NEW ZEALAND IMMIGRATION POLICIES AND THE LAW — A PERSPECTIVE

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Introductory Comments

The events of Labour weekend in 1976 highlighted the difficulties of strictly enforcing the immigration laws and brought into focus the socially and politically divisive nature of picking on minority ethnic groups when attempting to enforce these laws. It is an important comment on New Zealand society that there has apparently been no public rebuke, in disciplinary or other legal proceedings, of those responsible for what happened that weekend. The senior police officer on duty in Auckland publicly advised persons who did not have a "Kiwi accent" to carry a passport, and the Minister of Police dismissed outraged protests from Pacific Island community leaders with the comment that in a herd of Jersey cows the odd Friesian cows will stand out. The official inquiry which was reluctantly agreed to by the government did find that there was a substantial number of so-called "random arrests" but did not lay any blame on senior officers or officials responsible for the operations. It is understood that all the private actions instituted by innocent residents who were aggrieved by their detention or arrest have been settled out of court by the Crown — with substantial settlement payments in some cases. Thus there has been no opportunity to try to find the full facts in the public forum of a court. Even so, it is submitted that the Labour weekend operation clearly failed in attempting to resolve the difficult social and political problems of immigration policies by resorting to intimidation and coercion. Further, it is submitted that the nub of the problem lay in the fact that immigration policies have been governed almost entirely by ministerial and official discretionary powers. The problem of large numbers of "overstayers" arose because, in their discretion, at a time when industries were desperate for labour, immigration officials allowed many thousands of "visitors" to enter New Zealand on three-month visas, knowing full well that it was impossible for these "visitors" to stay in New Zealand or to pay for their air fares unless they stayed longer than three months and obtained full-time employment contrary to the conditions of a visitors permit.[1] The problems of "dawn raids", "random checks" and other attempts to round up illegal overstayers arose because, at a time of economic downturn, police officers and immigration officials decided it was appropriate to mount a campaign to catch "lawbreakers". It is the submission of this paper that the

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1 Under the terms of the Immigration Act 1964, s.14(1), permits are "only for the purposes of business, study, training, instruction, pleasure or health." New provisions relevant to this have been inserted by the Immigration Amendment Act 1977, with effect from 1 February 1978.

delegation of wide-ranging legislative or quasi-legislative powers to the executive is neither inevitable nor desirable and that it is imperative for steps to be taken to limit discretionary powers relating to immigration.

It is important, before proceeding to the substance of the paper, that the author's perspective should be made clear. I can best do so by adopting this statement of the Italian Association of Democratic Lawyers:[2]

> The position of the progressive lawyer we have been speaking of here is one which involves taking sides and choosing. . . . Again and again he will fight for one side and against another: he will uphold the arguments in favour of the right to employment against those which defend the right to ownership, those in favour of the right to strike against those of free enterprise, usefulness to society against profit-making, and so on. In a dichotomous society these arguments will not be impartial, though they will reflect aspirations which are universal and will be intimately linked with the defence of the dignity of man.
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> But there is a field in which the progressive lawyer can and must speak in defence of values which are officially accepted by all alike in the liberal democracies, and this is the defence of democracy itself. To criticise the upholders of the rule of law must not amount to leaving them the monopoly of that defence. On the contrary, the criticism will be all the more effective and convincing if it is aimed at the restrictive and purely "procedural" interpretation of democracy offered by holders of the rule of law theory.

It will be argued that only a "restrictive or procedural interpretation of democracy" can justify the ways and means by which the Minister of Immigration and his officials exercise their powers to govern the lives of migrants, and especially temporary migrants, residing in New Zealand. The slogan "law and order" is often a catchphrase relied upon by reactionary political elements. Usually the emphasis is much more upon "order" — maintaining the existing social and economic order — than upon "law". The illegalities committed by the police in the 1976 Labour weekend "random checks" for overstayers are an example of that. However, in the realm of immigration policy there is virtually no law that acts as a check on whatever type of order the Minister of Immigration wishes to impose.

Patterns of Migration

Migration flows are a constant factor in human history. School history books contained much about the various "hordes" of "barbarians" which swept in from Asia and toppled the Roman Empire thus undermining "civilisation" and ushering in the period known as the "dark ages". In the modern era of capitalism migration flows have followed a number of different patterns. First there was the migration of large numbers of Europeans throughout the world. The history books did not refer to them as "hordes" but rather as "settlers" in "new lands" and as people with a "civilising mission" — the Bible and the ploughshare. These migrants dominated the territories they moved into, created capitalist economic structures, and established appropriate political instruments to maintain their sway. Sometimes these settlers subjugated or even physically eliminated the indigenous peoples and became the majority ethnic group. This was the pattern in the Americas and Australasia, and the pattern continues today, for example in the Amazon region of

2 Italian Association of Democratic Lawyers, "The Role of the Lawyer in the Western World" [1977] 1 *Review of Contemporary Law* 47, 56.

Brazil. In other places the settlers always remained a minority and had to rely upon complex social, legal and political forms of coercion to maintain their dominance — as in South Africa and Rhodesia.

A second pattern of migration, very different in character, was coerced migration of various types. The most extreme form of this was the trade in slaves, particularly from Africa to the Americas, for cheap labour in the plantations of European settlers. Then there was the transportation of criminal convicts. Slightly different in theory but similar in practice were the methods of recruiting indentured labourers. Undoubtedly the most shameful chapters of Pacific history relate to the brutal episodes known as "blackbirding" to obtain labourers for plantations in Queensland and elsewhere.

A third type of migration was voluntary migration of people wishing to establish themselves as small-scale traders and commercial middlemen — for example Chinese in South-East Asia, Indians and Arabs in various parts of Africa. In recent years, since decolonisation by the imperial powers, these middle-level, commercially important ethnic minorities have been highly vulnerable — as Idi Amin's "economic war" in Uganda illustrated most vividly.

A fourth major migration pattern, and the primary concern of this paper, is a relatively modern phenomenon which has been given a tremendous boost with the advent of large-scale air travel. This is the movement of large numbers of people from the underdeveloped countries of the Third World to perform largely unskilled working-class jobs in the affluent capitalist countries. One author has described the process in this way:[3]

> If we compare the tide of migration with the action of a suction pump, we may say it is actuated by the pressure which the heads of firms, as the creators of the job opportunities, exert on the government authorities responsible for granting the permits.

Thus in Europe a number of ad hoc government policies have evolved which have been labelled, rather euphemistically, "guest worker schemes". The reverse aspect of the suction pump analogy is that such migrants have been used as an unemployment buffer. Unemployment figures can be kept down and nationals' employment can be protected by measures to repatriate existing "guests" and prevent or reduce the inflow of new migrants. This economic fact is at the basis of the ambivalence of many trade unionists towards normally accepted principles of working class solidarity. In some respects, because of this, communities of temporary migrant workers form a "sub-proletariat", a doubly-exploited layer of the proletariat. Xenophobic reactions of some workers towards immigrants in general and "coloured" immigrants in particular are an ideological reflection of this reality.

For New Zealand the sources of unskilled labour flows have been the islands of the South Pacific. As the process of local industrialisation has accelerated in recent years there has at times been an acute shortage of unskilled workers. The poor, small, highly underdeveloped islands of the Pacific have been a ready source to satisfy these labour demands. The results have been clearly decribed in a monograph aptly named *How*

3 F. Rigaux, "The Migration of Workers within E.E.C." [1977] 1 *Review of Contemporary Law* 75, 82.

Tonga Aids New Zealand,[4] where it is pointed out how young healthy workers migrate to New Zealand without the New Zealand government having to bear the costs of bringing up children (including health and education expenditures) or the cost of maintaining aged, maimed or other economically non-productive people. In addition New Zealand exporters benefit from the demand for consumer products by temporary migrants who have returned home.

Professor Rigaux, the author quoted above, has outlined the principal problems affecting migrant workers. He lists:[5]

(1) The notion of discrimination (i.e. racist reactions of local citizens)
(2) Insecurity of legal status
(3) Cultural alienation
(4) Sociological isolation
(5) Absence of political rights and restrictions on the enjoyment of constitutional liberties

This paper is concerned with issues relating to insecurity of legal status and with suggestions for reforms in the existing laws. It cannot be said that legal reforms will radically alter economic realities, but it is, as noted above, imperative that some lawyers should struggle to ensure that liberal democratic values are defended.

State Sovereignty and Interdependence

Jurists studying public international law have at various times debated the existence or otherwise of a rule permitting states to impose direct controls on alien immigration. The contending principles were those of state sovereignty as opposed to interdependence of states.[6] Undoubtedly the principle of state sovereignty, which assigns an absolute power for states to admit or exclude aliens at their own discretion, is of paramount relevance in present-day international relations. But there is a limited acceptance of the principle of interdependence by some states. Thus New Zealand imposes no immigration controls on trans-Tasman migration. Also, and highly relevant to the present topic, there are a number of Pacific Island territories whose residents are accorded the status of New Zealand citizens so that they can move freely to and from New Zealand. In this category are the existing colonial territory of the Tokelau Islands and the self-governing former colonies of Niue and the Cook Islands. To a much more limited extent there is a degree of interdependence between Western Samoa and New Zealand which relates back to an agreement made at the time Western Samoa achieved independence from New Zealand's United Nations Trusteeship rule. This agreement permits a limited flow of permanent migrants each year from Samoa to New Zealand. So there is a significant number of Pacific Island people for whom New Zealand has, legally at any rate, an "open door". For this reason, of course, the question of insecurity of legal status does not arise for these migrants, although they share the other problems of being minority ethnic groups of recent migrants.

4 J. de Bres & R. Campbell, *How Tonga Aids New Zealand* (Auckland, 1975).
5 Rigaux, supra n.3 at 80-87.
6 R. Plender, *International Migration Law* (Leiden, 1972). Chapter I deals with the issues of sovereignty versus interdependence and the origin of exclusionary powers.

For the rest of the world, including the rest of the Pacific, the New Zealand government maintains a strict system of immigration control and the principle of state sovereignty is very much relied upon today. It was not always so in the common law system which New Zealand has inherited. The author of a study on international migration law has pointed out that clause 14 of the Magna Carta of 1215 guaranteed merchants freedom to travel into and through the kingdom in accordance with ancient and lawful customs. He also quoted the considered view of W. F. Craies as follows — "Except with reference to foreign sovereigns, their ambassadors and their forces . . . there seems to be no prerogative of the Crown either to exclude or expel aliens" — although he suggested that that conclusion appeared to be somewhat extravagant.[7] The beginnings of modern immigration controls he traced to the Aliens Act 1793, which was intended to control the flow of refugees from France because of the fear that Jacobin emissaries had infiltrated the ranks of the refugees. Of course it was one thing to allow merchants freedom to enter England, but quite another thing to permit revolutionary democratic ideas to be spread around! By the time New Zealand received English laws it had become clearly established that statutory controls were a normal and accepted exercise of the powers of a sovereign state. New Zealand governments have never hesitated to control immigration in the manner they deemed fit.[8]

The Nineteenth Century

Issues relating to immigration policies in New Zealand have almost invariably been related to devising ways and means of encouraging settlers to emigrate to New Zealand. In the early years of the New Zealand state there was of course the problem of providing land for these new settlers, because most of the land was owned and occupied by the indigenous Maori people. These "immigration problems" were solved for the new migrants by a variety of means which were often devious and frequently brutal — including direct warfare.[9] One settler politician admitted as much when he said in the Upper House in 1863:[10]

> I was present when the Treaty of Waitangi was proposed, and an attentive and anxious listener to all that passed. I heard Her Majesty's representative arguing, explaining, promising to the natives, pledging the faith of the Queen and of the British people to the due observance of it; giving upon the honour of an English gentleman the broadest interpretation of the words in which the Treaty was couched. . . . The ink was scarcely dry on the Treaty before the suspicions which had been temporarily allayed by the promises of the Governor were awakened with redoubled force, and I need scarcely remind the Council that from that time (1840) to this, *every action of ours affecting the natives* had presented itself to their eyes, and had been capable of that interpretation, as showing that *our object and business* in this colony was to obtain possession of the land of the natives, *recte si possimus, si non quocumque modo.*

7 Ibid., 40, citing W. F. Craies, "The Right of Aliens to Enter British Territory" (1890) 6 L.Q.R. 27, 29.

8 New Zealand was not always of course a completely sovereign state, and the exercise of statutory powers in some circumstances was subject to disallowance by the imperial authorities in London: for example, see pp.190-191 infra on the Asiatic Restriction Bill 1896.

9 See A. Ward, *A Show of Justice* (Canberra, 1974).

10 G. W. Rusden, *Aureretanga; Groans of the Maoris* (Cannons Creek, 1974— originally published in London, 1888) 147, quoting Dr. Pollen, who was a member of the government ministry on numerous occasions over many years. Rusden gives his source as: [1863] N.Z.P.D. 872.

The point was made even more directly in *Te Hokioi,* the newspaper of the Maori King Movement, in the same year. It said (in translation):

> Look, your attempt to bring us under your rule without authority, is different from what you asserted. It shall not be so, men are of tall stature.[11]

Many of these valiant "men of tall stature" were brutally crushed later that very year in the Waikato Land Wars and enormous tracts of land were "confiscated" because of their "rebellion".

Strangely enough, in view of the historical facts, the official ideology sought not only to entirely gloss over the deception and force used by the settler migrants, with the ever-ready support of the imperial armed forces, but also to claim credit for the settlement policies. In fact extravagant claims like the following statement by a Governor, Colonel Gore Browne, were (and are) common:[12]

> New Zealand is the only Colony where the Aborigines have been treated with unvarying kindness. It is the only Colony where they have been invited to become one people under one law. . . . It will be the wisdom of the Maori people to avail themselves of this generous policy. . . . Every Maori is a member of the British nation; he is protected by the same law as his English fellow subjects.

It is difficult to believe that such hypocrisy was uttered by the Governor who was himself responsible for the events which deliberately provoked the Taranaki Land War in 1859.[13] It is easier to understand why this complacent and inaccurate ideology is having its bitter consequences even to this day — as the police/military operation to clear Bastion Point, Orakei, of its Maori land rights "squatters" on 25 May 1978 bears witness.

In time, the almost complete alienation of Maori land to settler migrants was achieved and a steady flow of migrants continued to be welcomed. However, there was one major exception to government policies of welcoming migrants — Chinese people. The Otago gold rushes brought all manner of persons of diverse origins to New Zealand including a small number of Chinese. Though they represented less than two per cent of the total population, in the minds of many they were an awesome portent of an Asiatic influx which could easily overwhelm the British Colony. An official committee in 1871 found that the Chinese migrants were industrious, frugal and orderly, that they were not likely to introduce any special infectious diseases and that anyway few were likely to become permanent settlers. Pandering to anti-Chinese feelings proved, however, to be a popular electioneering ploy and for thirty years from 1877 to 1907 debates on appropriate legislation to restrict Chinese immigration took place almost every legislative session. The most important measures passed included the following: the Chinese Immigrants Act 1881 which imposed a £10 poll-tax on all Chinese immigrants and restricted their number to one migrant per ten tons of cargo on the ship carrying such migrants; and the Chinese Immigrants Act 1888 which increased the passenger restriction to one migrant per 100 tons. The Asiatic Restrictions Bills of 1896 sought "to safeguard the race purity of the people of New Zealand" by raising the poll tax to £100 per head and

11 *Te Hokioi,* 22 January 1863—quoted in Ward, supra n.9 at 98.
12 Ward, supra n. 9 at 115-116.
13 See K. Sinclair, *The Origins of the Maori Wars* (Wellington, 1961) ch.9.

limiting migrants to one per 200 tons of cargo — this Bill applied to all "Asiatics", then was amended to exclude British Indians and Jewish people, but it was reserved for assent by the Imperial authorities and was eventually disallowed. Meanwhile, the £100 tax and 1:200 tons cargo ratio had been applied to Chinese only by the Chinese Immigration Restriction Amendment Act 1896. By the Immigration Restriction Act 1899 the further requirement that an application for entry had to be written out in a European language was imposed. Finally a test of 100 English words was required by a further amendment passed in 1907.[14]

This long saga of overtly racist legislation is the clearest possible evidence of the willingness of New Zealand governments to exercise statutory powers to prohibit aliens from entering the country. Any doubts as to the legislative competence of the Australasian Colonies to pass such legislation were firmly thrust aside by the Privy Council in the fascinating case of *Musgrove* v *Chun Teeong Toy*.[15] The respondent was one of 268 Chinese prospective immigrants who arrived on board a British ship, the *Afghan,* at the port of Melbourne. The master of the ship tendered the £10 per head poll tax but the appellant as Collector of Customs refused to accept the sum of money and refused to allow the respondent to land in Victoria. He refused because section 2 of the Chinese Act 1881 required a proportion of one Chinese immigrant to every 100 tons of the tonnage of the vessel.[16] The *Afghan* by this test had 254 more Chinese than the Act allowed.[17] A Full Court of the Supreme Court carefully inquired into the constitutional powers of the colonial state authorities and concluded that the defendant had no power to act as he had in excluding these aliens. It was also held that damages of £150 should be awarded to the plaintiff. The Privy Council would have none of this. It advised that upon the true construction of the enactments the respondent had no right of entry, and then their Lordships went much further saying:[18]

> Their Lordships would observe that the facts appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native, but it is quite another thing to assert that an alien excluded from any part of Her Majesty's dominions by the executive government there, can maintain an action in a British Court, and raise such questions as were argued before their Lordships on the present appeal — whether the proper officer for giving or refusing access to the country has been duly authorised by his own colonial government, whether the colonial government has received sufficient delegated authority from the Crown to exercise

14 Information derived from P. C. Campbell, *Chinese Coolie Emigration to Countries Within the British Empire* (New York, 1969—originally published in London, 1923) 79-84. See also the more detailed account in M. J. McNeur, *Chinese in New Zealand* (1930) M.A. thesis, University of Otago.

15 [1891] A.C. 272.

16 The Victorian Act of 1881, like the New Zealand legislation of that year, followed on from an agreement reached at the Australian Inter-State Conference of 1880-1881. See Campbell, supra n.14 at 80.

17 Ibid., 70-72 contains an account of the mass meetings and demonstrations by white settlers when news arrived of the impending arrival of the *Afghan.*

18 [1891] A.C. 272, 282-3.

> the authority which the Crown had a right to exercise through the colonial government if properly communicated to it, and whether the Crown has the right without Parliamentary authority to exclude an alien. Their Lordships cannot assent to the proposition that an alien refused permission to enter British terrirtory can, in an action in a British Court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies. When once it is admitted that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory, their Lordships are of opinion that it would be impossible upon the facts which the demurrer admits for an alien to maintain an action.

That opinion of the Board firmly puts a Chinese alien in his place for having the impudence to raise difficult constitutional law issues sufficiently convincing for the colonial Supreme Court to give judgment in his favour!

In reflecting on the legislation to restrict Chinese migration to New Zealand it is worth making the point that this was a blunt, unsubtle use of law in a form which clearly spelled out the requirements that Chinese migrants had to fulfil before they could be allowed to enter the country. The great merit of this form of immigration policy was that it involved *legislative* decisions as to how an immigration issue should be resolved. Parliament itself set out the criteria and the pre-conditions and government officials had merely to implement the statutory decisions — "Have you got your £100 for poll-tax?" "How many tons of shipped cargo is on board this ship?" Chinese who wished to migrate to New Zealand knew exactly what they were up against and knew how they could comply with the exacting requirements of the law. It is a major submission of this paper — as will be elaborated shortly — that the anti-Chinese legislation of last century is a much better model for laws regulating immigration than our current laws which lay down no proper criteria for decision-making but confer enormously wide discretionary powers on the Minister of Immigration and his officials.

Modern Problems

As suggested above, the usual focus of government immigration policies in the past has been on the promotion of emigration to New Zealand. There have been numerous schemes providing free or assisted passages to New Zealand for migrants who had skills which were needed for the development of the New Zealand economy. This was especially so as the economy gradually moved away from its near total reliance on primary produce for export and began to develop a larger local industrial base. Virtually all subsidised and assisted passage migrants came from Britain, with a small number from the Netherlands and insignificant numbers from elsewhere in Europe and from North America.[19] Such immigration policies were not fertile ground for legal disputes and whilst immigrants came to New Zealand in a fairly steady flow from Britain and Europe few problems arose. A person who inquired about emigration at the New Zealand High Commission in London would be given a circular which stated that people of British birth, wholly of European origin, of good health and character and in possession of valid British passports

19 Statistics for the period 1946-1977 in round figures: from Britain, 101,000; from the Netherlands, 9,100; from elsewhere in Europe and from North America, 3,100. Annual Report of the Department of Labour [1977] A.J.H.R. G1.

were not required to make an application for a permit before leaving for New Zealand and would be given one at the time of arrival.[20]

It is not the case that a law report series is likely to give an accurate reflection of all aspects of law in a changing society. It is interesting however to note that the 1972 volume of the *New Zealand Law Reports* is something of a watershed with respect to cases on immigration statutes. For many years such cases were few and far between. Thus from 1946 to 1971 there were only two reported cases concerning the Immigration Restriction Act 1908 or its amendments, and there was none on the Immigration Act 1964 which repealed and replaced the earlier legislation.[21] Then appears *Sione* v *Labour Department*[22] and since then there have been immigration cases reported almost every year. The facts of *Sione's* case give an indication of the nature of the modern problem for New Zealand's immigration policies. The appellant was a Tongan citizen who stowed away on the passenger liner *Australis*. He was detected and put to work, but locked up at each port. After the liner left the wharf in Auckland Sione was unlocked as usual. He then jumped into the harbour and got into difficulties, but was picked up and taken to hospital. He was also immediately charged and later convicted of entering New Zealand without a permit. The reason he gave for his action was his desire for "making a new life". Before Richmond J. on appeal, Mr Edwards, of Clive Edwards and Fuimaono,[23] put forward the rather ingenious argument that Sione had not entered New Zealand voluntarily — he was in custody on the ship. He could not therefore have had the required mens rea for the offence charged. As for jumping over the ship's side, it was suggested that the appellant was merely moving around the country he had already entered. Not surprisingly perhaps, the appeal was dismissed.

The interest in this case for present purposes is not the legal analysis of the provisions of the Immigration Act 1964. Its relevance lies in its fact situation, as it is one of many cases that are now dealt with quite routinely in the Magistrate's Court. Stowing away on ships (and even on the undercarriages of aircraft) is a regularly attempted, though seldom successful, way of trying to "make a new life". The Kingdom of Tonga is a small overcrowded group of islands with a restrictive, authoritarian government and a semi-feudal economic system. It is clearly an underdeveloped country with a "surplus" population being drawn to work overseas in California, Australia, and especially New Zealand. By an accident of the history of imperialism in the South Pacific, Tonga was a British Protected State without any legal ties to New Zealand though it is geographically closer to New Zealand than most of the New Zealand island territories.

Stowing away is clearly an illegal way of trying to circumvent New Zealand's immigration barriers. The more normal route adopted by

20 The circular was produced to the court in *Labour Department* v *Green* [1973] 1 N.Z.L.R. 412, 413.

21 *Annandale* v *Collector of Customs* [1955] N.Z.L.R. 168; *Queen v Elliott* [1964] N.Z.L.R. 158.

22 [1972] N.Z.L.R. 278.

23 Mr Edwards and his partner both have Pacific Island origins. Mr Edwards has long been President of the Tongan Society in Auckland.

thousands of Tongans, Fijians[24] and Samoans[25] has been to apply for a three-month visitor's permit and then to lead the semi-fugitive life of being an overstayer. By 1972 there were certainly many thousands of people in this category, and of course insecurity of legal status was an everyday fact of life. Factories depended on the large pool of labour thus made available and knowingly recruited overstayers. Some firms even sent agents to the home islands to encourage more people to come in on visitors' permits. The Immigration Section of the Labour Department as a consequence became increasingly inundated with applications to extend visitors' permits and with applications for permission to remain permanently in New Zealand. It is in dealing with these applications that the fact of enormous discretionary powers in the hands of officials becomes a key issue. Members of Parliament, lawyers, employers, church leaders and others regularly engaged in making representations on these immigration matters have no legal guidelines to assist them. Constant dealings with the Labour Department makes one aware of some of the factors which weigh in favour of or against an applicant. Curt letters, without reasons given, are the norm so far as the applicants are concerned. Rumours circulate that so-and-so was granted permanent residence and others question why they are treated differently and are given ten days to leave the country.

If challenged in legal proceedings, the Crown argues very strongly and forcefully that there should be no limitation whatsoever on the discretionary powers of the Department. As it was put by a Crown counsel in one case, "the control of immigration is a matter of extreme social and national importance."[26] Thus there are the simple terms of section 14(6) of the Immigration Act 1964 — "A temporary permit granted under this section may be at any time revoked by the Minister." When exercising the power thus granted to revoke the temporary permit of a Mr Tobias no reasons were given and there was no chance to make representations. Quilliam J. fully accepted the Crown's submissions in stating:[27]

> It is necessary to remember that the basis upon which s.14 proceeds is first and foremost that no alien may have any right of entry into New Zealand. The Minister may, upon certain defined grounds, permit an alien to enter. That permit may only be granted for a limited period and from the moment it is granted it is subject to revocation at any time. . . . Whether or not in

24 Fiji, now independent, was a British Crown Colony. Fiji has long been termed "a special problem" for New Zealand's immigration policy—apparently because of the pressure to emigrate felt by some sections of the Fijian Indian community. The term "special problem" appeared in the September 1966 published statement of government immigration policies.

25 Western Samoa has long-standing links with New Zealand as a former New Zealand-administered United Nations Trust Territory. However, only very limited numbers of Samoans are allowed to obtain continuing residence permits in New Zealand which can later be converted to permanent residence permits. For others, economic and political pressures similar to those in Tonga (although perhaps somewhat less intense) are the stimulus for the "suction pump" of migration to New Zealand.

26 *Labour Department* v *Aloua* [1975] 1 N Z.L.R. 507, 508. Crown Counsel there argued, without success fortunately, that unrestricted immigration is a social evil which must be rigorously controlled so that the overstaying offence — s.14(5) of the Immigration Act 1964 (now repealed and substituted by s.4(2) Immigration Amendment Act 1976)—should be held to be an offence of strict liability.

27 *Tobias* v *May* [1976] 1 N.Z.L.R. 509, 511-512.

> any particular instance it might be thought unreasonable . . . [to give an opportunity of making representations] . . . is one thing; to hold, in effect, that it must be done in every case, is altogether another. That would be to take out of the Minister's hands the freedom of action with regard to aliens which the legislature has been at pains to confer upon him.

The same judge in another case made an equally sweeping observation with respect to the Minister's powers to deport aliens:[28]

> I think it must be accepted that the intention of the legislation is to confer on the Minister a wide discretion and it would be contrary to the nature of that legislation to fetter the Minister's discretion by importing into it the additional procedural requirements which would be necessary if the audi alteram partem principle is to apply.

It is submitted that it is necessary to find ways to limit the Minister's freedom of action. Perhaps the point can be made most clearly in relation to the "amnesty" for overstayers announced in April 1976. In fact the government offer was not a proper amnesty like that of the Australian government made at about the same time. Rather it was a policy of registering all overstayers and then deciding which of them should be allowed permanent residence, which should be granted a temporary permit to stay a little longer and which should be repatriated immediately. The Minister of Immigration apparently expected that the many thousands of overstayers should register themselves with the Labour Department without any indication of who would decide on the applications and of what criteria would be used in making such momentous decisions in the lives of these people. By a combination of unauthorised press leaks, private negotiations and public pressure it eventually transpired that there was not a complete cloak of secrecy upon that decision-making process. What needs to be challenged — and strenuously challenged — is the assumption by Government Ministers and their advisers that people should be expected to have no procedural safeguards in decisions that so fundamentally affect their future. After all, by definition, every person who registered on that register was a "law-breaker" who should not have been in the country at all. And now some of them were to acquire permanent residence permits and others were to be ordered to leave the country forthwith. Such decisions are a good deal more important in human, social, political and economic terms than thousands of relatively trivial matters routinely dealt with in courts and in scores of New Zealand's mass of permanent administrative tribunals — where there are rights of hearing, rights of appeal to independent bodies and the other paraphernalia of natural justice.

Decisions at an individual level are of very great importance for that person. A twenty-one year old woman entered New Zealand on a student permit to study at a commercial college. Because of an insufficient grasp of English she was learning slowly, so she decided to enrol for English and other subjects at Form VI level in a school with a special adult education programme. She was ordered to return to the commercial college or to leave the country within three weeks of the date of the letter informing her of this extraordinary decision. Representations from various quarters failed to bring about a changed decision, no doubt because all these representations arrived back on the same official's desk. At any rate the same or a very similar reply was given to all letters

28 *Pagliara* v *Attorney-General* [1974] 1 N.Z.L.R. 86, 95.

whether directed to the district office, the Wellington head office, or to the Minister himself.[29]

Then there are decisions which relate to individuals but vitally affect numerous people. For example, some of the churches which play a vital role in the life of many Pacific Island migrants have to rely on ordained ministers who are only temporarily present on visitors' permits or temporary work permits. This leads to a lack of continuity for the church community, but requests to the authorities to allow some of these ministers to stay on are turned down when, as is often the case, the applicants are over the age of forty-five. It seems strange that a community which relies on its church leaders and greatly respects its elders should not be allowed this important stabilising influence in the alien cultural environment of New Zealand society.[29]

Sometimes decisions are taken which might make sense from the point of view of enforcing immigration laws but lead to nonsensical results if a wider view is taken. For example, an overstayer who has been in New Zealand for some time marries a New Zealand citizen who is bearing their child. He then applies for permanent residence status to regularise matters. He is told that he has flouted New Zealand law so he must return to his home country and from there apply to re-enter. If he does so his application will be granted and he can rejoin his family. That may vindicate the country's immigration laws but at what a price. The family must find the cost of a return air fare when the breadwinner is being put out to work. During the husband's absence the wife usually will have to be supported by social security and, in view of the time delays often involved, she may well suffer the trauma of having her first childbirth whilst her husband is absent overseas. From a human, social and economic point of view the exercise is quite ridiculous.[29]

At the very least, it is submitted, it should be possible to take matters such as these to some authority outside the Department which made the initial decision and which is thus very loath to reconsider the decision.

A wider issue concerning the discretionary powers of the Minister has been raised by recent decisions relating to the freedom of speech of persons temporarily in New Zealand. It has been reported that the United Nations representative of the Democratic Republic of East Timor and any student selected to a New Zealand Universities Students' Association Southern Africa Scholarship shall not be permitted to participate in public political activities if they should come to New Zealand. The implications of this exercise of discretion by the Minister of Immigration are extremely disturbing, to say the least, in view of the power the Minister has over the lives of temporary migrants — in particular to revoke a temporary permit at any time without giving a reason. A more potent gag on political activism by temporary migrants and any other residents who do not have permanent residence status it is difficult to imagine. These recent cases make it clear how extremely important it is to speak up in defence of democratic values and against unfettered discretions in the hands of officialdom.

Minimum Demands

In this concluding section of the paper a number of suggestions will be put forward which can be viewed as minimum demands to provide

29 These three examples are based on particular cases with which the writer has been involved.

for an improved legal regulation of the administration of immigration policies. First, within the existing legal framework, it is suggested that the possibility exists of a successful challenge to the Crown's claim that the Minister of Immigration's discretion should be unfettered and not subject to judicial review. In the most recent litigation in which this issue was considered — *Movick* v *Attorney-General*[30] — there is an interesting conflict of views. Davison C. J., in one of his first judgments, appeared to accept *in toto* the Crown's claims. However, obiter dicta in the judgments of the Court of Appeal make it clear that, without deciding the point, it is overstating the case to claim that a decision of the Minister of Immigration cannot be questioned in an application for review.[31] This seems to be a clear signal from the Court of Appeal that in a case with a more meritorious fact situation there could be an opportunity to successfully question an immigration decision. Perhaps the carte blanche of the Crown, accepted by Quilliam J. in the earlier cases cited above, would be reconsidered. It is interesting to note that recent immigration cases in Australian courts have led to sharp judicial differences of opinion. In *Salemi* v *Minister for Immigration and Ethnic Affairs*[32] the statutory provision was a section in simple terms. Section 18 of the Migration Act 1958 (Commonwealth) read: "The Minister may order the deportation of a person who is a prohibited immigrant under any provision of this Act." On the issue of whether or not there were any natural justice procedural requirements which controlled the Minister's power to act under section 18, the six members of the High Court of Australia were evenly divided. Barwick C.J., Gibbs and Aickin JJ. stressed that the Act was concerned with a matter of national interest and that all decisions should be made in conformity with the relevant governmental policies rather than with principles laid down by the judiciary. On the other hand Stephen, Jacobs and Murphy JJ. argued that at the least the Minister was under an obligation to disclose the reasons for his threatened deportation and provide an opportunity to present submissions which might displace those reasons. In *Salemi's* case the plaintiff had been illegally overstaying a visitor's permit and came forward to apply for resident status at the time of the government's amnesty offer. His application was turned down for reasons which appeared to be based on an incorrect view of the facts relating to the plaintiff's entry into Australia. Yet the Minister refused to reconsider his decision and later staunchly defended the proceedings brought against him. The case on its facts is clear evidence of the need to be able to review a Minister's decision, even if, on a narrow view of statutory interpretation, the position adopted by Barwick C. J., Gibbs and Aickin JJ. may be more convincing.[33]

It is necessary, however, to go further than questioning the exercise of the Minister's powers by litigating particular individual cases. What is required is a fundamental reassessment of the legislative framework of

30 Unreported judgment of Davison C.J., Supreme Court, Wellington Registry, 15 March 1978, A.112/78.

31 Unreported judgment of Woodhouse, Richardson and Quilliam JJ., Court of Appeal, Wellington, 17 March 1978, C.A.24/78.

32 (1977) 14 A.L.R. 1.

33 See G. A. Flick, "Natural Justice Before the High Court of Australia: Three Recent Cases" [1978] N.Z.L.J. 90. One of the other cases discussed is also an immigration case: *R.* v *Minister of Immigration and Ethnic Affairs, Ex parte Ratu* (1977) 14 A.L.R. 317.

the immigration laws. If immigration policies really are of such importance to the national interest — and it is not suggested that they are not — then it is submitted that they are important enough to require *legislative* decisions and not merely *executive* decisions. It is clearly not the case that the overall immigration policies need to be adjusted frequently — as is alleged to be the case with economic policies implemented by Economic Stabilisation Regulations. Parliament should therefore be set the task of enacting legislation which contains the government policies, and thus reject outright the method of conferring discretions contained in the Immigration Act 1964. In general terms there are some policy guidelines contained in the government statement of 7 May 1974. The racialism has been removed from the previous September 1966 policy which established a descending order of priorities and an ascending requirement of skills from British citizens of wholly European origin, to North Europeans and North Americans, then to South and East Europeans. The strictest limitations of course applied to the peoples of Asia and Africa. Now the basic element for permanent entry to New Zealand should be the likelihood that the applicants will settle harmoniously with the community but nevertheless "[t]he objective of harmonious settlement should not stand in the way of orderly change in the ethnic composition of the population."[34] It is the implementation of general policy which causes the problems, however, and in its detail the legislation here being advocated must provide procedures by which officials' decisions can be tested against stated legal criteria and the facts of particular cases. Obviously essential is the establishment not only of procedural safeguards with respect to the initial decision-making process but also of an independent appeal authority. No doubt there are bureaucrats who would view proposals such as these with horror, but is it really outrageous to require that a clearly defined procedure is followed which gives a person a reasonable chance to present his side of the facts before his stay is terminated by revocation of his permit? Would it undermine the "New Zealand way of life" if there were the requirement of a court order before any person could be deported? After all, deportation is a penalty which in its finality and severity exceeds almost all of the penalties imposed by the criminal law. Would it cause unthinkable social evils if there were a statutory provision declaring that any person who bona fide marries a New Zealand citizen shall have the right to continue to reside in New Zealand? Putting the matter broadly, ought not our legislature to allow migrants and temporary residents in this country to know the real basis for decisions affecting their lives and to guarantee them some of the legal rights, including appeal rights, which are thought to be axiomatic for citizens faced with problems caused by government decision-makers?

It would require another article to spell out the details of the type of legislation which is being argued for in this paper. It is hoped that this attempt to put the question of immigration policies and the law into an historical perspective has aroused a degree of interest. It is also hoped that those engaged in law reform, political party policy-making, and pressure-group lobbying will think it worthwhile to carry out the detailed work required to implement the minimum demands which have been suggested. There are existing precedents in various countries which

34 Set out as Appendix 4A in the Report of the Inter-Departmental Committee on Resettlement, *Review of Immigration Policy* [1975] 3 A.J.H.R. G34.

would go some way towards satisfying these demands. Perhaps the best known would be the appeal system established in the United Kingdom by the Immigration Appeals Act 1969[35] with adjudicators at first instance, and an Immigration Appeal Tribunal, considering the merits of Home Office decisions, and with recourse to the ordinary courts on various matters of law being frequently relied upon.[36] The most recent issue of the *Commonwealth Law Bulletin* contains information from two jurisdictions closer to home which in 1978 have laid down procedures and criteria relating to deportation decisions. The *Bulletin* reported that in the Solomon Islands the Deportation Ordinance 1978[37] makes provision to allow

> the responsible Minister to make a deportation order in respect of a convicted person, an undesirable person, a destitute person or a prohibited immigrant. It expressly provided that the Ordinance does not apply to citizens.... The Minister is required to serve a notice on a proposed deportee specifying the grounds (with sufficient particulars) upon which the order is intended to be made, and requiring him to show cause before a Magistrate why such an order should not be made against him. The proceedings before the Magistrate are to be held in camera if the Attorney-General so certifies, or the proposed deportee so requests. Legal representation is provided for, and witnesses may be called on either side. When the proceedings are concluded, the Magistrate is required to report to the Minister and on receipt of the report "the Minister may, in his discretion, having regard to the findings of fact and any conclusions of law stated in the report, make a deportation order".

Even more helpful is the decision of the Commonwealth of Australia's Administrative Appeals Tribunal in *Re Salazar-Arbelaez and Minister for Immigration and Ethnic Affairs*. The applicant had been convicted of the possession and sale of heroin but the Tribunal, which was established under the Administrative Appeals Tribunal Act 1975, laid down a number of guidelines of general importance including the following:[38]

> (iii) although the expression "the best interests of Australia" left much to be desired, it was not to be understood in a narrow and restricted sense but as extending to such interests broadly regarded and embracing, on occasion and according to circumstances, the taking of decisions by reference to a liberal outlook appropriate to a free and confident nation;
>
> (iv) adopting this approach, the Tribunal ought not to find the acceptable level of risk to be so low that deportation was the prima facie result of any conviction which fell within s.13 of the Migration Act;
>
> (v) long established policy showed a more tolerant and confident response to migrants who transgressed the laws of Australian society; . . .
>
> (ix) although the interests of the community in general would best be served by deportation, humanitarian considerations must always be weighed.

The above examples are cited merely to confirm that there is a strong trend away from bestowing unfettered powers on Ministers responsible for decision-making in immigration cases.

35 The Immigration Appeals Act 1969 (c.21) followed the report of the Committee on Immigration Appeals (1967, Cmnd. 3387) and it has since been consolidated into the Immigration Act 1971 (c.77), Part II.

36 Recourse to the ordinary courts may of course lead to narrow formalistic reasoning, as for example in *Suthendran* v *Immigration Appeal Tribunal* [1977] A.C. 359 (H.L.). (But cf. Lord Kilbrandon's dissent therein.)

37 (1978) 4 C.L.B. 811.

38 (1978) 4 C.L.B. 883, 884.

In conclusion, therefore, it is hoped that there will be a determined effort to lessen the legal insecurity of persons temporarily residing in New Zealand. This may have only a marginal impact on the social and economic pressure affecting many of these persons, but, as it has been argued above, even achieving a marginal improvement is better than doing nothing at all. Furthermore, the solidarity which would need to be attained by various groups and people in order to challenge the existing status quo should in itself be a worthwhile contribution in the struggle to defend democratic values.