IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 25/2023
[2023] NZSC Trans 18

ELIZABETH MARIA BOLEA

Appellant

v

THE KING

Respondent

Hearing:	31 October 2023
Court:	Glazebrook J O'Regan J Ellen France J Williams J Kós J
Counsel:	A J Bailey, E Huda, R J T George and A G F Lange for the Appellant M J Lilico, R M A McCoubrey and M C M Nash for the Respondent

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CRIMINAL APPEAL

MR BAILEY:

May it please your Honour. Bailey is counsel's name. I'm here alongside Mr Huda, Mr George and Mr Lange as counsel for the appellant.

GLAZEBROOK J:

Tēnā koutou.

MR MCCOUBREY:

E nga Kaiwhakawā, ko McCoubrey ahau. Kei kōnei mō ko Nash, mō te Karauna. May it please the Court. McCoubrey together with Ms Nash on behalf of the Crown as respondent.

GLAZEBROOK J:

Tēnā korua. Mr Bailey. We'll take the adjournment at 10.30 and we thought you'd probably be finished around 10.30?

MR BAILEY:

I think that would be right your Honour, thank you.

GLAZEBROOK J:

I mean obviously we won't totally hold you to that if you've got five minutes or so after the adjournment then that'll be fine as well, but so we aim for finishing by the adjournment at 10.30.

MR BAILEY:

Yes. In terms of this appeal, your Honours, obviously it centres around the course...

GLAZEBROOK J:

Can you perhaps you bring that around, otherwise it doesn't go through to the transcript, thank you.

MR BAILEY:

Sure, yes. The appeal centres of course around the application of section 107 of the Sentencing Act 2002 and in particular how that applies or should apply

to the appellant's position. As such, and in accordance with the usual practice adopted by both sentencing in appellate courts in relation to section 106 cases, the appellant is proposing to address the Court in accordance with the usual stepped approach, which is usually undertaken as part of the section 107 assessment stage. Because I'll be dealing with the direct and indirect consequences of a conviction aspect of the section 107 test, it is proposed that I will begin with that. I appreciate sometimes the cases usually begin with the gravity of the offending, and Mr Huda, closest to me, will deal with the remaining aspects of the submissions. I should just add to that that I will not be focusing on the factual matters, or the factual consequences as they apply to the appellant's situation. Mr Huda will deal with that as part of the proportionality assessment.

We've provided to the registrar an outline of oral argument. That just pertains to my part of the appellant's submissions, rather than Mr Huda's. He's not using one. I appreciate the Court wouldn't have had any or little time to review that, and subject to any questions, of course, and the direction the hearing takes, I'm intending to largely stick to this and go through matters in the order they're set out in the synopsis.

KÓS J:

Can I just say to you Mr Bailey that this being the Supreme Court the question is really what section 107 means rather than what the Court of Appeal has said it has meant in somewhat divergent ways over a period of years. Do you understand my point?

MR BAILEY:

Well I do particularly given this, well, this is the first section 106 case to go to this Court, yes.

KÓS J:

Quite.

MR BAILEY:

So paragraphs 1, 2 and 3 set out matters which I say are settled law which, as we've said in the appellant's written submissions, we are not seeking to revisit. Just briefly, and taking into account your Honour's comments just then, in the paragraph 1 where I've referred to *Maraj v Police* [2016] NZCA 279 somewhat unusually the defence or the appellant, being the defendant, took issue at the Judge making a somewhat accurate assessment of risk of deportation. So the Court of Appeal was deciding whether that was something that could be done and as per that quote they said that's a legitimate part of the proportionality exercise, which is obviously consistent with the way we're advancing this case.

So the higher likelihood of an adverse outcome, proceeding to paragraph 2, the more significant the consequence will be, we say, all other things being equal. As we've said in the written submissions anything that could reduce the prospect of deportation applying a use of a principle where it's not just the consequence that could eventuate, but the likelihood of it, any reasonable alternatives that could lead to the avoidance of deportation we therefore accept right from the outset are relevant to the assessment exercise.

I turn to paragraph 4 and Mr George, who I think is operating the equipment, can turn to page 20 of the respondent's bundle of authorities. So this is the case, the *Truong v R* [2023] NZCA 97 case, which obviously made its way to this Court in the form of a leave application recently, and it's helpful to look at paragraph 56 of that decision on page 20, for the submissions that will follow that I intend to advance. So I'm referring to the Court of Appeal judgment, not this Court's leave decision. It appears to be highlighted, I didn't expect that, but those are the passages that I was going to focus on. Comments that we've highlighted are comments that are very frequently seen in section 106 cases of this nature.

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So essentially when there's an assessment as to the possible consequences, these sort of comments feature, such as well these assessments about whether

a person should be there to stay or not in the relevant country are best considered by the Minister and related to that, the second part we've highlighted, the case will be determined on its merits.

Now just to add to that theme, and I'm referring to paragraph 4 in *Zhang v Ministry of Economic Development* HC Auckland CRI-2010-404-453, 17 March 2011, so paragraph 4 of my written synopsis, a similar sort of comment: "There is nothing that requires the courts to intervene to try and impose their perception of what the right immigration consequence should be. That is best left to the immigration authorities." Now for what it's worth the next bit down on my synopsis is that the *Rahim v R* [2018] NZCA 182 quote –

ELLEN FRANCE J:

Sorry, just in terms of paragraph 56, that's in the consequence, sorry in the context of the Court of Appeal in that case at 55, treating liability to deportment as a consequence but not one that's out of all proportion?

MR BAILEY:

Yes, that's…

ELLEN FRANCE J:

So you're agreeing with that approach?

MR BAILEY:

I'm agreeing with the approach albeit I'd say it suffers from some defects in terms of the comments we see now where there's a preference to leave it to someone else but I intend to –

ELLEN FRANCE J:

But that's more of a factual question, isn't it?

MR BAILEY:

Yes, and I think I'm going to cover both matters.

GLAZEBROOK J:

Can you perhaps just bring the microphone…

MR BAILEY:

Sorry.

GLAZEBROOK J:

Thank you. I think you were coming through anyway but just in case because we're never quite sure how…

MR BAILEY:

So my point or the appellant's point is this. It may well be the best and appropriate outcome and the legally right one to leave it to Immigration but there's only one way you should get there, and that's the bit that I've put in bold, in cases like this it's the outcome of the proportionality assessment we say that determines whether or not matters are considered by the Minister or best left to Immigration authorities because if everyone is on the same page the appellant cannot be deported or there's no risk of that or exposure to it unless a conviction is entered or was entered.

So the criticism that we advance in relation to this is often the gravity is assessed and there's not normally too many fundamental errors particularly in recent times with relevant mitigating and aggravating factors including personal mitigating and aggravating factors taken into account. Then there is a heading usually "Consequences of a Conviction" and there's a discussion and often it involves discussion of expert evidence. And that's when often, more often or very frequently, Judges will start saying this is best left to the Immigration and, like I've just said, that could be the end outcome but the way to tell is the proportionality section 107 test. It works it out for you. It essentially does all the heavy lifting. You still have to make an assessment as to the consequence, level of consequence, and the gravity, of course, and if the scales are tipped out of all proportion then it will be a case of saying actually it's not the best

outcome for Immigration to consider this. That's a case where I have to or I should exercise the section 106 power and not discharge her – and discharge her without conviction.

WILLIAMS J:

So the proportionality is between exposure to an Immigration New Zealand assessment and the gravity of the offending, not deportation and the gravity of the offending?

MR BAILEY:

So we're arguing it could be both but exposure per se, i.e., the ability for Immigration to issue a deportation liability notice, exposure per se without going into an assessment how likely it will actually follow onto deportation is not a significant consequence and in most cases there's been very few, that's most cases, it's not seen as sufficient to meet a section 107 test.

WILLIAMS J:

But what I'm asking you is what is the proportion, what are the two things sitting each side of the scales of proportionality?

MR BAILEY:

Yes, the gravity –

GLAZEBROOK J:

Can you just perhaps, maybe the way to deal with it is, what test would you apply or I could understand a submission that says well it really depends on the factual context but it would be useful for us if you could say well they were using this test and that it's wrong and this is the test I say.

MR BAILEY:

Yes, well what the Courts have done, and perhaps in the *Truong* decision, is they've watered down the consequence of a conviction when that's been assessed, not so much on the basis that options to avoid deportation significantly reduce the risk of deportation, but the fact it's preferable the Courts

have seen for Immigration to deal with the case. So essentially they've decided too early on who should be dealing with deportation decision.

GLAZEBROOK J:

And what should they have done?

MR BAILEY:

They should – it's such a simple test we say, you assess the gravity, you assess the consequences, if an appellant is putting or a defendant is putting forward the mere exposure to deportation, then that is what we would say relatively low-level consequence.

GLAZEBROOK J:

So is the gravity of the offending against whatever the consequences are and the consequences you say can take into account the likelihood of deportation and the significant effects that could arise from that?

MR BAILEY:

Yes.

GLAZEBROOK J:

Thank you.

KÓS J:

So can we just follow that up. We're not the deporting authority so we have to look at deportation just as we would look at loss of employment, just as we would look at the consequence of a child that has no other family support and we'd have to surely say well what are the probabilities of that and what are the consequences of that. The probability of deportation can never be taken as 100% because there's a discretion so what are we – how do we weigh what can only ever be exposure to deportation, not inevitability of deportation?

MR BAILEY:

Yes, in some cases I say the Courts, it will simply be too hard, it's too borderline to give a precise estimation of likelihood. I mean there's many cases, and we've referred to some, where the Court of Appeal, again accepting your Honour's comments earlier, the Court of Appeal have said: "We accept the expert evidence. It's very likely you'll be given this notice and it's unlikely you'll meet the appeal threshold." So in some cases whether that's because little or no expert evidence has been offered by either side because, of course, the Courts can't generally make the parties provide helpful information. It may just be a case of coming back and saying well there's certainly a real and appreciable risk that you could be deported and it may not go higher than that.

GLAZEBROOK J:

And then you'd assess the consequences if they were, I think you're saying, and the seriousness of those consequences if they were in terms of, for example, separation from a child?

MR BAILEY:

Yes. In other cases, say there's two affidavits –

KÓS J:

No, but hang on, do you then have to discount that consequence because there was a reasonable probability or reasonable chance that the Minister will be moved or the Tribunal will be moved and not deport?

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MR BAILEY:

I don't think it's a case of discounting. I think it would just be a case of saying, "I'm not in a position to make any particular accurate assessment of what may happen if I convict you". Neither parties have provided any particular expert evidence in that respect. I therefore proceed on the basis that there's a real and appreciable risk it could happen, looking at the statutory framework, and that's it. it's not a high risk or very high risk because there has to be some sort

of obligation imposed on a defendant. I think Justice Miller said as much to provide the evidential basis.

KÓS J:

Okay. So we just say well there's a real appreciable risk of deportation, real and appreciable risk of loss of employment, real and appreciable risk that this child will have no support while both parents are…yes.

MR BAILEY:

In a case, we're saying you wouldn't do that in this case because we've got a number of things that we can rely on including the affidavit and the legislation itself and cases but it may well be in some cases which are more borderline that that would be where you're left.

That brings me on in a similar theme, so I'm sort of at the bottom of page 1 of my synopsis. So following on from comments such as "this is best left to Immigration, best considered by the Minister" they – courts reached that conclusion too early, as I've already said, in my cases, by saying and having some comfort in the fact that the merits of the case will be considered, and that was the phrase used in *Truong* and by the Court of Appeal. So the question I pose is when courts are saying things like "everything can be taken into account in the merits of the case" what does that actually mean and where does that get us?

So in *Sok v R* (2021) 29 CRNZ 962, as we've quoted heavily in the, or as we've quoted in the written submissions as well: Courts usually assume, in the absence of evidence to the contrary, that immigration authorities will take *relevant considerations* into account." And we're not arguing against that per se, but I'll come to why it doesn't take us very far soon.

Then the next page, I'm on to page 2 at the top, I think it's *Zhang*, but perhaps I'll just say *Zhu v R* [2021] NZCA 254: "If a [deportation liability] notice issues it will be a product of a process in which Mr Zhu's conduct and *circumstances… are examined on their merits.*"

I think the reason for quoting these parts will become apparent when I come down the page further, but the obvious point which needs to be said here is Immigration don't determine the merits of section 106 cases, and that's what the defendants in these situations are advancing, and as I say, if there's an accurate assessment, or as accurate as possible of the gravity against the consequences, whether that's being advanced as mere exposure to deportation, or risk, quite a high risk et cetera, then you do that proportionality assessment. If it's out of all proportion, that's the end of the matter obviously in a case like this for Immigration it won't come to them. They won't need to consider the appellant's position.

That's made apparent when we consider what will Immigration actually do if it gets to them. So that's the second bullet point. The Minister of Immigration, in considering whether to issue a deportation liability notice. Now this is, could have been more extensively covered in the written submissions. So it hasn't been but it is an important aspect of our case. So if Ms Bolea is convicted, as she has been, Immigration have a power, and there's no specific guidance in that section 170, I think it is, that says when they should do it or when they shouldn't do it. But, and I certainly think your Honour Justice Glazebrook is familiar with *Ye v Minister of Immigration* [2010] 1 NZLR 104 wrote a very lengthy judgment in the Court of Appeal. I am relying on the comments made by this Court when it was appealed further. Now this might be a little bit out of context, and that's partly why I've set it out, but this is a provision dealing with removal orders for people unlawfully in New Zealand who had an appeal right under s 47 of the old Act, which has been adopted and is now the section 207 test, the one Ms Bolea would have to satisfy if things went that far.

The question, or one of the issues in that case was Immigration can do something. If the person gets an outcome they don't like, they can appeal it. the appeal's got specific criteria. Does that mean the decision-maker, the first decision-maker, Immigration Minister, should consider the case in light of the appeal grounds, and I think your Honour Justice Glazebrook, it might not have been a major part of this case, but said, well, no, they shouldn't be constrained.

It doesn't say they have to consider it like an appeal, the Minister that is, so therefore it wouldn't be right to limit a minister in that way. Now I appreciate just after this decision the Immigration Act, the new one, was passed, and it specifically in relation to removal orders essentially overturned *Ye*, but the position I rely on is as follows.

The principle, I say, of *Ye v Minister of Immigration*, is still good law, the Supreme Court, this Court's law is still good law. that is if there's an appeal right that has specific statutory criteria, then the earlier decision-maker as I've said should also limit themselves to that criteria, and that's that middle quote of Justice Tipping, so I've quoted three paragraphs: It cannot have been intended that a lower threshold than that set out in…" the test on appeal, "… should operate outside the RRA" which is the equivalent of the appeal regime. "That would simply encourage those concerned to bypass the specific statutory process and the applicable test.

Later on in Justice Tipping's judgment he expressed some real surprise that the questionnaire, which is also relevant in this case and used, didn't actually specifically deal with the appeal criteria, as the Supreme Court held it should have. So my point here is, your Honours, and there's always the uncomfortable factor that there's not a whole lot of oversight, it's not the equivalent of a District Court judgment who gives reasons and we come to this Court or the High Court and we can analyse things in detail as to how they've got there. but if we assume, as we have to in my submission, that section 170, whether to issue a deportation notice, should be very much assessed, that decision should be very much assessed in terms of the appeal in section 207, the appeal criteria, then the merits of the case that these sentencing decisions refer to, are very tightly assessed in a very tight statutory framework. It's not what the Judge is entitled to do, take into account anything and everything. It's, as we know, your Honours know, it's really – well one of the factors, exceptional humanitarian grounds I've referred to –

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KÓS J:

This seems in some ways to be a point against you because the consequence is that it is less likely then that a deportation liability notice will be issued if the Immigration authorities follow your approach so it is a lesser, it is a less likely consequence of offending?

MR BAILEY:

Well if we were saying we were – the appellant would meet the section 207 test that might not help but our position is she's quite unlikely to meet that test.

WILLIAMS J:

There are options before you get there that you really need to confront those.

MR BAILEY:

Well I've confronted the first one which is whether Immigration/the Minister issues a deportation liability notice and I'm saying this Court said, well, only look at their appeal criteria when you make that assessment not everything.

ELLEN FRANCE J:

What the Court is saying is it can't be a lower threshold. It doesn't mean that more – other things that might be in fact more favourable to the person can't be considered. I think you're running the risk of imposing a constraint that doesn't actually assist.

MR BAILEY:

Well that's the middle – well my submission the middle paragraph of Justice Tipping and the rest of the judgment, which as a whole makes it clear that you should stay within the, if I can just call it the section 207 test, the old section 47 test, when the first decision maker goes about his or her decision.

ELLEN FRANCE J:

Well so there's some slightly lesser humanitarian – not something that's not an exceptional humanitarian but nonetheless a humanitarian consideration that can't be taken into account?

MR BAILEY:

I say on the basis of this case it would be improper for it to be taken into account but another way of assessing it would be to say would there be anything wrong if the Minister didn't take it into account, those wider factors, and I think it would be extremely difficult whatever view is taken of this *Ye* decision to argue a Minister had made a judicially – judicial review error by not looking at wider factors outside of the section 207 test.

KÓS J:

So it'd have to be relevant considerations?

MR BAILEY:

What would have to be relevant?

KÓS J:

Factors that are not necessarily directly within section 207 but which counted in favour of not issuing a notice for deportation. It can't be, it can't be corralled just into – considerations can't be just corralled under section 207. I think that's what Justice France is making.

MR BAILEY:

Yes, well it was the point that Justice Glazebrook made and my take on the Supreme Court, obviously it's a matter for your Honours, was that that approach was disagreed with.

O'REGAN J:

So are you saying that in every case where there's an exposure to deportation, you have to assume the Minister is not going to consider the merits and therefore you have to discharge without conviction?

MR BAILEY:

No.

O'REGAN J:

Well what are you saying?

GLAZEBROOK J:

Aren't you saying that they are only going to consider the merits insofar as they would reach exceptional humanitarian –

MR BAILEY:

Yes.

O'REGAN J:

I just don't think that's right.

MR BAILEY:

You can chuck it all in but –

O'REGAN J:

The Minister has to consider all humanitarian factors.

MR BAILEY:

Yes, but –

O'REGAN J:

So why would, why would the Court limit the Minister and say that the Minister can't consider humanitarian factors?

MR BAILEY:

Well I think I might not be frank. You can chuck it all in, everything that was relevant to the section 106 application in this case, will be relevant to the Minister's decision –

O'REGAN J:

Well you just said before that it wouldn't, wasn't.

MR BAILEY:

No, but it needs to reach a test which is different. It needs to reach that exceptionality test and I'm saying all well and good saying we can consider it but you've got such a huge hurdle –

O'REGAN J:

But Parliament's given the power to the Minister to consider it, not to the Court?

MR BAILEY:

No, subject to a conviction. Clearly it was an intentional distinction between, for example, section 157 which talks about criminal offending and section 161 which is only triggered with the conviction. So that's why I'm saying do the balancing test, the Courts will –

O'REGAN J:

So you're saying the Court should effectively do the exercise the Minister would have done if there'd been a conviction, is that what you're saying?

MR BAILEY:

No. I'm saying do the section 107 balancing test and then look –

O'REGAN J:

Yes, but how do you balance it if you don't know what the outcome would be –

MR BAILEY:

Well as –

O'REGAN J:

– or what the likelihood would be? How do you assess the likelihood without taking into account those matters?

MR BAILEY:

Well, as per the discussion with Justice Kós, some cases you might not be able to provide much certainty as to the likely risk, and I accept that, other cases the Court have accepted, I think perhaps in *Bong v R* [2020] NZCA 94 et cetera or

another case, *Rahim* I think, is a high risk or likely that the person will be deported and if that's the case the consequence for section 107 will be, will be significantly higher than a case where you haven't got that evidence which is accepted.

O'REGAN J:

Well it'll be the difference between a possibility of being deported and a likelihood of being deported.

MR BAILEY:

A strong likelihood.

O'REGAN J:

Either way deportation could occur, couldn't it?

MR BAILEY:

Yes, and that's the nature of the business. I mean a court can't. In any case some people might get fortunate and get discharges when it wouldn't have actually prevented them doing what they feared it would. We just have to make our best assessments.

WILLIAMS J:

What you, well it seems to me anyway, what you're not really confronting is the pre-notice and then post-notice but pre-deportation decision options available to the Minister both in the statute and more generally as a matter of public law?

MR BAILEY:

I think this –

WILLIAMS J:

Because the Minister can, as the Crown says, cancel the notice or cancel it on conditions such as no offending within the next five years. What I'm really interested in, because that does seem to me to be a middle ground that's quite

useful, I just have no idea how that's used or whether it's used and nor have I seen any evidence from anyone to indicate what the position is.

MR BAILEY:

Well I think at least to a degree I'm going to address that in the headings that follow.

WILLIAMS J:

Good.

MR BAILEY:

So –

WILLIAMS J:

So are you going to address the middle ground because you're backing – you seem to be backing yourself into a really tight corner here, perhaps unnecessarily.

MR BAILEY:

Well I'm making an assessment of how much is the risk of deportation mitigated by various options your Honour I think wants discussed.

WILLIAMS J:

Yes.

MR BAILEY:

And in terms of the first one, whether you even get a notice given to you, my submission is correctly applied by law the Minister should by and large, if not exclusively, be limiting him or herself to the section 207 test.

WILLIAMS J:

But that would be inconsistent with section 172 and just general principles of public law. What you're really saying is unless there are exceptional circumstances of a humanitarian nature, a notice must issue?

MR BAILEY:

Yes, a notice should issue or perhaps must –

WILLIAMS J:

Must, you're saying must which – at which point what's the point in your Appellate Tribunal?

MR BAILEY:

Well that's my point. If you've got a process which can effectively in some way, shape or form be appealed, why don't you look at the – if it's a true appeal –

WILLIAMS J:

It does seem though that you're reading the notice decision oppressively, probably unnecessarily, in order to make your point. You're being a little instrumental in your analysis here.

MR BAILEY:

Yes. It's not – it doesn't depend on this aspect but that's why I said –

WILLIAMS J:

Particularly given there are middle grounds that are provided specifically in the statute post the issue of a decision which must be relevant necessarily pre the issue of a decision and that is whether there are other ways of doing this?

MR BAILEY:

Yes, well –

KÓS J:

I mean it seems to me –

O'REGAN J:

I think you should just move on Mr Bailey. You're just flogging a dead horse here.

KÓS J:

Yes, I think so. I mean this point is helpful perhaps to Ms Bolea but it's going to be extremely unhelpful to hundreds of people who are going to find themselves on planes as a result of this submission if it's right, it's just not right.

MR BAILEY:

In terms of the Immigration Tribunal, if I move onto bullet point 2 on page 2, and again I'd say well at least the submission could be put that if the Minister doesn't go outside section 207 then you couldn't criticise that. I maintain that at least.

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So if we come to the Immigration Tribunal and there's no, I don't think there's going to be any debate that they can't take wider grounds than what's specified in the section, of course, and there is a logical argument, I'd still maintain, to say well if they're dealing with, it's titled an appeal, then that's a good reason why the first decision-maker should be similarly doing the same exercise, because otherwise you're not really appealing the decision, and that's where I say Ms Bolea is likely, very likely to fall down in terms of the exceptional circumstances of the humanitarian nature, which is, we've reduced to the *Minister of Immigration v Jooste* [2015] 2 NZLR 765 decision, and I don't really need to further add to the written submissions in that respect.

This is a point coming back to why courts shouldn't be scared to make their own assessment because whatever way you view this, they're not really doing the same thing, and this is why *R v Hughes* [2009] 3 NZLR 222 is helpful. "We do not consider descriptions of the disproportionality test such as 'very stiff', 'exceptional', or 'extreme' to be helpful." So we don't need to, you don't need to come to court to get a discharge, the Court to – exceptional circumstances, but that's specifically one of the tests and one of the hurdles in section 207 of the Immigration Act 2009.

So it's not a case of well someone else can do our job for amongst other reasons the Courts have, or at least to date, have set out how things should be approached and exceptionalities being struck out is an appropriate standard,

whereas if you're forced to go to the Immigration Tribunal, which we say in this case it's highly likely, then that's what the Immigration Tribunal are stuck with.

The last point there, number 4 is, we've in some ways touched on it, but you don't so much get an appeal against the merits of the decision of Immigration whereas like I said earlier you fail a – you have a failed section 106 application in the District Court, you get full reasons, one would expect, and you have the opportunity to actually critique that, and appeal it, whereas Immigration have, or your Honours would say a large degree of discretion which, yes, can be appealed in a sense, but that appeal right becomes very constrained. So I say overall little comfort should be given to the fact that the Minister can, if it's correct, and your Honours are right, take into account matters much wider than whether the section 207 test is met.

That brings me to paragraph 7 and I think I've relatively extensively dealt with this in our written submissions, so I'll try and be brief. It's clear that *Zhu*, so I'm better at page 2 of my synopsis, "liability to deportation", Justice Miller, and the rest of the Court say that is, that's a direct consequence of conviction, and can be taken into account. As I said earlier, if you're relying on that solely, just exposure, that's going to be difficult to meet, in most cases, the section 106 test, and hence why not many cases have managed to do it on the basis of exposure alone. But if you're advancing the submission that there's an actual risk, and often in part of that submission you'll be saying the, how likely it is, then that is not a consequence of conviction according to the Court of Appeal in that case.

So I'm on the top of page 3 now, and that says what I've just said. Seldom will section 106 applications succeed based on exposure alone being the consequence relied on, and as I've said, if it comes to the appellant's case, we accept she wouldn't meet the section 107 test if we can only rely on exposure.

This is not what *Zhu* itself says, but I say the effect of *Zhu* is that if there is some sort of process, which we've talked about and discussed in the cases, involving,

involved before deportation can occur then it operates to causatively "cleanse" the conviction. Obviously, we submit that's wrong, and –

KÓS J:
Sorry, where – is that language used in *Zhu*?

MR BAILEY:
No, certainly not, not "cleanse".

KÓS J:
No.

MR BAILEY:
But that's the effect of it, if it doesn't become a consequence of conviction then the consequence – the conviction essentially goes away is the only way in my submission to read Justice Miller's approach or comments.

Justice Miller talks about this approach being the usual approach with respect to Immigration. I've cited the relevant paragraphs. There's no real explanation of why, if that's good law, it should be restricted to Immigration because things like liquor licensing et cetera similarly would have rights-based approaches or opportunities to appeal often and I disagree with the submission that it can be distinguished. I think this is more of a point from the respondents that it's completely different to employment because I'd say actually employment processes have a number of protections. As we all know, unlawful dismissals et cetera are common matters being advanced. So employers also have a number of processes that they must follow and things they must take into account. So if the *Sok/Zhu* approach is good law, I saw it's good law for everything really, whether it's another statutory body or an employer or similar.

At paragraph (b) on page 3 how do we determine, again if Justice Miller's approach is good law, how do we determine when it applies because the Crown's submission in this case is the *Truong* decision is essentially it can't be distinguished from Ms Bolea's position, and if that's the case, it's very surprising

that the Court of Appeal, again on the assumption it's good law, didn't dismiss the appeal by saying it's not a consequence of conviction, it's a consequence of offending that you're advancing. But they didn't. They appeared to accept the risk of – the actual risk of deportation rather than being exposed to a liability for or is a matter that is a consequence and that's why I say there's no difference between *Zhu* and *Bolea* and *Truong* but completely different approaches are being taken, and that last comment, clearly Justice Miller's comments that this is the usual approach where if there's an Immigration process which essentially I think we're going to have to accept in this day and age there's going to be in every case, then the conviction doesn't cause the consequence but here we have a recent Court of Appeal decision not following that process and what the Crown say is identical circumstances to Ms Bolea's.

O'REGAN J:
Do you accept that?

MR BAILEY:
Sorry?

O'REGAN J:
Do you accept the Crown's view that *Truong* and Ms Bolea's situation are the same?

MR BAILEY:
No, no. Well firstly I'd say their criticism and that's partly why I started with that paragraph 56 of *Truong* where it's essentially at a much too early stage comes out with this is best left to X, Y, Immigration. Partly that's –

O'REGAN J:
But that wasn't the question, what I was asking was do you accept that her position is the same?

MR BAILEY:

No, you haven't got a situation, I think one of the parties was already back in Vietnam, if I've got the country right. They weren't going to be split up et cetera. They had separated and things like that.

O'REGAN J:

Yes, sure.

GLAZEBROOK J:

Can you just make sure you do bring that over please.

MR BAILEY:

Thank you. Paragraph (c) on page 3, middle of the page, "Appellant's position" I can run through this very quickly. Exposure as we've said and risk is consequences. One's direct, one's indirect. *Sok/Zhu/Bolea* are usually – they say the usual run of cases will say that's not a consequence. A conviction doesn't cause the deportation which we say is bad law.

Truong, as I've said, appears to accept Immigration consequences or the actual risk of deportation is a relevant factor and it is a consequence of conviction so we adopt that but, as again I've already outlined the last bullet point, section 107 does not permit the Courts to, in effect, delegate this assessment. As I've said, you can't actually delete it because there's two different things being decided in the first place. So I say *Sok/Zhu/Bolea/Truong* are bad law in that respect.

Just to be clear, to the extent they say well there's other options available therefore – well not so much there's other options available, there's a decision maker that's good at doing these sort of assessments therefore we are not attracted to ruling that option out, that option and deportation.

O'REGAN J:

But isn't that just saying the consequence isn't that great and therefore the proportionality assessment under section 107 comes out in favour of conviction?

MR BAILEY:

Well that might have been the same outcome but I just feel there's a preference, I submit there was a preference to defer to another body to make the Immigration assessment whereas, as I said earlier –

O'REGAN J:

Well the Court – but the Court has to consider what the consequence will be and that is a relevant part of that consideration, isn't it? It's not saying we're not going to consider it, it's just saying because there is another process we can't say that the consequence is deportation because we don't know?

MR BAILEY:

That's a fair comment to make and it will water down the likelihood or the severity of the expected consequence because there's only a 50%, or what have you, then it's less accepted but the cases which I've cited or the comments at paragraph 4, going back to page 1, they say: "This assessment is best left." So they've got an end outcome that they prefer and that is pivotal to the consequences being watered down itself.

WILLIAMS J:

What they're really saying though is that the result you most fear is too contingent for us to treat it as disproportionate. That's all.

GLAZEBROOK J:

Well you say that's not how they articulate it –

MR BAILEY:

No.

GLAZEBROOK J:

– but they're articulating it as saying we can't look at it.

WILLIAMS J:

Well that's true, they articulate it differently, but that's what they're saying, someone else is going to make this decision and it's too contingent for us to give it – for it to weigh more heavily than the matters on the other side of the scale.

MR BAILEY:

Well, yes, like Justice Glazebrook said –

WILLIAMS J:

And you wouldn't take any argue – you wouldn't argue with that, would you –

MR BAILEY:

No, their –

WILLIAMS J:

– if that were the case?

GLAZEBROOK J:

Well all you're saying is that's not what they say.

MR BAILEY:

Yes.

GLAZEBROOK J:

They say we're not going to look at this –

WILLIAMS J:

No, I just want to – but I just want to drill down please, you wouldn't argue with that proposition, would you?

MR BAILEY:

If it's speculative as in you can't predict the end outcome.

WILLIAMS J:

Well of course you can't because you're not the decider so –

MR BAILEY:

No, but if you can't even go – say it's a high likelihood or a moderate likelihood, it's just somewhere perhaps real and appreciable but no more, yes, that's going to –

WILLIAMS J:

So it's the contingent nature of the decision and, of course, the scale of contingency may well depend on the quality of the expert information that's provided.

MR BAILEY:

Yes, exactly.

WILLIAMS J:

So if an expert says inevitable deportation and that's credible and the prosecution don't disagree with it, then it's not contingent anymore?

MR BAILEY:

I think I'm using likelihood and your Honour is using contingency but if they're one and the same thing, I agree the contingency level or the likelihood level do clearly alter the consequence of convicting someone.

WILLIAMS J:

And you don't argue with that as an appropriate way of understanding how these things fit together, whatever the Court of Appeal might have said?

MR BAILEY:

Well I'm not arguing with that proposition that that's appropriate.

KÓS J:

So is this good policy, because what we seem to end up here then with, is before we ever get anywhere near the Immigration Tribunal, the Courts are

going to do the Immigration Tribunal's job for it. There's going to be a great deal of evidence in front of it, the Courts, as to the relevant prospects, and you're going to come along and say, "now listen here, Court, the prospect of my client being let off by the Immigration Tribunal is zip" and the Court say, "yes, prospects are zip". Well what do you think the Immigration Tribunal is going to do after all that?

MR BAILEY:
Well it might –

KÓS J:
If we do this job twice?

MR BAILEY:
Your Honour is saying that will prejudice the –

KÓS J:
Yes.

MR BAILEY:
Well some would say it shouldn't because they should be still doing their job. They shouldn't be making an independent assessment, but I get your Honour's point. From a sort of tactical point of view it wouldn't be –

KÓS J:
Well you're going to be coming along and saying "deport my client" to the Courts and then you're going to go along to the Tribunal and say "don't deport my client".

WILLIAMS J:
But to be fair the Tribunal's easy because there's a lot of, there's a lot of jurisprudence from the Tribunal and humanitarian matters of an exceptional nature are very narrow. There are lots of decisions on that. So we could predict that outcome but really that's not the outcome we're predicting.

MR BAILEY:

No.

WILLIAMS J:

We're predicting the issue of a deportation notice, the prospect of its cancellation subject to conditions, so on and so forth. That's the process we're convicting. Once you get to the section 207, whatever it is, test generally speaking you're a goner unless there's something very strong.

MR BAILEY:

That's the position and I'm not –

WILLIAMS J:

And if it were that strong you probably would have got a discharge in the first place.

MR BAILEY:

Well that's essentially what we're saying should have happened here. We're not saying, as one of your Honours said earlier, it's not complete 100% deportation so Ms Bolea can still say, "well, yes, my lawyer tried and said it was a high risk" and we acknowledge it is and put her best foot forward still. It's just we're saying the percentage, if you want to call it percentage or likelihood of being able to do that, is too little to allow that prospect to, or outcome to eventuate. So, for example, I know it's not a case of maths, but if it was a 95% chance or a 98% chance Ms Bolea, and everyone accepted that, was going to get deported –

WILLIAMS J:

We keep telling juries that they shouldn't.

MR BAILEY:

Exactly, so it's not attractive and I know it won't feature in a judgment like this but if it's that high your Honours are going to say no that's such a limited opportunity to escape deportation what – you're balancing that against what

you've done, that's out of all proportion and that's what ultimately the proportionality test comes down to in our submission.

GLAZEBROOK J:

Well what you say the test is, in terms of proportionality, is you look at the gravity of offending, and that's balanced against the consequences of deportation and the likelihood.

MR BAILEY:

The nature of the consequence and the likelihood –

GLAZEBROOK J:

The nature – well the seriousness of the consequences and the likelihood.

MR BAILEY:

And you must get over the –

GLAZEBROOK J:

And that's an assessment that's done in terms of proportionality.

MR BAILEY:

Yes, and again of course it's not carried out like this but if deportation was going to have an extreme, you know, adverse outcome on a scale of one to 10 it was a 10 but there was only a 50/50 chance of that happening, I would roughly say approaching it in a mathematical way, that's down to a five, where if it's a very high certainty it doesn't come down much from the 10 because it's most likely to happen.

GLAZEBROOK J:

And you say the test here wasn't that, they said you can't look at that at all?

MR BAILEY:

Who?

GLAZEBROOK J:

You say in this case they said because it was a consequence of the offending not the conviction –

MR BAILEY:

Oh, yes, we didn't even –

GLAZEBROOK J:

– it couldn't be looked at at all so they just got the test wrong?

MR BAILEY:

Yes, and that's partly why I've said –

GLAZEBROOK J:

And that's all you're really saying at this point?

MR BAILEY:

Yes, your Honour, and that's partly why I think this is more appropriate if the appeal was to be allowed – well if it was accepted that *Zhu* is not good law, no Court has really undertaken a proportionality assessment yet to date and if there's concerns about the adequacy of the expert evidence, which I'll come to in a minute, that would be an additional factor favouring going back to the High Court for either party to provide additional or more clarified expert evidence. So I'm back to page 3 –

WILLIAMS J:

Do you have any knowledge of how section 172 is used? Just say no if you don't.

MR BAILEY:

Not knowledge which is right for me to…

WILLIAMS J:

Right, okay.

MR BAILEY:

But I'm going to come – that's under the heading of number 8 which is my last matter. Because we say we can rely on actual deportation rather than exposure to at some stage, whether it's this Court or if it was to go back to the lower court, the High Court, that needs to be – well it's relevant. So, as I've noted, the High Court and Court of Appeal made no assessment of this. They didn't need to based on their approach. I note in the *Truong* decision and this Court commented, perhaps if I get this up, so this is the Respondent's Bundle of Authorities, the Supreme Court *Truong* decision, paragraph 9 because in this case I think I'm right in saying that the Court of Appeal was almost the first instance court and I think in fact there might have been cross-examination in that Court and this Court made the comment it might have taken a different view on the facts but that was a factual assessment so we're not getting involved on appeal. Again, like I say, we haven't really –

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WILLIAMS J:

I don't think the Court said the Supreme Court would take a different view on the facts because the line is, while it might have taken a different view on different facts, it's referring to the Court of Appeal there, not the Supreme Court.

MR BAILEY:

The *Truong*, paragraph 9?

WILLIAMS J:

Yes.

MR BAILEY:

Yes, but all I'm saying is a judge will, depending on how the case is, the section 106 case is advanced, will have to make an assessment of the likelihood –

WILLIAMS J:

You're disappearing off the…

MR BAILEY:

Will have to make an assessment as to the likelihood of deportation if that can be done and if there's sufficiently reliable evidence. This Court seemed to be saying well the Court of Appeal discounted some of the expert evidence but effectively they're entitled to. My point is no one has discounted per se and said I don't accept the evidence filed on behalf of the appellant Ms Bolea and we put it to one side. We haven't gone down that pathway because of the *Zhu* approach coming over top.

ELLEN FRANCE J:

But that evidence only deals with the likelihood of a deportation notice?

MR BAILEY:

Yes. And what I'm saying is Courts have obviously had some degree of freedom to accept matters or not, even if it's no contra evidence provided by the opposing party, but it's a fair point to make in my submission that Mr Hennessey's affidavit was unchallenged in the sense that there was no different evidence presented.

WILLIAMS J:

But that just gets you to a notice?

MR BAILEY:

Yes.

WILLIAMS J:

You still have to grapple with what happens after the notice?

MR BAILEY:

Yes, well then we come –

GLAZEBROOK J:

We really need to leave Ms Huda time to do the factual matters because Mr Bailey's only doing the legal side as I understand it. So we perhaps wait for those questions until we get –

WILLIAMS J:

But it's section, grappling with the meaning of section 172, it seems to me is key here if Hennessey is right.

MR BAILEY:

And that's, that's the next – sorry section 172 your Honour wants discussed?

WILLIAMS J:

Yes, please.

MR BAILEY:

Yes, yes, so that's the next one. So just finishing with Mr Hennessy, the position at the moment, we say it would be improper for the Court to not accept the affidavit evidence. Even we accept it could have been more detailed and explain the conclusions more but it is what it is. It's from a what appears to be someone that's accepted as qualified and the opinion of is – the opinion of that person is Ms Bolea will get the notice. So then the appeal becomes relevant. The appeal threshold, we've discussed that, and then your Honour wants the section 172 which, as you'll see, is on the thing. Now I appreciate that the – I mean there's two ways to look at this before we even look at any cases. It seems to be by and large the Courts will say the Minister's absolute discretion so that will mean everything's going to be, you know, he or she can do what is right. We are comforted by that. We think, you know, if you've got as good a case that you're saying you're not going anywhere.

The other way to look at it is if, again without getting to the in-depth legal analysis at this stage, if it is absolute discretion well that's not actually something that we can guarantee will happen and therefore I'm not going to take that chance, I don't conclude, this is a judge speaking, I don't pull down

the level of consequence based on the possibility, or I don't significantly lower the severity of the consequence based on the possibility that a Minister might do something which you really can't have any say over and that's the fair assessment and the better way of looking at it. I suspect the reason we get caught saying, oh, well, look, you should be comforted, there's one, two, three things, one of these things is 172, really wide discretion, is because there's a preference in the first place by the Judges, as I've discussed earlier, to leave this to Immigration and so it's essentially an additional justification for a conclusion that's already been derived at. The Court has decided its best person, as to make the deportation assessment, is Immigration and therefore they rely on a section 172 and similar provisions to support that reasoning. So I would say, like I've just said, Ms Bolea can't get much comfort from someone who's got an absolute discretion but just to add to that, and this will come back to the earlier –

WILLIAMS J:
I don't get that, why not, because on the face of it that discretion is broader than section 106?

MR BAILEY:
It's broad but how can you ensure that it will get exercised favourably for Ms Bolea?

WILLIAMS J:
By making a strong case.

MR BAILEY:
Yes.

WILLIAMS J:
And if you don't get what you want testing it in a court somewhere.

MR BAILEY:
No appeals, anything like that, it's –

WILLIAMS J:

Well there's this thing called judicial review that is quite effective I'm told.

MR BAILEY:

Yes, but I mean I'm going to come to section 11 which should have been included in our written submissions but there's two, just two additional matters I wish really to mention under this heading. So this is a case that's not referred to here, but I think it's quite a well-known case, *Unison Networks v Commerce Commission* [2008] 1 NZLR 42 and the passage in particular is at 53. So that's *Unison Networks v Commerce Commission* [2008] 1 NZLR 42: "Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act and… ascertained from reading the Act as a whole."

Now the reason I say this is because I say well if section 172 is meant to be exercised in the way that's consistent with the Act as a whole, we come back to this section 170/section 207 point, which your Honours didn't seem particularly attracted to, namely the Minister should be considering whether to exercise or to issue a notice based on the section 207 test, and I'm saying similarly if you are going to cancel it, you would argue that they should do it for similar reasons to the section 207 threshold, exceptional circumstances of a humanitarian –

WILLIAMS J:

Subsection (4) says the Minster can simply stop the Tribunal process and override it.

MR BAILEY:

Subsection?

WILLIAMS J:

Subsection (4).

MR BAILEY:

Of?

WILLIAMS J:

Of section 172. Just by telling them I've decided to cancel it subject to conditions and simply stop the process.

MR BAILEY:

Yes, and bearing in mind I appreciate and accept the Court's – the commentary that even the Minister or a delegate will make but you won't expect, as I've said in our written submissions, for a Minister to do something, consider something, and then just change his or her mind later down the track absent a significant change in circumstances. So why would you issue a section 170 notice and then decide to change that if that can be done because this talks about liability to deportation not revoking an actual order.

O'REGAN J:

I think you're just circling around to when –

ELLEN FRANCE J:

Well presumably because you get further information but –

O'REGAN J:

Yes, but you need to leave Mr Huda some time. The merits are important after all.

MR BAILEY:

But well there's no further information to – it wouldn't be foreseen at the moment, there would have to be a change in circumstances. But, importantly, coming back to how much weight the Court should put on something like section 172 so again *Unison Networks* would suggest you exercise it consistently with the other provisions which I've discussed. Section 11 of the Immigration Act defines what an absolute discretion or the consequences of an absolute discretion are. You can't apply for it. If you do apply for it, they don't

have to consider it. If they do consider it, they don't have to release any of their reasons et cetera under the Privacy Act 2020 or the Official Information Act 1982. So again I'd say that's not a provision which the Court should water down what would otherwise be the assessed level of consequence based on that theoretical possibility. As suggested, I'll try and leave Mr Huda a few minutes, were there any more questions?

GLAZEBROOK J:

Thank you. Mr Huda?

MR HUDA:

Thank you. I should be able to do this on time before 10.30. If I could just start by pointing out or addressing a matter that Justice Williams had picked up on, section 172, and at the risk of repeating what's important, Sir, is to perhaps consider the definition of absolute discretion in section 11 of the Act which makes it plain there is no obligation on the decision maker to consider the purported application or inquire into the circumstances of the person or any other person.

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WILLIAMS J:

Yes, so where does absolute discretion appear in section 172?

MR HUDA:

Section 172 subsection (5) Sir. "The decision to cancel or suspend a person's liability for deportation is in the absolute discretion of the Minister."

WILLIAMS J:

So are you suggesting that's a completely unreviewable unfettered discretion?

MR HUDA:

Courts don't, I'm not a judicial review expert, but courts don't like what would be called ouster clauses. I appreciate that but the statute speaks in its terms and very clearly, very forcefully.

GLAZEBROOK J:

Well of course what happens usually is that you have no idea why that, because no reasons are given.

MR HUDA:

That's –

GLAZEBROOK J:

You have absolutely no idea whether it's done on the proper basis or not so ouster clause or not it's usually not reviewable for that reason.

MR HUDA:

Correct, and the rich features that may be important to each person may be difficult to look at. What I did want to say was, I always feel like I'm stating the obvious, but starting from the statute, which is section 107, the statute obviously will have to be applied on its own terms, section 107 part of the Sentencing Act. If I can start with section 107, it says a court must not discharge –

WILLIAMS J:

Just before you do. Is there, are there authorities on the application of section 11 under section 172?

MR HUDA:

The short answer is, Sir, I don't know.

WILLIAMS J:

Okay, thanks.

MR HUDA:

And I think the *Unison* case is one of the judicial review cases looking at the meaning Sir, that Mr Bailey was referring to.

ELLEN FRANCE J:

But not of section 172, it's in a different context?

MR HUDA:

It is in a slightly different context, that's right.

GLAZEBROOK J:

Can I just ask you a question in relation to the evidence in this case?

MR HUDA:

Yes.

GLAZEBROOK J:

So we do have unchallenged evidence that there will almost certainly be deportation liability notice, but we don't have an assessment on any likelihood of any other processes meaning that the likelihood of deportation is lower, or whatever the – would you accept that that might be seen as a lack in the evidence that we have before us at the moment?

MR HUDA:

I must concede the point. There is a lacuna in the evidence. This is –

GLAZEBROOK J:

So you would normally expect that someone like Mr Hennessy would not just have done the first stage, but would also have done the second stage, which may have been not able to say anything more than we had no idea whether the Minister would exercise that discretion, but pointing out that it's an absolute discretion and not reviewable.

MR HUDA:

That's correct, and there have been other cases where one looks at the cases and sees citations from other experts, and certainly one gets the feeling that –

GLAZEBROOK J:

Truong seemed to have that, that assessment was actually before the Court.

MR HUDA:

That's correct your Honour, and I think that's why Mr Bailey was making the point, that if there is an evidential lacuna, that the appellant is given the opportunity to provide further evidence.

O'REGAN J:

So you're saying we should send the case back to the High Court are you?

MR HUDA:

If there was a real evidential lacuna, I think that should happen Sir. What –

WILLIAMS J:

Section 11 is focused on a purported application. It doesn't say the decision does not require reasons. It simply says, if there is a purported application, then the Minister is not bound to respond to that. It does not say that the statutory discretions exercised under section 172 or anywhere else are therefore utterly unfettered.

GLAZEBROOK J:

There is actually authority on this so I think maybe we should leave this because we don't have immigration experts in front of us, but I've certainly seen quite a lot of authority on this, I just – but there's no point in –

MR HUDA:

Yes, if I may pick up on this point, and I think one ought to be frank. Section 106 applications are brought by criminal lawyers, and there is this gap in knowledge.

WILLIAMS J:

Yes, absolutely.

MR HUDA:

Which in criminal law and immigration law, and you usually go to an expert, and then because you don't know immigration law yourself you kind of don't know sometimes where the lacuna is. Obviously with time you look at other cases

and you think A, B, C, D should be covered and sometimes it's not. Over here I've got to frankly accept that the evidence could have been more fulsome. But if we don't know then the solution may be to get the fulsome evidence and decide it on the merits. That will be the fair approach to the appellant.

In terms of the test to be applied it's of course the one that is set out in section 107 and I say that some focus must be given to the words the direct and indirect consequences of a conviction, and I say that could be by analogy looked at, I accept analogies are not perfect, in the way the Courts usually treat the concept of hardship or extreme hardship in name suppression cases. You pull all the relevant and accepted consequences in that pile, direct and indirect. So there is a bright-line test, as opposed to saying this is not a consequence of conviction, but of offending. The words "the direct and indirect consequences of conviction" in my submission seem to suggest Parliament is trying to capture as many consequences as possible.

Then we get to the next part, which is "out of all proportion". Those are the words that should be doing the heavy lifting really. Th question is whether the claimed and provable consequences are out of all proportion to the gravity of the offence. So in my submission there should be a bright-line test. We should not be looking at consequences of offending versus consequences of conviction, and the reason I say that, most section 106 applications are dealt with, and I'm not saying this in any wrong way, in very fast manner before the Community Magistrates, before the District Court, because of sometimes the lower nature of the offending that come in. So we end up getting submissions from two parties. This is a consequence of conviction not of offending, and we're splitting hairs. I think a bright-line test where the decision-maker, Judge or a Community Magistrate can apply with confidence is important.

Of course whether something is out of all proportion to the gravity of the offence, requires acceptance of this idea, which is a real and appreciable risk. It's not a test that is unknown to the law. It's applied in name suppression cases. It's applied in bail cases. Is the purported risk real and appreciable. Then you judge what I would term the probability. Possibility, yes. What's the probability,

and that's where Justice Williams was talking about how do we assess probability. Well by looking at the expert evidence. That's the only way you can judge probability, and obviously –

WILLIAMS J:

So you're saying the Court, the section 106 court has to grapple with that contingency and do the best it can?

MR HUDA:

Of course.

WILLIAMS J:

And how do you say the real and appreciable risk test that has been applied works in that context?

MR HUDA:

Well if ultimately having assessed all the expert evidence you come down to the view, or the Judge comes down to the view that this is too vague, this is too general, there is no real and appreciable risk.

WILLIAMS J:

So is your argument once you get to real and appreciable risk you lock it in?

MR HUDA:

Correct, and you look at the probability. You always have to look at the probability.

WILLIAMS J:

Well, but are you looking at it before or after real and appreciable risk?

MR HUDA:

After. Because it has to be out of all proportion. it's not just simple mere disproportionality. So that's why the Court will want to know what is the real likelihood that this is going to happen, as opposed to a mere possibility that this will happen.

KÓS J:

I think that's why we'd be interested to know what actually happens in the real world, and this is probably a fresh issue to the Crown, on a section 172 applications. If it was the case that 97% of drug offenders who received deportation liability notice are deported, that would be useful information. If it was only 22% on the other hand that would be a rather different contingency.

MR HUDA:

That's right and a lot of people depend on the type of offence before the Court. Your Honour may take a completely different view to a drink-driver to Ms Bolea's participation in an organised criminal group, to somebody actually importing methamphetamine. So, and that's why I say that expert evidence is crucial for anybody to have confidence as to the chance or the probability as opposed to the mere possibility because everybody accepts –

WILLIAMS J:

Well some background relating to the manual that immigration officials supply in respect of deportation liability notices, cancelling of such notices, decisions generally, would be useful. But that's not expert evidence, that's simply evidence from officials.

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MR HUDA:

It is. I mean I think that habit of criminal lawyers calling things expert evidence which may not be expert evidence. I accept your Honour's point. It's a manual that's there. And I think that is, that is what the decision maker, as in the Judge, will ultimately need.

Now just very quickly turning to Ms Bolea. Ms Bolea of course pleaded guilty to an offence that alleged she participated in an organised criminal group, the purpose of which was to obtain material benefits from the sale of methamphetamine. It'll be recalled that she was only 22 at the time of the offending.

WILLIAMS J:
Twenty one, wasn't she?

MR HUDA:
Sorry, Sir?

WILLIAMS J:
I thought she was 21, she turned 22 at sentencing.

MR HUDA:
She turned 22 at sentencing, sorry, Sir. Was pregnant when she was arrested. Today, literally today, the appellant's daughter is two and a half years old. All of this is of moment because in my submission neither the High Court, so that's Justice Campbell, nor the Court of Appeal grappled with the long-standing and subtle line of authority that places focus on the adversity of the consequences for the offender and his or her family, particularly the interests of children resulting from deportation.

I won't take your Honours to chapter and verse but *Rahim* and *Bong* are two cases that have you will see that the Courts look at the consequences to children. So in *Rahim* there was the situation where the Court considered what would happen if the family is sent back to Pakistan. What we have, and there are numerous High Court decisions to the same effect and I won't go through that because I kind of agree with what Justice Kós said, it doesn't matter what's been said below, it's what's here.

Now the approach taken in *Rahim*, *Bong* and several other cases accords with what the Supreme Court recently said, or this Court recently said, in *Philip v R* [2022] NZLR 571 about the obligation to take into account the best interest of an offender's children during the sentencing exercise. It is plain that a Court conducting the assessment required under section 107 of the Sentencing Act must take into account the complete suite of purposes and principles of sentencing described in sections 7 and 8 of the Act. In that way the reasoning in *Philip* can be adapted to section 107.

In particular I draw the Court's attention, although this will be absolutely familiar, to paragraphs 51 and 52 of *Philip v R*. This is in the appellant's bundle at page 304 and in 52 the Court says: "The provisions for such discounts reflects both section 8(h) and (i) of the Sentencing Act" and it's section 8(h) that I will focus on in a minute very quickly. "Section 8(h) requires the Court to take into account circumstances of the offender that would mean an otherwise appropriate sentence 'would, in the particular instance, be disproportionately severe'." Then the Court says, speaks of 8(j): "… the offender's personal, family, whānau, community, and cultural background in imposing a sentence… a sentencing approach which recognises the importance to a child of the familial relationship is also supported by the United Nations Convention on the Rights of the Child (Children's Convention). The Children's Convention emphasises the importance for children of growing up in a family environment and imposes an obligation on courts to treat the best interests of the child as a 'primary consideration'."

Now I think the words "primary consideration" is important and if my memory serves me right I think that's what Justice Glazebrook said in the Court of Appeal in *Ye v Minister of Immigration*. The weight to be attached to that concept is inbuilt in international legislation. It's a primary consideration. Now I don't intend to go on too much about it because I think your Honours heard a name suppression appeal by youths so that would have a lot covered there but the point I do intend to make is to the Court's analysis in *Philip* may be added this point which I'm about to make which is section 8(h) of the Sentencing Act is worded in neutral terms. In my submission it does not require the hardship to be suffered by the offender directly. As such it is conceivable that if matters will affect the welfare of others, then it may be disproportionately severe for the purpose of section 8(h). I'm not sure if your Honours do have section 8(h) in front of you by any chance but it says that the Court must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would in the particular instance be disproportionately severe. So –

O'REGAN J:

That's just doubling up on section 107 isn't it?

MR HUDA:

And that was the point I was – that was the submission that I was going to make, Sir. There is an obvious symmetry between section 8(h) and section 107 of the Sentencing Act. Each requires more than bare disproportionality. If this Court accepts the severe disproportionate threshold in section 8(h) is engaged in respect of Ms Bolea and her daughter as a consequence of likelihood of deportation then it follows that the test in section 107 is also met.

Now the Court of Appeal has said in the first paragraph of the decision that this is not minor offending, it's not. It did, however, attract four months' home detention in a 10 year maximum penalty. So not trying to water down the offending, this is not the worst of its kind, nowhere even near to it and the offending seriousness was obviously factored into by the Sentencing Judge and the Court of Appeal in arriving at the sentence. The aggravating features and the mitigating features came down to that but nowhere does it expressly state why the consequence of a conviction which will be profound and enduring for Ms Bolea and her daughter are not out of all proportion given the gravity of the offence has been measured as moderate to low.

So if we were to have three bands, the three classic sentencing bands, band 1, band 2, band 3, this is on the bottom end of band 2 offending of the top end of band 1. The family as a unit because of the male partner's situation, he was a 501 deportee, and if Ms Bolea is deported, they will never be together again.

WILLIAMS J:

Sorry, I don't understand your banding. This is organised criminal group, not direct drug offending.

MR HUDA:

No, the band was just an analogy, Sir.

WILLIAMS J:

All right, thank you.

MR HUDA:

It was just moderate to low so I was just saying if there were three bands it'll be the bottom end of band 2 if moderate was in the middle.

GLAZEBROOK J:

So the submission is, although you accept the evidence is perhaps not here, that the risk of deportation is very high and the consequences are devastating for the child and the family unit, is that…

MR HUDA:

Correct. The best interests of the child would take into account the presence of both the father and the mother and the –

WILLIAMS J:

What evidence did the Sentencing Judge have about that issue, that specific issue?

MR HUDA:

The parents and the child issue?

WILLIAMS J:

The child that –

MR HUDA:

Had Ms Bolea's affidavit, Sir, and in –

WILLIAMS J:

It doesn't really refer to that issue.

MR HUDA:

There is paragraph 14 of the, I'm sure it's paragraph 14 so bear with me a moment.

GLAZEBROOK J:

I'm not sure you need evidence that the best interests of the child are that you have a relationship with both parents. There must be 5,000 decisions that say that.

MR HUDA:

There are ample decisions that say that. All I was answering for in terms of what Justice Williams asked was –

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WILLIAMS J:

It certainly says that Rhakim has been present in the life of the girl who was at that stage 19 months old.

MR HUDA:

That's right and this was a circumstance when he was on, when he was on EM bail.

WILLIAMS J:

Yes, I get that and he was the stay at home dad.

MR HUDA:

Correct.

WILLIAMS J:

It's pretty light evidence for what might end up being your – what could have been your linchpin argument?

MR HUDA:

I have to concede that, Sir, yes. As I said Sir there –

O'REGAN J:

Has he been sentenced now?

MR HUDA:

This is perhaps, I understand, he has Sir.

O'REGAN J:

Do we know what happened to him?

MR HUDA:

Perhaps a better question for the Crown, Sir.

O'REGAN J:

Do you know what happened to him?

WILLIAMS J:

Mr Bailey has it.

MR HUDA:

End sentence of five years, three months from 1 December 2022.

O'REGAN J:

Okay, that's fine.

MR HUDA:

Estimated end sentence end date is 1 December 2027 subject to parole. What I do understand from Mr Bailey is that mother and child do keep in contact prison –

WILLIAMS J:

Yes, that's in the affidavit.

MR HUDA:

Yes. So it's really the separation of the family unit. I know there's an element, and I do emphasise this, that there's an element of employment matters and if it was just that the Court may say "well neither here nor there, go get employed in Australia" but once again like the name suppression extreme hardship threshold you pull it altogether and then you decide whether it reaches the level

of extremity. Just don't discount it. There are a number of factors, key one being the child and the family dislocation which the three of them meeting in another place, because of their respective criminal records, is speculative in terms of reality, where are they going to go.

WILLIAMS J:
Was there a suggestion that that was the way out of this that they could meet in a neutral jurisdiction?

MR HUDA:
I'm sure I've read at least one decision where somebody had suggested that and that's why I made the point.

WILLIAMS J:
Okay.

MR HUDA:
I'm conscious of the fact it's 10.32 and I shall be no more than two more minutes. That is the primary submission we intend to make and I think that is the analysis, grappling with the dislocation is missing, especially in the High Court, your Honours you will find that Mr Bailey made the submission it didn't make it to the actual assessment area. There is some mention of it by Justice French in the Court of Appeal decision but not fully grappled with and I think this matter deserves to be grappled with because really that is the reason why we are here. I do emphasise the bright-line, the need for a bright-line test, due to the nature in where this sort of test are applied. There is a language that comes in if the Court discharges somebody without conviction, they will usurp the role. Now I agree with what Justice French has said in the Court of Appeal not accurate terminology. It does not prevent necessarily Immigration authorities from doing what they can or need to do.

Last point being, I think Mr Bailey made this point, that this is the nature of the business There may be circumstances where the Court discharge an offender without conviction. In doing so the Courts, if the Court takes into account a

whole lot of rich evidence, if that is all in the judgment, that permits this offender to put a better foot forward and that should be taken into account because Parliament is equally saying the Court should supply the 106, the 107 test. Nowhere does it say do not apply it if there are professional bodies or Tribunals that are charged with determining this person's fate. It's in open-ended terms.

The last point is discretion. It is a discretion, 106, the discretion is set out in 106. It says the Court may. There are several Court of Appeal decisions that says if the test is met the Court will be slow to exercise the discretion or almost never. It's in rare circumstances the word used in *Zhu v R*.

KÓS J:
Yes, but your case is that the High Court proceeded on a wrong legal test so –

MR HUDA:
Yes.

KÓS J:
– so you get past those cases, type of cases.

MR HUDA:
Correct. Thank you. Is there any other questions?

GLAZEBROOK J:
We'll take the adjournment and then perhaps you can think over the adjournment if there's anything else that you've missed out rather than rushing now.

MR HUDA:
I'm grateful, your Honour.

GLAZEBROOK J:
And if any of us have any questions we'll ask you them at that stage but we'll take the adjournment now.

MR HUDA:

I'm obliged.

GLAZEBROOK J:

But you know if there is anything then you're welcome to have another 10 minutes to bring it up.

MR HUDA:

Thank you.

COURT ADJOURNS: 10.35 AM

COURT RESUMES: 10.51 AM

MR HUDA:

Ma'am, unless there are any other questions there was perhaps only two other points that I intended to make. Will there be any questions for me?

GLAZEBROOK J:

No.

MR HUDA:

The first one is a case that has been brought to my attention, that is *Dean v Associate Minister of Immigration* [2019] NZCA 343. That decision deals with the ability to judicially review an absolute discretion. At paragraph 30 the Court makes it plain that given the exercise of absolute discretion the way the words are used in extraordinary or overwhelming circumstance, going to *Wednesbury* unreasonableness is required before judicial interview is justified.

KÓS J:

Was that dealing with section 11?

MR HUDA:

Correct Sir.

KÓS J:

Thank you.

MR HUDA:

The second point is really a repetition but worth making, in my submission, which is the evidence from an expert as to setting out all the steps in a step-by-step way, taking into account the Immigration manual and any middle tier approach, and I just use that word as a synonym for the point that Justice Williams was making, and I appreciate that perhaps the Court will be much more comforted in arriving at a decision if those information was before the Court. Of course it should have been there, it's not, and I can only apologise and ask for a second chance to provide that, because that would not be Ms Bolea's fault and it may be that the matter is remitted, or we do provide the expert evidence direct to this Court to look at.

GLAZEBROOK J:

Is there anything further that about the circumstances, any update on the circumstances that might be relevant at this stage that you'd want to also bring up?

MR HUDA:

The only circumstance that I would highlight, personal circumstance, and I appreciate that this is one thing I did want to highlight. Although I acknowledge that this was taken in account in arriving at the sentence imposed, it's, there's some merit in looking at the psychological report that was obtained for Ms Bolea case on appeal page 126, and in page 126 there was a heading from the psychologist, and I'll come to list how it links to it. It says amongst other things, in the middle paragraph, "Unfortunately, she," is Ms Bolea "carries the vulnerabilities of an abusive upbringing, which have made her susceptible to entering manipulative relationships and being exploited for her poor self-esteem and dependency traits."

Why am I highlighting this. One needs to only look at the circumstances of the offending as summarised by the High Court judge. These were text messages

by a partner who was part of the Comancheros gang and the High Court judge accepted that while she had knowledge of the partner joining the gang, her offending was limited to what happened in August. So the High Court accepted Mr Bailey's submission. She hired a car as requested. So that's how that expert evidence fits in as to why and how she may go about participating in the group.

While it may, it will not form a clear backdrop to this judgment, the only other additional point may well be to look at the terms of section 98A, which is the participation in organised criminal group provision. It's a, it seeks to capture a recklessness and does not necessarily require intentional conduct contributing to two things. I'm not criticising the provision, I'm just saying you can be caught up with it –

O'REGAN J:

We do need to hear from the Crown. We've only got an hour to go.

MR HUDA:

Thank you Sir. So that's all I need to address. Thank you.

GLAZEBROOK J:

Thank you. Now Mr McCoubrey.

MR MCCOUBREY:

May it please your Honours. By this stage the road map is usually no longer what one thought it was, so it is in this case. That's fine, being frank, that's fine. It's an apology of advance if I deal with things in piecemeal form. Can I just tick off a couple of points while they're live in the Court's mind, and that's *Dean*, the citation that my learned friend Mr Huda just gave you on the justiciability of judicial review, the justiciability of section 172 decisions if that is, indeed, what they are. This Court refused leave in *Dean*, and I'm hoping my learned friend Ms Nash can just put up the paragraph for you to have a look at, and it's towards the end there where I wouldn't be so foolish as to paraphrase this Court to this Court, but paragraph 5 certainly is not this case.

We're not going to have a look at section 172 in this case because the facts aren't very good, and it's had a chequered litigation history, but if I can say so paraphrasing fairly what your Honours may have said there. It's certainly never say never in terms of a heightened scrutiny review of section 172. But I accept I'm neither a public law expert, nor an immigration expert, and I have to accept on its plain terms the very broad wording of section 11 in the way it tends to attempt to insulate the Minister's decision-making powers under section 172. But obviously as apex courts have shown in this and other jurisdictions, if the Court wishes to scrutinise something it usually finds a way to do it, if I can put it like that, I hope that's not too cynical, but since *Anisminic* onwards frankly courts have found a way to look at things they want to have a look at. That's really all I want to say about that, the *Dean*, the justiciability point.

In terms of evidence, which is really the next point, there's two aspects to this which I'd really like to make clear. The first is my learned friend's point that's been hinted at, and that is that of course this Court has to enunciate a test which a District Court judge or a Community Magistrate sitting in a busy list on a Tuesday morning at Waitakere District Court is going to be able to administer, and if that is, if there's any suggestion that's to be contested expert immigration evidence with cross-examination, then my real fear on behalf of the Crown is that that's simply unrealistic, that can't happen.

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In every case in which it is said an Australian citizen will or may be deported, it can't be the case that detailed affidavit evidence pointing to prospects of success on which cross-examination may take place could be a realistic way of determining the section 106 decision in my submission.

WILLIAMS J:

You need a couple of those until the facts settle themselves down because we're just operating in a vacuum. It's very hard to apply section 106 to that vacuum.

MR MCCOUBREY:

Your Honour, I accept, two answers to that if I may. In general agreement with what your Honour says. My answers are these really. First of all, of course it's possibly for the reason my learned friend Mr Huda adverted to that as criminal lawyers we perhaps sometimes say: "I don't know this bit of the law so I better get some expert evidence" but taking it back a step it is, of course, the orthodox position that evidence, expert evidence on domestic law, is inadmissible because the Judges decide what the law is and expert evidence is only usually admissible on foreign law.

WILLIAMS J:

This is really about policy though not law.

MR MCCOUBREY:

Agree but this practice appears to have grown up where immigration practitioners do make submissions on the law in affidavits in effect. I'm not being unkind on that I hope but that's the first point and so this practice has grown up. The second answer to your Honour's question is there is in my submission at least a growing body of understanding, and maybe your Honour will conclude we're not there yet, but could I possibly take you to three examples within the materials in this case which in my submission begin to demonstrate that there is a consensus, a broadly agreed understanding of what takes place, in the 161 resident visa context.

The first is in the Court of Appeal in this case itself at paragraphs 11 to 12 which is – it's in the case on appeal, it's not lengthy. I don't know if your Honours have it in front of you but it's where the Court of Appeal set out the process in the decision of Justice French which says: "On becoming aware of a qualifying conviction entered against the resident visa holder, Immigration New Zealand prepares a detailed briefing paper for the Minister of Immigration (or more commonly the Minister's delegate)" who will then decide whether to order that a deportation liability notice be served. So that's wholly uncontroversial of course.

In these materials we have an example, which I would like to take the Court to very briefly, and that's in the *Truong* decision in the Court of Appeal at paragraph 15 and the point I wish to make when looking at this is that not only does it describe the letter that's written but it shows what we make in submissions about it, shows that happening in practice. Ms Truong, it was in that case, was invited to make submissions. So there this is, with respect I'm not here on behalf of the Minister or his delegate, but with respect that is the Court may conclude, helpful and transparent decision-making being demonstrated by the letter. You may wish to comment on the grounds for your deportation liability, your personal circumstances or the circumstances of your family. You and your family it says are also welcome to provide additional submissions and documents in support of your case. So –

WILLIAMS J:

Are there policy settings set out in the manual?

MR MCCOUBREY:

Your Honour, I don't know the answer to that and I –

WILLIAMS J:

Because that would presumably be OIA-able?

MR MCCOUBREY:

One would think so, yes. I mean the manual I think is publicly available and that's right I don't have that.

WILLIAMS J:

That's really what's helpful. These processes are great in terms of indicating that despite section 11 there's plenty of process here but if there are basic policy settings reflecting 10 or 20 years of experience then it would be good for the Court to know about that.

MR MCCOUBREY:

Certainly, your Honour. Just in respect of despite section 11 this isn't section 11 guarded, this is before the –

WILLIAMS J:

Yes, I know when –

MR MCCOUBREY:

So this –

WILLIAMS J:

– once you get to the decision it's clear that the officials hear from the party despite, you know, the absolute discretion on section 172(4), (5).

MR MCCOUBREY:

What I'm saying is this isn't an absolute discretion part of the process. It's only 172 that's an absolute discretion part of the process. Here a right of appeal lies and/or judicial review lies and it has to be an oral hearing so –

WILLIAMS J:

So there's no absolute discretion on whether or whether not to issue a notice?

MR MCCOUBREY:

No, it's only 172 by virtue of 172(5), it's only 172 which, if I can say so, sort of floats over the top of it all. That is a section 11 absolute discretion provision. So this is, this is –

WILLIAMS J:

So but 161 makes it reasonably clear, doesn't it, that you only issue a notice if you intend to deport?

MR MCCOUBREY:

Yes.

WILLIAMS J:

So it's a serious step?

MR MCCOUBREY:

It's absolutely a serious step yes but it’s not a 172 step.

KÓS J:

All of these submissions seem to be directed Mr McCoubrey towards the idea that the process should be quick and dirty and suitable for the Waitakere District Court on a Tuesday morning but there are going to be lots of cases where in a discharge without conviction predictive evidence or predictive analysis is required.

MR MCCOUBREY:

Yes.

KÓS J:

Typically, for instance, a case not involving deportation where a conviction will mean a person faces a professional disciplinary charge.

MR MCCOUBREY:

Yes.

KÓS J:

So in all of those cases the Court is surely going to have to engage in some kind of predictive analysis?

MR MCCOUBREY:

I, of course, agree with that because what a sentencing judge can't avoid is that section 107 forces the Judge to examine the consequences of the conviction. That's absolutely right and there's really two responses to your Honour’s question. The first is there is a distinction between those types of cases, perhaps such as employment cases, where a court may more readily conclude that the decision maker, namely the employer, will be overwhelmed by the very

presence of let's say a conviction for indecent assault, such as in Mr Rahim's case, but equally and more fundamentally to the arguments and to the Justice Miller line of reasoning, if I can call it that. And in response to a question that his Honour Justice Williams asked of Mr Bailey, where a judge says, if he does, whether he says it out loud or not, "this is too contingent for us to call it disproportionate" if a judge is saying that, what that tends to suggest, in my submission, is that we are no longer looking at things that are consequences of the conviction because they're far too contingent. They are properly, as Justice Miller held in that line of cases, and as the Court in – Justice French held in the Court of Appeal in this case they are properly to be viewed as consequences of the offending or consequences of all of the circumstances because if something is so wholly contingent that we don't know what the outcome is going to be, there are so many intervening steps that one will reach a point, in my submission, where you can no longer say that's a consequence of the conviction.

KÓS J:

I just think that specious, with respect, because none of those consequences were vested on the defendant unless the conviction was entered.

MR MCCOUBREY:

Your Honour, obviously, I can't avoid the fact that on a but-for analysis, as a matter of colloquial use, plainly it's a consequence of the conviction inasmuch as it happens after the conviction and cannot happen without the conviction. I have to accept that. That's the statutory situation. I suppose what I'm arguing for is that it should not be viewed as a legal consequence because of the intervening process which is what truly gives rise to the deportation if it happens. But I readily accept, if your Honours consider that specious, there's nothing I can do to turn that particular boat around and I accept there's a superficial attraction to saying you can't be deported without a conviction therefore the deportation is a consequence of the conviction but –

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GLAZEBROOK J:

Well it's just if it's not then why would you ever say it was disproportionate, so at what point does it become the offending and not the conviction?

MR MCCOUBREY:

Well in all of these nobody said it was easy –

GLAZEBROOK J:

I mean aren't you better saying it's the conviction but whether it's disproportionate or not you take into account all the circumstances and if you really don't know what's going to happen then it can't be disproportionate.

MR MCCOUBREY:

It's that last group in my submission where the difficulty lies, I agree with that, because what we all seem to agree on is that to some degree a sentencing judge must look at what happens after, sorry if a conviction's entered. Everybody agrees on that because that's what section 107 says and everybody agrees that to some extent therefore Immigration outcomes have to be considered. Of course they do because again that's what section 107 says and you can't ignore the fact that section 161(1)(b) is there.

KÓS J:

Just like a professional disciplinary charge?

MR MCCOUBREY:

It is except that, and possibly professional disciplinary charge is closer to the Immigration settings because if a professional body, a medical body or a legal body, were to act capriciously in its decision making then an appellant or a respondent to its processes would have remedies. That's absolutely right. I do say the employment settings are different but it perhaps doesn't matter for these purposes. So there has to be an examination of Immigration outcomes, I accept that, and it's what you do with that third group identified by her Honour Justice Glazebrook which may be difficult.

Now, of course, it would be an abrogation of the sentencer's responsibility simply to throw his or her hands up and say it's all difficult. I'm not saying that that should happen and I don't think anybody could but it might well be appropriate to say well I cannot on a fine grained analysis accurately predict whether this particular Australian citizen or person in a section 161 situation will be deported but I do know a process whereby all of that will be considered in a right space context taking into account all factual matters and exposing the defendant to that process is in my submission not disproportionate to the offending.

KÓS J:

What's wrong with Mr Bailey's mathematical approach, prospects times gravity?

MR MCCOUBREY:

Well I suppose there's two difficulties. The first is the Tuesday morning at Waitakere difficulty. That is asking a lot of a community magistrate to consider contested Immigration evidence and also look at offending gravity and the level of the consequences.

GLAZEBROOK J:

Well, but I'm not sure actually because if the consequences are so grave then that is actually their job as a sentencer and usually a community magistrate would not be dealing with these types of deportation issues, would they?

MR MCCOUBREY:

Well they deal with any Australian citizen who is convicted of a crime such as section 161 kicked in and there are various ways in which section 161 can kick in. But anybody who's an Australian citizen who appears before the Courts and is bitten by section 161 would be able to advance – this isn't a floodgates argument to terrify you, this is just to say that that's what section 161 says. So there are admitted –

GLAZEBROOK J:

But they just have to do their job, don't they? They can't say: "Oh sorry this is actually too hard because I'm in a list court and I can't actually listen to all this information about consequences. I'm especially challenging you on consequences not on the likelihood of Immigration. I don't really care about your kid, I'm not going to listen to evidence about that"?

MR MCCOUBREY:

Well they wouldn't be saying that. What they would be saying is: "I cannot accurately predict the Immigration outcome." There are plainly some profound consequences here, as there are in Ms Bolea's case, but it is not disproportionate to defer that decision – not to defer, that's the wrong word – it's not disproportionate to expose somebody –

GLAZEBROOK J:

Well it might be depending on the gravity of the offending, mightn't it?

MR MCCOUBREY:

And I agree with that completely your Honour. That's what I was going to say is that –

GLAZEBROOK J:

Okay.

MR MCCOUBREY:

– there is another class of cases and which Justice French refers to in the Court of Appeal in this case, although regrettably I disagree with her Honour's characterisation of one of them, but if you look at paragraph 41 of the Court of Appeal in this case, which is – and it's at 41(e). Her Honour there says: "There are cases… have held that the mere exposure to the risk of deportation and the associated processes is in itself a highly disproportionate response..." So there will be a class of cases where simply exposing you to the State writing to you saying "I'm considering deporting you" is a disproportionate response to the offending.

ELLEN FRANCE J:

That must reflect in part the fact that section 161 applies depending on your circumstances to sentences for which the term of imprisonment is quite low so if –

MR MCCOUBREY:

Yes.

ELLEN FRANCE J:

– you say here on a temporary entry class you're down to the three months, aren't you?

MR MCCOUBREY:

Exactly. Broadly speaking, your Honour is absolutely correct that the more firm your foothold in New Zealand the more serious the offence has to be to boot you out and, of course, that makes good common sense. Now in the Court of Appeal this may be getting to a point where it's either too refined an analysis or your Honours don't care but in my submission her Honour has wrongly identified *Rahim* as a case in that category. In my submission I don't think it is but I can give your Honours –

GLAZEBROOK J:

So what do you say it is, what category do you say it is?

MR MCCOUBREY:

Well if you look, *Rahim's* an outlier in my submission and in that decision what they say is, again they've looked at the Immigration evidence, and what they say is the conviction, sorry the deportation which they say is very likely, would be a consequence of the offending, sorry would be a consequence – I'll start that again. In that case they say on the evidence before them deportation would be likely and would be a consequence of the conviction and says Justice Toogood disproportionate and, with respect to the sentencing judge, Judge Taumaunu, they say that his Honour in sentencing got that a bit wrong and as a result they effectively granted the discharge on appeal.

GLAZEBROOK J:

What do you say was wrong with that?

MR MCCOUBREY:

Well it's in my submission it's difficult to see how his Honour Justice Toogood's conclusion flows from what's gone before where other courts have looked at it in a different way. But what did happen in that case is that again the evidence was the effect that the deportation would be very likely, the evidence went quite a long way, and was accepted, whether rightly or not, that was accepted. Just in terms of the Immigration evidence, whilst I mention that topic and whilst talking about how a sentencer is to evaluate that and, of course, taking her Honour Justice Glazebrook's point about well that's their job and, of course, I accept that, there is an additional difficulty in terms of who would necessarily give that evidence because all you would ever have, if there was competing evidence, is all you would ever have is two presumably Immigration practitioners expressing a view on likelihood of deportation in that case, whereas what the Court really needs is clear answers to what's going to happen in this case and you don't get that from contested evidence. You might be able to draw a conclusion –

KÓS J:

Well you might not, It's probably going to be more of a vibe; I doubt that that's going to be realistic. likely, very likely, unlikely. Those sorts of grades.

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MR MCCOUBREY:

Yes, I accept that, that there is likely, yes, and here we get into analysis which may be unhelpful but whether – I think we would all accept putting a number on it would be unhelpful. But when I say "I think we'd all accept" it was a very dangerous thing to say.

WILLIAMS J:

No, no, no, I was laughing in agreement with you Mr McCoubrey.

MR MCCOUBREY:

I see but it's difficult to know-

GLAZEBROOK J:

Well there's probably some statistics that somebody should have at Immigration one would have thought as to what sort of proportion of people who come within whatever, the 10 year category, or whatever, actually have these notices issued?

MR MCCOUBREY:

That must be right. The difficulty I foresee with that is that what will follow is evidence which says my person is in a very different category from the generality of cases for these reasons and/or much worse off or much better off or the offending is much more trivial. Of course, the offending is much more trivial is classically something for a sentencing judge to evaluate. There's no difficulty there. But again even if there were the statistics, which there must be I accept, I suppose can only deal with the generality of cases and they won't necessarily remove the need for the sort of fine-grained analysis which I suppose I'm cautioning against.

WILLIAMS J:

I would have thought that evidence from an appropriately qualified and delegated official indicating this is the process pursuant to sections 161, 172 and beyond and, while I cannot give you any prediction in this particular case or any particular case, these are the sorts of cases that have been treated that way and these are the sorts of cases that have been treated that way. It would be kind of the equivalent of counterintuitive –

MR MCCOUBREY:

Counterintuitive.

WILLIAMS J:

– evidence in the – so that the – because the problem here is the assessment is consequences which means you have to make a judgement about the future, which mostly judges don't have to do, they have to make judgements about the past, they have to make judgements about direct and indirect consequences in the future so proximate, roughly proximate consequences, and they have to make judgements about likelihood because it's in the future, we don't know, and the more guidance we get, the better our decisions will be under the section 106 and the fact of the matter is the best source of that information is your side.

MR MCCOUBREY:

Yes, and it certainly has to be the case that there undoubtedly could be evidence of that kind. There's no doubt about that. I think the closer that evidence got to anything evaluative, the less likely or the less happy obviously a public official will be to give it.

WILLIAMS J:

Anything evaluative on the particular case?

MR MCCOUBREY:

Yes.

WILLIAMS J:

In my view that should not be given but it's not necessary.

MR MCCOUBREY:

But what would then come over the top, with respect, would be evidence from an Immigration practitioner to the effect that well I know they say that but in my experience of Immigration practice somebody with these circumstances loses and doesn't go so well.

WILLIAMS J:

Well perhaps so and the Judge has to make that assessment. It'll only – you know that will happen about half a dozen times before they stop because it becomes clear in the way that, you know, these sentences come out or judges deal with them or the Appellate Courts deal with appeals from them.

MR MCCOUBREY:

Yes.

WILLIAMS J:

So it may be just some initial pain that's necessary to get the clarity we need so that we're not getting these inconsistent signals even at appellate level.

MR MCCOUBREY:

And I suppose the point I was trying to make is that the sorts of things, from the letter I showed your Honours from *Truong* in the Court of Appeal, the sort of things they take into account may perhaps be reasonably obvious and I suspect the answer, I don't know, but I suspect the answer would be it's difficult of course to be prescriptive about what's going to be – somewhere that background document, if it were to exist, will say it's all a matter of fact and degree and so on and so forth.

WILLIAMS J:

But it's also likely to say here are some cases in the past that were dealt with this way just to assist the officials, right, so it would be great if we could see that too.

MR MCCOUBREY:

Right, yes. Being absolutely frank about it, I was cautioned against trying to produce evidence for this hearing by those above me so I'm not – I promise there won't be an "I told you so" email after the event but look if the Court were to find that helpful then, of course, I'm sure that could be provided.

WILLIAMS J:
I'm not suggesting that we would necessarily find it helpful.

MR MCCOUBREY:
Or at a later stage.

WILLIAMS J:
I'm speaking systemically in section 106 applications involving Immigration.

MR MCCOUBREY:
Yes. I mean I think your Honour is right that that will probably be of benefit to both sides as well for the simple reason that, no criticism of anybody, but the applications are advanced at short notice with perhaps an inability or a reluctance to respond evidentially to them and they usually are dealt with and that's possibly why some of the cases have gone the way they have because it's sometimes not easy to respond evidentially in the time available.

I'm going to make a submission without fear of any contradiction that not every timetabling direction in the District Court is adhered to and so it's often the case that it's argued on a be that as it may basis or it's argued on a well fine but that's still not disproportionate basis". And I agree with your Honour completely that if there was greater clarity as to process then it might be of assistance to both sides, both those responding to these applications and those making them.

WILLIAMS J:
And more likely, this is the point that I'm most concerned about, more likely that judges will make better decisions under section 106, whichever way that decision might go.

MR MCCOUBREY:
Yes, yes. Because again the examples in the materials demonstrate that there is a, if not a helpful process, at least there plainly is a process. It's not mere lip service to there being a process. There plainly is and a person in respect of

whom the Minister's delegate is thinking about issuing a DNL is told the sorts of things which ought to be taken into account.

I actually don't know where that leaves me, being frank about it for a moment. Obviously all the written materials deal with a number of arguments which I don't need to address because they've been discussed in argument with your Honours and unless there was anything further specific that you'd like me to deal with.

GLAZEBROOK J:

I'd quite like you to articulate what you say the test is because – or what's wrong with the test that's indicated, apart from possibly an evidential issue.

MR MCCOUBREY:

Yes.

GLAZEBROOK J:

Because it's sort of difficult to – well either I can understand an argument that says Immigration issues are for the Immigration authorities and they shouldn't be taken into account but I don't anticipate that is actually your argument?

MR MCCOUBREY:

Well in response to that last point, that's correct for two reasons or at least that line of thinking should influence the test, whatever it may be, for two reasons. The first is the classical constitutional argument that it's for the Executive to protect the borders and the second is a procedural evidential one that it's just, it's for the reasons we've discussed, difficult to predict outcomes in this area. And the other thing which a test would have to consider is that defendants don't get a windfall because of the possibility of deportation. If I can just explain that. 1130

By virtue of section 106(2) of the Sentencing Act a discharge without conviction is deemed an acquittal and any test would have to take into account the fact that there might be cases where, or would have to guard against frankly, cases

where a defendant was discharged without conviction in circumstances where no deportation liability notice would in fact have eventuated, or by virtue of one of the other processes we've been discussing, deportation would not have followed and so the test has to be careful not to result in acquittals for too many people who shouldn't be acquitted.

KÓS J:

The same argument then applies to people who happen to have professional qualifications who would face a disciplinary charge and those people happen to have children for whom consequences might be more disproportionately severe.

MR MCCOUBREY:

Yes.

KÓS J:

Everyone is in a special case.

MR MCCOUBREY:

That's right, but I suppose what I'm saying is that by shifting the test too far onto the sentencer there may be cases where the sentencer says "I'm effectively going to acquit you" where if they were asked an Immigration official may well say "well, they weren't going to come anywhere near deportation."

GLAZEBROOK J:

Well so what is your test?

WILLIAMS J:

That's why we need your information.

MR MCCOUBREY:

Absolutely. All of this is an attempt to avoid having to formulate a test obviously but I feel I've got to the point where I can hide no longer. So, as I originally wrote it down during earlier argument when my learned friend Mr Bailey was on

his feet and I appreciate things have moved on and there will be objections to this, but as I originally formulated it was exposure, in the circumstances of the defendant, is exposure to the deportation liability assessment out of all proportion to the gravity of the offending. Now where we've probably moved on from that in argument is some assessment, I think his Honour Justice Kós very likely, likely, unlikely, you know, there might be a traffic light or there might be something but we all agree it can't be too fine-grained, it can't be a score out of 10.

KÓS J:

It also can't just be that topic. I mean it's all the consequences and that's just one that has to be weighed.

MR MCCOUBREY:

Absolutely, absolutely. So you'd have to add into that or at least I apprehend that, I'd be happy with that test as framed, but I apprehend the Court would want to build in some analysis of likelihood of deportation.

GLAZEBROOK J:

Well you're almost building that in by the argument that you had before if in fact a person isn't liable to be deported then in fact they should have a conviction entered, especially if it's a relatively serious offence, maybe not disorderly conduct or…

MR MCCOUBREY:

No, no, that's right. To an extent, yes, but the reason that in my submission it isn't a symmetrical situation is because the person who's refused the discharge may nevertheless not be deported, but the person who's discharged, that's an end of it, there'll be no deportation assessment and to an extent therefore the sentencer will have removed from the Executive the ability to examine whether or not this person should be in New Zealand. Not this appellant obviously but, I'm not pointing a finger at her, but if a sentencer were to say: "I'm going to give you a section 106 which is an acquittal" that will deprive the Immigration decision-maker of even looking at your circumstances and I suppose that's what

I was saying that that's why care has to be taken because on some, on some level that is depriving the Executive of being able to assess that person's character.

WILLIAMS J:

So you're not, although you state your test relatively blandly and I don't mean that disrespectfully, you simply say entering into the DNL process is that disproportionate to the gravity of the offending –

MR MCCOUBREY:

Yes.

WILLIAMS J:

– and you would absolve the system of undertaking a risk analysis and therefore the problem that you point to, because the effect of that taken at that simple level, is that the balance will almost always be in favour of the gravity of the offending because we don't build in any assessment of the reality of deportation, the seriousness of the risk of deportation. So let's assume that you can go with building in the seriousness of that risk to the test so that we don't make the mistakes that you're so worried about, then we can only do that with help, or you're crafting a test in which the offender almost always loses because it's simply exposure to process?

MR MCCOUBREY:

We certainly would have to do that, sentencers would have to do that, I absolutely acknowledge with a clear understanding of the process.

WILLIAMS J:

Well, not just the process but the decisions that have in the past been made –

MR MCCOUBREY:

Yes.

WILLIAMS J:

– at the various forks in that process. Once you get to that point, then you've reduced the risk that a person who is never going to be deported gets an acquittal and that's what you want to address. On the other hand from the other side, you don't want someone who the Judge wouldn't have wanted deported getting deported because you build in no risk assessment so in the middle there is a risk assessment assisted by you?

MR MCCOUBREY:

Yes.

WILLIAMS J:

Okay, good.

GLAZEBROOK J:

You just say it shouldn't be too fine-grained analysis or requiring expert evidence in all cases, that in fact is probably not going to be terribly helpful because it's likely to be assertion on both sides?

MR MCCOUBREY:

Correct. I mean, without being too cynical, it's remarkable the number of people who are caught drink-driving who want to go to Canada and absolutely won't be allowed to and so what, I suppose I'm being flippant, but what I'm cautioning against is affidavit after affidavit that says you just don't get into Canada therefore you've got to give my client a section 106. That sort of thing.

KÓS J:

Yes, but deportation is a different order of magnitude.

MR MCCOUBREY:

Yes, I –

KÓS J:

This is not vanity travel.

MR MCCOUBREY:

No, I accept that completely your Honour and hence my acceptance that I was being flippant, of course, but I suppose my submission is directed more to procedure that that's what happens. But I absolutely accept, of course, that in this particular case there are very real consequences were Ms Bolea to be deported, I absolutely accept that.

WILLIAMS J:

So –

O'REGAN J:

It does seem to be an oddity that on that basis you've got a better chance of getting a discharge without conviction if your risk of deportation is higher, in other words, you're a more worthy candidate for deportation, gives you a better chance of getting a discharge without conviction. That seems a bit perverse to me.

MR MCCOUBREY:

That is a difficulty because those are exactly the sort of people you might think that the Executive ought to be allowed to say: "I've carefully considered all the circumstances but I'm going to deport you."

GLAZEBROOK J:

But that's where the gravity of the offending I think would come in at that stage because one assumes a very high risk of deportation would usually be correlated to the gravity of the offending?

MR MCCOUBREY:

Yes.

GLAZEBROOK J:

Well, I suppose, to a degree it might be not so to that extent if in fact there were no adverse consequences if somebody was going to go to Australia to meet

with their whole family where they have family support et cetera, then the consequences are not going to be high however.

MR MCCOUBREY:

Absolutely. An Australian resident who gets a residence class visa the moment they land but they're the only member of their extended family who's ever been to New Zealand and it's for the first time and everybody else is back in Sydney and they commit some relatively serious –

GLAZEBROOK J:

Or even not serious.

MR MCCOUBREY:

Or even not that serious but then it's much easier to see that the chances of deportation will be very high in those circumstances, yes.

KÓS J:

Do you see a difficulty with your producing in the Waitakere District Court an affidavit from an Immigration official which says one of the three following possibilities; the prospects of deportation for this man are high, second moderate, third low?

MR MCCOUBREY:

I do. I see a – well I see a very great and very real reluctance on the part of an Immigration official producing such evidence –

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GLAZEBROOK J:

Well it would actually probably be improper because it would look as though it had been predetermined as well.

MR MCCOUBREY:

Well, I suppose there'd be, that's right, there'd be two things. There'd be (a) it would be asking the immigration official to do his job at the wrong time in the

process, and it would be to burden them with a burden that they shouldn't take on. But equally the people, on public law grounds the people making the decision at a later stage shouldn't at an earlier stage in a different context, in my submission, give a prediction as to immigration outcome.

WILLIAMS J:

For what it's wroth, I completely agree with that, but like counterintuitive evidence, evidence from an official that says I make no comment about this case, but I can tell you in these sorts of cases deportation has followed, and in these sorts of cases deportation has not, so that there are some guide rails for the decision-maker. That's probably sufficient, and then if the defendant wants to call an expert to comment on that, so be it, it's the Judge's job to deal with contested evidence, but if you've only got an expert, you know, an immigration lawyer saying "it's all over" and nothing else, it's not that helpful.

MR MCCOUBREY:

No, I accept that. Look obviously I haven't spoken to Immigration New Zealand, I don't know what they'd be prepared to do, and I suspect the closer it got to anything, the further away it got from general process the more problematic it would become, but certainly this is the process and these are the sorts of things, which are in those letters, for example, these are the sorts of things we look at. Personal circumstances, whether a family would be broken up, whatever it might be. I don't think those are State secrets your Honour.

WILLIAMS J:

No, we all know those anyway. It's really what sort of weight keystone factors will have, or have had, in the past, are the key guide rails for decision-makers. So you've got some sense of how powerful this human story that's in front of the Judge, and eventually will be in front of, perhaps, an immigration official, will play, without any prediction of the outcome.

MR MCCOUBREY:

Yes, and as I say I'm hesitant to say yes or no, not having spoken to it, not been instructed by them on that, but I can –

GLAZEBROOK J:

I suspect the answer would be no. Probably at the most they might be able to give some statistics in terms of how many people eligible, although actually that becomes a bit difficult, depending upon what you're under.

WILLIAMS J:

I don't think we should discourage them.

MR MCCOUBREY:

No.

GLAZEBROOK J:

No, no, I just suspect that they won't be – because they wont actually, I suspect, have everything written in that way that enables them to even make that assessment, because it'll be in individual cases.

MR MCCOUBREY:

Yes, as I say I do, from a decision-making point of view I can see it's, both its utility and its benefit, but on a practical level I can see the difficulty in the caution that might have to attach to it, but I don't think I can say too much more about it.

KÓS J:

I mean the evidence wouldn't necessarily need to come from an official. It could, for instance, be an expert such as a retired immigration official who was retained to provide evidence of that kind.

WILLIAMS J:

It might be a little out of date.

MR MCCOUBREY:

Absolutely. I suppose the, again the difficulty with that might be, I don't want to sound like I'm always trying to put difficulties in the way, but the difficulty with that might be that it would really, it would have no higher status than any other

immigration official who, or immigration practitioner who would say, well, and a court might say “I don’t know”, but a court might say “why am I to accord that any greater weight than this experienced immigration expert who’s provided an affidavit”.

WILLIAMS J:

I guess that will depend on whether you leave the vacuum there for –

KÓS J:

Correct.

WILLIAMS J:

For entrepreneurial defence counsel to find such an official and fill it.

MR MCCOUBREY:

Yes. That has to be a consequence, I accept that your Honour. I don’t know if there’s anything else specific. I can see the time and of course your Honours will wish to accord the appellant some time to reply. So unless there was anything specific that you’d like to hear from me about, those are the respondent’s submissions.

GLAZEBROOK J:

No, thank you very much. Mr Bailey?

MR BAILEY:

I'll be extremely brief. Just picking up on the topic of discussion about what information and additional material that we don’t always get or to date don’t provide courts with and coming back to one of my points about do Immigration Officers when they – or, sorry, does the Minister go outside of section 207 criteria. If, for example, there was evidence and it shouldn’t be contentious, that said, when we make the assessment to issue a deportation liability notice we primarily or exclusively focus on the appeal criteria knowing that that will be an option available if we do issue the notice, then that would be helpful as well in my submission. Conversely, and if it's permitted, they say well we appreciate

that this section 207 appeal criteria is important, we also look at XYZ, then similarly the more information in that respect the better, for the reasons I've outlined, we could more accurately assess what the likelihood of the notice being issued is.

The second matter, only because I raised it and I know it's not going anywhere, but we had talked about assessing gravity and to pick up on Justice Kós' dialogue with my friend that's normally done with words like low, moderate, moderate to low, as in this case and, similarly, that's what I envisage if it hasn't already been suggested courts would do with the assessment of deportation risk if it's being relied on. It won't in many cases be, well no cases will it be a certainty and equally in no cases I suggest would a mathematical approach be adopted. I just use that for ease of reference before. So you'd essentially be proportionality would come down to weighing against, for example, low, moderate to severe or moderate to serious, as the case may be, and that would then provide the answer of course.

Third and last matter, my friend was, as he said, raising caution with a number of matters and one of those is essentially well a judge might think it's likely that the person will be deported and that risk is not justified in light of the gravity and it may well be downstream that wouldn't have happened. That's what I said at the start. That's the nature of the beast looking forward, making forward-looking exercises. I was just looking at the preventive detention legislation, I assume your Honours have all imposed that sentence at one time or another or likely have, but one of the criteria, I think the main criteria is you have to be satisfied it is likely that the offender will commit another qualifying offence after their sentence end date which, as your Honours would have had to grapple with, that's no doubt a difficult assessment to make and no doubt in some cases courts might have concluded an offender will or they think they will commit an offence and if time had been left and they had been free and not been subject to such a sentence, they may well not have and it's just again the nature of the beast. I don't think there should be too much fear that –

WILLIAMS J:

We tend to get a lot more help on that front than we get in these cases.

MR BAILEY:

Yes, well that's – yes, and that's why I agree with the suggestions that have been made the more information the better and that's not something the appellant's trying to avoid, we're just working with what we were – what I was provided with and really left with that in this Court today. Unless there's any further questions those are the reply submissions.

GLAZEBROOK J:

Thank you very much. Well thank you all counsel for your helpful submissions and also the juniors who have been working the ClickShare so thank you all and we'll take time to consider and give our judgment in due course.

COURT ADJOURNS: 11.49 AM