

EXECUTIVE COUNCIL

CONFIDENTIAL

Title of Report: Immigration (Amendment) Bill 2011

Paper No: 36/11

Date: 27 January 2011

Report of: Director of Community Safety/Collector of Customs/Principal Crown Counsel

1. Purpose

The purpose of this paper is to seek the approval of Honourable Members –

- (a) for the publication, and subsequent submission of the Immigration (Amendment) Bill 2011 to the Legislative Assembly, and;
- (b) interim policy on procedural arrangements in respect of prohibited persons and persons refused entry by the Principal Immigration Officer on the ground that it is conducive to the public good.

2. Recommendation

2.1 Members are invited to –

- (a) approve the publication, and subsequent submission of the Immigration (Amendment) Bill 2011 (Appendix A) to the Legislative Assembly which, if passed, would give effect to the:
 - i. amendment of the definition of ‘prohibited person’ in section 2,
 - ii. amendment of a reference to the Constitution in the definition of ‘Falkland Islander’ in section 2,
 - iii. amendment of section 5 of the Ordinance in order to provide additional control of entry by providing for a person to be refused leave to enter on the ground that it would be conducive to the public good;
 - iv. amendment of sections 16 and 17 of the Ordinance in relation to residence permits and work permits and residence permits respectively, to allow for a permit to be refused on grounds of the burden on public resources that would be likely to arise from an applicant’s, or a dependent’s, educational needs;
 - v. revocation of the Permanent Residence Permit (Application) Regulations 1996 which was overlooked on the making of the

Immigration (Permanent Residence Permits) Regulations 2009,
and;

- (b) approve the recommended interim policy regarding procedural arrangements in regard to prohibited persons and refusal of entry on conducive grounds as outlined at 5.4.to 5.8 and 5.11 to 5.14 respectively, and;
- (c) note the current position in regard to the review of policy being co-ordinated by the Director of Health and Education in respect of educational needs and medical treatment entitlements as a whole given at 5.16 and the Chief Medical Officer's outline of current medical assessment practice and health issues provided at Appendix B.

3. Summary of Financial Implications

There are no direct financial implications.

4. Summary of Legal Implications

None.

5. Background

5.1 A review of immigration policy is currently being progressed by the Immigration Review Group which will include (after other higher priorities have been addressed such as Falkland Islands status, permanent residence permits) a major overhaul of the Immigration Ordinance and supporting regulations in order to address a raft of existing inadequacies. However several of these inadequacies have been identified by Members to be of such importance that they require these to be addressed on an interim basis in advance of the overall revision of the current immigration legislation. The primary purpose of the Immigration (Amendment) Bill 2011, which is attached for information at Appendix A, is to make provision for three of these identified inadequacies in the Immigration Ordinance. These are explained in detail below. A copy of the Immigration Ordinance is available at Gilbert House.

A. Clause 4: Amendment to update a reference to the New Constitution in the definition of Falkland Islander

B. Clause 4: Amendment to the definition of 'prohibited person' under section 2 (d) of the Ordinance

5.2 Paragraph (d) of the definition of "prohibited person" in section 2 of the Ordinance currently provides for the Governor to notify the Principal Immigration Officer of categories of persons who are then prohibited persons. The proposed amendment would if passed, enable the Governor to also declare an individual to be a prohibited person.

5.3 Until our immigration legislation can be properly overhauled, and clear supporting procedural regulations developed, the following interim policy for the procedural process that would be followed in relation to prohibited persons is recommended.

5.4 Making a prohibition in relation to the members of a class of persons or an individual could be relevant in relation to a broad range of circumstances, but the power would only be exercised exceptionally where it is believed that taking such a course of action is justified in being conducive to the public good.

5.5 Each case would be considered on its individual merits, and in determining whether a class of persons or an individual should be declared as prohibited, the Governor would need to take into account whether:

- it can be established as necessary for and proportionate to, the legitimate aims of, for example, protecting national security, preventing crime and protecting the rights of others;
- having regard to the public law decision making principles of fairness, rationality and proportionality; the evidence is sufficient to support the making of such a prohibition, that is to say one which is not based only on allegations, unsubstantiated suspicions and vague generalisations;
- where it is intended for such a prohibition to be made in respect of an individual, all of the reasons in justifying the intention must be given to the person before a decision to proceed in making such a prohibition is taken;
- where it is intended for such a prohibition to be made in respect of the members of a class of persons, where the particular class of persons is figure headed by an organisation which is contactable and it is considered appropriate and reasonable to do so, all of the reasons in justifying the intention may be given to the relevant party before a decision to proceed in making such a prohibition is taken.

5.6 Where a person is present in the Islands upon who the Governor intends to serve a notice of deportation in accordance with the relevant provisions of the Immigration Ordinance because he believes the person is a member of a prohibited class of persons or for other reasons, the existing statutory process stipulates that the person must be given the opportunity to make representations in writing. Any such representations received would then be taken into consideration when the decision is made whether to proceed in making a deportation order and if the decision is so to do, the deportation order would by its effect confirm or make the member of the class of persons or the particular individual a prohibited person.

5.7 In order to uphold public law decision making principles, it would similarly therefore be appropriate for reasonable attempts to be made to communicate with the country or organisation if it is not represented in the Islands in relation to a class of persons or the particular individual who is not present, in order that they

may have the opportunity to make representations which could then be taken into consideration before the decision is made whether to declare them as being prohibited. This could take the form in the first instance by means of written communication and if that is not successful, by posting if possible, a brief notice of the intention in a local newspaper where it is believed the class of person is based or the particular person resides and at the same time for a similar notice to be published in the Gazette. If after a reasonable period has elapsed, no communication has been received from the relevant party, a notice declaring the organisation or person concerned as prohibited could then be published in the Gazette.

5.8 If at a later time, the representatives of a class of persons or an individual subsequently become aware that their class or they have been made prohibited, it would be reasonable to allow them if they so chose to do, to make representations challenging the earlier decision and for the Governor then giving consideration for the prohibition to be rescinded.

C. Clause 5: Amendment of section 5 by insertion of a new subsection 10A after subsection (10) of section 5.

5.9 This new provision would provide additional control on entry for a person to be refused leave to enter if the Principal Immigration Officer (or an immigration officer exercising delegated powers under section 3 (4) of the Ordinance) believes that it is reasonable and fully justified in the particular circumstances that refusal of entry would be conducive to the public good.

5.10 Until our immigration legislation can be properly overhauled, and clear supporting procedural regulations developed, the following interim policy for the procedural process that would be followed in relation to the refusal of entry of persons on the ground that it is conducive to the public good is recommended.

5.11 In considering exercising the power to refuse entry of a person on conducive grounds, the Principal Immigration Officer (or an immigration officer exercising the power as delegated by the Principal Immigration Officer) would have regard to the same general principles as apply in relation to prohibited persons as outlined at 5.4 above, and would also be guided, on a best practice basis, by the principles of the United Kingdom's immigration rules and guidance. Circumstances in which an officer may consider exercising this power where there is evidence and justifiable reasons for so doing could include where:

- a person is a threat to national security
- a person's admission could adversely affect the conduct of foreign policy
- a person has been involved in serious criminal activities either in the Islands or overseas; even though they have not been convicted; including associations with people who have

- a person's admission might lead to an infringement of Falkland Islands' law or a breach of public order
- a person's admission might lead to an offence being committed by someone else e.g. extreme views or intended actions that could result in civil unrest resulting in an infringement of Falkland Islands' law
- a person is a member of a class of persons who have been declared prohibited persons
- a person is subject to a deportation order (is a prohibited person)
- a person was previously refused entry on conducive grounds and the reasons for the previous refusal remain valid
- a person has attempted to seek entry using a forged or falsified travel document or are not the rightful holder of the travel document
- it is apparent that a person is suffering from a serious mental disorder and circumstances do not allow for the person to be properly examined by a medical officer

5.12 Where the Principal Immigration Officer, or an immigration officer in exercising delegated powers, has determined that it is appropriate to refuse entry to a person seeking entry to the Islands on conducive grounds, the person so refused will be informed of all of the reasons why they are so being refused entry. However where it is an immigration officer, before so doing if there is time available so to do, they will first consult the Principal Immigration Officer or their most senior officer if they are available or contactable, before proceeding with the refusal.

5.13 A person seeking entry who is refused entry on conducive grounds is not entitled to make representations or lodge an appeal at the time of being refused entry but may if they wish to do so, make representations to the Governor challenging the decision from outside the Islands within 30 days of the date of when they were refused entry or such longer period as the Governor may allow in the particular circumstances. This is consistent with other existing statutory provisions in regard to refusals such as that pertaining to applications for Falkland Islands status that are refused.

5.14 Following a person being refused entry on conducive grounds the Principal Immigration Officer will then consider in the particular case whether it should be recommended to the Governor that he considers making the person a prohibited person.

D. Clauses 6 and 7: Amendments to sections 16 and 17, in relation to residence permits and work permits respectively, to allow for a permit to be refused on grounds of the burden on public resources that would be likely to arise from an applicant's, or a dependent's educational needs

5.15 At the October 10 meeting of Executive Council, when considering Paper 261/10 from the Principal Immigration Officer in relation to an application for a residence permit in respect of a child, Members noted that there was an urgent need for legislation to address the matter of the potential for an unreasonable burden to be placed on public resources as a result of the special educational needs of children who are the subject of an immigration application. The above amendments would therefore supplement the existing power to refuse a permit on grounds of the burden on public resources that would be likely to arise from an applicant's, or a dependent's health; by making similar provision in regard to an applicant's or a dependent's educational needs.

5.16 In regard to policy in relation to educational needs, entitlements, and indeed future entitlements to medical treatment, both generally and in respect of persons seeking to enter the Islands, the Director of Health and his staff in liaison with the Principal Immigration Officer as appropriate, are currently progressing a complete review of both considerations as a whole. As this is work in progress at this time no clear policy considerations can be provided at this time. However, for information purposes, a paper from the Chief Medical Officer which outlines current medical assessment practice and health issues in relation to immigration matters is provided for Members' information at **Appendix B**.

6.0 Financial Implications

There are no financial implications.

7.0 Legal Implications

There are no legal implications on the basis that it is assessed that the above recommendations incorporate appropriate safeguards being adopted as policy to balance the introduction of more stringent powers of immigration control.

8.0 Human Resources Implications

There are no human resources implications.

Immigration (Amendment) Bill 2011

(No: of 2011)

ARRANGEMENT OF PROVISIONS

Clause

1. Title
2. Commencement
3. Amendment of Immigration Ordinance
4. Section 2 amended - Interpretation
5. Section 5 amended - General provisions for regulation and control
6. Section 16 amended – Residence permits
7. Section 17 amended – Work permits
8. Repeal

IMMIGRATION (AMENDMENT) BILL 2011

(No: of 2011)

(assented to: 2011)
(commencement: on publication)
(published: 2011)

A BILL

for

AN ORDINANCE

To amend the Immigration Ordinance (Title 52.2) in connection with; prohibited persons, regulation and control on entry, and residence and work permits; and to repeal regulations

BE IT ENACTED by the Legislature of the Falkland Islands —

1. Title

This Ordinance is the Immigration (Amendment) Ordinance.

2. Commencement

This Ordinance comes into force on publication.

3. Amendment of Immigration Ordinance

This Ordinance amends the Immigration Ordinance.

4. Section 2 amended - Interpretation

(1) This section amends Section 2.

(2) The definition of “Falkland Islander” is amended by omitting “17(5)” and substituting “22(5)”.

(3) The definition of “prohibited person” is amended by repealing paragraph (d) and substituting —

“(d) a person or category of persons notified by the Governor to the Principal Immigration Officer as a prohibited person or prohibited category of persons.”

5. Section 5 amended - General provisions for regulation and control

Section 5 is amended by inserting the following subsection after subsection (10) —

“(10A) Leave to enter the Falkland Islands will be refused if the Principal Immigration Officer determines that it would be conducive to the public good to refuse leave to enter.”

6. Section 16 amended – Residence permits

Section 16(4A) is repealed, and the following substituted —

“(4A) A residence permit will not ordinarily be granted if it appears likely (if the application were granted) that an applicant, or a person included in an application, would impose a relevant burden because of —

(a) the person’s health;

(b) the person’s educational needs.

(4B) For the purposes of subsection (4A), a “relevant burden” means a substantial financial or other burden on public resources which, in all the circumstances, it is unreasonable to expect them to bear.”

7. Section 17 amended – Work permits

Section 17(4A) is repealed, and the following substituted —

“(4A) A work permit will not ordinarily be granted if it appears likely (if the application were granted) that an applicant, or a person included in an application, would impose a relevant burden because of —

(a) the person's health;

(b) the person's educational needs.

(4B) For the purposes of subsection (4A), a "relevant burden" means a substantial financial or other burden on public resources which, in all the circumstances, it is unreasonable to expect them to bear."

8. Revocation

The Permanent Resident Permits (Application) Regulations (SR&O No 6 of 1996) are revoked.

OBJECTS AND REASONS

This Bill would amend the Immigration Ordinance (Title 52.2), and would come into force on publication.

Clause 4 would amend the definition of "prohibited person" in section 2, to allow the Governor to notify that an individual is a prohibited person; supplementing the existing power to declare a category of persons as prohibited persons.

Clause 4 would also amended section 2 to update a reference to the Constitution in the definition of "Falkland Islander".

Clause 5 would amend section 5 to provide additional control on entry by providing for a person to be refused leave to enter the Falkland Islands if the Principal Immigration Officer determines that refusal would be conducive to the public good.

Clauses 6 and 7 would amend sections 16 and 17, in relation to residence permits and work permits respectively, to allow an application for a permit to be refused on grounds of the burden on public resources that would be likely to arise from an applicant's, or a dependent's, educational needs. This would supplement the existing power to refuse a permit on the grounds of the burden on public resources that would be likely to arise from an applicant's, or a dependent's, health.

Clause 8 would revoke the Permanent Residence Permit (Application) Regulations (SR&O No 6 of 1996). These regulations should have been revoked on the making of the Immigration (Permanent Residence Permits) Regulations (SR&O No 18 of 2009), but were overlooked.

Health Issues in Relation to Immigration

Background

The immigration medical process was reviewed in late 2003 by the then Government Secretary and the Chief Medical Officer. A new form was devised based upon the best aspects of a number of other countries forms such as New Zealand, Australia, Canada and the UK.

The form is completed by a medical practitioner - normally, but necessarily, the patient's general practitioner. This is then sent to the immigration department who forward it to the CMO for his opinion whether the person is suitable to immigrate to the Falklands.

The CMO signs the front page and decides whether the person is fit with no restrictions, fit for less than 5 years or unfit. If unfit or only fit for less than 5 years a paper is sent to the Principal Immigration Officer outlining the issues that underpin that recommendation.

The basis for assessing fitness can be related to a number of different criteria:

- The person has a medical condition that cannot be managed within the Falklands – for example: kidney dialysis, a patient either waiting for or just had a major organ transplant, patients whose condition would require overseas treatment had they been living in the Falklands such as cancer treatment.
- The person has a condition that could be made significantly worse by living in a remote community with limited medical facilities
- The person has a condition that could be made significantly worse by ultra-long-haul flying or where their condition would preclude flying
- The person has a condition which is likely to require ongoing medical treatment that is likely to cost more than £3,000 per annum as a rough guide
- The person has a condition which, at the moment, is not likely to cost more than £3,000 but could in the longer-term; for example diabetes that is reasonably well controlled with no complications at the moment but there is a high probability that in the future they may need recurrent laser eye treatment or kidney dialysis or treatment for poor peripheral circulation. In this type of case the usual recommendation is to advise fit for less than 5 years and review each time a work permit is issued.
- The person has special needs that will require extra resources either from social services, the health service or from the Education Department. In these cases detailed reports from their existing providers of services are reviewed by the relevant department and an assessment made of the capacity of the service to provide the required care and what, if any, extra resources might be needed.
- In any case where the CMO has concerns a written report is sent to the Principal Immigration Officer who then either decides himself or makes a further report to Executive Council.
- There have been cases where FIG has deliberately employed a person where they or a family member has increased needs but it has been decided that the person is so important to the needs of the government or the Islands that they have been allowed to immigrate in spite of the potential extra demands upon the services.

Following the Executive Council decision in June 2010 the process has required the CMO plus one other FIG medical officer to review each case.

Problem areas

In general this process has worked well but there have been a number of practical problems related to the process.

- On occasions it has been difficult for the applicant to find an English speaking doctor capable of completing the necessary examination.
- Either due to lack of personal knowledge of the patient, accidental or deliberate concealment of relevant facts the examining doctor has failed to elicit relevant information which might have had an impact upon the person's fitness assessment. In certain parts of the world pressure is placed upon the examining doctor to minimise any pre-existing condition so that the individual can gain work.
- Persons who are employed by MOD contractors at Mount Pleasant do not have to undergo this process, although most have their own pre-employment assessments. Some are stricter and others less so but they all tend to look at the person's immediate needs and employability rather than considering the longer-term implications. The person then decides to change employer and become a civilian employee outside of Mount Pleasant. Although they may need a work permit they do not always have medical assessment at this time. Even if they do it can be difficult to justify refusing them on medical grounds if they have been present and working in the Falklands for a number of years. Similar issues have arisen on occasion with persons who have been present in the Islands on a visitor's permit for which no medical examination is required.
- There have been a significant number of occasions when potential FIG employees have had medical issues and FIG, as an employer, has put conditions in their person's contract specifically relating to their medical condition. Commonly this would be that FIG would not pay for any overseas referrals for a pre-existing condition. In one extreme example the person was required to lodge a returnable bond to cover the potential cost of an air ambulance flight to New Zealand which required a family member to mortgage their house. There is no power to ask other employers to do the same as FIG therefore there can be anomalies between FIG employees and other employees.
- Assessment of future risk of health related issues is a complex and inexact science and even within this there are anomalies: for example we do not assess the risk posed by smoking. A heavy smoker will have an increased long-term health risk but would be passed as satisfactory whereas a non-smoker with a medical condition that has the same overall risk might be assessed as unfit. It goes without saying that ultimately everyone develops some medical condition and ultimately will die, so what we are trying to assess is the excess risk compared with the mythical average person.
- There are a number of persons in the Falklands who do not have rights to visit the UK or Chile and this potentially causes major difficulties if they need overseas medical treatment. If it is a life-threatening situation then normally this is resolved very easily on the day, if it is a non-urgent referral then they can wait for a UK visa although the visa validity starts from the day of issue in New York and it sometimes could be difficult to coordinate the visa dates with an NHS appointment in the UK. The worst case scenarios are those where it is not an immediately life threatening condition and yet is serious enough that they cannot wait until a visa is forthcoming. My view is that all potential immigrants to the

Falklands should have unrestricted access either to the UK or to Chile and preferably both. A once only transit visa for the UK is not sufficient, because what that means is the person can get here but cannot leave!!

Roger Diggle
Chief Medical Officer

06 January 2011