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**IMMIGRATION POLICY AND THE CHILDREN
BORN TO ILLEGAL IMMIGRANTS – DO THEY
STAY OR DO THEY GO?**

LLM RESEARCH PAPER

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The text of this paper (including contents page, Footnotes, bibliography and annexures) comprises approximately 14,500 words.

ABSTRACT

This paper explores the situation where children are born in New Zealand to illegal immigrants. The paper specifically looks at the conflict between the rights of the citizen and the rights of the State. Firstly the New Zealand Immigration Service policy guidelines are considered, which introduce the rights of both parties. New Zealand domestic legislation is considered, specifically the Immigration Act 1987, the Citizenship Act 1977 and the New Zealand Bill of Rights Act 1990. The paper also identifies the relevant international instruments and considers the application of applicable articles in the immigration context. The paper then looks at the role of international instruments in decisions and whether they create either a mandatory relevant consideration or a legitimate expectation and what this means in the immigration context. Different categories of rights holders are identified, and the rights each party has. Finally changes to citizenship and immigration policy are formulated to solve the immigration problem. This paper concludes that in the current environment, children born to illegal immigrants have no real option to stay in New Zealand and so they must leave New Zealand with their illegal immigrant parents.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 14,500 words.

I INTRODUCTION

People are seeking to come to New Zealand in greater numbers than ever, either on a temporary or permanent basis.¹ Inevitably, some of these immigrants will become overstayers as a permit expires, and they fail to leave New Zealand or gain New Zealand residence. These illegal immigrants will be served with removal orders from the New Zealand Immigration Service (NZIS).

The problem that exists in many cases is that illegal immigrants have New Zealand born children while they are in New Zealand. These children are New Zealand citizens by the Citizenship Act 1977. The illegal immigrants then seek to rely on their children's status as New Zealand citizens to preclude their removal from New Zealand. This introduces a conflict between the rights of the state to determine who can reside in New Zealand and the rights of the citizen children to remain in New Zealand. The focus of this paper will principally be on the rights of the children to stay in New Zealand, not those of the parents. The conflict of rights exists because the children have a right to remain in New Zealand and cannot be removed, by virtue of citizenship. The parents have no such right. But in essence removal of the parents results in 'removal' of the children. This could be argued to be an infringement of the children's rights.

This paper will seek to explore the balance between the rights of the state and citizen in more detail. In this regard, the scope of the paper will be limited to situations where persons have arrived in New Zealand and have become illegal immigrants; predominately from Pacific Island nations.² These immigrants have

¹ Numbers of short-term passenger arrivals for the year ended March 1998 were 1,464,766. During 1999 there was 1,517,324. During 2000 there was 1,648,988. Statistics New Zealand *Key Statistics August 2000* (Statistics New Zealand, Wellington, 2000) 23.

² Statistics for the year up to August 1994 show the source countries with the highest number of overstayers were Samoa with 30 per cent and Tonga with 19 per cent. *Mismatch Numbers (Overstayers) by Nationality at given date*.

http://www.immigration.govt.nz/research_and_information/. These results are also shown in current statistics, overstayers from Samoa are 27 per cent of total overstayers and from Tonga 25 per cent. "Last-chance amnesty for overstayers" *New Zealand Herald*, Auckland, New Zealand 20 September 2000, 1.

had New Zealand citizen children in the interim. Children's citizenship should not demand that the parents be allowed to stay in New Zealand. In view of the vast number of cases before the courts on this issue, the paper will be restricted to those before the Court of Appeal and those in the High Court raising points of particular importance.

Part II of this paper will introduce the NZIS policy guidelines that were revised as a consequence of criticism of the situation in *Tavita v Minister of Immigration*.³ Part III will set out the domestic law on the point which creates the children's citizenship and right of residence in New Zealand. Part IV will look at the relevant international instruments and their application in the immigration context. Part V will look at the conflict between state and citizen, in particular the rights of each party. Finally Part VI will suggest any viable changes in immigration or citizenship policies that are appropriate before immigration creates a real problem for the nation.

II NZIS IMMIGRATION POLICY

New Zealand has had a targeted immigration policy since 1991, which was designed to attract quality immigrants.⁴ The process is based on a points system where the qualities of potential immigrants are ranked according to set criteria and given an overall point result. This result must reach the point pass mark for residency to be granted. The pass mark is announced weekly to meet the set immigration targets.⁵ This system excludes many applications from Pacific Island persons, because the required standard is so high.⁶ The policy was targeted to highly educated persons who could contribute to the economic growth of New

³ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) [*Tavita*].

⁴ Ruth SJ Farmer "New Zealand's 'Targeted' Immigration Policy, 1991 to 1996" (1997) 5(1) *People & Place* 1, 3.

⁵ New Zealand Immigration Service *Immigration Policy Guidelines* (New Zealand Immigration Service, Wellington, 2000) R6.20 [NZIS].

⁶ Farmer, above n 4, 8.

Zealand.⁷ Thus many Pacific Island immigrants rely on temporary entry to New Zealand.

The Court of Appeal criticised the NZIS's treatment of the situation in *Tavita*⁸ where the rights of a New Zealand born child were not considered when removing an illegal immigrant father. A specific format was then developed to deal with all immigration decisions to avoid further adverse comments. The guidelines represent the protocol to be followed when assessing immigration applications and enforcing removals.

The guidelines start from the proposition that decisions must be made in accordance with fairness and natural justice.⁹ This means that all decisions are dealt with consistently. Temporary entry permits and visas are not granted as of right, but as a matter of discretion¹⁰ and the guidelines set the required considerations. Applicants must be bona fide and intending a truly temporary stay in New Zealand, they must not be likely to breach the conditions of the permit, nor remain in New Zealand unlawfully.¹¹ The NZIS is fully aware of the current problem of illegal immigrants and considers this when deciding applications. Temporary entry can be for employment, visitation or study and is for a maximum initial stay of four years.¹²

In the situations of the cases to be discussed, the parents legally gained temporary entry to New Zealand. However, their permits then expired and they became illegal immigrants. Such persons are obligated to leave New Zealand on or before the date their permit expires.¹³ The NZIS will conduct investigations with the objective to maintain the integrity of New Zealand's immigration law and policy, by ensuring that breaches are dealt with in accordance with this law and policy.

⁷ NZIS, above n 5, R1a.

⁸ *Tavita*, above n 3, 266.

⁹ NZIS, above n 5, A1.1b.

¹⁰ Immigration Act 1987 s 10 and NZIS, above n 5, E3.3.10.

¹¹ NZIS, above n 5, E5.1.

¹² NZIS, above n 5, E3.5.5.

The NZIS proceeds on the footing that the principle is to uphold New Zealand's immigration law under the Immigration Act 1987 and the protocol developed by the NZIS for approval or rejection of permits. Prima facie illegal immigrants will be removed. However¹⁴

[a]s the New Zealand Government recognises New Zealand's obligations under international law it is essential that such obligations be taken into account when executing removal orders. International obligations which may apply in such circumstances are:

- ii the 1966 International Covenant on Civil and Political Rights . . . ;
- iii the 1989 United Nations Convention on the Rights of the Child . . .

This is an express recognition that international instruments are relevant to removal decisions. The two documents contain provisions on the rights of children that must be taken into account in executing a removal order.¹⁵

Further recognition of an assessment of rights is in D4.45.5a of the policy guidelines. The Immigration officer must "take into account the particulars of the case and the impact removal might have on the rights of: . . . any immediate family associated with that person, (particularly those who are New Zealand citizens or residents)." This also incorporates the rights of the New Zealand citizen children into the decision making process. Those rights are not absolute and must be balanced against the rights of others. In particular, against¹⁶

- i the rights and interests of the state in determining who should reside within its borders;
- ii the principal goals of the Government residence policy;
- iii the intention of the Immigration Act 1987 to ensure a high level of compliance with immigration laws;

¹³ NZIS, above n 5, D2.10 and Immigration Act 1987 s 45 and 46.

¹⁴ NZIS, above n 5, D4.45a.

¹⁵ *Puli'uvea v Removal Review Authority* (1996) 14 FRNZ 322, 334 (CA) [*Puli'uvea*].

¹⁶ NZIS, above n 5, D4.45.5b

iv the need to be fair to other potential immigrants who have not met policy requirements and who have not been able to remain in New Zealand.

This balancing process indicates there has been "a change from asking whether government has the power to do something, to asking whether persons have a right that it not be done."¹⁷ The rights of the individual are not unqualified, but they must at least be considered. Deficiencies in the procedure will attract criticism by the court. The application of this concept will be discussed later in Part V.

III NEW ZEALAND DOMESTIC LEGISLATION

A Immigration Act 1987

The relevant law is contained firstly in the Immigration Act 1987 that empowered the NZIS to create the policy guidelines. Of particular importance to the children in these cases is Section 3(1), which provides that "every New Zealand citizen has, by virtue of that citizenship, the right to be in New Zealand at any time." Also Section 3(3) "no such citizen is liable under this Act to removal or deportation from New Zealand in any circumstances."

When children leave New Zealand with their illegal immigrant parents Section 3(3) has been breached because the children are in fact 'removed' from the country. But the courts have distinguished removal orders for the parent and the consequential choice to take their children with them.¹⁸ It is correct to say that the children are not the subject matter of the removal order, but the end result is removing New Zealand citizens from New Zealand. The only difference is the label attached, "removal from New Zealand" and "leaving New Zealand". The same detriment results for the child, which is morally wrong.

¹⁷ Carl E Schneider "Discretion and Rules: A Lawyers View" in Keith Hawkins (ed) *The Uses of Discretion* (Clarendon Press, Oxford, 1992) 52.

The children are in a sense removed because their parents have no real alternative but to take their children with them, yet the court in *Elika v Minister of Immigration* said Mrs Elika had a choice to leave her children in New Zealand.¹⁹ Mrs Elika could leave her children with their father, her defacto partner. For most illegal immigrants, with no other family in New Zealand there is no choice.

The illegal immigrants are pushed into making a difficult decision that the State stands back from. The choice to abandon their child or maintain the family at a lesser standard of living. Although the decision is agonising it is primarily demanded by the immigrants' own circumstances. The State must uphold the immigration laws and so illegal immigrants should leave New Zealand. If this means taking their New Zealand citizen children with them, then that is the unfortunate result.

Once a removal order has been executed, the persons have a right to appeal to the Removal Review Authority (RRA) within 42 days. The grounds of appeal are²⁰

exceptional circumstances of an humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.

These grounds incorporate the interests of New Zealand born children into the appeal process.

B *Citizenship Act 1977*

The starting point for those rights in the Immigration Act 1987 is that every person born in New Zealand "shall be a New Zealand citizen by birth."²¹ Therefore,

¹⁸ *Elika v Minister of Immigration* [1996] 1 NZLR 741, 749 (HC) [*Elika*].

¹⁹ *Elika*, above n 18, 749.

²⁰ Immigration Act 1987 s 47(3) and NZIS, above n 5, D4.75.

²¹ Citizenship Act 1977 s 6(1).

regardless of the immigration status of parents, anyone born in New Zealand has the rights and privileges that attach to New Zealand citizenship.

Section 6(1) is sensible in practice and is easy to apply. Nevertheless, it does intensify the situation with regard illegal immigrants, since the rights of New Zealand citizens are relevant when executing removal orders.²² When a child born in New Zealand to illegal immigrants is given New Zealand citizenship this is one more factor the State must balance when deciding to remove parents. This citizenship provides a convenient link to New Zealand for illegal immigrants who have no further rights to be in New Zealand, which is a problem with the rule.

The birthright citizenship rule needs to be changed to reduce the number of immigration cases before the courts. However these changes may not be sensible in practice. The changes will be discussed in Part VI

C New Zealand Bill of Rights Act 1990

Section 18 of the New Zealand Bill of Rights Act 1990 (NZBORA) is also relevant. Those lawfully in New Zealand have a right of residence in New Zealand. New Zealand citizen children are lawfully in New Zealand and have a right to remain as residents. Yet in most cases, they depart with their parents, which is in effect removal.

This point was argued in *Schier v Removal Review Authority*.²³ In that case the Court of Appeal agreed with the RRA, that as a consequence of the lawful removal of Mr and Mrs Schier they had "no practical option" but to take their three New Zealand born children with them. However this is not to be "characterised as the unlawful 'indirect' removal of the children by the New Zealand authorities."²⁴

²² NZIS, above n 5, D4.45.5a.

²³ *Schier v Removal Review Authority* [1999] 1 NZLR 703, 706 (CA) [*Schier*].

²⁴ *Schier*, above n 23, 709.

This statement supports the view that the children are not subject to the removal order and hence are not 'removed'.

The children's right to residence in New Zealand for the time being cannot be enjoyed, because they must leave New Zealand. This right has not been breached because of an act of state;²⁵ the right cannot be enjoyed because the illegal immigrant parents have decided to keep the family together and leave New Zealand. Therefore the State is removed from the decision. The right of residence still exists and if a child returns to New Zealand they can still enjoy this right, the result is justified.

In the end both Mr and Mrs Schier and their three children left New Zealand. They filed a complaint with the United Nations Commissioner for Human Rights in 1998, which was later withdrawn to advance the review by the Minister of Immigration. Lianne Dalziel is currently reviewing the case because the Schier's wish to return to New Zealand.²⁶ Therefore the media attention the case attracted has been beneficial to the plight of the Schiers.

In sum, the New Zealand domestic legislation recognises the children as New Zealand citizens and introduces their right to remain in New Zealand.

IV INTERNATIONAL INSTRUMENTS

The NZIS policy guidelines specifically refer to the United Nations Convention on the Rights of the Child (CRC) and the International Covenant on Civil and Political Rights (ICCPR) as being relevant to a decision to execute a removal

²⁵ For the New Zealand Bill of Rights Act 1990 to apply it must be an act of the State, New Zealand Bill of Rights Act 1990 s 3.

²⁶ "Deported couple's case likely for review" *The Dominion*, Wellington, New Zealand, 11 July 2000, 2.

warrant. These international instruments provide specific protection for the rights of children.

A United Nations Convention on the Rights of the Child 1989

The most prominent recognition of children's rights is in the CRC that New Zealand ratified in 1993.

This Convention expanded the protection given broadly to all by the Universal Declaration of Human Rights and the ICCPR because it was considered that "childhood is entitled to special care and assistance."²⁷ Because children are in a vulnerable position extra protection is justified. Therefore the CRC is tailored especially to the needs of children.

The Convention offers protection and recognises rights for children in a vast number of circumstances, including such things as abduction (Articles 11 and 35), cultural identity (Article 29(1)), health (Article 24(1)) and recreation (Article 31(1)) to name but a few. The Convention "reflect[s] the generally accepted standards of society in this country."²⁸ The predominant views on how children should be treated are encapsulated in this document. In *Minister for Immigration and Ethnic Affairs v Teoh* the High Court of Australia had to decide on the appropriateness of the CRC to a decision to remove an immigrant convicted of a drug offence. Gaudron J thought the Convention gave expression to a fundamental right already recognised in society.²⁹ There should be no dispute when applying the provisions in the CRC because society expects these standards to be recognised. The CRC collects the rights and protections and makes them more identifiable and accessible.

²⁷ United Nations Convention on the Rights of the Child preamble and Universal Declaration of Human Rights art 25(2).

²⁸ *H v F* (1993) 10 FRNZ 486, 499 (HC).

²⁹ *Minister for Immigration and Ethnic Affairs v Teoh* 128 ALR 353, 376 (HCA) [*Teoh*].

1 *Article 3(1)*

The relevant provision of the Convention for the purposes of the rights of children in immigration cases is Article 3(1). "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

During development of the Article there was discussion about the consideration requirement. The wording of the article was originally "... shall be the paramount consideration."³⁰ However this was thought by some Delegates to be too broad.³¹ It was possible that "there were situations in which the competing interests, inter alia, of justice and society at large should be of at least equal if not, greater importance than the interests of the child."³² This is sensible, as a broad convention such as the CRC operates at many levels and an article that would make the interests of the child the 'paramount' consideration would create too much of a burden on the decision making body. If the interests of the child were the 'paramount' consideration then illegal immigrants would have a much better chance of remaining in New Zealand on this basis, which would not be acceptable. In fact restrictions or limitations on children's rights may be necessary and justifiable in some circumstances.³³ Immigration may be such a circumstance.

2 *Does Article 3(1) of the Convention on the Rights of the Child apply in the immigration context?*

Notwithstanding the recognition by the NZIS that the CRC is relevant to immigration decisions it is useful to examine whether it does actually have constructive application.

³⁰ Sharon Detrick (ed) *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff, Netherlands, 1992) 131.

³¹ Detrick, above n 30, 133.

³² Detrick, above n 30, 137.

Firstly, Article 3(1) applies “[i]n all actions concerning children”. A decision to execute a removal order on a parent of a child qualifies as an action that concerns children, as they will be affected by the consequences. This matter was considered in *Teoh*. The Minister in that case relied on the definition of ‘concerning’ to mean “regarding and touching”.³⁴ A decision to remove parents affects children, but does not touch them.³⁵ Mason CJ and Deane J disapproved of this argument and required a broad reading and application of the Convention.³⁶ Adopting the interpretation of the Minister would be to restrict the application of the CRC to only a few situations. This would not be a satisfactory result because the expected standards would not be applied.

What also must be considered is that the Article refers to “the child”. This means all children within the jurisdiction of the State.³⁷ Regardless of the immigration status of parents, children must be protected, because children are vulnerable. New Zealand society would expect all children within the State to have the same rights and protections as a fundamental proposition.

An obligation is imposed on the State to consider the best interests of the child in all decisions, regardless of resources available. In Article 4, economic, social and cultural rights are implemented within the available resources. Article 3(1) has wide application and must be applied in all relevant situations without dissent. The State party cannot rely on a lack of resources argument to justify not applying the Article. This treatment reinforces the importance of the Article’s application.

³³ GW Austin “Children’s Rights in New Zealand Law and Society” (1995) 25 VUWLR 249, 281.

³⁴ JA Simpson and ESC Weiner (eds) *The Oxford English Dictionary* (Clarendon Press, Oxford, 1989) 657.

³⁵ *Teoh*, above n 29, 363.

³⁶ *Teoh*, above n 29, 363.

³⁷ Mark Henaghan “The Legal Significance of the Ratification of the UN Convention of the Rights of the Child” (1993) 9 Children 11.

The Convention then applies in the immigration context, because the decision will be made by NZIS, which is an "administrative authorit[y]".³⁸ The requirement is that in decisions to remove parents, the best interests of the child are a primary consideration.

3 *The best interests requirement*

The best interests requirement is difficult to follow. There is no guidance in the provision as to who decides the child's best interests or on what grounds they should be based. This concern was raised during development of the provision where the Delegate from Venezuela thought the provision was too subjective.³⁹ This objection was later withdrawn. There is also no guidance as to what interests are relevant - physical, mental or spiritual. This could be overcome by requiring an examination of the overall interests in unison, which would give the greatest protection. These deficiencies in meaning were not resolved when the Convention was developed. It would appear the meaning was either taken for granted or considered unimportant.⁴⁰

Robert Mnookin was one of the first authors to critique the principle. He formulated the principle as "equivalent to the least detrimental alternative".⁴¹ The least detrimental alternative is consistent with what is in a child's best interests. However the same outcome would not result in all situations. For example, in the medical context, it could be in the person's best interests to receive chemotherapy treatment, but the least detrimental alternative would be a bone marrow transplant, because the side effects of chemotherapy are avoided.

³⁸ United Nations Convention on the Rights of the Child art 3(1).

³⁹ Detrick, above n 30, 137.

⁴⁰ Philip Alston "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights and the Law* (Clarendon Press, Oxford, 1992) 1, 11.

⁴¹ Robert Mnookin "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39(3) *Law & Contemporary Problems* 226, 255.

Mnookin's formulation of least detrimental alternative therefore does not clarify the meaning of best interests. Mnookin also puts forward that best interests are not an action that "would pose an immediate and substantial threat to the child's physical health".⁴² This is not comprehensive, as there is no reference to mental or spiritual interests, which should be considered.

The problem that exists with best interests, particularly in immigration cases, is that in order to evaluate the best interests a value must be put on all possible outcomes. Those outcomes are matters of pure speculation.⁴³ In general the outcomes will be to stay in New Zealand with or without parents or to return to the parents' home country to a lesser standard of living which was argued in *Puli'uvea*.⁴⁴ The consequences of these options will not be known for some time. What appears to be in the child's best interests now might not be in five years time. However this problem is a general flaw in the best interests requirement. The only solution is to obtain current and relevant information for the decision-maker. Then there would be a satisfactory base for the decision, so as to eliminate speculation.

Linked to this speculation is the problem that the decision-maker decides the child's best interests. This "provides a convenient cloak for bias, paternalism and capricious decision making."⁴⁵ Everyone defines best interests differently; it depends on the value system of the decision-maker.⁴⁶ The NZIS on behalf of the State is executing the removal order, the best interests of the child are to be weighed against the rights of the State to decide who can reside in New Zealand and enforce the immigration law.⁴⁷

⁴² Mnookin, above n 41, 249.

⁴³ Stephen Parker "The Best Interests of the Child – Principles and Problems" in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights and the Law* (Clarendon Press, Oxford, 1992) 26, 30.

⁴⁴ *Puli'uvea*, above n 15, 332.

⁴⁵ Parker, above n 43, 26.

⁴⁶ Parker, above n 43, 26.

⁴⁷ NZIS, above n 5, D4.45.5.

There is an inherent risk of bias because the decision-maker (NZIS) is effectively the same as one of the parties (the State). This is true of all government decisions but is particularly important in the immigration context because of the potential outcome of leaving New Zealand. But there is no suitable alternative party to decide these outcomes. They must be formulated by the NZIS who executes the removal orders.

Given the deficiencies of the principle, its value is that it injects issues into the decision making process.⁴⁸ The decision-maker must consider the position of the child by weighing up the potential outcomes and assigning a value to them. There is at least an examination of the effect of an action on the child. Therefore the best interests requirement is the better option to recognise and protect children's interests because the effect of the outcome on the child is considered.

4 *Application of Article 3(1) in the immigration context*

Article 3(1) stipulates that the "best interests of the child shall be a primary consideration." The interests of the child are not absolute. What is required is a genuine consideration, something more than a token or merely formal examination to ensure all aspects are factored into the decision.⁴⁹ This requirement imposes a workable obligation on the decision-maker and would be the minimum standard possible.

In *Puli'uvea*⁵⁰ the Court thought the starting point was the person unlawfully in New Zealand, the parents. This would make it extremely difficult for the children's interests to outweigh a breach of the Immigration Act 1987. But the law must be upheld and this does occur at the expense of innocent third parties.

⁴⁸ John Eekelaar "The Interests of the Child and the Child's Wishes: the Role of Dynamic Self-Determination" in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights and the Law* (Clarendon Press, Oxford, 1992) 42, 46.

⁴⁹ Alston, above n 40, 13.

The Minister in *Teoh* also argued this stance.⁵¹ Mr Teoh's criminal convictions were thought by the Immigration officer to outweigh any claims of compassion by the children or Mrs Teoh. The Immigration officer recognised the bleak future for the family, and that Mr Teoh was the only person who could keep the family together because of his wife's heroin addiction. But the Immigration officer thought the family circumstances were subordinate to Mr Teoh's unlawful actions. Mason CJ and Deane J criticised the argument. They took a human rights approach to maximise the rights of children. Mason CJ and Deane J indicated that the rights of the children must be established first, which ensures absolute protection for children, which is a desirable achievement.

The starting point is to establish the interests of the child and weigh those against any other interests, such as the State's. What is required is a balancing exercise.⁵² However there is no indication of the weight to be placed on each factor. The weighting is left to the decision-maker and is not reviewable by the court.⁵³ Whilst this recognises that different views attach to different factors and is best left to discretion, it introduces issues of inconsistency. The balancing exercise is going to favour the State in upholding immigration law. Therefore the process really does not give adequate protection to children, as their cause is predominately inferior to the State's.

Tavita presents an exception to the norm because it was the first in this line of cases. The rights of the child had not been considered in the situation, because the child had not been born when Mr Tavita's removal was ordered. Cooke P indicated that "the basic rights of the family and the child are the starting point."⁵⁴ The fact that Mr Tavita was the sole caregiver for the child was important. In an affidavit by Dr AA Kerr, pediatrician, it was stated that if Mr Tavita was to leave New Zealand the care for the child would no longer be available which would

⁵⁰ *Puli'uvea*, above n 15, 329.

⁵¹ *Teoh*, above n 29, 366 per Mason CJ and Deane J.

⁵² *Elika*, above n 18, 746.

⁵³ *Puli'uvea*, above n 15, 334.

affect the child's well-being and development, which would not be in her best interests.⁵⁵

The distinguishing feature in *Tavita* was that the NZIS had never referred to the CRC or the ICCPR because the child had not been born when the removal was ordered. The Crown acknowledged that the case had not been considered from this point of view, and may produce a different result.⁵⁶ The Court allowed the Minister time to reconsider the circumstances.⁵⁷ Mr Tavita was then given permission to remain in New Zealand.⁵⁸ The criticism of the treatment is quite harsh, given that the rights of the child cannot be important unless the child has been born. But once a child is born, it is essential that those rights are the starting point, as the Court of Appeal in *Tavita* concluded.⁵⁹ The findings then prompted the NZIS to develop the considerations of international instruments in the policy guidelines. Since this case the courts have been swift to refuse any hope for residency on the basis of New Zealand citizen children.

In *Elika* the Court recognised the stress the three New Zealand born children were likely to suffer if they had to leave New Zealand. There were no other family members in Tonga, no social welfare benefits and a lesser standard of education.⁶⁰ Yet the Court still ordered removal of Mrs Elika who had been in New Zealand illegally for 10 years. This approach reflects the position of NZIS on immigration. Even though the children's interests were considered they did not outweigh the fact that Mrs Elika was in New Zealand illegally. The result is unfair to the children, but in the end the law must be upheld.

In *Puli'uvea*, the Court acknowledged that the Puli'uveas came to New Zealand as visitors, so they must have known they could not stay in New Zealand

⁵⁴ *Tavita*, above n 3, 266.

⁵⁵ *Tavita*, above n 3, 260.

⁵⁶ *Tavita*, above n 3, 265.

⁵⁷ *Tavita*, above n 3, 266.

⁵⁸ Philip A Joseph "Constitutional Law" [1997] NZ Law Rev 209, 228 ["Constitutional Law"].

⁵⁹ *Tavita*, above n 3, 265.

indefinitely.⁶¹ The relevant factors were that the children would miss their parents if they remained in New Zealand and that Mr Puli'uvea had no land or job in Tonga.⁶² In the Puli'uveas' case, life in New Zealand was not that ideal either, the Puli'uveas depended on charity from family members and lived in crowded conditions. Thus, remaining in New Zealand was not in the children's best interests anyway. The correct legal result ensued with the parents choosing to take their children with them when the removal order was eventually executed. In a sense the children's best interests were promoted by keeping the family together.

3 The International Covenant on Civil and Political Rights

Article 3(1) of the CRC does have important application in the immigration setting; the rights of the child are a "primary consideration." Children do not guarantee an illegal immigrant's right to stay in New Zealand, they are one consideration in the decision to remove their parents.⁶³ The balance that has been developed is to favour the rights of the State to uphold the immigration law, which is a good result.

4 Article 23

5 Article 9

The ICJPR gives protection to the family and hence children. Article 23(1)

Another important provision for the immigration setting is Article 9. This provides that "[s]tate parties shall ensure that a child shall not be separated from his or her parents against their will". On its face a decision to remove parents from New Zealand would be separating parents and child. The parents are removed from New Zealand and their children can remain because they are New Zealand citizens. However the response from the courts is that the parents are being removed, not the children. The parents then have the choice to take their children with them when they leave New Zealand. If the parents decided to leave their children in New Zealand, there would be separation. This separation would not be from the action of the State, but from the action of the parents and so Article 9 no

⁶⁰ *Elika*, above n 18, 747.

⁶¹ *Puli'uvea*, above n 15, 325.

⁶² *Puli'uvea*, above n 15, 333.

⁶³ *International Covenant on Civil and Political Rights*, Article 23(1).

longer applies. This is a fine distinction and quite illogical. The problem with the logic is that the State has forced the separation of parents and child. But the distinguishing characteristic is that the separation is also forced by the circumstances of the parents; they are illegal immigrants and have no right to stay in New Zealand. Therefore if they choose to leave their children in New Zealand it is a consequence of their unlawful position. This is the justification for the current position; no criticism can be attributed to the State.

B The International Covenant on Civil and Political Rights

The ICCPR is another international instrument that offers rights protection. It differs from the CRC, in that the protection is for all humans. The Covenant recognises that the rights derive from "the inherent dignity of the human person".⁶⁴ Yet the ICCPR does offer specific protection to children.

1 Article 23

The ICCPR gives protection to the family and hence children. Article 23(1) provides that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." The State must seek to keep the family together.

2 Does Article 23 apply in the immigration context?

Article 23 gives protection to the family and is important in the immigration context. In decisions to remove illegal immigrant parents from a country, the family can be broken up. This would not be giving the family any protection. However, the courts do not equate removal of parents with removal of children.

⁶³ Richard Peter McLeod *The United Nations Convention on the Rights of the Child: Implications for Domestic Law* (LLM Research Paper, Victoria University of Wellington, 1995) 16.

⁶⁴ International Covenant on Civil and Political Rights preamble.

Parents must decide whether to take their children with them, though sometimes because of their circumstances there is no real choice.⁶⁵

The parents have a choice; they can leave their children in New Zealand, thus breaking up the family; or take them with them when they leave New Zealand, keeping the family unit intact. In these situations the State is protecting the family because the parents decide the outcome. The fact that this choice is forced, by their own circumstances as illegal immigrants, must be realised. The choice is not driven by the State in enforcing the law.

In *Elika*, the Immigration officials recorded the circumstances of the family and indicated that Mrs Elika would be best travelling with her three children to Tonga. Mrs Elika could also leave her children in New Zealand with her defacto partner, the children's father.⁶⁶ This highlights the options available to an illegal immigrant who has a partner legally in New Zealand.

In *Puli'uvea*, both parents were in New Zealand illegally. Their only option was to take their children with them or leave the children with an already large extended family. If both parents are illegal immigrants there may be no feasible option but to take their children out of New Zealand. It is basically a decision for the parents once the State has made the order for removal. Therefore although children leave New Zealand the family unit is maintained and there is no reviewable action under Article 23, which is correct.

Mr and Mrs Puli'uvea wanted to remain in New Zealand on the basis of their three New Zealand born children's citizenship. However they had left a Tongan-born child in Tonga before coming to New Zealand. Therefore the Court was reluctant to accept the arguments advanced for the Puli'uveas concerning family unity.⁶⁷ When the family left New Zealand, family unity would be enhanced, as the whole

⁶⁵ As in *Elika*, above n 18, 748 and *Schier*, above n 23, 709.

⁶⁶ *Elika*, above n 18, 747.

immediate family would be together in Tonga. Therefore the result is justified, even though the New Zealand born children must leave New Zealand.

There has been a recent case in the media, which seems to typify the current situation where families are split up. Malama Soapi was removed from New Zealand. She chose not to take her three-month-old baby with her when she left for Tuvalu. The result was a tearful good bye at Auckland Airport.⁶⁸ In this case the young mother thought the child's future would be best served remaining in New Zealand with other family members. The decision to leave the child in New Zealand means that Ms Soapi cannot see her child in New Zealand for the five years that the removal order remains in place. It is harsh that the child cannot see her mother, but weighed against a life in New Zealand the best result for the child was to remain in New Zealand.

3 Article 24

Article 24(1) gives specific protection to children and states:

[e]very child shall have without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as minor, on the part of his family, society and the State.

This Article imposes a positive obligation, as does the CRC. This obligation falls on the family, society and also the State to protect children because of their vulnerable position in society. During the development of the Article, there was debate whether children needed this extra protection because all of the other protections and rights applied to children.⁶⁹ Delegates thought that some of the other rights in the ICCPR could not be fully exercised by children and a special

⁶⁷ *Puli 'uvea*, above n 15, 334.

⁶⁸ "Overstayer law cruel for children" *Nelson Mail*, Nelson, New Zealand, 13 June 1999, 7.

⁶⁹ MJ Bossuyt *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, Netherlands, 1989) 455.

protection clause was justified.⁷⁰ Children should be given this special protection because their characteristics are different to other persons, children lack capacity to make decisions so they should have protection which ensures their interests are considered.

Article 24(3) states “[e]very child has the right to acquire a nationality.” This is particularly relevant in the immigration context, because children who are New Zealand citizens leave New Zealand when illegal immigrant parents are removed. Removal from a country of birth may affect nationality, because nationality is affected by country of residence.

4 *Does Article 24 apply in the immigration context?*

Article 24 protects “[e]very child”. This means any child within the territory of the State.⁷¹ Regardless of the immigration status of their parents, all children are entitled to protection.

The level of protection required is not stated, nor is there any guidance as to what must be protected. In the immigration context what must be protected is the right of the child to stay in New Zealand as a New Zealand citizen and to remain with their family. The State must firstly decide the level of protection. The State makes the decision whether to enforce the removal order against illegal immigrants. The parents must then protect their children either by taking the children with them when they leave New Zealand and keeping the family together or leaving them in New Zealand and preserving their future. This would be the level of protection decided by the family. Society also has a role of protection if children remain in New Zealand. Society bears the cost of education, health and other benefits to children.

⁷⁰ Bossuyt, above n 55, 456.

The approach to protection would be similar to that required under Article 3(1) of the CRC. The interests of the children are relevant, but are generally subordinate to the rights of the State. There must be a consideration of the wider interests of the family and child, not mere incidental references.⁷² To satisfy Article 24 the child's interests must be considered in a decision because they cannot voice them on their own.

The right of the child to obtain a nationality under Article 24(3) is particularly difficult. The children have New Zealand citizenship, which entitles residence in New Zealand. However citizenship is different to nationality.

Citizenship entitles "the citizen to all the rights, and binding the citizen to all of the duties of members of the body politic."⁷³ By virtue of citizenship there is a right to vote and a right to free education. There is also an obligation to comply with New Zealand's tax obligations and obey and protect the laws of New Zealand.⁷⁴ Citizenship creates a connection between the individual and the State by imposing rights and obligations.

This can be contrasted with nationality, which is a "connection between an individual and a state that results in, for example, diplomatic protection."⁷⁵ Nationality is an international law concept, conveying a sense of belonging to a state. Nationality creates a different type of connection between the individual and the State than citizenship. It creates a national unity because of an allegiance and patriotism between the individual and the State. In this regard, one could be a national of a country but not a citizen. For example a national of the United States would include persons from American Samoa. They are not citizens of the United States but owe a permanent allegiance to the United States because of the

⁷¹ Melissa A Poole "International Instruments in Administrative Decisions: Mainstreaming International Law" (1999) 30 VUWLR 91, 97.

⁷² *Rajan v Minister of Immigration* [1996] 3 NZLR 543, 550 (CA) [*Rajan*].

⁷³ John W Guendelsberger "Access to Citizenship for Children Born Within the State to Foreign Parents" [1992] AM J Comp L 379, 382.

⁷⁴ *Frequently Asked Questions* <<http://www.citizenship.govt.nz>> last updated 16 August 2000.

country's attachment to the United States. Therefore the country of residence would dictate nationality. Nationality is different to citizenship.

Under Article 24(3) children have a right to acquire a nationality. Citizenship is granted by the Citizenship Act 1977 upon birth in New Zealand. The fact that children are removed from New Zealand with their illegal immigrant parents does not negate this. There is still a right to acquire a nationality, although in a foreign country. For example, moving to Tonga means the child will acquire a Tongan nationality. Nationality is something people can be identified by and reflects on their personalities. It is developed by belonging to and identifying with a nation. This right has not been broken if children leave New Zealand with their parents. Nationality is developed from the surroundings the child grows up in, this could be either New Zealand or a foreign country.

Therefore the ICCPR is relevant in the context of immigration. The child and the family both require protection, the level of protection will be decided by the decision-maker.

C Conclusion: The Role of International Instruments

The ICCPR and the CRC contain articles that are relevant in the immigration context. There is debate over how these instruments should be applied by the NZIS and in turn the courts. The interpretation will affect the recognition and application of the rights of the New Zealand citizen children.

It is common ground that it is the Legislature that makes the law for the country, Parliament developing law as elected representatives. However the Executive ratifies international instruments, which is where the problem occurs. If the international instruments are ratified but not specifically provided for in legislation they are not an act of the Legislature - the law making body. There is a fear that

⁷⁵ Guendelsberger, above n 73, 328.

the Judiciary in applying the treaties would be "incorporating the [treaty] into . . . domestic law through the back door".⁷⁶ This would not be an act of the Legislature enacting law, but the Judiciary making law, the Legislative power to make law would thus be undermined. However ratification is an act of the State and so sovereignty is still maintained. It is premature to criticise the ratification and application of unincorporated treaties as they are still an act of state.

Cooke P in *Tavita* preferred a much more liberal approach. "A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts".⁷⁷ If the New Zealand courts failed to apply an international text by reason that it was not incorporated into domestic law, they could be criticised by international bodies such as the United Nations and the European Court of Human Rights. This is because some international norms are so fundamentally important that treaties must be given effect. Individuals would expect basic values to be adhered to in a decision by a state party otherwise ratification of a treaty is redundant.

The point that treaties represent international norms was recognised in *Teoh* when Gaudron J indicated that the CRC represented values that were already inherent in Australian society.⁷⁸ The same analysis applies to New Zealand.⁷⁹ Therefore a failure to give effect to these standards either by a decision-maker or the courts would not be enforcing what society expects. If treaties are not applied the treatment should be criticised.

⁷⁶ *R v Home Secretary, ex parte Brind* [1991] AC 696, 761 (HC).

⁷⁷ *Tavita*, above n 3, 266.

⁷⁸ *Teoh*, above n 29, 376.

⁷⁹ *H v F*, above n 28, 499.

1 Do international instruments create mandatory relevant considerations in the immigration context?

Following *Tavita* international instruments may be a mandatory relevant consideration.⁸⁰ This means that some international obligations are so important that no reasonable decision-maker can ignore them. Cooke P extended the prevailing view of the time which was developed in *Ashby v Minister of Immigration*.⁸¹ An unincorporated treaty was only an aid to interpretation if there was some ambiguity with the operation of the Act, the treaty could not override the words of the Act. The Act still governs a decision but should be applied in consultation with the international treaties. This ensures an acceptable approach to protect fundamental human rights.

Following the comments in *Tavita* concerning the approach to the execution of removal orders, the NZIS revised the policy guidelines. These guidelines make specific reference to the international instruments. The obligation is for the NZIS to take such obligations into account when deciding to execute a removal order.⁸² This recognition makes the ICCPR and CRC mandatory relevant considerations.⁸³

Even the mandatory relevant consideration stance has attracted criticism. It has been thought that for an international instrument to be a mandatory relevant consideration there must be "some statutory reference to the relevant obligation."⁸⁴ A statutory reference means that Parliament has identified which international texts are relevant so that the Legislature has involvement in the treaty process. But given the lengthy process of legislation this procedure would be slow and burdensome. Requiring statutory reference for every treaty for every state agency would create too much of a backlog on legislation through Parliament. The NZIS policy guidelines do not have the force of law, but represent the internal procedure

⁸⁰ Poole, above n 70, 91.

⁸¹ *Ashby v Minister of Immigration* [1981] 1 NZLR 222, 224 (HC) [*Ashby*].

⁸² NZIS, above n 5, D4.45a.

⁸³ Poole, above n 70, 95.

to be followed when applying the Immigration Act 1987. It would be ridiculous if an express recognition that the ICCPR and CRC must be taken into account by the body that developed the guidelines, would not be a mandatory relevant consideration.

This criticism can be reconciled to the *Ashby* general view by recognising that not all international instruments are mandatory considerations, they must of course be relevant and must impose an obligation that has arguably been breached or will be breached by the outcome under challenge.⁸⁵ This idea is emphasised in the identification by the NZIS of the ICCPR and CRC as being relevant to immigration decisions.⁸⁶ Since the NZIS has highlighted the importance of the ICCPR and the CRC it can be assumed that these are relevant considerations and must be examined. The fact the policy guidelines are not an Act of Parliament is irrelevant, because the NZIS is applying the Immigration Act 1987.

In *Elika* the NZIS satisfied the requirement by balancing the rights in the ICCPR and the CRC against the "country's right to determine who may remain"⁸⁷ in New Zealand. This approach ensures that the rights of the New Zealand citizen children have been accounted for in the process, giving the best possible protection within the Immigration Act 1987.

In *Puli'uvea*, the court found that the NZIS had considered the relevant instruments and so there was no reviewable error.⁸⁸ What the court will not stray into is suggesting the weight to be placed on each factor. It was recognised that "different views will be held about the balance to be struck between the various considerations."⁸⁹ The weights of different factors are not reviewable. The decision-maker (NZIS) is in the best position to decide the weightings. The fact

⁸⁴ GDS Taylor "Administrative Law" [1997] NZ Law Rev 187, 204.

⁸⁵ Rodney Harrison "Domestic Enforcement of International Human Rights in Courts of Law: Some Recent Developments" [1995] NZLJ 256, 263.

⁸⁶ NZIS, above n 5, D4.45.

⁸⁷ *Elika*, above n 18, 748.

⁸⁸ *Puli'uvea*, above n 15, 334.

that the NZIS is a state agency means that the rights of the State are going to be predominant, but is a consequence of the immigration system.

The issue whether the international instruments were a mandatory relevant consideration and was not

There is still dissent concerning international instruments as mandatory relevant considerations. The first argument hypothesises that the Executive enters into treaties so they cannot be mandatory relevant considerations. There is the basic fear that this would result in unincorporated treaties being incorporated into domestic law without the vote of Parliament. This would be changing the law, without the consent of Parliament, which in turn violates the separation of powers and the concept of Parliamentary sovereignty.

It is questionable whether it remains as a resident

in New Zealand is important to immigrants. Therefore the rights in the

However mandatory relevant considerations do not have to alter the law; they just form one of the factors that must be considered in a decision.⁹⁰ For example the State's right to determine who resides in New Zealand under the Immigration Act 1987 must be factored alongside the "best interests of the child".⁹¹ Under this interpretation the fact that illegal immigrants have New Zealand born children does not impose an obligation on the State to grant residence on the basis of the ICCPR or the CRC. The obligation is to consider the rights of the children when deciding to remove the parents.

It does not carry any mandatory considerations. However

since it is a discretion there needs to be some check on the power. The decision

This proposition imports the rights established by the international obligations into the decision process. It does not make the international instruments New Zealand law. It simply allows persons within the State's jurisdiction to rely on the provisions in the immigration context. This effectively recognises that there are other factors relevant to the exercise of a discretion that Parliament has not considered or failed to consider.⁹² Which would make the decision more informed and better for the individual and the State.

on making. The real argument was that

the examination of the international instruments falls to the Department Review

⁸⁹ *Puli'uvea*, above n 15, 334.

⁹⁰ "Constitutional Law", above n 58, 229.

⁹¹ United Nations Convention on the Rights of the Child art 3(1).

⁹² "Constitutional Law", above n 58, 229.

In *Rajan* the Court canvassed the arguments concerning whether the discretion of the Minister was to be subject to the international instruments. The issue whether the international instruments were a mandatory relevant consideration and was not finally decided.⁹³

The arguments for reading the discretion as subject to the international instruments are that they could be read consistently with the Section.⁹⁴ Section 20(1) confers discretion on the Minister; therefore the international instruments can be read into this discretion. In this sense the law is not changed and so there would be no fear of back door importation of a treaty. The right in question, to remain as a resident in New Zealand is important to immigrants. Therefore the rights in the international instruments, as being indicative of society's expectations and humanitarian views, would be relevant and should be considered. There is also the right to appeal on humanitarian grounds, so the rights in the international instruments would also be relevant when initially making the decision.

Arguments against reading international instruments as a mandatory relevant consideration are that the discretion of the Minister is simply a discretion not a power, therefore this should not carry any mandatory considerations. However since it is a discretion there needs to be some check on the power. The decisions must be consistent and so imposing mandatory relevant considerations would ensure there is no criticism. The obligations on behalf of the Minister are not onerous, only to take the international instruments into account. Therefore the fact they are mandatory is not problematic. Also argued was that Section 20(1) is not explicit as regards humanitarian considerations.⁹⁵ However reading in the humanitarian considerations provided in the ICCPR and CRC would not create major difficulties, but would aid the decision making. The last argument was that the examination of the international instruments falls to the Deportation Review

⁹³ *Rajan*, above n 72, 551.

⁹⁴ That is the Immigration Act 1987 s 20(1) "The Minister may at any time revoke a permit . . ."

⁹⁵ As compared to Immigration Act 1987 s 63B, s 105 and s 22 (as they were in 1996).

Tribunal. If the case is then referred to the Tribunal the issues will have already been canvassed making the decision easier to review.

The first argument can be displaced, labeling an international instrument as a mandatory relevant consideration does not change the law, it injects issues into the decision making process.

A further argument against international instruments being a mandatory relevant consideration is practicality. The instruments are the product of a multi-state agreement and are the consensus of many different views.⁹⁶ The texts are developed by diverse member states for use in their own territories. Therefore the fact they represent the agreement of many nations should indicate their importance. As has been mentioned, Gaudron J in *Teoh* thought the CRC represents what society expects.⁹⁷ In this sense the international texts are relevant from the general viewpoint of society. Therefore international texts should be mandatory relevant considerations, because society expects the principles to be adhered to.

The thrust of the argument is that the international texts will be difficult to apply because of the way they have been developed. This does not indicate they are not relevant. It simply indicates that there should be caution in application. The decision-maker has the discretion to decide what factors are important, but must at least examine the international instrument to ensure protection is given to the relevant parties.

The approach of the NZIS in applying the international instruments has been that the rights contained are not absolute, but must be balanced against other rights,

⁹⁶ "Constitutional Law", above n 58, 230.

⁹⁷ *Teoh*, above n 29, 376.

such as the rights of the State.⁹⁸ Therefore the ICCPR and CRC create mandatory relevant considerations in the immigration context.

2 *Do international instruments create a legitimate expectation in the immigration context?*

There is another interpretation of international instruments created by the majority of the Court in *Teoh*. Gaudron J thought that in the context of the CRC, there was an expectation that it would be given effect because it encapsulated human rights already inherent in Australian society.⁹⁹ Children could rely on the argument that the decision-maker would consider their best interest as a primary consideration, because society expected it. This argument is plausible.

The Court disagreed on the formulation and application of the legitimate expectation. But the Court did dismiss the Minister's appeal and allowed Mr Teoh to remain in Australia.

Mason CJ and Deane J thought there was a legitimate expectation the CRC would be followed. This did not require a set procedure as that would be back door importation of a treaty. They indicated that procedural fairness would require notice to be given if a decision was to be taken inconsistently with the Convention.¹⁰⁰ Giving notice is quite fair. If there is an expectation that a decision will be made with consideration of an international obligation and it is not going to be decided that way, they should be informed. However the problem exists that why should an unincorporated treaty have to be considered in a domestic decision? It falls back on Gaudron J's reasoning that the Convention represents ideas already inherent in society.¹⁰¹ Therefore even though the texts are not recognised in law

⁹⁸ NZIS, above n 5, D4.45.

⁹⁹ *Teoh*, above n 29, 376.

¹⁰⁰ *Teoh*, above n 29, 365. Gaudron J also agreed with on this point at 376.

¹⁰¹ *Teoh*, above n 29, 376.

they are what society expects. If they are not examined, criticism could result because a poor decision will be made.¹⁰²

Toohy J also formulated the legitimate expectation along the same lines. He said that if the decision-maker was not going to treat the best interests as a primary consideration, then an opportunity must be given to argue that it should.¹⁰³ Toohy J then said there is no obligation to make inquiries, but doing so will put the decision-maker in a better position to meet the expectation.¹⁰⁴ Toohy J's formulation imposes an obligation to inform an affected party of how a decision will be made, which is reasonable. The affected party can then introduce further evidence. The obligation does not force the decision-maker to decide in favour of the affected party, as that would be a fetter on the decision-maker's power, which would be a ridiculous result.

McHugh J dissented on the legitimate expectation issue and thought no such expectation existed. McHugh J indicated that an expectation could only exist if the affected person knew about the Convention and there was an express or implied undertaking to that person.¹⁰⁵ This seems plausible; you cannot expect something to be followed when you do not know of its existence. However your expectation could stem from a belief as a member of society.

It is uncertain whether this legitimate expectation would be applied in New Zealand. The NZIS guidelines expressly recognise of the relevance of the international instruments. McHugh J said that unless a decision-maker has given some indication that provisions of a convention will be applied, it is not reasonable to expect the convention to apply to the decision.¹⁰⁶ Since the NZIS has stated in the policy guidelines that the ICCPR and CRC are relevant, there is a legitimate expectation that these would be considered. Under Mason CJ and Deane J's

¹⁰² As was thought in *Tavita*, above n 4, 266.

¹⁰³ *Teoh*, above n 29, 373.

¹⁰⁴ *Teoh*, above n 29, 374.

¹⁰⁵ *Teoh*, above n 29, 381.

approach NZIS would be required to notify an illegal immigrant if a decision is not going to be taken in accordance with the ICCPR or CRC. This would not be onerous. Under Toohey J's approach an illegal immigrant would then be given the opportunity to present evidence that a decision should be taken in accordance with the ICCPR and CRC, this ensures all evidence is available which is easily attainable.

Therefore the ICCPR and CRC create a legitimate expectation in the immigration context.

The Australian Senate has expressed disapproval of the decision in *Teoh*. The Administrative Decisions (Effect of International Instruments) Bill 1999 is currently before the House of Representatives. The Bill seeks to "set aside legitimate expectations arising out of entry into treaties."¹⁰⁷ The reason this Bill was introduced was because it was thought that *Teoh* was inconsistent with the proper function of Parliament incorporating treaties into Australian law.¹⁰⁸ This is the same fear that was presented against international treaties being mandatory relevant considerations, that the law will be changed by a body other than Parliament. However the law is not changed if an international treaty is a mandatory relevant consideration or a legitimate expectation. All that is required is that the decision-maker informs the affected person and an opportunity to advance further arguments is permitted.

There was also a fear that this expectation would be unworkable in practice as Australia is party to many thousand treaties. However "[a]dministrators exercise discretion functions within a known and ascertainable compass and may readily access relevant international obligations."¹⁰⁹ Not all treaties would be relevant to all agencies. The NZIS has identified that the ICCPR, the CRC, the Convention

¹⁰⁶ *Teoh*, above n 29, 383.

¹⁰⁷ (13 October 1999) *House of Representatives Official Hansard*, 11436.

¹⁰⁸ Minister for Foreign Affairs and the Attorney General Statement 1997.

Relating to the Status of Refugees and the Convention Against Torture are relevant to their activities.¹¹⁰ The argument is fundamentally flawed because what is the point of ratification of a convention if there is no expectation it would be followed? There is a conflicting message to society.

In South Australia the equivalent Bill has been passed at State level. Section 3(2) of the Administrative Decisions (Effect of International Instruments) Act 1995 sets aside the legitimate expectation that a decision will conform to the instrument or that a case can be presented against a decision which was not in terms of a convention. This overriding of the legitimate expectation principle is unwarranted, it is a "blunt repudiation of . . . international obligations and, without much doubt, a serious breach of international law."¹¹¹ This legislation reduces the significance of international instruments which is unfounded because a legitimate expectation does not change the law.

In short, it must be recognised that children can argue mandatory relevant considerations or legitimate expectations of international instruments against the State.

3 *What does this mean in the immigration context?*

In an immigration case an argument could be made that the ICCPR and the CRC create either mandatory relevant considerations or a legitimate expectation.¹¹²

To satisfy the mandatory relevant consideration requirement the NZIS must at least have regard to the documents that represent the rights of the children in

¹⁰⁹ Philip A Joseph "Constitutional Review Now" [1998] NZ Law Rev 85, 116 ["Constitutional Review Now"].

¹¹⁰ NZIS, above n 5, D4.45.

¹¹¹ Jianfu Chen "Taking International Obligations More Seriously" in *Cross Currents: Internationalism, National Identity and Law* (Australasian Law Teachers Association, Bundoora, 1995) 181, 185.

¹¹² Harrison, above n 85, 263.

making decisions.¹¹³ The balance for each factor is still left to the NZIS and the court will not decide on the balance for each factor. The nature of the obligation; the relevance of the international instrument; the discretion involved and the subject matter of the legislation would probably determine the balance.¹¹⁴ Since remaining in New Zealand is fundamental and is directly related to New Zealand citizen children, it is arguable that the provisions of the international instruments would form the basis of the decision. However as the issue concerns immigration and the State has the right to choose who remains in the territory the State will prevail.

The reasoning in *Teoh* can be transferred to New Zealand. This would mean on the majority approach that an illegal immigrant could expect that a decision would be made in accordance with the ICCPR and the CRC. If this was not going to be done then the immigrant would have to be notified. The approach would mean the rights of the children must be considered and their best interests followed.

The international instruments provide the introduction of the rights of New Zealand born children in immigration cases. It is useful to formulate what these rights are.

V THE RIGHTS HOLDERS

In all situations various groups have different rights and these rights inevitably conflict. This Part will look at the rights of the New Zealand citizen children, but will also examine the balance with the rights of the State, the rights of New Zealanders as members of society and the rights of parents.

¹¹³ *Tavita*, above n 3, 266.

A *Children as Rights Holders*

The general view is that rights holders are those people that have the capacity and competency to choose between their own actions. This proposition is identified by Hart when he states "a right is a normative capacity that the bearer may choose to use for the furtherance of his or her own interests or projects, a sanctioned exercise of legitimate control over others."¹¹⁵ This suggests that rights can only be held by persons who can choose to act for their own interests against others. This would then exclude children and others who lack capacity to make decisions, such as intellectually handicapped persons and mental health patients, which is abhorrent.¹¹⁶

It is obvious that such vulnerable groups would be the sorts of classes of people that should have strict rights because, by virtue of their position, they are more susceptible to abuse.¹¹⁷ Thus exposed groups require protection from not only the State, but also other rights holders. The rights of children arise from the interest of care, "security and protection from harm."¹¹⁸

Protection is important to the concept of rights for children. If it was accepted that children themselves could not be rights holders, at least personal representatives could hold the rights and enforce or waive them as they see best.¹¹⁹ The personal representative would act as a proxy rights holder in deciding a course of action for a child, or the person who lacks the requisite capacity. This commonly occurs now

¹¹⁴ Andrew and Petra Butler "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173, 182.

¹¹⁵ HLA Hart *Essays on Bentham Jurisprudence and Political Theory* (Clarendon Press, Oxford, 1982) 173.

¹¹⁶ Indeed the rights are encapsulated in the Guardianship Act 1968, the Protection of Personal and Property Rights Act 1988 and the Mental Health Act 1992 respectively.

¹¹⁷ This point was acknowledged by Tom D Campbell "The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult" in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights and the Law* (Clarendon Press, Oxford, 1992) 2, 11.

¹¹⁸ Campbell, above n 117, 21.

¹¹⁹ Robert Young "In the Interests of Children and Adolescents" in William Aiken and Hugh La Follette *Whose Child? Children's Rights, Parental Authority and State Power* (Rowman and Littlefield, Totowa, New Jersey, 1980) 187.

in the case of children in legal proceedings and in contracts. Intellectually handicapped persons have welfare guardians appointed by the court to decide medical treatment.

Although this position does acknowledge that children do have interests that require protection, it is not very satisfactory. The recognition of the rights depends upon another person invoking those rights on the child's behalf. Therefore that personal representative would determine the child's interests. It should be understood that children have different interests to their parents (who are most commonly the personal representative) and procedures must be taken to ensure these interests are not overridden¹²⁰ and are recognised.

Children should be able to hold rights because "the child is a person and not merely an object of concern."¹²¹ Children have fundamental freedoms that must be protected. Therefore children along with all the other members of society can hold all of the rights in the NZBORA. However they cannot be enforced, or invoked on their own behalf until the child reaches an age of competency and understanding. This is what Hart was meaning with his definition of a rights holder. The rights of Life and Security of the Person would apply from birth, but could not be enforced by the child on their own. Also some of the Democratic and Civil Rights would not apply to children, such as the right to vote. Other rights such as freedom of movement would apply to children but would need to be enforced by another person.

Therefore to promote recognition of children's own interests and thoughts it must be conceived that children can possess rights, have independent interests and have the competence to evaluate these interests.¹²² In family migration decisions it is suggested that children should be given a view, and indeed a right to be heard and considered in a decision to shift a family base from the United Kingdom to a new

¹²⁰ Young, above n 119, 184.

¹²¹ Report of the Inquiry into Child Abuse in Cleveland (1987) Cm 412, 245.

country.¹²³ Eekelaar believes that a child's view should influence a decision if it is compatible with law.¹²⁴ In the context of immigration proceedings against a parent, the views of a child would be relevant, but not to the extent it precluded operation of the law. Therefore if a child wanted to stay in New Zealand, this would be considered against the State's right to remove the illegal immigrant parents.

In the immigration setting the parents are relying on the rights of New Zealand citizen children as a basis for the family to remain in New Zealand. Therefore the rights of the children are to be invoked by another.

1 What are the rights of New Zealand citizen children in the immigration context?

The rights of the New Zealand citizen children were primarily discussed in Part III. Firstly by virtue of their citizenship they have a "right to be in New Zealand at any time."¹²⁵ This is reinforced by Section 3(3) of the Immigration Act 1987 that states New Zealand citizens cannot be subject to removal, which means the children have a right to residence in New Zealand.¹²⁶ The children also have those rights encapsulated in the ICCPR and CRC, because the NZIS recognises that these obligations must be taken into account.¹²⁷

2 Have these rights been breached?

If children are 'removed' from New Zealand with their illegal immigrant parents, this is in effect a breach of their right to be in New Zealand at any time.

¹²² Young, above n 119, 180.

¹²³ Louise Ackers "From 'Best Interests' to Participatory Rights - Children's Involvement in Family Migration Decisions" (2000) 12 CFLQ 167, 169.

¹²⁴ Ackers, above n 123, 167.

¹²⁵ Immigration Act 1987 s 3(1).

¹²⁶ New Zealand Bill of Rights Act 1990 s 18(1).

¹²⁷ NZIS, above n 5, D4.45a.

The children have been forced to leave New Zealand by a decision to remove their overstaying parents. However, the courts have stated that the parents are subject to the removal order and hence have a choice whether to take their children with them.¹²⁸ If the parents choose not to take their children then those children can remain in New Zealand and their right is fulfilled. If however the parents decide to take the children with them, that is the parents' choice for their children and would not be a breach of the children's rights by the State, although the right cannot be enjoyed at present, it is because of a private family decision. The State can stand by its decision.

The children still have the right to come to New Zealand and the right to residence. This can be invoked later in life, when the child can decide their own actions – where they are going to live. In this regard the right to be in New Zealand at any time can be held by children but not enforced. Their parents who have the capacity to decide on a place of residence must make the choice.

Children also have those protections in the ICCPR and CRC, that is the right to family protection, to acquire a nationality and have their best interests considered. The rights in these texts are not breached if the NZIS has considered the application of the texts in a decision.¹²⁹

Prima facie the rights of children in immigration cases have not been breached if a decision is made by the NZIS by referring to the ICCPR and the CRC that results in the children leaving New Zealand with their illegal immigrant parents. For “[e]ven people who are sympathetic to their plight have felt that ‘the law must be upheld’ and . . . ‘we cannot tolerate the open flouting of our immigration laws.’”¹³⁰ This represents the current sentiment of the courts, the NZIS and the New Zealand

¹²⁸ As in *Schier*, above n 23, 706 and *Elika*, above n 18, 748.

¹²⁹ As required in *Tavita*, above n 3, 266.

¹³⁰ J de Bres and R Campbell *The Overstayers* (Auckland Resource Centre for World Development, Auckland, 1976) 14.

public. The law must be upheld even if New Zealand citizens must leave New Zealand, this is a harsh reality but the only sensible result in most cases.

B The State as Rights Holder

It is strange to record the State as a holder of rights, given the discussion about rights as protection for those in a vulnerable position. The State has discretion, which it gains from representing the general populace.¹³¹ The State holds the rights of society in a general sense and invokes them against others. It is power to make decisions that is relevant in the immigration context.

The State delegates the power of decision making to relevant state agencies. In the immigration setting this will be the NZIS. The NZIS then has the power granted by the Immigration Act 1987 and their own immigration policy guidelines, specifically to decide who can reside in New Zealand.¹³² This right must be balanced against the rights of New Zealand citizen children to remain in New Zealand.

The right of residence to a country is a fundamental government policy consideration. The State has an important right to decide New Zealand's immigration policy. It would not be acceptable if residence was granted to parents as of right, just because of a New Zealand born child. The child's citizenship would be one consideration in the process.¹³³ It is unfortunate that a New Zealand citizen by birth is forced to leave New Zealand, but represents the current problem in immigration. The right of the State to grant or deny residence ranks in front of the right of New Zealand born children to remain in New Zealand with their illegal immigrant parents.

¹³¹ Schneider, above n 17, 52.

¹³² NZIS, above n 5, D4.45.5b.

¹³³ McLeod, above n 63, 16.

Inherent in this discussion is the opposite to the rights of the State – the obligations. The NZIS is predominately the body that fulfills these obligations. There is an obligation to take account of the ICCPR and the CRC and consider the situation of the children when executing removal warrants. Since these obligations interfere in the lives of citizens the interventions must be clearly defined so that the power used is predictable.¹³⁴ This has been satisfied by recognition of the obligations in the policy guidelines.¹³⁵ The NZIS must examine the ICCPR and the CRC and assess the impact of removal on the New Zealand citizen children. If this is satisfied then the decision of the NZIS can stand and the obligation has been fulfilled. Unless there is a gross error in the decision making process the courts are reluctant to interfere.

1 The State as rights holder for New Zealand society

The preceding discussion presumed that the State could hold rights for society in general. In this sense, the NZIS determines residency and in turn fosters national unity on behalf of the rest of New Zealand. The right of society to live and enjoy life in New Zealand is affected by immigration, which is why the Government sets immigration targets. There are limited resources which must be shared amongst all of New Zealand. Permission for illegal immigrants to remain in New Zealand will affect resource allocation. Therefore in order to promote the rights of all New Zealand, the NZIS must follow the immigration targets when deciding residency of illegal immigrants, who must then decide for their children's future.

Ultimately New Zealand society would bear the burden for the New Zealand citizen children if they were allowed to remain in New Zealand. At the extreme case this would mean providing for social welfare benefits and in most cases the provision of public education and health care. Taxpayers contribute to social services through income tax and other citizens forgo benefits in favour of those

¹³⁴ Eekelaar, above n 48, 268.

¹³⁵ NZIS, above n 5, D4.45.5.

more in need. One should remember the words of Cooke P in *Tavita* that "her [the child's] future as a New Zealand citizen is inevitably a responsibility of this country."¹³⁶ Most of New Zealand society could justify extending limited resources and support to New Zealand citizens by birth, but many would not feel the same towards illegal immigrants, the parents. There is justification in enforcing the Immigration Act 1987 and removing illegal immigrants. If the decision of the parents was for their children to remain in New Zealand then the State would have an obligation to support them. These obligations would stem from domestic and international law, as children within the jurisdiction.

C Parents as Rights Holders

The parents, the illegal immigrants, do have rights. The right to fair process and of appeal. These are recognised in the Immigration Act 1987. The rights of the illegal immigrants will be subordinate to the right of the State to determine who can reside in New Zealand. The parents initially came to New Zealand as visitors and remained in New Zealand illegally, they have no right to stay in New Zealand, and it is not unduly harsh for them to return to their home country.¹³⁷ This result is sensible as any other conclusion would frustrate the intention of Parliament and the Immigration Act 1987. Illegal immigrants are not in a special position just because of their New Zealand born children. If this were the proposition it would create inequities between the rights of other illegal immigrants. Therefore the only relevant right for the parents in the immigration context is the right to be heard. The balance between the State and parent, through the child is towards the State.

Illegal immigrant parents also have obligations. Given a decision to remove them from New Zealand, the parents must decide the outcome for their children. This is the responsibility of the family.¹³⁸ The decision is whether to leave the children in New Zealand or to take them to their own home country. There is no check on this

¹³⁶ *Tavita*, above n 3, 266.

¹³⁷ *Puli'uvea*, above n 15, 325.

obligation by the State; it is a final choice. The fact there is no check is strange, given the requirement to account for the needs of the child in a decision to remove parents. However, the decision of the parents would be a private decision and unless there were serious human rights issues, the decision is beyond the review of the court.

In summary, various groups have rights in removal actions in the immigration context. New Zealand citizen children have rights of residence in New Zealand. They are not breached when their illegal immigrant parents are removed from New Zealand. The rights of the children can still be exercised later in life. In this sense the rights of the State to determine their residence policy remain dominant, which is justified.

VI *CHANGES TO POLICY*

It has become apparent that more and more temporary entrants are coming to New Zealand. Within this group many become illegal immigrants. Estimated figures indicate that the number of overstayers is currently 20,700. Of this group 6,800 people have been in New Zealand for more than five years.¹³⁹ In numerous cases children are born in New Zealand and receive birthright citizenship. This system needs addressing before the situation grows to unmanageable proportions. Indeed, tougher immigration laws and an amnesty for overstayers were introduced on 1 October 2000 to deal with the problem of illegal immigrants.¹⁴⁰ The huge number of overstayers eventuates because of the birthright citizenship rule and the delay in identifying and removing illegal immigrants. Solutions and alternatives to these policies will be examined.

¹³⁸ Ian Hassall "New Zealand Courts and the UN Convention – Tavita" (1993) 11 Children 6.

¹³⁹ "Last-chance amnesty for overstayers", above n 2.

¹⁴⁰ "Islanders 'not all overstayers'" The Dominion, Wellington, New Zealand, 16 August 2000, 18.

A *Birthright Citizenship*

New Zealand, along with many other countries, gives citizenship to anyone born within its territories.¹⁴¹ This system has also worked well in the United States for centuries. However during recent years, conditions in foreign countries have worsened and means of travel have become more accessible. There has been an incentive to breach immigration laws for a better future.¹⁴² These factors also apply to New Zealand.

1 *The problems with birthright citizenship*

Firstly "it might be asked why it is that children born in this country [the United States] to parents who enter without permission or for short-term visits should be citizens from birth."¹⁴³ Temporary entrants and illegal immigrants know they must sometime leave the country. Children will inevitably also have to leave if their parents are removed; therefore citizenship should not be given to those born to illegal immigrants or short-term entrants.

When citizenship is given to children of illegal immigrants or temporary entrants and their parents must leave New Zealand it is defacto removal of the children. There is still a right of re-entry available to the children and possibly the parents as well, on family reunification grounds. This allows previous illegal immigrants to return to New Zealand because of a situation that occurred when they were in New Zealand illegally, which is unsatisfactory for immigration policy. Additionally the children can receive social welfare and other benefits because of their New Zealand citizenship. Another problem is the incentive for temporary entrants to ignore the immigration laws and remain in New Zealand to have children. It may lead to exploitation of children and women to secure an advantage in the

¹⁴¹ Citizenship Act 1977 s 6(1).

¹⁴² "Mexican Women Cross Border so Babies can be US Citizens" New York Times, New York, United States, 21 November 1982, 1.

¹⁴³ Guendelsberger, above n 73, 379.

immigration process.¹⁴⁴ This result would also breach fundamental human rights and not be desirable in society.

National unity would be strengthened if citizenship were not given to children born to illegal aliens or temporary entrants.¹⁴⁵ This would protect the rights of society to live and enjoy life in New Zealand. However the difficulty is identifying viable alternatives, as there are also problems with the solutions to birthright citizenship.

2 *The solutions to birthright citizenship*

If the birthright citizenship rule were no longer applied in New Zealand some other alternative would have to be formulated. It is useful to look at what is set forth in the French Nationality Code 1973.

The Code provides that children born in France to parents who were also born in France (or former French Colonies) would be given citizenship.¹⁴⁶ If one parent was born in France, then French citizenship could be chosen by the child under Article 24. Neither Article would apply to the children in the cases discussed, as the parents were not born in New Zealand. If a child was born in France to foreign parents, the child could choose French citizenship at majority (or some younger age) if the child had resided in France for five years.¹⁴⁷ The parent's immigration status is irrelevant. The choice to attain citizenship is a viable alternative as it requires a residency period. However a child can fulfill this requirement while their parents are illegal immigrants, this defeats the purpose of a solution to the birthright citizenship rule.

¹⁴⁴ Butler and Butler, above n 114, 264.

¹⁴⁵ Guendelsberger, above n 73, 411.

¹⁴⁶ French Nationality Code 1973 art 6 and art 23.

¹⁴⁷ French Nationality Code 1973 art 44, art 52, art 53 and art 54.

What then happens to the child's citizenship prior to them fulfilling the five-year residency requirement? The child could take the same citizenship as their parents hold. This is dependent on the parent's home nation recognising citizenship to those born outside the territory. If this does not happen, the child would be stateless which would be far worse than the immigration problem at present and breach international obligations.¹⁴⁸

Another problem is that the removal of illegal immigrant parents could also preclude the child from acquiring citizenship. If parents were removed then the five-year residency requirement could not be met. This also would create a stateless child.

Another feature of the French system is that parents of French citizen children cannot be removed even if they are illegal immigrants. Once a child has chosen French citizenship the illegal immigrant parents can also reside in France. This means that a lot more immigrants would have the incentive to have children in the territory, as was feared after the *Tavita* decision.¹⁴⁹ This is not a good solution and would escalate the number of illegal immigrants.

The problems with administering the French system would be in determining the country of parent's birth. Delays would occur while documents were traced, leaving a child's citizenship status in limbo which would breach the CRC as the child would not have an identity.¹⁵⁰ Therefore the birthright rule is much easier to apply than any alternative.¹⁵¹ Even the French alternative would not solve the immigration problem by discouraging illegal immigrants.

A second alternative is to retain the birthright citizenship rule, except for those children born to illegal immigrants or temporary entrants. Children born in New

¹⁴⁸ United Nations Convention on the Rights of the Child art 7.

¹⁴⁹ Butler and Butler, above n 114, 264.

¹⁵⁰ United Nations Convention on the Rights of the Child art 7.

¹⁵¹ Guendelsberger, above n 73, 424.

Zealand would be granted citizenship, except if their parents were illegal immigrants or temporary entrants. This again is fraught with problems. Illegal immigrants remain undetected for so long,¹⁵² again a stateless child would be created. The alternative also provides an incentive not to register births, breaching Article 7 of the CRC, for fear of being identified as an illegal immigrant. A related problem is proving parentage of children. If one parent is unknown then a sound decision could not be made. If one parent is an illegal immigrant and the other is legally in New Zealand, then treatment would be inconsistent. Citizenship would be granted to children of an illegal immigrant which is contrary to the alternative policy of not conferring citizenship to the children of illegal immigrants or temporary entrants. The overarching problem with this alternative is that children are treated differently because of the actions of their parents. They did not choose to be born to illegal immigrants, their situation is precarious and they should be protected. The best protection is citizenship.

3 *Do these alternatives solve the immigration problem?*

The French system and the second alternative would not solve the problem of the huge number of illegal immigrants. Indeed the alternatives may even accentuate the problem, because the process would be more drawn out. Parentage would have to be proven, documents traced and citizenship choices made by the child. Either system would require additional administration. A problem does exist in this area and because of the importance of immigration policy and the equal importance of protecting children's rights, the issue should be considered by Parliament by drafting legislation to address the increasing immigration levels and children born in New Zealand to illegal immigrants.¹⁵³

¹⁵² Mrs Erika was in New Zealand for eight years and the Puli'uveas for six years before being detected.

¹⁵³ Judge J Daniel Dowell, Judge Philip J Motante Jr, Judge Ira Sandron and Judge Jose Simonet "Protection and Custody of Children in US Immigration Court Proceedings" (1992) 16 Nova L Rev 1285, 1296.

B Immigration Policy

In the current situation many illegal immigrants remain undetected for years. Recent figures suggest that 33 per cent of overstayers have been in New Zealand for more than five years.¹⁵⁴ Reviews, court decisions and appeals further draw out the process. The situation needs to be reviewed to ensure that it does not become worse, with more New Zealand citizen children leaving New Zealand when their illegal immigrant parents are removed.

1 Alternatives for change

Firstly, there needs to be a tougher enforcement of permit rules. Reminders must be sent to immigrants that their permits are soon to expire and the consequences of remaining in New Zealand. Additional information should be placed on applications about the significance of remaining in New Zealand unlawfully. The NZIS will also enforce permit expiration rules in a more stringent manner.

Hence illegal immigrants will not be given the incentive to stay in New Zealand and in turn have children. Currently for illegal immigrants¹⁵⁵

[t]he key to success, it seems, is to ensure the application process is as drawn out as long as possible and, when the final appeal fails, lie low long enough to become part of the scenery.

If illegal immigrants are allowed to remain in New Zealand for long periods of time it escalates the problem and makes it even harder to leave, as there are children born in New Zealand. For example in the case of Mrs Erika, she had been in New Zealand unlawfully for ten years. This delay provides the opportunity for

¹⁵⁴ "Last-chance amnesty for overstayers", above n 2.

¹⁵⁵ "Ignoring the rules works in the end" *Waikato Times*, Hamilton, New Zealand, 10 April 2000, 6.

children to be born in New Zealand. The consequence is that parents must make difficult choices for their children's future, which is an unsatisfactory situation.

During 1997 there were 20,000 overstayers in New Zealand. However only seven per cent actually received removal notices and only four per cent subsequently departed New Zealand.¹⁵⁶ Therefore there needs to be a more consistent approach to the enforcement of the immigration law, specifically execution of removal orders.

Toughening up of immigration law was introduced on 1 October 2000. Removal notices can now be served on illegal immigrants and they can then be removed that day.¹⁵⁷ This change is specifically in response to the high number of illegal immigrants. Previously illegal immigrants had a right to appeal within 42 days.

The right to appeal ensures all aspects of the case are dealt with, including the rights of New Zealand citizen children. This delay of 42 days does draw out the process, but removal on the same day is too harsh. Proper arrangements could not be made on the same day. Time should be given to ensure that affected parties can take action and children can be properly cared for. However illegal immigrants know they must leave New Zealand and should do so when detected. The problem is that families are involved and the State is obligated to ensure the children's welfare is accounted for.

An amnesty for overstayers was also announced in conjunction with the new laws introduced on 1 October 2000. From that date until 31 March 2001 well settled overstayers can apply for a two-year work permit and later New Zealand residency. Well-settled overstayers include "overstayers who [have] been in New

¹⁵⁶ "Overstayer law cruel for children", above n 70.

¹⁵⁷ "Immigration cleans up for law change" Evening Post, Wellington, New Zealand, 19 June 2000, 3.

Zealand for more than five years, [are] married to or in a relationship with a Kiwi, or [have] a New Zealand-born child".¹⁵⁸

This amnesty is a complete policy change. Those illegal immigrants who have evaded removal for more than five years will be rewarded by being allowed to remain in New Zealand. If they have New Zealand born children then this will increase their chances of remaining in New Zealand. The policy is too sympathetic for those who have blatantly broken immigration laws. The purpose of the amnesty is to allow those who are assimilated in New Zealand society to remain in New Zealand society. But they would not be in this situation if they had left New Zealand on expiration of their permits.

The overall benefit of the amnesty is that New Zealand born children get to stay in New Zealand and retain their family unity. This is great for those illegal immigrants still in New Zealand; but for those recently removed it is not much use. Once the amnesty is over then there is no relief for illegal immigrants, they can be removed the day they are identified. This immigration policy is inconsistent over time and will not solve the problem of reducing the number of illegal immigrants. Although the number of current illegal immigrants will be reduced because they will be entitled to work permits and to be in New Zealand lawfully.

The only effective result is for the Government to issue a statement that New Zealand born children do not guarantee a right to stay in New Zealand, they are one consideration in the process. Failure to do this may put false hope into the minds of desperate people or lead to exploitation.

Yet there are still the exceptional cases, which when introduced to the media produce results beneficial for the children. The Mila family from Tonga had been overstayers for nearly a decade, and some of their children had been born in New

¹⁵⁸ "Thousands in hiding get chance to stay on" *The Dominion*, Wellington, New Zealand, 20 September 2000, 1.

Zealand. The family could apply for residence because the case hit the media and the Minister of Immigration Lianne Dalziel took action.¹⁵⁹ Like the amnesty the treatment of the Mila family is an inconsistent application of immigration policy, and other illegal immigrants can be justified in concluding that treatment has been unequal.

2 *Do these alternatives solve the immigration problem?*

These alternatives will reduce the number of illegal immigrants in New Zealand, as more will be removed sooner. However it will not reduce the number of New Zealand citizen children removed with their parents. In fact the number of children removed from New Zealand is likely to increase, because there would not be adequate time to find suitable alternative care for them.

The amnesty will make illegal immigrants legal temporary entrants and give their New Zealand born children the right to stay in New Zealand with their parents. This does not solve the overall problem of illegal immigrants, but enhances the rights of the children.

It appears the only solution is to change the mindset of immigrants, that temporary entry means temporary entry and that they and other dependent family members must leave New Zealand. This removal does not infringe any rights, but is a consequence of temporary entry.

VII CONCLUSION

In conclusion, children who are born in New Zealand have the right to remain in New Zealand because of their citizenship. Their parents do not have this right. These children also have the rights contained in the ICCPR and the CRC. The best

¹⁵⁹ "Ignoring the rules works in the end", above n 155.

interests of the child and the right to family unity must be considered by the NZIS when the removal of their illegal immigrant parents is determined. These rights are balanced against the rights of the State to determine who resides in New Zealand. The balance that has been struck favours the State. This means that the parents are removed from New Zealand and the parents then must decide whether to take their children with them. This is a family choice and is divorced from the decisions made by the State. Therefore the children's rights are not breached by the State can still be relied on later in life.

The current situation means that New Zealand citizen children are in fact removed from New Zealand. The solution to this problem is to change the birthright citizenship rule or to take a tougher line on illegal immigrants. However these also have problems in the theory and application of these solutions. The only solution is the realisation that New Zealand citizen children do not guarantee a right to stay in New Zealand and in most instances they must leave when their parents are removed. Although this result is harsh, it is justified to maintain the validity of immigration laws. Therefore children born to illegal immigrants must leave New Zealand if their parents are removed and they decide to take the children with them, there is no recourse from this decision.

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