ANTONIA LEGGAT

ABSOLUTE DISCRETION AND THE RULE OF LAW: UNEASY BEDFELLOWS

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2016

Abstract

"Absolute discretion" in decision-making under the Immigration Act 2009 is intended to generate administrative efficiency and balance individual and national interests. While New Zealand courts have reached a consensus that the use of absolute discretion does not create ouster clauses and Immigration New Zealand's internal instructions have also eroded the absolute nature, each of them have differed their definitions of the scope of absolute discretion over time, within the same sections and over the whole Act.

This paper proposes that the uncertainty surrounding absolute discretion's precise meaning—both within and between the varying definitions provided by the Legislature, Judiciary and Executive—threatens the vital rule of law concept of legal certainty. Considering the potential encroachment of unrestrained absolute discretion on international obligations, human rights and access to information, clarity is essential. Two steps could be taken to enhance clarity, with minimal impingement on the Act's policy: removal of the descriptive "absolute"; and clarification, in regulations, of the mandatory considerations, recording standards and extra-legislative factors to which must be given effect within each decision made in absolute discretion.

Key words: absolute discretion; Immigration Act 2009; ouster clause; Cao v The Ministry of Business, Innovation and Employment*;* Singh v Chief Executive, Ministry of Business, Innovation and Employment.

Contents

I Introduction *1*

II The Intended Meaning *3*

A Discretion *3*

B Absolute Discretion *4*

1 Review of decisions made in absolute discretion *5*

C Policy Underlying the Immigration Act *7*

1 Section 11 .... *9*

2 Section 61 .... *10*

3 Section 177 .... *11*

III The Meaning in Practice *12*

A Section 11 .... *13*

B Section 61 .... *13*

1 Cao v The Ministry of Business, Innovation and Employment *13*

C Section 177 .... *15*

1 Singh v Chief Executive, Ministry of Business, Innovation and Employment *16*

2 Conflicting commentary *19*

IV Does the Practice Undermine the Policy? *20*

A Judicial Interpretation *21*

B Immigration Instructions *22*

V Issues Raised by the Practice *23*

A Lack of Clarity *24*

B Rights Impacted by Rule of Law Breaches *26*

VI Recommendations for Reform *27*

A Remove "Absolute" *27*

1 Challenges *28*

B Express Requirements in the Immigration Act *29*

1 Challenges *29*

C Express Requirements in Regulations *30*

1 Challenges *31*

D A Middle Ground *31*

VII Conclusion *33*

VIII Bibliography *35*

I Introduction

> Rigid rules, by themselves, don't ensure wise solutions. Without discretion, the quality of mercy is very strained.[1]

Discretion, like mercy, "seasons justice" – but how can justice season discretion?[2]

Discretion is fundamental to, and commonplace in, New Zealand's legal system. While we often conceive the law as black and white, our system has recognised that there are shades of factual and legal grey to which the Executive and Judiciary must be able to adapt. In this way, discretion is the "essential, flexible shock absorber of the administrative state".[3]

Less prevalent, and more controversial, is "absolute discretion" in decision-making, which features heavily in the Immigration Act 2009 (IA). Absolute discretion reacts to the immigration context because the right to control borders is fundamental to New Zealand's sovereignty.[4] Over the past two years, the number of migrants to New Zealand has been at a record level.[5] As a result an increasing number of immigration applications have been dealt with. Their administration often extends over a number of years, at significant public expense, regularly changing the status of a case; many people use "the courts to exploit any weakness they can find in our immigration law."[6]

---

1 *A Catalogue of Discretionary Powers in the Revised Statutes of Canada 1970* (Law Reform Commission of Canada, Ottawa, 1975) at 7.

2 William Shakespeare *The Merchant of Venice* (Oxford University Press, Great Britain, 1979) at 70.

3 Daniel Kanstroom "The Better Part of Valor: The REAL ID Act, Discretion, and the 'Rule' of Immigration Law" (2007) 51 NYL Sch Rev 161 at 162.

4 *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 at [116].

5 "Migration continues to hit record levels" (22 June 2016) Radio New Zealand <www.radionz.co.nz>.

6 (4 November 1992) 186 Cth PD HR 2620.

Each year, the Minister and Associate Minister of Immigration make approximately 1,500 immigration decisions and Immigration New Zealand (INZ) over 500,000 decisions purely on visas.[7] Because of this volume of decisions it is well established in many countries that immigration officers must be at liberty to make decisions quickly and with finality, without unnecessary consultation or prolonged fact-finding. New Zealand aims to ensure this through the grant of absolute discretion.

The purpose of this paper is twofold: to demonstrate that absolute discretion under the IA is not "absolute" in practice, and to consider whether this undermines the IA's goals or the rule of law.

Part II outlines the intended meaning of absolute discretion in the IA based on its explicit purposes and underlying, ever-informative political background. Next, Part III demonstrates that its meaning in practice is less than absolute, through the lens of ss 11, 61 and 177. However, the actual scope of its meaning, as defined in judgments and Immigration New Zealand's (INZ) internal instructions, has varied significantly over time. There is no evidence of a single definition of absolute discretion crystalising in the near future.

The paper will then argue, in Parts IV and V, that, while the difference between wording and practice does not significantly undermine the IA's policy goals, the numerous sections within the IA which confer absolute discretion, numerous (often conflicting) court decisions and numerous (regularly shifting) instructions import their own dangers by undermining aspects of the rule of law – above and beyond any usual mild difficulties in the interplay between these different sources. This ambiguity is a chief concern in the immigration context. It is trite that if Parliament intends to impinge significantly on human rights, natural justice, access to information and international obligations, as unrestrained absolute discretion does, it must do so clearly and transparently.

---

[7] Ministry of Business, Innovation and Employment *Further Information for the Transport and Industrial Relations Committee: Immigration Amendment Bill (No 2)* (17 February 2014) at [23].

Finally, while it must be accepted that the interplay between the "soft law" instructions and the IA provides necessary flexibility, many of the issues raised by the uncertainty of absolute discretion's meaning can be remedied. In Part VI, the paper proposes that the descriptive "absolute" can be removed without changing its practical meaning. Further, it recommends inclusion of broad decision-making requirements in regulations (codifying the high-level process, recording standards and mandatory considerations) to distinguish the different uses of absolute discretion, making Parliament's intended standard of decision-making clear to decision makers, courts and affected individuals. These changes would strengthen the use of discretion as the courts would not be able to conclude that Parliament requires a higher standard to which it did not turn its mind.

II The Intended Meaning

A Discretion

In conferring discretion, Parliament gives the power to exercise judgement, choice or conscience rather than a strict rule. For example, the grant of a visa is generally a discretionary matter.[8] There are no "uniquely correct discretionary decision[s]" but there are those that are incorrect because they are "unconstitutional, unauthorized or simply arbitrary".[9]

Unlike absolute discretion, the boundaries of mere discretion are clear. In *Sharp v Wakefield* Lord Halsbury stated that a discretionary decision must be made "according to the rules of reason and justice […] to law and not humour. It is not to be arbitrary, vague and fanciful, but legal and regular."[10] Discretionary decisions must be made in good faith, reasonably and not according to personal opinion.[11]

---

8 Immigration Act 2009, s 45.

9 Kanstroom, above n 3, at 167.

10 *Sharp v Wakefield* [1891] AC 173 (HL) at 179.

11 Mauro Cappelletti *Judicial Review in the Contemporary World* (Bobbs-Merrill Company, United States of America, 1971) at 609.

Discretion in decision-making allows us to distinguish "between falsity and truth, between wrong and right".[12] As the power and size of the Executive has grown, discretion has become more important to ensure that the large number of daily decisions can be made fairly and quickly. Often discretion is exercised in favour of individuals, where the facts of their case are unique such that application of the strict legal rule would lead to injustice.

"Immigration policy and judicial review have always had a kind of oil-and-water relationship" because courts are required to question specialised decision-making in an area "where technical nuances abound".[13] However, even wide discretion cannot "unfetter the control which the judiciary have over the executive".[14] Courts will determine whether the Executive decision, made under legislation, has been made in accordance with that power (including the scope of the discretion, and without error or procedural impropriety).[15] This analysis will depend heavily on the content and context of the particular Act because, for example, there is no universal standard of natural justice.[16] Courts will not question matters of policy or resource allocation.[17]

B Absolute Discretion

Through the use of the term "absolute discretion", Parliament has built on the meaning of discretion, giving a seemingly unlimited decision-making power. The ordinary meaning of absolute is "free from all external restraint or interference".[18] We may use synonyms of untouchable, unqualified and unrestricted. Courts tread carefully when encountering

---

12 *Rooke's Case* (1598) 77 ER 209 (Comm Pleas) at 210.

13 Stephen H Legomsky "Fear and Loathing in Congress and the Courts: Immigration and Judicial Review" (2001) 78 Tex Law Rev 1615 at 1615 and 1629.

14 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] UKHL 1 at [24].

15 Judicature Amendment Act 1972, s 4.

16 Francis Cooke QC "Judicial Review"(paper presented to the New Zealand Law Society, May 2012) at 4.

17 *Wolf v Minister of Immigration* [2004] NZAR 414 (HC) at [47] and [72].

18 "Absolute" Oxford English Dictionary <www.oed.com>.

"extraordinary and unusual" wide powers; they are both wary of unobstructed power and of overstepping their role.[19]

Absolute discretion is present outside of immigration law. Trustees are commonly given absolute discretion,[20] alongside judicial and administrative bodies[21] and ministers.[22] However, it is by far most prevalent in the IA; it appears 68 times, across 31 sections. In 2013, INZ made 11,701 decisions under a single frequently-used section allowing absolute discretion: s 61.[23] However, this is a small percentage of *all* immigration decisions.[24] Usually, absolute discretion is a "safety net"[25] and present in "hard cases"[26] where it can only positively affect individuals.[27]

1 Review of decisions made in absolute discretion

The rule of law requires that "[t]here is in truth no such thing as an unfettered discretion".[28] If this were the case, law would end and tyranny begin.[29] Therefore,

---

[19] *Yan Sun v Minister of Immigration* [2002] NZAR 961 (HC) at [5].

[20] See for example Arts Centre of Christchurch Trust Act 2015, s 7; Anglican (Diocese of Christchurch) Church Property Trust Act 2003, sch 1; Anglican Church Trusts Act 1981, sch 2; and Mckenzie Family Trust Act 1954, sch pt 1-3.

[21] See for example Judicature Amendment Act 1972, s 10(2)(g); and Coroners Act 2006, ss 75 and 126.

[22] See for example Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 33(1); Education Act 1989, s 158B; and Immigration Act 2009, s 233.

[23] Ministry of Business, Innovation and Employment, above n 7, at [22].

[24] Ministry of Business, Innovation and Employment, above n 7, at [23].

[25] Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Immigration Amendment Bill (No 2)* (23 September 2013).

[26] *Ye*, above n 4, at [438].

[27] See for example Immigration Act 2009, ss 17, 72 and 79.

[28] Thomas Bingham "The Rule of Law" (Sir David Williams Lecture, Cambridge, 2006).

[29] John Locke *The Second Treatise of Civil Government* (eBook ed, Project Gutenberg, 2005) at [202].

judicial review is available even for decisions made in absolute discretion. As Susan Glazebrook notes, the:[30]

> … description of judicial review as a lighthouse in the fog seems particularly apt in the immigration context [with] the light of judicial review shining though the mist, showing whether [migrants] may pass the reef.

Aptly, she recognises that "the light provided by this precarious beam has not been steady".[31] The Ministry of Justice notes that absolute discretion under the IA does not expressly deny judicial review, but accepts that this is difficult practically because applicants cannot access necessary information.[32] Further, under the New Zealand Bill of Rights Act (NZBORA), statutes should be construed in conformity with that Act if possible, including the right to judicial review under s 27(2).[33]

In Ireland, the Minister for Justice and Equality has absolute discretion to waive conditions for naturalisation,[34] but courts have still shown willingness to quash these decisions.[35] In Australia, the Migration Act 1958 uses absolute discretion and other provisions state that its "privative clause" decisions are "final and conclusive".[36] Again, commentators have noted that such phrases are "relatively weak" as courts will intervene.[37] Likewise in the United Kingdom, Lord Donaldson asserted that, had the

---

30 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385 at [373] as cited in Susan Glazebrook "To the Lighthouse: Judicial Review and Immigration in New Zealand" (paper presented at the Supreme Court and Federal Judges Conference, Hobart, 24–28 January 2009) at 2.

31 Glazebrook, above n 30, at 2–3.

32 Ministry of Justice, above n 25.

33 New Zealand Bill of Rights Act 1990, s 6.

34 Irish Nationality and Citizenship Act 1956, s 15.

35 *Mallak v Minister for Justice Equality & Law Reform* [2012] IESC 59.

36 Migration Act 1958 (Cth), ss 159 and 474.

37 Nicholas Gouliaditis "Privative Clauses: Epic Fail" (2010) 34 MULR 870 at 871. See also John Vrachnas and others (eds) *Migration and Refugee Law in Australia* (3rd ed, Cambridge University Press, United States of America, 2012) at 335.

proposed "breathtaking[ly]" broad ouster clause in asylum legislation been passed,[38] the courts would have cried out, "[w]e're not having this".[39]

As well as judicial review, decisions made in absolute discretion (unless ministerial) may be questioned by the Ombudsman;[40] the "office of last resort".[41] Further, under the Official Information Act 1982, government information can only be withheld in limited circumstances.[42]

C Policy Underlying the Immigration Act

By combining the meanings of "absolute" and "discretion", Parliament has tailor-made a powerful standard of decision-making to achieve its two-fold intent: administrative efficiency and allowing balancing of individual and national interest.

One explicit purpose of the IA is to balance the national interest and rights of individuals.[43] The Ministry of Business, Innovation and Employment, which administers the IA, notes that the IA "deliberately provides more rights to … people who are engaged or enfranchised in the immigration system",[44] in order to ensure that people who are not "are not advantaged over those who do comply".[45] However, such national interest is not "all powerful", as immigration deals with individuals who also have rights domestically and internationally.[46] Equally, Parliament intended that the IA encourage contribution to

---

38 Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003–2004.

39 (7 December 2004) 667 GBPD HL 746.

40 Ombudsman Act 1975, s 13(1).

41 Letter from Dame Beverley Wakem (Ombudsman) to Jonathan Temm (President of the New Zealand Law Society) regarding section 61 of the Immigration Act 2009 (3 August 2012) at 7.

42 Sections 6 and 9.

43 Immigration Act 2009, s 3(1).

44 Ministry of Business, Innovation and Employment, above n 7, at [14].

45 Workforce (Immigration New Zealand*) Internal Administration Circular No: 13/08* (30 September 2013) at [8].

46 Peter Moses and Fraser Richards "Developments in Immigration Law" (paper presented to the New Zealand Law Society, Auckland, June 2011) at 15.

New Zealand through immigration because the country is "built on immigration".[47] A greater flexibility of decision makers' powers was recognised as necessary to ensure the correct intake of skill.

When the Bill was first read,[48] Christopher Finlayson MP (as he then was) noted that the IA also aimed to create administrative efficiency so actions are not "unnecessarily delayed because of judicial review".[49] Peter Brown MP used the example of the "many millions of dollars"[50] spent on the *Zaoui* saga.[51] The 2006 immigration review aimed to ensure "fair, firm and fast decision-making".[52]

Immigration is an area with great public interest. We need look no further than the wide ministerial discretion used to grant temporary entry permits to the Springbok rugby team, culminating in the controversial *Ashby v Minister of Immigration*,[53] or the public fears roused following the United Kingdom's decision to leave the European Union.[54] Immigration affects those with a "deep and vital interest" in living "where they have settled and sunk roots."[55] Therefore it is not surprising that a large proportion of judicial review applications are concerned with immigration; it is the largest area of judicial review in England.[56]

---

47 (5 March 2009) 652 NZPD 1707. See also Immigration Act 2009, s 3(b); and Department of Labour *Immigration Act Review: Discussion Paper* (April 2006) at i and [1.1].

48 Immigration Bill 2007 (132-1).

49 (16 August 2007) 641 NZPD 11231.

50 (16 August 2007) 641 NZPD 11231.

51 *Zaoui v Attorney General* [2004] 2 NZLR 339 (HC); *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (CA); and *Attorney-General v Zaoui (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

52 Department of Labour *Immigration Act Review: Overview* (April 2006) at 4.

53 *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).

54 See for example Vaughne Miller and others "Brexit: what happens next?" (30 June 2016) United Kingdom Parliament <www.parliament.uk>.

55 Joseph H Carens "Who Should Get in? The Ethics of Immigration Admissions" (2003) 17 Ethics Int Aff 95 at 97.

56 Robert Thomas "Mapping immigration judicial review litigation: an empirical legal analysis" [2015] PL 652 at 652.

These policy goals and concurrent public interest are demonstrated in the IA section defining absolute discretion and two sections conferring absolute discretion. The latter sections represent the practical issues raised by the IA's absolute discretions; the place of international obligations and reasons for decision-making. They cover last chance deportation and visa claims so decisions under them unsurprisingly prompt judicial review proceedings most frequently of all IA absolute discretions.

1 Section 11

Section 11 defines absolute discretion within the IA to mean that:[57]

> … (a) the matter or decision may not be applied for; and
>
> (b) if a person purports to apply for the matter or decision, there is no obligation on the decision maker to—
>
> (i) consider the purported application; or
>
> (ii) inquire into the circumstances of the person or any other person; or
>
> (iii) make any further inquiries in respect of any information provided … and
>
> (c) whether the purported application is considered or not,—
>
> (i) the decision maker is not obliged to give reasons for any decision … other than the reason that this section applies; and
>
> (ia) privacy principle 6 … does not apply to any reasons for any decision … and
>
> (ii) section 27 of this Act and section 23 of the Official Information Act 1982 do not apply …

The policy of administrative efficiency is seen in ss 11(1)(c)(ia)–11(1)(c)(ii) as means of challenging decisions are reduced. Inserted in 2015,[58] the Privacy Act provision practically impacts requests under Privacy Principles 7 and 8 because if a person cannot

---

57 New Zealand Legislation <www.legislation.govt.nz>.

58 Immigration Amendment Act 2015, s 9.

view information related to their case, they cannot correct errors or review decisions - an issue underlying the *Cao* litigation discussed below.[59] The amendment received opposition from the Green and Labour parties who contended that it skirted the "normal processes of a democratic system".[60]

2 Section 61

Section 61 demonstrates the IA's consideration of individual interests by providing for the grant of a visa in absolute discretion, by the Minister of Immigration, to a person who is unlawfully in New Zealand where no deportation or removal order is in force. It aims to cover those who have "genuine reasons for being in New Zealand unlawfully", such as where there has been innocent oversight or illness.[61] In practice the decision is often delegated.[62]

The intended scope of this section has varied over time due to issuing of Internal Immigration Circulars (IAC), which clarify INZ's Operational Manual (OM).[63] In IAC 08-06, any relevant international obligations were required to be taken into account.[64] The instructions included a step-by-step guide of factors to consider, including the person's immigration history and current situation (like whether rights of children are impacted).[65] A far cry from this, IACs 10-21, 11-10 and 13-08 stated that there were "no

---

59 Privacy Act 1993, s 6.

60 (30 April 2015) 704 NZPD 3092.

61 Controller and Auditor-General *Inquiry into Immigration Matters* (May 2009) at [5.96]. See for example Dave Nicoll "Deportation order cancelled for Invercargill mum Clarissa Garces" (1 July 2016) Stuff <www.stuff.co.nz>.

62 See Immigration Act 2009, s 380.

63 "Internal Administration Circulars" Immigration New Zealand <www.immigration.govt.nz>.

64 Workforce (Immigration New Zealand) *Internal Administration Circular No: 08/06* (10 April 2008) at [9].

65 At 6–10.

specific immigration instructions that must be met as decisions are a matter of absolute discretion."[66]

In 2013, a new circular was issued stating that officers were required to "briefly record their reasons for decisions" if they consider an application.[67] This was a result of a letter from the Ombudsman[68] criticising the 2011 IAC's requirement that reasons for s 61 decisions were not to be recorded.[69] Giving reasons enables consistency checks and compliance with the Public Records Act 2005.[70] The Ombudsman also suggested that it is "arguable that there is a presumption that decision makers will act consistently with international law".[71]

These changes demonstrate reluctance to impose high recording standards and the intention that regard to international obligations be minimal. Extensive information requests and litigation increase administrative workloads and decrease the incentive to remain within the immigration system: consequences which the IA did not intend.[72]

3 Section 177

Under s 177, a deportation order may be cancelled in the absolute discretion of an immigration officer. Unlike s 61, it contains the further requirement that the officer must consider an application if a person provides them with information related to their personal circumstances and it is relevant to New Zealand's international obligations.[73] If an officer does consider cancelling an order, they must have regard to international

---

66 Workforce (Immigration New Zealand) *Internal Administration Circular No: 10/21* (22 December 2010) at [7]; Workforce (Immigration New Zealand) *Internal Administration Circular No: 11/10* (14 November 2011) at [12]; and Immigration New Zealand, above n 45, at [23].

67 Immigration New Zealand, above n 45, at [34].

68 Wakem, above n 41, at 2.

69 Immigration New Zealand *No: 11/10*, above n 66, at [13] and [19].

70 Section 17.

71 Wakem, above n 41, at 3.

72 Ministry of Business, Innovation and Employment, above n 7, at [20].

73 Immigration Act 2009, s 177(2).

obligations but do not have to inquire further into the individual's circumstances: they can make the decision they see fit.[74] When an officer does have regard to international obligations, under s 177(5) they must record a description of these and the individual's relevant personal circumstances.

Inserted by Supplementary Order Paper, s 177 was intended to overturn the "future effect"[75] of two 2009 judgments.[76] In *Ye v Minister of Immigration* (*Ye*) and *Huang v Minister of Immigration* (*Huang*), the Supreme Court required a humanitarian balancing test and further inquiry where there were exceptional circumstances that would make it unjust or unduly harsh to remove the person, and it was not against the public interest to do so.[77] The insertion of s 177 overrides these cases by stating that no test is required, imposing a high threshold before courts can intervene.[78]

Thus ss 61 and 177 are intended to recognise individual interests, providing "compassionate treatment" where appropriate.[79] However, their wording, and that of s 11, intend to significantly limit means of review so that neither national interest nor administrative efficiency are undermined. Despite this, judicial review is available for decisions made in absolute discretion in some circumstances.

III The Meaning in Practice

While the policy goals of absolute discretion and clear wording of the key sections are clear, judgments and INZ's internal instructions have interpreted absolute discretion as less than absolute. These interpretations mean an increased administrative workload, and sometimes that the balancing exercise is second-guessed, seemingly against the IA's

---

[74] Immigration Act 2009, s 177(3).

[75] Supplementary Order Paper 2009 (32) Immigration Bill 2007 (132-2) (explanatory note).

[76] *Ye v Minister of Immigration* [2009] NZSC 76; and *Huang v Minister of Immigration* [2009] NZSC 77.

[77] *Ye*, above n 76, at [30].

[78] Immigration Act 2009, s 177(3)(b)(i).

[79] Tom Bingham *The Rule of Law* (Allen Lane, England, 2010) at 51.

goals. Significantly, it is unclear which definition will be applied or if the definition will change between sections, prompting the question: is this ambiguity inconsistent with the rule of law?

A Section 11

While limiting the avenues of review, s 11 does not remove review rights. It does not function as an ouster clause by "shut[ting] off the conversation altogether."[80] Doug Tennent has recognised that courts have not taken a literal approach where individuals have "very little if any rights."[81] He notes that "absolute discretion does not amount to absolute power"[82] and limits will be implied, like the requirement that there is "fair and reasonable" reading of an application.[83]

B Section 61

Section 61 is not "absolute" because it does not completely oust the courts' jurisdiction. In judicial review proceedings the High Court considered whether there should be discovery[84] of the reasons for refusing a visa.[85]

1 Cao v The Ministry of Business, Innovation and Employment *(*Cao*)*

Mr Cao was an unlawful overstayer who married a New Zealander. After his application for a visa was refused, he argued that the relevant considerations of his wife and child were not taken into consideration, and that there had been a breach of natural justice and legitimate expectations because the relevant IAC stated that reasons would be recorded, and so they should be provided to him. He further claimed that s 11 was unconstitutional and discriminatory, but the Court did not comment on this.

---

80 Glazebrook, above n 30, at 52.

81 Doug Tennent *Immigration and Refugee Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) at 4.

82 At 121.

83 Doug Tennent "Absolute discretion in immigration" [2012] NZLJ 144 at 149.

84 Judicature Amendment Act 1972, s 10.

85 *Cao v The Ministry of Business, Innovation and Employment* [2014] NZHC 1551 at [1].

Fogarty J accepted the Ministry's submission that review had been limited purposely, "given the Crown's historic and continuing control over movement of people and goods across the border".[86] The Court analysed the similar former powers under the British Nationality Act 1981,[87] where there was no statutory duty to provide reasons, but the affected party was entitled to be informed of the standard which they would have to meet.[88]

The Court ordered disclosure of reasons and stated that it would examine these, taking into account the absolute discretion. It was not a "legitimate argument" that because the IA prevented individuals from obtaining reasons, the same applied to the High Court in its inherent jurisdiction.[89] Fogarty J emphasised that the ruling did not undermine the IA, but upheld the orthodox role of the Court to ensure that all statutory powers are exercised "in good faith and for their proper purpose": there "is no such thing as an unreviewable exercise of government power."[90]

This is likely a correct interpretation of absolute discretion. Indeed, during the NZBORA consistency analysis, the Ministry of Justice regarded it as ameliorating that individuals could obtain information through discovery.[91] However, in *Zhang v The Associate Minister of Immigration* (*Zhang*), the Court of Appeal limited discovery rights; an entitlement to discovery, without a "real risk" of unreasonableness, "would undermine the statutory scheme".[92] Discovery was only available "to enable the Court to exercise its jurisdiction properly".[93]

---

86 *Cao*, above n 85, at [19].

87 Section 44(2).

88 *R v Secretary of State for the Home Department, ex parte Fayed* [1998] 1 WLR 763 (CA) at 774 and 781.

89 *Cao*, above n 85, at [23].

90 *Cao*, above n 85, at [36].

91 Ministry of Justice, above n 25.

92 [2016] NZCA 361 at [26].

93 At [25].

Cao held that absolute discretion limited judicial review of s 61 decisions to "manifest irrationality",[94] or *Wednesbury* unreasonableness: the decision cannot be so unreasonable that no reasonable decision maker could have made it and it must comply with the statute.[95] Lord Cooke notes that *Wednesbury* is a problematic ground for review.[96] The intensity of review often differs. Courts have looked to different factors: some to the statutory scheme; others to subject matter; and still others to which rights may be undermined.[97] Further, review solely on unreasonableness is hardly ever successful. Given these "bleak prospects" and the high threshold for overturning a decision on unreasonableness, the Court of Appeal has still called absolute discretion "untrammelled".[98]

C Section 177

The meaning of absolute discretion in s 177 has been more contentious than s 61, but similarly the courts have held that it not an ouster clause; it is "not in every sense absolute",[99] nor "completely without fetter".[100] The primary disagreements around s 177 have been over whether, and to what extent, New Zealand's unincorporated international obligations must be considered given the absolute discretion, and if reasons must be provided.

---

[94] *Cao*, above n 85, at [6].

[95] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229.

[96] Robin Cooke "The Discretionary Heart of Administrative Law" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord* (Claredon Press, Oxford, 1998) 203 at 211. See also Graeme Austin "The UN Convention on the Rights of the Child – and the domestic law" (1994) 1 BFLJ 63 at 67.

[97] Compare Cooke, above n 16, at 18; *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 (CA) at 197–198; and *Wolf*, above n 17.

[98] *Zhang*, above n 92, at [12] and [14].

[99] *Chief Executive of the Ministry of Business, Innovation and Employment v Liu* [2014] NZCA 37, [2014] 2 NZLR 662 at [8].

[100] *Dong v The Chief Executive of the Ministry of Business, Innovation and Employment* [2016] NZHC 1468 at [40].

In *Babulal v Chief Executive, Department of Labour* (*Babulal*), the review of s 177 was held to be "extremely limited" and "within a very narrow compass".[101] In *Ewebiyi v Parr* (*Ewebiyi*) Fogarty J upheld the "basic principle" that there was no obligation to adhere to international obligations unless they were incorporated domestically, but required recording so that New Zealand's obligations are "taken seriously" under s 177.[102] Some commentators have suggested that *Puli'uvea v Removal Review Authority*[103] leaves open the prospect that the presumption of consistency (courts assume that Parliament did not intend to legislate against international obligations) will be used where discretion is broad.[104]

1 Singh v Chief Executive, Ministry of Business, Innovation and Employment *(*Singh*)*

In 2015, the Court of Appeal provided some much-needed clarification on s 177.[105] Mr Singh, Ms Kaur and their son came to New Zealand on a two-week limited purpose visa, without disclosing that Ms Kaur was eight months pregnant. Their daughter, born soon after, is lawfully a New Zealand citizen. On expiration of their visa, they stayed in New Zealand. Their second son was also liable for deportation because he was born when his parents were unlawfully in New Zealand. The officer recorded the international obligations he considered, but not his reasons for refusing to invoke s 177.

Like s 61, review was narrowed to a *Wednesbury* analysis. On the facts the decision to deport was open to the officer (there was not one right answer) so it was not quashed.[106] The Court held that s 177 prevented it from conducting the English approach, reviewing the proportionality of the decision to the aim (including human rights considerations).[107]

---

101 HC Auckland CIV-2011-404-1773, 29 September 2011 at [29] and [36].

102 *Ewebiyi v Parr* HC Christchurch CIV-2011-409-2010, 7 December 2011 at [45] and [56].

103 (1996) 2 HRNZ 510 (CA).

104 Claudia Geiringer "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law"(2004) 21 NZULR 66 at 83–84 and 92. See also *Te Runanga O Raukawa Inc v Treaty of Waitangi Fisheries Commission* CA178/97, 14 October 1997 at 8.

105 *Singh v Chief Executive, Ministry of Business, Innovation and Employment* [2015] NZCA 592.

106 At [66].

107 *Singh*, above n 105, at [64].

There is support for the proportionality approach over an orthodox *Wednesbury* analysis.[108] However, such an approach was rejected in *Singh* because, as noted by the Court of Appeal in *Huang*, New Zealand "operate[s] in a different legislative and human rights environment."[109] The weight of literature is not in support of the "hard look" approach where absolute discretion is involved.[110]

In deciding on a *Wednesbury* review, the Court formulated a test. First, the statutory context was considered: s 177 provides a "last ditch" attempt at cancellation.[111] Secondly, based on the legislative history Parliament "has made a deliberate choice … to place the ultimate decision in the hands of the officer", following *Huang* and *Ye*.[112]

A similar test was applied by the Court of Appeal in *Chief Executive of the Ministry of Business, Innovation and Employment v Nair* (*Nair*).[113] Like *Singh*, the Court held that specific weight need not be given to international obligations, nor did they need to be given *effect* to.[114] The Court reiterated that any steps which an officer takes external to the statute, like further consultation, cannot be required.[115] Interestingly, the Court gave great effect to the IA's purpose of administrative efficiency through finality of decision-making; Mr Nair was deported, requiring him to pursue further review from India.[116]

---

108 See for example *Wolf*, above n 17, at [26]; and Michael Taggart "Proportionality, Deference, *Wednesbury*" [2008] NZ L Rev 423 at 451.

109 *Huang v Minister of Immigration* [2008] NZCA 377, [2009] NZLR 700 at [64].

110 See for example Tennent, above n 83, at 149.

111 *Singh*, above n 105, at [13]–[14].

112 *Singh*, above n 105, at [64].

113 [2016] NZCA 248.

114 *Singh*, above n 105, at [18]; and *Nair*, above n 113, at [30].

115 *Nair*, above n 113, at [42].

116 *Nair*, above n 113, at [46].

Singh distinguished *Cao* because s 61 contains no equivalent express limitations on the absolute discretion; it is cast "in very different terms from s 177".[117] By this logic, s 61 may be open to more grounds of review than s 177, opposing *Cao*. Further, *Singh* suggests that s 61 does not have to be interpreted in light of its legislative background, somewhat undermining its test for "an immigration decision".[118]

Singh rejected the contention that natural justice requires reasons to be given.[119] The Court refused to follow the Irish Supreme Court in *Mallak v Minister for Justice, Equality & Law Reform*,[120] despite *Mallak* having been influential and gaining significant academic support.[121] This rejection shows s 177's wording being narrowly construed: natural justice does not outweigh the decision maker's right not to give reasons under s 177(4)(a).

Therefore, an officer must actively consider international obligations when required.[122] However, provided they have complied with s 177(5), courts have limited ability to challenge how the obligation has been applied, for example what the best interests of a child are, and how they have been taken into consideration.[123] Thus the Supreme Court in *Singh* found that there was "nothing particularly surprising" about the officer not considering the rights of the child who is a New Zealand citizen as a "trumping consideration".[124]

---

117 *Singh*, above n 105, at [55]. See also Ministry of Business, Innovation and Employment *Report of the Ministry of Business, Innovation and Employment to the Transport and Industrial Relations Committee* (18 March 2014) at 12.

118 *Singh*, above n 105, at 14.

119 *Singh*, above n 105, at [56].

120 *Mallak*, above n 35.

121 Tim Cochrane "A general public law duty to provide reasons: why New Zealand should follow the Irish Supreme Court" (2013) 11 NZJPIL 517 at 518; and Tennent, above n 83, at 149.

122 *Singh*, above n 105, at [17].

123 *Singh*, above n 105, at [49]–[50].

124 *Singh v Chief Executive of Ministry of Business, Innovation and Employment* [2016] NZSC 39 at [3].

However, *Singh* did not put an end to all s 177's ambiguities. In 2016, *Li v Ministry of Business, Innovation and Employment* (*Li*) held that *Babulal* was not expressly approved by *Singh* and preferred the approach of *Ewebiyi* under which the officer must specify which personal circumstances relate to which international obligation noted under s 177(5).[125] There are "sound policy reasons" for this approach: to avoid "inadequate and improper" means of decision-making which Parliament did not intend.[126]

2 Conflicting commentary

While *Singh* provides much clarity over the s 177 uncertainties raised previously by commentators, some remain.

Tennent contends that an incorrect weighting of international obligations within an absolute discretion decision amounts to a reviewable error of law, even if this requires an intensity of review greater than *Wednesbury*.[127] As the importance of the obligation increases, the rule in *Tavita v Minister of Immigration* (mandatory consideration of international obligations)[128] strengthens.[129] He also proposes that wherever international obligations are relevant, they must be considered.[130] This point is unlikely to be successful following *Singh*, but it may be applicable to other sections containing absolute discretion depending on their legislative history and purpose.

Responding to Tennent's claims, Jessica Birdsall-Day argues that Parliament did not intend decisions be vulnerable because of a court's view that insufficient weight was given to international obligations.[131] She notes that while there is a presumption of legality that Parliament did not intend to legislate in contravention of its obligations,

---

125 [2016] NZHC 1788 at [60].

126 *Fang v The Ministry of Business, Innovation and Employment* [2015] NZHC 1630 at [34].

127 Tennent, above n 83, at 148.

128 [1994] 2 NZLR 257 (CA).

129 Doug Tennent "Absolute discretion" [2013] NZLJ 2 at 3.

130 Tennent, above n 83, at 146.

131 Jessica Birdsall-Day "Section 177 of the Immigration Act"[2012] NZLJ 230 at 230.

sometimes the court will be unable to give effect to them without "challeng[ing] Parliament's apparent intention".[132] *Singh* accords with this comment. However, she goes further by proposing that s 177 is an appropriate "forum to flex judicial muscle" and allows "the judiciary to manoeuvre the limits that Parliament has placed on it" by, for example, declaring inconsistency of absolute discretion with international human rights or challenging Parliament's intention.[133]

Ultimately, this conflict in opinion demonstrates the lack of clarity of absolute discretion and a court's interpretation will likely depend on, as Claudia Geiringer puts it, the "potency and persuasiveness of the particular obligation, and the egregiousness of the particular breach."[134] Courts will question whether, based on "national policy, it would send all the wrong messages" to use s 177, and if the decision maker has merely given "lip service" to its requirements.[135] As Tipping J in *Ye* proposes, "what ultimate effect should be given to [rights accorded by international obligations] is a matter of assessment against all the other relevant circumstances".[136]

Within ss 11, 61 and 177 the interpretation of absolute discretion by courts and INZ has differed since the IA's enactment, and the current interpretations are not consistent across all sections of absolute discretion. There is a crevasse between actual and natural meanings which has fluctuated in size over time.

IV Does the Practice Undermine the Policy?

The limitations on the intended meaning of absolute discretion by the Judiciary and Executive increase administrative workloads and provide opportunities to challenge the

---

132 Birdsall-Day, above n 131, at 235. See also *Ashby*, above n 53, at 229.

133 Birdsall-Day, above n 131, at 234–235.

134 Claudia Geiringer "*Ding v Minister of Immigration*: *Ye v Minister of Immigration*" (paper presented at the Legal Research Foundation Conference: "Human Rights at the Frontier: New Zealand's Immigration Legislation – an International Human Rights Law Perspective", Auckland, 12 September 2008) at 24.

135 *Babulal*, above n 101, at [60] and [66].

136 *Ye*, above n 76, at [25].

IA's balancing of national and individual interests, partly undermining its goals. However, overall these impingements on "absolute" are still restrained and for the most part give effect to what Parliament intended immigration practice to be.

A Judicial Interpretation

Following *Singh* and *Cao* the possibility of judicial review for unreasonableness does not substantially undermine the decision maker's ability to make a decision with confidence that it will not be questioned further. Review solely on the ground of unreasonableness is hardly ever successful.[137] In part, this is because when broad powers are trusted to immigration officials, Parliament and courts must defer to their superior "knowledge and experience".[138] Likewise, when Ministers have absolute discretion, the decisions made "at the highest levels of Cabinet" become "*less* susceptible to judicial supervision".[139] Thus the goal of administrative efficiency is unlikely to be undermined because of the narrow circumstances in which courts are willing to review. Even if a court does review, as in *Cao*, it will take into account the absolute discretion, so only in rare cases will a decision be set aside.

Further, *Singh* highlights that the courts' interpretation of any absolute discretion will depend on the section's history and underlying purpose, so it is implausible that judges would depart significantly from the IA's policy. Courts are inherently reluctant to review policy decisions by second-guessing a decision maker's own balancing of national and individual interests. In the immigration arena, courts have approached review as legality-based rather than rights-based.[140] However, if courts were to follow Tennent's view that a "hard look" review of weight given to international obligations could be available, or Birdsall-Day's proposal that courts apply human rights fundamentals in a more meaningful way, this would have the potential to undermine the balancing exercise of the decision maker by exchanging one reasoned opinion for another.

---

137 But see *Dong*, above n 100, at [45]–[46].

138 *Wednesbury*, above n 95, at 230.

139 Geiringer, above n 134, at 22.

140 Glazebrook, above n 30, at 14.

B Immigration Instructions

At first glance, supplementing the IA with internal instructions undermines its purpose. There is substance to this because instructions often require greater administration, such as recording reasons. However, the 2016 OM reiterates that there is no right to consider decisions against immigration instructions.[141]

Further, s 25 of the IA intends that the OM instructions are published and easily obtainable, and IACs are instructions to staff which aid in their interpretation. The IA is a mere framework.[142] The OM includes detailed "statements of government policy" and is certified by the Minister of Immigration, but is subordinate to the IA and regulations.[143]

This so-called "soft law" does "not have the status of legislation" and is not binding.[144] However, courts have recognised that there is a scale from binding to non-law, and much in-between, so soft law is a "persuasive phenomenon"[145] which can be at least as *influential* as "black letter" law.[146] It is "powerful because [it] is commonly *treated* like law":[147] the House of Lords has even called it "quasi-legislation".[148] The OM and instructions are policy and so cannot be questioned by courts. In reviewing cases of absolute discretion, it is surprising how little the OM and instructions are referenced, suggesting that their role is more informative and underlies interpretation. However, *Patel v Chief Executive of the Department of Labour* (*Patel*) actively considered the

---

141 Immigration New Zealand *Operational Manual* (22 August 2016) at A23.1.

142 Minister of Immigration *Immigration Change Programme: Immigration Act Review* (2006) at 3.

143 "Immigration Legislation Hierarchy" (15 January 2016) Immigration New Zealand <www.dol.govt.nz>.

144 *Singh v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3273 at [20].

145 Greg Weeks. "The use and enforcement of soft law by Australian public authorities" (2014) 42 Fed L Rev 181 at 181.

146 Greg Weeks *Soft Law and Public Authorities* (1st ed, Bloomsbury, Oxford, 2016) at 23.

147 Weeks, above n 145, at 181.

148 *Re McFarland* [2005] UKHL 17 at [24].

meaning of "conclusively proves" in the OM.[149] The Court held that it "must be construed sensibly according to the purpose of the policy" and "as part of a comprehensive and coherent" immigration scheme.[150]

Instructions do not substantially undermine the purposes of the IA. They enable balancing of national interest by allowing policy to be adapted without legislative change, which would undermine the ease of administration. Arguably instructions beget less administrative efficiency because decision makers must refer to both the IA and instructions. However, the instructions often translate single statutory provisions into a checklist-type format and include relevant excerpts from the IA.[151] Further, the IA's accessibility is increased by not including administrative instructions within it, unlike Australia's dense Migration Act 1958.

The IA's policy is not substantially undermined by the oft-changing Executive interpretations of absolute discretion because a more flexible balancing of national interests is catalysed and instructions incorporate the policy of the primary IA. Likewise, the wider judicial interpretation of absolute discretion does not significantly undermine the IA's policy because courts have restrained the grounds of review and will not question policy or balancing exercises of the decision maker.

V Issues Raised by the Practice

Even though the policy of the IA is not undermined by the changing interpretations of absolute discretion, other issues are raised by these shifting definitions. While affected persons can hope that the exercise of absolute discretion will "not vary according to arbitrary criteria like the length of the proverbial 'Chancellor's foot'", the changes are regular and fundamental, far above inevitable minor variations in interpretation by

149 *Patel v Chief Executive of the Department of Labour* [1997] 1 NZAR 264 (CA) at 270. See also *Li*, above n 125, at [83] and *Fang*, above n 126, at [58]; *Dong*, above n 100, at [86]; and *Zhang*, above n 92, at [16].

150 At 271.

151 See for example Immigration New Zealand, above n 64.

different branches of government.[152] This uncertainty rings alarm bells of the rule of law, which is particularly important to consider in order to analyse the extent to which absolute discretion can impinge on fundamental rights.

A Lack of Clarity

Of course "[t]here are boundaries on all powers", even decision-making that purports to be absolute.[153] As far as possible, laws need to be enforced evenly between citizens, accessible to the layperson and predictable in their application. All of these ideas are present across varying conceptions of the rule of law: a mechanism which prevents arbitrary power in discretionary decision-making.[154] Quite simply, any action which is not exercised in line with this should be treated as invalid. Coining the phrase "rule of law" in 1885, AV Dicey accepted that in "almost every continental community the executive exercises far wider discretionary authority [in] expulsion from its territory", but warned his readers that "wherever there is discretion there is room for arbitrariness".[155]

Tennent notes that discretion "must be exercised within the scope of the rule of law".[156] Lord Bingham's work on the rule of law incorporates prior conceptions but practically breaks down its 21st-century components, rejecting that it is merely idealistic. He suggests that the core of the rule is that all people should "be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered by the courts".[157]

---

152 Richard Haigh and Jim Smith "Return of the Chancellor’s Foot?: Discretion in Permanent Resident Deportation Appeals under the Immigration Act"(1998) 36 OHLJ 254.

153 Cooke, above n 16, at 12.

154 Tennent, above n 81, at 122. See also Aristotle *Politics: A Treatise on Government* (eBook ed, Project Gutenberg, 2013) at ch XVI.

155 AV Dicey *Introduction to the Study of the Law of the Constitution* (Macmillan and Co., London, 1902) at 110.

156 Tennent, above n 83, at 144.

157 Bingham, above n 28.

There are eight sub-rules, including that the law be accessible "without undue difficulty" and clear and predictable to a "prudent person".[158] The difference between the ordinary and practical meaning of absolute discretion means that a significant amount of investigation into the "paper-chase" of Parliamentary intent and contemporary immigration trends, and prediction as to how the courts will interpret its scope in any one section, is needed.[159] This antithesis of clarity and public decision-making is problematic. It is not practical for individuals to inquire to this level of detail, especially given the short period in which they can query decisions.

Next, Lord Bingham states that legal rights "should ordinarily be resolved by application of law and not the exercise of discretion."[160] Unlike Dicey, he recognises that, particularly in immigration, "sympathetic consideration" is often needed.[161] However, there is no excuse for unreasonableness in decision making or "exceeding the limits of such powers", highlighting the remaining presence of judicial review.[162] The fourth and eighth sub-rules are adequate protection of fundamental human rights and assurance that the state complies with its international obligations, speaking to the rights discussed below.[163] This modern substantive approach to the rule of law has found support and, this paper submits, is essential in immigration.[164]

---

158 Bingham, above n 28.

159 Bingham, above n 79, at 41.

160 Bingham, above n 28. See also Dicey, above n 155, at 120.

161 Bingham, above n 28.

162 Bingham, above n 28.

163 Bingham, above n 28. See also Bingham, above n 79, at 73.

164 "Rule of Law Index" (2015) World Justice Project <www.worldjusticeproject.org> at 10, 12 and 27; and JD Heydon "What Do We Mean by the Rule of Law?" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) 15 at 39–40. But see Matthew Palmer "The Rule of Law, Judicial Independence and Judicial Discretion" (Kwa Geok Choo Distinguished Visitor's Lecture, Singapore, 20 January 2016) at 5; and Joseph Raz *The Rule of Law and its Virtue* (2nd ed, Oxford University Press, United States of America, 2009) at 211.

B Rights Impacted by Rule of Law Breaches

The lack of clarity means that in theory (albeit unlikely), absolute discretion could be conceived narrowly so that individuals have no rights based on international obligations, access to information and natural justice and human rights rules. As *Patel* suggests, immigration policy must be applied consistently and fairly, so Parliament needs to be clear if it intends courts not to strive to uphold these concepts through the common law.[165]

First, international obligations can be overlooked in the balancing exercise of absolute discretion, as discussed in the s 177 context. Glazebrook regards this intersection of international obligations and immigration as a rule of law issue: "[i]t is a basic truth … that every person … is subject to the rule of law. But what about the rule of international law?"[166] It remains an "unattractive argument" that, especially where considerations are discretionary, it is not mandatory to consider international obligations.[167] However, the ss 61 and 177 cases demonstrate a high threshold for courts to question a decision maker's judgement of relevance and weight of international obligations. Because this outcome depended heavily on the wording and history of the sections, the position of other sections of absolute discretion is unclear, undermining the intent that the IA comply with international obligations in a "clear legal framework"[168] and "transparent way".[169]

Secondly, the scope of natural justice rights is also unclear. Natural justice (including acting fairly and making consistent decisions) is required under the OM, and accordance can be ensured by judicial review or Ombudsman investigation.[170] However, the Ministry of Justice considered that the amendments to s 11 were inconsistent with natural justice under s 27(1) of the NZBORA but it was "the only realistic option".[171] Further, *Zhang*

165 Above n 149, at 274.

166 Glazebrook, above n 30, at 14.

167 *Tavita*, above n 128, at 266.

168 Department of Labour, above n 47, at [1099].

169 Immigration Bill 2007 (132-1) (explanatory note) at 1.

170 Immigration New Zealand, above n 141, at A1. See for example *Dong*, above n 100, at [87].

171 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1; and Ministry of Justice, above n 25.

and *Li* recognised that natural justice depends on context, which under the IA includes a right not to give reasons and absolute discretion.[172]

Thirdly, a question central to immigration is "the extent to which human rights variations can be used as a legitimate tool for immigration policy".[173] There is scope, in decisions made in absolute discretion, for courts to treat such rights as either intrinsic to the person[174] or mere aspirations.[175] Finally, there is a lack of clarity as to the extent of access to information rights purportedly barred by s 11, and those from routes such as discovery.

The absence of definition as to whether such essential rights exist in decisions of absolute discretion are symptomatic of the lack of clarity censured by the rule of law. It is important to minimise this uncertainty, otherwise it can be difficult for affected persons to present their best possible case and assert these fundamental rights.

VI Recommendations for Reform

The immigration review aimed to create understandable, accessible and transparent legislation, but this has not been achieved fully because of the lack of single meaning of absolute discretion between the IA, Executive instructions and judicial definitions.[176] Other options must be considered, without undermining either the administrative and balancing policy goals behind the power being absolute, or the often-overlooked but vital rule of law principle of legal certainty.

A Remove "Absolute"

Is there logic in retaining a mere hyperbole? The inclusion of "absolute" when the power is not is misleading. Discretion is common in legislation, better understood by courts, and

---

[172] *Zhang*, above n 92, at [28]; and *Li*, above n 125, at [86].

[173] Ruth Rubio-Marín (ed) *Human Rights and Immigration* (Oxford University Press, United Kingdom, 2014) at 5.

[174] *Universal Declaration of Human Rights* GA Res 217 (III), A/Res/3/217 (1948).

[175] Rubio-Marín, above n 173, at 11.

[176] Department of Labour, above n 52, at 4 and 6.

it still creates a wide power. In reality, the power conferred under the IA is closer to discretion than any standard of "absolute". The policy goals of the IA are still met; decision makers can balance the interests of the nation and individuals based on the political and immigration climate. Sole discretion would be a mid-point between the 1987 and 2009 IAs; it would not be as powerful as the ordinary meaning of absolute, but would be stronger than decisions made at the decision maker's "own volition" because it strengthens the finality of the decision rather than merely providing the ability to make that decision.[177]

1 Challenges

Proponents of absolute discretion will argue that even if it is not practically absolute, the words demonstrate a high standard for intervention and provide security to decision makers. They may suggest that "absolute" is not misleading as words are not "crystal[s], transparent and unchanged [but] may vary greatly in color and content according to the circumstances".[178] Thus in the immigration context absolute discretion comes with an implied codicil that decisions can be called into question if they are inconsistent with policy or unreasonable. However, the point of clarity is not trivial. Implied meanings and guesswork are not conducive to a successful statutory scheme; the rule of law requires that the law be explained "without undue difficulty", such that a judge can explain it to a jury.[179]

However, one limitation which has certain strength is that removing "absolute" undermines the IA's aim of administrative efficiency. The layperson understands that there is a fundamental difference between the wording of absolute discretion and discretion alone. Therefore, even if reviews on wider grounds will not be successful, applications could multiply and overwhelm INZ and the courts. However, a revised s 11 could note that there is no right to review on an ordinary basis, signposting the constrained review grounds.

---

[177] Immigration Act 1987, s 35A.

[178] *Towne v Eisner* (1918) 245 US 418 (SC) at 425.

[179] Bingham, above n 28.

B Express Requirements in the Immigration Act

A further option is to define the boundaries of the discretion in the IA. Under Lord Bingham's analysis a discretion must be narrowly defined so it is clear that the decision maker is making a decision which is permitted.[180] He would likely approve of Parliament's intention as codified in the s 177 steps: it is (aside from some ambiguities) clear what must be considered. In contrast, the scope of s 61 has changed so frequently that no one could be confident that its requirements at any one time are stable.

Each section containing absolute discretion could contain a s 177 equivalent, being more or less detailed depending on the power and whether its scope is obvious from its context. Alternatively, such details could be inserted at the start of every part of the IA, governing the sections of absolute discretion therein (for example, visas compared to deportation). The words would have to be sufficiently broad so immigration instructions would continue to respond to political and contemporary realities. Instructions will always be needed because it is not possible to codify every situation, only to provide adaptable guidelines for decision makers so that there is some consistency between decisions.

1 Challenges

While it is arguable that the courts' interpretation of the various sections will stabilise over time (as appears may well occur with s 177) and so change is unnecessary, there are two issues with this. First, there are over 30 sections of absolute discretion and so achieving a stable definition for each section will take significant time and judicial decisions. Secondly, as policy changes, the courts' interpretation of Parliamentary intent will also change and the definitions become less predictable. It is different if Parliament clarifies its minimum broad level intent, and it is clear that courts will apply the policy in the instructions.

If requirements are included in the IA, Parliament must ensure that the sections do not become excessive in rules and size. As Lord Bingham notes, the rule of law can also be undermined if this occurs because the law becomes inaccessible and affected persons

---

[180] Above n 28.

once again cannot discover what their rights are.[181] As proposed, requirements at the start of each part and the continued use of instructions will limit the length.

C Express Requirements in Regulations

Instead of legislative clarification, the same details could be included in regulations, which are forms of delegated legislation that provide detail necessary to implement an Act.[182] Where absolute discretion appears, it sometimes appears *only* in regulations, rather than the primary Act.[183]

Under the Legislation Act 2012, regulations must be published and available, there must be notice of their making and they can be revoked on recommendation of the Attorney-General.[184] Under s 400, the IA provides for regulations to be made and lists the type of matters covered, which could be extended to note what regulations covering absolute discretion may cover, such as recording standards and whether international obligations must be considered. As in other current provisions, each section of absolute discretion could point individuals to the regulations and they can easily access them through Legislation New Zealand.[185] The IA would not become extensive and so inaccessible, and the regulations would create public awareness. Provided that the wording is definitive, regulations would considerably ameliorate the uncertainty of absolute discretion found in the current legal matrix.

Regulations would enable the IA's policy goals because they have the strength of law, as opposed to instructions being predominantly overlooked by courts.[186] Further, unlike

---

181 Above n 28.

182 "Regulations and Other Delegated Legislation" New Zealand Centre for Public Law <www.victoria.ac.nz>. See also Interpretation Act 1999 s 29.

183 See for example Insolvency (Personal Insolvency) Regulations 2007; and Rating Valuations (Local Authority Charges) Regulations 1999.

184 Legislation Act 2015, ss 4, 6, 7, 9, 12 and 15.

185 See for example ss 5, 8, 25 and 71(c).

186 Legislation Act 2012, s 16.

legislative clarification, they would be made by the Executive and so could be more easily changed to meet the current immigration climate.

1 Challenges

The Legislative Advisory Committee has stated that provisions covering human rights should "always be included in primary legislation", including rights by virtue of the NZBORA.[187] However, as discussed, courts have still endeavoured to give effect to these rights, and will only do so more if they are in regulations.

The IA already has regulations, focusing on how to deal with unique applications and setting out fees.[188] There is no reason why the scope of a broad decision-making power cannot be covered in regulations, but it must be clearly advertised in the IA that its regulations cover this, on top of the administrative provisions, so individuals are clearly informed that there are further rules which apply.

D A Middle Ground

While it is tempting to conceive these issues in binaries of absolute or nothing, certainty is an objective and discretion a mechanism, so these goals are not mutually exclusive.[189] Even though practice has accorded with Lord Cooke's comment that "[t]otally uncontrolled discretion would be a bane and anathema", the law needs to mirror this explicitly.[190] Equally, uncertainty is not completely avoidable; laws are formed where "risks are unable to be precisely quantified",[191] so we must seek the "Aristotelian mean between over-breadth and over-specificity".[192]

---

187 Legislative Advisory Committee *Guidelines on Process and Content of Legislation* (2012) at [10.1.3]. See also Paul Yowell "Legislation, Common Law and the Virtue of Clarity" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) 101 at 123.

188 Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010.

189 Daniel Kalderimis, Chris Nixon and Tim Smith "Certainty and Discretion in New Zealand Regulation" in Susy Frankel and John Yeabsley (eds) *Framing the Commons: Cross-Cutting Issues in Regulation* (Victoria University Press, Wellington, 2014) 94 at 95.

190 Cooke, above n 16, at 211.

191 Kalderimis above n 189, at 94–95.

192 Yowell, above n 187, at 116.

It is submitted that including definitions of absolute discretion under regulations has fewer limitations than doing so under legislation, and fits more comfortably with how regulations are used. Key points of ambiguity which should be clarified in regulations, if briefly, include whether international obligations must, can or cannot be taken into consideration, recording standards, and if the decision maker can inquire further into the individual's circumstances, within each use of absolute discretion. Alternately, it could include general standards across the IA's parts, for example, noting that where sections covering deportation require recording of considerations in absolute discretion decisions, this means brief notes on the individual's file. Such factors are not liable to change between government policies, and would give effect to the Ombudsman's requirements so are fundamental to codify. Instructions would respond to regularly changing policy, for example by stating that a particular international obligation must be given an increased weight.

As well as clarification in regulations, "absolute" must be removed so decision makers know that their decisions can be called into question, but also be confident in their finality when made in accordance with the clear rules. Affected persons should know that in limited circumstances decisions can be reviewed, and which rights they can utilise.

These changes should not be controversial: the decisions in *Cao* and *Singh* would likely be the same, but the processes clearer. It would give greater effect to administrative efficiency since claimants could predict, and courts decisively state, the outcome of the case, thereby preventing excessive extension. Consistency of decision-making would be enhanced despite instructions allowing "different interpretations of policy or balancing of factors", as the Controller and Auditor-General regarded as important.[193]

[193] Controller and Auditor General, above n 61, at [4.6].

VII Conclusion

The controversial exercise of absolute discretion in decision-making under the IA is less than absolute in practice. Immigration is by nature a balancing act but this cannot be concealed fully behind a cloak of absolute discretion - as the courts and Executive have recognised in their interpretations of ss 11, 61 and 177. The fundamental issue which is raised by this contrast between ordinary and practical meaning is not that it undermines the IA's purposes but, as Greg Weeks notes, the "tension within any rule of law system between allowing sufficient discretion to do justice in individual circumstances and requiring sufficient structure that exercises of discretion are broadly predictable".[194]

This lack of clarity raises fundamental rule of law issues, and so must be minimised. As Lord Bingham aptly recognises, "[t]he broader and more loosely-textured a discretion is … the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law".[195] Immigration increasingly enters the public imagination through media coverage, and it affects every New Zealander indirectly. More acutely, it affects individuals who must comply with certain rules to remain in or enter New Zealand. If they do not know what these rules are, and what rights they have by virtue of human rights or natural justice concepts, international obligations or access to information legislation, they cannot present their case to the best of their ability. Already they are in a vulnerable position; the State has great power, and fundamental aspects of their lives are affected by its decisions.

This paper has raised three alternatives and recommended two: removal of "absolute" because of its misleading inference and a tiered approach where the instructions coexist with heightened clarification in regulations of the broad recording requirements and mandatory and permissible considerations for each exercise of absolute discretion (or part of the IA). While each has limitations, they act as an appropriate middle ground because they do not substantially undermine the IA's policy. In all likelihood, neither would

194 Weeks, above n 145, at 20.

195 Bingham, above n 28.

change the current interpretation of absolute discretion, but would provide heightened clarity to decision makers, courts and affected persons.

Where the scope of discretion is large and consequences of error high, justice must season discretion in a principled, predictable—and, of course, practical—manner.

VIII Bibliography

A Legislation

1 New Zealand

Anglican Church Trusts Act 1981.

Anglican (Diocese of Christchurch) Church Property Trust Act 2003.

Arts Centre of Christchurch Trust Act 2015.

Coroners Act 2006.

Education Act 1989.

Immigration Act 1987.

Immigration Act 2009.

Interpretation Act 1999.

Judicature Amendment Act 1972.

Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

Legislation Act 2015.

Mckenzie Family Trust Act 1954.

New Zealand Bill of Rights Act 1990.

Official Information Act 1982.

Ombudsman Act 1975.

Privacy Act 1993.

Public Records Act 2005.

Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010.

Insolvency (Personal Insolvency) Regulations 2007.

Rating Valuations (Local Authority Charges) Regulations 1999.

Immigration Bill 2007 (132-1).

Supplementary Order Paper 2009 (32) Immigration Bill 2007 (132-2).

2 Australia

Migration Act 1958 (Cth).

3 Ireland

Irish Nationality and Citizenship Act 1956.

4 United Kingdom

Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003–2004.

B Cases

1 New Zealand

Ashby v Minister of Immigration [1981] 1 NZLR 222 (CA).

Attorney-General v Zaoui (No 2) [2005] NZSC 38, [2006] 1 NZLR 289.

Babulal v Chief Executive, Department of Labour HC Auckland CIV-2011-404-1773, 29 September 2011.

Cao v The Ministry of Business, Innovation and Employment [2014] NZHC 1551.

Chief Executive of the Ministry of Business, Innovation and Employment v Liu [2014] NZCA 37, [2014] 2 NZLR 662.

Chief Executive of the Ministry of Business, Innovation and Employment v Nair [2016] NZCA 248.

CREEDNZ Inc v Governor General [1981] 1 NZLR 172 (CA).

Dong v The Chief Executive of the Ministry of Business, Innovation and Employment [2016] NZHC 1468.

Ewebiyi v Parr HC Christchurch CIV-2011-409-2010, 7 December 2011.

Fang v The Ministry of Business, Innovation and Employment [2015] NZHC 1630.

Hansen v R [2007] NZSC 7, [2007] 3 NZLR 1.

Huang v Minister of Immigration [2008] NZCA 377, [2009] NZLR 700.

Huang v Minister of Immigration [2009] NZSC 77, [2010] 1 NZLR 135.

Lab Tests Auckland Ltd v Auckland District Health Board [2008] NZCA 385.

Li v Ministry of Business, Innovation and Employment [2016] NZHC 1788.

Patel v Chief Executive of the Department of Labour [1997] 1 NZAR 264 (CA).

Puli'uvea v Removal Review Authority (1996) 2 HRNZ 510 (CA).

Singh v Chief Executive of the Ministry of Business, Innovation and Employment [2013] NZHC 3273.

Singh v Chief Executive, Ministry of Business, Innovation and Employment [2015] NZCA 592.

Singh v Chief Executive of Ministry of Business, Innovation and Employment [2016] NZSC 39.

Tavita v Minister of Immigration [1994] 2 NZLR 257 (CA).

Te Runanga O Raukawa Inc v Treaty of Waitangi Fisheries Commission CA178/97, 14 October 1997.

Wolf v Minister of Immigration [2004] NZAR 414 (HC).

Yan Sun v Minister of Immigration [2002] NZAR 961 (HC).

Ye v Minister of Immigration [2008] NZCA 291, [2009] 2 NZLR 596.

Ye v Minister of Immigration [2009] NZSC 76.

Zaoui v Attorney General [2004] 2 NZLR 339 (HC).

Zaoui v Attorney-General (No 2) [2005] 1 NZLR 690 (CA).

Zhang v The Associate Minister of Immigration [2016] NZCA 361.

2 Ireland

Mallak v Minister for Justice Equality & Law Reform [2012] IESC 59.

3 United Kingdom

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.

Padfield v Minister of Agriculture, Fisheries and Food [1968] UKHL 1.

R v Secretary of State for the Home Department, ex parte Fayed [1998] 1 WLR 763 (CA).

Re McFarland [2005] UKHL 17.

Rooke's Case (1598) 77 ER 209 (Comm Pleas).

Sharp v Wakefield [1891] AC 173 (HL).

4 United States of America

Towne v Eisner (1918) 245 US 418 (SC).

C International Materials

Universal Declaration of Human Rights GA Res 217 (III), A/Res/3/217 (1948).

D Books and Chapters in Books

A Catalogue of Discretionary Powers in the Revised Statutes of Canada 1970 (Law Reform Commission of Canada, Ottawa, 1975).

Aristotle *Politics: A Treatise on Government* (eBook ed, Project Gutenberg, 2013).

Tom Bingham *The Rule of Law* (Allen Lane, England, 2010).

Mauro Cappelletti *Judicial Review in the Contemporary World* (Bobbs-Merrill Company, United States of America, 1971).

Robin Cooke "The Discretionary Heart of Administrative Law" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord* (Claredon Press, Oxford, 1998) 203.

AV Dicey *Introduction to the Study of the Law of the Constitution* (Macmillan and Co., London, 1902).

JD Heydon "What Do We Mean by the Rule of Law?" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) 15.

Daniel Kalderimis, Chris Nixon and Tim Smith "Certainty and Discretion in New Zealand Regulation" in Susy Frankel and John Yeabsley (eds) *Framing the Commons: Cross-Cutting Issues in Regulation* (Victoria University Press, Wellington, 2014) 94.

John Locke *The Second Treatise of Civil Government* (eBook ed, Project Gutenberg, 2005).

Joseph Raz *The Rule of Law and its Virtue* (2nd ed, Oxford University Press, United States of America, 2009).

Ruth Rubio-Marín (ed) *Human Rights and Immigration* (Oxford University Press, United Kingdom, 2014).

William Shakespeare *The Merchant of Venice* (Oxford University Press, Great Britain, 1979).

Doug Tennent *Immigration and Refugee Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014).

John Vrachnas and others (eds) *Migration and Refugee Law in Australia* (3rd ed, Cambridge University Press, United States of America, 2012).

Greg Weeks *Soft Law and Public Authorities* (1st ed, Bloomsbury, Oxford, 2016).

Paul Yowell "Legislation, Common Law and the Virtue of Clarity" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) 101.

E Journal Articles

Graeme Austin "The UN Convention on the Rights of the Child – and the domestic law" (1994) 1 BFLJ 63.

Jessica Birdsall-Day "Section 177 of the Immigration Act" [2012] NZLJ 230.

Joseph H Carens "Who Should Get in? The Ethics of Immigration Admissions" (2003) 17 Ethics Int Aff 95.

Tim Cochrane "A general public law duty to provide reasons: why New Zealand should follow the Irish Supreme Court" (2013) 11 NZJPIL 517.

Claudia Geiringer "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66.

Nicholas Gouliaditis "Privative Clauses: Epic Fail" (2010) 34 MULR 870.

Richard Haigh and Jim Smith "Return of the Chancellor's Foot?: Discretion in Permanent Resident Deportation Appeals under the Immigration Act"(1998) 36 OHLJ 254.

Daniel Kanstroom "The Better Part of Valor: The REAL ID Act, Discretion, and the 'Rule' of Immigration Law" (2007) 51 NYL Sch Rev 161.

Stephen H Legomsky "Fear and Loathing in Congress and the Courts: Immigration and Judicial Review"(2001) 78 Tex Law Rev 1615.

Michael Taggart "Proportionality, Deference, *Wednesbury*" [2008] NZ L Rev 423.

Doug Tennent "Absolute discretion" [2013] NZLJ 2.

Doug Tennent "Absolute discretion in immigration" [2012] NZLJ 144.

Robert Thomas "Mapping immigration judicial review litigation: an empirical legal analysis" [2015] PL 652.

Greg Weeks. "The use and enforcement of soft law by Australian public authorities" (2014) 42 Fed L Rev 181.

F Parliamentary and Government Materials

(4 November 1992) 186 Cth PD HR.

(5 March 2009) 652 NZPD.

(7 December 2004) 667 GBPD HL.

(16 August 2007) 641 NZPD.

(30 April 2015) 704 NZPD.

Controller and Auditor-General *Inquiry into Immigration Matters* (May 2009).

Department of Labour *Immigration Act Review: Discussion Paper* (April 2006).

Department of Labour *Immigration Act Review: Overview* (April 2006).

Immigration New Zealand *Operational Manual* (22 August 2016).

Legislative Advisory Committee *Guidelines on Process and Content of Legislation* (2012).

Minister of Immigration *Immigration Change Programme: Immigration Act Review* (2006).

Ministry of Business, Innovation and Employment *Further Information for the Transport and Industrial Relations Committee: Immigration Amendment Bill (No 2)* (17 February 2014).

Ministry of Business, Innovation and Employment *Report of the Ministry of Business, Innovation and Employment to the Transport and Industrial Relations Committee* (18 March 2014).

Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Immigration Amendment Bill (No 2)* (23 September 2013).

Letter from Dame Beverley Wakem (Ombudsman) to Jonathan Temm (President of the New Zealand Law Society) regarding section 61 of the Immigration Act 2009 (3 August 2012).

Workforce (Immigration New Zealand) *Internal Administration Circular No: 08/06* (10 April 2008).

Workforce (Immigration New Zealand) *Internal Administration Circular No: 10/21* (22 December 2010).

Workforce (Immigration New Zealand) *Internal Administration Circular No: 11/10* (14 November 2011).

Workforce (Immigration New Zealand) *Internal Administration Circular No: 13/08* (30 September 2013).

G Addresses and Seminar Papers

Thomas Bingham "The Rule of Law" (Sir David Williams Lecture, Cambridge, 2006).

Francis Cooke QC "Judicial Review" (paper presented to the New Zealand Law Society, May 2012).

Claudia Geiringer "*Ding v Minister of Immigration*: *Ye v Minister of Immigration*" (paper presented at the Legal Research Foundation Conference: "Human Rights at the Frontier: New Zealand's Immigration Legislation – an International Human Rights Law Perspective", Auckland, 12 September 2008).

Susan Glazebrook "To the Lighthouse: Judicial Review and Immigration in New Zealand" (paper presented at the Supreme Court and Federal Judges Conference, Hobart, 24–28 January 2009).

Peter Moses and Fraser Richards "Developments in Immigration Law" (paper presented to the New Zealand Law Society, Auckland, June 2011).

Matthew Palmer "The Rule of Law, Judicial Independence and Judicial Discretion" (Kwa Geok Choo Distinguished Visitor's Lecture, Singapore, 20 January 2016).

H Online Materials

"Absolute" Oxford English Dictionary <www.oed.com>.

"Immigration Legislation Hierarchy" (15 January 2016) Immigration New Zealand <www.dol.govt.nz>.

"Internal Administration Circulars" Immigration New Zealand <www.immigration.govt.nz>.

"Migration continues to hit record levels" (22 June 2016) Radio New Zealand <www.radionz.co.nz>.

Vaughne Miller and others "Brexit: what happens next?" (30 June 2016) United Kingdom Parliament <www.parliament.uk>.

New Zealand Legislation <www.legislation.govt.nz>.

Dave Nicoll "Deportation order cancelled for Invercargill mum Clarissa Garces" (1 July 2016) Stuff <www.stuff.co.nz>.

"Regulations and Other Delegated Legislation" New Zealand Centre for Public Law <www.victoria.ac.nz>.

"Rule of Law Index" (2015) World Justice Project <www.worldjusticeproject.org>.

Word Count

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises 8,000 words.