NOTE: THE CONFIDENTIALITY OF THE NAME OR IDENTIFYING PARTICULARS OF THE APPELLANT AND OF HIS CLAIM OR STATUS MUST BE MAINTAINED PURSUANT TO S 151 OF THE IMMIGRATION ACT 2009. SEE http://www.legislation.govt.nz/act/public/2009/0051/latest/DLM1440836.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 104/2020
[2021] NZSC 192

BETWEEN	H (SC 104/2020) Appellant
AND	MINISTER OF IMMIGRATION Respondent

Hearing:	20 July 2021
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Arnold JJ
Counsel:	R E Harrison QC and M Lee for Appellant R A Kirkness and E G R Dowse for Respondent
Judgment:	23 December 2021

JUDGMENT OF THE COURT

A The appeal is dismissed on the basis set out at [32]–[33].

B Costs are reserved.

REASONS

WILLIAM YOUNG, GLAZEBROOK, O'REGAN AND ARNOLD JJ

(Given by Glazebrook J)

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Introduction

[1] Mr H has issued proceedings for judicial review challenging the validity of instruction A5.30 of the Immigration New Zealand (INZ) Operational Manual (the Manual). This instruction provides that applicants who would pose a risk to New Zealand's international reputation will not normally be granted a residence class visa (residence visa). Applicants are said to pose a risk to New Zealand's international reputation if they have or have had an association with, membership of, or involvement with, any government, regime, group or agency that has (among other things) advocated for or committed gross human rights abuses.

[2] The validity of the instruction was upheld by the High Court.[1] Mr H's appeal was dismissed by the Court of Appeal.[2] This Court granted leave to appeal on 19 March 2021.[3]

Background

[3] Mr H, a Chinese citizen, arrived in New Zealand in 1996 on a visitor visa. He was an officer of the Chinese Public Security Bureau (PSB). For the purposes of these proceedings, it is uncontested that the PSB is an organisation that has committed gross human rights abuses.

[4] Mr H had been sent to New Zealand to spy on Taiwanese nationals living here. By 1997, Mr H had decided that he preferred New Zealand's democratic way of life and abandoned his mission. Mr H applied unsuccessfully for refugee status without disclosing his involvement with the PSB.

[5] In 2007, Mr H made a second application, acknowledging his involvement with the PSB and claiming to be at real risk of persecution if he returned to China, having abandoned his official duties. His application was initially refused by a refugee status officer, but his appeal against that decision was successful.[4]

[6] In 2009, Mr H's application for a residence visa was refused on character grounds because of his involvement with the PSB. The decision was upheld by the Residence Review Board (the Board)[5] and the High Court.[6] The Board referred the application for ministerial consideration, but the Minister of Immigration (the Minister) declined to recognise Mr H's case as an exception to the policy.

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1 *H v The Minister of Immigration* [2019] NZHC 2870 (Davison J).
2 *H v The Minister of Immigration* [2020] NZCA 562 (Kós P, Brown and Courtney JJ) [CA judgment].
3 *H (SC 104/2020) v Minister of Immigration* [2021] NZSC 28 (Winkelmann CJ, Glazebrook and Williams JJ).
4 *Refugee Appeal No 76087* RSAA Auckland, 22 November 2007. The reasons for this decision are suppressed pursuant to s 129T of the Immigration Act 1987.
5 *Residence Appeal No 16522* RRB Wellington, 21 July 2010. The reasons for this decision are suppressed pursuant to s 129T of the Immigration Act 1987.
6 *AB v Chief Executive of the Department of Labour* [2011] 3 NZLR 60 (HC) (Simon France J).

[7] In 2014, Mr H applied again and was refused a residence visa for the same reason. He appealed successfully to the Immigration and Protection Tribunal (the Tribunal), and the application was referred back to INZ for reconsideration.[7] INZ refused the application on the same ground. Mr H appealed to the Tribunal again, which upheld the INZ decision but considered that Mr H's special circumstances warranted ministerial consideration.[8] The matter was referred to the Minister but was again declined.

[8] As well as pursuing his appeal rights in respect of the second application, Mr H made the application for judicial review referred to above at [1].

Statutory scheme

[9] The purpose of the Immigration Act 2009 (the Act) is "to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals".[9] To achieve this purpose, the Act establishes an immigration system which, relevantly:[10]

> …
>
> (b) provides for the development of immigration instructions (which set rules and criteria for the grant of visas and entry permission) to meet objectives determined by the Minister, …
>
> …
>
> (g) supports the settlement of migrants, refugees, and protected persons; …

[10] Under s 22 of the Act, the Minister can certify immigration instructions relating to a variety of matters. Under s 22(6)(a)(ii), this may include matters relating to character.

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7 *AE (Refugee and Protection)* [2017] NZIPT 203647. Publication of the decision is restricted by order of the Immigration and Protection Tribunal (the Tribunal).

8 *AG (Refugee and Protection)* [2018] NZIPT 205054. Publication of the decision is restricted by order of the Tribunal.

9 Immigration Act 2009, s 3(1).

10 Section 3(2)(b) and (g).

The Manual

[11] The Manual contains the immigration instructions certified by the Minister under s 22. Section A5 of the Manual sets out instructions relating specifically to the character requirements to be satisfied by applicants for residence or temporary entry visas. Instruction A5.1 provides that applicants for visas must:

> a. be of good character; and
>
> b. not pose a potential security risk.
>
> If any person included in the application fails to meet the necessary character requirements and the character requirements are not waived, the application may be declined.

[12] At the relevant time, instruction A5.15 identified applicants not considered to be of good character:[11]

> Applicants not considered to be of good character for a residence class visa are classified as follows:
>
> a. applicants who will **not** be granted a residence class visa (see A5.20); or
>
> b. applicants who will not **normally** be granted a residence class visa (see A5.25) unless a character waiver is granted; or
>
> c. applicants whose applications for a residence class visa will usually be **deferred** (see A5.35).

[13] Instruction A5.20, which applies to applicants in the first category (who are not eligible for a residence visa at all), captures those who fall within ss 15 or 16 of the Act. Among other things, s 15 covers those who have certain criminal convictions, and s 16 covers members of terrorist entities.

[14] Instruction A5.25 applies to those in the second category (who will normally not be granted a residence visa unless granted a character waiver). It captures:

> (a) under A5.25(a)–(h), those convicted of a variety of offences;[12]

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11 Emphasis in original.

12 Including sexual and violent offending, and offences involving drugs and dishonesty.

(b) under A5.25(i) and (l), those who have made false statements or given false or misleading information in support of a visa application of themselves or any other person;

(c) under A5.25(k), those who have belonged to certain kinds of organisations; and

(d) under A5.25(j), those who have publicly expressed racist views.

[15] With regard to instruction A5.25(i)–(l), the Manual states that an "immigration officer should establish whether, on the balance of probabilities, it is more likely than not that the applicant committed such an act". Under instruction A5.25.1(b), it is provided that an immigration officer must consider "the surrounding circumstances of the application to decide whether or not they are compelling enough to justify waiving the good character requirement".

[16] Although it was at the relevant time not referred to in instruction A5.15, the instruction under challenge, A5.30, also identifies applicants who will not normally be granted a residence visa. At the relevant time, instruction A5.30 provided:[13]

A5.30 Applicants normally ineligible for a residence class visa

a. Applicants will not normally be granted a residence class visa, unless in accordance with A5.30.1 below, where an applicant would pose a risk to New Zealand's international reputation.

b. In particular (but not exclusively), applicants are considered to pose a risk to New Zealand's international reputation if they have or have had an association with, membership of, or involvement with, any government, regime, group or agency that has advocated or committed war crimes, crimes against humanity and/or other gross human rights abuses.

c. A5.30(b) does not mean that an applicant cannot be considered to pose a risk to New Zealand's international reputation for any other reason.

d. Applications to which this provision applies must be determined in accordance with A5.30.1 below.

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[13] The instruction has been amended since the Court of Appeal judgment. There was also a similar instruction related to entry visas, A5.50, which is now integrated into instruction A5.30 as amended.

A5.30.1 Action

a. An immigration officer may decline residence class visa applications under A5.30 on character grounds. In determining whether to decline an application under A5.30 the surrounding circumstances of the application, including any family connections the applicant might have to New Zealand, are to be disregarded for the purposes of the decision.

b. Where A5.30(b) applies, an immigration officer may consider the nature and extent of the applicant's association with, membership of, or involvement with, the government, regime, group or agency. If the immigration officer is satisfied beyond doubt that the nature and extent of the association, membership or involvement was minimal or remote then the officer may grant a residence class visa to the applicant provided all other Instructions requirements are met.

c. An immigration officer must make a decision in compliance with fairness and natural justice requirements (see A1).

d. An immigration officer must record the reasons for their decision on this aspect of the character requirements.

e. Any decision to determine the application in accordance with A5.30 must be made by an immigration officer with Schedule 1-3 delegations.

Submissions[14]

Submissions for Mr H

[17] Mr Harrison QC submits, on behalf of Mr H, that instruction A5.30(b) deems a person not to be of good character by mere association, even if there is no personal involvement with, or even knowledge of, war crimes, crimes against humanity and/or other gross human rights abuses advocated for or committed by the relevant government, regime, group or agency (the organisation).

[18] Mr Harrison points out that instruction A5.30.1(b) only allows residence visas to be granted if the decision-maker is satisfied beyond doubt[15] that the association with

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14 We do not summarise the decisions of the Courts below. This is because the argument took a somewhat different turn before us than it had in the Courts below.

15 The "beyond doubt" requirement was removed after the Court of Appeal decision. The Court of Appeal considered this phrase did not have the effect of imposing either an onus or standard of proof, but merely denoted a level of certainty that amounts to being "sure". It did say, however, that it may have been preferable not to have used a phrase so similar to that used in a criminal context: CA judgment, above n 2, at [52]–[53].

the organisation was minimal.[16] Again there is no consideration of the extent of any association with the gross human rights abuses advocated for or committed by the organisation.

[19] It is submitted therefore that overall, instruction A5.30(b) is not founded on consideration of personal bad character at all. It is, as a result, unreasonable, unfair or ultra vires, and therefore invalid. Accordingly, Mr Harrison submits that the challenged instruction should be declared to be unlawful and this Court should issue a declaration that Mr H was and is entitled to a residence visa.

[20] It is submitted further that granting a residence visa to a person who is in fact of good character, despite association with an impugned organisation, could never affect New Zealand's international reputation. In addition, it is submitted that instruction A5.30 fails to have regard to the special position of refugees under art 34 of the Convention relating to the Status of Refugees (the Refugee Convention).[17]

Submissions of the Minister

[21] The Minister accepts that instruction A5.30 is intended to be a character measure. It is submitted, however, that character is wider than personal characteristics and can include external circumstances, such as having an association with an organisation that advocates for or commits gross human rights abuses.

[22] It is, however, accepted that this depends on the nature of such association with such an organisation. It is also accepted that New Zealand's international reputation could only be affected where there is a rational connection between the nature of the association with the organisation and the applicant's character. As a matter of principle, it is submitted that the instruction should be interpreted if possible in a manner that would give it validity.[18] Therefore, the Minister accepts that it should be interpreted to require such a rational connection.

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16 The requirement in instruction A.5.30.1(b) that the applicant's association "was minimal or remote" was changed after the Court of Appeal decision to read "was or is minimal or remote".

17 Convention relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954) [Refugee Convention].

18 Relying on *Patel v Chief Executive of the Department of Labour* [1997] NZAR 264 (CA) at 271 and the common law principle *ut res magis valeat quam pereat* (it is better for a thing to have effect than be made void).

[23] With regard to art 34 of the Refugee Convention, it is submitted that this does not excuse refugees from meeting the character requirements that apply to all applicants for residence.

Our assessment

General points

[24] The lawfulness of policies made under a statute can be challenged, including on grounds of unreasonableness.[19] Courts will normally prefer to consider the lawfulness of a policy against the background of a concrete set of facts.[20] In this case, however, the issue is sufficiently confined for this not to be necessary. The issue on appeal is whether instruction A5.30(b), properly interpreted, is unreasonable and therefore invalid.

[25] Instruction A5.30(b) is related to character. As is accepted by the Minister, this means that there must be a rational connection between the applicant's association with the organisation and the applicant's character.

[26] We accept that being associated[21] with an organisation[22] that advocates for or commits impugned activities[23] is capable of being an indication that an applicant is

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19 See *Regina v Ministry of Defence, Ex parte Smith* [1996] QB 517 (CA) at 554–556 per Sir Thomas Bingham MR, with whom Henry and Thorpe LJJ agreed (at 561 and 564, respectively); and *Regina (Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392, [2006] 1 WLR 2649 at [82]. As there is a statutory basis for the instruction in this case, we do not consider *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL) and *Regina (A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931 to be applicable. In *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA), McGrath J applied *Gillick* in support of his view that the impugned operational instruction was reviewable: at [106]. But, as there was in that case a specific statutory background against which to assess the instruction, we do not consider *Gillick* was directly applicable. The other Judges in the case did not mention *Gillick*.

20 *Refugee Council of New Zealand*, above n 19, at [45] per Blanchard, Tipping and Anderson JJ. Conversely, McGrath J at [106] had no difficulties sanctioning review of the operational instruction in the abstract where the proceedings raised a "live issue" regarding the application of the relevant legislation, although at [107] he cautioned against proceedings seeking to "go beyond review of the terms of the policy statement itself to bring a representative proceeding to determine the rights of all those to whom it was applied over a given period". Glazebrook J did not comment on this issue.

21 We use this term as shorthand for "association, membership or involvement".

22 As noted above at [17], we use this term as shorthand for "government, regime, group or agency".

23 We use this term as shorthand for "war crimes, crimes against humanity and/or other gross human rights abuses".

not of good character, but this must depend on the level of knowledge[24] the applicant had of the impugned activities at the relevant time; the nature, duration and extent of the association with or involvement in the impugned activities; and the level of free choice the applicant in fact had.[25]

[27] We also accept that if New Zealand grants a residence visa to a person associated with an organisation that advocates for or commits impugned activities, this could have the potential to affect New Zealand's international reputation as a nation that values and upholds human rights. But again, this would depend on the factors outlined above. Granting residence to a person who, despite being associated with an organisation, had absolutely no knowledge of its impugned activities, for example, is not rationally capable of affecting New Zealand's international reputation.

[28] It is difficult to give much guidance on when association with an organisation will signal that an applicant is not of good character, as the assessment will depend on the facts of any particular case. A rational connection with an applicant's character could exist, for example, even if the applicant has not personally advocated for or committed any of the impugned activities. Joining or remaining associated with an organisation that an applicant knows, or should know, advocates for or commits impugned activities may suffice, depending on the nature of the organisation and the applicant's level of free choice in their association with it. The extent of any impugned activities within the organisation will be relevant to that assessment. For example, in a large organisation, it may be that only parts of the organisation advocate for or commit impugned activities. It would therefore likely only be an association with those parts of the organisation that could potentially provide a rational connection with a person's character.

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24 We include recklessness in this: see *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161 at [64]–[77].

25 An individual's free choice may be impacted by factors on a spectrum from economic necessity to justified fear of death or injury. The extent to which diminished free choice may be relevant will depend not only on its extent and the reasons for it but also on the level of knowledge of or involvement in the impugned activities. When considering an individual's free choice, art 34 of the Refugee Convention, above n 17, could have some relevance. Refugees may well come from situations where free choice might be limited.

Interpretation

[29] Instruction A5.30(b) is expressed in broad terms. The words "an association with, membership of, or involvement with" are designed to be comprehensive, as are the terms "government, regime, group or agency". This has the effect, as Mr Harrison submits, of deeming a person to be of bad character merely by reason of their association with an impugned organisation. Contrary to Mr Harrison's submission, we consider this reasonable as a starting point. After all, applicants are in the best position to know the level of association they had with the impugned activities of an organisation and therefore whether there is a rational connection between such an association and their character. They can put that material before the decision-maker to be considered under instruction A5.30.1(b).

[30] Instruction A5.30.1(b) alleviates the effect of instruction A5.30(b) by ensuring that an association with an impugned organisation will not be disqualifying if there is no rational connection between the association with the organisation and character. Instruction A5.30.1(b) contemplates an examination of the "nature and extent" of the association with the organisation; if the nature and extent of an applicant's association was "minimal or remote", the applicant may be granted a residence visa. In context, this language must be interpreted to encompass an analysis of the types of considerations set out at [26] and [28] above. It contemplates not merely an analysis of the level of association with the organisation itself, but also an assessment of the knowledge of, and the nature, duration and extent of the association with or involvement in, the impugned activities of the organisation. If the nature and extent of the applicant's association is such that they can be said to have been, for example, well removed (that is, remote) from any association with any impugned activity, they may fall within instruction A5.30(1)(b).[26]

[26] A similar but slightly different interpretation of instruction A5.30, requiring a rational connection between an applicant's association with an organisation and their character, was reached by the Tribunal in *AB (X Category)* [2020] NZIPT 205654 at [131].

Refugee Convention

[31] With regard to the Refugee Convention, we accept the Minister's submission that there is no breach of the Convention by requiring refugees to meet the same character requirements as all other applicants for residence.[27]

Conclusion on validity

[32] For the reasons set out above, we hold that instruction A5.30.1(b) requires a decision-maker to consider whether there is a rational connection between an applicant's association with an organisation and the applicant's character. It therefore requires a consideration of the nature and extent of the association with the impugned activities of the organisation. Interpreted in this manner, instruction A5.30 is not unreasonable, unfair or ultra vires.[28]

[33] While we have come to the above view on the basis of interpretation, we consider that the instruction should be redrafted to make it explicit that there has to be a rational connection between association with the organisation and the character of an applicant. As a matter of good public policy, the instructions should be accessible and clear, both to those administering them and to applicants.

Suggestions for redrafting

[34] We provide below some suggestions for redrafting in order for the instruction to be clear and accessible. We stress these are suggestions only.

[35] We first comment that the concentration in instruction A5.30 on international reputation seems something of a red herring in that it tends to obscure the fact that instruction A5.30 is intended to be a provision dealing with character. Damage to New

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27 Had the Refugee Convention been relevant, we would have had some concern about an assumption that it must have been taken into account, despite the fact that there was nothing specific in the briefing papers about it, by reference to an assumption that, because of a previous role, the Minister must have been aware of it (see CA judgment, above n 2, at [61]). Nor would we have considered a general briefing given in 2004 sufficient to infer that it had been properly taken into account (at [62]). The same applies to the fact that the Refugee Convention is discussed in relation to other parts of the Manual (at [63]).

28 It is not appropriate, in the context of a judicial review proceeding generally challenging the validity of the instructions, to express any view on whether or not Mr H is, on our interpretation of the instructions, entitled to a residence visa.

Zealand's international reputation may be a consequence of granting a residence visa to a person who is not of good character because of the person's association with advocacy or commission of impugned activities, but it is not the reason a person's character is not good. In our view, it would make it clearer that instruction A5.30 is a provision related to character if it were moved to instruction A5.25 with the other similar character requirements.

[36] If it is considered important that instruction A5.30 remains a separate provision and related to harm to New Zealand's international reputation, then we suggest that instruction A5.30.1(b) might be redrafted as follows:

> Where A5.30(b) applies, there must be a rational connection between the applicant's character and the association with, membership of, or involvement with the relevant government, regime, group or agency. In assessing whether there is a rational connection, the immigration officer must consider the level of knowledge of, and the nature, duration and extent of the applicant's association with or involvement in the advocacy or commission of war crimes, crimes against humanity and/or other gross human rights abuses by the government, regime, group or agency. The extent of free choice the applicant in fact had will also be relevant. If the applicant has satisfied the immigration officer that there is no rational connection between the applicant's character and the association with, membership of, or involvement with the relevant government, regime, group or agency, then the officer may grant a residence class visa to the applicant provided all other immigration instructions requirements are met.

Result

[37] The appeal is dismissed on the basis set out at [32]–[33].

[38] Costs are reserved. If the parties are not able to agree, memoranda on costs may be filed on or before 5.00 pm on 1 February 2022.

WINKELMANN CJ

[39] I would allow the appeal.

[40] I consider that the challenge to instructions A5.30 and A5.30.1, on the grounds they are unreasonable, should succeed. The argument for Mr H in this regard is that the instructions are unreasonable as they are directed to an applicant's character yet

may require exclusion from residency for reasons that are unconnected to the character of an applicant.

[41] I differ from the majority in that, on my interpretation, instruction A5.30.1(b) does not contemplate an assessment by officials of the applicant's knowledge of, and the nature, duration and extent of the association with or involvement in, the impugned activities of the organisation.[29] I do not consider that the majority's interpretation is available because the combination of A5.30(b) and A5.30.1(b) makes clear that it is mere association with the problematic government, regime, group or agency that is disqualifying, unless the association with that government, regime, group or agency was itself remote or minimal.[30] The instruction is not worded in a way that allows for an interpretation whereby an applicant who cannot show minimal or remote association with the relevant entity can nevertheless overcome this presumptive disqualification by showing minimal or remote involvement in and knowledge of the impugned conduct itself. Whilst in some cases it may be appropriate to read words into a policy as part of a purposive interpretation of that policy, in this case there are good reasons not to do so.

Interpretation of instructions A5.30 and A5.30.1

[42] It is helpful first to set out the immigration instructions at issue. At the relevant time, these provided:

> **A5.30 Applicants normally ineligible for a residence class visa**
>
> a. Applicants will not normally be granted a residence class visa, unless in accordance with A5.30.1 below, where an applicant would pose a risk to New Zealand's international reputation.
>
> b. In particular (but not exclusively), applicants are considered to pose a risk to New Zealand's international reputation if they have or have had an association with, membership of, or involvement with, any government, regime, group or agency that has advocated or committed war crimes, crimes against humanity and/or other gross human rights abuses.

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29 See the majority's reasons above at [30] and [32].

30 As noted by the majority above at [18], n 16, the requirement in instruction A.5.30.1(b) that the applicant's association "was minimal or remote" was changed after the Court of Appeal decision to read "was or is minimal or remote".

c. A5.30(b) does not mean that an applicant cannot be considered to pose a risk to New Zealand's international reputation for any other reason.

d. Applications to which this provision applies must be determined in accordance with A5.30.1 below.

A5.30.1 Action

a. An immigration officer may decline residence class visa applications under A5.30 on character grounds. In determining whether to decline an application under A5.30 the surrounding circumstances of the application, including any family connections the applicant might have to New Zealand, are to be disregarded for the purposes of the decision.

b. Where A5.30(b) applies, an immigration officer may consider the nature and extent of the applicant's association with, membership of, or involvement with, the government, regime, group or agency. If the immigration officer is satisfied beyond doubt that the nature and extent of the association, membership or involvement was minimal or remote then the officer may grant a residence class visa to the applicant provided all other Instructions requirements are met.

c. An immigration officer must make a decision in compliance with fairness and natural justice requirements (see A1).

d. An immigration officer must record the reasons for their decision on this aspect of the character requirements.

e. Any decision to determine the application in accordance with A5.30 must be made by an immigration officer with Schedule 1-3 delegations.

[43] To interpret these instructions, I start with *Patel v Chief Executive of the Department of Labour*, which describes the usual approach to interpreting a policy document:[31]

> A policy document, such as the one in issue, is not to be construed with the strictness which might be regarded as appropriate to the interpretation of a statute or statutory instrument. ... It must be construed sensibly according to the purpose of the policy and the natural meaning of the language in the context in which it is employed, that is, as part of a comprehensive and coherent scheme governing immigration into this country.

[44] For the Minister of Immigration (the Minister), Mr Kirkness argued for the application of the common law principle that, where possible, a rule or policy should be interpreted in a manner that reconciles it with its empowering provision – reflecting

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[31] *Patel v Chief Executive of the Department of Labour* [1997] NZAR 264 (CA) at 271 (citations omitted).

a presumption that a person entrusted with a power may reasonably be expected to seek to act within the scope of that power. I agree that this is an approach that is appropriate when construing rules and policies created in reliance upon statutory provisions. It can be reformulated, in this context, as a principle that a court should be slow to conclude that the empowering legislation authorises the promulgation of unreasonable rules or policies, as assessed against the purpose and scope of the empowering provision itself.[32]

[45] As to the purpose of instructions A5.30 and A5.30.1, counsel for the Minister took us through the circumstances leading to their creation. The genesis was the entry into New Zealand of individuals tied to a regime associated with human rights abuses. The particular concern was that immigration policy at the time did not allow immigration officers to decline an application from a person connected to a regime involved in war crimes, crimes against humanity and/or other gross human rights abuses where allowing entry could damage New Zealand's international reputation, unless the person had criminal convictions or pending investigations. It was this concern that led to the issuing of instructions that are now captured in instructions A5.30 and A5.30.1.

[46] The majority's interpretation is that the instructions require consideration of whether there is a rational connection between an applicant's association with an organisation and the applicant's character – and therefore consideration of the nature and extent of the association with and knowledge of the impugned activities of the organisation.[33] I accept that this interpretation of the instructions would achieve the policy objectives that lay behind the issue of the instructions. But so too does the interpretation that has been applied in the Courts below and that was initially the interpretation argued for by the Minister on this appeal. That interpretation is that association with the government, regime, group or agency can be grounds to determine an applicant is not of good character unless that association is minimal or remote – irrespective of the applicant's knowledge of or involvement in the impugned actions of the government, regime, group or agency.

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32 See *Wielgus v Removal Review Authority* [1994] 1 NZLR 73 (HC) at 79.
33 See the majority's reasons above at [30] and [32].

[47] The majority's interpretation has the advantage that it saves the policy from a finding that it is unreasonable, and in accordance with the principles set out above, that tilts the interpretive scales in its favour. But in my view, that interpretation is inconsistent with the language of the instruction and requires a non-contextual reading.

[48] Throughout instructions A5.30 and A5.30.1, the focus is on the applicant's association, membership or involvement with the government, regime, group or agency, rather than on their personal knowledge or conduct, as justification for a finding that they are not of good character. And it is clear from instruction A5.30.1(b) that the path to residence for an applicant who falls within instruction A5.30(b) is to show that their association with, membership of, or involvement with the problematic government, regime, group or agency was minimal or remote – not that they were minimally or remotely involved with its impugned activities. The majority's interpretation of what is contemplated in examining the "nature and extent" of the association with the organisation therefore requires divorcing the first half of instruction A5.30.1(b) from the second half.[34]

[49] During the hearing of the appeal, Mr Kirkness accepted the view (put to him from the bench) that there needs to be a nexus between the applicant's association with the government, regime, group or agency, and the concern that underlies the policy – in other words, only associations which call into question character should be caught by instruction A5.30(b). I accept that the majority's interpretation provides this logical connection, but in my view it requires reading in words that change the meaning of instruction A5.30.1(b) as judged by reference to the language used and the wider context provided by instructions A5.30 and A5.30.1. It is a feature of the cases Mr Kirkness referred to us, that they typically involve reading down overly broad words so as to bring the policy within the scope of the empowering provision. Here, the majority has, with its interpretation, expanded the scope of the proviso beyond that which the words of the provision naturally bear.

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[34] See the majority's reasons above at [30] and [32].

[50] There are, in this case, good reasons not to strain to arrive at an interpretation of this instruction in order to save it from a finding of invalidity.[35]

[51] The requirements of fair and lawful administration support the approach I favour of declaring the instructions invalid, if they are found to be unreasonable. The meaning of the instructions should be accessible both to those administering them and to applicants – few of whom will be lawyers. The majority's interpretation is not apparent on reading the instructions and it follows that those reading the instructions will need to have knowledge of the decision in this case – applicant and immigration officer alike – to understand it and properly apply it.[36]

[52] There is no countervailing policy reason to uphold the validity of the instructions. It was not suggested to us that it is difficult to rewrite them. Indeed, we were told that the instructions in question have already been rewritten after the Court of Appeal hearing, to address concerns identified there.

[53] I mention in connection with this that I considered and rejected another interpretation, which would require a logical connection between the association and the applicant's character, but in my view would be a readier fit with the language than the interpretation favoured by the majority.[37] On this alternative interpretation, a relevance requirement is imported into the words "association with, membership of, or involvement with" in instruction A5.30(b) – so that only an association, membership or involvement that is sufficient to create a rational connection to the applicant's character will trigger the application of the exclusionary presumption. But

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35 I acknowledge that in some cases it may be appropriate to read words into policies, rules or regulations in the process of interpretation, depending on the provision in question and the nature of the specific issue raised by the litigant: see, for example, *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774; *Transport Ministry v Alexander* [1978] 1 NZLR 306 (CA); and *Wielgus*, above n 32.

36 The context of this case is different from this Court's recent judgment in *Fitzgerald v R* [2021] NZSC 131, (2021) 12 HRNZ 739, where the Court did read a proviso into s 86D(2) of the Sentencing Act 2002. This case concerns judicial review of immigration instructions on unreasonableness grounds, whereas *Fitzgerald* addressed the proper interpretation of legislation (which is not itself subject to judicial review) in light of s 6 of the New Zealand Bill of Rights Act 1990. The effect of the Bill of Rights Act was not argued in this case. Issues of accessibility are also more pressing in this case – the instructions form part of a manual that must be capable of administration by officials and capable of being understood by lay applicants.

37 This alternative interpretation was raised during the hearing and is similar to that which was applied by the Immigration and Protection Tribunal in *AB (X Category)* [2020] NZIPT 205654 at [131].

this alternative interpretation has the difficulty that it disrupts what is otherwise a sensible administrative scheme.[38]

[54] On the interpretation that has been applied in the Courts below, immigration officials can apply a presumption that a person who is associated with a problematic government, regime, group or agency is not of good character. That presumption is administratively sensible, if not essential – immigration officials would struggle in many cases to gather evidence as to the details of the association in question beyond the fact of membership, association or involvement. On the policy as it has been applied, it is then for the applicant, under instruction A5.30.1(b), to show that the "nature and extent of the association, membership or involvement was minimal or remote". An interpretation that imports a requirement of relevance into the association, membership or involvement test in instruction A5.30(b) would place the fact-finding onus on the officials – perhaps an impossible burden from an operational point of view.

[55] The way in which interpretation and administration connect in this particular scheme are further reasons why, in all of the circumstances, the difficulty with the instructions is best addressed by invalidating them, leaving the Minister to decide the form in which they will be reissued.

[56] Finally, I observe that Mr H has been engaged in litigation in relation to the proper meaning and application of these provisions for many years, challenging decisions that have been made based upon the interpretation originally argued for by the Minister in this appeal. Mr H has now taken a different approach in his attempts to gain residency and has challenged the reasonableness of the instructions themselves, pursuing judicial review proceedings through to this Court. If Mr H succeeds in this argument that the policy as interpreted and applied is unreasonable (and I consider Mr H does), then the appeal should be allowed.

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[38] It also has the difficulty that it renders what is in effect a proviso in instruction A5.30.1(b) redundant.

Unreasonableness

[57] I address the issue of the reasonableness of the instructions on the basis of the interpretation that has been applied by immigration officials to Mr H's case, and that I have preferred over the interpretation applied by the majority.

[58] Like regulations, rules and bylaws, government policies made under a statute must be reasonable.[39] They will be unreasonable if they are policies that no reasonable decision-maker could have promulgated, or if they are "outside the limits of reason" – the test is a stringent one.[40] Put another way, the immigration instructions will be ultra vires if they are so unreasonable that their making would not have been contemplated by Parliament as empowered by the Immigration Act 2009.[41] Any policy which guides the exercise of a statutory power "must be based on factors and purposes relevant to the power".[42]

[59] I accept Mr Kirkness' submission that the empowering provision, s 22 of the Immigration Act, confers a broad power on the Minister to certify immigration instructions relating to residence class visas. But whatever instructions may be authorised under such an empowering provision, the Minister accepts that the instructions in question provide a character test, and that while they are also directed to protecting New Zealand's international reputation, they achieve that by preventing people who may not be of good character (by reason of their association with the problematic government, regime, group or agency) from gaining residence. Mr Kirkness' position for the Minister is simply that a person's association with this sort of organisation itself speaks to character, and therefore the instructions are reasonable.

[60] I cannot accept that an assessment of whether a person is of good character need not depend upon an assessment of their personal qualities or behaviour. In New Zealand society, a person's character is assessed by reference to their own acts

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39 See the majority's reasons above at [24].

40 *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176, [2013] NZAR 1409 at [136], citing *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 131 per Cooke P and *Wellington City Council v Woolworths (New Zealand) Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545 per Richardson P.

41 See *Turners & Growers Exports Ltd v Moyle* HC Wellington CP720/88, 15 December 1988 at 49.

42 *Criminal Bar Association*, above n 40, at [119].

or omissions, and not by reference to matters which they have no control over or responsibility for.

[61] I agree with the majority that while association with a problematic government, regime, group or agency is capable of being an indication that an applicant is not of good character, it will not be conclusive of that in all circumstances. This is obvious when the size of the potential catchment of these instructions is considered – anyone who is a member of or associated with a problematic government, regime, group or agency is caught within the presumptive exclusion from residency effected by instructions A5.30 and A5.30.1. I also agree with the majority that whether it is evidence of lack of good character must depend on the level of knowledge (including knowledge in the sense of recklessness) the applicant had and/or the extent and nature of their involvement in advocacy for or commission of "war crimes, crimes against humanity and/or other gross human rights abuses" (the impugned conduct). I would sum this up by saying that whether a person who has been associated with a problematic government, regime, group or agency is of good character depends on whether their association with the impugned conduct was in any sense blameworthy.

[62] I accept, as does the majority,[43] that it is reasonable to have a presumption that a person who is associated with a problematic government, regime, group or agency is not of good character for the reasons I have set out above. It is not unreasonable to require the applicant who has such an association to prove that they are nevertheless of good character. But they should be able to do so by reference to that which is relevant to their character – their connection to the impugned conduct. While association with the problematic government, regime, group or agency may be appropriate as a screening mechanism, it may ultimately prove to be irrelevant to an assessment of the applicant's character if they had no knowledge of, and involvement in, the impugned conduct.

[63] It follows that I would find instructions A5.30 and A5.30.1 unreasonable and therefore invalid. Although the critical defect or lack of logic may lie within instruction A5.30.1(b), these instructions operate together and so must stand or fall

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[43] See the majority's reasons above at [29].

together. I would allow the appeal and declare the instructions, in the form they were in at the relevant time, invalid. As I am not in the majority, I do not go on to address the other aspects of relief that counsel for the appellant, Mr Harrison QC, sought consequent upon a decision to quash the instructions.

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