IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA615/2018
[2019] NZCA 343

BETWEEN	FARISHA FARINA DEAN Appellant
AND	ASSOCIATE MINISTER OF IMMIGRATION Respondent

Hearing: 23 May 2019

Court: Stevens, Duffy and Dobson JJ

Counsel: R J Hooker and M G P Martin for Appellant
N Butler and T Witten-Sage for Respondent

Judgment: 30 July 2019 at 1.00 pm

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is declined.

B The appeal is dismissed.

C The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Duffy J)

[1] Ms Dean is unlawfully in New Zealand and is subject to a deportation order. She asked the Associate Minister of Immigration (the Associate Minister) to intervene and take steps that would allow a fresh consideration of her immigration status, but he declined to do so. She then sought judicial review of the Associate Minister's

decision, but the proceeding was dismissed by Churchman J.[1] She now appeals against that decision.

[2] In support of her appeal Ms Dean sought leave to adduce fresh evidence in the form of newspaper articles of statements made by the Minister of Immigration. However, when her appeal was heard she did not advance this application. Accordingly, it is declined. Even if the application were advanced, it would still have been declined, because we were satisfied the proposed evidence was not cogent.

Facts

[3] The essential facts are not in dispute. Ms Dean is a Fijian national who arrived in New Zealand in January 2009 and was granted a visitor's visa for one month. She was subsequently granted a further visitor's visa which expired in October 2009.

[4] In April 2009 Ms Dean met Abdul Saleem Hussein and in July 2009 they commenced a de facto relationship. He is also a Fijian national however he has New Zealand residence. They entered into a relationship, which led Ms Dean to apply in October 2009 for a partnership-based work permit. Her application was refused on 5 March 2010 because Immigration New Zealand (INZ) did not accept the couples' assertion that they were in a genuine and stable de facto relationship. Mr Hussein was already married and there was no evidence to establish the marriage was at an end. INZ considered the couple were not in an exclusive relationship. Ms Dean was granted a short-term visitor's visa valid to 5 April 2010 to allow her to leave New Zealand lawfully. She did not do so and has since remained in New Zealand.

[5] On 21 June 2011 Ms Dean was served with a deportation liability notice[2] and a deportation order.[3] She then began a series of procedural steps under the Immigration Act 2009 (the Act) to avoid deportation.

[6] In 2012 and 2013 Ms Dean made requests under s 61 of the Act for work visas to be issued to her. As someone who was the subject of a deportation order she did

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1 *Dean v Associate Minister of Immigration* [2018] NZHC 2455.
2 Issued under s 154 of the Immigration Act 2009.
3 Issued under s 175 of the Immigration Act.

not come within s 61. Her requests were refused. In 2014 Ms Dean asked the Associate Minister to cancel her deportation liability and for her to be granted a visitor's visa to allow her to apply for a resident's visa under the partnership category. In April 2015 the Associate Minister declined to intervene.

[7] On 11 August 2015 Ms Dean made a second request for the Associate Minister to cancel the deportation order, which was refused on 18 August 2015. In September 2015, Ms Dean applied for judicial review of that decision. On 15 February 2016 the proceeding settled, and later in 2016 INZ officers made a further assessment of whether to cancel the deportation order. On 12 August 2016 an INZ officer refused to cancel the order and Ms Dean was given 14 days from 15 August to leave New Zealand.

[8] There were further exchanges with INZ. On 18 August 2016 Mr Hussein contacted INZ and was told he was not an eligible sponsor. Ms Dean obtained a copy of her INZ file and learned that Mr Hussein was described as a "family violence offender" who had been served with a final protection order from the Waitakere District Court in 2010. This description was partially incorrect insofar as Mr Hussein has no criminal offences for family violence.

[9] On 7 September 2016 Ms Dean brought further proceedings to judicially review the recent refusal to cancel the deportation order and she obtained interim relief preventing her from being deported.[4] The following year those judicial review proceedings settled, and a different INZ officer, Damon Treadaway, undertook an assessment of her request. Ms Dean provided him with additional information on her relationship with Mr Hussein, including information relevant to New Zealand's obligations under relevant international conventions.

[10] Ms Dean was interviewed by officer Treadaway on 17 August 2017. At the end of the interview officer Treadaway confirmed that all Ms Dean's previous INZ files were available to him, and that he had no concerns her relationship with Mr Hussein was genuine. Later in September 2017 officer Treadaway interviewed

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

Mr Hussein. Then on 11 October 2017 officer Treadaway decided not to cancel the deportation order and Ms Dean was given until 10 November 2017 to leave New Zealand.

[11] This prompted Ms Dean to request the Ministerial intervention through the assistance of the Member of Parliament for Mangere, the Honourable Aupito Sio, who wrote to the Associate Minister requesting he intervene.

[12] The request to the Associate Minister included a 10 page document attaching: the first letter Ms Dean received from INZ declining her visa application, the deportation liability notice and deportation order, correspondence about Mr Hussein's lack of criminal history, the High Court decision granting interim relief, records of officer Treadaway's interviews with Ms Dean and Mr Hussein, officer Treadaway's decision not to cancel the deportation order and other evidence Ms Dean provided in support of her relationship.

[13] This request was forwarded to the Ministerials Team of INZ, who provided the Associate Minister with a briefing paper dated 13 April 2018. The briefing paper summarised representations made on behalf of Ms Dean and her immigration history. It identified relevant issues for the Associate Minister's attention and the relevant immigration instructions and legislation as well as New Zealand's international obligations. Regarding the latter, the briefing paper noted that the Associate Minister had already been briefed on the relevance and importance of international obligations in decision making on immigration related cases.

[14] The briefing paper presented the Associate Minister with four possible options for him to take. They were: (a) cancelling Ms Dean's deportation liability and granting a 12-month open work visa under s 61 of the Act, subject to relevant requirements; (b) cancelling the deportation liability and granting a 12 month open work visa under s 61, subject to health and character requirements and evidence that Mr Hussein supports the request; (c) declining to intervene, but cancelling the period of prohibition under s 182 of the Act; and (d) declining to intervene.

[15] On 19 April 2019 the Associate Minister decided that he was not prepared to intervene in Ms Dean's case, which meant that she was liable for deportation at the discretion of INZ.

[16] Ms Dean first responded by judicially reviewing officer Treadaway's decision. She then withdrew those proceedings and applied for judicial review of the Associate Minister's decision, which is now the subject of this appeal.

The High Court decision

[17] There were two causes of action. The first alleged the briefing paper for the Associate Minister was deficient, imbalanced and contained errors, all of which had led to an irrational decision. Essentially the first cause of action alleged two errors: (a) the relationship between Ms Dean and Mr Hussein was presented in the briefing paper as open to question, when officer Treadaway had already accepted the couple were in a genuine relationship, which gave them a pathway to residence under the partnership category; and (b) Mr Hussein was presented as someone who "may be an eligible supporting partner" when he met the requisite criteria. In addition, Ms Dean contended that INZ's failure at the outset to complete a proper assessment of her relationship with Mr Hussein had contributed to her unlawful status in New Zealand.

[18] The second cause of action alleged the decision was unreasonable for the following reasons. Ms Dean and Mr Hussein had been living together in a genuine and stable relationship since 2009 and had completed a cultural marriage. Officer Treadaway accepted their relationship was genuine. Mr Hussein qualifies as an eligible sponsor. Ms Dean has a pathway to residence. Ms Dean is in non-communication with her family in Fiji and has been disowned. To expect Mr Hussein to return to Fiji with Ms Dean would force him to be separated from his New Zealand citizen children. Mr Hussein is unable to return to Fiji for financial reasons, and the Associate Minister's decision was said to be inconsistent with New Zealand's international obligations, in particular arts 2, 13, 17 and 23 of the International Covenant on Civil & Political Rights (the ICCPR).

[19] The Judge rejected Ms Dean's contentions. In a carefully considered and comprehensive decision, the Judge concluded that the briefing paper to the Associate Minister was not misleading, deficient, imbalanced or erroneous.[5] Neither was the decision found to be unreasonable.[6] Accordingly, the decision the Associate Minister made was one that was available to him, particularly in light of the limited basis on which his decision is amenable to judicial review.[7]

Grounds of appeal

[20] Ms Dean contends the Judge's findings on the briefing paper and its effect on the Associate Minister's decision were wrong in fact and in law. In her notice of appeal she identifies six errors to support this ground of appeal. Four of those errors relate to alleged factual errors or omissions in the briefing paper, which she contends establish the unreasonableness of the Associate Minister's decision. The fifth error is essentially a complaint that the Associate Minister should have provided an affidavit setting out his reasoning process, the absence of which has adversely influenced the Judge. The sixth is essentially an argument the Associate Minister's decision is unreasonable when viewed in the context of Ms Dean's interactions with INZ, her relationship with Mr Hussein and the difficulties the couple will face if she is obliged to leave New Zealand.

Statutory framework relevant to Ms Dean

[21] The statutory process for removal of persons unlawfully in New Zealand commences with them becoming "liable for deportation" and proceeds to the point where deportation orders are served, and then executed. Persons who are liable for deportation have limited rights of appeal which must be exercised within a prescribed time frame.[8] Deportation orders cannot be served until the time for appeal against liability for deportation has expired, or the appeal has been determined.[9]

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5 *Dean v Associate Minister of Immigration*, above n 1, at [53].
6 At [67].
7 Immigration Act, ss 11 and 172.
8 Section 154(2).
9 Sections 175 and 175A.

[22] However, deportation orders can be served immediately on someone who was unlawfully in New Zealand before 2 am on 29 November 2010, who continues to be unlawfully in New Zealand and who has no right of appeal against liability for deportation.[10] Ms Dean appears to be within this category because her circumstances satisfy all the statutory requirements.

[23] The Act provides the Associate Minister with two specific powers to regularise the status of someone who is in New Zealand unlawfully. Section 61 applies in circumstances where a person is in New Zealand unlawfully, but is not yet subject to a deportation order. Section 172 applies in circumstances where a person is "liable for deportation".

[24] Section 172 permits the Associate Minister to cancel "liability for deportation". It relevantly provides:

> **172 Minister may cancel or suspend liability for deportation**
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> (1) The Minister may at any time, by written notice, cancel a person's liability for deportation.
>
> …
>
> (2A) The Minister may exercise his or her powers under this section whether or not the person who is liable for deportation—
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> …
>
> (b) has purported to apply to the Minister for any other reason.
>
> (3) Where a person fails to comply with the conditions stated in a notice under subsection (2),—
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> (a) the Minister may reactivate the person's liability for deportation by causing a deportation liability notice to be served on the person that sets out the grounds of the reactivation; and
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> (b) subject to section 175A(4), the person has 28 days from the date the deportation liability notice is served to leave New Zealand.
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> …
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> (5) The decision to cancel or suspend a person's liability for deportation is in the absolute discretion of the Minister.
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> …

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[10] Section 175A(5)(c).

[25] The Act provides no specific power for ministerial cancellation of a deportation order once made. The position is different for INZ officers to whom s 177 of the Act specifically gives such power.[11]

[26] Ms Dean requested the Associate Minister grant her a work visa under s 61 of the Act. However, she was not eligible for consideration under that section because she is someone for whom a deportation order is in force. Rather than decline the request, INZ responded by treating the application as made under s 172 and it was referred to the Associate Minister on this basis.

[27] Counsel for the Associate Minister in written submissions suggested that because liability for deportation is a necessary precondition to a deportation order once liability for deportation is cancelled, the deportation order would necessarily fall away as well.[12] The Associate Minister would then be free, were he so minded, to issue Ms Dean a visa under s 61, thus regularising her immigration status in New Zealand. This issue was not addressed by counsel for Ms Dean in her written submissions nor during oral argument.

[28] Without hearing full argument, we do not consider it appropriate to determine whether s 172 is available for the Associate Minister to use in this way. Nor is it necessary for us to do so. That is because the issue before us involves the refusal to exercise s 172. For the reasons which follow we have concluded that the merits of Ms Dean's case did not warrant intervention by the Associate Minister under s 172. Moreover, as there is no other specific power that he might have used to prevent her deportation, we propose to make no further comment on whether s 172 could provide a proper basis for cancellation of the deportation order.

[29] Turning to the substance of the matter, s 172(5) provides that the Minister's decision is one of absolute discretion. Section 11 of the Act defines "absolute discretion" as follows:

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11 In *Fang v Ministry of Business, Innovation and Employment* [2017] NZCA 190, [2017] 3 NZLR 316 at [20] this Court referred to s 177 as "the 'last ditch' opportunity to have a deportation order cancelled".

12 Such an argument was accepted in *Singh v Associate Minister of Immigration* [2018] NZHC 44 at [31].

> **11 Meaning of absolute discretion of the decision maker**
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> (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—
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> (a) the matter or decision may not be applied for; and
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> (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
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> (ii) section 27 of this Act and section 23 of the Official Information Act 1982 do not apply in respect of the purported application.
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> (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.

[30] This Court has said that "absolute discretion" effectively limits judicial review to *Wednesbury* unreasonableness.[13] This necessarily follows from the absence of specific statutory considerations or requirements to provide reasons to support the decision.

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[13] *Singh (Kulbir) v Chief Executive, Ministry of Business, Innovation and Employment* [2015] NZCA 592, [2016] NZAR 93 at [46].

Discussion

[31] Ms Dean contends there are four factual errors or omissions in the briefing paper, which have led the Associate Minister to make an unreasonable decision. We reject this. First, we do not consider the alleged errors or omissions can exist on a proper reading of the briefing paper. Secondly, even if we were persuaded to accept there were such errors we do not view them as having a material impact on the decision. They could not therefore have led the Associate Minister to make an unreasonable decision.

[32] The first factual error is said to arise from what Ms Dean contends is a misleading or inaccurate statement in the briefing paper:

> If Ms Dean and Ms 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.

[33] No point is taken about the misuse of a female title regarding Mr Hussein. The rest of the briefing paper and the other material correctly referred to him by the appropriate male title. Rather Ms Dean contends the above passage from the briefing paper suggested the couple's relationship was yet to be established when in fact officer Treadaway had already decided it was a genuine and stable relationship[14].

[34] We consider this argument misreads the passage and takes it out of context. It is the penultimate paragraph in a briefing paper that accurately summarises Ms Dean's immigration history in New Zealand. This includes reference to INZ's earlier doubts about the quality of the couple's relationship. The chronological sequence of events in the briefing paper is sufficient to show, at the time it was written, that the couple had been together for almost nine years, which strongly suggests they are in a genuine and stable relationship. The briefing paper also shows that officer Treadaway had no recorded doubts about whether the couple were in a genuine and stable relationship. Accordingly, the subject paragraph cannot be said to throw doubt on the quality of the couple's relationship.

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[14] The Associate Minister has admitted in his statement of defence that after officer Treadaway interviewed Ms Dean he confirmed to her that he had no concerns her relationship with Mr Hussein was genuine.

[35] The subject paragraph is also expressed in a way that correctly recognises the legal route Ms Dean would follow if the deportation order were to be cancelled. The couple would then have to undergo a further assessment including an interview to determine whether Ms Dean should be granted residence under the Partnership Category. Officer Treadaway's view on the couple's relationship could not bind a subsequent interviewing officer, who would also need to be satisfied the couple were in a genuine and stable relationship before he or she could decide to grant Ms Dean residence under that category. Further, being in a genuine and stable relationship is not the sole criteria for residence under the Partnership Category. Accordingly, it was correct to use "may" when referring to Ms Dean having a pathway to residence because "may" is appropriately used to describe circumstances that are a present or future possibility.[15]

[36] The second alleged error in the briefing paper concerns a statement that Mr Hussein's eligibility as a partner and sponsor was yet to be determined, when he met the criteria specified by INZ's Instructions and INZ accepted he did so. We reject this summation of the briefing paper. First, the briefing paper referred to advice from Ms Dean's solicitor, Ms Clarke that in 2016 officer Aiden Rolls had told Mr Hussein he was not an eligible sponsor because of his history of family violence and having been issued with a protection order. Secondly, the briefing paper advised the Associate Minister that Immigration Instructions E7.45 set out a character disqualification for sponsors if "convicted of any offence involving domestic violence or of a sexual nature whether in New Zealand or overseas". The Associate Minister was also advised a certificate from the police confirmed Mr Hussein had no disqualifying convictions. The paper stated that from information available "it appears that Mr Hussein may be an eligible supporting partner".

[37] We consider the Associate Minister was properly advised about Mr Hussein's eligibility to be a supporting partner and sponsor. The Associate Minister was correctly informed that Mr Hussein had no character disqualifications of the type provided for in E7.45 and a certificate from the police confirmed Mr Hussein did not have any convictions relating to domestic violence or of a sexual nature. The way in

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[15] Jeremy Butterfield *Fowler's Dictionary of Modern English Usage* (4th ed, Oxford University Press, Oxford, 2015) at 508.

which Mr Hussein's family violence history had erroneously influenced officer Rolls earlier on in 2016 was correctly described.

[38] We are satisfied the briefing paper correctly expressed the conclusion on Mr Hussein's eligibility as a supporting partner and sponsor. It was necessary, in the briefing paper to qualify the conclusion by reference to "[f]rom the information available", as other relevant information may have come to light if further enquiries were made as part of assessing whether Ms Dean should be granted residence under the Partnership Category. The use of the word "may" was also proper because a decision on whether Mr Hussein was an eligible supporting partner and sponsor could only be made when an INZ officer was charged with making that decision. At the stage when cancellation of liability for deportation was in issue, it would have been premature for the writer of the briefing paper to treat Mr Hussein's eligibility as a foregone conclusion. Instead, the Associate Minister was provided with an accurate account of the relevant circumstances from which he could then draw his own conclusions.

[39] The third error in the briefing paper is said to arise because it did not inform the Associate Minister that Ms Dean met the criteria for a residence visa and had a clear pathway to that visa. The third error overlaps the first and second errors. We consider the findings we have made on those errors fully answer Ms Dean's arguments in relation to the third error.

[40] The fourth error which Ms Dean alleged is founded on a false assumption: namely, that INZ had earlier committed errors, which had contributed to her being in New Zealand unlawfully. We do not accept that INZ had committed any such errors. The doubts an INZ officer had earlier expressed about the quality of the couple's relationship were not errors. Those doubts were expressed in March 2010 when the couple's relationship was less than 12 months old. In such circumstances the officer may have had good reason to be doubtful of the quality of the relationship, particularly in terms of its stability. Ms Dean was then given a short-term visa that would have allowed her to leave New Zealand before she became unlawfully in New Zealand. She did not do so. Instead, she remained in New Zealand and took no further steps to leave before she was issued with a deportation order.

[41] We acknowledge that in 2016 and 2017 separate sets of judicial review proceedings which Ms Dean brought against INZ were settled with the result her eligibility for residence under the Partnership Category was reconsidered. However, we have not been provided with detail on those proceedings and are in no position to determine whether the settlements involved an acknowledgment of error on the part of INZ. Without such information there is no basis to infer those settlements establish earlier errors on the part of INZ.

[42] Accordingly, we are not persuaded that Ms Dean's presence in New Zealand unlawfully for nine years can in any way be attributed to conduct by INZ. The approach of this Court to persons unlawfully in New Zealand who seek to remain here until their immigration status is resolved is well established.[16] Removal of persons unlawfully in New Zealand is regarded as having no bearing on the way in which respective INZ officers might complete their task under s 177 of the Act if asked to cancel a deportation order.[17] The same reasoning would also apply to the exercise of Ministerial cancellation under s 172, and when the person under consideration has made a voluntary departure from New Zealand. Accordingly, Ms Dean did not need to remain in New Zealand to pursue her various challenges against INZ's decisions or her requests for residence as Mr Hussein's partner.

[43] Ms Dean further argued that the four factual errors on which she relies were sufficient to invoke the principle applied in *Air Nelson Ltd v Minister of Transport* where this Court accepted that the failure of officials to provide the Minister with a "fair, accurate and adequate report" meant the Minister's decision was flawed.[18] However, this argument misapplies the relevant principle. Ms Dean has failed to establish that the briefing paper to the Associate Minister was erroneous, materially inaccurate or inadequate. Nor can it be said to have been unfair to her. It provided a well-balanced and accurate account of her immigration history in New Zealand and the factors relevant to her request for cancellation of the deportation order. This is not a case where the Associate Minister's refusal to intervene can be attributed to his receiving unfair, inadequate and inaccurate advice from officials.

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16 *Parmanadan v Minister of Immigration* [2010] NZCA 136, [2010] NZAR 424 at [10].
17 See *Fang v Ministry of Business, Innovation and Employment*, above n 11, at [81].
18 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [53].

[44] The fifth error on which Ms Dean relies encompasses three complaints, all of which relate to the absence of an affidavit from the Associate Minister. He did not provide an affidavit setting out the matters that he considered before he reached his decision. Ms Dean contends that in the absence of an affidavit from the Associate Minister, the Judge should have drawn adverse inferences against the Associate Minister and in favour of the appellant. We reject this argument. Ms Dean relied on *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* to support her argument. However, that decision goes no further than to say that in the absence of an affidavit from a Minister the Court must attempt to infer the Minster's reasons from the various pieces of evidence supplied to it.[19] Moreover it would be anomalous to draw adverse inferences from the absence of an affidavit from the Associate Minister when s 11(1)(c) of the Act specifically exempts him from providing reasons for his decision.

[45] The Minister was exercising an absolute discretion. He was bound to exercise it reasonably and in a way that promoted the policy and objects of the Act. Other than those limitations, he was free to take whatever relevant considerations he thought appropriate into account and to place such weight on them as he chose. The information that was before him is in evidence before us. It plainly shows there was more than one possible course of action upon which reasonable people may hold differing opinions as to which is to be preferred. This is the very essence of administrative discretion.[20]

[46] Ms Dean is someone who has chosen to remain in New Zealand unlawfully since 2010. Whilst Mr Hussein has no criminal convictions for family violence, he does have a history of family violence in terms of the Domestic Violence Act 1995. The character requirements in E7.45 define "domestic violence" as having the meaning set out in s 3 of the Domestic Violence Act. Accordingly, the fact a final protection order was issued against him is not favourable to him qualifying as a suitable sponsor and supporting partner. The Associate Minister was not limited to the criteria given in E7.45 when he made his assessment of Mr Hussein's character.

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19 *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA).

20 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL) at 1064.

Ms Dean's circumstances for being permitted to remain in New Zealand were not compelling. There were no children of the relationship. She was in no worse position than many other adult persons find themselves after having remained unlawfully in New Zealand for some considerable time.

[47] The sixth error concerns the finding of the Judge that the Associate Minister's decision was not unreasonable. Ms Dean submits the decision is inconsistent with INZ's previous internal policy as per paragraph 13 of the Internal Administration Circular 10/21 which provides that:

> Deserving cases involving persons who are *prima facie* eligible for residence under residence instructions, but who are prevented from applying due to their unlawful status, should usually be granted a temporary entry class visa of a type appropriate to their circumstances to enable them to test their eligibility for residence in the normal way.

[48] The difficulty Ms Dean faces here is that her argument assumes she is a deserving case who is prima facie eligible for residence. The Associate Minister's refusal to cancel her liability for deportation necessarily entails him viewing her as not presenting as a deserving case.

[49] Ms Dean then repeats her reliance on the fact her relationship with Mr Hussein is over nine years duration, the determination by officer Treadaway that she is in a stable and secure relationship, and she contends she has an eligible partner in a pathway to residence. However, the relationship of nine years has developed because she has remained in New Zealand unlawfully. Whilst officer Treadaway found the couple to be in a stable and genuine relationship at a particular time that factor alone would not warrant cancellation of her liability for deportation.

[50] Whether Mr Hussein is an eligible supporting partner and sponsor and Ms Dean has a pathway to residence is not certain. Mr Hussein's history of family violence as evidenced by the issue of a final protection order against him reflects poorly on his suitability as a sponsor and supporting partner. This is not a situation where Ms Dean is outside New Zealand making a partnership based temporary entry application or is lawfully in New Zealand and seeking residence under the Partnership Category and so the E7.45 criteria have no direct application. In the context of an

assessment under s 172 it was open to the Associate Minister to take a broad view of family violence that looks beyond criminal offending of this type. Further, apart from his family violence history, Mr Hussein has six criminal convictions for dishonesty offending, which were also before the Associate Minister. It would have been open to the Associate Minister to take those matters into account as well.

[51] Ms Dean points to her various attempts to regularise her status in New Zealand. However, as we have already stated, she did not need to make those attempts whilst in New Zealand unlawfully. It was open to the Associate Minister to take her conduct in this regard into account.

[52] Ms Dean refers to the fact that in July 2017 she and the Chief Executive of the Ministry of Business, Innovation and Employment entered into a settlement agreement whereby it was agreed that a new decision would be made about Ms Dean under s 177 of the Act. A different INZ officer from the one who had made the decision which was the subject of the claims would make the new decision under s 177 of the Act. Ms Dean and Mr Hussein would be interviewed prior to the new decision being made. Any prejudicial information arising from the information provided to the INZ officer or the interviews conducted which the INZ officer proposed to take into account was to be provided to Ms Dean and Mr Hussein for comment.

[53] A new INZ officer (officer Treadaway) assumed responsibility for making the s 177 decision and both Ms Dean and Mr Hussein were interviewed by this officer. However, officer Treadaway did not advise Ms Dean of any information that was prejudicial to her request.[21] She now relies on this omission, amongst other things, to show the Associate Minister's decision is unreasonable.

[54] Ms Dean has now had access to the information that was before both officer Treadaway and the Associate Minister. She has therefore had full opportunity to make submissions on this information. The omission by officer Treadaway cannot make the Associate Minister's decision unreasonable, given the broad scope of the

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[21] In the judicial review pleadings this fact was admitted by the Associate Minister at paragraph 24 of his statement of defence.

absolute discretion given to him by s 11, and particularly when Ms Dean has failed to identify any prejudicial information to which she might have responded had officer Treadaway informed her about it. Moreover, if Ms Dean wanted to rely on officer Treadaway's omission as being something that has materially affected the outcome of her request to the Minister she could have pursued specific remedies in that regard. For example, if she considered INZ had failed to follow the procedure it had promised to follow under the terms of the settlement that was agreed in July 2017 she could have included this as a separate cause of action in her judicial review proceedings, but she has not done so.[22]

[55] As particulars of unreasonableness, Ms Dean repeats arguments which she has already made in the earlier grounds of appeal, namely, that she and Mr Hussein have been in a genuine and stable relationship since 2009, officer Treadaway accepted that, and that Mr Hussein is an eligible sponsor under INZ partnership temporary and residence instructions. She says she has a clear pathway to residence. None of which is correct. The information given to the Associate Minister in the briefing paper correctly outlined and characterised the couple's relationship. The Associate Minister was not bound by INZ instructions relating to Mr Hussein's eligibility as a sponsor and supporting partner. There were other factors in the available information which did not reflect well on Mr Hussein. It cannot be said Ms Dean had a clear pathway to residence.

[56] Ms Dean contends the Associate Minister's decision was inconsistent with New Zealand's international obligations, in particular arts 2, 13, 17 and 23 of the ICCPR and the Associate Minister was advised in the briefing paper that he must consider New Zealand's international obligations. Whilst the briefing paper did contain that advice, the power the Associate Minister was exercising did not require him to consider New Zealand's international obligations. In this regard the briefing paper was more generously expressed in Ms Dean's favour than it needed to be. The Associate Minister may have chosen to take the relevant articles of the ICCPR

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[22] For example, she could have pleaded there has been a breach of legitimate expectation of the procedure that INZ had promised it would adopt under the settlement terms. Had she done so INZ would then have been properly on notice of the need for it to address this subject.

into account, but he was not obliged to do so. And if he chose to consider them, what weight he placed upon them was for him to decide.

[57] Moreover, it cannot be said that when the international obligations on which Ms Dean relies are applied to her case they would make the refusal to prevent her removal from New Zealand unreasonable.

[58] Ms Dean further contends that she is no longer in communication with her family in Fiji and has been disowned, to expect Mr Hussein to return to Fiji with her would force him to be separated from his New Zealand citizen children; and he is unable to return to Fiji for financial reasons. However, these personal factors do not distinguish Ms Dean from others who have remained in New Zealand unlawfully and then face deportation, some of whom have been removed together with their New Zealand citizen children.[23]

[59] The extent to which the Associate Minister took any or all of Ms Dean's personal factors into account and the weight he placed upon them were a matter for him to determine, subject to the requirement for him to act reasonably.

[60] Nothing about the factors on which Ms Dean relies, either individually or in combination, is so compelling that they could make the Associate Minister's refusal to intervene unreasonable. Nor can the Associate Minister's decision be said to thwart the objects and policies of the Act, and in this way be unreasonable. Insofar as Ms Dean sought to rely on statements of the High Court of Australia in *Minister for Immigration and Border Protection v SZVFW* and the Supreme Court of Queensland in *Arcturus Downs Ltd v Stilgoe (Member of the Land Court of Queensland)* regarding the scope of unreasonableness as a ground of review, we see no essential difference between those comments and the approach taken in this country.[24]

[61] Accordingly, we are satisfied the appeal should be dismissed.

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23 See *Singh (Kulbir) v Chief Executive, Ministry of Business, Innovation and Employment*, above n 13; and *Chief Executive of the Ministry of Business, Innovation and Employment v Nair* [2016] NZCA 248, [2016] NZAR 836.

24 *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, (2018) 357 ALR 408; and *Arcturus Downs Ltd v Stilgoe (Member of the Land Court of Queensland)* [2019] QSC 84.

Result

[62] The application for leave to adduce further evidence is declined.

[63] The appeal is dismissed.

[64] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Vallant Hooker & Partners, Auckland for Appellant
Crown Law Office, Wellington for Respondent