IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2018-485-408
[2018] NZHC 2455

UNDER THE	Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules
AND	section 61 of the Immigration Act 2009
IN THE MATTER OF	an application for judicial review under Part 1 of the Judicial Review Procedure Act 2016
BETWEEN	FARISHA FARINA DEAN Applicant
AND	ASSOCIATE MINISTER OF IMMIGRATION Respondent

Hearing: 18 September 2018

Counsel: M L Clark for Applicant
N T Butler and E F Tait for Respondent

Judgment: 18 September 2018

JUDGMENT OF CHURCHMAN J

Introduction

[1] The applicant, Ms Dean, is a Fijian national. She arrived in New Zealand in 2009 and was granted a visitor visa. She was later declined a work permit and her presence in New Zealand became unlawful on 7 April 2010. In June 2011, she was served with a deportation liability notice and deportation order.

[2] On 2 November 2017, Ms Dean sought the assistance of the Member of Parliament for Mangere, the Hon Aupito William Sio, for the Associate Minister of Immigration to cancel her deportation order and issue her with a 12-month work visa.

[3] The Associate Minister declined to intervene in Ms Dean's case (the decision), sending a letter to Mr Sio on 19 April 2018 advising him of the decision.

[4] Ms Dean seeks judicial review of the decision on the grounds that:

(a) the case note prepared for the Associate Minister by Immigration New Zealand (INZ) was deficient, imbalanced and contained errors leading to an irrational decision; and

(b) the decision was unreasonable, including on the basis that the decision is inconsistent with New Zealand's international obligations.

[5] The Associate Minister opposes the application.

Background

[6] In April 2009, Ms Dean met Mr Hussein, a New Zealand permanent resident visa holder. They began living together in a de facto relationship in July 2009.

[7] In October 2009, Ms Dean applied for a partnership based work permit, which was declined on 5 March 2010 because there was no documentation provided to show that Mr Hussein had legally separated or divorced from his wife. INZ reached the conclusion that there was no exclusive relationship between Ms Dean and Mr Hussein. Ms Dean was granted a short-term visitor's visa to allow her to leave New Zealand lawfully which expired on 5 April 2010. She did not leave New Zealand then and has remained here unlawfully hereafter.

[8] In the years that followed, Ms Dean lodged a number of requests for a special direction under s 15 of the Immigration Act 2009 (the Act) and the cancellation of her deportation order and/or a visa under s 61 of the Act.[1]

[9] In relation to her request of 11 August 2015, the Associate Minister declined to intervene by letter dated 18 August 2015. In September 2015, Ms Dean applied for judicial review of that decision. On 15 February 2016, a settlement agreement was reached, following which an INZ immigration officer undertook an assessment under s 177 of the Act on whether or not to cancel Ms Dean's deportation order, refusing to cancel the order on 12 August 2016.

[10] In September 2016, Ms Dean sought judicial review of that decision and was granted interim relief so that she would not be deported until the Court could hear and determine that application. A settlement agreement was again reached on 17 July 2017, the judicial review proceedings were discontinued, and a different INZ immigration officer undertook a fresh assessment under s 177, deciding not to cancel the deportation order on 11 October 2017.

[11] Ms Dean sought judicial review of that decision on 6 November 2017, only to withdraw that application on 24 January 2018. The current proceedings were filed on 30 May 2018.

The request for intervention from the Associate Minister

[12] On 2 November 2017, Ms Dean sought assistance from Mr Sio. Her request included a letter providing background information and attaching:

(a) a letter from INZ to Ms Dean declining her work visa, dated 5 March 2010;

(b) the deportation liability notice under s 154 and deportation order under s 175;

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[1] On 6 August 2012, 3 January 2013, 27 March 2014, 7 April 2014, 24 September 2014 and 11 August 2015.

(c) correspondence regarding Mr Hussein's criminal history, dated 11 August 2016;

(d) a High Court decision providing interim relief dated 29 March 2017;

(e) the INZ record of Personal Circumstances dated 17 August 2017;

(f) the partnership interview transcript dated 28 September 2017;

(g) the INZ decision not to cancel the deportation order dated 11 October 2017;

(h) various evidence provided by Ms Dean in support of her relationship; and

(i) a Separation, Maintenance and Property Agreement (together, the request).

[13] On 13 February 2018, Mr Sio wrote to the Associate Minister on behalf of Ms Dean requesting the Associate Minister's intervention and attaching the request.

[14] The request was forwarded onto the Immigrations Resolutions Team which reviewed the request and prepared a case note dated 13 April 2018 (the case note). The case note described, among other matters:

(a) the request in summary form (the request was also attached to the case note);

(b) the representation made by Ms Dean through Mr Sio;

(c) Ms Dean's immigration history;

(d) the relevant immigration instructions and legislation;

(e) relevant issues; and

(f) international obligations, with reference to the Minister's earlier briefing (on 1 November 2017) on the role of international obligations in decision-making on immigration related cases.

[15] The case note set out possible options for the Minister including:

(a) cancelling Ms Dean's deportation liability and granting a 12-month open work visa under s 61 of the Act, subject to the requirements of instructions WF2, including health and character for temporary entry;

(b) cancelling Ms Dean's deportation liability and granting a 12-month open work visa under s 61 of the Act, subject to her meeting health and character requirements for temporary entry and providing evidence that Mr Hussein supports the request;

(c) declining to intervene, but cancelling the period of prohibition under s 182 of the Act; or

(d) declining to intervene.

[16] The case note recorded that if the Minister chose an option that granted a visa subject to certain requirements, and the processing branch determined that the requirements were not met, the case could be referred back to the Minister for directions.

[17] On 19 April 2018, the Associate Minister sent a signed letter to Mr Sio, advising that he was not prepared to intervene. It is this decision that is the subject of this proceeding.

Relevant legislative provisions of the Immigration Act 2009

[18] The Act provides that a person who is not a New Zealand citizen may only be in New Zealand if he or she holds a visa granted under the Act.[2] Any person who is

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2 Immigration Act 2009, s 14(1)(b).

unlawfully in New Zealand has an obligation to leave.[3] Unlike someone who is lawfully in New Zealand, such a person has no right to apply for a visa and, if he or she purports to apply for a visa, it is a matter for the absolute discretion of the Minister.[4]

[19] While an individual can challenge or appeal an adverse visa decision,[5] once unlawfully in New Zealand, if the person has either not exercised a right of appeal or the appeal has been unsuccessful, deportation can proceed.[6]

[20] Section 61 confers on the Associate Minister (or his or her delegate) a discretion to grant a visa of any type to a person unlawfully present in New Zealand who is not subject to a deportation order:

> **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.

[21] As a person for whom a deportation order is in force would be ineligible for consideration for grant of a visa by virtue of s 61(1)(b), such a person would therefore need to apply to have their liability for deportation cancelled or suspended under s 172. The relevant parts of s 172 provide as follows:

> **172 Minister may cancel or suspend liability for deportation**
>
> (1) The Minister may at any time, by written notice, cancel a person's liability for deportation.
>
> …

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3 Section 18.
4 Section 20.
5 Part 7 of the Act sets out the provisions relating to appeals, reviews and other proceedings.
6 Section 154.

(2A) The Minister may exercise his or her powers under this section whether or not the person who is liable for deportation—

(a) has given good reason under section 155(2), 156(2)(b), or 157(2) why the person should not be deported; or

(b) has purported to apply to the Minister for any other reason.

…

(5) The decision to cancel or suspend a person's liability for deportation is in the absolute discretion of the Minister.

…

(7) The cancellation or suspension of a person's liability for deportation does not prevent the person from becoming liable for deportation on other grounds.

[22] The breadth of the Associate Minister's discretion under ss 61 and 172 is set out under s 11, which defines "absolute discretion" as follows:

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.

(2) Subsection (1)(c)(ia) applies to any decision made in relation to a purported application, whether the decision was made before or after the commencement of that subsection.

[23] The language of ss 11, 61 and 172 signals a clear intention that the scope for judicial review of decisions made under ss 61 and 172 is extremely limited. It is important to remember that judicial review does not involve an assessment of the merits of the case. The Court's focus is on the lawfulness of the decision-making process.

Relevant case law

[24] Although a decision in the exercise of an absolute discretion is reviewable, the Court of Appeal in the case of *Zhang v Associate Minister of Immigration* recently confirmed that, effectively, the only ground of review that is permitted is unreasonableness in a Wednesbury sense: "This definition of absolute discretion gives bleak prospects for judicial review unless *Wednesbury* unreasonableness can be identified."[7]

[25] The Court stated:

> [23] Mr Burrows, pursuant to s 61 of the Act, was exercising an absolute discretion. Pursuant to s 11 of the Act, he was not obliged to give reasons for his decision. His only obligation when giving his decision was to note that s 11 applied. Therefore, the availability of judicial review as a remedy is very limited. Effectively, the Court is limited to examining whether, on the information available to Mr Burrows, his decision could be seen as unreasonable in the *Wednesbury* sense.

[26] In *Babulal v Chief Executive, Department of Labour*, a case involving s 177 which also confers an absolute discretion, the High Court commented that:[8]

> The wording of the section leads me to conclude that Parliament clearly intended the scope for judicial review of decisions made under s 177 to be extremely limited. In keeping with its commitment to observe its international

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7 *Zhang v Associate Minister of Immigration* [2016] NZCA 361, [2016] NZAR 1222 at [14].

8 *Babulal v Chief Executive, Department of Labour* HC Auckland CIV-2011-404-1773, 29 September 2011 at [29].

> obligations, however, Parliament did not word s 177 so as to completely exclude judicial review of all decisions made under s 177.

[27] In *Singh v Associate Minister of Immigration*, Muir J noted the very limited success of judicial review claims of the exercise of absolute discretion, and that the test for Wednesbury is one which an applicant will find difficult to satisfy.[9] He said:[10]

> As to the test for *Wednesbury* unreasonableness, this is well established and variously described in terms of:
>
> (a) "a decision so unreasonable that no reasonable authority could ever consider imposing it";
>
> (b) a decision which is "irrational or such that no reasonable body of persons could have arrived at the decision"; and
>
> (c) a decision in respect of which "there could only be one answer" and that contrary to the decision that was made.

Issue 1: Was the case note deficient, imbalanced or erroneous?

[28] Counsel for Ms Dean, Ms Clark, submits that the case note prepared for the Associate Minister was deficient, imbalanced and contained errors leading to an irrational decision. She alleges errors in respect of the nature of Ms Dean and Mr Hussein's relationship, Mr Hussein's eligibility to be a sponsor, and as to whether INZ contributed to Ms Dean's unlawful status.

[29] Ms Clark submits that in some circumstances, a decision can be set aside in judicial review proceedings if there is evidence it was based on a material mistake or misconceptions of an established fact, relying on *Smith v Attorney-General*.[11] In that case, Katz J stated:[12]

> Generally, factual matters are not the proper subject of judicial review. Courts are reluctant to interfere with reasonably held factual views and genuine value judgement calls. However, in some circumstances a decision can be set aside in judicial review proceedings if it is based on a material mistake or misconception of an established fact. The precise scope of the review ground is unclear, but the following test from the English Court of Appeal is often cited:

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9 *Singh v Associate Minister of Immigration* [2017] NZHC 44 at [43] and [46].
10 At [45] (citations omitted).
11 *Smith v Attorney-General* [2017] NZHC 136, [2017] NZAR 331.
12 At [55] (citations omitted).

> First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not … have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning.

[30] The content of case notes has been at issue in several previous immigration judicial review proceedings.[13] In *Singh v Associate Minister of Immigration*, Mr Singh alleged that an Associate Minister's decision to decline to intervene under s 172 of the Act was based on a flawed case note. Muir J held that:[14]

> In circumstances where there is no obligation on the part of the Minister to take any specific matter into account it will be a rare occasion in which an applicant will be able to establish irrationality based on error or omission in a briefing paper. In particular, the Court will need to be satisfied that on a reasonable assessment of *all* the information available to the Minister he or she could not be expected to make a rational decision. In that context, I would adopt the "something overwhelming" terminology from *Wednesbury* itself.

[31] While an error in the case note was identified in *Singh*, in that it contained an inaccurate representation of a statement made to INZ by Mr Singh which potentially reflected on his character, the Court held that this error was not "so overwhelming as to lead to an irrational decision".[15] In making this finding, Muir J had regard to the fact that the case note accurately summarised Mr Singh's substantive response to this potential credibility issue, and that the relevant correspondence and interview notes were also included. The Court found that "[c]umulatively these provide[d] balance to the case note itself" and that the error was "unlikely in itself to have been determinative".[16]

The genuine and stable relationship issue

[32] The Minister of Immigration has issued immigration instructions pursuant to the Act which must be considered and applied by an Immigration Officer when considering an application for a visa under the Act. Under these instructions, a person

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13 *Singh v Associate Minister of Immigration*, above n 9, and *Devi v Minister of Immigration* [2017] NZHC 728.
14 At [57] (citation omitted).
15 At [81].
16 At [82].

can apply for a resident visa or work visa under partnership instructions if they are living in a genuine and stable relationship with a New Zealand citizen or resident and are sponsored by the citizen or resident. The partner must be an eligible sponsor.

[33] Instruction F2.5 provides:

> **F2.5 How do partners of New Zealand citizens and residents qualify for a residence class visa?**
>
> (a) To be granted a residence class visa under Partnership Category applicants must provide sufficient evidence to satisfy an immigration officer that they have been living together for 12 months or more in a partnership that is genuine and stable with a New Zealand citizen or resident.
>
> (b) For the purpose of these instructions 'partnership' means:
>
> i. a legal marriage; or
>
> ii. a civil union; or
>
> iii. a de facto relationship
>
> and 'partner' means one of the parties to such a partnership indicated in (i), (ii) and (iii) above.
>
> (c) In each case the onus of proving that the partnership on which the application is based is genuine and stable lies with the principal applicant and their New Zealand partner.
>
> (d) An application under Partnership Category will be declined if:
>
> i. the application is not supported by an eligible New Zealand citizen or resident partner; or
>
> ii. an immigration officer is not satisfied that the partnership on which the application is based is genuine and stable; or
>
> iii. the applicant and New Zealand citizen or resident partner have not lived together for 12 months or more at the time the application is lodged; or
>
> iv. the application is based on marriage or a civil union to a New Zealand citizen or resident and either that New Zealand citizen or resident, or the principal applicant is already married to or in a civil union with another person; or
>
> v. both the principal applicant and the New Zealand citizen or resident partner cannot satisfy an immigration officer they comply with the minimum requirements for recognition of partnerships …; or

vi. the applicant(s) does not meet health and character requirements … .

…

[34] Instruction WF2 provides:

> **WF2 Partners of New Zealand citizens or residence class visa holders**
>
> Partners … of New Zealand citizens or residence class visa holders may be granted a work visa provided that:
>
> a) they are living together in a genuine and stable relationship … ; and
>
> b) the New Zealand partner intends to be in New Zealand for the same period of time applied for by the applicant; and
>
> (i) complies with the minimum requirements for recognition of partnerships …; and
>
> (ii) meets the character requirements for partners supporting 'partnership-based temporary entry applications' set out at E7.45; and
>
> (iii) is an eligible partner under residence family category instructions … .

[35] In the case note, under the heading "Relevant Issues", the Ministerial Team advised the Associate Minister that "if Ms Dean and Ms [sic] Hussein are able to satisfy INZ that they are in a genuine and stable relationship, Ms Dean may have a pathway to residence under the Partnership Category".

[36] Ms Clark submits that when assessing whether or not to grant a visa under s 61, highly relevant considerations for the Associate Minister include an assessment of whether an applicant has lawful means of remaining in New Zealand and a pathway to a temporary visa or residence. She submits that this advice is misleading as the Associate Minister would have been left in some doubt as to the true status of the relationship, and recognition of their relationship as being genuine was important because that is the key aspect of both partnership work and residence instructions.

[37] Ms Dean and Mr Hussein were interviewed by Compliance Officers on two different occasions, the last interviews taking place in August 2017 for Ms Dean and in September 2017 for Mr Hussein, with the officer, Mr Treadaway, telling Ms Dean that he had no concerns that her relationship with Mr Hussein was genuine. Ms Clark

therefore submits that, having satisfied INZ that they are in a genuine relationship and meeting the other requirements of instructions F2.5 and WF2, Ms Dean *does* have a pathway to residence under the Partnership Category, rather than *may* as was advised to the Associate Minister. Ms Clark submits this would have been a material factor for consideration by the Associate Minister.

[38] Ms Butler, counsel for the Associate Minister, submits that the statement is not misleading as:

(a) the Associate Minister had before him Ms Dean's letter dated 2 November 2017 which refers to Mr Treadaway's comments as well as Ms Dean's relationship information. From this information, the Associate Minister could form his own view as to the genuineness of the relationship;

(b) notwithstanding his comments, Mr Treadaway declined to exercise his absolute discretion under s 177 of the Act; and

(c) the case note described the options available to the Minister, including options that may require further assessment of the relationship of Ms Dean and Mr Hussein. That assessment of the relationship would be made in accordance with relevant instructions, rather than relying solely on what Mr Treadaway had previously concluded (given that Mr Treadaway had decided not to exercise his discretion).

[39] Ms Butler submits that the wording in the case note is, therefore, accurate: Ms Dean may have a pathway to residence under the Partnership Category, but further assessment is required.

[40] I accept that the first part of this statement could have been potentially misleading. If read in isolation, it could have left the Associate Minister with the impression that INZ were not yet satisfied that Ms Dean and Mr Hussein were in a stable and genuine relationship which could have impacted on his decision to exercise his discretion. However, the statement was not made in isolation. Attached to the case

note was Ms Dean's full request, including her letter which outlined Mr Treadaway's comments, along with other relationship information. As to whether or not Ms Dean may have a pathway to residence, this part of the statement was not misleading. Even if INZ were satisfied Ms Dean and Mr Hussein were in a genuine and stable relationship, Ms Dean's pathway to residence would not have been clear under the Partnership Category as INZ still needed to be satisfied that Mr Hussein was an eligible partner. Given that he has had a protection order made against him, it seems possible that this could have presented an obstacle to him meeting character requirements as a sponsor. Accordingly, I do not find that this statement, when read in its entirety, was misleading.

The eligible sponsor issue

[41] In order to qualify for a work visa or residence visa under partnership instructions, an applicant must be sponsored by an eligible partner. A partner will only qualify as a sponsor if they meet the character requirements in instructions E7.45.

[42] Instructions E7.45 provides:

> **E7.45 Character requirements for partners supporting 'partnership-based temporary entry applications'**
>
> a) The following people will not meet the character requirement for supporting partners, unless granted a character waiver (see E7.45.10 below), if they have been convicted of any offence involving domestic violence or of a sexual nature whether in New Zealand or overseas:
>
> i. New Zealand citizen or resident class visa holder at any time since turning 17; or
>
> ii. work (WF3) or student (WF4) visa holders in the seven years prior to the date the partnership application is made.
>
> b) If the supporting partner does not meet the character requirement for partners supporting 'partnership-based temporary entry applications', the application may be declined.

[43] The paragraph of the case note relating to Mr Hussein's eligibility as a sponsor is as follows:

> The representations state that Mr Hussein was advised by a compliance officer in 2016 that he is not an eligible supporting partner as he has a history of domestic violence and was issued a protection order. Immigration instructions

> E7.45 state that people will not meet the character requirement for supporting partners, unless granted a character waiver, if they have been convicted of any offence involving domestic violence or of a sexual nature whether in New Zealand or overseas. A police certificate provided with the representations (see annex 3) confirms that Mr Hussein does not have any convictions relating to domestic violence or of a sexual nature. From the information available, it appears that Mr Hussein may be an eligible supporting partner.

[44] The advice provided in 2016 related to Mr Hussein having been subject to a protection order issued by the Family Court.

[45] Ms Clark submits that the use of the word "may" would have left some doubt in the Associate Minister's mind as to the eligibility of Mr Hussein as a sponsor. She submits that this, when coupled with the doubt cast over the couple's genuine relationship would have led to overall uncertainty as to Ms Dean's eligibility for a partnership work or residence visa.

[46] Ms Butler submits that the statement is not misleading as:

(a) the case note does not state that Mr Hussein has a criminal conviction. Instead, the case note sets out the requirements of E7.45, and then expressly states that "[a] police certificate provided with the representations… confirms that Mr Hussein does not have any convictions relating to domestic violence or of a sexual nature"; and

(b) any assessment as to whether or not he is an eligible sponsor would be made at the time of an application.

[47] It is unfortunate that the case note refers to the advice provided in 2016 as, again if read in isolation, this could arguably have given the Associate Minister the impression that there were concerns as to Mr Hussein's character. However, the case note goes on to state that the police certificate confirms that he does not have any relevant convictions. I conclude that the Associate Minister, reading this paragraph in full, would not have been misled and would have had a clear understanding that Mr Hussein could, in fact, be an eligible sponsor.

The contribution to unlawful status issue

[48] Ms Dean made submissions in support of her request that INZ have contributed to her unlawful status arising from the decline of her application for a work permit in 2009 under partnership instructions in that:

(a) the application was declined by INZ as there was no documentation provided to show that Mr Hussein had legally separated or divorced from his wife and therefore concluded that there was no exclusive relationship and existence;

(b) there was no requirement for a sponsor to be able to show documentation that they are separated or divorced from their previous husband or wife; and

(c) the Ministerial Team failed to make any finding or provide any advice to the Associate Minister on whether Ms Dean's submissions were correct that INZ have contributed to her unlawful status.

[49] Ms Clark submits that the case note omits to include an INZ finding on Ms Dean's allegation that INZ contributed to her unlawful status by declining her application for a work permit in 2009 under partnership instructions. She submits that if it had been confirmed for the Associate Minister that Ms Dean's unlawful status came about due to INZ's material errors then that may have shifted the Associate Minister's perception over her unlawful status.

[50] In response, Ms Butler submits that, to the extent that INZ did not address these matters, there is no requirement for every detail to be specifically mentioned in the briefing. She submits that it cannot be seriously argued that it was a mandatory consideration for INZ to form such a view in the case note to the Minister. The Associate Minister's decision under s 61 was made in his absolute discretion. There was no duty on the Associate Minister to even consider the request under s 61, let alone give weight to any particular fact as a mandatory relevant consideration.

[51] Even if it could be argued that an "INZ finding" or an "INZ submission" was a mandatory relevant consideration for the Associate Minister to consider (which is denied), Ms Butler submits that, in any event, the case note addressed:

(a) the previous decisions on Ms Dean's relationship status;

(b) Ms Dean's assertions regarding her partnership status; and

(c) Ms Dean's submissions on this topic were provided to the Associate Minister in full as an annexure to the case note.

[52] I conclude that, while it might have been advisable for the case note to directly refer to Ms Dean's concerns that INZ had contributed to her unlawful status by declining her initial application for a work visa as they determined there was no exclusive relationship between Ms Dean and Mr Hussein in the absence of documentation to show that his marriage was at an end, they were not obliged to do so. Ms Dean did spell out her concerns in the request and this was before the Associate Minister, so he would have been able to form his own views as to the role INZ played in Ms Dean's unlawful status.

Summary on Issue 1

[53] Overall, for the reasons given above, I conclude that the case note placed before the Associate Minister was neither deficient, imbalanced nor erroneous.

Issue 2: Was the decision unreasonable?

[54] Ms Dean pleads that the decision was unreasonable, citing the following particulars:

(1) Ms Dean and Mr Hussein have been living together in a genuine and stable relationship since 2009 and have completed a cultural-religious marriage;

(2) Immigration (Compliance) Officer Damon Treadaway accepted that the relationship is genuine;

(3) Mr Hussein is an eligible sponsor;

(4) Ms Dean has a pathway to residence;

(5) Ms Dean is no longer in communication with her family in Fiji and has been disowned;

(6) Expecting Mr Hussein to return to Fiji with Ms Dean would force him to be separated from his New Zealand citizen children;

(7) Mr Hussein is unable to return to Fiji for financial reasons; and

(8) The decision is inconsistent with New Zealand's international obligations, in particular articles 2, 13, 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR).

[55] These matters can be grouped into two headings:

(a) Ms Dean's personal circumstances; and

(b) International obligations.

[56] As outlined above, given that the decision involves the exercise of absolute discretion, an extraordinary or overwhelming circumstance going to *Wednesbury* unreasonableness is required before judicial intervention is justified.

[57] The question is, therefore, whether the decision not to intervene was so unreasonable that no decision-maker, acting reasonably, could have arrived at that decision.[17] In other words, was the decision "outside the limits of reason", "so outrageous in its defiance of logic or of accepted moral standards" or "so absurd that [the decision-maker] must have taken leave of his senses"? [18]

[58] The starting point is the absolute discretion nature of the decision, which does not require the decision-maker to take any particular matter into account, nor to place particular weight on any one factor or factors. As Muir J observed in *Singh*, there is "no particular test" which the Associate Minister is obliged to apply in exercising his absolute discretion.[19] The Associate Minister clearly stated in his decision letter that he "carefully considered the information provided". While Ms Clark criticised that as being part of a standard form letter, it is not something that the Court can go behind.

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17 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] a KB 223 (CA).
18 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545.
19 *Singh v Associate Minister of Immigration*, above n 9, at [92].

Ms Dean's personal circumstances

[59] Ms Dean's personal circumstances were considered by the High Court in 2017 in the context of an application for interim relief to prevent her deportation until her previous application for judicial review had been heard.[20] The personal circumstances she cited in that case are substantially the same as the present case, including her wish not to be separated from Mr Hussein, his desire not to be separated from his (adult) children, and her lack of relationship with her Fijian family. There, Gordon J stated that:

> [25] The consequences identified by Ms Dean above are less severe than those identified by the applicants in *Singh (Kulbir)* and *Chief Executive of the Ministry of Business, Innovation and Employment v Nair*, which in both cases included the forced emigration of New Zealand citizen children. In both cases, the Court of Appeal found that the consequences of deportation were not "particularly adverse" and did not meet the necessary threshold to justify interim relief. While Mr Hooker, who appeared on behalf of Ms Dean, did not formally concede that the consequences for Ms Dean would be no greater than the usual statutory consequences of deportation, he acknowledged that he might struggle to make a submission to the contrary.
>
> [26] Were the consequences of deportation limited to those described above, therefore, I would not be satisfied that the consequences of deportation were sufficiently adverse to justify interim relief. (citation omitted)

[60] Unfortunately, deportation will inevitably involve an element of harshness and emotional upset, often requiring separation from family and friends. In itself, that will not be sufficient to found a claim that the decision not to intervene was unreasonable in the Wednesbury sense. I conclude that the consequences for Ms Dean of her deportation are not such that the Associate Minister's decision not to intervene was "outside the limits of reason".

International obligations

[61] Ms Clark submits that the decision was inconsistent with New Zealand's international obligations, in particular, the following articles of the ICCPR:

(a) Article 17: the right not to be subjected to arbitrary or unlawful interference with the family; and

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[20] *Dean v Chief Executive of the Ministry of Business, Innovation and Employment* [2017] NZHC 588.

(b) Article 23: the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

[62] Ms Clark submits that Ms Dean and Mr Hussein had already been recognised as being in a genuine relationship and this would have been a key factor when considering New Zealand's international obligations.

[63] The Court of Appeal has held that when considering international obligations in the context of an absolute discretion decision under s 177 of the Act (where there is an express reference to international obligations), "no particular test need be applied and the immigration officer 'need not attach particular weight to any given international obligation'".[21]

[64] In describing the decision of an immigration officer under s 177, the Court of Appeal said:[22]

> The only inference available from Mr Shand's affirmation of performance of his obligations under s 177 is that, in accordance with New Zealand's international obligations, he has treated Amanpreet's interests as a primary consideration. But, within his discretionary power, he has decided that the statutory requirement to ensure the integrity of New Zealand's immigration system — what may generally be termed "the national interest" — must prevail. A Court cannot inquire further. In these circumstances, applying the *Wednesbury* approach, it cannot be said "there could be only one answer", namely that the [Immigration Officer] should have cancelled the deportation orders. We are satisfied that the [Immigration Officer] reached a decision that was reasonably open to him on all the facts and having regard to New Zealand's international obligations.

[65] In *Devi v Minister of Immigration*, which concerned a decision that breached Ms Devi's rights under the ICCPR and the International Covenant on Economic, Social and Cultural Rights, the High Court noted:[23]

> [29] A decision maker is not required by s 61 to make decisions with regard to international obligations. To raise any issue on judicial review, these obligations must have been of sufficient relevance to Ms Devi's case "that to overlook them raises *Wednesbury* unreasonableness". In any event, I find that Mr Burrows did not overlook the obligations. Mr Burrows indicated by

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21 *Chief Executive of the Ministry of Business, Innovation and Employment v Nair* [2016] NZCA 248, [2016] NZAR 836 at [30] (citations omitted).

22 *Singh (Kulbir) v Chief Executive, Ministry of Business, Innovation and Employment* [2015] NZCA 592, [2016] NZAR 93 at [66] (citations omitted).

23 *Devi v Minister of Immigration*, above n 12 (citation omitted).

> signing the internal Record of Decision form that he considered the application of any relevant international obligations, as the briefing paper directed him to do. He read the plaintiff's letter which specifically referenced the human rights instruments now raised. It was a matter for his judgment how any of the factors which he considered were weighted in his decision.

[66] On the facts of this case, the Associate Minister had been briefed about the impact of New Zealand's international obligations on his discretionary decision making, including the ICCPR. The case note itself specifically refers to these obligations, as does Ms Dean's request. In his decision, the Associate Minister stated that he had carefully considered the representations. I conclude that the Associate Minister made his decision fully understanding his obligations under international law. The fact that he, nevertheless, declined to intervene despite the impact his decision would have on Ms Dean and her partner, while no doubt impacting negatively on them, is not of itself an unusually difficult situation in terms of immigration and deportation cases. His decision, with respect to New Zealand's international obligations, could not be described as so absurd that he must have taken leave of his senses.

Summary on Issue 2

[67] Overall, for the reasons given above, I conclude that the Associate Minister's decision was not unreasonable in the *Wednesbury* sense.

Lack of affidavit from the Associate Minister

[68] While conceding that the Associate Minister had in front of him the submissions of Counsel for Ms Dean and supporting documents at the time he made his decision, Ms Clark submits that, in the absence of any evidence from the Associate Minister, it is not clear whether he reviewed that material, or if he only relied on the briefing paper prepared by his team.

[69] The lack of affidavit evidence from the Associate Minister has been considered before. In *Singh*, Muir J said:[24]

> [51] I do not consider any adverse inference [can be] appropriately drawn against the Minister for failing to provide an affidavit. It would be unrealistic in the context of the caseload considered by Ministers or Associate Ministers

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24 *Singh v Associate Minister of Immigration*, above n 9.

> of Immigration for them to recall with particularity the reasons for their decision in any particular instance. Nor are they even obliged to identify such reasons. The Court has before it a full record of the information available to the Minister when he made his decision and on the basis of which the rationality of that decision can be assessed.

[70] Ms Butler submits that the present case is directly comparable as there is affidavit information before the Court on the information which was before the Associate Minister. A manager with the Immigration Resolutions Team deposes to, among other matters:

(a) the information before the Associate Minister; and

(b) the briefing which the Minister received at the time of his appointment, including the impact of New Zealand's international obligations on discretionary decision-making and in particular the ICCPR.

[71] I accept Ms Butler's submissions that nothing turns on the lack of an affidavit from the Associate Minister. The Court has before it a record of the information available to the Associate Minister when he made the decision and on the basis of which the rationality of that decision can be assessed. He was aware of his obligations, was provided with the necessary information, and will have made a reasonable decision not to exercise his discretion accordingly.

Conclusion

[72] Sections 66 and 172 provide an absolute discretion of last resort, imposing minimal formal requirements on the decision-maker. There was no material error or omission in the case note, and the Associate Minister's decision not to intervene was not unlawful in terms of being *Wednesbury* unreasonable. The high threshold required for the Court's intervention is not met in this case.

[73] None of the grounds advanced in support of the application has been made out. The application for judicial review is accordingly dismissed.

Costs

[74] I invite the parties to settle costs. If that is not achievable, I direct the respondent to file and serve submissions within 14 days of this decision, with the applicant having 14 days from service to respond.

Churchman J

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