IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-1591
[2018] NZHC 45

BETWEEN	NOBILANGELO CERAMALUS Plaintiff
AND	CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT First Defendant
	THE MINISTER OF IMMIGRATION Second Defendant

Hearing:	27 November 2017
Appearances:	Plaintiff in person M Mortimer for the Defendants
Judgment:	2 February 2018

JUDGMENT OF WOODHOUSE J

Parties/Solicitors:
Mr N Ceramalus
Mr M Mortimer, Meredith Connell, Office of the Crown Solicitor, Auckland

[1] The plaintiff, Mr Ceramalus, has brought an application for judicial review of two decisions of Immigration New Zealand declining applications by Ms Jennifer Agcaoili, a citizen and resident of the Philippines, for a visitor visa to allow her to enter New Zealand. Mr Ceramalus has also applied for review of matters arising from or relating to steps he took to seek to reverse the decisions and enable Ms Agcaoili to enter New Zealand.

[2] The defendants have applied under r 15.1 of the High Court Rules 2016 to strike out the proceeding on the following grounds:

(a) The claim does not identify a cause of action or causes of action, such that the defendants are prejudiced in that they are not fairly informed of the case against them, and the claim is therefore likely to cause prejudice or delay.

(b) The claim discloses no reasonably arguable cause of action.

Background

[3] On 2 December 2015, Ms Agcaoili made an application to Immigration New Zealand at the office of Immigration New Zealand in Manila, Philippines for a visitor visa to New Zealand. Ms Agcaoili was sponsored by Mr Ceramalus. The application was declined, by letter dated 4 December 2015. The letter recorded, amongst other things:

> Please note that there is no statutory right of appeal. There is also no right of reconsideration of this decision.
>
> …
>
> You may apply again for a visitor visa at any time. Any future application is unlikely to be successful unless your circumstances have changed significantly. If you wish to apply in the future, you will be required to lodge a new application which will be considered on its merits.

[4] Mr Ceramalus is a New Zealand citizen and resident in New Zealand. He took up Ms Agcaoili's case. He obtained authority from Ms Agcaoili to act on her behalf to seek "Ministerial intervention" in respect of the decision to decline the application. There was correspondence between Mr Ceramalus and Immigration New Zealand and

involvement of the Minister's office, without resolution to Mr Ceramalus's satisfaction.

[5] Mr Ceramalus was referred to a "Client Complaint Resolution Process" of Immigration New Zealand. It is now referred to as the "Complaint and Feedback Process". The processes are the same and I will refer to them as "the complaint process".

[6] Mr Ceramalus used the complaint process and sought to persuade Immigration New Zealand to change its decision on Ms Agcaoili's application and grant her a visa. Immigration New Zealand declined to do so on the grounds that it was unable to do so through the complaints process.

[7] There is a letter to Mr Ceramalus of 25 July 2016, from the manager of Immigration Resolutions, a part of Immigration New Zealand which is a section of the Ministry of Business, Innovation and Employment (the Ministry). This letter summarised the position of Immigration New Zealand as follows:

> As advised by Ms Frankham in her letter of 28 April 2016, INZ's complaints process is not intended as an avenue to seek a review of a visa application when dissatisfied with the outcome of a visa decision. The decline of Ms Agcaoili's visitor visa application has now been reviewed three times – once by a Delegated Decision Maker following a request for ministerial intervention, once by Ms Frankham, and now by me. I acknowledge that you are likely to remain dissatisfied but the matter of Ms Agcaoili being declined a visitor visa is now at and [sic] end as far as INZ is concerned and as such no further correspondence will be entered into. For the avoidance of doubt that means that any further communication from you about Ms Agcaoili's visa application and your subsequent complaints, will go unanswered.

[8] Copies of the preceding correspondence were not put in evidence, and did not need to be put in evidence on an application to strike out the proceeding. However, submissions for the defendants noted that much of Mr Ceramalus's correspondence "was in the same tone as the documents he has filed in Court". The documents he has filed contain allegations against employees of the first defendant, and Immigration New Zealand in general, of serious wrongdoing. This is perhaps encapsulated in one of the orders Mr Ceramalus seeks, which is to –

> To remove and prevent the evil practices, policies, rules and culture evidenced and exposed in this present case.

[9] On 20 March 2017 Ms Agcaoili, in the Philippines, made a further application for a visitor visa. This was declined by letter dated 24 March 2017. Mr Ceramalus challenged this decision through the disputes process, without success. He issued the present proceeding for judicial review on 17 July 2017.

The matters challenged by Mr Ceramalus

[10] This proceeding has been brought expressly under the Judicial Review Procedure Act 2016. So far as is relevant to this proceeding, applications for judicial review may be brought in respect of the exercise, or failure to exercise, a statutory power of decision.[1] The matters challenged by Mr Ceramalus go beyond statutory powers of decision, as I will discuss shortly. It is for that reason that the heading to this section refers to "matters" challenged by Mr Ceramalus, rather than "decisions".

[11] Mr Ceramalus has acted throughout on his own behalf. His pleadings and submissions are not entirely clear. At the commencement of the hearing, Mr Mortimer, for the defendants, submitted that it appeared from the statement of claim and submissions filed by Mr Ceramalus that there were three broad matters which he challenged. I then discussed this with Mr Ceramalus for the purpose of identifying all matters that he sought to challenge. Mr Ceramalus said that there are five matters of concern, as follows:

1. The process that led to both of the visa application decisions and the decisions themselves.

2. The response by Immigration New Zealand to Mr Ceramalus from the point that he first made a complaint in respect of the first visa decision.

3. There are provisions in Immigration New Zealand's complaints process publication which are contrary to law.[2] Mr Ceramalus

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1 Judicial Review Procedure Act 2016, ss 3 and 5.

2 Mr Ceramalus referred to Immigration New Zealand's operations manual, but his complaint was about the content of the complaints process publication. There is a link to the electronic version of the complaints process publication in the operations manual, but the latter is quite different in terms of legal force from the complaints process publication. The difference between the two is explained below.

submitted that there are provisions contrary to s 27 of the New Zealand Bill of Rights Act 1990 and the first seven of the enactments listed in Schedule 1 of the Imperial Laws Application Act 1988, which I identify below.

4. Section 186 of the Immigration Act was misinterpreted in respect of both of the visa applications. Section 186 is recorded below.

5. There is a general challenge by Mr Ceramalus to the way in which Immigration New Zealand operates. The broad contention is that there are systemic problems in terms of the application of the law.

[12] Mr Ceramalus's complaints can be considered under four headings, as follows:

(a) The decisions on the visa applications.

(b) The complaints process.

(c) The interpretation of s 186 of the Immigration Act.

(d) The way in which Immigration New Zealand operates.

The decisions on the visa applications

[13] Mr Ceramalus made clear that his complaint in relation to the decisions on the visa applications includes what occurred leading up to those decisions, as well as the decisions themselves. References in this judgment to "decisions on the visa applications" include matters leading up to the decisions. Mr Ceramalus alleges that the decisions were the result of a "series of false, unjust and unfair accusations made in writing against" Ms Agcaoili.

[14] On a strike out application it is to be assumed that the facts pleaded in the statement of claim are true.[3] That is unless the facts pleaded are self-evidently

[3] *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.

speculative or false.[4] Mr Mortimer, for the defendants, whilst acknowledging the principle just noted, submitted that Mr Ceramalus has made "extreme allegations" of serious dishonesty or other wrongdoing, but failed to provide proper particulars of fact. I agree, but it is unnecessary to address the submission. If it is assumed, for present purposes, that Mr Ceramalus could provide admissible evidence in support of the allegations, he nevertheless cannot proceed with the application. This is because s 186 of the Immigration Act 2009 prevents an application for judicial review from being brought in respect of the visa decisions in this case.

[15] The specific provision in s 186 is subsection (3). However, the section as a whole has relevance in other respects and is conveniently recorded here in its entirety. It is as follows:

> **186 Limited right of review in respect of temporary entry class visa decisions**
>
> (1) No appeal lies against a decision of the Minister or an immigration officer on any matter in relation to a temporary entry class visa, whether to any court, the Tribunal, the Minister, or otherwise.
>
> (2) Subsection (1) applies except to the extent that section 185 provides a right of reconsideration for an onshore holder of a temporary visa in the circumstances set out in that section.
>
> (3) A person may bring review proceedings in a court in respect of a decision in relation to a temporary entry class visa except if the decision is in relation to the—
>
> (a) refusal or failure to grant a temporary entry class visa to a person outside New Zealand:
>
> (b) cancellation of a temporary entry class visa before the holder of the visa arrives in New Zealand.

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4 *Siemer v Judicial Conduct Commissioner* [2013] NZHC 1853 at [13].

[16] The two decisions on Ms Agcaoili's applications for a visitor visa were decisions in relation to a "temporary entry class visa". A "visitor's visa" is not a defined class of visa under the Immigration Act 2009. This is true for the versions of the Act as at December 2015 and March 2017 (when Ms Agcaoili's applications were made). A "visitor's visa" was a specified class of visa under the former Immigration Act 1987 and Part 1 of Schedule 5 of the 2009 Act now classifies these as a "temporary visa". As the 2009 Act was in force at the dates of Ms Agcaoili's applications, it is safe to assume that references to a "visitor's visa" in Mr Ceramalus's application are intended to be references to a temporary entry class visa. That is also indicated by the reference in the letters from Immigration New Zealand to Ms Agcaoili, declining her applications for "visitor visa – General", which refer to s 186 of the Immigration Act 2009 and "temporary entry class visa" applications.

[17] Mr Ceramalus did not seek to argue that s 186(3) does not apply to the decisions made in respect of the two visa applications by Ms Agcaoili. His submission was, in effect, that s 186(3) is a nullity because it is contrary to s 27 of the New Zealand Bill of Rights Act and the first seven of the enactments listed in Schedule 1 of the Imperial Laws Application Act 1988. I will refer to the latter as the constitutional enactments. Mr Ceramalus made clear that he challenges the validity of s 186 (and of s 247 referred to below) of the Immigration Act on the grounds that both sections are contrary to the constitutional enactments. It became apparent that this contention underpins Mr Ceramalus's application for judicial review as a whole.

[18] Mr Ceramalus's argument is untenable. Section 186 (and s 247) is binding on the Courts. In consequence, because of s 186(3), the challenge to the two visa decisions cannot proceed, and the application to review those decisions, and the steps leading up to both decisions, must be struck out.

[19] The reason s 186 (and s 247) is binding, and must be applied, is that the Immigration Act as a whole is binding. The Courts of New Zealand do not have power to strike down Acts of Parliament, or provisions in Acts of Parliament. Mr Ceramalus referred to some observations of Cooke J suggesting that there may be some limits to

this constitutional principle.[5] However, there has been no change in the settled constitutional position. It was summarised in this Court, with subsequent approval of the Court of Appeal, as follows:[6]

> [T]he constitutional position in New Zealand … is clear and unambiguous. Parliament is supreme and the function of the Courts is to interpret the law as laid down by Parliament. The Courts do not have a power to consider the validity of properly enacted laws.

[20] That statement of principle is sufficient, but the following further points may be made in light of Mr Ceramalus's submissions:

(a) Mr Ceramalus referred to some provisions in the constitutional enactments which he suggested were a form of supreme law which would prevail over Acts of the New Zealand Parliament. This point has been argued before without success.[7]

(b) The New Zealand Bill of Rights Act is not a supreme law and does not contain a provision for legislation to be overruled by the Courts.[8]

(c) The provisions in the constitutional enactments referred to by Mr Ceramalus are not provisions which either establish or declare rights of persons who are not New Zealand citizens, who are not in New Zealand, and who do not otherwise have an existing right to enter or re-enter New Zealand. The constitutional enactments therefore do not apply to Ms Agcaoili in any event.

The complaints process

[21] Mr Ceramalus's second complaint was directed to the response of Immigration New Zealand to him when he invoked the complaints process. This is appropriately dealt with in conjunction with the third concern identified by Mr Ceramalus – that

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5 See the discussion in Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Reuters, Wellington, 2014) at 551-552.

6 *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 330, quoted in *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at 157. Philip A Joseph *Constitutional and Administrative Law in New Zealand*, above n 5, at 529, n 99.

7 *Shaw v Commissioner of Inland Revenue*, above n 6.

8 At 157.

provisions in the complaints process publication are contrary to the New Zealand Bill of Rights Act and the constitutional enactments.

[22] The complaints process is referred to in Immigration New Zealand's "Operations Manual". The manual contains instructions, policies and information that is intended to guide decision-making by immigration officers. The contents of the manual is in two distinct categories:

(a) Processes that are enforceable: for example, "immigration instructions", which have a specific status under s 22 of the Immigration Act.

(b) Non-enforceable processes, such as the complaints process. The Complaints and Feedback Policy states explicitly that it "should also not be equated with certified immigration instructions within the meaning of the Immigration Act".

The complaints process is intended for complaints of a customer service nature and are not intended to provide a basis for reviewing decisions. The Operations Manual itself states: "The [complaints process] is not an avenue to seek a review of a declined visa application".

[23] The complaints process policy and its rationale is described in more detail in paragraph [E.2.5] of the Complaints and Feedback Policy document, which states:

> E.2.5 While it could be argued that a visa or other decision affecting one's immigration status is a "service" matter, INZ's position is that looking at the merits of a decision (as defined above) is equivalent to a review or appeal of the decision. Parliament, in passing the Immigration Act, stipulated that certain types of applications do have a right of review or appeal attached to them, while others (such as a temporary visa application lodged offshore) do not. Therefore, including a merits review of INZ decisions in the Process would be at cross purposes with what Parliament intended and may create an avenue of appeal or review when one does not exist under the legislation or an alternative/duplicate right of appeal/review in other instances.
>
> (footnote omitted)

[24] Mr Ceramalus took issue with Immigration New Zealand's refusal to overturn the decisions by way of the complaints process. The grounds on which Mr Ceramalus challenged the complaints process, and the application of it in his case, do not provide arguable grounds for judicial review and this part of the claim should be struck out. The legal position is clear beyond reasonable argument. The statement in the complaints process document that there is no ability to overturn a visa decision through the complaints process is a lawful disclaimer. The process for challenging visa decisions, to the extent that they may be challenged, is the process prescribed by the Immigration Act. A process designed simply to enable clients to lodge complaints cannot override an enactment, or any subordinate legislation.

[25] Even if there was some basis for bringing an application for judicial review of decisions made in response to Mr Ceramalus's complaints, there is a further difficulty for Mr Ceramalus. Section 247(1) of the Immigration Act provides that any review proceeding in respect of a statutory power of decision arising out of or under the Immigration Act must be commenced not later than 28 days after the date on which the person concerned is notified of the decision.

[26] Mr Ceramalus's statement of claim did not identify, with any adequate particularity, a decision or decisions of the first defendant, or any employee of the Ministry of Business, Innovation and Employment, or of the second defendant, in respect of Mr Ceramalus's use of the complaints process and in respect of which he sought judicial review. Particulars were sought by the defendants. Mr Ceramalus filed and served a response. The most recent communication, from or on behalf of either of the defendants, which relates to Mr Ceramalus's complaints (as opposed to decisions on Ms Agcaoili's visa applications) is an email from Ms Cantlon dated 22 May 2017, although there is a further email, dated 29 May 2017, from Mr Dunston of Immigration New Zealand to Mr Ceramalus. The proceeding was commenced on 17 July 2017. That is a date well outside the 28 day time limit whether the time is calculated from 22 May or 29 May.

[27] There is provision in s 247(1)(a) for the High Court to allow further time if there are special reasons. Mr Ceramalus, in the hearing before me, and in response to my enquiry, expressly disclaimed any intention to argue that there were special reasons for extending the time. And he adopted that position notwithstanding a pre-hearing timetable which required the defendants to file submissions on the time bar issue before submissions were required to be filed by Mr Ceramalus. The defendants' written submissions set out in reasonable detail, in anticipation, reasons why the defendants contended that there were no special circumstances justifying an extension of time.

[28] Mr Ceramalus's position was that s 247, like s 186, is invalid because it is contrary to the constitutional enactments. For the reasons already dealt with in relation to Mr Ceramalus's challenge to s 186, his challenge to the time limit in s 247 is untenable. The application to judicially review the way in which Immigration New Zealand responded to Mr Ceramalus's complaints, and provisions in the complaints process publication, is struck out because it is well out of time. For completeness, I also record that, had Mr Ceramalus made an application for an extension of time I would have declined that application for the reasons recorded in the respondents' submissions.

The interpretation of s 186 of the Immigration Act

[29] Mr Ceramalus's fourth broad contention was that Immigration New Zealand had misinterpreted s 186 of the Immigration Act. Mr Ceramalus's argument in this regard was based on the argument, already considered, that s 186 is invalid. For the reasons already recorded, there is no merit in this argument.

The way in which Immigration New Zealand operates

[30] Contentions in Mr Ceramalus's statement of claim, and in submissions in memoranda filed, went well beyond challenges to the matters so far considered and extended to a general attack on the way in which Immigration New Zealand operates. These very general allegations are not directed to a statutory power, as defined in the Judicial Review Procedure Act 2016, which could be susceptible to an application for judicial review. Mr Ceramalus, in essence, has mounted a very broad attack on

Immigration New Zealand, and its staff, and applied to the Court to make a very large number of orders or declarations for the purpose of remedying what Mr Ceramalus says are serious failings.

[31] The colour of these allegations may be seen in some of the relief sought by Mr Ceramalus in his statement of claim. Orders Mr Ceramalus seeks include the following: directing how Immigration New Zealand is to train its staff; requiring the department to instruct all of its staff "never to breach the powerful constraint" of the constitutional enactments; requiring Immigration New Zealand to institute psychometric testing of all staff "in order to identify and eliminate from [Immigration New Zealand] any persons who have sociopathic or psychopathic tendencies and fundamental dishonesty"; directing alterations of Immigration New Zealand's website with the adoption of a new motto, including detailed directions in respect of formatting and colour.

[32] These complaints do not provide any tenable grounds for an application for judicial review and do not seek any relief which could be granted by a Court. They too are struck out.

Other matters

[33] The defendants challenged Mr Ceramalus's standing to seek judicial review on behalf of Ms Agcaoili. As I have found that the causes of action are not of themselves tenable, and must be struck out, it is not necessary to decide this point.

Costs

[34] The defendants sought costs on a 2B basis in the event that the application to strike out was successful. Having succeeded the defendants are entitled to costs and costs on a 2B basis are appropriate.

Result

[35] There are the following orders:

(a) The proceeding is struck out.

(b) The plaintiff is to pay the defendants' costs on a 2B basis, together with reasonable disbursements. Any issue on quantum is to be determined in the first instance by the Registrar.

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Woodhouse J