

No. 8295 P. 3

REFUGEE STATUS BRANCH 64+9+9145299

25 July 2002

REVISED INTERIM OPERATIONAL INSTRUCTION IN RESPONSE TO THE JUDGMENT OF BARAGWANATH J IN THE CASE OF REFUGEE COUNCIL OF NEW ZEALAND INC. & ORS v ATTORNEY-GENERAL 27 JUNE 2002

1. The operational instructions of 19 September 2001, 24 September 2001, and 19 December 2001 (dated 19 November 2001 in error) concerning the exercise of the discretion pursuant to section 128(5) of the Immigration Act 1987 to detain persons (including children and young persons under 18 years of age) claiming refugee status at the border and who are refused a permit are suspended pending an appeal.

2. No person who claims refugee status upon arrival in New Zealand may be detained if that person is a person to whom Article 31.1 applies unless that person's detention is "necessary" in terms of Article 31.2 of the Refugee Convention. Article 31 states:

Article 31: Refugees Unlawfully In The Country Of Refuge

1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.


3. Reasons why detention may be necessary include where there is a real risk of offending or absconding or where the identity of the person is unknown and therefore the risks of offending or absconding cannot be ascertained at the time.

4. If detention is necessary, that detention should occur pursuant to s 128(5) in a facility, (either the Mangers Accommodation Centre or a penal institution), that effects the least restriction on freedom of movement having regard to the risk being managed.

5. Where, however, an immigration officer has refused to grant a refugee status claimant a permit but does not consider that the detention of that person in a secure facility is "necessary", the immigration officer may immediately apply for that person's release on conditions in accordance with section 128AA of the Immigration Act, and may necessarily

detain a claimant under section 128(5) to enable such an application to be made.

6. If an immigration officer determines that detention of a refugee status claimant is "necessary", or where a refugee status claimant is released on conditions under section 128AA, those decisions must be kept under review in accordance with paras 7 and 8 below.
7. For a claimant in detention, the review of the "necessity" test should occur as soon as practicable after any new evidence or information emerges about the claimant or in any event at least after 14 days of detention. If continued detention is then determined to be no longer "necessary" then the immigration officer must decide whether to apply for the claimant's release on conditions under section 128AA or whether to release them with a permit granted under section 35A.
8. For a claimant already released on conditions, the review of that situation should occur as soon as practicable after any new evidence or information emerges about the claimant, or in any event at least after 14 days of release on conditions.
9. No immigration officer other than each of those immigration officers listed in Appendix A, (as may be amended by the Chief Operating Officer from time to time), are authorised to determine whether detention under section 128 of the Immigration Act of a person who is a refugee status claimant is "necessary" or to apply for or give consent to the release on conditions of a refugee status claimant under section 128AA of the Immigration Act or to grant a permit under section 35A of the Immigration Act to claimant who has been detained and/or released on conditions.
10. The interim operational instruction of 8 July 2002 is rescinded.



Chris Hampton
General Manager
New Zealand Immigration Service

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APPENDIX A

Part 1: Immigration Officers who are authorised to determine whether detention in a penal institution of a person who is a refugee status claimant is "necessary", or to apply for or consent to the release on conditions of a refugee status claimant from a penal institution, or to grant a permit under section 35A to a refugee status claimant detained in a penal institution:

- Bernard Maritz
- Toni Bentley
- John Pogram

Part 2: Immigration Officers who are authorised to determine whether detention at the Mangere Accommodation Centre of a person who is a refugee status claimant is "necessary", or to apply for or consent to the release on conditions of a refugee status claimant from the Mangere Accommodation Centre, or to grant a permit under section 35A to a refugee status claimant detained at the Mangere Accommodation Centre:

Those immigration officers listed in Part 1

Part 3: Immigration Officers who are authorised to grant a permit under section 35A to a refugee status claimant who is released on conditions:

Those immigration officers listed in Part 1