

## A legitimate citizen? (A)

In July 2008 Shane Jones, a minister in New Zealand's Labour government, was responsible for a decision on the application for citizenship by a Chinese immigrant, Yang Liu. It was the first time Jones had been called upon to use the powers delegated to him some months earlier, and the case was looking like a curly one. On one hand the applicant had a murky past and officials were recommending against granting citizenship. But on the other, Liu had a New Zealand partner and two New Zealand-born children. Liu's lawyers pointed out that Liu feared for his life if he had to return to China.

The case had been passed to Jones, Associate Minister of Immigration,<sup>1</sup> because Rick Barker, the Minister of Internal Affairs, who usually dealt with citizenship decisions, had recused himself on the grounds of conflict of interest due to having previous personal dealings with Liu. The decision wasn't easy, but compassion won; on 6 August 2008 Shane Jones authorised the grant of citizenship to Yang Liu, who was confirmed as a New Zealand citizen five days later.

### A man of many names and many places

Yang Liu<sup>2</sup> was born in China and had an interesting past; it was unclear exactly when he was born<sup>3</sup> and he had at least two passports.<sup>4</sup> He also was peripatetic: he went to Australia in

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This case has been written by Adjunct Professor Mark Prebble and John Yeabsley, with research assistance from Meg Prebble. We are grateful to Hon Shane Jones for reviewing a near-final draft. It has been prepared as a basis for class discussion rather than to illustrate either effective or ineffective handling of a managerial situation, drawing largely on the Auditor-General's March 2013 report *Inquiry into Decision by Hon Shane Jones to Grant Citizenship to Mr Yang Liu*.

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<sup>1</sup> Immigration (then part of the Department of Labour) dealt with residency and Internal Affairs handled citizenship applications. Jones did not receive the file because of his Immigration responsibilities; it came to him under a standing delegation that the Prime Minister had previously approved.

<sup>2</sup> Apparently Liu has used various names; this case note follows the Auditor-General and refers to him as Yang Liu or Liu.

<sup>3</sup> Various birth dates seem to have been quoted, with the Chinese saying these were part of his criminal behaviour. His lawyer mentioned 1969, 1971 and 1972 and explained these as a result of his history of having been fostered. [See *Dominion Post* 26 May 2012, "The saga that led to Shane Jones being sidelined".]

<sup>4</sup> Liu acknowledged two passports (Auditor-General Report, paragraph 5.15).

early 2001 and by April the next year had obtained permanent residence. But while that was being processed he had moved on to New Zealand in December 2001. In his new location he was again quickly successful in obtaining New Zealand permanent residence in June 2002.

But permanent residence is not as secure as citizenship (see *Appendix*). So in May 2005 Liu applied for citizenship. At this point things started to get more difficult. The complication was that Liu's interesting background included more than multiple identities. The Chinese authorities said he was a criminal and Interpol had issued a notice indicating he was wanted for extradition for economic crimes and passport fraud.<sup>5</sup>

Against this background it was the responsibility of officials to assemble the necessary material to consider his citizenship application. But first, there was the question whether his permanent residence had been secured properly.

Soon after Liu applied for citizenship, Australian immigration officials contacted their New Zealand counterparts with the news that Liu was wanted in China and they had concerns about his financial dealings.<sup>6</sup>

Officials in Wellington thought there were grounds to revoke Liu's New Zealand residency, but twice deferred their decision until the results of the Australian process were known. In November 2006 Liu's permanent residency in Australia was rescinded.<sup>7</sup> In addition, Liu's funds in Australia were frozen and eventually Liu agreed to forfeit \$A3.75m; this money was repatriated to China.<sup>8</sup>

If Liu's application for citizenship was successful, he would be able to travel freely to Australia on his New Zealand passport. But the process of investigating possible fraud in his application for New Zealand residency dragged on. Liu had married and was the father of two New Zealand-born children. In March 2007, almost two years after Liu's lawyers had first lodged the citizenship application, the then Minister of Immigration, David Cunliffe, sought to bring matters to a head and asked for Liu's case to be put in front of him for consideration. The Immigration Service wanted more time to investigate possible fraud, but assembled a comprehensive case, advising the minister to revoke permanent residence. The minister had to balance this against the risk of judicial review and of possible consequences for Liu if he were denied residence and thus had to return to China.<sup>9</sup>

In September 2007 David Cunliffe decided that it would be premature to revoke permanent residence. A key factor in his decision was the risk to Mr Liu's life if he had to return to China. However, he annotated the file saying that the case should remain under investigation as a possible prosecution. Liu's lawyers were notified and they promptly asked that the Department of Internal Affairs reactivate the citizenship application.<sup>10</sup>

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<sup>5</sup> Auditor-General Report, paragraph 4.3.

<sup>6</sup> Auditor-General Report, paragraph 4.3.

<sup>7</sup> This Australian decision was subsequently reversed on appeal, (*Liu versus Minister of Immigration*, FMCA [2008], 595) but at the time Liu's citizenship application was considered in New Zealand he did not have permanent residence in Australia.

<sup>8</sup> Auditor-General Report, paragraph 4.12.

<sup>9</sup> Auditor-General Report, paragraphs 4.15 and 4.17.

<sup>10</sup> Auditor-General Report, paragraphs 4.20 and 5.5.

## Citizenship and good character

Under sections 8 and 9 of the *Citizenship Act 1977* the Minister of Internal Affairs is ultimately responsible for all decisions on the granting of citizenship (see also *Appendix*). Each week the department provides the minister with a list of those applicants who have met the criteria under section 8 to qualify for citizenship. These criteria include having the right to be in New Zealand indefinitely, having been present in New Zealand for a minimum number of days in the preceding five years, intending to continue to live in New Zealand, having sufficient command of English, and being of “good character.” With no further legislative guidance, the interpretation of what constituted good character had long been a source of difficulties between departmental officials and their minister.

For applicants who are not deemed to meet section 8 criteria, or about whom there is some doubt (for example when allegations of criminal behavior are unproven) the department may prepare an individual submission for ministerial consideration. The minister decides whether the applicant meets the “good character” test. If the criteria are passed, citizenship is granted. If not, section 9 allows the minister discretion to grant citizenship. That discretion is to be used in a limited range of circumstances, including where the minister is satisfied that citizenship would be in the public interest “*because of exceptional circumstances of a humanitarian or other nature.*”

Rick Barker had gained experience in sorting out difficult citizenship cases since he became minister in 2005. However he had misgivings about how the department briefed him on difficult cases. He thought officials should offer guidance on the truth of allegations. Instead they commonly sent up a massive file with all the material included, for the minister to sort out for himself. This reflected the departmental view that officials were not in a position to determine such matters and it was not their role; ministers had to form their own opinion to be able to exercise discretion.<sup>11</sup>

## Departmental processes

In October 2007 Liu’s lawyer applied more pressure, writing to Rick Barker asking him to expedite the grant of citizenship. Following normal office procedures, the minister’s standard reply letter suggested he was going to take a personal interest in the case. In fact, Mr Barker intended to move the decision off to another minister because of his previous personal dealings with Mr Liu. The response also said he would encourage agencies “to give Mr Liu’s application their urgent attention.” It seems this sentence was inserted by the department because there was a general concern at that time about delays in processing an unusually large number of citizenship applications. It was not seen by officials as implying anything particular about Liu’s application.<sup>12</sup>

At this stage the file was being handled in Wellington, by the Investigations Unit in the Department of Internal Affairs. The investigator talked with Mr Liu’s lawyers, suggesting that the allegations of past criminal involvement were likely to mean the application would be declined. Alternatively, the department proposed that the issue could be resolved at source: in China. But the lawyers replied that the charges were political, so it would be difficult to have them withdrawn. They further suggested Mr Liu would be endangering his life if he had to return to China. Accordingly the lawyers wanted the matter to be considered by the

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<sup>11</sup> Auditor-General Report, paragraph 3.54.

<sup>12</sup> Auditor-General Report, paragraphs 7.26 and 7.27. See also Appendix: at the time about 50 applications a month were being made by submission, i.e. requiring individual consideration by the minister.

minister, irrespective of the department's concerns. The department agreed to proceed on that basis.

On 12 March 2008 the file reverted to the citizenship processing centre in Manukau (Auckland), where a ministerial submission was to be prepared. A file note recorded that the General Manager of Citizenship had agreed the matter would be handled expeditiously; it also recorded that the department would recommend against citizenship. A citizenship officer began to review the case and talked again with Liu and his lawyers, seeking a new application and asking about the Australian investigation and the dual passports.<sup>13</sup>

After a month the general manager rang the Manukau office and spoke directly to the citizenship officer asking him to wrap up his work and get the application back to Wellington. This was the first time the citizenship officer had heard directly from the general manager on any case. He interpreted the call as a response to political pressure and viewed it as an instruction to "stop digging."<sup>14</sup>

Later, however, the general manager said there was no unusual political pressure; rather he was honouring the undertaking to Liu's lawyers that the case would go to the minister. He saw no value in further investigations; the pragmatic thing to do was to get the file to the minister as soon as possible so that a decision could be made. Since the application for citizenship had been revived in October there had been letters from various MPs, a Privacy Act review, formal interviews with Liu, interactions with other agencies, several inquiries from the minister's office (prompted by MPs' letters) and many calls and e-mails with the lawyers. The file was growing but there was no substantive progress; it was time to call a halt.<sup>15</sup>

In April and May 2008 there were two further meetings between Liu and the citizenship officer at Manukau. These covered procedural matters, including assembling material from other departments. But not all conversations were procedural. The citizenship officer later recalled that during these meetings Liu said he was confident that he would get his citizenship because of the support he had received from MPs.<sup>16</sup>

Eventually, in late May the file was returned to the Investigation Unit in Wellington. The investigator who had previously handled the case resumed his work, inserting classified material and assembling the submission. The submission was reviewed by the legal team, signed by the general manager and was to be delivered personally by the investigator because it included classified material. When the investigator contacted Rick Barker's office on 30 June to arrange delivery he was told that there was a conflict of interest; on 3 July the application was transferred to Shane Jones.<sup>17</sup> This was in line with a standing delegation that had been in place for some months.<sup>18</sup>

### **Consideration by Shane Jones**

The submission to Shane Jones about Liu was the minister's first briefing from Internal Affairs. It was eight pages long, plus a large number of attachments including correspondence (with other government agencies, with Liu's lawyers, from MPs and

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<sup>13</sup> Auditor-General Report, paragraphs 5.24 - 5.25.

<sup>14</sup> Auditor-General Report, paragraph 5.32.

<sup>15</sup> Auditor-General Report, paragraphs 5.34 - 5.41.

<sup>16</sup> Auditor-General Report, paragraphs 5.48 - 5.49.

<sup>17</sup> Auditor-General Report, paragraph 5.56.

<sup>18</sup> Auditor-General Report paragraph 5.19.

supporters in the Chinese community) and a transcript of the departmental interview with Mr Liu. It outlined the legislative requirements for citizenship and recorded that Liu passed every test other than good character.

The submission noted that there was a continuing investigation into Liu's true identity by the Immigration Service. It did not point out that the Minister of Immigration had directed that the case be considered for possible prosecution or that permanent residency might be revoked in the future. It similarly made no reference to the Australian decision to revoke residency.<sup>19</sup>

The investigator delivered the file to Shane Jones' office on 14 July. To his surprise the minister called him into his office for an immediate briefing. This was something new; the investigator had never briefed a minister before. They spoke for an hour.

The minister wanted to know about the truth of the allegations about Liu. The investigator stuck to the departmental view that he did not know the truth and it was for the applicant to prove good character.<sup>20</sup> When the minister asked about threats to Liu's safety if he were to return to China to establish his good name he found the official's responses unsatisfying ("callous and inhumane").<sup>21</sup> Shane Jones recorded that he found the discussion "harrowing"<sup>22</sup> and that he thought the investigator was trying to close down his ministerial discretion. The investigator recalled that he found the conversation "intimidating."<sup>23</sup>

After the meeting the investigator wrote a brief note to the General Manager, Citizenship reporting on the meeting. He also informed Liu that the matter was with the minister. This led to an immediate request from Liu's lawyer asking to see the submission and to make representations. A week later, there was another meeting with the minister. The purpose was to go through the submission to agree what could be released to Liu's lawyer. This meeting happened at very short notice (about half an hour). Neither the chief legal adviser nor the general manager was available so the investigator, a departmental solicitor and Shane Jones' political advisor attended.

### **Natural justice and need to withhold**

At the meeting the minister was concerned about natural justice – he wanted Liu to know what he was accused of. Officials explained that some material about ongoing investigations should be withheld. At times the discussion became strained; officials recall Shane Jones telling the investigator that he did not want to hear any more from him. Following the meeting the solicitor provided a brief note to the general manager and the chief legal advisor.

The investigator was concerned and thought that the Police should brief the minister because they would be better able to explain the intelligence they held. His managers supported the idea, but because they did not know the staff in Shane Jones' office they attempted to organise things through Rick Barker's office. That proved all too complex and the idea disappeared.

On 4 August Liu's lawyer sent another submission. The following morning Shane Jones requested urgent legal advice; he said he was going to Australia next morning and wanted to decide the case before he went. The Chief Legal Advisor was quickly consulted and a note

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<sup>19</sup> Auditor-General Report paragraphs 6.2 6.8 and page 7.

<sup>20</sup> As advised to Rick Barker by the Crown Law Office.

<sup>21</sup> Auditor-General Report, paragraph 6.29.

<sup>22</sup> Auditor-General Report, paragraph 6.20.

<sup>23</sup> Auditor-General Report, paragraph 6.25.

was prepared explaining that it was still possible to defer a decision and that deferral might be preferable since in a judicial review of a refusal to grant citizenship it would be helpful to be able to demonstrate that the lawyer's lengthy submission had received careful consideration.

On the morning of 6 August Shane Jones approved Liu's application for citizenship. On the advice of his staff he did not note any reason for his decision. However, in a later affidavit he said:

"From the outset, I was deeply troubled by the attitude of the New Zealand officials, the callous approach to the forcing of a human being to return to China with the risk of execution, as the suggested outcome of a refusal to grant citizenship. The applicant is the father of two young New Zealanders, and I was not going to risk making them orphans based on the information I had to consider."<sup>24</sup>

### **The private ceremony**

At 9.30 am on the morning of 6 August Shane Jones' office e-mailed Liu's lawyer and the Department of Internal Affairs to let them know that citizenship was approved. Next morning the lawyer wrote to the department seeking an urgent ceremony, saying "he cannot wait to be a New Zealand citizen."<sup>25</sup> The department contacted Rick Barker's office recommending against an urgent ceremony, but noting that the general manager would approve urgency if the Minister approved a private ceremony.

Dover Samuels, MP then wrote to Shane Jones (probably on the same day, 7 August, but the note is undated), seeking approval to preside over the citizenship ceremony. As an MP, Samuels did not need approval to preside. On the other hand, new to the citizenship process, Shane Jones was unaware of proposals for an urgent ceremony or that his approval was needed for a private ceremony; it just looked like procedural detail to him. He scribbled a note on the bottom of Dover Samuels' letter saying "Kia ora. OK. Deal with the officials."<sup>26</sup>

Officials interpreted the Minister's annotation as an approval for a private ceremony. As a result Liu's citizenship ceremony took place on 11 August in the Maori Affairs Committee Room at Parliament.

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<sup>24</sup> Auditor-General Report, paragraph 6.35.

<sup>25</sup> Auditor-General Report, paragraph 6.71.

<sup>26</sup> Auditor-General Report, paragraph 6.73.

## Appendix: Citizenship – what and how

### Citizenship – what it is and why it matters

Citizenship of a country recognises that that country is where you have a right to be.

In New Zealand, the defining special rights of a citizen are set out in section 13 of the Immigration Act 2009:

*“... every New Zealand citizen has, by virtue of his or her citizenship, the right to enter and be in New Zealand at any time; ... no New Zealand citizen is liable under this Act to deportation from New Zealand in any circumstances.”*

Citizenship in New Zealand is superficially similar to permanent residency. Citizens and permanent residents enjoy certain rights and protections, including the right to reside permanently in New Zealand. However, citizenship recognises a particular relationship between the citizen and the state, which does not apply in the same way to permanent residents. The grant of citizenship can be seen as giving three main benefits:

- a greater sense of national identity;
- a greater degree of “security of tenure” for being in New Zealand (and indirectly Australia); and
- the right to travel internationally on a New Zealand passport.

New Zealand citizenship and a New Zealand passport, in particular, are highly prized internationally because of New Zealand’s reputation as a country largely free from corruption, and because a New Zealand passport provides relative ease of access to other countries– especially Australia.

### Citizenship – how it is obtained

The Citizenship Act sets out how and when people acquire and lose New Zealand citizenship. Most citizens automatically acquire that status because they are born in New Zealand or because one of their parents is a citizen. However, if you are not automatically a citizen, you can apply to the Crown to be granted that status.

The grant of citizenship is more a privilege than a right. To grant citizenship is to exercise a core power of state sovereignty. The Citizenship Act gives this decision to a Minister and sets out the grounds on which the Minister can grant that status.

There are two sections of the Citizenship Act under which the Minister may authorise the grant of citizenship. Most applications would be made under **Section 8**, which lists a number of criteria including being of “good character”. **Section 9** is used for a limited range of “exceptional circumstances” including where the Minister is satisfied that citizenship would be in the public interest *“because of exceptional circumstances of a humanitarian or other nature.”*

If the Minister authorises the grant of citizenship under section 9, this decision can take into account whether the applicant satisfies the section 8 criteria, but the Minister is not obliged to apply them.

### Process

When an application for citizenship is received, it is usually referred to one of the Citizenship Offices located around the country, where it is checked to ensure that the applicant qualifies for citizenship under the Citizenship Act. In difficult cases (including those needing to refer to classified information) the file can be transferred to the Investigations Unit in Wellington.

If an applicant satisfies the standard section 8 criteria, their name is entered on a schedule that is forwarded to the Minister for approval. Schedules are usually sent to the Minister weekly and

include between 300 and 650 names, depending on the number of applicants. Little detail is provided about the applicants, other than their name and nationality and confirmation that, according to the policy manual, they satisfy the section 8 criteria.

If there is a question about whether the applicant clearly satisfies the criteria, or if they wish to apply for citizenship under section 9, an individual submission is prepared for the Minister's consideration.

At the time of the decision about Mr Liu, the Department was experiencing a particularly high volume of citizenship applications due to imminent changes to the Citizenship Act. In the four years from 2005 to 2008, about 2395 applications were made by individual submission. This is an average of just under 600 each year, or 50 each month. The number of individual submissions has since decreased to around 270 in 2011.

The Department's practice is to recommend whether to accept or decline the application for citizenship. Ultimately, it is the Minister's decision. Between 2005 and 2011, on average, about eight percent of submissions were decided against the recommendation of the Department.

## **Ceremonies**

People who are granted citizenship do not become citizens until issued their citizenship certificate (Section 12), and that requires an oath (or affirmation) of allegiance. These occur at regular citizenship ceremonies. Ceremonies are usually presided over by the local Mayor, but a series of others such as MPs, JPs, judges or the Secretary of Internal Affairs may preside. Any time until a certificate is issued the Minister may rescind approval for the grant of citizenship.

With the agreement of the Minister (Section 11(b)) the department can organise a private citizenship ceremony. Where necessary, such as where a new citizen needs a passport to travel as a member of a New Zealand sports team, the department has a policy of authorising an urgent ceremony.