minister has the power to apply to the District Court for an order for the custody and detention of the deportee until he is placed on a ship or aircraft that is leaving New Zealand. The District Court Judge hearing the application must be satisfied that this course is necessary in the public interest, and he may have regard to evidence that would not be admissible in a court of law in order to decide.[56]

54 s.22H(1).

55 Movick v. Attorney-General [1978] 2 N.Z.L.R. 545.

56 s.22H(3) - (5).

IV DEPORTATION REVIEW TRIBUNAL

A. Persons Entitled to Appeal to the Tribunal

The Minister of Immigration may deport a person who is convicted of an offence committed before he has resided in New Zealand for a period of two years after his 16th birthday, and this offence is one that a court has power to impose imprisonment for.[57] Under section 22(1)(b), if the offence is committed in New Zealand before the person has resided in New Zealand for five years, then the Minister can only deport him if he is sentenced to imprisonment for a term of 12 months or more. If the offence is committed outside New Zealand, and a New Zealand court has convicted and sentenced him to imprisonment for a period exceeding 12 months, then the protection of five years' residence does not apply. Finally, under paragraph (c), a person may be deported where the court has certified that the person has been convicted of an offence before he has resided in New Zealand for five years, or of an offence committed outside New Zealand, and in either case the court is empowered to impose a term of imprisonment for 12 months or more and the court has recommended deportation.

There does not appear to the writer to be any reason why an offence committed outside New Zealand should be treated differently from an offence committed inside New Zealand. It is speculated whether any distinction was intended at all.[58] The distinction may have been created only because of a misdrafting of this difficult section.

Section 22(1)(b) and (c) cover the area where a person has resided in New Zealand for over two years and under five years. In the former, the person must be sentenced to a term of imprisonment exceeding 12 months before a

57 s.22(1)(a).

58 When this situation was pointed out in an interview with a Labour Department official, his first reaction was to suggest that the writer had interpreted the section incorrectly. However, it is submitted, that the section clearly makes a distinction between offences committed in and outside New Zealand.

deportation order can be made. In the latter, it is only necessary for the court recommending the deportation, to have the power to do so. No doubt, these provisions in respect of the length of time of imprisonment are supposed to suggest that deportation is intended only for persons who have committed serious offences or crimes.

In contrast, under section 22(1)(a), a person having resided in New Zealand for less than two years may be deported for any offence punishable by imprisonment.

The rationale behind this difference is presumably that there is a need for more protection for the person who has resided in New Zealand the longer because he has a greater interest at stake. Thus, the person who has been in New Zealand for less than two years is in a more vulnerable position.

It is submitted that section 22(1) is only intended to apply to persons who are legally resident in New Zealand, although the section does not say 'lawfully resided'. In an analogous situation where the English Court of Appeal had to determine the meaning of 'ordinarily resident', Lord Denning took the approach that the word 'lawfully' should be read into immigration legislation. He felt that a person not lawfully in the country should not qualify for rights which were given to those who were lawfully resident.[59]

Thus, it is submitted, that where an illegal immigrant commits an offence that brings him under the provisions of section 22(1), he has no right to claim the protection of 'residency' in New Zealand or the right to appeal to the Deportation Review Tribunal. He is technically an illegal immigrant and is liable to be deported under section 20 for an offence of breaching the permit system; rather than being deported under the grounds in section 22(1).

59 Re Abdul Manan [1971] 1 W.L.R. 859, 861.

Under section 22(4) a person who is ordinarily resident in New Zealand is deemed to be 'residing' in New Zealand for a year if he is not absent in that year for more than 30 days from New Zealand. A person who is not ordinarily resident in New Zealand and who stays in the country for less than a total of 30 days, is deemed not to be residing in New Zealand during those days. All three paragraphs of subsection (1) use the phrase '(whether or not continuous)' after talking about their respective periods of residence. It appears therefore, that for the purposes of section 22(1), it is not necessary for a person to have resided in New Zealand for five years continuously in order to obtain the benefit of such a period of residency. Rather, it seems that one could accumulate the years that one has resided in New Zealand, after subtracting one's periods of absences from the country.

There is a time limit on when a deportation order can be made by the Minister in the situations provided for in section 22(1).[60] This is desirable, as a person falling under subsection (1) should have a right to know as soon as possible whether he is to be deported or not. The order must be made within six months from the date when the person is released from detention, or where there is no sentence of imprisonment, from the date of his conviction.

It was suggested to the Statutes Revision Committee that six months was 'quite long enough for any efficient Department to act and long enough for the deportee to remain in a state of uncertainty'.[61] There is even more force in this argument for people who are serving sentences. The time for the Minister to order deportation in these circumstances, is extended by the length of the sentence.

60 s.22(9).

61 N.Z. Council for Civil Liberties "Submissions to the Statutes Revision Committee on the Immigration Amendment (No.2) Bill", p.2.

A complaint was made[62] to the Ombudsman in the case where a prisoner, serving a three year sentence was kept guessing for 18 months about whether he was to be deported. This is typical of a situation which can arise under the Act. An early decision to deport is desirable from the viewpoint of the person in prison as decisions by the Justice Department as to home leave and work parole cannot be considered until a decision to deport has been made.

The Ombudsman suggested that the Department of Labour should give some form of interim reply as to whether the prisoner would be liable to be deported. The Secretary of Labour has agreed to implement this suggestion.[63] This will mean, it is submitted, an improvement in the situation where, as there is no provision to serve a copy of the deportation order or a notice of it within a specified time, long delays have occurred between the making and communicating of the order to the deportee (supra). So long as the Department maintains some correspondence with the deportee who is serving a term of imprisonment, these delays, it is submitted, will be shortened.

B. The Tribunal

It is to the Deportation Review Tribunal that deportees under section 22(1) are to direct their appeals. It was largely an independent initiative of the Department of Labour to reform the deportation legislation that led to the Amendment Act of 1978.[64] It was felt that there was no valid justification for having two sets of statutory provisions to deal with the deportation of non-New Zealand citizens. The Department wanted a single set of provisions to apply equally to aliens and Commonwealth citizens and to incorporate them into one statute.[65]

62 Report of the Ombudsmen for the year ended 31 March 1981 New Zealand Parliament. House of Representatives. Appendix to the Journals, 1981, A.3. pp.13-14.

63 Ibid, 14.

64 Supra n.6.

65 Idem.

It was however New Zealand's decision to ratify the International Covenant on Civil and Political Rights which required her to implement into her domestic law the obligations that she had undertaken. The Ministry of Foreign Affairs stated[66] that by establishing a tribunal to hear appeals, New Zealand fulfilled her basic obligation under Article 13. It further stated that Article 13 imposed an obligation to give rights of appeal only to aliens lawfully within the territory of the state. It did not apply to persons who had entered the country fraudulently or who had breached the conditions on which they had entered.[67]

There is, as noted before, a belief that persons who enter the country on a temporary basis and who breach conditions of their entry, have no right to remain in the country or have no expectation of being able to remain here. On the other hand, persons ordinarily resident in the country have an expectation of being able to remain, and where they are ordered to be deported, they should be able to have full appeal rights in order to present their case.

The wording of Article 13 suggests that a separate body to hear the alien's case is not necessary. The competent authority is in fact the Minister of Immigration, and it is he who makes a decision to deport someone or not. Hence, if the deportee is given an opportunity to present his case before the 'competent authority', that, it is submitted, would be adequate to satisfy the requirements of Article 13.

The decision, however, was taken to set up an independent appeal authority to hear appeals from persons liable to be deported under section 22(1). A court of law was not considered to be an appropriate body to hear an appeal. This was because it was thought that as a court

66 Ministry of Foreign Affairs. "Comments on the Immigration Amendment Bill."(20 March 1978).

67 Ibid, para 1.

imposed the penalty for the offence committed by a person making him liable to be deported, it would be more desirable to have a body, divorced from this task to hear an appeal on the question of deportation. Further, it was felt that having a tribunal was advantageous to the appellant because evidence that was not admissible in a court, could however be produced before a less formal body.[68]

The Deportation Review Tribunal consists of three members, one who is appointed Chairman.[69] The Chairman is to be a barrister or solicitor of not less than five years standing.[70] There are no requirements that the other two members are to be qualified in any particular field of expertise. There is, it is submitted, no need for the other members to be qualified in any other way because of the subject matter of the appeal. It deals with an individual's character and personality, and his relationships with other people and, therefore, it is contended, that the other members need only have a wide experience of life in general and experience in dealing with people. In view of the nature of such 'qualifications', it is submitted that statutory codification of them is inappropriate.

The members are appointed by the Governor-General on the recommendation of the Minister of Justice.[71] Their term of office is three years, but any member may be reappointed. At time of writing, the members are Dr J.M. Priestley (Chairman), Ms M.M. Bailey, a managing director and Mr J.L. Fuohy who is retired.[72]

68 Supra n.6.

69 s.22B(2).

70 s.22B(2)(a).

71 s.22B(3).
See "First Report of the Public and Administrative Law Reform Committee" (1968) para.42.
The P.A.L.R.C. recommended that appointments to administrative tribunals should be made by the Governor-General acting on the advice of the minister concerned. It was said that "it should dispel any illusion that the department of state administering the tribunal may be exercising undue control over its personnel."

72 New Zealand Gazette Vol. I, 1979 : 3.

Members may be removed from office by the Minister of Justice for disability, bankruptcy, neglect of duty or misconduct, or they may resign at anytime.[73] Deputies may be appointed and may act as a member where any member is absent from a meeting.[74] In the event of sickness or incapacity the Minister of Justice may appoint another person to act in place of that member.[75] These provisions remedy the situation where one member may be unable to sit on an appeal because of a personal interest in the case. As all three members form a quorum, the tribunal would not be able to hear an appeal if a member was unable to sit.[76]

The members are not personally liable for acts which are done in good faith in pursuance of their powers and authorities of the Tribunal.[77]

The Tribunal sits at such times and places as the Chairman or Tribunal appoints. Generally, in practice, it is the Chairman who decides. All three members must be present before a sitting or hearing can take place.[78] As two of the members live in Auckland and one in Wellington, and because some of them have other occupations, arranging a time may result in some delay because of the difficulty of setting a meeting date suitable for all three members. Sittings may be adjourned from time to time. So far, two hearings have been adjourned sine die.[79]

73 Cl.2 Fourth Schedule.

74 Cl.4 Fourth Schedule.

75 Cl.5 Fourth Schedule.

76 See the problem that arose with the Shop Trading Hours Commission noted in Capital Letter (1979) 2 T.C.L. 47/3 ; and the resulting change in the legislation - Shop Trading Hours Amendment Act 1979.

77 Cl. 9 Fourth Schedule.

78 Cl. 8 Fourth Schedule.

79 Robinson v. Minister of Immigration (1979) Unreported, Deportation Review Tribunal, DRT 1/78. Wesseling v. Minister of Immigration (1980) Unreported, Deportation Review Tribunal, DRT 8/80.

The Tribunal tries to arrange to have its hearings in premises close to the appellant's residence or place of imprisonment.[80] If the appellant is in prison, the practice has been to have the hearing outside the prison premises. For this purpose, the Secretary of the Tribunal arranges with the Prison Superintendent to bring the appellant to the hearing.[81] The Tribunal has sat in various cities around New Zealand depending on where the appellant is situated.[82] Their travelling and other expenses are paid from money appropriated by Parliament pursuant to the Fees and Travelling Allowances Act 1951.[83]

The Tribunal is deemed to be a Commission of Inquiry under the Commissions of Inquiry Act 1980, but the provisions of that Act are subject to the provisions of the Immigration Act 1964 and any regulations made under the 1964 Act.[84] There have been no regulations made yet which deal with the Deportation Review Tribunal. Several of the provisions in the Commissions of Inquiry Act 1908 do not appear to be applicable because they are specifically catered for in the Immigration Act 1964. These provisions are in respect of the protection of members, the power to receive evidence that is not admissible in a court of law, the power to require certain information to be produced, and referring a question of law to the High Court.[85] Clause 7 of the Fourth Schedule (Immigration Act) also specifies that sections 11 and 12 (Commissions of Inquiry Act) which relate to costs shall not apply. It also appears that the power to cite parties under section 4 of the 1908 Act is not applicable as the only two parties to any appeal before the Tribunal are the deportee and the Minister of Immigration.

80 Deportation Review Tribunal Guidelines for Appellants to Deportation Review Tribunal, p2. (Appendix D).

81 Interview with Tribunals Division Officer, Justice Department. June 1981.

82 Auckland, Wellington, Christchurch, Raglan, Palmerston North, Hamilton, Invercargill.

83 Cl. 3 Fourth Schedule.

84 Cl. 7 Fourth Schedule.

85 They are ss.3, 4B, 4C and 10 of the 1908 Act. Dealt with in cls. 9, 11 of the Fourth Schedule, cl. 4 of the Fifth Schedule and s.22E of the 1964 Act, respectively.

The provisions of the 1908 Act that may be applicable are section 4A dealing with persons who may be entitled to appear, section 4D - the power of the Tribunal/Commission to summon witnesses, section 6 - the protection of persons appearing before the Tribunal, section 7 - witnesses' allowances and certain offences under section 9, for example, failing to produce documents.

It is noted however, that even these provisions are subject to the enactment under clause 10, Fourth Schedule, that the Tribunal shall regulate its own procedure as it thinks fit. This power is in turn subject to anything stated in the Immigration Act 1964 and it is submitted, the requirements of natural justice.

A person who intends to appeal from a deportation order made against him must file an appeal on the form provided by the Secretary of Justice. The appeals are to be sent to the Tribunals Division, Head Office in Wellington[86] within 28 days[87] after the order or a copy or written notice of it is served on the appellant. There is no provision for the appeal to be sent anywhere else.

It is interesting to note that under section 20A, a request to be not deported is to be made within 14 days. In this more limited period offices of the Department of Labour are able to receive requests on behalf of the Minister. However, the longer period to lodge an appeal to the Tribunal seems justified where an appeal must be forwarded to one place only.

In the first draft of the Bill, appeals to the Tribunal were to be made within 14 days. It was submitted[88] by the N.Z. Council for Civil Liberties that the Tribunal should have the power to extend time for appealing. The Department of Labour agreed[89] that it would be usual for

86 Cl. 1 Fifth Schedule.

87 s. 22C(2).

88 Supra n.61 p.4.

89 Dept. of Labour "Departmental Comments on Submissions and Discussions on the Immigration Amendment (No.2) Bill." p.4.

there to be some provision for extending the time to appeal and proposed to discuss the matter with Parliamentary Counsel. In the end, the Statutes Revision Committee reported the Bill back to the House with the changes, inter alia, that the time to appeal be 28 days and not fourteen.

As soon as practicable, after the appeal is filed, it is referred to the Tribunal for determination.[90] The Tribunal notifies the Minister of the appeal and sends a copy of it to him. The Minister is given time to notify the Tribunal of his intention to make representations.[91] It appears that in practice, the Minister will send in a full report giving his reasons for making the deportation order.

The Tribunal can require either party to supply any information which it requests regarding the case.[92] The Tribunal sends out to every appellant a note entitled "Guidelines for Appellants to (sic) Deportation Review Tribunal".[93] It is a very helpful summary, informing the appellant of the role of the Tribunal, the factors it will consider in hearing an appeal and the procedure it will follow. The Tribunal also offers the services of an interpreter should the appellant require one.

When a date is fixed for the hearing, notice of the time and place is to be sent to the appellant and the Minister.[94] In fact, the Tribunal, where the appellant is represented, will also send a notice to the appellant's representative.[95] The parties are entitled to be represented at a hearing whether it be by legal counsel or otherwise.[96] In the majority of cases as at 1 July 1981, the appellant has been represented by counsel.[97]

90 Cl 2 Fifth Schedule.

91 Cl 3 Fifth Schedule.

92 Cl 4 Fifth Schedule.

93 See Appendix D.

94 Cl 5(1) Fifth Schedule.

95 Supra n.81.

96 Cl 5(2) Fifth Schedule.

97 Out of 26 cases where both parties were present, 84·6% of the appellants were represented. That is, 22 appellants.

At the hearing, both parties may call evidence, made submissions and cross-examine each other's witnesses.[98] The appellant is required to present his case first.[99] The onus is on him to convince the Tribunal that his deportation order should be quashed. If he decides to give his own evidence then he must give it under oath.[100] In one case where counsel for the Minister invited the Tribunal to draw an adverse inference because of the appellant's failure to give evidence, the Tribunal firmly declined to do so. It said that it would only determine the appeal on the evidence placed before it.[101] Where the appellant does intend to give evidence, he may be questioned by the Minister's counsel and/or the Tribunal itself.[102]

The Tribunal is not bound by any rules of evidence and may inform itself in such manner as it thinks fit. Subject to this, the Evidence Act 1908 applies. The Tribunal has in past practice received and considered a wide range of evidence. The Minister may send to the Tribunal police, probation and psychologists' reports if they have been obtained by the Department of Labour in order for the Minister to make the decision to deport. The appellant may send in prison warden's references, references from Church leaders, employers or relatives. Witnesses who have been called range from relatives, spouses, fiances, employers and so on. Often the Tribunal has copies of the sentencing notes of the court that has recommended deportation. These examples are, of course, only indicative of the sources of evidence that are brought to the Tribunal's attention or disclosed to them. They are not exhaustive lists.

The Tribunal will assess the evidence offered and the credibility of witnesses that appear. It has been

98 Supra n.80.

99 Idem.

100 Idem.

101 Letele v. Minister of Immigration (1979) Unreported, Deportation Review Tribunal, DRT 14/79, pp2-3.

102 Supra n.80.

critical of assertions made where no evidence is given in support[103] and it has expressed reservations in respect of evidence given by certain witnesses.[104]

Where the Tribunal has differed with the Minister's decision or a court's recommendation to deport, it may be because of certain evidence received by it, which was not before the Minister or court[105] or the evidence before the Tribunal reveals that the Minister has proceeded to make an order on a mistaken assumption.[106]

If one or both of the parties do not appear then on proof of service of the notice of the hearing, the Tribunal may nevertheless proceed to determine the appeal. At present there is an appeal pending whereby the appellant is in Australia.[107] In that case, the appellant may be unable to reenter New Zealand because of the deportation order made against him. Thus the Tribunal may have to determine the appeal on any written submissions that the appellant and Minister give to the Tribunal.

Where it appears to the Tribunal that the appellant's absence from the hearing may be due to not having received notice of it, the Tribunal will adjourn the hearing sine die.[108]

Hearings are open to the public. However, the Tribunal may receive evidence in private, deliberate in private and may order that parts or the whole of the proceedings be not published. Nevertheless, the names and descriptions of the parties to the appeal cannot be prohibited from publication.[109] If a report is published in

103 Gould v. Minister of Immigration (1979) Unreported, Deportation Review Tribunal, DRT 10/79, pp.5-6. Tanu v. Minister of Immigration (1980) Unreported, Deportation Review Tribunal, DRT 9/80, p.3.

104 Fualau v. Minister of Immigration (1979) Unreported, Deportation Review Tribunal, DRT 3/79, p.3.

105 Chan v. Minister of Immigration (1980) Unreported, Deportation Review Tribunal, DRT 6/80, p.4.

106 Suput v. Minister of Immigration (1979) Unreported, Deportation Review Tribunal, DRT 4/79, p.3.

107 DRT 7/81.

108 Wesseling, supra n. 79.

109 Cl. 6 Fifth Schedule.

breach of the order then under section 22I, the person who publishes it commits an offence and is liable to a fine not exceeding $500. The Tribunal has exercised its power to prohibit publication in two cases as at 1 July 1981.[110]

The Tribunal has the duty to hear appeals to quash deportation orders. It may quash orders under section 22D(1) if

> ... it is satisfied that it would be unduly harsh or unjust to deport the applicant from New Zealand, and that it would not be contrary to the public interest to allow the person concerned to remain in New Zealand.

There are two limbs to be satisfied in section 22D(1). Most of the appellants seem to place the bulk of their argument on the first limb, that is, it is 'unduly harsh' or 'unjust' to deport. Should this point fail to satisfy the Tribunal then it has no need to go on and consider the second question on the public interest point.

There are distinctions between something being 'unduly harsh' and something being 'unjust'. For instance, where deportation may be just, for example, for a serious drug offence, it may nevertheless be unduly harsh because it has severe detrimental effects on the deportee's personal life.[111] On the other hand, a deportee may not be too affected if he is deported because he does not have deep 'roots' or 'ties' with the country, or deportation will not affect his relationships with other people in New Zealand. However, it may be unjust to deport him where he is to be deported because he has committed his first offence and it happens to be for a 'minor' offence such as car conversion.[112]

110 Karet v. Minister of Immigration (1979) Unreported, Deportation Review Tribunal, DRT 12/79; Peni v. Minister of Immigration (1981) Unreported, Deportation Review Tribunal, DRT 1/81.

111 For example, Suput supra n. 106.

112 Aitaua v. Minister of Immigration (1981) Unreported, Review Tribunal, DRT 3/81, p.3.

The wording of section 22D(1) appears difficult to satisfy. However, it is submitted that of the cases decided by the Tribunal as at 1 July 1981, the Deportation Review Tribunal has not taken a too restrictive view of the criteria.

Although the Tribunal has said that difficulties in finding accommodation and employment do not render deportation 'unduly harsh' or 'unjust' as they are to be shouldered by all deportees,[113] the Tribunal has been prepared to construe the provisions liberally depending on the facts of each case. Further, it is submitted that the Tribunal's approach in respect of accommodation and employment difficulties, is correct. These problems are inevitably going to arise when a person is deported. It could be said that in these circumstances deportation is 'harsh', but it is submitted, it is clearly not 'unduly' harsh.

In Re Nabi v. Minister of Immigration[114] the applicant, an Aghanistani had been ordered to be deported on the grounds that he had been convicted of a severe drug offence and was presently serving a four year sentence of imprisonment. The Tribunal said that it was not unduly harsh to deport the applicant from New Zealand. However, on the facts it was clear that the applicant would be in serious danger if he were deported to his home country.

The Tribunal was willing to construe the words in section 22D(1) 'unduly harsh to deport the applicant from New Zealand' as meaning 'unduly harsh to deport the applicant to Afghanistan'. Hence, it decided that to deport Nabi to Afghanistan would be unduly harsh. However, the applicant failed to satisfy the Tribunal on the second limb. That is, that it would not be contrary to the public

113 Ng v. Minister of Immigration (1980) Unreported, Deportation Review Tribunal, DRT 7/80, p.4.

114 (1980) 2 N.Z.A.R. 84.

interest to allow him to remain in New Zealand. Thus, the appeal was dismissed.

The Tribunal, however, did not leave the case there. It made strong recommendations to the Minister to exercise his discretion to deport in such ways that might avoid having to deport Nabi to Afghanistan and to therefore, avoid the fate that would probably befall him.[115]

The range of matters that the Tribunal is to have regard on making its decision is wide. It is supplemented by the provision that the Tribunal is empowered to have regard to any other matters that it considers relevant.[116] The matters that are to be considered are those that exist as at the date of the hearing.[117] The Tribunal, therefore, has an advantage over the Minister, in that it obtains the most up-to-date information and is aware of recent developments in terms of the appellant's character and relationships.

The outcome of each case is determined by its own set of facts. In such an area of decision making, the facts are all important, and the process of balancing and weighing up the facts is a delicate one. In one case certain factors will be of more weight than others and vice versa. For example, the serious nature of the offence and the past criminal record of the appellant may be an overriding factor in one case,[118] and in another, the interests of the family may be the deciding factor.[119]

While it is not desirable nor possible to have precedents in this field of decision making, it is interesting to note the different approaches that the Tribunal has made in regarding the consideration 'interests of the family'. Where one spouse has decided to remain in

115 Ibid, 87-88.

116 s.22D(2), especially see para. (h).

117 Pe'a v. Minister of Immigration (1979) Unreported, Deportation Review Tribunal, DRT 8/79, pp3-4.

118 Ibid.

119 Suput, supra n. 106.

New Zealand in the event of the other being deported, the Tribunal has taken two different approaches.

On the one hand, the effect of deporting the applicant would be 'to break up irrevocably the family unit'.[120] On the other hand, because one spouse has stated her intention to remain, 'deportation will not on its own break up the family unit' and the resulting situation becomes one 'largely ... of her own making'.[121]

These can be seen as inconsistencies of approach by the Tribunal, but once again it is stressed that each case is determined on its own merits. Certain other factors in one case may affect its outcome, so that no two cases will ever be 'on all fours' with another. It would therefore be, it is submitted, improper to place too much significance on the Tribunal's findings in one case as opposed to any other.

There is the question of what matters the Tribunal will have regard to under section 22D(2)(h). As the matters set out under section 22D(2) are already extensive, there has not been much occasion for the Tribunal to look beyond them.

In one case it was said[122] that religious conversion, although genuine, had no bearing on the matters that the Tribunal was required to consider.

In Gould v. Minister of Immigration,[123] counsel for the applicant invited the Tribunal to ask itself the question whether the appellant was likely to make a good citizen. The Tribunal declined to do so, reiterating that it could only exercise its jurisdiction under the terms of the Act and that the criteria for citizenship were in any case different, and a matter for the Minister of Internal Affairs.

120 Idem.

121 Letele supra n. 101.

122 West v. Minister of Immigration (1979) Unreported, Deportation Review Tribunal, DRT 16/79, p.3.

123 Supra n. 103.

In another case, the Tribunal said[124] that a magistrate's recommendation for deportation was a relevant matter to consider. It felt obliged to give some weight to it because it said that without the recommendation, the deportation order would never have been made.

124 Chan supra n. 105. p. 4.

> It was said in 1975 that it was rare for the then Minister of Immigration to not accept a recommendation of the court to deport someone, with the result that criminals so recommended were almost invariably deported. (New Zealand Parliamentary debates Vol. 396, 1975 : 441.)
>
> A recommendation to deport is not part of the sentence and is not provided for the purpose of adding to a man's sentence in terms of punishment (R. v. Mahmod [1979] 1 N.Z.L.R. 62) It should be dealt with separately, after the court has dealt with the offence on its merits and the sentence to be prescribed. (R. v. Edgehill [1963] 1 Q.B. 593.)
>
> The main consideration that the court is to have is whether the potential detriment to the country, if the person was allowed to remain, was shown to justify the recommendation. (R. v. Caird (1970) 54 Cr.App. Rep. 499.) Other considerations to be taken into account are the nature of the offence committed, the person's past criminal record (Caird at p. 510), the interests of his family and whether there was any evidence of mental instability connected or resulting in the commission of the crime. (R. v. Nazari [1980] 1 W.L.R. 1366, 1374.)
>
> The New Zealand Court of Appeal has held that before making a recommendation to deport, the sentencing judge should note the possible consequences of an order to deport the defendant (R. v. Mahmod - supra) In that case, a Singaporean was imprisoned for ten years on a drugs offence and was ordered to be deported to Singapore. The applicant claimed that he would risk facing a capital charge on the same offence if he was to be deported home. The court said that a deportation recommendation in that case was 'not ... right on humanitarian grounds'.
>
> (Cf the English approach R. v. Antypas (1972) 57 Cr. App. Rep. 207.)
>
> It has been held to be inappropriate to make a recommendation to deport someone who is serving a sentence of life imprisonment. (R. v. Assa Singh [1965] 2 Q.B. 312.)

It does not appear that the Deportation Review Tribunal has ever taken account of ministerial policy, if any, as one of the criteria to which it will have regard, when determining an appeal. In this, and other respects, it differs in approach from the Australian Administrative Appeals Tribunal.

The Federal Court of Australia has said[125] that although the AAT is not bound by government policy, it is, however, entitled to treat such policy as a relevant factor in the determination of an application for a review of the decision to deport. For this purpose, statements of government policy relating to the deportation of certain types of persons have been published for general information.[126]

The AAT will not only have regard to government/ ministerial policy, but it will also review any policy which has been applied to the facts in reaching the decision to deport. This is part of the novel jurisdiction of the AAT to review policy considerations which govern or affect certain discretionary powers.[127]

The position of the AAT in hearing deportation appeals differs from that of the Deportation Review Tribunal. Firstly, in New Zealand the onus is on the applicant-deportee to satisfy the Tribunal that he should not be deported. In Australia, the Minister of Immigration and Ethnic Affairs has the burden of proof to justify his decision to deport.[128] Secondly, the Deportation Review Tribunal has a statutory list of criteria to which it must have regard, whereas the AAT does not.

125 Drake v. Minister of Immigration & Ethnic Affairs (1979) 2 A.L.D. 60, 69.

126 For the current policy see Pearce, The Australian Administrative Law Service, 6029.

127 Re Becker v. Minister of Immigration & Ethnic Affairs (1977) 1 A.L.D. 158, 162.

128 Re Pochi v. Minister of Immigration & Ethnic Affairs (1979) 2 A.L.D. 33.

For these reasons, it is submitted, the latter will more readily have regard to any ministerial policy that is enunciated. The policy will provide the AAT with some idea of the matters taken into account by the Minister in reaching his decision. The focus of the Australian approach appears to be whether the Minister has, on the facts and on policy reached a decision that was right or preferable. In New Zealand there is, it is submitted, not so strong an examination of the Minister of Immigration's decision to deport. Rather, the focus is on a new inquiry, whether on the matters stated in the Immigration Act 1964, the applicant should be deported or not. The Tribunal is not concerned with whether the Minister was right or wrong.

A decision of the majority is the decision of the Tribunal. There have been two majority decisions so far.[129] In both cases, the Tribunal was able to agree that the second limb was satisfied, but the cases were finely balanced on the facts rendering deportation 'unduly harsh' or 'unjust'.

After a hearing the Tribunal will occasionally give an oral decision. However, the usual practice is to give a written decision about two to three weeks after the hearing.[130] The Deportation Review Tribunal is required to give its decision in writing and to give a statement of reasons with it to the parties.[131] This requirement to give reasons involves the giving of reasons which are adequate and intelligible. It is not satisfied if the statutory considerations are merely reproduced.[132] In the decisions of the Tribunal, it appears that the Tribunal has taken pains to go through all the matters specified in the Immigration Act 1964, dealing with the facts of the case and the evidence adduced.

129 Cummings v. Minister of Immigration (1980) Unreported, Deportation Review Tribunal, DRT 1/80; Tanu supra n.103.

130 Supra n. 80.

131 Cl. 7 Fifth Schedule.

132 Clark v. Rent Appeal Board [1975] 2 N.Z.L.R. 24.

The Tribunal has a seal which is to be judicially noticed in all courts and for all purposes.[133]

Under clause 8 Fifth Schedule no party shall be liable to pay the costs of any other party unless the Tribunal makes an order on the grounds that it is desirable for special reasons to make such an order. This provision has not been used yet.

The Tribunal has the power to dismiss any applications that it considers frivolous or vexatious.[134] This power has not been used so far. It is arguable that it is not needed as it is enough if the Tribunal hears an appeal and merely dismisses it if it does not warrant full consideration.

At any time before the decision is made, the Tribunal may state a case on a question of law to the High Court. The Tribunal may do this on its own motion or on the application of one of the parties. Once the High Court determines the question of law, the case is remitted to the Tribunal for determination.[135]

Under section 22F, after the Tribunal has made its determination, a dissatisfied party may appeal to the Administrative Division of the High Court within fourteen days. But the High Court has the power to extend the time for lodging an appeal. The appeal is restricted to an appeal by way of case stated on a question of law. In this situation, the Administrative Division hears and determines the appeal. At present, there are two cases lodged and waiting to be heard.[136]

This appeal right after a determination of the Tribunal is a further safeguard for persons liable to be

133 Cl. 6 Fourth Schedule.

134 Cl. 9 Fifth Schedule.

135 s. 22E.

136 Re Nabi A.D. High Court, Wellington. M519/79.
Tanu A.D. High Court, Wellington. M270/81.

deported. Although it is limited to appeals on questions of law, it is, it is submitted, adequate. The Deportation Review Tribunal was established for its relative informality of procedures and to gain experience in dealing with deportation appeals. It would be anomalous in these circumstances, where a special independent tribunal has been set up, to allow a court of law to hear a further appeal on the merits of the case.

It is also noted that if a person is ordered to be deported after a conviction for an offence, the sentencing court has already conducted an initial hearing on the merits of deportation in that case in order to decide whether or not to make a recommendation to deport the person. The Tribunal therefore holds a later and more involved hearing on the question of deportation when it hears an appeal. In view of this, it is submitted, that any further appeal, although limited to questions of law is sufficient to do justice in each case.

The Tribunal was established on 1 December 1978.[137] Since then the number of cases it has heard has been relatively low. In just over the two and a half years of its existence, it has received only 37 appeals.[138] It was submitted[139] by the N.Z. Council for Civil Liberties that the number of members on the Tribunal would mean a greater delay in the commencing of hearings and that there should therefore be only one member on the Tribunal. On average hearings have been held between one-and-a-half to two- and-a-half months after the appeal has been lodged, and there has been the rare occasion when hearings have taken over four months to be heard.[140] Despite these delays, there has not been a 'great buildup in the backlog of pending cases' as feared by the Council, because of the low numbers of appeals.

137 Commencement date of the Immigration Amendment Act 1978 S.R. 1978/287.

138 Appendix A Table A.

139 Supra n. 61. p.4.

140 Fualau v. Minister of Immigration (1979) Unreported, Deportation Review Tribunal, DRT 3/78. Approximately 5 months before case was heard.

The low numbers of appeals possibly reflect the low numbers of people deported for having committed criminal offences in New Zealand before having resided in the country for more than five years. In the last five years, an average of forty one people per year were deported on the "criminal offences" ground.[141]

The success rate of appeals to the Tribunal has been very low. Out of the thirty cases heard only seven have been allowed. It could be said that because of the small numbers of appeals heard since 1 December 1978, it would be misleading and would give a distorted picture if a success/failure breakdown was made.

However, it could also be argued that the test in section 22D(1) has too high a threshold, and that many cases will inevitably fail because of this. One case that might be used in support of this contention is Kumar v. Minister of Immigration.[142] In that case, the applicant committed an offence of manslaughter only seventeen days before his fifth year in New Zealand. He had a New Zealand born wife and two New Zealand born children. Despite these factors, the appeal was dismissed because of the serious nature of the offence and the adaptability of the applicant's wife and children to a new home in the event of the whole family returning to Fiji. It is noted, however, that the Tribunal did express[143] its difficulty in making a decision in that case.

Although only a small number of people actually use the appeal procedure provided for in section 22C, and only an even smaller number are successful, the establishment of the Deportation Review Tribunal, has been a useful exercise. It has ensured that certain individuals are given some protection from ministerial decisions which affect their lives and futures, and has added some fairness in a process that was previously virtually unchallengeable.

141 Appendix A Table B.

142 (1981) Unreported, Deportation Review Tribunal, DRT 4/81.

143 Ibid, p. 4.

* See also Appendix E pp. 94-95.

V SECTION 22(3) - DEPORTATION of TERRORISTS

The second most extensive appeal right after that of the Deportation Review Tribunal, is that provided for persons deported on the grounds of terrorism. Section 22(3) empowers the Minister to deport someone where the Minister has reason to believe that that person has had some connection with an organisation or group that has engaged in acts of terrorism in New Zealand, or where that person has engaged in such an act personally, or where the acts of terrorism were committed outside New Zealand, there is the added criterion, that the person's continued presence in New Zealand constitutes a threat to public safety. Finally, the Minister may deport a person if he has reason to believe that the person, if permitted to remain in New Zealand will engage or participate in the commission of any act of terrorism.

An "act of terrorism" is defined in section 22(10) and is extended to include the planning of any such act.

For the purposes of section 22(3)(a), (b) or (c), the person ordered to be deported does not have to be a member of the terrorist organisation or group. It suffices if he "adheres" to such an organisation. The intention of the legislature in using this word was to cover the situation where:[144]

> Every organisation has a constitution... A person could show the court he was not a member of an organisation, but if he takes part in its activities and is an effective member without being recognised officially as a member, he is adhering to that organisation.

It was submitted[145] to the Statutes Revision Committee that section 22(10) (or clause 22(8) as it then was), in defining the phrase "acts of terrorism" encompassed,

144 New Zealand Parliamentary debates. Vol 418, 1978 : 1576

145 Supra n. 61. p.4.

inter alia, former members of the French resistance and that therefore these people were liable to be deported for their acts.

However, as pointed out by the Department of Labour,[146] the power to deport is under section 22(3) and an "act of terrorism" must be read in conjunction with its provisions. Thus, where a person adheres to an organisation which engages in acts of terrorism outside New Zealand, his presence must be considered a threat to the public safety of New Zealand before he can be deported.

The Ministry of Foreign Affairs commented[147] that in terms of bringing the domestic legislation in line with New Zealand's obligations under the International Covenant on Civil and Political Rights, there would be difficulty in withholding a right of appeal from persons intended to be deported on the grounds of terrorism. It said that in the example where a person was to participate in an attack on a diplomatic mission in Wellington, such a person might not necessarily constitute a threat to the national security of New Zealand. In this example, therefore, the exception recognised by Article 13, that a person deported on national security grounds had no rights of appeal, was not applicable. Consequently, there was an obligation on the Government to provide such rights.

This raises a problem in the situation where a person could be deported either on terrorism grounds or national security grounds. In the former there is a right to appeal to the Administrative Division of the High Court under section 22G. In the latter case, there is no appeal right at all. Furthermore, there is no control over the government's choice to deport on one ground as opposed to another. One way around this problem would be to provide some form of appeal right in the national security situation too, so as to avoid any great distinctions in treatment of the respective deportees.[148]

146 Supra n.89 p.4.

147 Supra n.66 para 5.

148 Infra Part VII.

Under section 22G, persons ordered to be deported under section 22(3) have a right of appeal to the Administrative Division of the High Court. The appeal must be made within 28 days after the order, or a copy or a written notice of it is served on the person. The court hears and determines the appeal as if it had been made in the exercise of a discretion.

Traditionally, an appeal heard from the exercise of a discretion has been held to be a limited appeal right. Courts have held that they will only interfere in these cases where there is a failure to take into account relevant matters, or irrelevant matters have been taken into account.[149] Hence, it appears that the appeal right differs very little in practice from an appeal on a question of law.

Examples of the courts' approach are seen in cases dealing with appeals from decisions of the Indecent Publications Tribunal and the Broadcasting Tribunal. Section 19(2) of the Indecent Publications Act 1963 and section 84(5) of the Broadcasting Act 1976 confer jurisdiction on the High Court to hear appeals from the tribunals' decisions, as if the decisions were made in the exercise of a discretion. In both cases, the courts have accepted the approach enunciated in Ostenton and Co. v. Johnston.[150] That is, the appellate body is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised. But if the appellate body reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations then the reversal of the decision may be justified.

The rationale behind giving such a limited right to appeal appears to be the particular nature of the decision

149 Blunt v. Blunt [1943] A.C. 517; Re Taupo Totara Timber [1943] N.Z.L.R. 557; Ward v. James [1966] 1 Q.B. 273.

150 [1942] A.C. 130, 138 - 139. Quoted in Secretary for Justice v. Taylor [1978] I N.Z.L.R. 252 and Plimmer v. Broadcasting Tribunal (1980) Unreported, Wellington Registry, M 688/79.

being made and the body empowered to decide. In both the indecent publications and broadcasting contexts, specialist tribunals have been set up to determine questions about specialist fields. The limitation of the appeal in the deportation of terrorists reflects the belief of the Legislature, that the Minister is better placed to determine on the facts whether the provisions under section 22(3) are satisfied. Even more importantly, it is submitted that it recognises that this type of decision involves political controversy and is better suited to be canvassed in the political arena, rather than in a court of law.

Unlike the indecent publications and broadcasting contexts, however, there is no hearing of the merits of the case when the Minister makes a decision to deport under section 22(3). Nor, it could be argued, does section 22(11) require to Minister to state the full reasons for his decision. In contrast, both the Indecent Publications and Broadcasting Tribunals provide an opportunity of a hearing. Their decisions are reasoned as well. Hence, an appellate court, hearing an appeal from these Tribunals is in a better position to hear the appeal. This is enhanced by the High Court (Administrative Division) Rules.[151] Rule 36 requires the Tribunal to lodge with the High Court documents, notes of evidence, any exhibits and a copy of the decision appealed against.

Where there is no initial hearing nor reasons given for the decision to deport, the deportee is in a difficult position. He has a huge evidential burden to try and draw an inference that the Minister erred by, for example, failing to take into account a relevant consideration. The issue arises whether the High Court Rules are applicable, when the High Court hears an appeal from the decision of the Minister. Rule 3 defines "tribunal" as meaning any tribunal or authority whose decision is the subject of the appeal. The way in which the word "tribunal is used in the High Court Rules tends to suggest that the word was not intended to encompass a minister of the Crown. For

151 S.R. 1969/145.

example, rule 36(b) says "where the tribunal consists of one person" - this doesn't apply where the Tribunal only comprises the 'minister', and the words 'the secretary, clerk or other proper officer of the tribunal' do not make much sense in relation to a minister.

Clearly, the Minister is not a 'tribunal', but is he an 'authority'? The usage of the word 'tribunal' in the rules suggests that 'authority' meant to refer to other bodies established but more commonly called 'authorities', rather than 'tribunals', for example, the Air Services Licensing Authority.

On the other hand, it could be argued that using the word 'authority' in this sense makes the word redundant, because the word 'tribunal' itself is wide enough to cover such bodies. Hence, it could be said that 'authority' includes a minister of the Crown because in ordinary usage, an 'authority' is someone who has the power to decide. Thus, on this interpretation, the High Court (A.D.) Rules are applicable when the court hears an appeal under section 22G.

However, the better view, it is submitted is that the word 'tribunal' as used in the rules, was not intended to extend to a minister of the Crown. Despite this the Administrative Division of the High Court has power under section 22G(7) to regulate its procedure in such manner as it thinks fit. It would therefore be possible for the court to require the Minister to file a report stating his reasons and the grounds and facts on which he bases his reasons to deport the appellant. This would enable the court to be in a better position to determine the appeal.

It is submitted that some procedure should be stated in the Act requiring the Minister to forward a report to the Court stating this information, and if the court thinks fit, it should be able to disclose the report to the appellant. This measure would in some way, lessen the evidentiary burden of the appellant and difficulties of the court on an appeal.

On the other hand, even if no reasons were given, the Court may infer on what evidence the appellant may adduce, that the decision was not reached in accordance with law.[152] But even so, it is contended, that the evidence would have to be so compelling that the court could not doubt that the minister did actually err in law. Hence, the appellant would still have many hurdles to pass in order to present a case on appeal.

Further problems face the appellant if his deportation on terrorism grounds also has national security implications. No doubt the Minister of Immigration will be acting on confidential information supplied by the Security Intelligence Service. In this instance, the public interest in the security of the country may outweigh the public interest in the administration of justice, and the court may refuse to order the information to be disclosed. As was said by Lord Denning M.R. :[153]

> Great as is the public interest in the freedom of the individual and the doing of justice to him, nevertheless in the last resort it must take second place to the security of the country itself.

The High Court has the power to confirm or quash the deportation order. Its decision is final and conclusive.[154] The finality clause has the effect of making the decision unappealable. Moreover, as the decision is made by a superior court of record, it is also unreviewable.

In Re Racal Communications,[155] it was held that any mistakes of law made by a superior court of record could only be corrected by means of an appeal to an appellate court. However, where there was a finality clause any appeal rights were removed. Thus, any mistakes of law

152 Padfield v. Minister of Agriculture, Fisheries & Food [1968] A.C. 997;
Fiordland Venison Ltd v. Minister of Agriculture and Fisheries [1978] 2 N.Z.L.R. 341.

153 R. v. Home Secretary, Ex p. Hosenball [1977] W.L.R. 766, 782.

154 s.22G(4) and (6).

155 [1980] 2 All E.R. 634.

made by the High Court cannot be corrected, as the jurisdiction of the Court of Appeal is wholly statutory.

With the difficulties in making a successful case on appeal, the protection against deportation in this situation is, it is submitted, minimal. In this respect, one can only rely on the Executive to be responsible when it deports someone under section 22(3).

The Department of Labour dealt with the fears that were raised by saying:[156]

> If there were any doubt about that it must be remembered that the deportation order is subject to review by the Supreme Court. Apart from a review of the order itself this will also result in public examination of the deportation order through the news media. This leaves little room for any argument that the executive would not act responsibly.

However, it is possible that the hearing before the High Court may not be open to the public. Hence any exposure of the case through the news media would be ex post facto, and will lose much of its effectiveness for the individual case. There is no guarantee or even any requirement for the hearing to be held in public.

The problems, especially of evidence, that are raised by the procedure in section 22G could be overcome by a different process of appeal or review provided in this area of deportation. Section 14 of the Migration Act 1958 - 80 of Australia is a good example of an alternative system. A person liable to be deported on the grounds, inter alia, of terrorism may request that a Commissioner be appointed to investigate the making of the deportation order.

The Commissioner is a judge or a qualified barrister or solicitor of not less than five years standing. He is required to make a 'thorough investigation' without regard to legal forms and is not bound by any rules of evidence. He may inform himself on any relevant matter in such manner

156 Supra n.89. p.3.

as he thinks fit, and the deportee may be summoned to appear before him.

This process is, it is submitted, a more effective one than that provided in section 22G of the Immigration Act 1964. The active investigative role of an independent person removes the burden of proving the 'right' or 'wrongfulness' of the deportation order, from the deportee who may not be in a position to adduce any evidence in support of his claims.

Furthermore, a commissioner may have greater access and may be more willing to examine confidential information involving national security, than a court under section 22G would, because he may be required to obtain the information in order to determine if the grounds for the deportation order are established.

There is, therefore, room for improvement in the appeal right provided in section 22G. The appeal right given is so limited that the deportee has no opportunity to have the merits of his case examined. His appeal is effectively limited to questions of law.

VI SECTION 20A - REQUESTS to the MINISTER

The third and final 'appeal' process provided in the Immigration Act 1964 is that contained in section 20A. Unlike the major overhaul in deportation legislation made in 1978, this appeal mechanism was enacted a year earlier by section 6 of the Immigration Amendment Act 1977.

Section 20A was enacted in response to the over-stayers' problem and was part of the process of streamlining and improving the Immigration Act 1964 in respect of the permits system and temporary entry into New Zealand.[157]

Although large numbers of people were quoted as being overstayers in New Zealand at any one time,[158] the convictions for overstaying offences were surprisingly low.[159] This was explained[160] by the fact that in many cases the Department of Labour refused to initiate prosecutions. Deportation was the automatic consequence of a conviction and it was felt that in many instances deportation would not be just on humanitarian grounds. Once a conviction for overstaying was entered, there was no legal basis upon which the Minister of Immigration could avoid the deportation of that person. The only appeal that a person could make to be not deported was to the Governor-General, requesting him to exercise his prerogative of mercy.[161]

It was essentially this problem which resulted in the enactment of section 20A. It was felt[162] by the Department of Labour that some type of review procedure was required. After the Amendment Act of 1977, the practice

157 Y.Y.F. Chan "Overstaying - challenge followed by change" 11 V.U.W.L.R. 211.

158 Between 3000-4000. Minister of Immigration. Press Statement dated 1 November 1977.

159 Appendix B Table B.

160 Supra n.6.

161 s.40 Immigration Act 1964 - nothing in the Act shall affect the prerogative of mercy.

162 Supra n.6.

of the Department has been to prosecute in every case, knowing that if a conviction is entered, the person convicted may make a request to the Minister to be not deported.

Section 20A provides:

> Appeals to Minister against deportation -
> (1) Where any person is convicted of any offence referred to in section 20(1) of this Act, except an offence against subsection (1) of section 22A of this Act, he may, within 14 days after the date on which the conviction is entered, request the Minister in writing, setting out the full circumstances on which the request is based, to make an order that the offender be not deported from New Zealand.
>
> (2) On any such request, the Minister may make such an order, in the prescribed form, if he is satisfied that, because of exceptional circumstances of a humanitarian nature, it would be unduly harsh or unjust to deport the offender from New Zealand.
>
> (3) The Minister shall cause to be filed a copy of the order in the Registry of the Court in which the conviction was entered, and the Court shall -
>
> (a) Order the immediate release of the offender, if he is then detained in a penal institution, unless he is undergoing a sentence of detention in respect of the offence or of some other offence; or
>
> (b) Discharge the offender from all obligations under any bail bond entered into by him to secure his release from detention.
>
> (4) On making an order under this section, the Minister shall cause to be issued to the offender a permit under this Act.

The persons who are entitled to request that they be not deported from New Zealand are basically those persons who have been convicted of offences against the Immigration Act 1964. That is, offences of landing or entering New Zealand without a permit, failing to comply with conditions laid down in permits, staying in New Zealand after a permit has expired or been revoked or making false

representations to obtain a permit.[163]

Most of the submissions to the Labour Committee which considered the Bill were receptive to clause 6.[164] One said that it merely provided 'an illusory appeal system'.[165] However, the majority of submissions made comments that an independent immigration appeal tribunal or a court were more appropriate bodies to hear an appeal. Nevertheless, section 20A was welcomed as mitigating the harshness and rigidity of the provisions 'governing technical breaches of the permit system'[166] and had a rightful place in an immigration policy that should be 'logical, sound and humane'.[167]

Surprisingly, none of the submissions made the point that there were more draconian powers in the Aliens Act 1948 and Part IV of the Immigration Act 1964, which contained no safeguards at all for people deported for committing criminal offences. The submissions of Amnesty Aroha[168] only touched upon this situation by mentioning that there was a 'range of decisions which threaten adversely the rights or status acquired or held by a person in New Zealand' and that these people were entitled to the protection offered by an independent appeal system.

163 Being a prohibited immigrant - ss.4, 5(1)(a) and 17. Offences against Part II Immigration Act 1964 rendering a person liable to be deported on conviction - ss. 14(2), (5) and (6), s.14B(6) and (7), s.15(5) and s.16.

164 Eight submissions on the Immigration Amendment Bill were received. Three of them did not comment on section 20A. Only one was highly critical of it - infra n.165.

165 Wellington Regional Pacific Islands Advisory Council, "Submissions to the Labour Committee on the Immigration Amendment Bill", p.1.

166 Amnesty Aroha, "Submissions to Labour Bills Committee on the Immigration Bill 1977", p.2.

167 National Council of Women of N.Z. Inc., "Submissions to the Labour Select Committee on the Immigration Amendment Bill", p.1.

168 Supra n.166 p.3.

The failure of the government to use the opportunity in the amendment Act of 1978 to improve the appeal procedure in section 20A or to allow appeals by people deported for breaches against the Immigration Act 1964 to be heard by the newly established Deportation Review Tribunal reflects the general belief that there is a fundamental difference between two groups of people.

Those entering New Zealand temporarily have no right to remain in the country beyond the expiration of their permits. On the other hand, persons ordinarily resident in New Zealand do have an expectation of being able to remain. Thus, it is felt that the safeguards against deportation in the latter case should be greater, and that it is sufficient if those falling in the first category have a right to appeal to the Minister only, rather than to an independent appeal authority.

Since the enactment of section 20A, the Minister has had a large number of requests made to him.[169] However, it is not possible to ascertain what percentage of the people who have been convicted of offences in respect of their permits or failure to hold one, have used the procedure in section 20A.

Under section 20, it is mandatory for a court to order the deportation of people who are prohibited immigrants, or have breached Part II of the Act. One would therefore expect that in the Justice Department Statistics,[170] the number of convictions for these offences would equate with the number of orders made. However, this is not so. Up to 1977,[171] the number of orders made have been consistently lower than the number of convictions. Furthermore, the information provided by the Justice Department to the Department of Statistics, does not distinguish between the types of orders made by a court. In other

169 See Appendix B Table A.

170 Published annually by the Department of Statistics.

171 Unfortunately, statistics are only available up to the end of 1977. See Appendix B Table B.

words, where there is a number indicating the total orders made, these could be either orders for detention or orders for deportation.[172]

The Department of Labour, Immigration Division, are also unable to help in this matter as they only keep records of people who have actually left the country pursuant to deportation orders.[173] There are no records kept of the number of deportation orders made. Assuming that the Department would be monitoring whether people left New Zealand or not after a deportation order was made against them, it is submitted, that the Department should be in a position to know how many deportation orders have been made. It is surprising that they do not keep such records.

The onus is on the applicant (the person making the request) to make his case to be not deported from New Zealand. It is noted that section 20A does not quash an applicant's conviction. It only empowers the Minister to make an order not to deport a person.

The request must be made in writing. In Tongia v. Bolger[174] it was said that an application by telegram with further details may suffice. It is clear that the request is to set out the full circumstances on which it is based. Thus the applicant should also set out all the relevant matters in favour of his case. If, therefore, a request was made by telegram then it too, would have to provide the 'full circumstances' of the applicant's case.

It was noted by the Assistant Secretary of Labour in 1978 that in spite of the plain wording of the section, several appeals had been lodged with a minimum of information.[175] The chances of success for a request

172 Comment by officer in charge of Justice statistics at Department of Statistics, Wellington.

173 Letter from the Minister of Immigration, Hon. A. Malcolm M.P., dated 10 July 1981.

174 (1979) Unreported, Auckland Registry, A655/79, Barker J. p.11.

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made like that are slim. Section 20A requires the Minister to be satisfied on the request that because of exceptional circumstances of a humanitarian nature, it would be unduly harsh or unjust to deport the offender from New Zealand.

Thus if a letter was written in support of an initial request, setting out further facts conducive to the applicant's case, the Minister may have no obligation to consider it, as it is not part of the original request under section 20A(1).

Furthermore, it was held in Tongia, that the Minister had no duty or obligation to make inquiries or request further information once he received a request.[176] In practice however, once a request is received by the Minister it is acknowledged and referred to the Department for investigation. The Department will obtain more information, if required and may sometimes conduct interviews if the information is not clear. The Department will then write a report and make recommendations to the Minister.[177]

The request is to be made within fourteen days after the date upon which the conviction is entered. In Tongia, the request was sent out on the last day for the appeal and could not have reached the Minister within the appeal period. It was held that the application was made out of time and therefore the Minister had no jurisdiction to entertain the request.[178]

However, it is submitted, with respect, that the wording of section 20A(1) only requires that a request be made within fourteen days. It does not require the request to be received within that time. Thus, in a situation where a request is sent off on the fourteenth day, the Minister should have jurisdiction to consider the request. A loose analogy can be made with the Postal

176 Supra n. 174 p.9.

177 Supra n. 6.

178 Supra n. 174 p.12.

Acceptance Rule in the law of contracts. Once an acceptance is put in the post, it is deemed to be communicated to the other party.

Where the time allowed to make a request is so limited and the subject-matter has important consequences for an individual, it is contended that the words of the section should be construed in favour of the applicant.

This was the approach of Barker J. in Faleafa v. Minister of Immigration,[179] when he considered the question whether requests could only be sent to and received by the Minister of Immigration. It was held that it was not necessary for a request to be sent to the Minister's office in Wellington. It is sufficient if the request is sent to any office of the Department of Labour around the country. Barker J. said :[180]

> I think I am justified in ascribing to the legislature the knowledge that the Department of Labour has offices in principal centres in New Zealand and the intention that an application sent to a responsible officer in charge of a Labour Department office, within the 14 day period would be sufficient. In other words, the legislature could not possibly have intended that the applicants for the exercise of an ameliorating power ... should be dependant on the vagaries of the postal system for having their applications considered.

This statement echoes a submission made to the Labour Committee that the time allowed for a request to be made was too restrictive.[181]

The actual decision whether or not to grant a request is to be made by the Minister. Such a duty could not devolve onto any officer within the Department. It is a decision of considerable importance, affecting the future of the applicant and could therefore only be made by the Minister. There was a clear distinction here,

179 (1979) Unreported, Auckland Registry, A293/79, Barker J.

180 Ibid, 8.

181 Supra n. 165 p.5.

between matters of 'bureaucratic convenience' when the Minister could act through his officials, and matters of 'the very first importance'.[182]

The figures of the total number of requests determined suggest that the Minister must deal with an average of two requests each day of the working year.[183] While the Department does present its file on the applicant for the Minister to peruse with a recommendation whether to grant the request or not, it was said[184] that the ultimate decision was made by the Minister, and that he had in the past, in some cases, declined to follow the Departmental recommendations.

Section 20A is silent as to the procedure that the Minister is to follow when considering a request. Prima facie, he has free rein to do anything he wishes and is not required to make any inquiries. However, in Daganayasi v. Minister of Immigration[185] the Court of Appeal held that the Minister is under a duty to observe the principles of natural justice, or in other words, is under a duty to act fairly. It is noted that it was said[186] that any differences between the requirement to observe the principles of natural justice and the duty to act fairly were 'basically semantic'. Fairness is the dominating criterion.

In that case, the appellant had a New Zealand born son with a rare disease. She made a request to the Minister mainly on the grounds that her son ought to remain in New Zealand in order to receive the proper medical treatment. It was said[187] that the appellant had 'bona fide and substantial grounds for claiming that the statutory test'

182 Supra n. 179 p.6.

183 See Appendix B Table A.

184 Supra n. 6.

185 Supra n. 1.

186 Ibid, 141.

187 Ibid, 145.

of section 20A(2) was fulfilled. To this extent these particular facts meant that the appellant had a 'legitimate expectation of a favourable decision'.

Thus, where the Minister obtained a report from a medical referee, it was held that fairness required that the report, or at least the substance of any prejudicial contents be disclosed to the applicant before any decision was made. Fairness required that the applicant have an opportunity to correct or contradict any relevant statement that was prejudicial to his case.[188]

Cooke J. justified his action in reading in the requirements of natural justice in part by reference to the marginal note of section 20A and to the recent legislative activity in the deportation legislation.

He noted that the word "appeal" appeared in the marginal note and that the practice within the Department of Labour was to refer to a request made under section 20A as an "appeal". Despite acknowledging that marginal notes are not part of an Act, Cooke J. went on to accept it as an apt description of the process provided in section 20A.[189]

Then, turning to the establishment of a Deportation Review Tribunal and the other changes made to the legislation by the Immigration Amendment Act 1978, Cooke J. said that such legislative activity was an indication that the courts should not put an interpretation on the decision which would seriously impair the effectiveness of the rights granted by it.[190]

Section 20A does not contain any procedures to be followed by the Minister. In contrast, the Immigration Amendment Act 1978 setting up the Deportation Review Tribunal took care to provide elaborate procedural provisions. It could have been argued that had the

188 Idem.

189 Ibid, 142.

190 Idem.

legislature intended to provide fuller measures to be followed by the Minister under section 20A, it would have done so when the amending Act of 1978 was enacted. The fact that this did not happen, could be said to have been intentional.

However, Cooke J. grafted the principles of natural justice onto the requirements of section 20A. On the one hand, it could be said that no general ruling was made as to the applicability of the rules of natural justice to the determination of a section 20A request. Thus, only where an applicant is in a similar position to Mrs Daganayasi, that is, with a legitimate expectation of a favourable decision, would the principles be applicable. On the other hand, the decision has been taken to mean that fair procedures are to be observed in every respect made under section 20A.[191] The Department, however, has taken the view that changes in the procedures for handling a request will only have to be made where specialist reports are requested by the Minister.[192] As in Daganayasi, the report or the substance of it may be disclosed to the applicant for comment. The current practice of dealing with requests received (supra) is seen as being in itself a 'fair procedure', and there is no need to modify it.[193]

Once a decision is reached there is no obligation on the Minister to give reasons for his decision . There is no statutory duty to do so, and there is no common law duty either. In Tongia, Barker J. said[194] that counsel for the appellant had properly conceded this point, and he distinguished his decision in Flexman v. Franklin County Council.[195]

191 J.F. Northey "Review of Deportation Procedures" [1981] N.Z.L.J. 48, 49.

192 Supra n. 6.

193 Idem.

194 Supra n. 174 p.8.

195 [1979] 2 N.Z.L.R. 690.

Barker J. suggested[196] in his decision that if there was evidence that the Minister granted identical applications, but refused on application that was on "all fours" with those that had gone before, then it might be argued that the Minister had not acted fairly.

In H.T.V. Ltd v. Price Commission[197] the English Court of Appeal said that if an authority regularly applied the statute under which it was operating in a particular way, then it should continue to interpret it and apply it in the same way thereafter, unless there was good cause for departing from it. It was said[198] that it would not be permissible to depart from a previous interpretation and application where it would not be fair or just to do so. Hence, if there was an inconsistency in approach that inconsistency is not in itself a principle of judicial review, but that where there is a duty to act fairly, a tribunal or authority may be required to act consistently.

If, as Barker J. suggests, a decision of the Minister could be attacked for inconsistency because it shows the Minister had not acted fairly, there are however, difficulties for the appellant in trying to show this. In Tongia, counsel for the appellant had provided two examples of similar cases, but this was not considered to be enough to show an 'inconsistency'.[199]

Furthermore, there is the difficulty of counsel, in obtaining details of similar cases in the first place. Unless he had permission from the persons involved in such cases, the information would probably be confidential or at least private between a solicitor, client and the Minister.

Thus, this possible means of challenging a Minister's decision would, it is submitted, be very rare and probably not successful.

196 Supra n. 174 p.14.

197 [1976] I.C.R. 170.

198 Ibid, 185, 192, 194-195.

199 Supra n. 174 p.15.

It appears that the courts are willing to review a decision of the Minister where there has been a breach of natural justice or of the duty to act fairly. It appears also, that the courts will interfere on other grounds of review.

Barker J. has said[200] that a court could interfere if the decision made was one which no reasonable Minister could possibly make. He cited Van Gorkom v. Attorney-General[201] in support of this statement that the 'reasonableness' test applies to decisions of a minister.

It was also said[202] that a court would interfere where the Minister took into account something which he should not have taken into account, or has failed to take into account something which he should have taken into account. However, where the Minister is not required to give reasons for his decision, this would be difficult to establish.

Finally, in Daganayasi, Cooke J. also based his decision on a second ground, that is, that there had been a mistake of fact.[203] However, the other judges, Richmond P. and Richardson J. declined to comment on this point.

Although the courts are willing to intervene with a Minister's decision under section 20A, they are still, however, wary of usurping the role of the Minister. It is for the Minister to be satisfied that because of exceptional circumstances of a humanitarian nature, it would be unduly harsh or unjust to deport the applicant from New Zealand. The subjective wording of subsection (2) and the subjective evaluation of each case by the Minister point towards a careful stance by the courts.

200 Ibid, 13.

201 [1978] 2 N.Z.L.R. 387.

202 Supra n. 174 p.13.

203 Supra n. 1 pp. 145-149.

In Faleafa Barker J. said[204] that it was not proper for the court to give any direction as to the matters that the Minister should take into account. Cooke J. in Daganayasi stated[205] categorically that it was not the function of the court to decide the question which Parliament had confided to the Minister.

Despite its limitations, section 20A has been a worthwhile enactment, providing some protection for persons who have breached the Immigration Act 1964. Further it has been made a more effective appeal procedure by the grafting on of the requirements of natural justice. In practice, an extraordinarily high percentage of requests are allowed by the Minister each year,[206] suggesting that the Minister has not placed too high a threshold in his interpretation of the test "exceptional circumstances of a humanitarian nature". The results of the requests made to him since 1 February 1978[207] are overwhelming proof that the mechanism provided in section 20A is not an "illusory appeal system".

204 Supra n. 179 p.9.

205 Supra n. 1 p. 149.

206 See Appendix B Table A.

207 Commencement date of Immigration Act 1977.

VII DEPORTATION on the GROUNDS of NATIONAL SECURITY

The fourth ground on which a person may be deported under the Immigration Act 1964 is provided in section 22(2). Where deportation is made under this provision, no appeal procedures exist for the protection of the deportee.

Under section 22(2), the Governor-General by Order-in-Council may order a person to leave New Zealand where the Minister of Immigration has certified that the continued presence in New Zealand of that person, constitutes a threat to national security.

Section 22(2) replaced the provision in the Aliens Act 1948 which allowed the Governor-General in Council to approve the deportation of an alien where the Minister of Internal Affairs was satisfied that the alien's presence in New Zealand was "not conducive to the public good". This power was only exercisable in respect to aliens and there were no similar provisions to deport non-aliens on these grounds.

Under section 22(2) all non-New Zealand citizens are subject to be deported in the interests of national security. Hence, Commonwealth citizens have lost one of the "privileges" of their status. Of the three submissions[208] to the Immigration Amendment (No. 2) Bill 1977, only that of the Pacific Islands Advisory Council objected to this "loss". They argued[209] that as a matter of principle, British Commonwealth citizens "who are and will be permanent residents of New Zealand should not be subject to this new liability to which only aliens have formerly been subjected to".

208 Apart from departmental comments from Foreign Affairs and the Police, submissions were received from Amnesty Aroha, Pacific Islands Advisory Council and New Zealand Council for Civil Liberties.

209 Submissions and Comments on the Immigration Amendment Bill (No. 2), pp.2-3.

However, it is submitted that persons constituting a threat to the national security of New Zealand could easily be either aliens or Commonwealth citizens. If the protection of national security is seen as so vital to the country, then it is illogical to allow one kind of person to remain in New Zealand merely because of the fact that they happen to be citizens of a country which is part of the British Commonwealth. Their continued presence in New Zealand is not going to remove or reduce the threats to national security.

Moreover, it is contended, that as New Zealand's deportation legislation has attempted to assimilate the position between aliens and non-aliens, it would be undesirable to retain any exceptions in any specific areas of the legislation.

It is noted, however, that in the transitional provision in section 22(7), protection is given to Commonwealth citizens that is not available to aliens. No Commonwealth citizen can be ordered to leave New Zealand under section 22(2) or (3), if he had permanently resided in New Zealand for at least five years as at 1 December 1978. Thus it could be said that some Commonwealth citizens, at least, have not entirely lost a "privilege" of their status.

The new grounds for deporting a person in section 22(2) is an improvement on the provision in section 14(1)(b) of the Aliens Act 1948. It is more narrow and specific than the phrase "being not conducive to the public good", though it is conceded that the phrase "constituting a threat to national security", is in itself vague. The old criterion could have extended beyond the needs to deport a person on the grounds of national security. Such was the case in Pagliara,[210] where deportation was ordered under section 14(1)(b) mainly because Pagliara had been convicted on a drugs offence. This alone was enough to deport him on the grounds that his presence in New Zealand was "not conducive to the public good".

210 Supra n. 19.

But even the wording of section 22(2) was criticised as being too vague. It was suggested[211] by the New Zealand Council for Civil Liberties that the phrase "a serious and present danger to national security" be used as an alternative. Whilst this proposal did elaborate on what a "threat" could involve, it did not, however, define more closely what "national security" would have included.

On the other hand, it is debatable whether the phrase "national security" should be any tighter or whether it should spell out what constitutes "a threat to national security". The phrase is possibly deliberately vague so as to encompass any possible situations that might arise in the future.

There are no rights of appeal granted to persons deported on the grounds of national security. This exception is recognised by international law. Under Article 13 of the International Covenant on Civil and Political Rights there is no obligation to provide a right of appeal where national security is the grounds for deportation.

Furthermore, in respect of countries of the Council of Europe, the European Commission of Human Rights has held[212] that deportation on these grounds is an act of a state falling within the public law sphere and not in the civil law sphere, with the result that there is no obligation on a state to grant the deportee a hearing in such situations.

Commentators have also said[213] that while the standards of international law may favour a system of appeals in deportation legislation, exceptions may be made in "security" cases. States may claim an absolute discretion in political or security matters.

211 Supra n. 61 p.3.

212 Agee v. United Kingdom, European Commission of Human Rights, No. 7729/76.

213 G.S. Goodwin-Gill op. cit.

The courts have also stated their reluctance to interfere in cases of this kind. The leading case is R. v. Home Secretary, ex p. Hosenball.[214] In this case, Hosenball was intended to be deported by the Secretary of State for Home Affairs, on the grounds that it would be in the interests of national security. In the United Kingdom context, Hosenball had no rights of appeal. However, he could make representations to an independant advisory panel. This panel was not set up under any statutory authority, it was an ad hoc body only.

Hosenball's solicitors sought to obtain particulars of allegations made against Hosenball, in order to prepare their case before the panel. The request was declined. Hosenball then applied for an order of certiorari to quash the deportation order on the grounds that there had been a breach of natural justice in that the Secretary of State had failed to inform the appellant of the allegations or the grounds upon which the appellant was to be heard.

In the Divisional Court, Lord Widgery C.J. said[215] that the rules of natural justice were flexible and had to be adjusted for each particular case. In general, the rules required that an accused person should have a fair statement of the case against him and that he must be given a fair hearing for the case which he proposed to put up. However, it was then said that in this case, issues of national security were involved and where the Minister certified that in his opinion the matters should not be disclosed, then the court was bound to accept what he had said. Further, it was only if there were allegations of bad faith on the part of the Secretary of State, that the court would interfere.

On appeal, this decision was reaffirmed. It was held in the English Court of Appeal that the rules of natural justice were modified in cases involving national

214 Supra n. 153.

215 Ibid, 773.

security. Lord Denning M.R. said:[216]

> It is a case in which national security is involved: and our history shows that, when the State itself is endangered our cherished freedoms may have to take second place. Even natural justice itself may suffer a set back. Time after time Parliament has so enacted and the courts have loyally followed.

Thus in Daganayasi when the Court of Appeal held that the Minister's decision was invalid on the grounds of procedural unfairness, Cooke J. noted that there was "no suggestion that national security might be in any way involved" and that if it were, then "the requirements of fairness or natural justice may well be modified".[217]

This approach by the courts in respect of the procedures that a minister should follow (or the lack of them) when deciding to deport someone on the grounds of national security reflects the courts' attitudes on the disclosure of documents where public interest immunity is claimed in respect of them.

In Conway v. Rimmer,[218] it was held that even if a minister certified that decisions should not be disclosed, the court would not be prevented from examining the documents and considering whether they should be disclosed or not. However, the House of Lords was in agreement that where national security was the grounds for withholding the documents or information then the courts would not order disclosure of them.

It may be argued, however, that since the decision in Conway, there have been more recent cases which show that courts are more willing to enter into an inspection of documents in order to determine whether they should be disclosed or not. Thus in Sankey v. Whitlam,[219] cabinet

216 Ibid, 778.

217 Supra n. 1 p.145.

218 [1968] A.C. 910. Applied in New Zealand by Tipene v. Apperley [1978] 1 N.Z.L.R. 761.

219 (1978) 142 C.L.R. 1.

documents which were once thought to be immune from production, were ordered to be disclosed. It was said that documents would be withheld from protection if it was in the public interest to do so. In order to determine what the public interest required, the court had to balance the factors of non-disclosure with the interests of justice in the individual case.

Similarly, the majority of the House of Lords in Burmah Oil Co. Ltd v. Bank of England[220] held that documents should be produced for inspection by the courts when without inspection it was not possible to decide whether the balance of public interest lay for or against disclosure. The documents involved in that case included ministerial minutes and memoranda.

Thus it could be argued that this willingness of the courts to inspect and order production of high level ministerial documents may result in a person ordered to be deported on grounds of national security being better able to challenge the order. That is, he may be able to obtain evidence that, for example, the Minister i ordering his deportation took into account irrelevant considerations.

However, despite these recent developments in the public interest immunity field, there have still been some statements that where the information involves national security interests or sensitive state information then disclosure will be highly unlikely. In Sankey, Stephen J. said[221] that where defence secrets, matters of diplomacy or affairs of government were involved, then often the balance of public interest would be against disclosure. In Burmah Oil, Lords Salmon and Scarman recognised[222] that documents concerning national safety, diplomatic relations or relating to some state secrets of the highest

220 [1980] A.C. 1090.

221 Supra n. 219 pp.58-59.

222 Supra n. 220 pp. 1121 and 1144.

importance would probably be immune from production, even though the court reserved the right to inspect the documents first.

Hence, it is submitted, a person deported on grounds of national security will still have a heavy evidentiary burden when attempting to challenge the deportation order. His chances of success are slim if he is unable to obtain evidence in support of his grounds for review.

What safeguards exist then? Section 22(2) provides that the Governor-General is to make the deportation order by an Order-in-Council. The decision is therefore made at the highest level, removed from a court or tribunal system. It is a decision open to the scrutiny of Parliament, thus the safeguard is the answerability of the Minister of Immigration or the government for the certification that the continued presence of a certain person in New Zealand constitutes a threat to national security. Furthermore, the decision is open to public criticism through the news media and any publicity that is generated by the decision to deport.

The language in section 22(2) is not mandatory. The Governor-General may make an order to leave New Zealand by means of an Order-in-Council, where the Minister of Immigration makes a certification. Arguably, there is an extra safeguard in this procedure. The Governor-General has a discretion whether to make an order or not. Thus in the hypothetical situation where the Governor-General believes that the Minister, in making his certification is not acting bona fides, the Governor-General may, in his discretion, refuse to order the person concerned to leave New Zealand.

This extra safeguard, however, is tempered by the convention that the Governor-General acts on the advice of his ministers.[223] It could therefore be argued to be an illusory safeguard.

223 New Zealand Gazette Vol. I, 1919 : 1215. Letters Patent and Instructions May 1917, Cl.V.

It is submitted that in order to ensure that the decision to deport under section 22(2) can better be made open to public debate, there should be provision for an Order-in-Council to be published in the New Zealand Gazette. The Regulations Act 1936 with its provisions for the printing and publishing of, inter alia, Orders-in-Council, only applies to Orders-in-Council made under any Act which extend or vary the scope or provisions of any Act.[224] An Order-in-Council made under section 22(2) does not do any of these things. It only effects a decision to deport without extending or varying the Immigration Act 1964. Hence, there are no statutory provisions requiring the Order-in-Council to be published. This omission, it is submitted, should be remedied.

The protection given to a deportee under section 22(2) is minimal, and arguably, in practice, non-existent. It is conceivable that a person deported under section 22(2) could equally be deported on the other grounds provided in that section. The decision of the Minister to choose which provision to use becomes a critical one in view of the possible avenues of appeal that exist in the other categories of deportation. That is, the Deportation Review Tribunal for deportation under section 22(1) and the Administrative Division of the High Court for deportation under section 22(3). There is no control on the Minister's discretion to choose any of the grounds for deportation. The consequences of his decision are completely different. In one case there is an extensive right of appeal, in the other, appeal machinery is non-existent.

In order to minimise the differences in result that could occur, it is submitted that some means of redress should be provided in the section 22(2) context.

It was suggested[225] that perhaps if a decision to deport under section 22(2) arose an ad hoc committee might be established. Such a committee might comprise members

224 s.2 Regulations Act 1936.

225 Supra n. 6.

of the Departments of Labour and Internal Affairs, the Ministry of Foreign Affairs, the Police and the Security Intelligence Service. However, it was said that there might not necessarily be a right to appear for the deportee.

It is submitted that if an advisory committee was set up which did not disclose to the deportee any allegations made against him as grounds for his deportation so that he could answer them (as was the case in Hosenball) then the deportee is not in any better position to feel that justice has been done to him.

Although national security is involved, the problem of providing a procedure for adequate review of a deportation order made under section 22(2), is not insuperable. For example, the Australian provision in section 14 of the Migration Act 1958-80 as described in Part V of this paper would be a useful means of redress.

Furthermore, such a provision as that in section 14 of the Australian Act is not entirely unknown in the New Zealand context. There is the analogous role of Commissioner of Security Appeals appointed under section 14 of the New Zealand Security Intelligence Service Act 1969. He also holds office as Chairman of the Security Review Authority and as such is a judge or retired judge of the High Court or District Court.[226] His function is to inquire into complaints made by persons ordinarily resident in New Zealand that their career or livelihood is or has been adversely affected by an act or omission of the Security Intelligence Service.[227] The function of the Commissioner could, it is submitted, be extended to include the conducting of investigations into a complaint in respect of a deportation order made under section 22(2).

The Commissioner would be in the position of being familiar with the type of information that is likely to be involved, that is, information involving national security.

226 The Authority is established under s. 38 State Services Act 1962.

227 s. 17 N.Z. S.I.S. Act 1969.

Further, the procedures provided in the 1969 Act could easily be adapted for investigations into the making of a deportation order under section 22(2).

For example, having regard to the requirements of security the Commissioner shall provide the complainant with a summary of the information and opinions held by the S.I.S. on the complaint. The complainant has an opportunity to be heard privately before the Commissioner and to call evidence. Evidence may be heard by the Commissioner that would not necessarily be admissible in a court of law. Moreover the Commissioner has the power to summon witnesses and receive evidence.[228]

Such procedures, it is submitted, are easily adaptable or suitable for an inquiry into the making of a deportation order made on the grounds of national security. There is a need for some means of redress in this area, and it is contended, the Commissioner of Security Appeals or a like body could fulfil this need.

Meanwhile, the only safeguards for the deportee in this situation, are the political process and the inevitable publicity generated by the making of an order.

228 s. 20 N.Z. S.I.S. Act 1969, as amended by s. 11 of the 1977 Amendment Act.

VIII UNDESIRABLE IMMIGRANTS EXCLUSION ACT 1919 - an anachronism?

At this point it is appropriate to mention section 6 of the Undesirable Immigrants Exclusion Act 1919. Despite the major changes in deportation legislation in 1977 and 1978 this Act remains in force. Section 6 provides that the Attorney-General, if so directed by the Governor-General in Council, may order a person to leave New Zealand where he is satisfied that :

> such person is disaffected, disloyal, or likely to be a source of danger to the peace, order and good government of New Zealand and that he is not permanently resident in New Zealand, or has not, at the date of the order, been permanently resident in New Zealand for at least 12 months.

This Act was passed in 1919 to prevent Germans and other World War I enemies from emigrating to New Zealand.[229] However, despite its historical origins, it remains on New Zealand's statute books and gives another power to deport outside the provisions of the Immigration Act 1964.

An examination of a very similar provision was made in Tagaloa v. Inspector of Police,[230] where this wording was found in the Samoa Offenders Ordinance. It was held that natural justice was not applicable. The enactment was a 'political precaution' giving a power to deport to be exercised by the 'political department of the Executive'.[231] Thus it was said that the 'intention of the Legislature might be defeated if before exercising the power, the decision maker was bound to give notice to the person concerned and to hold an inquiry.[232]

The approach of the Full Court to the provision equates to that of a court dealing with a deportation order made on the grounds of national security. That is, it is a decision for the Executive to make and so long as it is

229 New Zealand Parliamentary debates Vol. 185,1919 : 826.

230 [1927] N.Z.L.R. 883.

231 Ibid, 898.

232 Idem. Venicoff applied.

made in good faith, then the decision will not readily be examined in a court of law.

Section 6 is applicable to aliens and non-aliens as it is worded 'any persons'. There is no definition in the Act to indicate otherwise. The section is cast in subjective terms, it is for the Attorney-General to be satisfied. This subjective language renders a court wary to intervene, though it is clear that this wording would not prevent a court from inquiring into a decision made.[233]

The wording of the section, like the phrase 'conducive to the public good' is much wider than the provision in section 22(2) of the Immigration Act 1964 (as amended). There is, therefore, a greater risk that this section could be used as a political weapon.

The safeguard here, as in the context of national security, is the political process. The decision to deport is made at a high political level. The Attorney-General may make an order for deportation where the Governor-General in Council directs him to do so. It was, however, said in the debates on the Bill that the answerability of the Attorney-General to Parliament would be stymied because the Attorney-General had no obligation to disclose any information or details when he exercised his powers under the Bill.[234]

Although the Governor-General in Council directs the Attorney-General, the latter still has a discretion whether or not to make the order because of the use of the word 'may' in section 6. The Leader of the Opposition, Rt. Hon. Sir J.G. Ward voiced[235] concern that the wide powers in the Bill were conferred on one Minister only. He said[236] that it would be much better if the Governor-General in Council were to hold those powers as any acts or decisions made under the Bill would automatically involve Cabinet

233 See e.g. Secretary of State for Education & Science v. Tameside Borough Council [1977] A.C. 1014.

234 Supra n. 229 p. 1221.

235 Ibid, 827-828.

236 Ibid, 828.

discussion. As the Bill stood (and as it was later enacted) the Attorney-General had 'supreme power to go on, irrespective of the opinions' of any other minister. This was seen as an undesirable situation.

On the other hand it could be argued that the choice of the Attorney-General as the deciding body was an added safeguard. There is a convention that the Attorney-General is to exercise his powers free from the direction of his ministerial colleagues[237] and hence his political biases, thus it could be said that the risk of section 6 being used as a political weapon is lessened by some degree.

The government justified and defended its choice of the Attorney-General holding the powers under the Bill on several grounds. Namely, the power had to be held by someone,[238] every power was capable of abuse anyway[239] and finally :[240]

> ... we cannot trust anybody better than the Government of the day, and of the Government of the day the best minister must reasonably be the Attorney-Genetal because of his legal capacity ..... any Attorney-General whatever his political bias will be very chary of using the powers conferred by this Bill.

Despite the fact that there are differences in the criteria between section 6 of the Act of 1919 and section 22(2) of the Immigration Act 1964 (as amended) it is submitted that in the movement away from broad ministerial discretions in the field of deportation legislation and in view of the recent major overhauls in deportation laws, the 1919 Act, or at the very least, section 6 is redundant and should be repealed. Furthermore, the Act was an emergency and wartime measure and in peace time, it is out of place and a potentially dangerous weapon. It has not

237 F.M. Brookfield, "The Attorney-General", [1977] N.Z.L.J. 334, 341.

238 Supra n. 229 p. 831.

239 Ibid, 1225.

240 Ibid, 1228.

been used in the last thirty years,[241] although recently an attempt was made to make the Attorney-General exercise his powers under it.[242]

The Undesirable Immigrants Exclusion Act 1919 is, it is contended, a hangover from post-war hysteria and should be deleted from the statute books.

241 State Services Commission, Statutory Functions and Responsibilities of New Zealand Public Service Departments 1979, (Government Printer, Wellington, 1980), 4.

242 Clements v. Attorney-General [1981] Butterworths Current Law 675; (1981) 4 T.C.L. 28/6-7.

IX THE AMENDMENTS IN CONTEXT

A. Immigration Amendment Acts 1977 and 1978

The Immigration Act as amended in 1977 and 1978 now provides appeal or appeal like provisions for persons liable to be deported, except in the case of deportation on the grounds of national security. The protection given to deportees, whether it be in the form of a request to a minister or an appeal to an independent tribunal or court of law takes effect after a deportation order has been made, and not before.

It could be said that the legislation on deportation is now a complete code and that as there does exist these various mechanisms of appeal, there is no obligation on the minister to give a person an opportunity to be heard before an order is made.

In the section 20A process there is no provision for a hearing to take place at all. The applicant can only present his case by means of a written request. However, the minister is free to seek the advice of his departmental officers who may make inquiries on behalf of him even though there is no requirement that the minister do so. Furthermore, the minister is not required to state his reasons for declining or allowing a request.

In contrast, persons lawfully residing in New Zealand and who commit offences rendering themselves liable for deportation have a more extensive right of appeal. Their appeals are directed to an independent tribunal where they have a right to a hearing, to be represented and to call evidence. Furthermore, the decisions of the tribunal must be in writing and state the reasons for them.

In both these situations, the minister or tribunal are dealing with an individual case. Their decisions affect the person individually and not simply as a member of the public. They are not dealing with the exercise of

an executive power with broad policy considerations.[243] Yet, there are two different types of appeal machinery.

This difference, it is submitted, is deliberate. In the debates on the Immigration Amendment (No. 2) Bill it was said :[244]

> [I am] sure that it was not suggested that we take those non-citizen non-residents into our system and give them all the rights of access to our courts and tribunals. They are not meant to be here, and are defying us by being here.

This statement echoes the comments made in several cases in which it has been said that there is no obligation to have a hearing before deporting a prohibited immigrant because he had no 'legitimate expectation' of remaining in the country.[245]

Moreover, it reflects the attitudes of courts deciding whether or not to grant interim orders where an application for review is filed in respect of the Minister's decisions in Part II of the Act. Interim orders have been refused because there is 'no position to preserve'.[246]

However, there are and can be exceptions. For example, in Daganayasi although Mrs Daganayasi had no legitimate expectation of staying in New Zealand, she had a New Zealand-born son with a rare disease, who would have been in a worse position had he been forced to return to Fiji with his mother. Hence, Mrs Daganayasi had a 'legitimate expectation of a favourable decision'.[247]

243 Salemi supra n. 28 p. 560 per Jacobs J.
Cf however p. 541 per Barwick C.J.

244 New Zealand Parliamentary debates Vol. 418, 1978 : 1570.

245 Salemi supra n. 28 p. 549;
Ratu supra n. 2 p. 599;
Schmidt supra n. 23 p. 170.

246 Movick supra n. 55.
Daganayasi v. Minister of Immigration (1979) Unreported, Auckland Registry, Mahon J;
Comments to this effect in Tongia supra n.174 pp. 1-2, cf however Faleafa supra n. 179 p.9.

247 Daganayasi supra n. 1 p. 145.

The principles of natural justice were held to be applicable in her case.

In 1978 the opportunity was not taken to extend the 'appeal right' in section 20A. There are several possible reasons for this. The International Covenant on Civil and Political Rights does not oblige a State to have a system of appeals for persons who have gained entry fraudulently or who have breached the conditions of their entry. Further, there is the widely held belief that a person liable to be deported under section 22(1) has a greater interest at stake which should be given greater protection. Residents of New Zealand have an expectation of remaining in the country, hence they should not be deported without a right to appeal against their deportation orders. In contrast to the section 20A process, their avenue of appeal is a much wider and more extensive one.

It appears that there was no intention when making the amendment (No. 2) bill in 1977 to extend the rights given in section 20A. Section 20A was considered an adequate safeguard for those ordered to be deported for technical breaches against the permit system.[248]

In respect of persons liable to be deported on the grounds of terrorism under section 22(3), a limited right of appeal to the High Court is available. It is arguable that in this situation a more appropriate body to hear the appeal would be a tribunal. A tribunal could have 'specialist' members who are familiar with dealing and examining the highly politically controversial issues that may arise. Moreover, it may be established in such a way that a better depth of 'review' of a deportation order could be made rather than the present appeal process under section 22G which is in effect limited to questions of law. The choice to provide an appeal to a court of law is, it is submitted, strange in view of the policy content and subject matter involved.

248 Supra n. 6.

Similarly, in the section 22(1) deportations it could be argued that a more logical body to have heard an appeal on a deportation order made because of a criminal conviction, would have been a court. The court in sentencing the deportee would have addressed its mind to the question whether a recommendation to deport should have been made.[249] (This power to make a recommendation to deport only exists where the offence committed is one for which the court has power to impose imprisonment for a term of twelve months or more - s.22(1)(c).)

It was felt,[250] however, that a court was not an appropriate body to hear an appeal from a deportation order because of the role of such a body in imposing the penalty for the offence committed. Justice may be done, but it must also be seen to be done and it is submitted, that an appellant may feel that an appellate court may take just as harsh a view to the nature of his offence as the court at first instance to the exclusion of any other factors that should be taken into account. Confidence in a system of appeals is, it is submitted, just as important as the avenue of appeal itself.

In marked contrast to the safeguards provided by sections 20A, 22C and 22G, a person deported on the grounds of national security has no rights of appeal at all. Article 13 of the International Covenant on Civil and Political Rights and international law commentators have noted this exception as being a commonly accepted one.[251] Thus, in the New Zealand context, the only safeguards for a deportee are to seek review through the courts, and the normal political processes. However these safeguards are severely limited. As seen by the Soblen[252] case it is very difficult to challenge a deportation order, moreover

249 Supra n. 124.

250 Supra n. 6.

251 Supra n. 63.

252 See pp 3-4.

the deportee has an enormous evidentiary burden. One may also query the effectiveness of Parliamentary debate if insufficient information is made available on the background and reasons for making the order.

Despite the sensitivity of the matters involved, there is, it is submitted, a need for more effective protection where deportation is made on grounds of national security. This protection could take the form of an ad hoc advisory committee giving the deportee a reasonable summary of the case against him and giving him an opportunity to rebut it. Another possible means of protection would be to have someone in a position similar to the Commissioner of Security Appeals or even the Commissioner himself, making an independent investigation as to whether there were sufficient grounds for the making of the deportation order.

The fact that in the New Zealand scene there does exist a Commissioner of Security Appeals with such powers in a slightly different context shows that the creation of a similar body to handle appeals from persons deported on the grounds of national security is not an entirely new or alien concept.

B. De facto Deportation

While this paper has been concerned with formal deportation, it should be noted that deportation can be effected in the 'temporary-entry-person' category without the need to convict a person for breaching the terms and conditions of his permit. In other words, it is possible to have 'de facto deportation'.

This situation will largely arise where a permit that has already been granted, is revoked. The permit holder must leave the country or face a conviction and compulsory deportation under section 20 of the Immigration Act 1964. He no longer has a right to remain in the country. In form, his permit has been revoked; in substance however, he is being 'deported'.

The power to revoke a permit in section 14(6) is a wide and unfettered one. In Tobias v. May[253] it was held that the Minister was not bound to observe the principles of natural justice. Nor in that case were any reasons given or required by the Act to be given for the revocation of the permit. The observations made by Lord Denning M.R. in Schmidt[254] that a person whose permit was revoked, ought to be given an opportunity of making representations because he would have a legitimate expectation of being allowed to remain in the country for the permitted time, were dismissed[255] by Quilliam J. as being obiter and being references to another case altogether.

The irony of this situation is that a person whose permit is revoked gains some advantage if he remains in New Zealand and is convicted of an offence of remaining in the country after his permit has been revoked. He is now qualified to use the process in section 20A to request the Minister of Immigration not to deport him.

Speaking in more general terms, the 'right of appeal' contained in section 20A is only available for those people who have been convicted for various breaches against the permit system. Thus a person who is not convicted is unable to avail himself of it. In some ways, therefore, there is an incentive to get oneself convicted for the offence that one has committed under Part II of the Immigration Act 1964.

However, this anomaly between a right of appeal upon conviction only and no rights of appeal where there is no conviction may in practice be small. Since the enactment of section 20A it has been the policy of the Department of Labour to prosecute in all cases where the permit system has been breached.[256]

253 [1976] 1 N.Z.L.R. 509.

254 Supra n. 23 p. 171.

255 Supra n. 253 p. 511.

256 Supra n. 6.

In terms of the revocation of a permit however, there is a need for some control on the ministerial discretion to revoke a permit. The Minister should at least give reasons for doing so, and or give some opportunity for the permit holder to submit reasons why he should be allowed to remain in the country for the duration of his permit. In terms of trying to reenter New Zealand in the future, risking a conviction and possibly being turned down in a request to the Minister under section 20A may be too great a risk to take. Having a conviction will not be particularly favourable to one's application to enter New Zealand in the future.

Despite the variation in appeal procedures and the variation in levels of effectiveness, the amendments to the deportation legislation are commendable. In the case of appeals to the Tribunal and to the High Court the number of occasions when they will be resorted to are and will be low. By far the greatest number of 'appeals' are made to the Minister in respect of prohibited immigrants and persons breaching the permit system. Although the enactments of 1977 and 1978 have been worthwhile, there is, however, some room for improvement in certain areas, particularly in the national security deportations and in the de facto deportations via revocations of permits.

X THE ROLE of the OMBUDSMAN[257]

It would be misleading to only discuss the means of redress provided by the Immigration Act 1964 alone. There is another channel to air grievances and this is by way of making a complaint to the Ombudsman's office.

Persons who have requested under section 20A that they be not deported may file a complaint with the Ombudsman under section 13. The Ombudsman cannot examine the actual decision of the Minister, as his jurisdiction does not extend to exercises of ministerial discretions. However the Ombudsman may conduct an investigation into the recommendation made by the Department of Labour when it advised the Minister upon the request.

The Ombudsman's main concern in this area is that fair and adequate procedures are followed. The Ombudsman will examine the departmental file with a view to seeing that the case was sufficiently presented for the consideration of the Minister. That is, whether all the relevant matters and correct information in support of the request has been put before the Minister.[258]

It was commented[259] that the numbers of complaints in this area had declined since section 20A was enacted. However, this comment was made with the rider that from year to year the emphasis of complaints made against the Immigration Division of the Department of Labour, changed. For example, in recent years there has been more complaints in respect of the Minister's refusal to grant certificates of exemption from the requirements of the Immigration Act 1964 to enter New Zealand. (This having particular significance for people desiring to enter New Zealand who have criminal records.)

257 Interview with an officer of the Office of the Ombudsman. July 1981.

258 Cf Report of the Ombudsman for the year ended 31 March 1978 New Zealand. Parliament. House of Representatives. Appendix to the Journals, 1978, A.3. pp. 9-10.

259 Supra n. 257.

The Ombudsman considers that although a decision of the Minister has been made, it will still enter into an investigation to determine that the procedure followed by the Department has been fair. It may be possible that appellants under section 20A are unaware that the Ombudsman is in a position to do this once a decision has been made, hence, this could explain a decline in the number of complaints made from this category of people.

In the situation where a person is ordered to be deported for having committed an offence before a certain period of residency in New Zealand, the Ombudsman will not investigate a complaint from such a person. The establishment of the Deportation Review Tribunal has consequently meant that the Ombudsman has no authority under section 13(7)(a) of the Ombudsman Act 1975 to enter into an investigation, save however, for the exceptional case where 'by reason of special circumstances it would be unreasonable to expect the deportee to have resort to it'.

Similarly, a person deported on grounds of terrorism has a right of appeal to the High Court. Thus under section 17(1)(a) the Ombudsman may refuse to investigate a case because an appeal right is provided and it was reasonable for the complainant to resort to it.

There is however no right of appeal for people deported on grounds of national security. The Ombudsman may therefore conduct an investigation in this situation. However section 20 of the Ombudsman Act 1975 could, if exercised, hamper an effective investigation by the Ombudsman. This section provides that where the Attorney-General certifies that the giving of any information, or the answering of any question or the production of any document might, inter alia, prejudice the security, defence or international relations of New Zealand then the Ombudsman cannot require the information to be given or produced. This power, if exercised by the Attorney-General could limit the Ombudsman's investigations when he wishes to discover the basis upon which the Department recommended deportation.

Furthermore, in the hypothetical situation where a decision to deport is made without reference to the Department, then there are no grounds for the Ombudsman to act.

The role of the Ombudsman in the area of deportation, figures largely in the area of deportation of prohibited immigrants and persons who have committed breaches under Part II of the Immigration Act 1964. However, there have been complaints made on other grounds in respect of the operation of deportation machinery.[260]

Although the number of complaints per year have been low,[261] the Ombudsman does have a useful role in that any suggestions or recommendations he makes to the Department are, if accepted, likely to affect not only the particular complaint, but also the handling of future cases. Such was the case when an 'overstayers' register' was opened in 1977-78 so that those registered would have their cases considered with the possibility of remaining in New Zealand permanently or temporarily. Complaints were made to the Ombudsman in respect of the handling of their cases. The Ombudsman suggested that the Department of Labour ensure that all letters and memoranda submitted to the Minister on individual cases be accompanied by the full file and that an officer familiar with the file be available to discuss the case with the Minister should he wish to do so.[262] (Note how this procedure is now used in the handling of requests made under section 20A.)

The Ombudsman is an extra safeguard for persons liable to be deported, moreover the impact that he may have, can extend to a range of cases rather than an individual complaint. He is, it is submitted, a useful backstop in the search for redress in the field of deportation.

260 Supra n. 62.

261 See Appendix C Table A.

262 Supra n. 258.

XI CONCLUSION

An order to deport is a drastic sanction and may be seen as a form of punishment.[263] Traditionally the power to deport non-nationals has been a wide and unfettered one, and any challenges to an order have had very little chance of success. (In fact, the writer has been unable to find any reported decision of a successful challenge in the Great Britain and New Zealand jurisdictions.)

More recently, however, there has been a growing recognition in international law that aliens have certain rights and obligations vis-a-vis a state and vice versa. Although it is accepted that a state has the right to expel an alien, its power to do so is not, however, absolute. There is an obligation to accord an alien rights of appeal/review, or to act in accordance with due process in making the decision to deport.

Hand in hand with the drawing up of treaties such as the International Covenant on Civil and Political Rights, the European Conventions on Human Rights and on Establishment and the EEC Directive 64/221/EEC, there is the growing practice of states to provide some form of appellate structure to hear and determine appeals from decisions to deport. These developments are evidence, it is submitted, of the evolving customary international law that a state's power to expel an alien is no longer an unfettered power, but that it is a controlled one.

Similarly, judicial attitudes are also shifting in the field of immigration law. Where previously a minister's or immigration official's decision would not be reviewed except on evidence of bad faith (it appears that there has been no reported decision of a case that has been successful on this ground) the courts are now less reluctant to examine a decision and may even require that the principles of natural justice are to apply.

263 Lieggi v. U.S. Immigration and Naturalisation Service 389 Fed. Supp. 12,17 (1975).

In this changing scene, New Zealand's deportation legislation has undergone dramatic revision. The provisions for deportation (and in fact, the body of law dealing with nationality and citizenship)[264] have been streamlined and made applicable to both British Commonwealth citizens and aliens equally. Even more importantly, avenues of appeal have been enacted to provide safeguards and protection for persons liable to be deported, except however, in the case of section 22(2) deportations.

While the amendment Acts of 1977 and 1978 have been worthwhile and commendable advances in New Zealand deportation legislation, there are, nevertheless, areas where improvements could and should be made. These areas or 'gaps' range from the procedural mechanisms in the process of deciding to deport and communicating the same to the person liable to be deported, to the more substantive gaps such as the glaring lack of effective safegurads for persons liable to be deported on grounds of national security. Moreover, there is the de facto deportations effected by a decision to revoke a permit. In this situation,the Minister of Immigration has a power of revocation that is both undesirably broad and uncontrolled.

In an overview however, there has been a move away from the previous situation of unfettered ministerial discretions, and a move towards a more responsible and humane system of deportation where appeal mechanisms are provided.

Although the avenues of appeal vary in strength and method and have their limitations, they are nevertheless welcome innovations in an area of decision making which is highly sensitive and sometimes highly controversial.

264 e.g. Citizenship Act 1977.

APPENDIX A

Table A Appeals to the Deportation Review Tribunal

Period (Year ended)	Total Appeals Received	Allowed[1]	Dismissed	Withdrawn	Miscellaneous[2]
31 Dec. 1978	3	-	1	1	1
31 Dec. 1979	17	5	10	2	-
31 Dec. 1980	9	2	6	-	1
31 June 1981	8	-	3	1	4

1 The figures for "Allowed" and "Dismissed" appeals relate to decisions on the appeals filed in the period. So the actual decisions may have been made in the following year.

2 Includes cases adjourned sine die and cases proceeding.

(Source: All the decisions of the Deportation Review Tribunal as at 1 July 1981).

Table B People Deported on the Grounds of Having Committed Criminal Offences

Year ended		
	31 March 1977	57
	31 March 1978	53
	31 March 1979 [1]	49
	31 March 1980	25
	31 March 1981	21

Prior to 1 December 1978 the legislation applicable was the Aliens Act 1948 and section 22 of the Immigration Act 1964.

The sudden drop between the years 1979 and 1980 might be indicative of the lesser numbers of aliens being deported due to better protection under the new deportation legislation, though this is only speculation.

(Source: letter from the Minister dated 10 July 1981).

Table C Deportation orders made under s.22(1)

1978 - 1981	s.22(1)(a)	22
	s.22(1)(b)	20
	s.22(1)(c)	3

Note: The figures in Table B include people actually deported from New Zealand pursuant to deportation orders made prior to the 1978 amendment act. Hence the figures are much larger.

(Source: Information supplied by the Deportation Review Tribunal. The figures are however only of the orders that the Tribunal has been able to ascertain. Hence they may only be part of the total orders made under s.22(1).

APPENDIX B

Table A Requests Made under section 20A and their Results

Period (Year Ended)	Total Requests Made in Period	Allowed[1]	Disallowed	Outside Jurisdiction[2]	Under Consideration[3]	Percentage of Success[4]
31-3-78 (2 months)	33	-	33	-	-	0%
31-3-79	565	169	251	68	77	40.2%
31-3-80	383	150	138	43	129	52.1%
31-3-81	630	287	289	73	110	49.8%

1 The figures for 'Allowed' and 'Disallowed' refer to requests actually decided in the period. Hence, because some requests will inevitably be under consideration after the period, the horizontal lines will not add up to the total requests made in the period.

2 That is, requests which are not received within the 14 day period allowed to make a request.

3 The writer has calculated these by adding the figures in the 'Allowed', 'Disallowed' and 'Outside Jurisdiction' columns to find out the total requests dealt with. Then added the previous year's number of 'Under Consideration' to the 'Total Requests Made in the Period' to be determined. Then the first figure is subtracted from the second to get the number of requests still to be determined.

4 The percentages relate to the $\frac{\text{number of allowed requests}}{\text{total number of requests within jurisdiction that were determined.}}$

(Sources: "Report of the Department of Labour for the Year Ended 31 March 1978" (Govt Print, 1978) 16

"Report of the Department of Labour for th Year Ended 31 March 1979" (Govt Print, 1979) 7, 26.

Letters from the Minister dated 10 July 1981 and 5 August 1981.)

Table B People Convicted for Offences Under Immigration Act 1964

Period (Year ended)	Overstaying Offence	Orders Made	Prohibited Imm.	Orders Made	Misc.[1]	Orders Made
31 Dec. 1975	266	192	65	51	3	1
31 Dec. 1976	249	182	35	28	10	7
31 Dec. 1977	262	233	29	26	124	106

1 'Miscellaneous' includes remaining in New Zealand after revocation of permits.

Note: The officer in charge of Justice Statistics advised that there was a sharp increase in convictions after 1977. This will account in part for the large numbers of requests made to the Minister - see Table A, and reflects departmental policy to prosecute in every case since there was a safeguard (s.20A) enacted in the 1977 amendment.

(Sources: "Justice Department Statistics 1975" (Department of Statistics, 1975) Table of 'Distinct Cases' Table 18. p.41.

"Justice Department Statistics 1976" (Department of Statistics, 1976) Table of 'Distinct Cases' Table 18. p.37.

Statistics for 1977 were taken from proofs of the "Justice Department Statistics 1977" which were kindly shown to the writer by Ms Kershaw at the Department of Statistics.)

Table C People Deported for Offences Against Immigration Act 1964[1]

Year Ended		
	31 March 1977	260
	31 March 1978	360
	31 March 1979	383
	31 March 1980	256
	31 March 1981	259

1 Figures for earlier years may be found in G.E. Crowder "Problems of New Zealand Immigration and Deportation Law" Legal writing Requirement LLB(Hons) Victoria University of Wellington.

(Source: Letter from Minister dated 10 July 1981.)

APPENDIX C

Table A Complaints to the Ombudsman[1]

Period (Year Ended)	Total	Justified, Rectified, Sustained.	Not Justified Not Sustained	Withdrawn	Discontinued, Declined Jurisdiction.
31-3-76	8	1	4	1	2
31-3-77	16	2	7	-	7
31-3-78	9	-	5	-	4
31-3-79	1	-	1	-	-
31-3-80	3	1	1	-	1
31-3-81	5	-	2	-	3

[1] The figures are taken from complaints made under headings "Directions to leave N.Z.", "Requirement to leave N.Z.", "Deportation Order", "Deportation of illegal immigrant with N.Z. dependants", "Deportation of illegal immigrants", "Unreasonable decision to deport", and includes complaints made in respect of delays in deportation decisions, misinformation, failure to arrange deportation, undue delay in serving deportation orders, failing to advise on deportation decisions and concern about the destination of a deportation.

(Sources: "Report of the Ombudsman for the year ended 31 March 1976" (Govt. Print, 1976)

"Report of the Ombudsman for the year ended 31 March 1977" (Govt. Print, 1977)

Figures for 1978 - 1981 were collated during a visit to the office of the Ombudsman.

APPENDIX D

DEPORTATION REVIEW TRIBUNAL

GUIDELINES FOR APPELLANTS TO DEPORTATION REVIEW TRIBUNAL

Introduction

The Deportation Review Tribunal is an independent Tribunal of three members. All three members are appointed by the Governor General for a term of three years. The Tribunal is designed to give people in your position a right of appeal against a deportation order made by the Minister of Immigration. The Tribunal is completely independent from the Minister of Immigration and his Department. In appropriate cases the Tribunal has the power to quash (cancel) the deportation order. The Tribunal may exercise its power to quash the Minister's order if it is satisfied that it would be unduly harsh or unjust to deport a person from New Zealand and that it would not be contrary to the public interest to allow that person to remain in New Zealand. When considering whether deportation would be unduly harsh or unjust, the Tribunal must consider the appellant's age; length of time he has resided in New Zealand; his personal domestic circumstances; his employment record; the nature of offences of which the appellant has been convicted and any other offences of which he has been convicted; the interest of his family; and such other matters as the Tribunal thinks relevant.

The matters relevant to the Tribunal and its jurisdiction are set out in the Immigration Act and in particular s.22D of that Act.

As you will see from the following notes, the procedure of the Tribunal is designed to be informal and flexible. You may if you wish conduct your own case in front of the Tribunal. Alternatively, you may find it helpful to instruct a lawyer particularly if your case is going to involve argument and witness other than yourself.

Prior to the Hearing

When the appeal has been lodged the Secretary of the Deportation Review Tribunal will acknowledge receipt of the Notice of Appeal and will immediately send a copy to the Minister of Immigration. The Secretary will also ask you to inform him in 21 days of the name of your lawyer if you intend to instruct one and whether you will require an interpreter, and if so in what language.

The Secretary of the Tribunal has responsibility of arranging a time and place for a hearing which will depend on a number of factors.

Once a date for hearing has been set and a venue arranged, a Notice of Hearing is sent to the appellant, his counsel (if any) and the Minister of Immigration. The Minister of Immigration forwards a report to the Tribunal setting out the reasons for making his order. This will be made available to the appellant or his lawyer before the hearing. If an appellant is in prison, the Secretary will make arrangements with the Superintendent to bring the appellant to the hearing. However, the Tribunal will try to hold its hearing in suitable premises close to the appellant's residence or place of imprisonment.

Procedure at the Appeal Hearing

The proceedings at the Appeal Hearing are informal. The appellant may call witnesses and so also may the Minister of Immigration. The hearing is open to the public and sometimes members of the press are present. However, the Tribunal does have power to suppress the publication of any evidence.

The appellant is required to present his case first. If he gives evidence it must be on sworn oath. He will be questioned by counsel for the Minister and by the Tribunal. Any witnesses will also be cross-examined after giving their sworn evidence. The Minister may then present his case and the appellant has the same right to ask questions about the evidence given. Both sides are then given the opportunity to make final submissions and to sum up.

Decision

Occasionally the Tribunal will deliver an oral decision a short while after completing the hearing. However, the usual practice is to forward a written decision to all parties about two to three weeks after the hearing.

IF YOU ARE IN ANY DOUBT ABOUT YOUR POSITION YOU SHOULD CONSULT A LAWYER OR THE SECRETARY OF THE TRIBUNAL.

APPENDIX E

The following notes were taken after an interview with the Deportation Review Tribunal on 15 September 1981 and were unfortunately too late to be incorporated into the text of the paper.

1. Composition of the Tribunal

It was felt that having a legally qualified member was necessary and essential. It meant that the Tribunal was less likely to commit a jurisdictional error.

Although no qualifications are required by the Immigration Act 1964 of the other members, it was felt that as 'human interest' cases were involved, persons appointed to the Tribunal should have the ability and be prepared to listen, to sift evidence and be humane.

Mr Fuohy was a former Director of Immigration and therefore has had experience in dealing with cases likely to come before the Tribunal. It is interesting to note too, that the first deputy to be appointed was also a recently retired Director of Immigration.

While it was said that having experience in dealing in the immigration field was helpful, the writer notes however that the appointment of former public servants from the Immigration Division of the Department of Labour has had its disadvantages.

In the case planned to be heard on 15 September 1981, Mr Fuohy had earlier on disqualified himself because he had been involved in the making of the order to deport the appellant when he was Director of Immigration.

Mr Cross was appointed to be the deputy of Mr Fuohy. However, on the day of the hearing it was discovered that he too, had been involved in some way with the order to deport the appellant, when he was Director of Immigration. Consequently Mr Cross had to disqualify himself from hearing the appeal.

The other member, Ms Bailey is a prominent Samoan. It was suggested by counsel for the Minister at the hearing that she was appointed because it was felt that a large number of appeals would come from Polynesians.

2. Requiring Information

A form has been drawn up by the Chairman, exercising the power of the Tribunal under Clause 4 Fifth Schedule, requiring the Minister to provide "any documents, written submissions, statements, reports, probation reports, police reports, memoranda and other materials and papers lodged or received by or prepared for [the Minister] and considered by [him] or [his] officers in reaching the decision appealed against".

The minister is also required to produce a copy of the deportation order and a report setting out considerations to which regard was had in reaching the decision to deport.

Thus, the Tribunal has ensured that it has the fullest amount of information possible. The counsel for the Minister at the hearing said that the entire file held by the Department was forwarded to the Tribunal.

The Secretary for the Tribunal receives all the information requested, and once everything requested is received, it is circulated to individual members of the Tribunal before the hearing.

Quite significant is the fact that an opportunity to peruse the entire file (information received) is given to counsel for the appellant before the hearing takes place so that the appellant can fully prepare his case.

3. Hearings

The Tribunal plans hearings where the appellant is situated. Where the appellant is in prison the Tribunal ensures that the hearing is outside the prison and in other premises. It was stressed that the Tribunal must be seen to be independent.

4. Considerations Taken Into Account

Each case is decided on its merits. No ministerial policy has been given or drawn to the Tribunal's attention. In the hypothetical situations where this happened, the Tribunal felt that the ministerial policy might not be an appropriate consideration to take into account.