



Administrative Review Council

ENTRY TO COCOS (KEELING) ISLANDS AND CHRISTMAS ISLAND

REPORT No 6

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ADMINISTRATIVE REVIEW COUNCIL
ENTRY TO COCOS (KEELING) ISLANDS

Report to Attorney-General

THE REFERENCE

1. By a letter dated 25 June 1979 the Attorney-General requested the Council's views on whether a right of appeal to the Administrative Appeals Tribunal against a decision of the Minister not to allow a person to enter or re-enter the Territory of Cocos (Keeling) Islands should be incorporated into the Immigration Ordinance of the Territory. His request followed the expression by the Senate Standing Committee on Regulations and Ordinance of views favouring such an appeal.

2. At the 24th Meeting of Council on 17 August 1979, the Council noted the reference and agreed that it should be considered within the Council's current project reviewing powers exercised by the Department of Immigration and Ethnic Affairs. It agreed that priority should be given to those aspects of the reference, which could be separated from the general questions arising in that project. The recommendations, the subject of this report were agreed upon at the 25th Meeting of Council on 5 October 1979.

3. The Council has examined the legislation conferring powers to control the entry to and residence in the Department of Home Affairs on the administration of these powers and the general conditions in the Territory. That Department gave its views on the issues involved, and the Department of Immigration and Ethnic Affairs was also consulted.

THE PERSONS TO BE PROTECTED

4. Permanent residents of Australia and Australian citizens are entitled in some situations to seek the protection afforded by an appeal to the Administrative Appeals Tribunal against orders for their deportation from Australia under the Migration Act. These rights of appeal may not be exercised except by persons who are Australian citizens or whose continued presence in Australia is not subject to any limitation as to time imposed by law (see cl. 22 of the Schedule to the Administrative Appeals Tribunal Act). Although this restriction is under examination by the Council in its study of powers in enactments administered by the Department of Immigration and Ethnic Affairs, the same criteria for determining the classes of persons who might appeal under

the Immigration Ordinance and Regulations of the Territory are suggested for the sake of conformity. The Council therefore recommends that unless further examination shows that the criteria adopted for the Migration Act are inappropriate, appeal rights under the Ordinance and Regulations should be available to Australian citizens and to foreign nationals who are permanent residents of Australia or of the Territories. The limitation should be modelled upon sub-clause 22(2) of the Schedule to the Administrative Appeals Tribunal Act extended to cover persons whose presence in the External Territories is not subject to any limitation as to time imposed by law. The possibility of reviewing this limitation in the light of further study of the Migration Act should not delay.

Ordinance and Regulations.

THE REVIEWABLE DECISIONS

5. Even with the limitation recommended in the preceding paragraph, not all the relevant powers in the Immigration Ordinance and regulations should be subject to review. In deciding which decisions should be reviewable, there are several important factors. The Territory is remote, and there must be caution in introducing review rights lest the Administration's ability to guard the welfare of the local community be impaired. An element of self-government has very recently appeared, with the creation of a local Council exercising - in the case of some immigration powers - an advisory role, and with the leasing by the Commonwealth of most of the land to a locally managed co-operative. The wishes of the local community, the absence of accommodation for visitors and newcomers, the need carefully to manage food supply and a delicate ecology, are important factors in a decision as to the exercise of discretions under the Ordinance and Regulations. However, these discretions are exercised by officers of the Australian administration who are subject and responsible only to a Minister of the Australian Government, and are phrased in the widest terms. Their exercise is potentially capable of interfering with some important civil liberties. This potential, in the view of the Council, justifies the introduction of review by an independent tribunal of some areas of decision.

6. The areas in which the Council recommends rights of review are decisions controlling the re-entry to the Territory of persons who are or have been permanent residents (i.e. persons whose lawful presence in the Territory at some stage in their life was without limitation as to time imposed by law), decisions controlling the entry of persons to the Territory for limited visits, and cancellation of entry or re-entry permits and passes.

7. Members of the local community have no right to re-enter the Territory after absence, but are obliged by the Ordinance to obtain entry or re-entry permits. These may be withheld on wide discretionary grounds, and a right of review would confer

some protection upon permanent residents in the event of an erroneous exercise of discretion. Furthermore, a resident who re-enters after an absence is thereafter dependent upon the continuance of his permit, and if it were cancelled, he would be liable to deportation. Cancellation of these entry or re-entry permits should therefore be reviewable on the application of permanent residents. Where the right to reside permanently in the Territory depends upon an entry permit, the cancellation of that permit should be likewise amenable to review, even if its issue were not. These drastic powers which could terminate the right to reside in the Territory should be reviewable, notwithstanding that they appear never to have been so exercised.

8. The Council's recommendation on refusal and cancellation of entry passes for temporary visits by Australian citizens or permanent residents of Australia and its External Territories is made in agreement with the view of the Senate Standing Committee on Regulations and Ordinances that "the ministerial power to exclude Australian citizens from the external territories of the Commonwealth, without a right of review, is potentially a very considerable power over the rights of citizens and their ability to gain information on the situation in the territories." The power to refuse temporary entry should not be exercisable in camera and without the need to justify the refusal on request. There have been few formal refusals of entry to visitors but that does not argue against the need for a right of review. Although a refusal would normally be upon practical considerations of available accommodation and food, those circumstances can be stated and do not, in the Council's view, remove the need for rights of review of these decisions.

9. It follows that the Council recommends that there be jurisdiction to review decisions not to issue entry or re-entry permits under sections 10 and 11 of the Ordinance to a person who is or has been a permanent resident of the Territory, decisions to cancel entry and re-entry permits under section 15, and decisions in relation to temporary entry passes made pursuant to Regulations 8 to 17. It also recommends that related decisions under section 12 on endorsement of names on entry or re-entry permits should be reviewable.

10. However, the Council recommends that those decisions should not be reviewable which are made under section 10 on whether persons who have never been permanent residents of the Territory should be permitted into the Territory for residence not limited in time. This follows, in the Council's view, from the special circumstances of the Territory referred to above at paragraph 5, and in particular from the policy that the long term composition of the Territory's population should be in the control of the local community.

11. One technical aspect of the present form of the Ordinance is that the decisions made by the Controller of Immigration which are recommended for review above, may be made pursuant to a direction of his superior, the Director of Immigration (see s.3 (2)).

Another is that the decisions may be determined by decisions of the Controller, the Director, medical practitioners of the Minister under sections 8 and 9 making a person a prohibited immigrant. The Council recommends that the drafting of provisions permitting applications for review of the decisions referred to in paragraph 8 should ensure that the Tribunal's jurisdiction in these applications extends to all related decisions made under sections 3, 8 and 9. The Council would, however, recommend excluding from review the making by the Minister of orders under paragraph 9(1)(a) prohibiting the entry, numbers, or period of stay of a class of persons, and which are gazetted under sub-section 9(3). The Council notes that, on the last recommendation, the making of such an order could deprive persons of rights of appeal, which they would have enjoyed if they had been excluded from the Territory by the exercise of alternative powers. No doubt the Minister will be conscious of this in exercising his powers.

12. The Council considered recommending rights of review with respect to the deportation of persons under sections 32, 33, 34, 37 and 56. These sections condition liability to removal upon the person being unlawfully present in the Territory, his conviction of offences under the Ordinance, or adverse decisions of the Controller, Director or Minister under other sections making the person a prohibited immigrant or refusing or cancelling a permit or pass. The appeal rights, which have been recommended above are sufficient, on the Council's present understanding, to permit review of the classification of a person as one eligible for deportation. The extent of the discretion not to deport a person eligible for deportation may not be as large as the discretionary power that brings him into that category. (Note under the Migration Act, the dicta in Salemi v. Mackellar (No.2) (1977) 137 C.L.R. 396 at 406, 432; The Queen v. Mackellar; ex parte Ratu and Anor (1977) 137 C.L.R. 461 at 466, 480). There are fears that a right of review against deportation of persons eligible for deportation could encourage evasion of entry controls, and jeopardise the proper administration of the Ordinance. In these circumstances the Council has decided not to recommend that decisions to remove persons from the Territory be reviewable.

REVIEW BY THE ADMINISTRATIVE APPEALS TRIBUNAL

13. The Attorney-General in his reference to the Council noted that if jurisdiction under the Immigration Ordinance of the Territory were conferred upon the Administrative Appeals Tribunal it would be the first occasion on which the Tribunal had received jurisdiction under a law of the External Territories. There is no doubt that the Tribunal could be given this jurisdiction, without the need for amendment to the Administrative Appeals Tribunal Act (see ss. 3(1), 4, 24 of that Act). The Council sees the position with respect to External Territories as analogous to the Tribunal's jurisdiction under Ordinances of the Australian Capital Territory. The position may have to be reconsidered were the Islands to attain a greater degree of self-government, but, until then, the Administrative Appeals Tribunal, as the central administrative

review tribunal in the Commonwealth, seems the obvious tribunal to exercise a jurisdiction likely to give rise only to rare appeals. However, the Council notes that a right of review under this Ordinance may be a precedent, and that many of the several hundreds of Ordinances of the Territory may contain powers, which it may be claimed, should include review rights. The Council considers that the peculiar circumstances of the Territory require that extensions of review into other areas should proceed with caution. In each case the question will arise whether the nature of the interests concerned justifies a right of review in the light of the administrative consequences of introducing review.

14. The Senate Committee has suggested that decisions under the Ordinance may not be capable of review by the Administrative Appeals Tribunal because the criteria for their exercise depends upon the subjective opinion of the decision-maker. This fear is not well grounded since it is the function of the Tribunal in reviewing a decision of an officer to form its own opinion and to stand in the shoes of the officer (c.f. *F.C.T. v. Brian Hatch Timber Co (Sales) P.L.* (1972) 128 C.L.R. 28 at 57 and 59). However, it is true that many of the powers confer extremely broad discretions. The Council considers that in the circumstances of the exercise of these discretions at present the Tribunal would be able properly to perform a review function, given that it would have the assistance of the Administration in ascertaining policies appropriate to the general discretions. But this is not to say that the Ordinance could not be improved by providing clearer guidelines for the exercise of the discretions it confers: this aspect was not considered by the Council.

15. At a practical level, the Council recommends that the possible difficulty facing persons present in the Territory in commencing a tribunal proceeding be met by establishing the Administrator or one of his officers as a Tribunal Registry in the same way that he now acts as a Registry of the Courts of the Territory.

RECONSIDERATION BY THE MINISTER

16. The Department of Home Affairs has suggested that any right of appeal to the Administrative Appeals Tribunal should recognise and permit a review by the Minister of the decision under appeal before the appeal proceeds. This would formalise the position of the Minister as the Controller's ultimate superior in the administration of the Immigration Ordinance, and ensure that the decision reviewed by the Tribunal had received his support. The Department is confident that the Minister would wish personally to review decisions going on appeal, and has pointed out that because of the remoteness of the Territory the Controller is often obliged to make decisions without prior reference to the Minister.

17. The Council accepts that there are reasons for structuring an "internal review" within the appeal mechanism recommended by it. It has considered what is the best

method for doing this, endeavouring to minimise the resultant complications. A most important factor is the requirement that an applicant should have an opportunity as quickly as possible after the making of the decision to approach the Tribunal to seek an exercise of its discretion to make stay orders under section 41 of the Administrative Appeals Tribunal Act pending the conclusion of the review. It is also important to ensure that the internal review mechanism does not give rise unnecessarily to technical objections to the Tribunal's jurisdiction.

18. The Council therefore recommends that a provision be inserted into the Immigration Ordinance permitting applications to be made directly to the Administrative Appeals Tribunal from the decisions referred to above at paragraphs 8 and 10. There should also be provision empowering the Minister, for a period of 28 days after the notification of an application to the Tribunal, to consider the decision under review and alter it. The hearing and progress of the application should be delayed for that period, and the Tribunal should be empowered to review any new or altered decision. The drafting of this provision should ensure that the Minister's decision itself could be reviewed in the course of a hearing. Where a person is given a right of appeal to the Tribunal according to the scheme recommended by the Council, this right should replace the person's rights under the existing appeal provisions of subsections 8(6), 10(3), 11(3), 15(4) and 34(2).

OTHER EXTERNAL TERRITORIES

19. The Council has considered whether there should be rights of review from decisions controlling entry to Christmas Island. The legislation affecting immigration to this Territory is, for present purposes, identical to that of Cocos (Keeling) Islands with the exception that the conditions on the power to issue entry and re-entry permits under sections 10 and 11 were the subject of a 1979 amendment made only to the Cocos (Keeling) Islands Ordinance. However, this difference is of no practical significance. The Council has considered the factual circumstances of the Territory relevant to the administration of immigration powers, and concludes that nothing emerges to cause it to make different recommendations from those it makes with respect to Cocos (Keeling) Islands. It therefore recommends that review provisions should be inserted into the Immigration Ordinance of Christmas Island identical to those to be inserted into that of Cocos (Keeling) Islands.

20. With respect to Norfolk Island, both the relevant legislation and administration clearly differ from the other two territories. Under the Norfolk Island Immigration Ordinance, 1968, residents of the Island are exempted from movement control, and visitors are allowed free entry for 30 days with, in practice, automatic extension for a further 30 days. The Council has therefore decided not to examine the adequacy of the

review provision of this Ordinance at this stage, and makes no recommendations.

ENTRY TO COCOS (KEELING) ISLANDS

Report to Attorney-General

Additions to M2624 proposed by Professor Richardson

1. Insert, after last sentence paragraph 11 on page 6:

"The Council notes that on this recommendation the making of such an order could deprive persons of rights of appeal which they would have enjoyed if they had been excluded from the Territory by the exercise of alternative powers. No doubt the Minister will be conscious of this in exercising his powers".

2. Insert after "under other sections" in line 7, paragraph 12 on page 6:

"making the person a prohibited immigrant or refusing or cancelling a permit or pass".