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## **OMBUDSMAN'S FINAL REPORT ON THE COMPLAINT BY**

**HOMELO VI, 'ILISAPESI LUPEITU'U AND 'AKANESI 'AHO**

**CASES NO. OMB 17/49, OMB17/104 and OMB17/164**

- 1. Whether there was a legal basis for the 6 months validity of foreign passports requirement by the Ministry of Foreign Affairs**
- 2. Whether there is a legal basis for the fee of \$230 imposed on foreign visitors with passports valid for less than 6 months**

**18<sup>th</sup> July 2018**

## **Table of Contents**

Executive Summary	3
Background	4
The Ombudsman's role	5
The Complainants'	5
The 6 month passport validity requirement and fee	6
The Solicitor General's Legal Advice	7
Exemption from the Requirements of section 10 of the Immigration Act	11
Confirmation of Tongan Citizenship/Nationality	14
Opinions	16
Recommendations	17
Response from the Ministry of Foreign Affairs	18



## EXECUTIVE SUMMARY

- 1 This is a complaint from three (3) different complainants' regarding the same two (2) issues. The first issue relates to the requirement imposed by the Tonga Immigration of the Ministry of Foreign Affairs ("the Ministry") that all visitors to Tonga with foreign passports must have passports with at least 6 months validity. The second issue is that those visitors who arrive with passports with less than 6 months validity must be issued with a letter from Tonga Immigration allowing them to enter into the Kingdom at a fee of \$230.
- 2 The question was then put to the Ministry as to whether the 6-month passport validity was prescribed by law and secondly, whether the \$230 fee was also prescribed by law.
- 3 Given that these were questions of law, the Ombudsman recommended and was accepted by the Ministry, that these issues be referred to the Attorney General's Office for a legal opinion. This was done and the opinion from the Solicitor General was received in February 2018 which set out the following –
  - a) that the 6-month passport validity requirement imposed by the Ministry on foreign visitors to Tonga was implied under section 10(1), 10(2) and 10(2A) of the Immigration Act; and
  - b) that item 21 in the Schedule of Fees under the Immigration Regulations is broad enough to justify the issuance of letters (with the required fees to be paid) from the closest Tongan Mission or Consul, or the Principal Immigration Officer ("PIO") upon arrival in the Kingdom for exemption from the requirement for at least six (6) months validity of the foreign passport.
- 4 Following the opinion from the Solicitor General, issues were raised as to whether the PIO had the discretion to allow foreigners into the Kingdom under visitors permit if they did not comply with section 10 of the Immigration Act. There was also issues as to whether the PIO could waive the fees in the Immigration Regulations Schedule of Fees and whether the PIO could issues a nationality confirmation letter under the Immigration legislation.
- 5 I am recommending seven (7) things in this Report pursuant to section 18(3) of the Ombudsman Act 2001-
  1. That the Ministry refund to 'Ilisapesi Lupeitu'u the fee of \$230 (including consumption tax) she paid the Ministry in July 2017 for the return of her daughter 'Ofa Ma'ilei Moana Lupeitu'u's New Zealand passport.

2. That the Ministry implement the recommendation from the Solicitor General regarding section 10 and item 21 of the Schedule of Fees under regulation 11 of the Immigration Regulations as follows -

*“That section 10 of the Immigration Act and also item 21 of the Schedule of fees under regulation 11 of the Immigration Regulation be considered for further amendment to clarify the requirement for foreign passports to be valid for at least six (6) months upon arrival in the Kingdom. We also recommend that the schedule of fees under item 21 be reviewed whether \$200 plus tax fee is justified.”*

3. That the Ministry cease issuing nationality/citizenship confirmation letters under the Immigration Regulations as this is ultra vires.
4. That the Ministry refund to ‘Akanesi ‘Aho the \$230 fee (*including consumption tax*) she paid the Ministry in September 2017 for the nationality confirmation letter she requested for Hesitimoa Hu’akau.
5. That the Ministry seek the Solicitor General’s further legal opinion as to whether –
  - (a) the PIO has the authority to issue visitor permits to foreigners who do not comply with section 10 of the Immigration Act; and
  - (b) the PIO has the authority to waive the fees set out in the Immigration Regulations Schedule of Fees.
6. That the Ministry issue a public apology that it has been erroneously imposing the fee of \$230 for letters confirming nationality fee under the Immigration Regulation Schedule of Fees and to include an offer to refund the fee to any person who has proof of payment.
7. That the Ministry of Foreign Affairs report back to me within 2 months of the date this report is finalised with a follow up report on these recommendations.

#### **BACKGROUND**

- 6 The complaints were received on 21 April 2017, 10 July 2017 and 4 September 2017.
- 7 I assigned the investigation to my Investigation Team who met with the Acting CEO of the Ministry, and other senior Immigration officers.



- 8 The team requested and received documents from the Ministry.
- 9 It is necessary to address the time it has taken for these complaints to reach a conclusion. The Vi complaint was received in April 2017, the Lupeitu'u complaint in July 2017 and the 'Aho complaint in September 2017. Each complaint was investigated on receipt and had separate issues aside from the 6-month foreign passport validity requirement that is addressed in this report. These issues were resolved separately from this Report. Having said that, the 6-month foreign passport validity requirement was identified early as an issue in the Vi case and again in the Lupeitu'u case so it was necessary to address this issue together. When the 'Aho complaint was received, it was clear that there was some similarities especially given the application of the fees in the Immigration Regulations. A meeting was then held with the Acting Secretary of the Ministry of Foreign Affairs in October 2017 and Immigration staff and it was agreed that the matter be referred to the Solicitor General for his legal opinion. The Solicitor General's legal opinion was received in February 2018. Following the receipt of the Solicitor General's advice and as a result of it, we considered whether the fees should be imposed at all and this again contributed to the delay in concluding these complaints to allow for a thorough consideration of the issues.

#### **THE OMBUDSMAN'S ROLE**

- 10 Under section 11 of the *Ombudsman Act 2001*, the Ombudsman has the authority to investigate the administrative acts, decision, omissions and recommendations of an officer of an organization in his capacity as an officer of that organization. This applies to the Ministry under the Act. (Section 18(1) and (2) of the *Ombudsman Act 2001*).
- 11 My investigation is not an appeal process. I would not generally substitute my judgment for that of the decision maker. Rather, I consider the substance of the act or decision and the procedure followed by the Ministry, and then form an opinion as to whether the act or the decision was and the procedures followed by the Ministry was properly arrived at and was one that Ministry could reasonably make.
- 12 My role is to consider the administrative conduct and decisions of the Ministry and to form an independent opinion on whether that conduct was fair and reasonable.

#### **THE COMPLAINANTS'**

- 13 Homelo Vi and his wife 'Aiona Vi arrived in Tonga on 23 of March 2017. Mrs. Vi's New Zealand passport was valid for less than six (6) months so the Ministry officials at the airport seized the passport and told her that she would have to pay \$230 for the return of her passport. This fee was ultimately waived by the Ministry as the complainants' return to Australia was impeded because the passport was not at the airport for collection when they went to the airport on 15 April 2017.



- 14 'Ofa Mailei Moana Lupeitu'u ("Moana") is a New Zealand citizen and resides in Auckland, New Zealand. On 10 July 2017 she travelled via Air New Zealand to visit her mother 'Ilisapesi Lupeitu'u in Tonga. Moana's brother Tevita Lupeitu'u took her to the airport to catch her flight and talked to the Air New Zealand official about Moana's New Zealand passport being valid for less than six months. He was told that there was no problem because Moana had a return ticket. On arrival in Tonga, the Customs officer at Fua'amotu Airport picked up on the fact that Moana's passport was valid for less than six (6) months and detained Moana. Moana was later released to her mother and sister Talaifina Qetaki with the advice that she had been detained because of her passport but that the passport would be returned on the payment of \$230 to the Ministry. The family paid the fee and received Moana's passport together with a receipt in time for her return to New Zealand on 15 July 2017. The Ministry did not issue 'Ilisapesi Lupeitu'u with a letter granting approval for Moana to enter Tonga given the fact that her New Zealand passport validity was less than 6 months. This was also confirmed by Ms. Telesia Kaitapu, Acting Director of Immigration and has been the practice followed by the Ministry when a person with a foreign passport with less than 6 months validity.<sup>1</sup>
- 15 'Akanesi 'Aho lodged a complaint on 4 September 2017 regarding the \$230 fee she was charged by and had to pay the Ministry on 4 September 2017 for a standard letter confirming the Tongan nationality of Hestimoa Hu'akau (deceased). Mrs. 'Aho was acting for Mr. Hu'akau's daughter who was born in New Zealand and was applying to have her birth registered in Tonga. The confirmation of citizenship was required by the Ministry of Justice.

#### **THE 6 MONTH PASSPORT VALIDITY REQUIREMENT AND FEE**

- 16 We investigated the complaint by sending the complaints as referrals to the Ministry. Meetings were also held with Ministry officials to discuss the complaints. At the outset it was clear that the issue was primarily a legal one of interpretation - firstly whether the 6-month validity requirement imposed by the Ministry was provided for in the Immigration Act and secondly, whether the \$230 fee for the foreign passport was also provided by law and justified.
- 17 In a meeting on 18 October 2017 between the Acting Chief Executive Officer for Foreign Affairs (Mrs. Palenitina Tiueti), Telesia Fakava (OIC Tonga Immigration) and Ombudsman officers<sup>2</sup>, it was agreed that the matter be referred to the Solicitor General for his opinion. This was formalized in a letter from the Ombudsman to the Acting Chief Executive Officer for Foreign Affairs on 20 October 2017<sup>3</sup>.

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<sup>1</sup> Interview with Ms. Telesia Kaitapu, Acting Director Immigration, Ministry of Foreign Affairs on 7 May 2018

<sup>2</sup> Meeting at the Prime Minister's Office 18 October 2017

<sup>3</sup> Letter 20 October 2017 from the Ombudsman to the Acting Chief Executive Officer, Ministry of Foreign Affairs



## THE SOLICITOR GENERAL'S LEGAL ADVICE

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The Solicitor General's advice was received on 26 February 2018<sup>4</sup> and is reproduced below;

**"Legal basis for the requirement that foreign passports must be valid for at least 6 months before arrival in Tonga"**

1. Section 10(1) of the Immigration Act provides that the Principal Immigration Officer (PIO) may issue a visitor's permit in the prescribed form (which shall include the conditions specified in subsection (2)) to a visitor, if he is satisfied that the visitor has a ticket or other means of travelling from Tonga to some other country which he will be able to enter.
2. Furthermore, section 10(2) provides that a visitor's permit shall entitle a visitor to remain in the Kingdom of Tonga for a period not exceeding (six) 6 months and shall be subject to the conditions that the visitor during his stay in the Kingdom –
  - a) Shall not take up employment in the Kingdom without permission in writing of the PIO;
  - b) Shall not behave in a manner prejudicial to peace, good order, good government of public morals;
  - c) Shall not marry without the consent in writing of the PIO; and
  - d) Shall furnish such security in cash or otherwise as may be demanded by the PIO.
3. Section 10(2A) further states that a visitor's permit may be extended beyond 6 months in special circumstances as determined by the PIO with the consent of Cabinet.
4. Under section 10(3), any person aggrieved by the refusal of the PIO to issue to him a visitor's permit under the provisions of section 10, may within 30 days of the notification of such refusal to him appeal by petition in writing to the Prime Minister, whose decision thereof shall be final.

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<sup>4</sup> Letter from the Solicitor General to the Acting Secretary for Foreign Affairs 26 February 2018

5. We are advised by the Immigration Division that the legal basis for the requirement for foreign passports to be valid for six (6) months is provided for under section 10(1), 10(2) and 10(2A).
6. We are of the view that section 10(1), 10(2) and 10(2A) are to be construed together in order to determine where there is a legal basis for the requirement for foreign passports to be valid for at least six (6) months upon arrival in Tonga.
7. We are of the view that references to the period of six (6) months under section 10(2) and 10(2A) is of significance. The reason being is that the time frame gives discretion to the PIO to issue the permits which in the case of New Zealand a permit may be issued upon arrival for a period of one (1) month, and could be extended up to a period of six (months) under section 10(2A).
8. A foreign passport should therefore be valid as a travel document in order for the holder to travel out of Tonga within the period of six (6) months.
9. It is therefore our view that it is implied under section 10(1), 10(2) and 10(2A), that a foreign passport should be valid for at least six (6) months upon the arrival of a traveler in the Kingdom.
10. A foreign passport that is not valid for at least a period of six (6) months upon arrival in the Kingdom would definitely defeat the purpose of section 10(1), 10(2) and 10(2A).

**Legal basis for the application of item 21 in the Schedule of Fees under the Immigration Regulations which requires a person with a foreign passport that is not valid for at least a period of six (6) months to pay TOP\$230**

11. As stated above in paragraphs 9 and 10, a valid passport for at least six (6) months is implied under section 10(1), 10(2) and 10(2A).
12. It is our opinion that item 21 of the schedule of fees under regulation 11 of the Immigration Regulation should be construed in light of section 10(1), 10(2) and 10(2A) of the Immigration Act.
13. As such we are of the view that item 21 in the Schedule of Fees under the Immigration Regulations is broad enough to justify the issuance of letters (with the required fees to be paid) from the closest Tongan Mission or Consul, or the PIO upon arrival in the Kingdom for exemption from the requirement for at least six (6) months validity of the foreign passport.



14. The matter is now referred to the Ministry to consider whether item 21 in the Schedule of Fees under the Immigration Regulations was complied with.
15. We are of the view that if a letter was issued by the PIO under item 21 of the Schedule of Fees under regulations 11, with fees paid by the complainants, then that was justified.
16. If a letter was not issued, then payment of the fee of \$230.00 was not justified and therefore should be refunded.

### **Way forward**

17. As a way forward, it is hereby recommended that section 10 of the Immigration Act and also item 21 of the Schedule of fees under regulation 11 of the Immigration Regulation be considered for further amendment to clarify the requirement for foreign passports to be valid for at least six (6) months upon arrival in the Kingdom.
  18. We also recommend that the schedule of fees under item 21 be reviewed whether \$200 plus tax fee is justified.”
- 19 Legislation referred to in the Solicitor General’s advice –

#### *Section 10 of the Immigration Act*

##### *“10 Visitor’s permit*

- (1) *The Principal Immigration Officer may issue a visitor’s permit in the prescribed form (which shall include the conditions specified in subsection (2) of this section) to a visitor, if he is satisfied that the visitor has a ticket or other means of travelling from Tonga to some other country which he will be able to enter.*
- (1A) *A visitor’s visa may be issued for a single entry or for multiple entries into the Kingdom upon payment of the prescribed fees. A visa for multiple entries into the Kingdom may be issued for a period of up to 5 years.*
- (2) *A visitor’s permit shall entitle a visitor to remain in the Kingdom of Tonga for a period not exceeding 6 months and shall be subject to the conditions that the visitor during his stay in the Kingdom —*
  - (a) shall not take up employment in the Kingdom without the permission in writing of the Principal Immigration Officer;*
  - (b) shall not behave in a manner prejudicial to peace, good order, good government or public morals;*
  - (c) shall not marry without the consent in writing of the Principal Immigration Officer; and*
  - (d) shall furnish such security in cash or otherwise as may be demanded by the Principal Immigration Officer.*

(2A) A visitor's permit may be extended beyond 6 months in special circumstances as determined by the Principal Immigration Officer with the consent of Cabinet 6.

(3) Any person aggrieved by the refusal of the Principal Immigration Officer to issue to him a visitor's permit under the provisions of this section, may within 30 days of the notification of such refusal to him appeal by petition in writing to the Prime Minister, whose decision thereon shall be final."

#### **Regulation 11 of the Immigration Regulations**

##### **Fees**

- (1) The fees in the Schedule hereto shall be paid in respect of the matters specified therein.
- (2) The said fees are payable in respect of every person included on the application.
- (3) The entire fee is payable prior to lodgment of an application form with the Immigration Division.
- (4) Fees charged are for application and processing of a permit and are not refundable, notwithstanding that the permit is later declined by the Immigration Division.
- (5) Where any permit held by an applicant has expired during the application process of a permit, and the applicant has not allowed the period of 4 weeks for the processing of his application during the validity of his visa, the principal applicant shall be charged an additional \$500 in addition to the relevant visa application fee.
- (6) Where any permit has expired before the principal applicant has lodged his re-application for a valid permit for the Kingdom, the principal shall be charged an additional \$1,000 in addition to the relevant permit application fee.
- (7) Revenue receipts will be issued and should be obtained for all fees paid

No.	Visa/Permit Type	Restriction	Fee
19	Any letter/documents issued by the Immigration Division allowing travel to the Kingdom on a one way ticket for any person 18 years and over	Per child included in the letter/document	\$30
20	Any letter/documents issued by the Immigration Division allowing travel to the Kingdom on a one way ticket for any person 18 years and over	Per child included in the letter/document	\$30
21	Any letter/documents issued by the Immigration Division not including items 19 and 20 above	Per child included in the letter/document	\$200



## EXEMPTION FROM REQUIREMENTS OF SECTION 10 OF THE IMMIGRATION ACT

- 20 Subsequent to the advice from the Solicitor General, we reviewed the provisions of the Immigration Act to consider whether the Principal Immigration Officer has the authority or the discretion to allow persons with foreign passports into the Kingdom if they did not have the requirements set out in section 10 which were (a) a return ticket and (b) passport with at least 6 months before expiration. Section 10 did not have a discretionary provision similar to that contained in section 9 -

### 9. *Permits to enter and reside.*

- (1) *The Principal Immigration Officer may issue a permit in the prescribed form to any person applying to enter and reside in the Kingdom, upon such conditions as to the security to be furnished, the profession or occupation which the holder may exercise or engage in and the person by whom the holder may be employed within Tonga, and to any other matter whether similar to the foregoing or not which the Principal Immigration Officer may deem fit to impose or as may be prescribed, and may at his discretion vary any such condition.*
- (2) *If such applicant is required by the provisions of any written law relating to passports for the time being in force in the Kingdom to have a visa to enter the Kingdom, the Principal Immigration Officer may issue a visa to such applicant on the production by him of his passport or other travel document and on payment of the fee prescribed by such written law and such visa shall remain valid until the expiry or cancellation of the entry permit issued to him.*
- (3) *The Principal Immigration Officer may at his discretion extend a permit issued under subsection (1) of this section, but shall not so grant or extend a permit so that the holder becomes an exempted person under subsection (1) of section 7 of this Act except in accordance with directions issued by the Prime Minister under section 4 of this Act.*
- (4) *Any person aggrieved by the refusal of the Principal Immigration Officer to issue to him any entry permit under the provisions of subsection (1) of this section may within 30 days of notification of such refusal to him appeal by petition in writing to the Prime Minister, whose decision thereon shall be final.*

### 10 *Visitor's permit.*

- (1) *The Principal Immigration Officer may issue a visitor's permit in the prescribed form (which shall include the conditions specified in subsection (2) of this section) to a visitor, if he is satisfied that the visitor has a ticket or other means of travelling from Tonga to some other country which he will be able to enter.*
- (2) *A visitor's permit shall entitle a visitor to remain in the Kingdom of Tonga for a period not exceeding 6 months and shall be subject to the conditions that the visitor during his stay in the Kingdom —*
  - (a) *shall not take up employment in the Kingdom without the permission in writing of the Principal Immigration Officer; and*
  - (b) *shall not behave in a manner prejudicial to peace, good order, good government or public morals; and*
  - (c) *shall not marry without the consent in writing of the Principal Immigration Officer; and*
  - (d) *shall furnish such security in cash or otherwise as may be demanded by the Principal Immigration Officer.*

- (3) *Any person aggrieved by the refusal of the Principal Immigration Officer to issue to him a visitor's permit under the provisions of this section, may within 30 days of the notification of such refusal to him appeal by petition in writing to the Prime Minister, whose decision thereon shall be final.*

21 As it appears, section 10 sets out the requirements for the PIO to follow in granting permits to visitors entering the Kingdom but does not have a discretionary provision as is provided under section 9 for resident permits. The next step would then be a refusal by the PIO as set out in section 10(3) which would then trigger the appeal procedures in section 30 which allows for an interim permit while the appeal process is followed. There is also a general exemption provision by the Prime Minister under section 3 –

***“30 Appeals.***

- (1) *Any person aggrieved by a decision of an immigration officer under the provisions of this Act may require the matter to be referred to the Principal Immigration Officer for confirmation or over-ruling of such decision, and the immigration officer shall so refer such matter within 7 days and may grant an interim permit to such person and to any member of the family and to any dependent of such person to enter and remain in the Kingdom for a period not exceeding 7 days pending the decision of the Principal Immigration Officer.*
- (2) *Any person aggrieved by a decision of the Principal Immigration Officer under the provisions of this Act may appeal against such decision to Cabinet. The appeal shall be by way of petition in writing and unless otherwise specified in this Act shall be made within 14 days of the decision appealed against.*
- (3) *Cabinet may, at their discretion, allow or disallow the appeal and their decision may not be questioned by any Court.*
- (4) *The Principal Immigration Officer may grant to any person who intends to appeal to Cabinet, and to any member of the family and to any dependent of such person, an interim permit allowing him to enter and remain in the Kingdom pending the determination of such appeal.*
- (5) *An immigration officer shall not grant an interim permit under this section unless he is satisfied that the person concerned is unlikely to become a charge on the public during the currency of the permit. Any such permit may be cancelled by an immigration officer if the person concerned appears likely to become a charge on the public or if he is satisfied that the visitor is not a person to whom an interim permit ought to have been issued or there has been a breach of any condition of the interim permit or if the appeal is not prosecuted with all due despatch, and if not cancelled shall expire on the giving of a decision by the Principal Immigration Officer or on the determination of the appeal, as the case may be.”*

***“38 Power to exempt from provisions of this Act.***

- (1) *Notwithstanding anything contained in this Act, the Prime Minister may, with the consent of Cabinet, by order exempt any person or class of persons, either absolutely or conditionally, from all or any of the provisions of this Act and may in any such order provide for any presumptions necessary in order to give effect thereto.*
- (2) *Every order made under this section shall be published in the Gazette.”*



- 22 At a meeting with Acting Director of Immigration Telesia Kaitapu<sup>5</sup>, she was not certain whether the PIO had the discretion to issue visitor permits to visitors who did not comply with the return ticket and 6 months passport validity requirements but stated that the practice allowing visitor permits even when these conditions were not complied with had been followed before she joined the Ministry in 2014 and had continued since. We also asked her if any directions had been issued by the Prime Minister relating to the visitor permits had been issued either recently or in the past that she was aware of pursuant to section 4 of the Immigration Act – she advised that to her knowledge there were no directions regarding visitor permits and indeed, when these complaints had been referred to the Ministry she had reviewed their Ministry documents to find any policy, directions regarding visitor permits but had not found any.

***“4. Power of Prime Minister to issue directions.***

*The Prime Minister with the consent of Cabinet may from time to time give the Principal Immigration Officer directions, not inconsistent with the provisions of this Act or of any Regulations made thereunder, as to the exercise of any powers, discretions or functions or the performance of any duties under this Act or any Regulations made thereunder and the Principal Immigration Officer and all other immigration officers shall comply with all such directions.”*

- 23 It is noted that in the Immigration Schedule of Fees, there is a specific fee (\$34.50) for a document issued by the Immigration Division allowing travel into the Kingdom on a one way ticket (item 19 and 20), but no specific fee for a document issued by the Immigration Division allowing travel into the Kingdom by a person whose foreign passport expires within 6 months in which case, item 21 of the Schedule of Fees applies (\$230). These being the two requirements for a visitors permit under section 10 of the Immigration Act. Discretion and exemption by default?
- 24 In the case of Homelo Vi and his wife ‘Aiona, they stated that the \$230 fee for the non-compliance with the 6 month validity passport issue had been waived by the Ministry in light of the delays they encountered. This was confirmed by the Ministry staff including the Acting Director of Immigration Telesia Kaitapu.<sup>6</sup> Ms. Kaitapu also shared with us that this waiving of the \$230 fee was not uncommon and used to exempt foreigners entering the Kingdom to do work for Government and is approved when a savingram from the relevant Ministry is received. We could not find in the Immigration Act the power to waive fees and put this to Ms. Kaitapu and she was not certain whether there was or not a power to waive fees.

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<sup>5</sup> Interview with Ms. Telesia Kaitapu, Acting Director Immigration, Ministry of Foreign Affairs on 7 May 2018

<sup>6</sup> Interview with Ms. Telesia Kaitapu, Acting Director Immigration, Ministry of Foreign Affairs on 7 May 2018

- 25 It is important to note that section 3 of the Passport Act imposes a \$5,000 penalty on an international transportation company or person who provides passenger services to any person who does not have a valid passport or valid travel document but there is not definition of what a “valid passport” or “valid travel document” is as this could be used to ensure the 6 months before expiration requirement is enforced with a penalty deterrent to the air/sea passage providers.

## CONFIRMATION OF TONGAN CITIZENSHIP/NATIONALITY

- 26 There was no specific mention of the issue raised in Mrs. ‘Akanesi ‘Aho’s complaint (that is that the fee of \$230 (\$200 fee plus consumption tax) imposed under item 21 of the Immigration Regulations Schedule of Fees for a standard letter confirming Tongan citizenship in the at the advice from the Solicitor General<sup>7</sup>. However, he does refer to item 21 in the Schedule of Fees under the Immigration Regulations that it “is broad enough to justify the issuance of letters”.
- 27 Section 37 of the Immigration Act sets out the authority to make Regulations under the Act –

### *“37 Regulations*

- (1) *The Prime Minister may with the consent of Cabinet make regulations not inconsistent with the provisions of this Act for all or any of the following purposes –*

- (a) *prescribing anything which is to be or may be prescribed under the provisions of this Act;*
- (b) *prescribing the forms to be used for the purposes of this Act and the stamps to be used by immigration officers;*
- (c) *prescribing –*
  - (i) *the period for which permits shall be valid;*
  - (ii) *the terms and conditions subject to which any person may be granted a permit and the authority who may issue permits;*
- (d) *providing for the payment and recovery of any expenses incurred by the Government in connection with the detention, maintenance, medical treatment and removal from the Kingdom of any person under the provisions of this Act;*
- (e) *prescribing the place where, the person to whom, and the manner in which application to enter the Kingdom shall be made;*
- (f) *prescribing the procedure to be followed by persons entering the Kingdom;*

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<sup>7</sup> Letter from the Solicitor General to the Acting Secretary for Foreign Affairs 26 February 2018



- (g) *prescribing the procedure to be followed by authorities in the exercise of their functions under this Act;*
  - (h) *governing the procedure to be followed and the fees and costs to be paid on any appeal;*
  - (i) *prescribing the deposit or security to be made or given by or in respect of any person granted a permit, and the conditions subject to which such deposit or security may be forfeited;*
  - (j) *prescribing the fees to be charged for anything done, and for any permit, exemption or document issued, granted, renewed, extended or replaced under this Act and regulations thereunder;*
  - (k) *generally for the better carrying into effect of the purposes and provisions of this Act.*
- (2) *All regulations made under this section shall be published in the Gazette and shall be laid before the Legislative Assembly as soon as possible after such publication."*

28 Section 37 clearly states that the Regulations be consistent with the Act (subsection (1)) and subsection (1) (k) allows the prescribing of fees for any document granted under the Immigration Act and Regulations.

29 The letter requested and provided to Mrs. 'Akanesi 'Aho on 4 September 2017<sup>8</sup> was issued by the Immigration Division and set out below was the substance of the letter –

<b>"Name</b>	<b>Nationality</b>	<b>Date of Birth</b>
Mr. Hesitimoa, HU'AKAU	Tongan	21 June 1964

Please be informed that the Immigration Division of the Ministry of Foreign Affairs, Kingdom of Tonga is hereby present it compliments and wishes to confirm that the abovementioned person according to our record is a Tongan citizen, issued with a Tongan passport and the details are as follow;

Passport No. : R008068  
 Date of Issue : 04.08.2004  
 Expiry Date : 04.08.2009 "

30 A review of the Immigration Act yielded no provision that authorised the Principal Immigration Officer to confirm or otherwise the Tongan citizenship/nationality Confirmation of Tongan citizenship/nationality of a person.

31 Ms. Telesia Kaitapu the Acting Director of the Ministry of Foreign Affair Immigration Division admitted on 7 May 2018<sup>9</sup> that there is no authority for the Immigration Division of the Ministry of Foreign Affairs to issue confirmation of nationality but the Ministry had been doing so before she had started at the Ministry in 2014 and had continued to do so.

<sup>8</sup> Letter from the Immigration Division regarding Mr. Hesitimoa, Hu'akau dated 4 September 2017

<sup>9</sup> Interview with Ms. Telesia Kaitapu, Acting Director Immigration, Ministry of Foreign Affairs on 7 May 2018

She noted that the Ministry administers the Nationality Act, the Passport Act and the Immigration Act which correspond to divisions within the Ministry. She surmised that the reason the Immigration Regulation fees were used when they issued letters confirming nationality was because of the 3 Acts that the Ministry administered, only the Immigration Regulations had a relative comprehensive Schedule of Fees and had used item 21 in the Immigration Regulations Schedule of Fees (catch all – “*Any letter/documents issued by the Immigration Division*”).

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## OPINIONS

- a) The advice of the Solicitor General was provided in this complaint and pursuant to section 11(5)(c) of the Ombudsman Act is accepted.
- b) Regarding the \$230 (*including consumption tax*) fee paid by ‘Ilisapesi Lupeitu’u in July 2017 for the return of her daughter Moana’s New Zealand passport, the Solicitor General’s advice was as follows –

1. “15. *We are of the view that if a letter was issued by the PIO under item 21 of the Schedule of Fees under regulations 11, with fees paid by the complainants, then that was justified.*

16. *If a letter was not issued, then payment of the fee of \$230.00 was not justified and therefore should be refunded.*”

- c) No letter was issued by the PIO to ‘Ilisapesi Lupeitu’u when the \$230 fee was paid, and as such this fee should be refunded to her. In addition, I am of the view that the PIO does not have the discretion to issue a visitors permit to persons who do not comply with section 10 of the Immigration Act nor does the PIO have the discretion to waive fees imposed by the Immigration Regulation Schedule of Fees.
- d) Regarding the \$230 (*including consumption tax*) fee paid by ‘Akanesi ‘Aho to the Ministry on 4 September 2017 should be refunded because the Immigration Act does not authorise the Principal Immigration Officer to confirm or otherwise whether a person is a Tongan national/citizen or not.
- e) That these complaints have highlighted areas that the Ministry has not complied with its own legislation – practices that have unfortunately been going on for years and it is not known how much revenue the Ministry has collected as a result of this practice. As such it is necessary for the Ministry to review its legislation and its current processes to ensure compliance with the law. I am also of the opinion that the Ministry should issue a public apology and offer to refund the erroneous fees to those who are able to provide proof of payment.



## RECOMMENDATIONS

33

1. That the Ministry refund to 'Ilisapesi Lupeitu'u the fee of \$230 (*including consumption tax*) she paid the Ministry in July 2017 for the return of her daughter 'Ofa Mailei Moana Lupeitu'u's New Zealand passport.
2. That the Ministry implement the recommendation from the Solicitor General regarding section 10 and item 21 of the Schedule of Fees under regulation 11 of the Immigration Regulations as follows -
  - a. *"That section 10 of the Immigration Act and also item 21 of the Schedule of fees under regulation 11 of the Immigration Regulation be considered for further amendment to clarify the requirement for foreign passports to be valid for at least six (6) months upon arrival in the Kingdom. We also recommend that the schedule of fees under item 21 be reviewed whether \$200 plus tax fee is justified."*
3. That the Ministry cease issuing nationality/citizenship confirmation letters under the Immigration Regulations as this is ultra vires.
4. That the Ministry refund to Akanesi 'Aho the \$230 fee (*including consumption tax*) she paid the Ministry in September 2017 for the nationality confirmation letter she requested for Hesitimoa Hu'akau.
5. That the Ministry seek the Solicitor General's further legal opinion as to whether -
  - i. the PIO has the authority to issue visitor permits to foreigners who do not comply with section 10 of the Immigration Act; and
  - ii. the PIO has the authority to waive the fees set out in the Immigration Regulations Schedule of Fees.
6. That the Ministry issue a public apology that it has been erroneously imposing the fee of \$230 for letters confirming nationality fee under the Immigration Regulation Schedule of Fees and to include an offer to refund the fee to any person who has proof of payment.
7. That the Ministry of Foreign Affairs report back to me within 2 months of the date this report is finalised with a follow up report on these recommendations.

## RESPONSE FROM THE MINISTRY OF FOREIGN AFFAIRS

- 34 On 31 May 2018, I delivered my Provisional Report to the Ministry setting out my findings, opinions and recommendations. On 13 July 2018<sup>10</sup>, I received a letter from the Ministry accepting the recommendations of this Report. As required under section 18(5) of the Ombudsman Act 2001, a copy of this letter is attached to this Report as Annex 1.



**'Aisea H. Taumoepeau, SC**  
**Ombudsman**

**18<sup>th</sup> July 2018**

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<sup>10</sup> Letter from Mahe 'Uli'uli Tupouniua, Secretary for Foreign Affairs dated 12 July 2018





Ministry of Foreign Affairs  
Nuku'alofa  
Kingdom of Tonga

RECEIVED  
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DOI,  
FYI  
JLA  
13/07/18

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12<sup>th</sup> July 2018

'Aisea H. Taumoepeau, SC  
Ombudsman  
Office of the Ombudsman  
Nuku'alofa

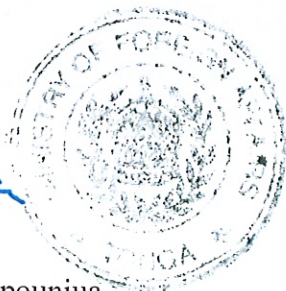
Dear Sir,

**RE: PROVISIONAL REPORT UNDER THE OMBUDSMAN'S ACT – COMPLAINT  
FROM HOMELO VI, 'ILISAPESI LUPEITU'U AND 'AKANESI AGAINST  
MINISTRY OF FOREIGN AFFAIRS – CASE NO. OMB 17/49, OMB 17/104 AND  
OMB 17/164**

The Ministry is to acknowledge the receipts of your letter dated 31<sup>st</sup> May 2018 regarding the above subject matters.

The Ministry duly noted the provisional report for the above cases and to advice here that we have no further comments on the report.

Yours sincerely,



Mahe 'Uli'uli Tupouniua  
Secretary for Foreign Affairs