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**IMMIGRATION ACT 2009:
IS THE USE OF “ABSOLUTE DISCRETION” AN
INVITATION FOR ARBITRARY DECISION MAKING?**

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ABSTRACT

Immigration law is a direct product of the State’s sovereign right to control its borders. One way this powerful right has manifested is in the use of “absolute discretion” in the Immigration Act 2009. “Absolute discretion” essentially allows the decision maker to make any decision they deem fit and they do not have to provide any reasons for that decision. This raises concerns in the deportation context, where the outcome of the decision may result in the person being forced to leave New Zealand. Given the human rights considerations and international obligations that are often relevant in the deportation context, such a broad use of power should be subject to sufficient accountability mechanisms to ensure arbitrary decisions are not being made.

This paper analyses the use of “absolute discretion” in ss 61 and 177 of the Immigration Act. Sections 61 and 177 are arguably the two most significant uses of “absolute discretion” in the Act, essentially allowing the Minister of Immigration or an immigration officer to stop the deportation process. Part II will introduce the concept of “absolute discretion” and how it arises in the deportation context. Part III will examine the accountability mechanisms that exist in this context, with a specific focus on the mechanisms that react to the use of “absolute discretion”. Part IV concludes that the use of “absolute discretion” in s 61 appears to be adequately safeguarded against the making of arbitrary decisions. However, the same does not appear to be true for s 177. Possible solutions to ensure good s 177 decisions are being made are considered.

Key Words: absolute discretion, Immigration Act 2009, accountability, judicial review, international obligations.

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I Introduction

Immigration law touches on the lives of many. It directly involves real people, their families, and their futures. While immigration is an area of law intimately connected with human rights, and the humanitarian considerations and international obligations that guide those rights, it is also the direct product of the State’s sovereign right to control its borders. This is explicitly recognised in the Immigration Act 2009 (the Act): “The purpose of this Act is to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals.”¹ As a result, “migration control is one of the few remaining areas where State executive authority can, under the guise of State sovereignty, enjoy almost unbridled power to favour individuals for entry into its territory.”²

One manifestation of this broad power is the use of “absolute discretion” in the Act. “Absolute discretion” is essentially an extension of an immigration officer’s discretionary powers, permitting them to make some decisions without providing any reasons for those decisions.³ Understandably, the provision of “absolute discretion” has attracted the attention of academics, especially within the deportation framework where the use of “absolute discretion” may result in the person being forced to leave their life in New Zealand. Given this and the humanitarian considerations the deportation process may raise, any use of “absolute discretion” in this context should be in accordance with fair processes and subject to sufficient accountability mechanisms. Yet, the lack of reasons required for decisions made under “absolute discretion” and the subsequent reluctance of the courts to undertake anything more than a *Wednesbury*⁴ level of reasonableness review has attracted criticism from academics, worried about the potential for arbitrary decision making and the avoidance of New Zealand’s international obligations.⁵

¹ Immigration Act 2009, s 3.

² Timothy Fadgen and Guy Charlton “Humanitarian Concerns and Deportation Orders Under the Immigration Act 2009: Are International Obligations Enough Protection for the Immigrant with Mental Illness?” (2012) 43 VUWLR 423 at 425.

³ Immigration Act 2009, s 11.

⁴ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

⁵ New Zealand’s international obligations arise from treaties New Zealand has entered into but has not fully incorporated into the domestic legal system.

Many have called for a higher intensity of judicial review for such decisions, given that human rights are often at the centre of them.⁶ However, discretion in the modern administrative state exists in an environment of operations manuals, internal instructions and an ever growing “culture of justification”⁷ to protect against both actual and perceived arbitrariness in decision making and to provide legitimacy for decisions made with discretion. Further, appeal rights for deportation decisions have been created in the Act and the Ombudsman exists as an independent body that may hear complaints and scrutinise administrative decisions, including immigration decisions. Therefore, while the availability of judicial review may have been limited by the provision of “absolute discretion” to the immigration officer for some decisions, whether this opens the door for arbitrary decision making and the avoidance of New Zealand’s international obligations depends on broader considerations.

The purpose of this paper is to analyse the accountability mechanisms that exist in respect of deportation decisions, and determine whether the use of “absolute discretion” in certain sections is an acceptable provision of power, or an invitation for arbitrary decision making. The sections that will be considered are ss 61 and 177 of the Act. These sections represent the most significant use of “absolute discretion” in the Act, essentially allowing the decision maker to stop deportation. Part II of this paper will briefly introduce the concept of “absolute discretion” and how it arises in the deportation context. Part III will examine the accountability mechanisms that exist within the deportation framework, with a specific focus on those accountability mechanisms that may react to the use of “absolute discretion”. First I will look at the Immigration and Protection Tribunal (the Tribunal) and the High Court’s supervisory jurisdiction and how they operate to promote good, fair and accountable deportation and “absolute discretion” decisions. I conclude that these external and formal accountability forums provide weak legal accountability for s 61 and s 177 decisions. Second, I consider the availability to the Ombudsman to provide accountability, concluding that the institution offers strong accountability for s 61 decisions. However, it appears to provide minimal accountability for s 177 decisions. Finally, I look more broadly at the role the media, question time, the Auditor General and soft law may play in ensuring good and reasoned decision making. Part IV concludes that the use of “absolute discretion” in s 61 appears to be adequately safeguarded,

⁶ Hanna Wilburg “Administrative Law (2016 triennial review of NZ developments)” [2016] NZ L Rev 571 at 594 and 597; Doug Tennent “Absolute Discretion in Immigration” [2012] NZLJ 144 at 149; Jessica Birdsall-Day “Section 177 of the Immigration Act” [2013] NZLJ 230 at 232.

⁷ Michael Taggart “Proportionality, Deference, Wednesbury” [2008] NZ L Rev 423 at 461.

particularly through the watchful eye of the Ombudsman and the use of internal instructions. However, s 177 of the Act may permit arbitrary decision making and allow Immigration New Zealand to avoid compliance with New Zealand’s international obligations. A higher intensity of judicial review for s 177 decisions and the creation of internal instructions for immigration officers making s 177 decisions will be considered as two ways of ensuring this broad discretion does not result in arbitrary decisions.

II “Absolute Discretion” Defined

Discretionary powers allow government officials to make decisions within defined parameters, as set by Parliament.⁸ As it is unrealistic and undesirable for Parliament to legislate for every possible situation in which the administrative state and the individual interact, discretion is a necessary tool to ensure policy can be applied fairly and as intended to individual cases.⁹ This is especially pertinent in the immigration context where sensitivity to individual circumstances is crucial to ensure a fair and just outcome. The application of strict legal rules, while providing certainty and transparency, would almost certainly create severe injustice and likely impinge on human rights if applied in deportation cases.

It is broadly accepted that discretionary powers are not wholly good or wholly bad; it depends on the context in which they are used and the parameters that exist to confine them.¹⁰ Unbounded discretion risks decisions being made that are, or are perceived to be, arbitrary. Therefore, even when the decision maker has wide discretionary powers, such as “absolute discretion”, they must be accountable in some manner,¹¹ to ensure just and fair decisions are being made in accordance with good administrative practice.¹² This ensures that public law values such as natural justice and the rule of law are being upheld.

Both “discretion” and “absolute discretion” are used in the Act. Decisions made under “discretion”, such as the issuing of visas,¹³ may be applied for and the applicant may request

⁸ Mark Elliott *Beatson, Matthews, and Elliott’s Administrative Law Text and Materials* (4th ed, Oxford University Press, Oxford, 2011) at 110.

⁹ At 113.

¹⁰ At 113.

¹¹ *Entick v Carrington* (1765) 2 Wilson 275, 95 ER 807 (KB).

¹² Doug Tennent *Immigration and Refugee Law* (3rd ed, LexisNexis, Wellington, 2017) at 127.

¹³ Immigration Act, s 45.

reasons for any rejected application.¹⁴ The same is not true for decisions made under “absolute discretion”. Absolute discretion is defined in s 11 of the Act:

11 Meaning of absolute discretion of the decision maker

(1) If a provision of this Act provides that a matter or decision is in the absolute discretion of the decision maker concerned, it means that—

- (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 by, or in respect of, the person or any other person; and
- (c) whether the purported application is considered or not,—
 - (i) the decision maker is not obliged to give reasons for any decision relating to the purported application, other than the reason that this section applies; and
 - (ia) privacy principle 6 (which relates to access to personal information and is set out in [section 6](#) of the Privacy Act 1993) does not apply to any reasons for any decision relating to the purported application; and
 - (ii) [section 27](#) of this Act and [section 23](#) of the Official Information Act 1982 do not apply in respect of the purported application.

A decision that is in the “absolute discretion” of the decision maker is one that may not be applied for.¹⁵ However, while there is no legal right for a person to apply for such a decision, the only way such a decision will come before the decision maker is if the deportee provides personal information that triggers the possibility of such a decision being made.¹⁶ It is likely this is to ensure that Parliament’s intention is clear; the sections in which the decision maker has “absolute discretion” are not intended to confer strong legal rights to the claimant, they are to provide a backstop to deal with exceptional cases.¹⁷ “Absolute discretion” is often touted as being for the benefit of the applicant. It allows justice to be done in cases where the applicant would not otherwise have any right to such a decision. Wide discretionary powers have long

¹⁴ Section 27.

¹⁵ Section 11(1)(a).

¹⁶ “Absolute Discretion in Immigration”, above n 5, at 145.

¹⁷ Sylvia Bell (ed) *Brookers Human Rights Law* (looseleaf ed, Brookers) at [IA4].

been recognised as necessary to deal with situations that fall outside the general laws or immigration instructions, to ensure justice is done.¹⁸ As a previous Minister of Immigration stated:¹⁹

The ‘absolute discretion’ powers apply when an exception outside the normal course of the law is being sought. It provides flexibility for the Minister or immigration officers, where appropriate, to make a positive exception to the law, where it otherwise would not have been made.

As expressed in s 11 above, the decision maker is under no obligation to provide reasons for any aspect of the decision.²⁰ The legislature has further protected immigration officers from any obligation to give reasons by explicitly stating that privacy principle 6 and section 23 of the Official Information Act 1982 do not apply in respect of a decision made under “absolute discretion”.²¹ Privacy principle 6 is the right of an individual to have access to any personal information held by an agency. The exclusion of this principle raises concerns as to how a potential deportee can ensure their personal information was correctly recorded and the decision was made based on correct information.²² Section 23 of the Official Information Act provides a legal right for a person to request the reasons for a decision made, by an official, in respect of them. The combination of excluding privacy principle 6 and s 23 of the Official Information Act impinges on an individual’s right to natural justice. This shows the strength of the legislature’s intention to exclude any requirement to provide reasons for decisions made under “absolute discretion”.

Twenty-six sections in the Act purport to confer “absolute discretion” to the decision maker. The focus of this paper will be the use of “absolute discretion” in ss 61 and 177 of the Act. Section 61 of the Act provides the Minister of Immigration (or their delegate)²³ with the power, in their “absolute discretion”, to grant a visa to any person unlawfully in New Zealand, provided there is no deportation order already in force. Section 177 of the Act provides an immigration officer with the power, in their “absolute discretion”, to cancel a deportation order

¹⁸ *Yure v Bentley* HC Auckland M1530-PL01, 8 November 2001 at [10].

¹⁹ David Cunliffe, Minister of Immigration “Address to Wellington District Law Society” (speech to Wellington District Law Society, Wellington, 11 October 2007).

²⁰ Immigration Act, s 11(1)(c)(i).

²¹ Section 11(1)(c)(ia) and (ii).

²² Stephanie Lewis “‘Absolute discretion’ in immigration law” (19 November 2015) Privacy Commissioner

<https://www.privacy.org.nz>.

²³ Section 380.

that has been served on a person who is unlawfully in New Zealand. A person is unlawfully in New Zealand if they do not hold a visa under the Act, either due to expiry or cancellation, or they were never granted entry into New Zealand.²⁴ The use of “absolute discretion” in these two sections is arguably the most significant in terms of the power they provide to the decision maker,²⁵ and these sections have been subject to the most attention in the courts. For these reasons, ss 61 and 177 will be the focus of this paper. Further, analysing these two provisions together will show that the provision of “absolute discretion” isn’t an inherently troublesome use of executive power, provided there are sufficient accountability mechanisms and guidelines in place. This appears to be the case for s 61. In comparison, the use of “absolute discretion” in s 177 is troubling.

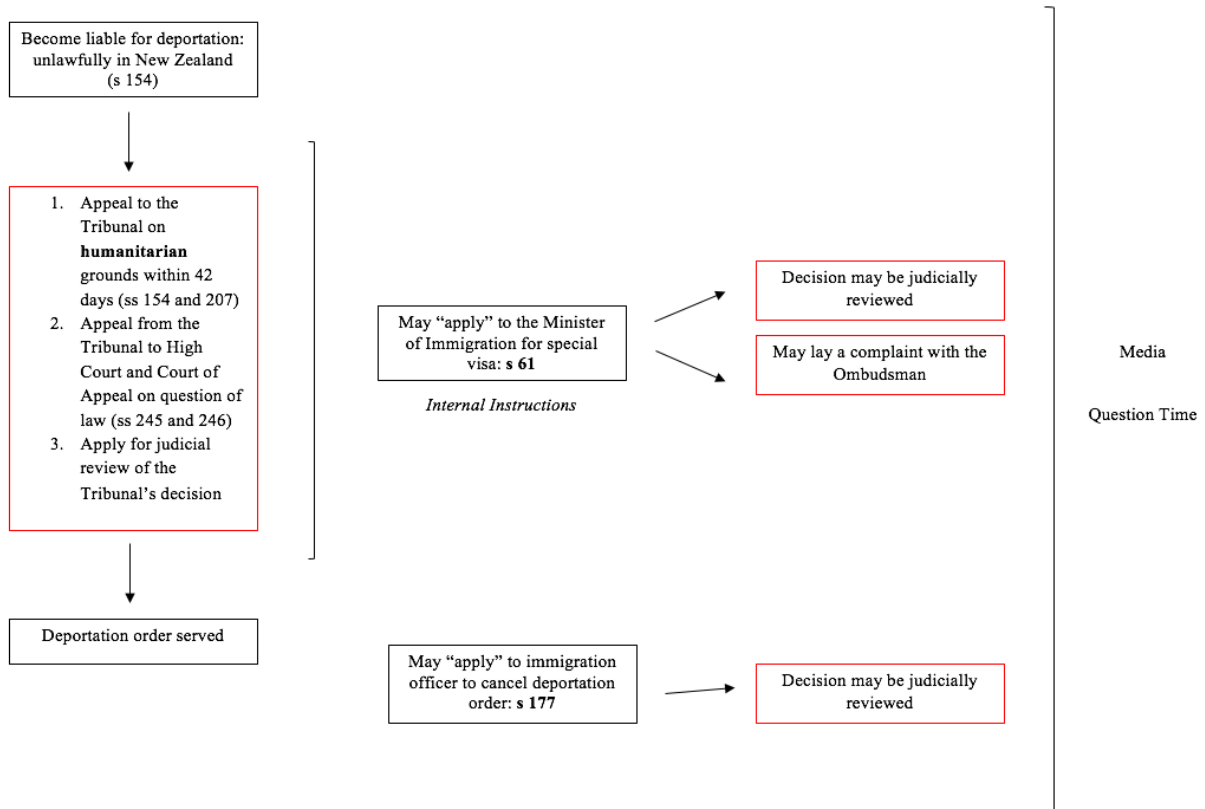
To properly analyse the use of “absolute discretion” in the Act and whether it is appropriate, it is first necessary to understand the broader context in which such decisions may arise, that is, the context in which the Minister of Immigration or an immigration officer is conferred this broad power. The diagram below sets out the deportation process if a person is unlawfully in New Zealand, the appeal and review rights available to the person, and when the Minister of Immigration or an immigration officer may use their “absolute discretion” to prevent deportation. As can be seen, ss 61 and 177 are *supplementary powers*. They exist alongside the main framework for deportation, essentially acting as a safety net to ensure that, in cases where it is fair and just to do so, the potential deportee may lawfully remain in New Zealand.²⁶ Section 61 may be used when the person is liable for deportation, but has not yet been served a deportation order. Section 177 may be used once a deportation order has been served. There are no formal appeal rights from s 61 or s 177 decisions, likely a result of their status as supplementary powers. However, they may be judicially reviewed and s 61 decisions may be subject to a complaint to the Ombudsman.²⁷ As well as these formal accountability forums, the diagram below also identifies other more informal forums, that may ensure the decision maker is making good and reasoned decisions, even when they have “absolute discretion”. These are the media and question time. The use of internal instructions, while not an accountability mechanism, will also be considered as a means of guiding the use of “absolute discretion”.

²⁴ Immigration Act, s 9.

²⁵ Wilburg, above n 6, at 594 and *Immigration and Refugee Law*, above n 12, at 602.

²⁶ *Immigration and Refugee Law*, above n 12, at 124.

²⁷ At 126.



The following analysis will introduce each proposed accountability mechanism and analyse how it works to provide or encourage accountability for decisions made under ss 61 and 177.

III Accountability of Decisions Made with “Absolute Discretion”

Accountability as a concept is elusive.²⁸ It is often used as an overarching theme to encapsulate other values we believe the administrative state should be acting in accordance with, for example, transparency, integrity and responsibility.²⁹ We tend to broadly associate accountability with good governance; an accountable administration is a trustworthy administration.³⁰ However, this broad, malleable idea of what constitutes “accountability” can make it difficult to effectively analyse whether or not particular government officials or departments are subject to sufficient and effective accountability mechanisms.

Accountability can be narrowly defined as “the relationship between an actor and a forum, in which the actor has an obligation to explain and justify their conduct, the forum can pose

²⁸ Mark Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13(4) ELJ 447 at 448.

²⁹ At 449.

³⁰ At 449.

questions and pass judgment, and the actor may face consequences.”³¹ In other words, accountability refers to a social mechanism by which a public actor may be held to account by a forum.³² For our purposes, the primary actor will be the immigration official who made the decision under s 61 or s 177. However, mechanisms that hold the Minister of Immigration or Immigration New Zealand accountable for decisions made by an immigration officer will also be relevant. As will be seen, the forums that may hold these various actors to account are plentiful. The Tribunal through appeal, the courts through judicial review, the Ombudsman through independent investigation, Parliament through question time, the media and the public, and the Office of the Auditor General all provide a potential forum to scrutinise the actions of an immigration officer or Immigration New Zealand. However, while an accountability relationship may exist between the actor and the forum, it may not be effective in obliging the actor to explain and justify their conduct and there may not always be consequences. This is especially true for s 177 decisions, where there appears to be less scope for passing judgment on the decisions of immigration officers and Immigration New Zealand more broadly.

A The Immigration and Protection Tribunal

There is no right to appeal to the Tribunal from a s 61 or s 177 decision. Sections 61 and 177 represent powers that may be used by the Minister of Immigration or an immigration officer to intervene in the deportation process if an appeal to the Tribunal is unsuccessful, or if it was not utilised. They provide a safety net; a privilege the claimant may obtain, not a right they have. The Tribunal, therefore, does not provide a forum by which s 61 and s 177 decision makers can be held to account. The Tribunal’s role is nevertheless relevant as appeal rights exist alongside any recourse the potential deportee may have through ss 61 or 177. It therefore informs our analysis of whether the use of “absolute discretion” in the Act is an appropriate provision of power.

The Act introduced the Tribunal as a specialist body to hear all appeals arising from decisions made under the Act.³³ Section 154 of the Act states that a person unlawfully in New Zealand may lodge an appeal against liability for deportation with the Tribunal within 42 days. Such an appeal may only be on humanitarian grounds.³⁴ If the Tribunal is satisfied that “there are

³¹ At 450.

³² P Day and R Klein *Accountabilities: Five Public Services* (Tavistock, 1987) as cited in Mark Bovens “Does Public Accountability Work? An Assessment Tool” (2008) 86(1) Pub. Adm. 225 at 227.

³³ Immigration Act, s 3(2)(f) and 218(1).

³⁴ Section 154.

exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported ... and it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand”, the appeal must be allowed.³⁵ If the claimant is unhappy with the Tribunal’s decision, they may appeal to the High Court or Court of Appeal on a question of law, or they may apply to the High Court for judicial review of the Tribunal’s decision.³⁶ Any appeal from, or review of, decisions made under these sections will have access to the reasons for the first instance decision. In the 2016 year, the Tribunal heard approximately 300 appeals relating to the deportation of non-residents.³⁷ Of these, 31% were successful.³⁸ None of the Tribunal’s decisions were overturned on judicial review or appeal.³⁹

The existence of the Tribunal perhaps indicates little need for strong accountability mechanisms for ss 61 and 177. The Tribunal is the primary means of appealing against liability for deportation and ss 61 and 177 represent an exception to this deportation framework. Perhaps it is more acceptable to have minimal accountability for decisions made under exceptional provisions, where the decision is seen as a privilege, rather than a right. This idea appears to be part of the justification for the use of “absolute discretion” in these circumstances. The government did not want those who did not use the processes provided by the Act as intended to be put a better position than those who engaged with the system.⁴⁰ However, if an accessible, fair and effective formal appeal system is to justify less accountability for exceptional provisions such as ss 61 and 177, we would want to be sure that the appeal process provided by the Act is in fact accessible, fair and effective. Whether this is the case may be debated.

It is difficult to appeal or review a Tribunal decision. For both, leave is required and the applicant must show that their case gives rise to a question of law that is of general or public importance (or any other reason).⁴¹ The courts have considered that these leave requirements were intended to limit a claimant’s ability to appeal in immigration cases and have been

³⁵ Section 207.

³⁶ Section 247.

³⁷ Peter Spiller *Immigration and Protection Tribunal Annual Report 2015/2016* (Ministry of Justice, July 2016) at 20.

³⁸ At 14.

³⁹ At 3.

⁴⁰ Workforce (Immigration New Zealand) *Internal Administration Circular No: 13/08* (30 September 2013) at [8].

⁴¹ Immigration Act, ss 245, 246 and 249.

reluctant to grant leave.⁴² Therefore, while a formal appeal system does exist, the limited ability for higher courts to review decisions and develop the law raises concerns as to how effective it is in ensuring good deportation decisions.

Further, the above appeal process may not always be sufficient to protect the rights of the deportee. Section 154 makes a person unlawfully in New Zealand liable for deportation by operation of law. There is no requirement they be given notice. While s 154(2) provides that a person who is liable for deportation has the right to appeal liability on humanitarian grounds within 42 days, the practical consequence of no notice requirement is that this period may expire before the person becomes aware that they are unlawfully in New Zealand.⁴³ Fogarty J in *Ewebyi* considered this justified in light of s 14 of the Act, which requires non-citizens in New Zealand to ensure they have a valid visa at all times; it coincides with the “principle of personal responsibility for immigration status”.⁴⁴ Though this ignores the fact that people may have a genuine reason for missing their appeal rights, such as illness.⁴⁵ Regardless of whether no requirement to give notice is justified, in such situations s 177 goes from being a “last ditch opportunity”⁴⁶ to have a deportation order cancelled, to the only opportunity. In this light, it may be more difficult to say that the existence of a formal appeal system justifies the use of “absolute discretion”, as the appeal rights provided have not been effective.

Therefore, it appears that the existence of a formal appeal system can not justify minimal direct accountability mechanisms for ss 61 and 177. While the Tribunal is available to access, in effect, the same decision a claimant may seek through ss 61 or 177, there must still be effective accountability mechanisms in place to ensure s 61 and s 177 decisions are being made in accordance with good administrative practice. The effectiveness of judicial review, another form of legal accountability and one that provides direct accountability for ss 61 and 177 decisions will be considered next.

B Judicial Review

A person who is unhappy with a s 61 or s 177 decision may apply for judicial review of the decision. Though, as will be seen, this provides weak accountability in the context of “absolute

⁴² *Immigration and Refugee Law*, above n 12, at 415.

⁴³ Wilburg, above n 6, at 594.

⁴⁴ *Ewebyi v Parr* HC Christchurch CIV-2011-409-2010, 7 December 2011 at [28] – [29].

⁴⁵ K B Brady *Inquiry into Immigration Matters* (Controller and Auditor General, May 2009) at [5.96].

⁴⁶ *Chief Executive of the Ministry of Business, Innovation and Employment v Nair* [2010] NZCA 248 at [30].

discretion”. Immigration is intimately linked with foreign policy, and as such, the courts are often slow to intervene.⁴⁷ The use of “absolute discretion” takes this further and represents a deliberate policy choice to reduce the courts ability to review such decisions. Without reasons, the court’s ability to scrutinise a decision is inevitably compromised.⁴⁸ While providing the decision maker with seemingly unfettered powers, the term “absolute discretion” has not been treated as a privative clause by the courts or commentators.⁴⁹ A privative clause is a clause contained in legislation that purports to exclude or limit the courts ability to review any decision made under that piece of legislation.⁵⁰ Privative clauses highlight a tension between the branches of government, specifically between parliamentary supremacy and the inherent jurisdiction of the High Court to review decisions of the executive. As recently as 2011, the Supreme Court has reaffirmed that there is a judicial responsibility to uphold the rule of law⁵¹ and that the courts will read down any attempt to oust their jurisdiction by construing legislation in a manner that still allows them to hold public officials to account.⁵² However, while the use of “absolute discretion” may not represent a privative clause in the orthodox sense,⁵³ it has been relatively successful in limiting the ability of the court to intervene and appears to operate in a similar way to an orthodox privative clause. This has led some academics to dub such clauses “modern privative provisions”.⁵⁴

This section of the paper will consider how the courts have approached their role in reviewing decisions made with “absolute discretion” and the extent to which they have been willing to interfere with such decisions. As will be seen, the minimal obligation on the immigration officer to inform the court, the difficulty with the court questioning the immigration officer’s

⁴⁷ *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) 226 Cooke J.

⁴⁸ *Babulal v Chief Executive, Department of Labour* HC Auckland CIV-2011-404-1773, 20 September 2011 at [33].

⁴⁹ Doug Tennent *Immigration and Refugee Law* (2nd ed, LexisNexis, Wellington, 2014) at 121; Wilburg, above n 6, at 594; *Cao v Ministry of Business, Innovation and Employment* [2014] NZHC 1551 at [37].

⁵⁰ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington 2014) at 905.

⁵¹ *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158 at [3].

⁵² *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at [24] and New Zealand Bill of Rights Act 1990, s 27.

⁵³ Traditional privative clauses attempt to oust the supervisory jurisdiction of the courts through express words, for example, “The decision may not be called in to question in any court of law.” The intended effect of such clauses is to allow administrative decision makers to conclusively determine questions of law. Such clauses are not welcomed by the courts, who apply a strong presumption in favour of judicial review when interpreting such clauses. For a more detailed discussion on privative clauses, see Philip A Joseph, above n 50, at 905.

⁵⁴ JG Pemberton “The Judicial Approach to Privative Provisions in New Zealand” (LLB (Hons) Dissertation, University of Otago, 2014).

conduct, and the resulting difficulty in passing any judgment on the conduct means that the use of judicial review as an accountability mechanism is weak for s 61 and s 177 decisions.

1 Section 177

The broad sweep of case law concerning how the courts may and do review decisions made under “absolute discretion” has been in response to s 177 decisions. Section 177 provides:

177 Deportation order may be cancelled

(1) An immigration officer may, in his or her absolute discretion, cancel a deportation order served on a person to whom section 154 applies.

(2) Nothing in subsection (1) gives a person a right to apply for the cancellation of a deportation order. However, an immigration officer must consider cancelling the deportation order of a person who is in New Zealand if the person provides information to the officer concerning his or her personal circumstances, and the information is relevant to New Zealand’s international obligations.

...

(5) However, to the extent that an immigration officer does have regard to any international obligations, the officer is obliged to record—

- (a) a description of the international obligations; and
- (b) the facts about the person’s personal circumstances.

While s 177(1) provides that the decision is in the “absolute discretion” of the immigration officer, s 177(2) appears to immediately circumscribe this discretion by providing that the officer *must* consider cancelling the order if the prospective deportee provides the officer with information concerning their circumstances that is relevant to New Zealand’s international obligations. This is the only limitation though. Section 177 goes on to affirm that provided the officer has regard to “any relevant international obligations”, the decision to cancel is in their “absolute discretion” and they may make any decision they think fit. The immigration officer is under no obligation to apply any test, they are under no obligation to inquire into the circumstances of the deportee or any other person and they are under no obligation to give any reasons for any decision.⁵⁵

⁵⁵ Immigration Act, s 177. Full section in the appendix.

Therefore, while s 177 is designed to allow humanitarian factors to be taken into account through the consideration of international obligations, the requirements on the immigration officer making the decision are not onerous. In comparison to a humanitarian appeal, which requires the Tribunal to cancel liability for deportation if exceptional circumstances exist that would make it unjust or unduly harsh for the person to be deported,⁵⁶ the immigration officer is merely required by s 177 to consider any international obligations they deem relevant. The culmination of the above is that it is difficult for the courts to conduct any sort of review of the decision making process.

The limited ability of the courts to review s 177 decisions has been recognised in a number of cases. Miller J in *Chief Executive of the Ministry of Business, Innovation and Employment v Liu* considered that “s 177 offers an inauspicious setting for judicial review”,⁵⁷ and Lang J supported this in *Babulal v Chief Executive, Department of Labour*, stating “Parliament clearly intended the scope of judicial review of decisions made under s 177 to be extremely limited.”⁵⁸ Part of the justification for limiting judicial review in this way appears to be the context in which s 177 applications arise, as “a last ditch opportunity to have a deportation order cancelled.”⁵⁹ The courts have considered this context fundamental in interpreting how s 177 should be applied.⁶⁰ This interpretation of how a s 177 decision may be reviewed is consistent with an apparent aim of the Act, that is, to reduce the number of immigration decisions that end up in the courts.⁶¹

The cases have primarily focused on the requirements in s 177(5) and how this may provide a basis for review. Section 177(5) states that when an officer does have regard to international obligations (as a result of the deportee providing information about their circumstances relevant to such obligations), the officer is *obliged* to record “a description of the international obligations” and “the facts about the person’s personal circumstances”. The courts may at least ensure officers have complied with the mandatory considerations contained in s 177(5).⁶² In a

⁵⁶ Immigration Act, s 207.

⁵⁷ *Chief Executive of the Ministry of Business, Innovation and Employment v Liu* [2014] NZCA 37 at [8].

⁵⁸ *Babulal*, above n 48, at [29].

⁵⁹ *Nair*, above n 46, at [30].

⁶⁰ *Singh (Kulbir) v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZCA 592 at [6] – [15].

⁶¹ (16 August 2007) 641 NZPD 11231; and Timothy P Fadgen, Guy Charlton and Mark Kielsgard “Narrowing the Scope of Judicial Review for Humanitarian Appeals of Deportation Orders in Canada, New Zealand and the United States” (2014) 35(2) *Hamline J.Pub.L.& Pol’y* 241 at 243 – 244.

⁶² *Fang v Minsistry of Business, Innovation and Employment* [2017] NZCA 190 at [59] – [60].

recent Court of Appeal decision, some much needed guidance as to the interpretation of s 177(5) was provided.⁶³ Current Immigration New Zealand policy requires the immigration officer to interview the potential deportee and record the findings in a Record of Personal Circumstances form.⁶⁴ The question on appeal was whether the completion of the form was sufficient to satisfy the requirement to record “the facts about the person’s circumstances”, or whether the officer was required to make a separate recording of the specific circumstances that were relevant to New Zealand’s international obligations.⁶⁵ The Ministry of Immigration contended that requiring the officer to complete a separate record of the particular facts that gave rise to New Zealand’s international obligations would be tantamount to providing reasons.⁶⁶ The Court rejected this. The officer must make a record of the particular international obligations and a specific statement of the personal circumstances that gave rise to the reference to those obligations.⁶⁷ Such a record does not amount to the giving of reasons.⁶⁸ The relevant facts must be stated but no additional analysis, weighting or consideration is required.⁶⁹ This provides the reviewing court with a foundation, albeit a limited one, upon which s 177 decisions may be scrutinised.⁷⁰ Therefore, while the use of “absolute discretion” has made it difficult for the courts to review such decisions, they will do what they can to exercise some form of supervision.

The intensity of review possible for s 177 decisions has also produced diverging judgments, though the weight of the case law appears to favour *Wednesbury* unreasonableness. For a decision to be *Wednesbury* unreasonable, it must be so unreasonable that no sensible person could have ever arrived at it.⁷¹ While *Wednesbury* unreasonableness may be appropriate for decisions made under “absolute discretion” in other areas of the Act, there are strong arguments for allowing a higher standard of review in the context of s 177 decisions. This is because, in part, such decisions tend to give rise to humanitarian considerations.

In *Singh (Kulbir) v Chief Executive of the Ministry of Business, Innovation and Employment*, the most recent Court of Appeal case to consider the intensity of review appropriate for a s 177

⁶³ *Fang*, above n 62.

⁶⁴ At [2] and [5] – [8].

⁶⁵ At [2].

⁶⁶ At [26].

⁶⁷ At [46].

⁶⁸ At [48].

⁶⁹ At [65]; *Nair*, above n 46, at [31].

⁷⁰ At [59] – [60]; *Liu*, above n 57, at [8]; *Singh*, above n 60, at [50].

⁷¹ *Wednesbury*, above n 4, at 229.

decision, the Court expressly rejected that proportionality review should be applied⁷² and held review was limited to *Wednesbury* unreasonableness.⁷³ This is consistent with the decision in *Babulal*.⁷⁴ In *Babulal*, Lang J reviewed past cases and came to the conclusion that the weight of the decisions was against more intensive review.⁷⁵ In doing so, Lang J distinguished *Wolf v Minister of Immigration*,⁷⁶ a High Court case that had applied an “anxious scrutiny” standard of reasonableness review when considering an appeal against deportation on humanitarian grounds.⁷⁷ While such a case is analogous to a s 177 decision, Lang J concluded that anything more than *Wednesbury* unreasonableness is not possible given s 177 does not require an officer to provide reasons and review may only be on the basis of whether the officer has complied with the limited mandatory considerations in s 177.⁷⁸ Section 177 requires a mere balancing exercise, in the immigration officer’s “absolute discretion”, between the deportee’s personal circumstances, as relevant to New Zealand’s international obligations, and the State’s interest in maintaining the deportation order. There is no way for the courts to evaluate how this has been done. On this basis, it is difficult to see how a reviewing court could ever determine that the immigration officer’s decision was *Wednesbury* unreasonable.⁷⁹

Therefore, judicial review appears to provide limited legal accountability for s 177 decisions. *Ewebyi v Parr* is the only case in which a s 177 decision has been successfully judicially reviewed and this was due to the immigration officer’s failure to record the international obligations that had been considered and the personal circumstances that had triggered the consideration, not because the resulting decision was *Wednesbury* unreasonable.⁸⁰

(a) No obligation to consider a s 177 application

The above discussion has focused on how the courts have interpreted their role in reviewing a s 177 decision in circumstances where the officer *has* considered a purported application. As above, the definition of “absolute discretion” explicitly states that “there is no obligation on the decision maker to consider the purported application” and “whether the purported

⁷² *Singh*, above n 60, at [28 – 37] and [42 – 50]

⁷³ At [50] – [51] and [64].

⁷⁴ *Babulal*, above n 48, at [41].

⁷⁵ At [25].

⁷⁶ *Wolf v Minister of Immigration* [2004] NZAR 414.

⁷⁷ *Babulal*, above n 48, at [24] – [25].

⁷⁸ At [27] – [33], [36] and [41].

⁷⁹ “Humanitarian Concerns and Deportation Orders Under the Immigration Act 2009: Are International Obligations Enough Protection for the Immigrant with Mental Illness?” above n 2, at 437.

⁸⁰ *Feifei Ning v Minister of Immigration* [2016] NZHC 697 at [28].

application is considered or not, the decision maker is not obliged to give reasons for any decision”.⁸¹ Therefore, theoretically it is within the immigration officer’s power to refuse to consider a purported application and give no reasons for that refusal.

In light of the courts unwillingness to totally forfeit their review powers, it seems likely that the courts would consider the surrounding words of s 177 as limiting the immigration officer’s broad discretion. Section 177(2) states that the officer *must* consider cancelling the deportation order if there are personal circumstances of the potential deportee that are relevant to New Zealand’s international obligations. Therefore, international obligations represent a mandatory consideration in the context of s 177. Failing to consider them is likely to constitute an error of law.⁸² In other words, if an immigration officer refuses to consider a s 177 application, but on review of the personal circumstances presented to the immigration officer, it is so obvious that they are relevant to New Zealand’s international obligations, surely the courts should use the surrounding words in s 177 to justify remitting the decision back to the immigration officer. On this basis, perhaps it remains open for a reviewing court to remit the decision back the immigration officer on the basis of error of law if they have considered some, but not all relevant international obligations, as determined by the available personal circumstances.

(b) The origin of s 177

It is worth briefly mentioning the history of s 177, as it has informed the court’s restrictive approach to reviewing s 177 decisions. The section was inserted by Supplementary Order Paper⁸³ in response to the Supreme Court’s findings in *Ye v Minister of Immigration*⁸⁴ and *Huang v Minister of Immigration*.⁸⁵ The explicit intention was to override the “future effect” of these two judgments and limit any review of analogous future cases.⁸⁶ This is a clear example of the executive’s prerogative to make immigration policy.

Ye and *Huang* both concerned Chinese citizens who were unlawfully in New Zealand, but had New Zealand citizen children. Applications were made under s 58 of the Immigration Act 1987, the equivalent of the current s 177, to cancel the deportation orders. In both cases, the Supreme

⁸¹ Immigration Act, s 11.

⁸² *Babulal*, above n 48, at [32].

⁸³ Supplementary Order Paper 2009 (32) Immigration Bill 2007 (132-2) at 31.

⁸⁴ *Ye v Minister of Immigration* [2009] NZSC 76.

⁸⁵ *Huang v Minister of Immigration* [2009] NZSC 77.

⁸⁶ (29 Oct 2009) 658 NZPD 7638.

Court held that when an immigration officer is considering a s 58 application, they must apply the humanitarian test established for appeals, now found in s 207.⁸⁷ In the Court of Appeal’s decision in *Huang*, William Young P considered that where there had been no previous assessment of compliance with New Zealand’s international obligations, applying the humanitarian test at the final stage was significant:⁸⁸

An officer is not obliged to consider a request that a removal order be cancelled under s 58. But the officer must, when and *to the extent s 47(3) issues have not already been addressed*, consider cancellation via the humanitarian interview process or otherwise, and, if the officer finds the s 47(3) criteria are established, the officer should likewise not proceed with removal.

When *Ye* was before the Court of Appeal, Glazebrook J interpreted this as meaning when the appeal process had not been used, the humanitarian interview at the final stage of deportation is essential in ensuring New Zealand is not in breach of its international obligations by deporting the person.⁸⁹ Nevertheless, the Minister of Immigration at the Third Reading of the Immigration Bill explained the reasoning for rejecting the Supreme Court’s finding:⁹⁰

The Government was concerned about the practical implications of a recent Supreme Court decision that required a complex humanitarian test to be applied by immigration officers at the final point of removing an over stayer... There is a formal process that allows most over stayers to lodge a humanitarian appeal within 42 days ... The time for over stayers to raise concerns is not at the last minute before they board the plane. Expecting an immigration officer to apply a complex legal case at the time is not practical.

By removing any requirement to apply the humanitarian test in response to a s 177 application, a dual standard has effectively been created.⁹¹ If the deportee has failed to use their appeal rights for whatever reason, and then makes a s 177 application, the officer can dismiss the application provided they have had regard to any relevant international obligations. There is no requirement to give any specific weighting to those obligations. This can result in people

⁸⁷ *Ye*, above n 84, at [30] and *Huang*, above n 84, at [1] stating that the reasoning in *Ye* applies in *Huang*.

⁸⁸ Note: section 47(3) of the Immigration Act 1987 is the equivalent of s 207 of the Immigration Act 2009. *Huang v Minister of Immigration* [2008] NZCA 377 at [53].

⁸⁹ 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 29.

⁹⁰ NZPD, above n 86.

⁹¹ Charlotte Kempthorne “Endangered Kiwis: The Rights of Children in Deportation Decisions” (2012, University of Otago) at 42.

being deported even if, had they appealed to the Tribunal and the humanitarian test had been applied, they would have been granted the right to stay in New Zealand on humanitarian grounds. This situation is exemplified by the Ram’s case, discussed in the Media section below. Given the high threshold for a humanitarian appeal in the Act,⁹² the result of such a situation is likely to be that New Zealand is in breach of its international obligations.

Nevertheless, the wording of s 177 and the intention expressed in the Minister of Immigration’s speech convey that Parliament’s intention was to reduce obligations on the immigration officer and ensure the basis for judicial review of any decision is limited. This has been effective, with judicial review representing a weak accountability mechanism for s 177 decisions. Section 61 will be examined next. While s 61 does not share the same legislative history, it appears “absolute discretion” has still been successful in reducing the effectiveness of the courts as an accountability mechanism for such decisions.

2 Section 61

Section 61 provides the Minister of Immigration (or their delegate) with the power to grant a visa to a person who is unlawfully in New Zealand, provided no deportation order has been served against them. Section 61 operates as a safety net to legitimise the status of anyone unlawfully in New Zealand, if the circumstances deem it appropriate.⁹³

61 Grant of visa in special case

- (1) The Minister may at any time, of the Minister’s own volition, grant a visa of any type to a person who—
 - (a) is unlawfully in New Zealand; and
 - (b) is not a person in respect of whom a deportation order is in force; and
 - (c) is not a person in respect of whom a removal order is in force.
- (2) A decision to grant a visa under subsection (1) is in the Minister’s absolute discretion.

⁹² Doug Tennent has noted that the framework for humanitarian appeals in s 207 of the Immigration Act 2009 represents the highest threshold for the applicant to reach, out of the multiple humanitarian appeal frameworks contained in the Immigration Act 1987. The cases have established that to meet the threshold, the applicant’s circumstances must be well outside the normal circumstances a person may expect to encounter when being forced to leave a country. For a more detailed examination of the s 207 humanitarian appeal framework, see *Immigration and Refugee Law*, above n 12, at 514.

⁹³ At 124.

The courts appear to be strictly upholding Parliament’s intent to exclude any requirement to give reasons, reinforcing that only a *Wednesbury* level of review is available for s 61 decisions.⁹⁴ Therefore, if an applicant is to succeed in judicially reviewing a s 61 decision, much like s 177, it would need to be a highly compelling reason.

The most recent Court of Appeal judgment on the reviewability of s 61 decisions is *Zhang v Associate Minister of Immigration*.⁹⁵ Mr Zhang had been unlawfully in New Zealand since 2001, when he was denied refugee status. In 2014, Mr Zhang applied to the Minister of Immigration for a visa under s 61. In his application, he noted that his wife and child are entitled to reside in New Zealand. The application was denied and the denial was upheld by the High Court on judicial review.⁹⁶ In reviewing the case, the Court of Appeal held that when an immigration officer is exercising “absolute discretion”, the Court is limited to reviewing whether or not, on the information available to the immigration officer, the decision was unreasonable in the *Wednesbury* sense.⁹⁷ The focus was on the wording of the provision and the express rejection of any requirement to give reasons.

The key arguments mounted by Mr Zhang were based on an Internal Administration Circular that requires immigration officers to “briefly record their reasons for decisions on the file” when considering s 61 requests.⁹⁸ It was contended that the failure to do this in Mr Zhang’s case amounted to an error of law. The Court disagreed, holding that a breach of the circular amounted to an administrative error, but in the context of “absolute discretion” the error was not material.⁹⁹ Such an error was not a breach of natural justice as “what constitutes natural justice depends upon context. The context here is an absolute discretion and a statutory right not to give reasons.”¹⁰⁰

Zhang also took the opportunity to narrow the finding in *Cao v Ministry of Business, Innovation and Employment*.¹⁰¹ In *Cao*, a judicial review case concerning a s 61 decision, the High Court allowed discovery of the Minister’s reasons for the decision. Fogarty J justified this on the

⁹⁴ *Zhang v The Associate Minister of Immigration* [2016] NZCA 361 at [14].

⁹⁵ [2016] NZCA 361.

⁹⁶ At [2].

⁹⁷ At [14].

⁹⁸ At [16].

⁹⁹ At [27].

¹⁰⁰ At [27] and [28].

¹⁰¹ *Cao*, above n 49.

basis that “there is a very real distinction between the ability of private individuals to require information on immigration files and the ability of the High Court, seized with an application for judicial review, to know what the reasons for the decision are.”¹⁰² The Court in *Zhang* disagreed. If a record of the reasons does exist, it will only be subject to discovery if the applicant can show that the decision is likely to be *Wednesbury* unreasonable.¹⁰³ Requiring anything more than this would “undermine the statutory scheme”.¹⁰⁴ This is consistent with the Court of Appeal’s decision in *Singh*, where cross examination of the immigration officer was refused on the basis that it would be contrary to the no reasons requirement in s 177.¹⁰⁵

However, the cases suggest there *may* be scope for the courts to allow judicial review of a s 61 decision if it is so obvious that relevant considerations have not been taken into account. This is most likely to be if the decision is clearly in breach of New Zealand’s international obligations, as courts are increasingly willing to utilise the presumption of consistency with international law.¹⁰⁶ Unlike s 177, there is no explicit requirement to consider international obligations in s 61. The High Court in *Feifei Ning v Minister of Immigration* considered whether, given this broad discretion, there was anything that limited the immigration officer’s power.¹⁰⁷ The Court, taking into account the purpose of the Act, the surrounding immigration policy and the explicit intention to limit the scope of judicial review through the use of “absolute discretion”, found that it would be difficult to read in any implied limitation on the discretion.¹⁰⁸ Further, the Court noted that the lack of reasons made it difficult to determine what considerations had been taken into account, but this alone could not sustain an argument that the decision had been made without proper consideration.¹⁰⁹ Such a finding would undermine the clear statutory policy. However, Thomas J hinted that there may be situations where an argument that relevant considerations had not been taken into account for a decision made with “absolute discretion” could be sustained:¹¹⁰

¹⁰² At [37].

¹⁰³ *Zhang*, above n 94, at [26].

¹⁰⁴ At [26].

¹⁰⁵ *Singh*, above n 60, at [62].

¹⁰⁶ Claudia Geiringer “International Law Through the Lens of Zaoui: Where is New Zealand at?” (2006) 17 PLR 300 at 320.

¹⁰⁷ *Feifei Ning*, above n 80. Note: *Feifei Ning* considered the use of “absolute discretion” in s 72, however the case discussed the reviewability of “absolute discretion” more generally. Therefore, the discussion in the case is still relevant to s 61.

¹⁰⁸ At [40].

¹⁰⁹ At [46].

¹¹⁰ At [46].

If there were no reasons, and the information provided as to what was before the decision maker showed there was no reference to, for example, international obligations, an inference that the decision was made without requisite consideration could be sustained.

However, in *Singh v Associate Minister of Immigration*, the High Court held that taking into account irrelevant considerations and failing to take into account relevant considerations are *not* instances of *Wednesbury* unreasonableness or reviewable errors in the context of s 61.¹¹¹ Both are High Court decisions and therefore it may be open for a future court to uphold a judicial review application if it were so obvious that considerations, such as New Zealand’s international obligations, had not been taken into account. While there is nothing in the provision itself requiring international obligations to be considered, the courts should ensure immigration officers are acting in accordance with New Zealand’s human rights obligations through the presumption of consistency.¹¹² Though the use and effect of the presumption would depend on the significance of the international obligations at issue in each case.¹¹³ While there still appears to be uncertainty as to the significance of international obligations in administrative decision making, the Supreme Court recently reaffirmed the importance of upholding international obligations in the immigration context.¹¹⁴ *Helu v Immigration and Protection Tribunal and Minister of Immigration* held that ensuring New Zealand is fulfilling its international obligations in respect of human rights is in the public interest.¹¹⁵ Considering the public interest factor is usually used to weigh in favour of deportation, for example, if the person is a danger to society, this decision is a positive indication that the courts are increasingly willing to ensure international obligations are being upheld in the immigration context.

¹¹¹ *Singh v Associate Minister of Immigration* [2016] NZHC 2888 [1 December 2016] at [25].

¹¹² The presumption of consistency is a rule of statutory construction that states, as far as the wording allows, a provision should be read in a way that is consistent with New Zealand’s international obligations. The other model that the courts may use to ensure international obligations are being taken into account in administrative decision making is the mandatory considerations model. However, it may be more difficult to apply the latter model in the context of a policy decision to confer “absolute discretion” onto the decision maker, as indicated by the High Court in *Singh*. For more detail on the presumption of consistency and the mandatory considerations models, see Claudia Geiringer “Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law” (2004) 21 NZULR 66.

¹¹³ “Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law”, at 106.

¹¹⁴ *Helu v Immigration and Protection Tribunal and Minister of Immigration* [2015] NZSC 28.

¹¹⁵ At [144].

This view is also supported by the Ombudsman¹¹⁶ and the New Zealand Law Society¹¹⁷ who have both commented to Immigration New Zealand that relevant international obligations must be taken into account in deportation decisions, even when not explicitly required by the legislation. Though, the use of “absolute discretion” cannot be ignored. It is likely that the relevant international obligations will have to be significant before the courts would intervene on that basis.¹¹⁸

Therefore, there is very limited scope for the courts to review any s 61 decision. The decision must meet the high *Wednesbury* unreasonableness threshold. Given the statutory wording, like s 177, it is difficult to see how any decision made under s 61 could ever be *Wednesbury* unreasonable. Though there may be scope for the courts to uphold judicial review if the decision is obviously contrary to New Zealand’s international obligations.

3 *Effectiveness as an accountability mechanism*

In substance, the use of “absolute discretion” significantly reduces the ability of the courts to review s 61 and s 177 decisions. While both ss 61 and 177 give the impression of being a positive exception to the deportation regime, directing the decision maker to take into account any relevant considerations and indicating these should or must include New Zealand’s international obligations, the lack of any ability to check what the decision maker has taken into account, or how, significantly undermines this. Without a requirement to provide reasons, the courts cannot confer any obligation on the Minister of Immigration or the immigration officer to explain and justify their conduct, nor is there any ability to question them. As a result, the courts provide little scope for passing judgment and there are unlikely to be consequences. This, together with the lack of any appeal rights to the Tribunal, means there is weak legal accountability for s 61 and s 177 decisions. Given the humanitarian concerns at the heart these decisions, the lack of legal accountability may be concerning.

The ability to judicially review administrative behaviour is often considered a fundamental component of an accountable government. However in recent times there has been a notable

¹¹⁶ 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) as cited in *Immigration and Refugee Law*, above n 12, at 129.

¹¹⁷ Letter of New Zealand Law Society to Chief Ombudsman on 14 March 2012 as cited in *Immigration and Refugee Law*, above n 12, at 128.

¹¹⁸ “Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law”, above n 106, at 78.

shift away from relying on the courts to check executive power.¹¹⁹ Other institutions and practices are increasingly recognised as providing effective external and internal controls on administrative decision making. These will be considered below.

C The Ombudsman

The Ombudsman was introduced as a means of reviewing administrative behaviour and process, alongside the more formal judicial review process or Parliament.¹²⁰ The institution stemmed from the realisation that for many individuals who were adversely or unfairly affected by the actions of the administrative state, there was no timely, affordable and effective redress.¹²¹ The following will examine how the Ombudsman functions as an accountability mechanism for s 61 and s 177 decisions.

The Ombudsman Act 1975 confers a mandate on the Office of the Ombudsman to investigate complaints about administrative action taken by Immigration New Zealand. The Ombudsman may consider the merits of Immigration New Zealand’s decision, not just the process undertaken.¹²² In the 2015/ 2016 year, 200 complaints were made to the Ombudsman regarding Immigration New Zealand,¹²³ showing the accessibility of the Ombudsman. However, it is slightly unclear what the Ombudsman may investigate in regards to immigration decisions. On the website for the Office of the Ombudsman, the immigration fact sheet explicitly states that the Ombudsman may not usually investigate deportation decisions, as such decisions have a right of appeal to the Tribunal, whether utilised or not.¹²⁴ This indicates that the Ombudsman may not receive complaints in regard to s 177 decisions, as these concern the same considerations that may be heard by the Tribunal, and s 177 is only available after the appeal rights have expired. However, the Operations Manual, a document created by Immigration New Zealand containing instructions for both applicants and Immigration New Zealand staff to follow when engaging in the Immigration process, explicitly recognises the right of the Ombudsman to investigate Immigration New Zealand or any officer, either in response to a complaint or on their own motion.¹²⁵ There does not appear to be any restrictions on the sorts

¹¹⁹ Sian Elias “The Unity of Public Law?” (Public Law Conference, Cambridge University, England, 13 September 2016) at 2.

¹²⁰ Anand Satyanand “The Office of Ombudsman in New Zealand” (1997) 6(3) *CanterLawRw* 470 at 471.

¹²¹ At 471.

¹²² Office of the Ombudsman “Immigration New Zealand (INZ)” www.ombudsman.parliament.nz.

¹²³ Peter Boshier *Annual Report 2015/2016* (Office of the Ombudsman, 2016) at 111.

¹²⁴ Office of the Ombudsman, above n 122.

¹²⁵ Immigration New Zealand *Operational Manual* (22 August 2016) at [A9.10].

of decisions the Ombudsman may investigate. Given the lack of evidence on the Ombudsman’s ability to review s 177, it may be that even if the Ombudsman is able to review such decisions, it does not occur in practice. On the assumption that the Ombudsman may not normally, or do not normally, investigate decisions made in relation to deportation, it may be concluded that the Ombudsman provides little accountability for s 177 decisions.¹²⁶

In contrast to the uncertainty surrounding s 177 decisions, it is well established that the Ombudsman may investigate complaints made about s 61 decisions.¹²⁷ In fact, s 61 has been the subject of much attention from the Ombudsman. A 2016 case note published in response to a complaint about a s 61 decision shows the role of the Ombudsman in promoting good governance and accountable decision making.¹²⁸ A s 61 application was denied and no reasons were recorded for the decision. A complaint was then made to the Ombudsman that the responsible immigration officers had failed to take into account the applicant’s circumstances and familial considerations when refusing the request.¹²⁹ The Chief Ombudsman began by noting that as no reasons had been recorded, it could not be determined whether or not all relevant considerations had been taken into account and consequently, whether the decision was reasonable.¹³⁰ The case note went on to address the decision making process more broadly, advising Immigration New Zealand that “good administrative practice requires that proper records of decision-making processes should be created and retained.”¹³¹ This is necessary for accountability and transparency.¹³² The record should at least be sufficient to enable external or internal review, it should indicate what information was relied upon, and what persuaded the decision maker to make the decision they did.¹³³ This was considered to be particularly important in the context of s 61 decisions, where the outcome may have a significant impact on the person.¹³⁴ Such advice would surely be applicable to s 177 decisions as well.

¹²⁶ At the time of writing, an Official Information Act request had been submitted to the Office of the Ombudsman regarding s 177 of the Immigration Act and whether the Ombudsman may review or investigate such decisions.

¹²⁷ Office of the Ombudsman, above n 122.

¹²⁸ Peter Boshier *Delegated Decision Makers – obligation to record reasons for decision* (Case Note 277752, February 2016).

¹²⁹ At 1.

¹³⁰ At 2.

¹³¹ At 2.

¹³² At 2.

¹³³ At 2.

¹³⁴ At 2.

Therefore, the Ombudsman still encouraged reasons to be kept for the purpose of review, even though a policy decision has been made not to require the decision maker to give reasons for a s 61 decision.¹³⁵ This indicates the importance of having reasons and creating a record of such reasons to ensure that the decision maker is accountable, and to safeguard the integrity of the immigration system.

This case note reiterates concerns that arose after an Internal Administration Circular (IAC 11/10) was published in 2011, providing guidance for the making of s 61 decisions.¹³⁶ IAC 11/10 stated that an immigration officer should *not* record any reasons for refusing to consider a s 61 request. The New Zealand Law Society wrote to the Office of the Ombudsman with their concerns about the circular, specifically, that IAC 11/10 failed to comply with good administrative practice and that it opened the door to arbitrary decision making.¹³⁷ The letter also expressed concern that the circular did not explicitly require any particular factors to be considered in making the decision, especially relevant international obligations. Upon investigation, the Ombudsman wrote to Immigration New Zealand suggesting changes to the IAC 11/10.¹³⁸ These changes, for the most part, were implemented a year later.¹³⁹ It is worth noting that the controversial IAC 11/10 also attracted much criticism from the media and the New Zealand Council for Civil Liberties.¹⁴⁰ No doubt this public outcry contributed to Immigration New Zealand amending the circular. Reasons must now be recorded, for the purpose of internal use, and the new circular lists relevant factors that should be considered by the s 61 decision maker.¹⁴¹ Though, the circular still fails to note that New Zealand’s international obligations represent mandatory considerations that must be taken into account in administrative decision making.¹⁴² It merely states that the decision maker *may* take them into account. Issues that that may arise as a result of this are likely mitigated by the close

¹³⁵ At 3.

¹³⁶ Workforce (Immigration New Zealand) *Internal Administration Circular (IAC) No: 11/10* (14 November 2011).

¹³⁷ Letter of New Zealand Law Society to Chief Ombudsman on 14 March 2012 as cited in *Immigration and Refugee Law*, above n 12, at 128.

¹³⁸ At 128.

¹³⁹ Marion Sanson “Recording reasons for decisions” (28 February 2014) New Zealand Law Society www.lawsociety.org.nz.

¹⁴⁰ Danya Levy “Reasons for visa denials to be kept secret” *Stuff* (online ed, New Zealand, 12 February 2012); “Editorial: Immigration’s self-serving edict must go” *The New Zealand Herald* (online ed, Auckland, 3 March 2012); Thomas Beagle “Complaint made re Immigration NZ’s flouting of the Public Records Act” (4 April 2012) NZ Council for Civil Liberties <nzcccl.org.nz>; and Marion Sanson “Record-keeping and human Rights – an on-going saga” (15 April 2013) NZ Council for Civil Liberties <nzcccl.org.nz>.

¹⁴¹ *Internal Administration Circular No: 13/08*, above n 40, at [29] and [34].

¹⁴² *Immigration and Refugee Law*, above n 12, at 131.

attention the Ombudsman and other groups such as the Law Society pay to s 61 decision making and their insistence that international obligations must be taken into account.¹⁴³ Therefore, the Ombudsman appears to operate as a robust accountability mechanism for s 61 decisions.

3 *Effectiveness as an accountability mechanism*

The Ombudsman can be considered an effective accountability mechanism as it protects against the abuse of the immigration officer’s broad powers by publically disapproving of the decision or process and recommending redress.¹⁴⁴ If a s 61 request has been declined, the requestor may complain to the Ombudsman, who will investigate the complaint if necessary. The Ombudsman can also be seen as effective as it forces Immigration New Zealand to reflect on their practices for making s 61 decisions and develop them in a way that will produce better, more robust outcomes.¹⁴⁵ Often, the Ombudsman will recommend a systemic change in the Department to prevent maladministration occurring in the future.¹⁴⁶ While the Ombudsman has no ability to make binding recommendations or formally sanction the decision maker, the threat of investigation and public disapproval often acts as an informal consequence and recommendations are usually complied with.¹⁴⁷ Government departments and their responsible ministers do not want to be seen by the public and the rest of government as being poorly run and dismissive of external review as this may lead to political and professional consequences for those involved. Therefore, the possibility of an Ombudsman investigation is also likely to incentivise good decision making in the first place. Overall, the Ombudsman as an accountability mechanism for s 61 decisions can be considered adequate. However, the Ombudsman does not appear to provide any accountability for s 177 decisions.

D The Media and Question Time

The media and question time also provide accountability for administrative decision making, though they represent less direct accountability mechanisms for ss 61 and 177. They work to

¹⁴³ At 611.

¹⁴⁴ In other words, it is an effective accountability mechanism from the constitutional perspective. See Bovens, above n 28, at 463.

¹⁴⁵ This shows the Ombudsman is effective as an accountability mechanism from the learning perspective. See Bovens, above n 28, at 463.

¹⁴⁶ Office of the Ombudsman “FAQs” <http://www.ombudsman.parliament.nz>.

¹⁴⁷ Beverley Waken, Acting Chief Ombudsman, New Zealand “Achieving Administrative Justice and Procedural Fairness in Ombudsman Investigations” (Australian and New Zealand Ombudsman Association, Melbourne, 22 – 23 April 2008) at 4.

promote fairness and good decision making in the deportation context. The strength of the media in encouraging good decision making can be seen in the Ram’s case. In September 2010, Usha Rani Ram and Sital Ram Mall were served with deportation orders after being unlawfully in New Zealand for eight years.¹⁴⁸ Their three New Zealand born children are citizen’s and could validly stay in New Zealand. Usha and Sital were faced with taking their children with them back to India where, as part of the scheduled caste, they would live in a slum, or leaving them parentless in New Zealand. As New Zealand citizens, the children are ineligible for Indian citizenship and would have had no access to healthcare or education in India. After the parent’s plea to the Associate Immigration Minister was declined (in effect a s 177 application) they went to the media. The community rallied around the couple and made submissions to the Associate Minister, requesting her to review the case. Their fight was followed closely by the media. In December, the Associate Minister overturned the removal order, stating that while she did not condone the couple’s disregard for New Zealand’s immigration laws, she had considered the submissions and would grant both parents a 12 month open work visa.¹⁴⁹ When this expired, the couple were able to apply to the Tribunal within the 42 day time period for humanitarian appeals. The Tribunal found that the humanitarian considerations outweighed the fact that the parents had been unlawfully in New Zealand for eight years and granted them residence visas.¹⁵⁰

This shows both the influence of the media and the consequences of the double standard that has effectively been created by the rejection of any requirement to apply the humanitarian test when considering a s 177 decision, as discussed above.¹⁵¹ In 2010, when the couple were served with deportation orders, the only avenue they had to challenge the orders was through appealing to an immigration officer and hoping they would exercise their discretion. The formal appeal rights had expired by that point. On the Associate Minister’s initial review of the case, she did not consider the Ram’s circumstances outweighed the interest in maintaining their deportation orders.¹⁵² Yet the Tribunal, applying the humanitarian test, found that those same circumstances did justify the Ram’s being able to remain in New Zealand.¹⁵³

¹⁴⁸ Charles Anderson “Overstayers fear for their Kiwi kids” *Sunday Star Times* (online ed, New Zealand, 4 February 2012).

¹⁴⁹ “Hastings Indian family gets deportation reprieve” *Hawke’s Bay Today* (online ed, Hawke’s Bay, 2 December 2010).

¹⁵⁰ “Tribunal clears parents’ visa application” *Indian Newslink* (online ed, New Zealand, 8 September 2013).

¹⁵¹ Charlotte Kempthorne, above n 90, at 41.

¹⁵² Diane Joyce “Family faces split after order to deport parents to India” *The Southland Times* (online ed, Invercargill, 4 October 2010).

¹⁵³ “Tribunal clears parents’ visa application”, above n 149.

While the media may play an important role in ensuring accountability of executive action, its strength in the deportation context seems less secure, at least for individual decisions. To be effective, it requires a story that will grab the attention of the public, such as the above. This is likely to be influenced by what else is in the news cycle at the time. This means the media may be difficult to trigger as an accountability mechanism. Further, given its informal nature, there is no guaranteed response or consequences. The decision maker may change their mind, but there is nothing obliging them to do so. However, the threat of media coverage and public outcry may incentivise good decision making in the first place. Immigration New Zealand does not want to be seen by the public as abusing their power or failing to use their power in circumstances that deserve it. Therefore, while the media may be difficult to trigger as an accountability mechanism and have uncertain impact, it still provides some level of accountability for s 61 and s 177 decisions.

Question time may also promote good administrative decision making by Immigration New Zealand through the questioning of decisions that do not appear to have followed good process. Question time provides a means for elected representatives to scrutinise the behaviour and actions of government.¹⁵⁴ This may include any immigration decision that is made. There are a few examples of questions being put to the Minister of Immigration regarding decisions made by Immigration New Zealand. Recently, Peter Theil’s dubious citizenship has been questioned, as has the deportation of a number of Indian students who were the victims of fraudulent visa agents in India.¹⁵⁵ Both these examples show how question time may be used to interrogate and pass judgment on the conduct of Immigration New Zealand, through the Minister of Immigration. However, in both cases, there appears to be little in the way of consequences as a result of the questioning. Further, it seems less clear whether an individual s 61 or s 177 decision would ever attract enough attention to subject the Minister to questions. This reduces its strength as an accountability mechanism for ss 61 and 177 decisions. However, the presence of question time may still provide an incentive for the Minister of Immigration to ensure there are good decision making processes in place and that decision makers are acting in accordance with administrative law and values.

¹⁵⁴ Andrew McGowan “Accountability or Inability: To What Extent does House of Representatives Question Time Deliver Executive Accountability Comparative to other Parliamentary Chambers? Is there Need for Reform? (2008) 23(2) APR 66 at 67.

¹⁵⁵ (7 February 2017) 720 NZPD 15887 and (16 February 2017) 720 NZPD 16290.

Overall, while the watchful eye of the media and question time surely encourage good administrative decision making, they do not provide strong consequences for the decision maker and triggering them may be difficult. Given that s 61 and s 177 decisions often have humanitarian concerns at stake, and in the case of s 177 decisions, they are the last step before a deportation order is executed, they cannot be considered sufficient accountability mechanisms alone to protect against arbitrary decisions being made. At the very least, they require the public or other members of Parliament to be informed and care. Given the different factors that affect this, both the media and question time represent weak accountability mechanisms.

E The Auditor General

The Auditor General may also act as a forum by which Immigration New Zealand decision makers may be held to account. The Auditor General is an independent body that may audit or inquire into public entities to ensure they are operating, and accountable for their operations, in accordance with Parliament’s intent.¹⁵⁶ Often the quality and legitimacy of decision making comes down to the culture of the department in which the decisions are being made. In 2009, just prior to the introduction of the Immigration Act 2009, the Auditor General conducted an inquiry into immigration matters.¹⁵⁷ The inquiry requested by the Prime Minister and Minister of Immigration, in response to public concerns and allegations regarding the integrity of Immigration New Zealand’s operations.¹⁵⁸ The investigation found that while most Immigration New Zealand staff were conscientious and acting in good faith, better guidance, processes and compliance monitoring needed to be put in place to support staff.¹⁵⁹ Given the discretion that Immigration New Zealand officers are afforded and importance of the decisions they are making, the Auditor General concluded that Immigration New Zealand needed to ensure they were providing an environment where staff felt safe to ask for help and raise concerns.¹⁶⁰ While these recommendations were not binding, Immigration New Zealand took immediate action to begin rectifying them.¹⁶¹

¹⁵⁶ Controller and Auditor General “Our Work” www.oag.govt.nz.

¹⁵⁷ *Inquiry into Immigration Matter*, above n 45.

¹⁵⁸ At 5.

¹⁵⁹ At 8.

¹⁶⁰ At 8.

¹⁶¹ At 8.

As part of the inquiry, specific attention was paid to s 35A decisions (now s 61). The Auditor General noted the need for good processes to be put in place to regularly monitor compliance with procedures for s 35A decisions, given the broad discretion.¹⁶² At the time of investigation, the only way to ensure the procedural requirements for s 35A decisions were being met was by voluntary internal audit. A voluntary audit was considered to be an inadequate check on decision making in this context.¹⁶³ Since this report, the Ombudsman has been actively monitoring s 61 decision making.

Therefore, the Auditor General may hold Immigration New Zealand to account through investigating their processes, asking questions and making recommendations. Though, an Auditor General investigation is likely to be in response to widespread systemic issues, not individual complaints. While this surely encourages good individual decision making, and in the case of s 61, is another reminder to Immigration New Zealand that such decisions are being closely watched, the lack of direct accountability it provides for individual decisions means it cannot be considered a sufficient accountability mechanism alone for decisions made under “absolute discretion”.

F Soft Law

There are limits of using a narrow definition to assess the accountability of decisions made under “absolute discretion”. The narrow definition risks overlooking other factors that ensure that administrative officials are making good administrative decisions but do not meet the narrow definition of accountability. For example, the use of soft law.

The term “soft law” is used to encapsulate administrative processes and guidelines for decision making, such as internal circulars and policy notes.¹⁶⁴ Soft law helps to increase transparency and integrity in decision making. As mentioned above, Immigration New Zealand publish Internal Administration Circulars to guide staff decision making in particular contexts. The current circular for s 61 requires decision makers to record their reasons for any decision and provides guidance as to various factors that should be taken into account. As this circular is publically available, it allows the subject of the decision to gain an insight as to what sort of

¹⁶² At [5.110].

¹⁶³ At [5.110].

¹⁶⁴ Richard Rawlings “Soft Law Never Dies” in Mark Elliot and David Feldman (eds) *The Cambridge Companion to Public Law* (Cambridge University Press, Cambridge, 2015) at 218.

information they should be providing to the decision maker for the best chances of a favourable decision. Requiring reasons to be recorded, providing guidance as to relevant considerations, and the knowledge that the Ombudsman may review any decision or the decision making process more generally, undoubtedly promotes good administrative decision making. Immigration New Zealand also provides an Operations Manual to its staff. Included in this manual is guidance on how immigration officers should be approaching decision making, namely acting on the principles of fairness and natural justice.¹⁶⁵ Though, this must be subject to the use of “absolute discretion” in ss 61 and 177.

Therefore, soft law has been developed for s 61 and appears to be constantly evolving on the advice of the Ombudsman and groups such as the Law Society to ensure it promotes good administrative decision making. Section 177 decisions are also guided by principles of fairness and natural justice, as laid out in the Operations Manual. However, in comparison to s 61, there are no internal instructions in place to guide s 177 decisions.

The final part of this paper will conclude that while there appear to be sufficient safeguards in place to protect against the making of arbitrary decisions under s 61, the same does not appear to be true for s 177. Given the lack of current accountability mechanisms that exist for s 177 decisions, options for improving and protecting against arbitrary decision making in s 177 decisions will be considered. These are a higher intensity of judicial review and a requirement for immigration officers to record reasons when making a s 177 decision.

IV Safeguarding Against Arbitrary Decisions

Section 61 decisions appear to be sufficiently accountable and the section is unlikely to result in the making of arbitrary decisions. The Minister of Immigration (or their delegate) may have “absolute discretion” when making a s 61 decision, but that discretion is subject to adequate accountability mechanisms. While there is no right to appeal a s 61 decision to the Tribunal, and the ability of the courts to review the decision is limited, a s 61 decision is guided by internal instructions, and complaints may be made to the Ombudsman. The internal instructions require reasons to be recorded and provides a list of considerations that the decision maker should take into account when making the decision. This gives the applicant some idea of how

¹⁶⁵ *Operational Manual*, above n 125, at [A1.1].

the decision will be made and it encourages good, reasoned decision making on the decision makers part. The potential for the Ombudsman to investigate is likely to encourage decision makers to make good decisions as well. The Ombudsman may also respond to individual complaints about s 61 decisions, meaning they also represent a potential ex post facto control on such decisions. This arguably justifies the limited ability of the courts to review s 61 decisions.

Given these safeguards, it can be concluded that the use of “absolute discretion” in s 61 does not amount to an invitation to make arbitrary decisions. Some may argue that the limited ability of the courts to review nevertheless erodes the legitimacy of the decisions due the common perception of the courts as the primary protector against executive abuses of power, but these days recourse to the courts is often not a person’s primary means of challenging administrative decisions.¹⁶⁶ The close attention being paid to s 61 decisions by the Ombudsman, the Auditor General, the media and groups such as the New Zealand Law Society and the New Zealand Council for Civil Liberties provides a good incentive for Immigration New Zealand to act in accordance with administrative law values.

However, it seems the use of “absolute discretion” in s 177 is subject to less accountability mechanisms. The provision as it stands may promote quick, haphazard decision making in cases where the decision could have a significant impact on the person’s, and their family’s, future. As established, s 177 allows an immigration officer to cancel a deportation order in force against a person unlawfully in New Zealand. There is no right to appeal this decision to the Tribunal and the courts have been overwhelmingly reluctant to undertake anything more than a *Wednesbury* standard of review. Further, there appears to be no right to complain to the Ombudsman, no internal instructions guiding immigration officers as to what considerations may be relevant nor any requirement that reasons be recorded. The media and question time may provide some incentive to act in accordance with good administrative practice, though given the humanitarian considerations at stake, this cannot be considered a sufficient safeguard against arbitrary decision making.

Therefore, it appears s 177 suffers from accountability deficits. Without any reasons nor any way of knowing how the immigration officer considered the relevant international obligations,

¹⁶⁶ “Unity of Public Law?”, above n 119, at 5.

there exists a risk that this provision may be used to scape goat New Zealand’s international obligations and to enforce deportation orders against people, and consequently their families, when humanitarian reasons exist for allowing them to stay. The existence of a formal appeal system and the difficulty for immigration officers to undertake a complex analysis at the last stage before deportation is often cited as the justification for restricting claimant’s rights in regard to s 177 decisions.¹⁶⁷ But if the decision has already been subject to a humanitarian appeal before the Tribunal, then it should be easy for the immigration officer to show why the s 177 application has been denied, drawing on the findings of the Tribunal. If the decision has not been subject to an appeal before the Tribunal, then surely natural justice and good administrative practice require more than just a list of the international obligations that have been considered and no real ability to have the decision reviewed.

Some academics have suggested a higher intensity of review is possible and desirable for s 177 decisions. These arguments will be considered and supported below. Following the consideration of how judicial review may and should be used as a safeguard against arbitrary decision making, the use of soft law and a requirement to record reasons will be considered.

A A Higher Intensity of Judicial Review

As mentioned above, *Singh* is the most recent Court of Appeal judgment to consider the intensity of review available for s 177 decisions.¹⁶⁸ It affirmed that while officers are obliged to consider relevant international obligations, they are not obliged to give effect to them in any particular way, or even at all.¹⁶⁹ As a result, unless the officer has failed to comply with the mandatory recording obligation in s 177(5), it is difficult to see how decision could ever be successfully reviewed.

It has been suggested that given *Singh* did not consider whether a more intensive level of review was appropriate in such cases (it only rejected proportionality review) and made no mention of the decision in *Wolf*,¹⁷⁰ it may be considered weak authority for rejecting more intensive review of s 177 decisions.¹⁷¹ Therefore, it is arguably open for an appellate court to reject the approach *Babulal* took in distinguishing *Wolf* to establish a *Wednesbury* level of unreasonableness, and

¹⁶⁷ NZPD, above n 86.

¹⁶⁸ *Singh*, above n 60.

¹⁶⁹ At [45] – [46] citing *Nair*, above n 46, at [31].

¹⁷⁰ *Wolf*, above n 76.

¹⁷¹ *Wilburg*, above n 6, at 597.

apply a higher standard of review. As discussed earlier, *Wolf* applied the “anxious scrutiny” standard of review in a case concerning deportation.¹⁷² “Anxious scrutiny” is also the standard that Glazebrook J thought appropriate in *Ye*.¹⁷³ “Anxious scrutiny” applies a greater intensity of review and is mostly used where fundamental rights are at stake.¹⁷⁴ Glazebrook J suggests that the standard “dovetails with the governing presumption under the principle of legality that Parliament does not intend to legislate inconsistently with human rights.”¹⁷⁵ However, when *Ye* came before the Supreme Court, intensity of review was not considered.¹⁷⁶ It is worth noting that the Supreme Court has recently applied *Wolf* in *Quake Outcasts v The Minister of Canterbury Earthquake Recovery*.¹⁷⁷ While *Quake Outcasts* was not concerned with immigration, the Supreme Court’s approach may show an increased willingness to undertake more intensive review, though this will of course depend on the context.

Academics Doug Tennent and Jessica Birdsall-Day also support a higher intensity of review in cases where fundamental rights are at stake. Tennent suggests that a “failure to give international humanitarian obligations not only consideration but appropriate weighting amounts to an error of law.”¹⁷⁸ For a reviewing court to be able to determine this, in light of the facts of the particular case, a standard of review higher than *Wednesbury* is required.¹⁷⁹ In a similar vein, Birdsall-Day considers there is scope “for the judiciary to manoeuvre the limits Parliament has placed on it” to ensure New Zealand is not breaching its international obligations,¹⁸⁰ specifically in situations where the person unlawfully in New Zealand has citizen children.¹⁸¹

Therefore, it seems arguable that if an immigration officer has had regard to relevant international obligations and has chosen not to cancel the deportation order, yet it is clear that the decision breaches New Zealand’s international obligations, there may be scope for a court to determine the decision was unreasonable, or perhaps constituted an error of law. Upholding international law and ensuring New Zealand is complying with its obligations is within the

¹⁷² *Wolf*, above n 76.

¹⁷³ Though the rest of the bench did not join her. *Ye v Minister of Immigration* [2008] NZCA 29 at [303].

¹⁷⁴ Glazebrook, above n 89, at 38.

¹⁷⁵ At 39.

¹⁷⁶ Wilburg, above n 6, at 595.

¹⁷⁷ *Quake Outcasts v The Minister of Canterbury Earthquake Recovery* [2017] NZCA 332 at [73].

¹⁷⁸ “Absolute Discretion in Immigration”, above n 6, at 149.

¹⁷⁹ At 149.

¹⁸⁰ Birdsall-Day, above n 6, at 233.

¹⁸¹ At 230.

purview of the courts. The seminal case is *Tavita v Minister of Immigration*, in which the Court of Appeal held that New Zealand’s international human rights obligations must be upheld.¹⁸² Since *Tavita*, the Immigration Act has been amended to explicitly require New Zealand’s international obligations be considered in decision making. However, arguably the use of “absolute discretion” undermines this. The case law shows that while s 177 explicitly requires international obligations to be considered, there is no way of ensuring relevant international obligations were given appropriate weight; the officer may give no effect to them at all with no consequence. Therefore, perhaps a higher intensity of judicial review is necessary and an appropriate way to ensure New Zealand is upholding its international obligations. Surely even the broad legislative provision of “absolute discretion” may be subject to the presumption of consistency with international law. There has been increasing acceptance that wide discretionary powers are still able to be read consistently with international obligations.¹⁸³ Hanna Wilburg appears to agree with such a conception of the status of international obligations in the context of s 177. After examining *Singh*, she considered that if this case is representative of the level to which the courts are willing to review s 177, it “arguably represents a failure to read legislation as consistently as possible with... international law.”¹⁸⁴ Though, the application and effect of the presumption of consistency will depend on the facts of each case and the strength of the relevant international obligations.¹⁸⁵

It should be mentioned that in refusing leave to appeal in *Singh*, the Supreme Court noted that in a case with appropriate facts, there may be issues about the interpretation of s 177 that would meet the general or public importance threshold.¹⁸⁶ Therefore, while the weight of case law appears to favour *Wednesbury* unreasonableness, there is still scope and support for a Supreme Court decision to apply a higher intensity of review. This would ensure that in situations where the appeal rights are not used, the claimant has a means of ensuring that proper considerations are taken into account. Given the lack of other effective accountability mechanisms for s 177 decisions, and the humanitarian considerations at stake, stronger legal accountability is desirable.

¹⁸² Philip A Joseph, above n 50, at 924.

¹⁸³ *Ye v Minister of Immigration* [2009] NZSC 76 and *Zaoui v Attorney- General (Vo 2)* [2005] NZSC 38 as discussed in Dan Meagher “The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)” [2012] NZ L Rev 465 at 469.

¹⁸⁴ Wilburg, above n 6, at 597.

¹⁸⁵ “Tavita and All That”, above n 106, at 78.

¹⁸⁶ *Singh*, above n 60, at [4].

B The Use of Soft Law

The use of soft law may be another means of safeguarding against arbitrary s 177 decisions. Producing an Internal Administration Circular to guide the decision making process for s 177 would increase transparency and promote consistent decision making. Internal instructions are flexible and easily changed, and as has been seen in the context of s 61, they do not undermine “absolute discretion”. A failure on the decision maker’s behalf to follow internal instructions is not legally enforceable by the applicant.¹⁸⁷ While claimants would still have no right to reasons, requiring the immigration officer to record their reasons for any s 177 decision they make, whether positive or negative, is recommended. Reasons are a fundamental aspect of an accountable decision. Without a written record, there is no means of assessing whether a decision is fair and reasonable.¹⁸⁸ “Absolute discretion” can not mean that the immigration officer does not need to have reasons. That would be the very definition of an arbitrary power.¹⁸⁹ Therefore merely requiring them to record those reasons should not be onerous. A record of reasons would also provide a basis upon which an internal review may occur. Knowing that s 177 decisions may be subject to internal review is likely to increase public confidence in Immigration New Zealand’s decision making process.

Though, it may be recalled that Parliament’s explicit intention when creating s 177 was to remove any requirement to apply any test, of any sort.¹⁹⁰ The danger with providing internal instructions that indicate relevant considerations that may or should be taken into account is that they may end up being strictly applied or creating tunnel vision. It may create a tick box type mentality and the decision maker may be less likely to adapt to the particular circumstances and ensure fair outcomes are reached in every situation. Given this, Immigration New Zealand would have to be cautious in developing guidance to ensure it is not prescriptive. At the very least, a requirement to record reasons for s 177 would be a step in the right direction for ensuring an accountable Immigration New Zealand.

V Conclusion

The provision of “absolute discretion” to the Minister of Immigration and immigration officers throughout the Act is not necessarily the antithesis of an accountable government. Like any use

¹⁸⁷ *Zhang*, above n 93, at [27] and [28].

¹⁸⁸ *Immigration and Refugee Law*, above n 12, at 128.

¹⁸⁹ *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 at [43].

¹⁹⁰ NZPD, above n 86.

of discretion within administrative decision making, it must be exercised within the constraints of public law values and any guidance provided. While the explicit rejection of any requirement to provide reasons for decisions may invite fear of arbitrary decision making, sufficient guidance and accountability mechanisms can ensure “absolute discretion” is used as intended. That is, to achieve fairness in situations where the deportation framework in the Act would otherwise create injustice and impinge on people’s human rights. The existence of the Ombudsman, the media, question time, the Auditor General, the Law Society and to a limited extent, the courts, watching over decision makers and actively promoting good administrative decision making appears to protect against this. At least for s 61 that is.

The lack of guidance provided for s 177 decisions and the lack of any formal accountability mechanisms for these decisions is problematic. While immigration law is a direct product of the State’s sovereign right to control its borders, this surely cannot justify the use of “absolute discretion” in a manner that allows immigration officers to act in breach of New Zealand’s international obligations. If New Zealand is to continue to hold itself out as a crusader for human rights, an exemplar of modern democracy and a good international citizen, increased accountability for s 177 decisions is necessary.

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The text of this paper (excluding title page, table of contents, footnotes, bibliography and appendix) comprises approximately 12,852 words.

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VII *Appendix*

177 Deportation order may be cancelled

- (1) An immigration officer may, in his or her absolute discretion, cancel a deportation order served on a person to whom section 154 applies.
- (2) Nothing in subsection (1) gives a person a right to apply for the cancellation of a deportation order. However, an immigration officer must consider cancelling the deportation order of a person who is in New Zealand if the person provides information to the officer concerning his or her personal circumstances, and the information is relevant to New Zealand’s international obligations.
- (3) If an immigration officer does consider cancelling a deportation order, whether by way of a purported application or his or her own motion, the officer must have regard to any relevant international obligations, but otherwise—
 - (a) may make a decision as he or she thinks fit; and
 - (b) in doing so, is not under any obligation, whether by implication or otherwise,—
 - (i) to apply any test or any particular test and, in particular, the officer is not obliged to apply the test set out in [section 207](#); or
 - (ii) to inquire into the circumstances of, or to make any further inquiry in respect of the information provided by or in respect of, the person who is the subject of the deportation order or any other person.
- (4) Whether or not an immigration officer considers cancelling a deportation order,—
 - (a) he or she is not obliged to give reasons for any decision, other than the reason that this subsection applies; and
 - (ab) privacy principle 6 (which relates to access to personal information and is set out in [section 6](#) of the Privacy Act 1993) does not apply to any reasons for any decision relating to the purported application; and
 - (b) [section 23](#) of the Official Information Act 1982 does not apply in respect of the decision.
- (5) However, to the extent that an immigration officer does have regard to any international obligations, the officer is obliged to record—
 - (a) a description of the international obligations; and
 - (b) the facts about the person’s personal circumstances.