

EXECUTIVE COUNCIL

RESTRICTED

Title of Report: Constitution - Permanent Right to Remain
Paper No: 236/09
Date: 26 November 2009
Report of: Acting Principal Immigration Officer

1.0 Purpose

The purpose of this paper is to seek Members' approval of proposals for giving effect to the grant of a "permanent right to remain" in accordance with section 22(7) of the Constitution.

2.0 Recommendations

2.1 Honourable Members are recommended to agree that:

(a) the grant of a permanent right to remain under section 22(7) of the Constitution should be given effect to by way of a grant of a permanent residence permit; and

(b) the Immigration (Amendment)(No 2) Bill 2009 should be submitted to the Legislative Assembly in December 2009.

3.0 Summary of Financial Implications

No direct financial implications.

4.0 Background

Relevant Constitutional provisions

4.1 Section 22(7) of the Constitution gives certain groups of people a right to apply for Falkland Islands status, and provides that if an application which is made by virtue of that right is unsuccessful, the applicant will be granted a permanent right to remain in the Falkland Islands

4.2 The obligation to grant a permanent right to remain is said to be subject to section 9(2) of the Constitution, which details derogations from the fundamental protection for private and family life and for privacy of home and other property.

4.3 The persons who are, by virtue of section 22(7), entitled to apply for Falkland Islands status are:

4.3.1 a British overseas territories citizen who has been naturalised or registered whilst resident in the Falkland Islands;

4.3.2 a spouse, widow or widower of a person who has Falkland Islands status; and

4.3.3 a person under 18 who is the child/stepchild/adopted child of a person who has Falkland Islands status.

4.4 The grant of a permanent right to remain under section 22(7) is thought to be subject to section 9(2) because the grant of a permanent right to remain in connection with the persons described in 4.3.2 and 4.3.3 above is in recognition of the right of those persons to respect for family life as set out in section 9 of the Constitution. Therefore if there are grounds under section 9(2) for not conferring the usual protections for family life in the case of an individual who would potentially benefit from the section 22(7) provision, then a failure to grant a permanent right to remain to the individual should not be in breach of section 22(7).

What is a permanent right to remain?

4.5 The Constitution does not define the phrase “permanent right to remain”. It is clearly intended that the right does not amount to the same thing as Falkland Islands status, but the question is; what does it amount to?

4.6 Section 8 of the Constitution, which protects freedom of movement, explicitly gives the same protections of freedom of movement to persons with a permanent right to remain as to persons with Falkland Islands status. Therefore, as a minimum, a grant of a permanent right to remain must bestow on the person benefiting from the grant, the same freedom of movement as a person with Falkland Islands status.

4.7 There are no other provisions of the Constitution which explicitly refer to a permanent right to remain. However, there are a number of factors which, arguably, need to be included in the grant of a permanent right to remain if the right is to be an effective and meaningful one, ie if an individual granted a permanent right to remain is to be able to live a settled life in the Falkland Islands. The necessary factors must be determined as a matter of policy.

4.8 The two key factors which are probably most associated with effective settlement in a country are; (i) the ability to earn a living through business or employment; and (ii) the ability to purchase property.

4.9 Under the Immigration Ordinance there are restrictions on taking employment, or engaging in a trade, business, profession, or vocation, in the Falkland Islands. Only persons with Falkland Islands status are not subject to

such restrictions under the Ordinance. The grant of a permanent residence permit has the effect of lifting the restrictions in relation to the permit holder.

4.10 The Land (Non-Residents) Ordinance restricts the ability of persons to purchase property in the Falkland Islands. The restriction is imposed by reference to residence which is, in turn, defined by reference to persons with Falkland Islands status or a permanent residence permit.

4.11 If it is accepted as a matter of policy that persons who are to be granted a permanent right to remain in the Falkland Islands should, in addition to having the relevant protections of freedom of movement under section 8 of the Constitution, be given the ability to earn a living through business or employment, and the ability to purchase property, then the most practical way to achieve this would appear to be to give effect to a permanent right to remain through the grant of a permanent residence permit. That is the recommendation of this paper.

4.12 There are other benefits which flow from the grant of a permanent residence permit which may need to be considered in terms of the effect of this recommendation. However, it is suggested that the benefits come naturally in connection with an ability to live a settled life in the Falkland Islands. The benefits which can be identified as currently connected with a permanent residence permit are:

- (a) protection of employment opportunities under the Immigration Ordinance;
- (b) classification as a preferred candidate for employment under FIG's Management Code (ahead of a person requiring a work permit, but behind a person with Falkland Islands status);
- (c) eligibility for FIG supported further education;
- (d) eligibility for family allowance
- (e) eligibility for FIG housing (after four years);
- (f) eligibility for FIG's Special Employment Programme; and
- (g) free medical treatment (although this will likely already be available to a person through another route before they are granted a PRP);

4.13 For the sake of completeness, it may be helpful to identify some of the other benefits which are not available to the holder of a permanent residence permit but which, by contrast, are only available to Falkland Islands status holders:

- (a) eligibility to vote and stand for election for the Legislative Assembly;
- (b) eligibility to hold ITQ in the Fishery and to register a Falkland Islands ship;

- (c) eligibility for holiday credits (for so long as the scheme operates); and
- (d) eligibility for FIG supported higher education.

Revocation

4.14 The Constitution gives no indication whether or not there can be a revocation of a permanent right to remain. The nature of a “permanent” right does imply an enduring right. However, logic also suggests that a permanent right to remain should not be a right which is superior to the grant of Falkland Islands status; the applicant is only entitled to a permanent right to remain following an unsuccessful application for Falkland Islands status.

4.15 It is therefore recommended that a permanent residence permit granted under this new provision should be subject to exactly the same revocation provisions as a person who has made a successful application for Falkland Islands status.

Permanent residence permit quota system

4.16 It should be noted that the permanent residence permit quota system associated with the points system will not be applicable to the grant of a permanent residence permit under the new provision. That is because the grant of a permanent residence permit gives effect to a right granted under the Constitution, so cannot be subject to a quota.

5.0 Financial Implications

No direct financial implications.

6.0 Legal Implications

The Immigration (Amendment)(No 2) Bill will need to be submitted to the Legislative Assembly to give effect to the recommendations of this paper.

The Bill is required as a matter of some urgency because there is at least one individual who may already be entitled to a permanent right to remain, but there is currently no mechanism with which to give effect to that right.

7.0 Human Resources Implications

If the recommendation of the paper is accepted; that a person with a permanent right to remain is granted a permanent residence permit, those persons will benefit from preferred status under the Management Code, so there are no direct Human Resources implications.

Immigration (Amendment)(No 2) Bill 2009

(No: of 2009)

ARRANGEMENT OF PROVISIONS

Clause

1. Title
2. Commencement
3. Amendment of Immigration Ordinance
4. Permanent Residence Permits
5. New section 18AA inserted
6. Revocation of permanent residence permits
7. New section 23A inserted

IMMIGRATION (AMENDMENT)(No 2) BILL 2009

(No: of 2009)

(assented to: 2009)
(commencement: on publication)
(published: 2009)

A BILL

for

AN ORDINANCE

To amend the Immigration Ordinance (Title 52.2).

BE IT ENACTED by the Legislature of the Falkland Islands —

1. Title

This Ordinance is the Immigration (Amendment)(No 2) Ordinance 2009.

2. Commencement

This Ordinance comes into force on publication.

3. Amendment of Immigration Ordinance

This Ordinance amends the Immigration Ordinance.

4. Permanent Residence Permits

Section 18 is amended by adding the following subsection —

“(4) Subsection (3) does not apply in relation to the grant of a permanent residence permit under section 18AA.”

5. New section 18AA inserted

The following section is inserted after section 18 —

“18AA. Permanent Right to Remain and Permanent Residence Permits

(1) A person who is entitled to the grant of a permanent right to remain under section 22(7) of the Constitution will be granted a permanent residence permit under this section for the purposes of satisfying that provision of the Constitution.

(2) A permanent residence permit will be granted for the purposes of subsection (1) by the Principal Immigration Officer on determining that the person is entitled to be granted a permanent right to remain under section 22(7) of the Constitution.”

6. Revocation of permanent residence permits

Section 23 is amended by inserting “granted under section 18” after “permanent residence permit” in the heading to the section and in subsection (1).

7. New section 23A inserted

The following section is inserted after section 23 —

“23A. Revocation of permanent residence permits granted under section 18AA

(1) The Governor may revoke a permanent residence permit granted under section 18AA on the grounds set out in subsection (2), following the procedure set out in subsection (3).

(2) A permanent residence permit granted under section 18AA may only be revoked on one or more of the following grounds —

(a) in the permit holder’s application for Falkland Islands status which formed the basis for the grant of the permanent residence permit, or in connection with that application, the person —

(i) knowingly made a false statement;

(ii) made a statement and was careless as to the true or false nature of the statement;

(iii) knowingly provided a document containing a false or misleading statement; or

(iv) provided a document and was careless as to the true, false, or misleading nature of a statement in the document;

(b) since the grant of the permit, the permit holder —

(i) has been convicted by a Commonwealth court of competent jurisdiction of an offence and has been sentenced by the court to immediate imprisonment or deprivation of liberty of twelve months or more;

(ii) has been absent from the Falkland Islands for at least two years (unless the absence is for educational or medical reasons or to serve as a member of Her Majesty's armed forces);

(iii) appears to be no longer ordinarily resident in the Falkland Islands (unless the absence is for educational or medical reasons or to serve as a member of Her Majesty's armed forces);

(iv) has voluntarily acquired the nationality or citizenship of a country outside the Commonwealth; or

(v) has voluntarily undertaken an obligation of allegiance to a country outside the Commonwealth.

(3) The procedure to be followed in relation to the revocation of a permit under this section is as follows —

(a) the Governor, acting on the advice of Executive Council, will —

(i) give written notice to the permit holder of the intention to consider revoking the permit, stating the grounds on which the revocation is to be considered;

(ii) give the permit holder a reasonable opportunity to make written representations in relation to the proposed revocation;

(iii) if the permit is to be revoked, give written notice to the permit holder of the revocation, stating the grounds for revocation, which must have been included in the notice given in accordance with paragraph (3)(a)(i);

(b) Executive Council must consider any written representations made under paragraph (3)(a)(ii) before a decision is made to revoke the permit.”

OBJECTS AND REASONS

This Bill, which comes into force on publication, would amend the Immigration Ordinance (Title 52.2) to provide for the grant of a permanent residence permit to a person who is entitled to the grant of a permanent right to remain under section 22(7) of the Constitution.

Clause 4 would amend section 18 to distinguish the grant of a permanent residence permit in connection with a permanent right to remain from the ordinary systems for the grant of a permanent residence permit.

Clause 5 would insert a new section 18AA, which provides that a permanent residence permit will be granted by the Principal Immigration Officer if the officer is satisfied that the person is entitled to the grant of a permanent right to remain under the Constitution.

Clause 6 would amend section 23 to distinguish the revocation provisions which apply in relation to the grant of a permit under section 18.

Clause 7 would insert a new section 23A to make new revocation provision in relation to a permit granted under the new section 18AA. The revocation provisions are derived from the revocation provisions contained in the Falkland Islands Status Ordinance (Title 52.3). This is to ensure that a person with a permanent right to remain is not deprived of that right in any circumstances different from the manner in which a person who has been granted Falkland Islands status under the Falkland Islands Status Ordinance may be deprived of that status.