ENDANGERED KIWIS: THE RIGHTS OF CHILDREN IN DEPORTATION DECISIONS

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Introduction

Deportation decisions have devastating consequences for children. At worst they can lead to a child being removed from the only country and culture they have ever known to an alien lifestyle and extreme hardship. Where citizen children are involved, families are forced to make an impossible decision: to leave their children parentless in New Zealand or to keep the family together in a country lacking the material resources to provide the same quality of life for them.

I propose that a commitment to children's rights, as defined under the United Nations Convention on the Rights of the Child (UNCRC),[1] is the appropriate way to ensure that these vulnerable children are protected. This paper will explore how the existing deportation framework protects the rights of children and whether the current law strikes an appropriately balance between the competing rights and interests at stake.

Chapter One will provide a necessary overview to this area of law, followed by a suggestion of general principles against which the current level of rights protection may be assessed. Chapter Two will explore inconsistencies in the protection of children across New Zealand law and Chapter Three will analyse the statutory threshold for appealing deportation on humanitarian grounds.

[1] United Nations Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990).

Finally, I wish to propose some practical solutions to improve the levels of protection for kiwi children facing deportation.

Chapter One: Balancing Competing Rights and Interests

1.1 Overview of deportation law

The law relating to deportation creates a framework outlining when the state can require a non-citizen to leave the country. Significant changes were made to the deportation and appeal process in the review of immigration law resulting in the Immigration Act 2009. Citizenship law has also gone through recent change that has enormous implications for the deportation of children.[2]

Liability for deportation under the 2009 Act

The Immigration Act 2009 replaced the categories of permit revocation, removal and deportation under the 1987 Act with the one category of deportation that is broken down into various different liability 'heads'. Liability for deportation will arise under the 2009 Act where:

1. A person is unlawfully in New Zealand[3]
2. The visa was granted in error[4] or held under a false identity[5]

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[2] Citizenship Amendment Act 2005.

[3] Immigration Act 2009, s 154.

[4] Immigration Act 2009, s 155.

[5] Immigration Act 2009, s 156.

3. The Minister considers that there is sufficient cause to deport a temporary visa holder,[6] for example where visa conditions are breached,[7] the person is convicted for a criminal offence or where there are concerns about a visa holder's character
4. A residence visa or citizenship is obtained through fraud, forgery, false or misleading representation, or concealment of information[8]
5. A resident has been convicted of certain criminal offences[9] or new information becomes available in relation to their character[10]
6. Refugee or protection status is cancelled[11]
7. A person is deemed to pose a risk to national security[12]

Unlike the 1987 Act which left all deportations to the complete discretion of the Minister, the 2009 Act makes deportation prima facie mandatory as soon as a person's conduct brings him or her within one of these categories. However, the Act does give the minister an absolute discretion to overturn the presumption in favour of deportation and cancel deportation liability.[13] Additionally, immigration officers are given the discretion to cancel deportation orders arising from a person being illegally in the country.[14] The discretion at the first instance deportation decision is deliberately wide. The immigration officer "must have

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[6] Immigration Act 2009, s 157.

[7] Immigration Act 2009, s 159.

[8] Immigration Act 2009, s 158.

[9] Immigration Act 2009, s 161.

[10] Immigration Act 2009, s 160: a holder of a residence class visa will be liable for deportation where new information becomes available that would have led minister to not issue the visa had it been available at the time of issue.

[11] Immigration Act 2009, s 162.

[12] Immigration Act 2009, s 163.

[13] Immigration Act 2009, s 172.

[14] Immigration Act 2009, s 177.

regard to any relevant international obligations, but otherwise may make a decision as he or she thinks fit."[15]

Appeals of these first instance decisions go to the Immigration and Protection Tribunal (IPT) and are determined by a specific 'exceptional circumstances' test that gives far more direction as to how the competing interests and rights at stake should be balanced.[16] Under the 1987 Act there were two appeal thresholds depending on whether the person appealing a decision was legally or illegally in New Zealand. For the 2009 Act, Parliament chose the harsher of the two standards to apply to all deportation appeals on humanitarian grounds. The test is now found in s 207 of the Act, and states that the Immigration Protection Tribunal "must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that

(a) there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and

(b) it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

The troubling difference between the determination of first instance decisions and appeal decisions will be considered in chapter two, and chapter three analyses the way in which the exceptional circumstances test balances children's rights against other interests.

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

[16] Immigration Act 2009, s 207.

Citizenship Amendment Act 2005

In 2005 Parliament significantly changed the requirements for obtaining New Zealand citizenship by birth. This is extremely relevant to deportation decisions because a New Zealand citizen can never be legally deported.[17] Prior to the amendment any child born in New Zealand automatically became a New Zealand citizen, even if both of their parents were illegally in New Zealand at the time. Parliament amended the Citizenship Act 1977[18] so that a child born in New Zealand on or after 1 January 2006 must have at least one New Zealand citizen or resident parent in order to acquire citizenship by birth.[19]

The changes to citizenship by birth will reduce the number of citizen children facing parental deportation in the long run. However for at least another twelve years there will be cases before the courts involving citizen children born before the 2006 change whose parents are liable for deportation. Furthermore, citizen children will continue to be born after 2006 to parents who can be liable for deportation in certain circumstances. It is not uncommon for citizens or residents to enter into relationships with overstayers or temporary visa holders and for children to be born as a result. These children will be New Zealand citizens by virtue of the residency or citizenship of one parent, but the other

[17] Nonetheless, a citizen child may be *de facto* deported where both parents are deported. This is discussed later.

[18] Citizenship Act 1977, s 6(1) amended by Citizenship Amendment Act 2005, s 5.

[19] Citizenship Act 1977, s 6(3)(a) provides an exception whereby a child born in New Zealand will be granted New Zealand citizenship if they would otherwise be stateless.

parent will be liable for deportation from the expiry of their visa or in certain other circumstances.

Citizen children have the right to remain in New Zealand indefinitely and cannot be required to leave the country.[20] The courts have demonstrated sensitivity to citizenship rights, and have treated the citizenship of children as a weighty factor against deporting parents, both for children born before and after the Citizenship Amendment Act.[21] Nonetheless in many situations one or both parents are deported despite the impacts on citizen children. Normally where both parents face deportation, the only practical decision is for the children to follow the parents overseas and to lose the benefits of New Zealand citizenship until they are old enough to return by themselves. This can be considered 'de facto deportation' of the citizen children.[22] Most commonly de facto deportation involves children born to overstaying parents before 2006. However, it will also affect children born after the citizenship changes who become citizens by virtue of their parent's residency visa.[23]

Children born on or after 1 January 2006 to non-resident, non-citizen parents no longer have the citizenship factor to protect them, despite facing the exact

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[20] Immigration Act 2009, s 13(1).

[21] For example see *Ding v Minister of Immigration* (2006) 25 FRNZ 568 (HC); *Al-Hosan v Deportation Review Tribunal* HC Auckland CIV 2006-404-003923, 3 May 2007; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104.

[22] Alison M. Osterberg "Removing the Dead Hand on the Future: Recognizing Citizen Children's Rights Against Parental Deportation" (2009) 13 Lewis & Clark LR 751 at 776.

[23] A parent's residency entitles their New Zealand born child to citizenship under s 6(1) Citizenship Act 1977, but residency can be revoked at any time if the parent's conduct brings them within ss 158, 160 or 161 of the Immigration Act 2009.

same predicament as their counterparts born before this arbitrary date. Ineligible for New Zealand citizenship, the child usually becomes a citizen of the country of one of their parents, according to the laws of that country, and is deemed to have the same immigration status as the parent with the most favourable status.[24] For example, if both parents are illegally in New Zealand at the time of birth, the child will also be deemed to be unlawfully in New Zealand and will be liable for deportation.[25] If one parent is unlawfully in New Zealand and the other is on a temporary visa, the child is deemed to hold a temporary visa with the same unexpired period as the parent's visa.[26]

New Zealand faces a growing number of non-citizen children liable for deportation due to these changes, as well as the continuing issue of citizen children with parents liable for deportation. The appropriateness of citizenship as a consideration in deportation decisions in light of these changes will be a recurring theme in the following chapters.

1.2 A spectrum of cases

A small number of deportation scenarios cause such severe hardship to children that it is quite clear the rights of the child to remain in New Zealand should prevail over a minimal state interest to deport. On the other end of the spectrum there are situations where the state has a seriously compelling reason to deport

[24] Immigration Act 2009, s 373(2).

[25] Immigration Act 2009, s 374(1)(a)(vii).

[26] Immigration Act 2009, s 374(1)(a)(ii).

and deportation would involve only minimal disruption with the child's wellbeing. Consider the following factual examples:

(1) Twelve-year-old Hemani Ram and her two eight-year-old brothers were born in New Zealand to Indian parents who are liable for deportation. The family is from the 'untouchable' caste in India and will face immense discrimination and economic hardship if they are forced to return to India. The children would live in a slum and would not be entitled to state education or healthcare because they are ineligible for Indian citizenship. The parents are eager to integrate and work if they are allowed to stay.[27]

(2) A child is born in New Zealand to a Tongan citizen father (who has New Zealand residency) and a New Zealand citizen mother. The father and child have no relationship to date because the mother doesn't allow the father to contact the child. The child's father becomes eligible for deportation when he is convicted of manslaughter after striking and killing a homeless man. He has a high risk of recidivism. The father's deportation will not affect the child at present, but it may make it difficult for the child to have a relationship with his father if he so wants in the future.[28]

It would be quite clear to most people that deportation could be justified in the second example. Keeping the father in New Zealand involves major risk to society but would have an uncertain and minimal benefit for the child.[29] However, in the first example, the severe and certain hardship to the children if

[27] Diane Joyce "Deported Parents Terrible Choice" (2010) Suff <www.stuff.co.nz/national/4196670/Deported-parents-terrible-choice>

[28] *Vaitaiki v Minister of Immigration* [2012] NZIPT 500060.

[29] On appeal the Tribunal confirmed that deportation in this situation was appropriate due to the risk of violent reoffending: *Vaitaiki v Minister of Immigration* [2012] NZIPT 500060 at [112].

deportation goes ahead cannot be justified by Immigration New Zealand's general interest in deporting anyone who stays after their visas have expired.[30]

Examples like these that elicit an intuitive conclusion are rare. Most deportation decisions will involve the interplay of far more evenly weighted rights and interests. Consider the following three scenarios that have come before the Immigration and Protection Tribunal or its precursor the Removal Review Authority:

(3) A Tuvaluan family including a primary school aged daughter (who is a New Zealand citizen), a daughter in her early teens and a son in his late teens have been in New Zealand for around five years. The parents and non-citizen children have become liable for deportation because their visas expired. Tuvalu has limited economic and educational opportunities and the children will face a significantly lower standard of living than in New Zealand.[31]

(4) A Kenyan man enters New Zealand in 2008 on a visa to work as a circus performer. He forms a relationship with a New Zealand woman and they have a daughter, to whom he is a loving father. He receives further visas on the basis of his partnership, but in 2011 the relationship ends. His ex-partner makes allegations of domestic violence and will only allow him supervised contact with his child. Unable to get a further visa, he is liable for deportation. Before his visa expires he enters into a new relationship with a New Zealander and they are expecting a child.[32]

(5) A Bangladeshi couple and their two sons arrive in New Zealand in 2005 and are given temporary permits. Residency is declined on

[30] The Ram family is still awaiting a decision from the Immigration and Protection Tribunal as to whether deportation will go ahead, however it is highly likely that they will satisfy the two limbs of the s 207 Immigration Act 2009 humanitarian appeal threshold.

[31] Removal Appeal No: 47367 [2010] NZRRA 105 (8 September 2010).

[32] *Kabui* [2012] NZIPT 500346.

> character grounds due to the father's involvement in immigration fraud. Refugee applications and appeal processes take two years during which time a New Zealand citizen child is born. From 2007 onwards the family illegally remains in New Zealand. The teenage sons are well established in New Zealand schools, and the older son's depression and obsessive-compulsive disorder will make it difficult to adapt to life in Bangladesh.[33]

In these cases the correct way to balance humanitarian concerns with the interests of Immigration New Zealand is not obvious. Currently these humanitarian appeals are decided through the 'exceptional circumstances test' in s 207 Immigration Act 2009. Out of the above three examples, the appeal body decided that there were "exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh" to deport in only example number four. In the other two scenarios the appeal on humanitarian grounds failed, and deportation went ahead. Nonetheless, it is important to note that reasonable people are likely to disagree on whether the Tribunal applied the s 207 test appropriately, and indeed whether this test is the most desirable way to balance the rights and interests at all.

1.3 The rights of the child facing deportation

Before analyzing the way in which the courts and the Immigration and Protection Tribunal have interpreted and applied the existing legislation to these grey area cases, it is appropriate to consider these rights and interests abstracted

[33] Removal Appeal No: 47041 [2009] NZRRA 55 (23 July 2009).

from domestic law. This enables an objective assessment of whether the existing legal protections balance them in a principled and just manner.

The United Nations Convention of the Rights of the Child is the primary source of children's rights at international law. The Convention creates a broad set of civil, political, economic and social rights belonging to people aged under 18, and enjoys widespread support from the international community.[34] New Zealand ratified UNCRC in 1993, albeit with a major reservation that will be discussed in Chapter Two. Articles 2, 3 and 12 are likely to provide the most protection to children if applied to deportation decisions, however the Committee on the Rights of the Child has repeatedly stressed that the Convention's articles are interrelated and the document must be interpreted as a whole.[35]

Article 2: Non-discrimination

> (1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.[36]

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[34] Every member of the United Nations is a party to the convention except for Somalia, South Sudan and the United States of America.

[35] *General Comment No. 13,* Committee on the Rights of the Child, 56th sess, CRC/C/GC/13 (2011) at [61].

[36] United Nations Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990), art 2(1).

Non-discrimination has been identified by the Committee on the Rights of the Child as one of four fundamental principles underpinning the whole Convention.[37] This article precludes the differential treatment based on prohibited grounds where it has the effect of impairing the recognition or enjoyment of the UNCRC rights.[38] New Zealand has a responsibility to protect the rights of all children within its jurisdiction, irrespective of their nationality, ethnic origin or immigration status.

Article 3: Best interests of the child

> (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[39]

Article 3 undoubtedly applies to deportation decisions involving children. The international Convention creates an obligation on States Parties to ensure the best interests standard is reflected in both legislation and relevant decision-making.[40] Although the child's 'best interests' has not been further defined, the concept is likely to encompass a broad variety of interests, especially those that

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[37] *General Comment No. 12,* Committee on the Rights of the Child, 51st sess, CRC/C/GC/12 (2009) at [2].

[38] CCPR General Comment No. 18, Human Rights Committee, 37th sess (1989), at [7].

[39] United Nations Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990), art 3(1).

[40] Rachel Hodgkin and Peter Newell, *The Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, United Nations Children's Fund, 2007) at 39.

enable the child to develop "physically, mentally, morally, spiritually and socially".[41] The major interests threatened by deportation decisions relate to family separation, standards of living, and identity issues.

In the context of deportation decisions, it is almost always in the child's best interests to live in the same country as their parents. The moral right of children to maintain relationships with parents has "robust support" from predominant philosophies, including the welfarist and autonomy-focused perspectives.[42] This right is also endorsed in articles 9 and 10, as well as the Preamble of the Convention and article 23 of the International Covenant on Civil and Political Rights[43] which each affirm the family as the "fundamental group of society". The deportation of one parent will often preclude the ability of the child to have a meaningful relationship with that parent.

It will usually not be in a child's best interests to be deported (or de facto deported) to a country in which they will have a lower quality of life. In the first example above, the children were facing deportation to a country in which they would be unlikely to have adequate food, shelter or medical care. However, even where the basic needs of a child will be met, deportation to countries with fewer economic or educational opportunities will often affect the ability of children to develop to their full potential. Similarly, the quality of a child's life

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[41] *Declaration of the Rights of the Child* GA Res 1386, UN GOAR (1959), Principle 2.

[42] James Dwyer *The Relationship Rights of Children* (Cambridge University Press, New York, 2006) at 121 and 168.

[43] International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 29 April 1997), art 24.

will be threatened by deportation to a country with a poor track record of protecting human rights.

The preservation of a child's identity cannot be overlooked as an important element of the best interests standard.[44] A child who has lived in New Zealand for their entire life will have enormous difficulty adjusting to a foreign country they have never known. Children progressing through New Zealand's educational system are likely to identify as 'kiwi' and will have developed significant relationships at school and in the community.

It is important to note that article 3(1) creates a *process* right. The best interests of the child must be '*a primary consideration*' in actions concerning children, but will not always be the single, overriding factor. There is no general right that a decision is in their best interest. Nonetheless this right will not be met by simply mentioning the child's right in connection with the decision making process. 'Primary' suggests some weight will attach to the child's best interests relative to competing interests.[45]

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[44] *General Comment No. 6*, Committee on the Rights of the Child, 39th sess, CRC/GC/2005/6 (2005), at [20].

[45] Claudia Geiringer "Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66 at 77.

Article 9: Separation from parents

> (1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.[46]

A literal interpretation of article 9 suggests that a child eligible to stay in New Zealand should only be subjected to parental deportation where it is determined that separation is in the best interests of the child. Nonetheless, after the adoption of article 9(1) the Chairman of the Working Group who drafted it stated that the article was intended to apply to separations arising in domestic situations only. It was "not intended to affect the general right of States to establish and regulate their respective immigration law in accordance with their international obligations."[47] Although this is merely a clarification of drafting intentions and is not legally binding, it is likely that New Zealand courts will accept this interpretive gloss. To require the state to prove the deportation necessary for the best interests of the child involved would be absurdly onerous and essentially preclude deportation in these situations, even where compelling state interests were at stake.

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[46] United Nations Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990), art 9(1).

[47] Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child Volume 1*, HR/PUB/07/1 (United Nations New York and Geneva, 2007) at 407.

Article 10: Entering or leaving countries for family reunification

(1) In accordance with the obligations of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by the States Parties in a positive, humane and expeditious manner.

(2) A child whose parents reside in different states shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents.

Article 10 is the only article directly relating to separation from parents across different countries. Its wording is evidently weaker than that of Article 9; a product of anxiety on the part of wealthier nations who sought to retain strong immigration control.[48] Significantly, the article is focused on minimizing the impact of separation on children *after* it has occurred, rather than preventing cross-border separation in the first place. The Implementation Handbook for the Convention on the Rights of the Child suggests that deportation of parents can "be assumed to be covered" by article 10 because a deported parent would at once be in the position to re-enter the country for the purpose of family reunification.[49] I am doubtful about the level of protection this article will provide to children in practice. Most parents facing deportation will choose to take their children with them rather than leaving them alone in New Zealand, and where this is the case there is no family reunification issue to engage the rights in the article.

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[48] Hodgkin, Rachel and Newell, Peter *The Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, United Nations Children's Fund, 2007) at 135.

[49] Rachel Hodgkin and Peter Newell, *The Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, United Nations Children's Fund, 2007), at 136.

Article 12: Respect for the views of the child

> (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 12 has been elevated to the status of a general principle holding special significance, alongside articles 2, 3, and 6.[50] The Committee on the Rights of the Child has emphasized that the full implementation of this right is especially important in immigration and asylum proceedings because of children's particular vulnerability in these matters.[51] The article not only encompasses giving children a right to express views and have them given due weight, but also providing children with all relevant information and support services including access to an adviser free of charge.[52] Proper implementation of this article has the potential to ensure that children's views are properly included in immigration decisions that affect them and that children are guided through the processes in a way that treats them with respect and dignity.

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[50] *General Comment No. 12*, Committee on the Rights of the Child, 51st sess, CRC/C/GC/12 (2009) at [2].

[51] *General Comment No. 12,* Committee on the Rights of the Child, 51st sess, CRC/C/GC/12 (2009) at [123].

[52] *General Comment No. 12,* Committee on the Rights of the Child, 51st sess, CRC/C/GC/12 (2009) at [124].

1.4 Interests in favour of deportation

The state has some extremely compelling interests competing against the rights of the child. Immigration New Zealand has a strong interest in deporting people who pose a risk to national security or who have committed serious crimes and are at high risk of reoffending. This situation can be analysed as a rights against rights situation in which one right will inevitably be infringed.[53] Occasionally deportation that is detrimental to the child can be justified in order to uphold the right of potential future victims to be protected from crime.

Most other rationales behind deportation are utilitarian in nature and do not engage rights. These interests tend to be more amorphous and vague, based on maximizing benefits to New Zealand society as a whole. For example, where a person liable for deportation has an illness requiring expensive treatment, allowing them to remain in New Zealand would result in a drain on the public purse.[54] Where a serious crime has occurred but there is minimal risk of reoffending, the courts have upheld deportation liability in order to send a strong message denouncing crime.[55]

Another utilitarian basis for many deportations is the interest of Immigration New Zealand in preserving the integrity of the immigration system. Deporting

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[53] Dworkin, Ronald *Taking Rights Seriously* (Harvard University Press, 1978) at 193.

[54] Doug Tennent *Immigration and Refugee Law* (LexisNexis, Wellington, 2010), at 354.

[55] For example in *Tiumalu v Minister of Immigration* [2012] NZIPT 500523 at [89] – [91], the court justified deportation by a strong public interest in deportation to condemn the deportees sexual exploitation of an adolescent which tragically led to her suicide.

those who have overstayed or those who have obtained visas by fraud or deception (for example by falsifying job offers) is likely to deter future abuse of the system and result in a community of immigrants that provide the most benefit to New Zealand's economy and society.

1.5 A Principled Approach to the Deportation of Children

A principled approach to weighing up the rights and interests at stake is particularly necessary in the context of deportation because the rights of children involved are so susceptible to abuse. These children are some of the most vulnerable members of New Zealand society. For a start, neither overstaying children, nor their parents are eligible to vote. Furthermore, New Zealand voters are not generally switched on to the plights of these children because overstaying families tend to keep a low profile. Where immigration *is* brought up as a political issue, individual family circumstances lack visibility. Overstayers tend to be viewed as "parasites on New Zealand society,"[56] rather than as individuals deserving of respect and dignity. Because the impacts of immigration and deportation policies are very difficult to define and measure, debate on the topic is vulnerable to emotive rhetoric used "to exploit the empirical uncertainties"[57] and justify subjective personal views.[58] A final

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[56] Tuariki Delamere "A Paper about the loss of citizenship rights of the NZ citizen children of overstayers" (2012) at 1.

[57] Peter H. Schuck "The Morality of Immigration Policy" (2008) 45 San Diego L Rev 865 at 870.

[58] For example see speeches by Winston Peters earlier this year: Patrick Gower "Winston: Take Away Dom Rd's Asian Takeaways" (2012) 3 News < www.3news.co.nz/Winston-Take-away-Dom-Rds-Asian-takeaways/tabid/1607/articleID/254653/>; Danya Levy "Winston Peters

overarching problem is that immigration law, more than any other area of law dealing directly with individuals, has always and will always be viewed as an essential expression of state sovereignty.[59] The natural extension of this view is that the state's interests hold more weight than the interests and rights of individuals involved, and that international law should intervene to a minimal extent.

The rights of the child, as defined by the UNCRC, provide the solution to the troubling vulnerability of children in this area of law. Michael Freeman argues that a rights based approach presents a "way in which the hitherto excluded can be included, within the community and within the political structure."[60] Jane Fortin also asserts the merits of a rights strategy: [61]

> Such an approach can address the problem experienced by children… of being the focus of various specialized branches of law and policy, all with their own distinctive character, with no coherence or similarity in objective. By placing the differing aspects of childhood in a framework of rights… the boundaries between the various disciplines start becoming irrelevant, with a far more coherent outcome being possible.

Attacks Immigration Policy" (2012) Stuff <www.stuff.co.nz/dominion-post/news/politics/7118498/Winston-Peters-attacks-immigration-policy>.

[59] Doug Tennent *Immigration and Refugee Law* (LexisNexis, Wellington, 2010) at 19.

[60] Michael Freeman *The Moral Status of Children* (Martinus Nijhoff Publishers, The Hague, 1997) at 17.

[61] Jane Fortin *Children's Rights and the Developing Law* (3rd ed, Cambridge University Press, Cambridge, 2009) at 3.

It is vital that the rights of the child have a central position in New Zealand's deportation framework. As noted above, articles 2, 3 and 12 of the UNCRC have the most potential to protect these children through deportation processes. Rights must be applied consistently to all children in New Zealand and implemented in a principled way that demonstrates a commitment to rights. These ideas are explored below.

The Consistency Principle

It is essential that the rights of the child be applied consistently and without discrimination to all state interactions with children. The rights of the UNCRC are universal and indivisible.[62] To interpret children's rights differently depending on what family they were born into, or under which area of law the rights are interpreted would be to undermine the basic principles of the Convention, as well as contravening article 2.

It must be acknowledged that different areas of law are characterised by differing rights and interests that compete against the rights of the child. The consistency principle concerns only the child's rights side of the equation. In domestic disputes over day-to-day care of a child, there will almost never be sufficiently important rights and interests to outweigh the rights of the child, and as such the child's best interests will almost always prevail. Decisions to deport overstaying families or non-citizen offenders with children are more likely to

[62] *Report of on the Fifth Session*, Committee of the Rights of the Child, CRC/C/24 (2005) at 38.

involve weighty public interest considerations that occasionally outweigh the best interests of the child. This difference is reconcilable with the consistency principle. It is, however, totally unjustifiable for the interpretation of and weight given to the *child's rights themselves* to be inconsistent between areas of law.

Another major theme of this dissertation will be the disparate treatment of rights of citizen and non-citizen children within New Zealand's jurisdiction. The Committee on the Rights of the Child's list of prohibited discrimination grounds includes "non-nationals, immigrant children, illegal immigrants, children of migrant workers."[63] Discrimination on these grounds cannot be justified under the consistency principle because it arbitrarily leaves the rights of certain children more vulnerable than others. A child cannot help the family he or she is born into and it is not just for the family's immigration status to have a bearing on the level of legal protection afforded to the child's rights.

The Commitment Principle

New Zealand needs to demonstrate a commitment to international human rights by taking rights seriously.[64] In the context of discretionary decisions involving children this principle requires that the rights of the child be given significant weight relative to utilitarian interests. Rights should not merely be thrown into the regular social calculus, because to do so would rob them of any

[63] Rachel Hodgkin and Peter Newell, *The Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, United Nations Children's Fund, 2007) at 25.

[64] Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, 1978) at 201.

meaning.[65] The rights of the child are inextricably linked with inherent dignity of all humans, as well as the special vulnerability and dependence of children. As such, these rights are deserving of special recognition and protection, even where it is not in the interests of the majority.[66] Children's rights should not be infringed simply as a means to fulfill the state's policy objectives.

Nonetheless, in the immigration context the commitment principle does not require that rights automatically trump non-right interests. It would be absurd to say that strong utilitarian concerns can have no bearing on a decision involving human rights. For example, in 2011 there were over 15 million refugees globally, 46% of which were children,[67] who by definition were at risk of serious human rights violations.[68] The incremental cost to society of accepting more refugees is undoubtedly a massive factor behind New Zealand's limited acceptance quota of only 750 refugees per year. On an absolutist, human rights approach, the rights of the refugees should trump the national interest in saving money.[69] However requiring New Zealand to accept as many refugees as our resources possibly permit would be thoroughly out of line with conventional views of international obligations and would undermine Parliamentary

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[65] Helen Fenwick *Civil Liberties and Human Rights* (3rd ed, Routledge, 2002) at 11.

[66] Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, 1978) at 194.

[67] United Nations High Commissioner for Refugees, "Global Trends 2011" (2012) <www.unhcr.org/4fd6f87f9> at 3.

[68] United Nations Convention Relating to the Status of Refugees (opened for signature 28 July 1951, entered into force 22 April 1954), art 1.

[69] Until, for example, the acceptance of a certain number of refugees infringes the rights of New Zealanders (such as the right to live in a secure society) in which case it becomes necessary to protect one right over the other (Helen Fenwick *Civil Liberties and Human Rights* (3rd ed, Routledge, 2002) at 12).

sovereignty to an unpalatable extent. Including utilitarian considerations in the deportation balancing exercise is entirely consistent with taking rights seriously but only if the rights of the child retain some special weight in the process in recognition of their status as rights.

Ensuring appropriate relative weight is given to human rights considerations necessarily requires a transparent and principled approach to the countervailing factors involved. The court must give rational justifications behind conclusions that state interests are weightier than the child's interests, and the more amorphous and vague the state interest is in deporting, the less weight it should hold relative to the rights of the child.

A further factor relevant to the weight of the interests against the rights of the child is state complicity in hardship on children. A 'complicity principle' should be employed in the balancing process: where action or inaction by the state has unnecessarily increased hardship to children, the state's utilitarian interests in favour of deporting should hold less weight. In other words, the state's duty to protect the rights of children should be particularly onerous where the state has been complicit in endangering the rights in the first place. This principle will be particularly relevant where a child who is highly integrated into New Zealand society and who has developed a distinctly 'kiwi' identity is required to leave the country long after removal was first possible. In this situation it is unjust for the state to rely on vague, utilitarian interests to the same extent as if it was not complicit in creating the harm.

1.6 Conclusion

Deportation decisions involve the complex interplay of a multitude of rights and interests. Above I have outlined general ideas that I believe will lead to appropriate protection of children in deportation decisions. In the next two chapters I will assess the current law for compliance with these general principles, in particular whether the law consistently protects children and whether rights are given sufficient weight in the balancing process.

Chapter Two: A Fragmented Approach to Children's Rights

As mentioned in chapter one, the rights of the child require consistent application in recognition of their universality. In this chapter I wish to demonstrate the troubling inconsistencies in how children are treated across New Zealand law. The interpretation and application of children's rights is currently contingent both on the area of law under which the child's rights are being considered, on the immigration status of the child, and on whether or not the deportation decision is appealed.

My research to assess the current law involved a review of all 219 humanitarian appeals heard in the Immigration and Protection Tribunal between January 2011 and September 2012. This includes all the decisions ever made under the above s 207 test, as well as a significant number of decisions that are still being made under the 1987 Act.[70] Altogether there were 62 cases (making up 28.3% of the total 219) that concerned the deportation of children or parents of children living in New Zealand.[71] In assessing the effectiveness of the current

[70] Appeals of deportations arising from overstaying followed an identical test under the 1987 Act and are therefore highly relevant. The 1987 Act test for appeals of deportations arising out of criminal convictions is slightly different but the cases determined under it provide insight into the impact of changes to the test (see 3.1 at page 46).

[71] See 'Immigration and Protection Tribunal' in the bibliography for a list of the 62 appeals concerning children that are included in this review.

law it is helpful to use a mixture of statistics gleaned from these cases as well as studies of specific cases to highlight inconsistencies.

2.1 Inconsistency between areas of law

This section demonstrates that children's rights are applied inconsistently between different areas of New Zealand law, through an examination of international family reunification in the immigration and family law contexts. This dissertation does not contend that Parliament has completely abandoned the rights of children in favour of Immigration New Zealand's interests in deporting. In fact, human rights are awarded a prominent position under the scheme. The sole stated purpose of the Immigration Act 2009 is "to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals."[72] What I do wish to demonstrate is that frameworks underlying different areas of laws create divergent conceptions of how far children's rights should extend, despite the fact that similar rights and interests are at stake.

It has long been acknowledged that childhood is a social construct. Society's understandings and expectations of childhood vary significantly between different historical contexts, and the interactions between state and child generally reflect these changeable attitudes.[73] More recent literature further

[72] Immigration Act 2009, s 3(1).

[73] Joel Feinberg, *Social Philosophy* (Prestige Hall, Englewood Cliffs, N.J., 1973) at 84.

alleges that conceptions of childhood also vary within a historical period depending on the *context* of the interaction between child and state.[74] David Thronson has applied this theory to United States immigration law, arguing that the United States framework reflects and reinforces "discredited approaches to children's rights",[75] including the 'children as property' model which treats children as passive objects.

One major piece of evidence that Thronson uses to support this argument is asymmetry in eligibility to apply for parent-child reunification,[76] a feature that is also present in New Zealand's immigration system. A New Zealand resident parent is able to generate immigration rights in non-resident dependent children but the rules preclude a resident child from exercising the same agency and extending those rights to their parents, unless another parent agrees to sponsor on the child's behalf.[77] A citizen child whose parents are deported can choose to stay in New Zealand without his or her parents. Bizarrely, the child will only be allowed to apply for the parents to rejoin him or her in New Zealand after turning eighteen. Reunification issues are also raised where one parent brings a child to New Zealand to live and the other parent remains overseas. There is no mechanism for reunification with the other parent unless the New Zealand resident parent agrees to sponsor them. It is entirely conceivable that a parent

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[74] Julia Fionda "Legal Concepts of Childhood: an Introduction" in Julia Fionda (ed) *Legal Concepts of Childhood* (Hart, Oxford, 2001) 1 at 5.

[75] David B. Thronson "Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law" (2002) 63 Ohio St LJ 979 at 979.

[76] David B. Thronson, "Entering the Mainstream: Making Children Matter in Immigration Law" (2011) 38 Fordham Urb LJ 393 at 404.

[77] Immigration New Zealand "Operational Manual" <www.immigration.govt.nz/opsmanual/34627.html> at v3.110(d) and (e).

would refuse to sponsor an ex-partner to join them in a new country, even though having regular physical contact with both parents is likely to be in the child's best interests.

Family reunification issues caused by international child abduction provide an appropriate comparison from family law, and indicate a disparity in the treatment of children. Similarly to the immigration context, compelling state interests in discouraging child abduction will usually pull in the opposite direction of the interests of a child who does not want to be returned. For this reason, the child's best interests will not be *the* primary consideration in determining whether or not they should be returned, but must be weighed up against equally important state interests.[78] Nonetheless, the child is still treated with respect and concern. Reunification in this context is dealt with under the Care of Children Act 2004, which creates a progressive framework, recognizing children as individuals with independent rights and interests.[79] For example, the Act gives children a right to be given a reasonable opportunity to express a view on matters relating to day-to-day care and contact with parents, and requires that any views expressed be taken into account.[80] Despite the general interest in returning the child, the Act allows the court to refuse return where a child objects,[81] and the courts have shown a reluctance to override children's wishes in the absence of countervailing factors.[82]

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[78] Care of Children Act 2004, s 4(7).

[79] This is evident in the s 3 Purpose section of the Care of Children Act 2004.

[80] Care of Children Act 2004, s 6(2).

[81] Care of Children Act 2004, s 106(1)(d).

[82] *Re R (Child Abduction)* [1995] 1 FLR 716 at 734.

Both of these examples involve the state determining who the child will live with and in which country, a decision that will fundamentally affect the course of the child's life. In the context of immigration law, the inability of children to generate immigration rights in others creates bizarre, adult-focused outcomes to family reunification, and betrays a view of children as mere ancillaries of the parents, unable to exercise rights except through the agency of adults. This out-of-date understanding of children is in spite of the fact that the Immigration Act was comprehensively reviewed in 2009. In the family law framework on the other hand, the child's interests and views are an integral part of the decision-making process, reflecting a commitment to the dignity of the child and their rights under the UNCRC.

This inconsistency in New Zealand's law concerning children has not gone unnoticed by the United Nations Committee on the Rights of the Child. All three considerations of reports submitted by New Zealand have noted a lack of harmony in the laws relating to children. In 1997 the Committee expressed concern "that the State Party's approach to the rights of the child appears to be somewhat fragmented, as there is no global policy of action which incorporates the principles and provisions of the convention."[83] In the 2003 Consideration, the Committee criticized the "insufficient measures adopted to ensure effective co-ordination between different governmental departments" which led to a "lack of a central focal point for coordinating governmental action [and]

[83] *Concluding Observations of the Committee on the Rights of the Child: New Zealand*, Committee on the Rights of the Child, 14th sess, CRC/C/15/Add.71 (1997), at 2.

inconsistency in government action."[84] Most recently, in 2011, the Committee once again expressed concern "at the lack of a comprehensive policy to ensure the full realization of the principles and rights provided for in the Convention."[85]

2.2 The citizenship factor

New Zealand's Reservation to the Convention

New Zealand's reservation to the UNCRC regarding children unlawfully in the country is a further example of inconsistent treatment of children across New Zealand law. The relevant reservation reads as follows:

> "Nothing in this convention shall affect the right of the Government of New Zealand to continue to distinguish as it considers appropriate in its law and practice between persons according to the nature of their authority to be in New Zealand including but not limited to their entitlement to benefits and other protections described in the Convention, and the Government of New Zealand reserves the right to interpret and apply the Convention accordingly."[86]

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[84] *Concluding Observations of the Committee on the Rights of the Child: New Zealand*, Committee on the Rights of the Child, 34th sess, CRC/C/93/Add.4 (2003), at 9.

[85] *Concluding Observations of the Committee on the Rights of the Child: New Zealand*, Committee on the Rights of the Child, 56th sess, CRC/NZ/CO/3-4 (2011), at [14].

[86] United Nations Treaty Collection "Status of Treaties: Convention on the Rights of the Child" (2012)

The only reasonable interpretation is that the New Zealand government is reserving the ability to withhold any or all benefits and protections under the Convention from children who are unlawfully in New Zealand. This reservation seriously undermines the principle of non-discrimination in article 2, one of four main principles underpinning the Convention.[87] States Parties must respect and ensure the rights "*to each child within their jurisdiction* without discrimination of any kind," including discrimination based on the child's or his or her parent's nationality, birth or other status.[88]

This reservation places New Zealand majorly out of step with the rest of the Western world and opens the government up to criticism by the international community. Of the thirty-three States Parties from the OECD, only Japan,[89] Switzerland[90] and Belgium[91] have reservations relating to immigration status. These reservations are far more limited in scope than New Zealand's blanket

<treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#13>.

[87] General Comment No. 12, Committee on the Rights of the Child, 51st sess, CRC/C/GC/12 (2009) at [2].

[88] United Nations Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990), art 2.

[89] Japan's reserves the ability not to apply family reunification rights under article 9 and 10 in deportation decisions. All other rights of the Convention are protected for children unlawfully in Japan.

[90] Switzerland merely declares that article 10(1) does not provide an *absolute* guarantee of family reunification to aliens (this is consistent with the Committee on the Rights of the Child's interpretation). No other rights of these children are affected.

[91] The Belgium government declares that the principle of non-discrimination does not guarantee foreigners the same rights as Belgian nationals, but maintains that any differing treatment must be "based on objective and reasonable considerations, in accordance with the principles prevailing in democratic societies." New Zealand's reservation gives no such guidelines on when differing treatment based on immigration status will be appropriate.

reservation, which has the potential to cover all rights of all children unlawfully in the country. The other commonwealth countries in the OECD - Australia, Canada and the United Kingdom – do not have any existing reservations relating to immigration law.[92] The Committee on the Rights of the Child has expressed concern over "the broad nature" of New Zealand's reservation which "raises questions as to their compatibility with the object and purpose of the Convention."[93] Furthermore, many other State Parties have alleged that such wide reservations "contribute to undermining the basis of international treaty law."[94]

New Zealand has recently reviewed its reservation relating to children unlawfully in the country and concluded that there are adequate measures in place "to demonstrate that New Zealand is committed to protecting the rights of all children." [95] The report pointed to a new measure that permits unlawful children to undertake education,[96] and cited "legitimate concerns, such as

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[92] Upon ratification, the United Kingdom reserved the right to apply deportation legislation as deemed necessary, but withdrew the reservation in 2008.

[93] *Concluding Observations of the Committee on the Rights of the Child: New Zealand*, Committee on the Rights of the Child, CRC/C/15/Add.71 (1997), at 2.

[94] Germany, Sweden, Finland, Netherlands, Norway, Portugal, Italy and Ireland made objections to this effect at other State Parties' reservations. Objections included Liechtenstein's reservation limiting the right of family reunification to citizens. This reservation erodes children's rights to a significantly lesser extent than New Zealand's widely worded reservation, so the criticism can be logically extended to New Zealand.

[95] *Third and Fourth Periodic Reports of States Parties: New Zealand*, Committee on the Rights of the Child, CRC/C/NZL/3-4 (2008), at [24].

[96] Immigration Act 2009, s 352(3).

effective immigration controls and resource constraints" to justify maintaining the reservation.[97]

It is likely that the judicial approach to children unlawfully in New Zealand is a further factor in the claim that they are adequately protected. Despite a Supreme Court obiter statement in *Ye v Minister of Immigration* that the reservation "will have relevance to cases where the children are unlawfully in New Zealand,"[98] the Immigration and Protection Tribunal has continued to apply the UNCRC across the board. Out of 23 IPT cases since January 2011 concerning overstayer children, the UNCRC was mentioned in every case except one.[99] In some cases, the Tribunal stated that the UNCRC requires the best interests of children unlawfully in the country to be a primary consideration, even after citing the Supreme Court decision that suggested otherwise.[100] It is unclear whether the Tribunal has decided not to follow the obiter or has not been made aware of it, but given that the minimal obiter statement was in a footnote to the judgment, plus the lack of commentary on the matter, it may well be an oversight.

Any existing protections for children unlawfully in New Zealand will be inadequate unless the state affirms the fundamental rights they possess at international law by withdrawing the reservation. Firstly, the legislative

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[97] Immigration Act 2009, s 352(3).

[98] *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24]. The statement is obiter because the case only concerned citizen children.

[99] *AK (Sri Lanka)* [2011] NZIPT 500142 was a case concerning two children unlawfully in the country. The Tribunal failed to mention the UNCRC, although this was probably an oversight.

[100] For example *Limosnero & Anor* [2012] NZIPT 500428-429 at [26].

protections and judicial generosity in extending the Convention's protection to unlawful children are not grounded in obligations at international law and could be revoked at any time without legal challenge. Secondly, protections by virtue of the state's charity and compassion alone undermine the notion that these children possess inherent human dignity and a special vulnerability worthy of protection.[101] As Freeman has argued, "benevolence is no substitute" for legal rights because rights "give their holder dignity and confidence."[102] Furthermore, it is inconsistent to deny rights to the children that are the most vulnerable in our society when a major rationale behind extending special rights to children in the first place is their special needs for safeguards and care.[103]

Citizenship under the s 207 balancing test

My research into deportation appeals to the Immigration and Protection Tribunal demonstrates a concerning inconsistency in the interpretation of citizen and non-citizen children's humanitarian circumstances. The Citizenship Amendment Act 2005 demonstrates the arbitrariness of citizenship as a factor: children born *before* 2006 to parents unlawfully in the country or on temporary visas became citizens automatically, but their counterparts born on or after the 1 January 2006 were not. Deportation went ahead in 38.9% of Tribunal cases

[101] These two values come through the Preamble of the UNCRC as the key rationales behind granting special rights to children.

[102] M.D.A Freeman *The Rights and Wrongs of Children* (F. Pinter, London, 1983) at 33.

[103] United Nations Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990), Preamble.

concerning citizen children, but in 76.9% of cases involving non-citizen children. The Tribunal is taking its cues from appeal cases, which have tended to place the focus on the duty of the state to acknowledge and protect *citizenship* rights, rather than general rights of all humans.[104] In the cases that result in deportation or de facto deportation of children themselves, the statistics are even more divergent with 25.0% of citizen and 78.9% of non-citizen deportations being affirmed.

There are increasing numbers of non-citizen children coming under the new Act that would have been citizens had it not been for the arbitrary law change. The increase is evidenced by the fact that deportations affecting citizen children made up 80.6% of decisions made under the 1987 Act but only 35.5% of 2009 Act decisions. It is the new class of non-citizen children that are particularly vulnerable. In light of a significant increase in non-citizen children who were born and raised their entire lives in New Zealand, you would expect a corresponding increase in successful appeals of deportations. Yet the rate of successful appeals for non-citizen children has stayed remarkably consistent relative to the increase, 25% under the new Act compared with 17% under the 1987 Act. This demonstrates that the courts are giving too much weight to citizenship itself, rather than the hardship inherent in deporting a child who has spent the majority or the entirety of their life in New Zealand.

[104] For example see *Ye v Minister of Immigration* [2008] NZCA 291 at [123].

2.3 Dual standards: Inconsistency in deportation processes

Inconsistency is also present between first instance deportation decisions and the humanitarian appeals of those decisions because the statutory provisions governing them are significantly different. The immigration official has far more discretion than the Immigration and Protection Tribunal with regards to balancing competing rights and interests. This makes children in deportations that are never appealed very vulnerable.

Appeals to the Immigration and Protection Tribunal on s 207 humanitarian grounds are available for all categories of deportation except where a person is deemed a risk to national security.[105] A person has only 42 days after first becoming unlawfully in New Zealand (i.e. when their visa expires) to appeal to the Immigration and Protection Tribunal.[106] Many overstayers are unaware of the appeal processes or choose not to appeal in order to enhance their chances of staying off Immigration New Zealand's radar. For other heads of deportation liability, appeals must be lodged within 28 days of being served a deportation liability notice.[107] These strict procedural requirements mean that the rights of many children affected by deportations will only be considered in relation to the minister's or immigration official's discretion to cancel deportation orders.

In practice, humanitarian interviews conducted prior to the execution of the deportation order guide the exercise of the discretion to cancel liability. The

[105] Immigration Act 2009, s 163.

[106] Immigration Act 2009, s 154(2).

[107] Immigration Act 2009, ss 155(4), 156(3), 157(4), 157(3), 159(2), 160(3), 161(2) and 162(2).

process was designed by the New Zealand Immigration Service, in the absence of any statutory direction to do so, as a direct response to the legal principle enunciated in *Tavita v Minister of Immigration*,[108] namely that a decision maker is required to have regard to relevant international treaties and conventions when exercising a discretionary power.[109] A specific questionnaire was developed with questions about the impact on children of the deportee, including whether they would return to the country with the parent or stay in New Zealand, and the sort of lifestyle they would face if they left with the deported parent. The questionnaire also sets out the important international obligations to be considered including the right of the child to appropriate protection as a minor,[110] acknowledgment of the family as the natural and fundamental unit of society,[111] and the obligation to give the best interests of the child a primary consideration.[112] While the development of this questionnaire was a step towards ensuring the interests of children are *considered,* it gives no formal guidance on what weight the child's interests should have in the process.

In *Ye v Minister of Immigration*, the Supreme Court read an implicit obligation into s 177 that the officer must exercise the discretion in a way that is consistent with the likely outcome if the deportation were appealed to the Immigration and Protection Tribunal. In other words the immigration officer must apply the

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[108] *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

[109] *Tavita v Minister of Immigration* [1994] 2 NZLR 257, at 266.

[110] International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 29 April 1997), art 24.

[111] International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 29 April 1997), art 23.

[112] United Nations Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990), art 3.

'exceptional circumstances' test of s 207, and if the test is met, liability for deportation should be cancelled.[113] This was considered necessary in order to ensure proper consideration of humanitarian issues where decisions could not be appealed, or where there have been material changes between consideration at the appeal authority and execution of the deportation order.[114] The Supreme Court decision was praised by commentators as "a principled approach"[115] and a "sensible, commonsense solution to a difficult issue."[116]

However, within months of the decision, Parliament amended the Immigration Act 2009 to reverse the Supreme Court's finding. Section 177(3) now reads as follows:

> (3) If an immigration officer does consider cancelling a deportation order… 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 s 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.

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[113] *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104, at [21].

[114] *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104, at [20].

[115] Peter Moses and Fraser Richards *Developments in Immigration Law* (NZLS CLE, Wellington, 2011) at 84.

[116] Tuariki Delamere "A Paper about the loss of citizenship rights of the NZ citizen children of overstayers" (2012), at 2.

Underlying the amendment was concern at the practical implications of requiring an immigration official to apply a "complex humanitarian test" just before deportation.[117] Although the amendment makes it clear that New Zealand's international obligations will be relevant to the exercise of the discretion, it gives no guidance as to how the official is supposed to approach the exercise. Requiring an immigration official to apply a clear statutory test with ample case law guiding its interpretation is far less complex than expecting them to come up with their own test that respects New Zealand's international obligations.

Cases arriving at the Immigration Protection Tribunal demonstrate that the dual standard is extremely problematic. Immigration New Zealand decided under the wide s 177 discretion that it was appropriate to deport the parents of 12 year old Hemani Mall, and 8 year old twins Gauran and Gagan, even though it would result in a choice between leaving the children parentless in New Zealand or having them live in an Indian slum without access to healthcare or education.[118] Fortunately, after the family went to the news media, the Minister of Immigration allowed them to lodge a humanitarian appeal outside of the 42-day time limit. Their appeal to the Immigration and Protection Tribunal will be successful and the parents will be allowed to remain

[117] (29 October 2009) 658 NZPD 7638, speech by Hon Nathan Guy during third reading of Immigration Bill.

[118] The children are inelgible for Indian citizenship and are therefore ineligible for public healthcare or education.

in New Zealand,[119] however this first instance decision raises concerns about all the families subject to similar decisions by immigration officials who are not able to appeal. Furthermore, the Mall family faces immense hardship until their appeal is heard. The parents are unable to legally work, so the family must rely on community charity for food, rent and the $550 fee for lodging a humanitarian appeal. They are living in a one-bedroom home to save money, and the children are terrified of the prospect of moving to a life of poverty in a country they have never known.[120]

Given the importance of the interests and rights at stake, and the fact that in many cases this process is the only way that they are considered, the legislative amendment seems incongruous. Parliament essentially legislated to create inconsistency between the standards on which first instance decisions and appeals are heard, while giving no suggestion whatsoever as to how the immigration official should balance the rights of the child with other considerations.[121]

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[119] These are truly exceptional circumstances of a humanitarian nature, and there is nothing to suggest it would be against the public interest for the family to remain in the country.

[120] Interview with the Mall family (Neighbourhood, series 1 episode 8, 17 June 2012) TVNZ <tvnz.co.nz/search/?view=all&requiredfields=type:media.format:full%20episode&partialfields=programme:neighbourhood&q=neighbourhood+video&tab=tvmedia&start=10&sort=date:D:S:d1>.

[121] Peter Moses and Fraser Richards *Developments in Immigration Law* (NZLS CLE, Wellington, 2011) at 86.

2.4 Conclusion

It is evident that New Zealand's law has an inconsistent approach to the child's rights side of the balancing equation. Countervailing interests will necessarily be weightier in areas such as immigration law, but it is still essential that processes be in place to ensure that children's rights are approached consistently between different policy areas, between first instance and appeal decisions, and without discrimination based on the immigration status of the child. The next chapter will consider the specific mechanism by which public interest considerations enter the balancing process and the relative weight they are given against children's rights.

Chapter Three: The Current Balancing Test

The test for determining humanitarian appeals of deportation decisions is found in s 207(1) Immigration Act 2009:

> The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that –
>
> (a) There are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and
>
> (b) It would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

3.1 The first limb: exceptional humanitarian circumstances

The first half of the s 207 test is the mechanism through which the rights of children enter into the decision on whether or not deportation should go ahead. A clear picture of all the personal and compassionate circumstances should be established before the public interest considerations are explored.[122] The majority of the Supreme Court considered that this test has three separate ingredients: 'exceptional circumstances,' 'of a humanitarian nature,' and 'that

[122] *Phillpott v Chief Executive of the Department of Labour* HC Wellington CIV 2005-485-000713, 21 October 2005, per Ronald Young J, at [64].

would make it unjust or unduly harsh for the appellant to be deported.'[123] I will assess whether these elements, as the judiciary are applying them, are providing sufficient commitment to the rights of the children.

"Exceptional circumstances"

The Supreme Court has held that for circumstances to be exceptional they "must be well outside the normal run of circumstances." Although they need not be unique or even very rare, they do have to be "truly an exception rather than the rule."[124] Hence, "circumstances which may cause difficulty, hardship and emotional upset to persons the subject of removal orders, or those associated with them, will not suffice to meet the statutory requirement unless the circumstances themselves or their consequences can legitimately be characterized as exceptional."[125] Doug Tennent has convincingly argued that the 'exceptional' element creates a presumption in favour of deportation.[126]

This 'exceptionality' requirement is incompatible with the 'commitment principle' outlined in Chapter One because it restricts the application of UNCRC rights to a minority of cases. Under Article 3, the best interests of the child affected by a decision must be a primary consideration in the balancing

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[123] *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [34].

[124] *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104, at [34].

[125] *Nikoo v Removal Review Authority* [1994] NZAR 509 at 514.

[126] Doug Tennent "Merging the categories of removal and deportation into one: is it really what we want?" Immigration Practitioners Bulletin (2007).

process. Even if a deportation only results in 'run of the mill' hardship for a child, that hardship should be part of the balancing process and might occasionally justify the appellant remaining in New Zealand if the competing interests in favour of deportation are particularly weak. Yet under the current s 207 test the interests of most children, far from being a primary consideration, will not even enter the balancing process.

That the 'exceptional circumstances' element decreases protection of children's rights is evident from a comparison of Tribunal cases under the 1987 and 2009 Acts. Deportation appeals arising out of a criminal conviction under the old Act were determined by a slightly different test, which omitted the 'exceptional circumstances of a humanitarian nature' element.[127] Deportation went ahead in 61.0% of the 41 cases decided under the 'exceptional circumstances test,' since January 2011,[128] but in only 42.9% of the decisions made under the 'non-exceptional' circumstances test.[129]

Children of New Zealand residents convicted of criminal offences are significantly more vulnerable under the newly reviewed deportation scheme. Under the 1987 Act these children's interests were always a part of the

[127] Immigration Act 1987, s 105(a): "the Tribunal may, by order, quash the deportation order if it is satisfied that it would be unjust or unduly harsh to deport the appellant from New Zealand, and that it would not be contrary to the public interest to allow the appellant to remain in New Zealand."

[128] This includes all decisions made under the new Act as well as the 'overstaying' cases under the 1987 Act.

[129] The statutory appeal test under the 1987 Act for deportations arising from visa fraud, breaches of visa conditions and criminal convictions do not include the 'exceptionality' requirement.

balancing exercise and as a result the parents were deported in only 47.1% of cases. There have only been two appeals of deportations arising from criminal convictions under the new Act's 'exceptional circumstances' test, and both have failed.[130]

Moreover, it is likely that many of the successful appeals under the 1987 Act would have failed to meet the 'exceptional circumstances' test of the new Act. In *Agau*,[131] a Samoan citizen with two New Zealand citizen children aged 13 and 9 was convicted of wounding with intent to cause grievous bodily harm and sentenced to five and half years imprisonment. The Tribunal found that the appellant's deportation was likely to have adverse emotional and psychological effects on the children because they would miss him and it would deprive the appellant of the "opportunity to positively influence his children's lives."[132] Given the very low risk of reoffending, this hardship on the children outweighed public interest considerations, leading the Tribunal to quash the deportation order. However, the emotional difficulties deportation would cause these children could not be considered 'exceptional.' This level of difficulty is to be expected in almost all deportation decisions, and therefore the children's best interests are unlikely to have been given any weight if it had been appealed under the 2009 Act.

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[130] *Loumoli v Minister of Immigration* [2012] NZIPT 500442; *Tiumalu v Minister of Immigration* [2012] NZIPT 500523.

[131] *Agau* [2011] NZIPT 500169.

[132] *Agau* [2011] NZIPT 500169 at [55], [61].

"Circumstances of a humanitarian nature"

This broad phrase allows the Tribunal to bring UNCRC rights into the balancing process. In practice, the Tribunal's focus is exclusively on Article 3 of the Convention. It is mentioned almost uniformly in cases concerning children,[133] although as discussed above, the 'exceptionality' requirement precludes its proper application.

The courts have made it clear that even where there are exceptional circumstances, the children's interests cannot be 'trump cards' and may well be outweighed by the need to control the border in certain ways.[134] The best interests of the child should not assume such prominence so as to enable the child to have his overstaying parents remain in New Zealand as long as childcare is needed.[135] However, the courts have acknowledged that it is important that the inquiry doesn't lower the consideration of best interests of the child from a primary to an equal consideration with other relevant factors.[136] So long as the Tribunal does indeed elevate the rights of the children to a special position over and above other concerns, these comments are compatible with the 'commitment principle.'

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[133] In *AK (Sri Lanka)* [2011] NZIPT 500142, a case concerning two children aged 17 and 11, the Tribunal failed to mention the Convention. Given the uniformity in the other cases this was probably an accidental oversight.

[134] *Al-Hosan v Minister of Immigration* [2008] NZCA 462 at [73].

[135] *Ding v Minister of Immigration* (2006) 25 FRNZ 568 (HC) at [257], per Baragwanath J.

[136] *M v Minister of Immigration* HC Wellington AP 84-99, 17 August 2000.

It is encouraging to see the Tribunal is taking a broad range of humanitarian factors into account when examining the children's best interests. These include whether the child would accompany the deported parent,[137] conditions they would face,[138] any health concerns or particular emotional vulnerability of children that may put them at special risk,[139] the level of attachment to parents,[140] the age of the children,[141] the length of time spent in and the level of integration into New Zealand society,[142] and the views of the child.[143]

"Unjust or unduly harsh for the appellant to be deported"

The majority in the Supreme Court held that the presence of 'exceptional circumstances' does not automatically make deportation 'unjust or unduly harsh'[144] requiring the court to additionally consider this as a separate element.[145] They have read 'unduly harsh' to mean that some harshness, even where it affects children, will be acceptable in order to preserve the integrity of

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[137] Removal Appeal No: 46937 [2009] NZRRA 10 (13 March 2009).

[138] *AC (Tonga)* [2011] NZIPT 500019, 49.

[139] *AC (Tunisia)* [2012] NZIPT 500396-397.

[140] *Edwards-Simerka* [2011] NZIPT 500186.

[141] *AD (Czech Republic)* [2012] NZIPT 500876.

[142] *De Moraes* [2011] NZIPT 500121.

[143] *Kumaran* [2012] NZIPT 500334.

[144] This judgment concerned s 47 Immigration Act 2009, but as the section is identical to s 207 of the new Act the court's reasoning is entirely relevant.

[145] *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104, at [37] – [38]. Elias CJ differed in her interpretation at [7], by reading "that would make it" to mean the necessary injustice or undue harshness derives from the very fact that exceptional circumstances exist.

New Zealand's immigration system.[146] 'Unduly harsh' creates a further impediment to the proper implementation of Article 3, by prematurely discounting many children's interests before weighing them with competing interests under the second limb of the test.

State complicity and the 'unjust' standard

The 'unjust' part of the standard incorporated by Parliament into the balancing test presents an opportunity for state complicity to be incorporated into the balancing process. Where the state has contributed to the hardship on children resulting from deportation, this would surely go to the justice of the deportation. However, the judiciary has been reluctant to allow the state's actions to factor into deportation decisions, and has tended to support deportations by shifting responsibility for the ensuing hardship to parents.

State complicity in the hardship of children is particularly evident where a child who is highly integrated into New Zealand society and who has developed a distinctly 'kiwi' identity is required to leave the country long after removal was first possible. The state's choice to limit the resources it puts into immigration enforcement and processes results in seriously increased hardship to children, and I contend that this must be relevant to an assessment of whether deportation is 'unjust.' Regrettably the judiciary has not shared my view on the

[146] *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 [35].

interpretation of this element. Consider the following example involving a long delay before deportation, significantly increasing hardship:

> In 1998 a Samoan family with three young children (aged six years, two years and two months) arrived in New Zealand on visitors visas. They remained in New Zealand unlawfully for around six years during which time a fourth child was born. After six years a further one-year visitor visa was granted by the minister, followed by another period of remaining in New Zealand illegally and another temporary visa. In early 2008, the family began the appeal process and was finally deported over 14 months later. By the time of deportation the children were aged 16, 12, 10 and 5.[147]

The root cause of the hardship in this situation is not the removal from New Zealand itself. If the children had been removed when the family's visas first expired they would have easily adapted to life in Samoa. However, because Immigration New Zealand was unable or unprepared to deport the family during the six years they were unlawfully in New Zealand, and because of the extended period of discretionary visas and appeals, these children spent ten years developing New Zealand connections and identities. It is the delay (principally attributable to state inaction and sluggishness) rather than the deportation itself that would have made the move to Samoa so distressing to the children, yet the delay factor was not even considered in the balancing process. In this situation I contend that deportation should be considered unjust. The Removal Review Authority, however, confirmed the deportation and after

[147] Removal Appeal No: 46937 [2009] NZRRA 10 (13 March 2009).

almost eleven years in New Zealand, the family was ordered to leave within seven days.[148]

Another missed opportunity to consider the injustice of state appeal delays was the Supreme Court decision of *Huang v Minister of Immigration*[149] which concerned whether the humanitarian interview approving deportation of a mother had adequately considered the interests of her son, nine-year-old, New-Zealand-born Jarvis. At the time that Jarvis' interests against deportation were considered before the Removal Review Authority he was only two years old. Almost three years passed before a humanitarian interview was held in anticipation of deportation but the immigration officer declined to reassess the increase in Jarvis' age as a relevant factor. The Supreme Court approved the assessment of Jarvis' interests at the humanitarian interview, stating that the increase in age was not "a material factor" requiring new consideration.[150] Because of the court's unwillingness to adjust their assessment in light of huge delays in the appeal process, de facto deportation of nine-year old Jarvis went ahead based on an assessment of his humanitarian interests when he was only two years old. Given that the interests of a boy who has spent nine years developing a New Zealand identity and connections would undoubtedly hold more weight than his interests at age two, this decision cannot possibly have factored his interests into the decision appropriately.

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[148] Removal Appeal No: 46937 [2009] NZRRA 10 (13 March 2009) at [32].

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

[150] *Huang & Ors v Minister of Immigration & Anor* [2009] NZSC 77, [2010] 1 NZLR 135 at [6].

Abdication of state responsibility for deportation of children is another feature of the judiciary's approach to deportation appeals. It cannot be said that a parent's decision to relocate a young citizen child to a lower standard of living is a free choice, where the alternative of leaving him or her parentless in New Zealand is likely to be far more traumatic. De facto deportation is in reality the only acceptable option, and thus it can be said that it is imposed on the family by the state.[151]

The courts have not been responsive to this idea. For example, the argument that it is "disingenuous" for the state to deny responsibility for de facto removal of the child was raised and promptly rejected in the Supreme Court.[152] The judiciary has instead tended to view the removal of a child from New Zealand in de facto deportation situations as a clear decision made by the child's parents.[153] In another case in which the Tribunal confirmed deportation of a Tunisian family, the court suggested that the significant challenges faced by the child in adapting to Tunisia were due to the parent's frequent moves between countries *prior* to entry into New Zealand, rather than deportation after two years of the child living in New Zealand.[154] The judicial approach to this issue reflects a general lack of responsibility to the state's role in creating hardship for children, and a willingness to pass the blame onto parents.

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[151] Doug Tennent *Immigration and Refugee Law* (LexisNexis, Wellington, 2010) at 358.

[152] *Huang & Ors v Minister of Immigration & Anor* [2009] NZSC Trans 74 at 84.

[153] For example see Removal Appeal No: 47367 [2010] NZRRA 105 (8 September 2010) at [28]; *Schier v Removal Review Authority* [1999] 1 NZLR 703 at 709.

[154] *AC (Tunisia)* [2012] NZIPT 500396-397 at [53].

Judicial conflation of the two limbs

Another problematic judicial trend is the use of public interest considerations in determining the harshness or unjustness of deportation. The tribunal has held that the gravity of fraud or offending is a significant consideration in weighing whether humanitarian circumstances render a deportation unjust or unduly harsh.[155] These factors do not have a bearing on the harshness or unjustness of the deportation where a dependent child's interests are involved. Deportation may not be unduly harsh *on the appellant* where he has committed serious crime that significantly harmed the New Zealand public. However the fraud or crime should not have a bearing on whether the parent's deportation is unjust or unduly harsh in its effects *on the child*, because the child is innocent of any wrongdoing.

Of course, public safety may well justify deportation, particularly where the appellant is at a high risk of reoffending. Nonetheless I contend that the 'humanitarian circumstances' limb is not the appropriate place for these factors to enter the equation. Fraud or crime of the parent undoubtedly creates weightier public interests against which the child's circumstances must be balanced, but it is untrue to say that a parent's crime or fraud reduces the weight of the child's humanitarian circumstances. A mixing of humanitarian and public interest factors in this way fails to recognise the special status of rights and "undermine[s] an effective balancing exercise."[156] Moreover, this current

[155] *Galanova v Minister of Immigration* [2012] NZIPT 500426 at [50].

[156] Doug Tennent *Immigration and Refugee Law* (LexisNexis, Wellington, 2010) at 343.

mingling of the two is out of line with the drafting of the two-limbed test with its separate 'humanitarian circumstances' and 'public interest' paragraphs.

3.2 The second limb: public interest

> s 207(1)(b): it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

This second limb provides the appropriate mechanism for including public interest factors in the balancing process, both those in favour of and those against deportation. The negative phrasing of the second limb establishes a less stringent test that falls short of requiring proof that it is in the public interest for the appellant to remain.[157] Nonetheless, on a literal interpretation, the wording of this limb creates a potential problem in the weighting of rights as against public interest considerations. Far from giving special weight to rights in accordance with the Commitment Principle, the requirement that deportation not be contrary to the public interest gives rights less weight than the public interest. Rights may be breached in pursuit of maximizing public utility, but protection of rights will only go ahead if it is not contrary to public interest.

The potential harshness of the wording has been diminished by the judiciary interpreting 'public interest' to include a commitment to rights. *Zanzoul v Removal*

[157] *Zanzoul v Removal Review Authority* (High Court, Wellington CIV 2007-485-001333, CIV 2008-485-000854, CIV 2008-485-000855, 9 June 2009), at [152].

Review Authority[158] held that concern for the wellbeing of others contains an inherently public element and thus should be included in the public interest limb.[159] In fact, international human rights obligations and the general interest in family unity have made it into most Tribunal cases assessing the 'public interest.' For example, in *Loumoli v Minister of Immigration* the Tribunal concluded, "it must be in the public interest that a family with established roots in this country should be permitted to stay, and to stay together, and that international conventions to those ends are respected."[160]

Evidently the limb can be interpreted in a way that takes account of and protects children's rights. However, it is difficult to see in practice how the court has balanced public interest factors for and against deportation because the first 'exceptional humanitarian circumstances' limb is so dominant. Of the 41 IPT cases since January 2011 that involved children and were decided under the exceptional circumstances two-limbed test, the first limb was determinative in every single case. As noted earlier, this is probably because public interest considerations were inappropriately considered under the first limb. In cases where the 'exceptional circumstances' limb was not met, a consideration of public interest was not necessary,[161] but in all sixteen of the decisions in which

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[158] *Zanzoul v Removal Review Authority* (High Court, Wellington CIV 2007-485-001333, CIV 2008-485-000854, CIV 2008-485-000855, 9 June 2009).

[159] *Zanzoul v Removal Review Authority* (High Court, Wellington CIV 2007-485-001333, CIV 2008-485-000854, CIV 2008-485-000855, 9 June 2009) at [177].

[160] *Loumoli v Minister of Immigration* [2012] NZIPT 500442.

[161] In three of these cases, the Tribunal decided to consider the public interest for the sake of fullness. It was found to be contrary to the public interest for the appellant to remain in New Zealand in all three.

exceptional circumstances were found, the Tribunal further ruled that it would not be contrary to the public interest for the appellant to remain.

The rate of deportation under different heads of deportation liability is one way to assess how the Tribunal balances children's rights against other factors. Deportation went ahead in 62.2% of deportation appeals arising out of a person being unlawfully in New Zealand, compared to 52.6% of deportation appeals arising out of an appellant's criminal offences. A comparison of criminal conviction and overstaying cases provides some surprising results. Convicted appellants have successfully appealed deportation liability despite convictions for multiple counts of arson,[162] wilful neglect of a child,[163] wounding with intent to cause grievous bodily harm,[164] assault with a stabbing instrument[165] and performing an indecent act on a female aged under 12.[166] Most of these appellants were considered to have risk of reoffending, albeit not high. By contrast, Ramandeep Singh failed in his appeal of a deportation arising from a single day vegetable picking in breach of his visa conditions. This was despite having a three-year-old daughter who had been in New Zealand for almost half her life.[167] The only real public consideration involved here (aside from family unity) is the general interest in preserving the integrity of the immigration system by dissuading people from working without the correct visa. Thus the balancing

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[162] *Campher v Minister of Immigration* [2012] NZIPT 500077.

[163] *Fakapulia v Minister of Immigration* [2012] 500162.

[164] *Agau* [2011] NZIPT 500169.

[165] *Garnie v Minister of Immigration* [2011] NZIPT 500269.

[166] *Motuliki v Minister of Immigration* [2012] NZIPT 500069.

[167] *Jawanda* [2012] NZIPT 500305.

in this decision seems inconsistent with the decisions to allow convicted appellants to remain in New Zealand in the face of real risks of reoffending.

The reason behind this surprising inconsistency is immigration status. The criminals above were permanent residents, whereas Mr. Singh was an illegal overstayer. Rather than looking objectively at the hardship on the children involved, the courts emphasise the parents' blameworthiness in creating that hardship. Decision makers consider that a permanent resident, having relied on his or her ability to remain in the country, has legitimately taken steps to create a stable life in New Zealand, including having children and establishing community networks.[168] Conversely, overstayers with children are viewed as irresponsible and less deserving of the court's mercy. Wherever innocent children are involved, this approach is inappropriate. The child's best interests should be considered objectively and given consistent weight, regardless of the parent's immigration status or actions.

3.3 Conclusion

The interests of children are frequently excluded from the balancing as a result of the 'exceptionality' requirement under the first limb. Furthermore, the application of the test tends to significantly disadvantage non-citizen children, which is a growing problem in light of citizenship changes. Once an appellant does satisfy the humanitarian limb of the test, they will normally be able to

[168] Doug Tennent *Immigration and Refugee Law* (LexisNexis, Wellington, 2010), at 393.

satisfy the public interest limb. Nonetheless this does not reflect a commitment to the proper weighting of rights so much as the judiciary inappropriately conflating the humanitarian and public interest considerations under the first limb of the test. An examination of the Tribunal case law suggests that the vague interest in maintaining the integrity of the immigration system is being given disproportionate weight against human rights considerations.

Chapter Four: Solutions

Thus far it has been demonstrated that New Zealand's legal framework for deportations provides inadequate protection of children's interests. The current law is plagued with unjustifiable inconsistency. The interpretation of a child's rights differ depending on whether they are dealt with under family law or immigration law, whether the child is a New Zealand citizen or unlawfully in the country and whether or not the child's parents appeal the first instance decision. Furthermore, the 'exceptionality' requirement in the current balancing test frequently excludes the child's interests from the equation altogether, and the public interest limb subordinates the child's rights as less important than the public interest.

The way forward is to create a child-focused approach to deportation decisions that demonstrates commitment to the rights of the child as defined by the UNCRC. By this I mean that children cannot be treated in the same way as adults are, but require special protection in recognition of their vulnerability. Deportation law must be structured in a way that ensures the child's interests are given a primary weighting in decisions that affect them, and that all children are treated with dignity and respect through deportation processes.

I propose that Parliament amend the Immigration Act 2009 to include a specific provision for deportations directly affecting children:

S207A: Deportations involving children

(1) This subsection applies to decisions made by an immigration officer, the Minister of Immigration, the Immigration and Protection Tribunal and appellate courts concerning orders for the deportation of
    (a) A child or children who are under the age of 18
    (b) A parent or parents who have day-to-day care or access to a child or children in New Zealand
(2) For decisions to which subsection (1) applies, the decision maker must not confirm or execute a deportation order if
    (a) There are humanitarian circumstances making it unjust or harsh for deportation from New Zealand to occur; and
    (b) Allowing the person to remain in New Zealand is not disproportionate to the public interest
(3) For the purposes of (2)(a), the decision-maker must have regard to the following principles
    (a) Where a child's welfare and best interests are promoted by the person liable for deportation remaining in New Zealand, it will generally be harsh for deportation to occur
    (b) In determining what promotes the welfare and best interests of the child, the decision maker must have regard to
        i. The views of the child, and
        ii. New Zealand's international obligations, in particular article 2, 3, 10 and 12 of the United Nations Convention on the Rights of the Child, and
        iii. The safety of the child, and
        iv. The length of time the child has spent in New Zealand, and
        v. The level of integration of the child into New Zealand society, and
        vi. The strength of the relationship between the child and parent
    (c) Where a parent is liable for deportation but the child is not, the court must additionally have regard to
        i. Whether the child would remain in New Zealand or leave with the parent, and

ii. If the child would leave New Zealand, the standard of living the child would experience in the destination country and the ability of the child to adapt to the destination country

(4) For the purposes of (2)(b), the decision-maker must have regard to the following principles
   (a) The child's welfare and best interests shall be a primary consideration
   (b) The stronger the child's interests in remaining in New Zealand with his or her parents, the stronger the public interest factors that will be required to make it disproportionate to cancel deportation liability
   (c) More than a general interest in protecting the integrity of the immigration system is required to justify deportation where (2)(a) circumstances are present
   (d) Where state action or inaction since deportation liability first arose has significantly and unnecessarily increased the hardship of deportation on the child, exceptional public interest factors will be required to make cancellation of deportation disproportionate to the public interest

(5) Decisions to which subsection (1) applies should be made and implemented within a time frame that is appropriate to the child's sense of time

(6) In decisions to which subsection (1) applies, a child must be given reasonable opportunities to express views on matters affecting the child; and any views the child expresses (either directly or through a representative) must be taken into account.

This provision has the potential to ensure consistency of protection for children affected by deportations and to demonstrate a commitment to the rights of the child by creating a balancing process that significantly decreases the level of hardship that children can be expected to bear in the pursuit of Immigration New Zealand's goals.

4.1 Achieving consistency

Harmonising the treatment of children within New Zealand is absolutely crucial to compliance with the UNCRC and its non-discrimination principle. The proposal above takes steps to addressing inconsistency in the law by incorporating family law principles into deportation decisions and creating one standard to be applied by all decision-makers.

Incorporating family law principles

Family law in New Zealand reflects the view that the protection of children's rights ought to be taken seriously. The Care of Children Act 2004 provides a model for successful incorporation of the principles of the UNCRC into domestic legislation and the proposed amendment above draws heavily on its framework.

Subsections (5) and (6) of the proposal require that children's views be heard and taken into account, and that the processes of appealing the deportation be made in child-appropriate time frames. The wording of these is lifted directly from the Care of Children Act 2004.[169] It is absolutely essential that procedural requirements designed to ensure the child is treated with respect and dignity are consistent across decisions that have such a big impacts on the children involved.

[169] Care of Children Act 2004, ss 4(5)(a) and 6(2) respectively.

Reference to the child's welfare and best interests in the above proposal and mandatory considerations in determining what best promotes the child's welfare and best interests are also inspired from the Care of Children Act 2004.[170] These provisions provide guidance to the judiciary to ensure that the child's best interests are always thoroughly considered.

There is one major inconsistency between my proposal and the Care of Children Act 2004. In proceedings involving the guardianship, day-to-day care or contact with a child the welfare and best interests of the child must be "the first and paramount consideration."[171] The above proposal instead conforms to the lower standard found in article 3(1) of the UNCRC, that the child's interests shall be *a* primary consideration.[172] This lower standard is appropriate in the immigration context because occasionally there will be other factors, for example national security or imminent threats to public safety, that cannot be subordinated to the child's interests in remaining in New Zealand with both parents. This is consistent with the standard used in international child abduction cases,[173] a rare area of family law that occasionally involves public interest factors that weigh against the child's best interests. The judiciary has justifiably rejected the notion that a child's interests assume such prominence as to always allow parents to remain in New Zealand as long as the child requires

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[170] Care of Children Act 2004, ss 4(5)(b) and 5.

[171] Care of Children Act 2004, s 4(1). N.B. Baragwanath J in *Ding v Minister of Immigration* (2006) 25 FRNZ 568 rejected the argument that the paramountcy principle impliedly covered immigration matters concerning children.

[172] In subsection (4)(a) of the above proposal.

[173] Care of Children Act, s 4(7).

care,[174] and have refused to impliedly extend the paramountcy principle of the Care of Children Act 2004 to deportation decisions.[175] "*A* primary consideration" is sufficient to meet New Zealand's international human rights obligations and provides a workable compromise with the other important interests at stake in immigration matters.

One standard for all decision makers

Under the existing deportation process, the s 207 balancing test is applied only where a decision is appealed, with immigration officers at the lower level having the discretion to make any decision as they think fit.[176] Although in practice the humanitarian interview ensures the rights of affected children are *considered*, these low-level officials are given no guidance on the appropriate *weight* of the child's rights. Subsection (1) of the proposal remedies the inconsistency between the first instance decision and appeal by making it clear that the new balancing standard applies to all people and judicial bodies that have the power to cancel liability for deportation. This ensures that the rights of the child will always be given weight in the decision, regardless of whether or not the first instance decision to deport is appealed.

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[174] *Ding v Minister of Immigration* (2006) 25 FRNZ 568 (HC) at [257].

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

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

Protecting Children unlawfully in New Zealand

It has been demonstrated that children unlawfully in New Zealand are systematically discriminated against under the current deportation framework. Firstly, New Zealand has maintained a discriminatory reservation to UNCRC that allows it to withhold the rights from children unlawfully in New Zealand. Although practically speaking the interests of these children have been considered in virtually all cases, we are yet to see the implications of the Supreme Court direction that the reservation is relevant to decisions concerning overstaying children.[177] Furthermore, a review of Immigration and Protection Tribunal decisions from 2011 and 2012 suggests that citizenship is given a primary position in the balancing process at the expense of children unlawfully in New Zealand and the new class of non-citizen children born in the country.

The first step is for the New Zealand government to withdraw its reservation to the UNCRC regarding children unlawfully in New Zealand. This would bring New Zealand in line with the rest of the OECD and would send a message that all children in our jurisdiction deserve rights protection, not by virtue of charity, but because of their inherent human dignity and unique vulnerability.

A second option to increase rights protection would be to harness the judicial enthusiasm for protecting citizens by extending citizenship to a greater number of children. The repeal of automatic birthright citizenship is part of a global

[177] *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24].

trend aimed at reducing the incentive for overstayers to have children.[178] Children born to overstayers in the United Kingdom[179] and Australia[180] no longer have automatic citizenship, however both these countries put an additional protection in place for the new class of non-citizens born in the country. Where a non-citizen child is born in Australia or the United Kingdom and lives in that country for the first ten years of his or her life, he or she becomes entitled to citizenship regardless of the immigration status of his or her parents.[181]

Incorporating a similar provision into New Zealand's Citizenship Act 1977 would be an appropriate step towards protecting children born to overstayers and temporary visa-holders. It would send a message that a child who has spent a significant amount of time in New Zealand has a strong moral claim to remain in the country, and it would also create an incentive for Immigration New Zealand to avoid long delays before executing deportation orders.[182] While the Australian and British provisions are an improvement on New Zealand

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[178] Peter Moses and Fraser Richards *Developments in Immigration Law* (NZLS CLE, Wellington, 2011) at 83.

[179] British Nationality Act 1981 (UK), s 1(1) requires that one parent be a citizen or settled in the United Kingdom for a child to acquire citizenship by birth in the United Kingdom.

[180] Australian Citizenship Act 2007 (Cth), s 12(1)(a) requires one parent to be an Australian citizen or permanent resident for a child to automatically acquire citizenship by birth.

[181] Under s 1(4) of the British Nationality Act 1981, this can happen where the child has not spent more than 90 days outside of the United Kingdom during those ten years and under s 12(1)(b) of the Australian Citizenship Act 2007 the child is eligible for citizenship where he or she has been "ordinarily resident" throughout the ten years.

[182] As noted in Chapter 2 and 3, it is often the delays more than the actual deportation that causes significant hardship to children because the child becomes more integrated into New Zealand society with every month that passes.

citizenship law, they are not particularly effective at targeting the hardship experienced by children. The provisions protect a child who has lived unlawfully in the United Kingdom since birth, but not where they arrive at the age of two months old, despite the fact that the hardship involved will be very similar. New Zealand should explore the idea of granting citizenship to any child who has lived continuously in New Zealand for a specified number of years[183] in order to minimize the arbitrariness of protection by virtue of the citizenship factor.

4.2 A new balancing test

I propose a method of balancing the rights and interests at stake that aims to ensure children's interests are always given weight in deportation decisions that affect them:

> (2) For decisions to which subsection (1) applies, the decision maker must not confirm or execute a deportation order if
>
> (b) There are humanitarian circumstances making it unjust or harsh for deportation from New Zealand to occur; and
>
> (c) Allowing the person to remain in New Zealand is not disproportionate to the public interest

There are two main differences with the existing balancing test in s 207 Immigration Act 2009. Firstly, my proposal removes the 'exceptionality' requirement to ensure that children's interests aren't prematurely excluded from

[183] A thorough discussion of this proposal is outside the scope of this dissertation. However I suggest that after five years of a child living continuously in New Zealand, it may be appropriate to grant them citizenship. Five years is a long period in a young person's lifetime, during which they develop significant links to the culture and community they are immersed in.

the balancing process. Secondly, a proportionality test replaces the old requirement that it not be contrary to the public interest to allow the person to remain. These differences are necessary to give children's rights any real weight in the decision.

Removing exceptionality

The current requirement in s 207 that circumstances be 'exceptional' before deportation liability can be cancelled inappropriately excludes the interests of many children from the balancing process. By removing the words 'exceptional' and 'unduly' from the humanitarian circumstances limb, the proposed amendment allows for far lower levels of hardship on children to enter into the balancing equation. Proposed subsection (3)(a) gives a direction that where a parent remaining in New Zealand promotes a child's best interests, this first limb will generally be met. This ensures that even hardship that is extremely common in deportation (such as anxiety at being separated from a parent) will be weighed against public interest factors in the second limb of the test.

A Proportionality Test

The existing s 207 allows cancellation of deportation liability only where it is not contrary to the public interest. I propose that where deportations involve children, a far less stringent test should be applied. Subsection (2)(c) of the proposed amendment requires deportation liability be cancelled where allowing

the person to remain in New Zealand is not disproportionate to the public interest. Implicit in this proportionality test is the idea that the public will be required to bear some cost in order to protect children's rights. Subsection (4) of the proposed amendment provides principles to guide the judiciary's exercise of this balancing test in a way that ensures the child's interests are given substantial weight in the balancing exercise, rather than mere consideration. If this proportionality test were to be adopted I would expect the percentages of successful appeals to go up, particularly for non-citizen children and appeals of deportations arising from overstaying.

Application of the test

Applying the proposed proportionality test to some examples mentioned earlier demonstrates its ability to tip the balance in favour of the children's interests:

(1) The children of the overstaying Tuvaluan family - although facing the sort of hardship that is implicit in all deportations - would have had their interests properly balanced against the state's interest in discouraging overstayers. The children's high level of integration in New Zealand, and their kiwi identities developed after five years living in the country would justify cancellation of deportation liability.

(2) The child with the Tongan father who faced deportation for manslaughter would have had the chance to express views on the matter and have them taken into account. However, given the high risk of reoffending and minimal difficulties on the child, cancelling deportation would have been disproportionate to the public interest.

(3) Hemani Ram and her twin brothers would have had their interests properly weighed up from the first time Immigration New Zealand considered their case, and their parents would have immediately been granted residency visas allowing them to work and support the family.

(4) The Samoan family forced to leave New Zealand within a week after almost eleven years of discretionary visas and appeals would almost certainly not have been deported under this test. Immigration New Zealand would have had to prove exceptional public interest factors to deport in light of the state's complicity in creating the hardship on the children.

While this proposal gives strong cues to the judiciary that children's rights need to be taken seriously, alone it is not enough to protect these children. It is absolutely crucial that decision makers, the Tribunal and the courts commit to upholding the rights of children and applying them in a consistent, non-discriminatory manner.

Conclusion

This dissertation has analysed how New Zealand's newly reviewed immigration legislation protects the rights of children in deportation processes. Despite the rights of individuals having a prominent place in the Act's stated purpose, the existing balancing test fails to uphold UNCRC rights by excluding the interests of many children from the balancing test altogether, and where included, subordinating these interests to utilitarian public concerns. Moreover, New Zealand has maintained a discriminatory reservation that denies UNCRC rights to children unlawfully in the country, even after legislating citizenship changes that create a growing class of children falling within this category from birth.

These children are some of the most vulnerable members of New Zealand society. It is absolutely vital that immigration law be structured to promote a consistent commitment to their rights. The above proposals, including a special proportionality test where children's rights are engaged, would bring deportation law in conformity with the UNCRC by ensuring that children are treated with dignity and respect during deportation processes, and that their interests are given a primary weighting in deportation decisions. These children deserve nothing less.

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