INCREASING EVIDENTIARY BURDENS IN RECENT JUDICIAL REVIEW CASES?

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Recent cases in New Zealand have paid particular attention to the evidentiary basis for public decisions. A line of cases decided in recent months many suggest growing demands by the courts on judicial review, both procedurally and substantively, for decision-makers to demonstrate the sufficiency of that evidence. This note canvasses that case law, centring on the Supreme Court case of A v Minister of Internal Affairs *and concludes that while it may be too soon to reach conclusions on a major doctrinal shift, something new does appear to be happening and this is a space worth keeping a watching eye on.*

I INTRODUCTION

It is not a new phenomenon for the courts on judicial review to pay close attention to the factual and evidentiary basis decision-makers have for their decisions.[1] However, precisely what level of evidence is demanded by the courts, how the strength of the available evidence affects the validity of a decision, and what grounds of review flaws in the evidentiary foundation might be classified under remain somewhat ill-defined.

In recent months, a number of cases which focus on these matters have come across the desks of New Zealand judges. In this note, I briefly reflect on a number of substantive and procedural decisions between late 2023 and early 2025 relating to alleged flaws in the evidentiary basis for decisions, the most prominent of which is the decision of the Supreme Court in *A v Minister of Internal Affairs*.[2]

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1 See for example Michael Taggart noting "greater evidential and factual review" by the courts in a 2006 article: Michael Taggart "Administrative Law" [2006] NZ L Rev 75 at 83. Going even further back, *Erebus Royal Commission, Re; Air New Zealand Ltd v Mahon* [1984] AC 808, [1983] NZLR 662 (PC) ("*Erebus*") saw the privy council overturn a specific finding of the Erebus Royal Commission on the basis of sufficiency of evidence, seeing it as a matter of process. This decision, though, was one very much of its own peculiar facts and legal settings and reads somewhat oddly forty years later.

2 *A (SC 70/2022) v Minister of Internal Affairs* [2024] NZSC 63 [2024], 1 NZLR 372 [*A*].

The note canvasses and offers brief comment on what was found in these cases and concludes by offering some initial thoughts on the implications. It suggests that evidentiary demands may well be increasing, though the grounds of review implicated remain opaque. Deepening evidentiary demands could also implicate the speed and efficiency of judicial review (in particular via increased discovery applications), suggesting the need for careful calibration of the process from the case management stage onwards.

II SUPREME COURT OF NEW ZEALAND: A V MINISTER OF INTERNAL AFFAIRS

A v Minister of Internal Affairs is an important case for a number of reasons. It considers important issues relating to the New Zealand Bill of Rights Act 1990. It concerns one of the more draconian powers short of imprisonment available to the government in relation to its citizens: the cancellation of a passport. It also involves the procedural oddity of there being both a closed and open judgment based on the security classification of certain information that cannot be disclosed publicly. All of this is interesting, but for the purposes of this note, the primary interest is in how the open judgment deals with the adequacy of official reports, particularly when human rights are at issue.

As alluded to above, *A* concerns the revocation of a New Zealand citizen's passport, on the basis that she was allegedly imminently going to travel to the ISIS caliphate and participate in terrorist fighting.[3] If those allegations were accurate, in certain circumstances, a New Zealand citizen's passport could at the time be cancelled by the Minister under the Passports Act 1992. But in order for that power to be available, there was a statutory requirement that the Minister "believe on reasonable grounds" that certain circumstances existed in an enumerated list in the statute.[4]

Many of the details were only discussed in the closed hearing, but the public judgment still makes a number of important legal points. The case ultimately turns on two things, one of which is the degree to which there is a *process* obligation to consider the New Zealand Bill of Rights Act while an administrative decision is being made (as opposed to simply reach a rights-consistent outcome). This point is relevant, at least in a collateral sense, to this note's overall inquiry as to the extent of evidentiary demands, so I will briefly address the Supreme Court's findings.

In the *Moncrief-Spittle v Regional Facilities Auckland Ltd* case several years ago, the Supreme Court held that the obligation to act consistently with the New Zealand Bill of Rights Act is primarily a substantive one.[5] However, that approach is finessed slightly in *A*. The Court does not find a clear positive obligation to put an explicit "rights consideration" step in a decision-making process, but it

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3 At [3] and [11]–[19].

4 Passports Act 1991, sch 2, cl 2 (subsequently repealed).

5 *Moncrief-Spittle* v *Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [82] [*Moncrief-Spittle*], cited in *A*, above n 2, at [137].

does say that rights cannot be completely missing from the process. The Court echoes *Moncrief-Spittle* in suggesting that the nature of rights is that they substantially constrain the range of decisions that administrative decision-makers can reach.[6] That being the case, decision-makers must be required to turn their mind to the rights: otherwise, it cannot possibly be a constraint on their decision-making.[7]

A engages more fully than *Moncrief-Spittle* with what this might require, suggesting that a simple statement from the Minister that they were "acutely aware of the significant impact that cancellation of a passport may have on a person's freedom of movement" is insufficient. Instead, actual evidence of advice on, and consideration of, the reasonableness of any limitation of the right is required.[8] Thus, while effectively saying that courts will be unlikely to overturn a decision where the outcome is rights-consistent but the process did not actively take the relevant rights into account, the Supreme Court also acknowledges that such rights should still be highly influential, even if they are not formally mandatory relevant considerations.[9]

At least at first glance, this appears a difficult position to reconcile with itself – rights consideration as important but not mandatory, critical but also incapable of founding a reviewable error, depending on the substantive outcome of a decision? I think there *is* an inherent lack of clarity from the Supreme Court here, but one way to at least partially explain it is to link the position to the second important development in the case. That development relates to the central issue covered in this note, namely sufficiency of the information before a decision-maker. More specifically, the Court in *A* addresses the quality of the information given to the decision-maker by officials, and human rights implications are very much on the list of things that officials ought to put in front of the Minister in the circumstances at issue in *A* (and thus would contribute to an invalidating error in the process if not in front of the Minister).

In many ways, the finding here about sufficiency of information is not new, although it is one of the few times the Supreme Court has addressed the issue.[10] There has been case law about the adequacy of briefings and reports for a long time; the leading case on the matter is *Air Nelson v Minister of Transport*, which is cited in *A*.[11] The standard from *Air Nelson* is that a report to a Minister from officials must be "fair, accurate and adequate".[12] *Air Nelson* also made clear that this report

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6 *A*, above n 2, at [138].

7 At [138].

8 At [139].

9 At [140]–[141].

10 *Erebus*, above n 1, does consider the matter, but in a very different, very specialised context.

11 *Air Nelson v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 [*Air Nelson*].

12 Adopted from *Bushell v Secretary of State for the Environment* [1981] AC 75, [1980] 2 All ER 608 (HL) at 96–97; and see *Air Nelson*, above n 11, at [44]–[52].

could, depending on the circumstances, require a reasonably substantial amount of surrounding contextual information to meet the fair, accurate and adequate standard.[13]

In *A*, the appellant argued that a more stringent test than this was required given that the matter at issue here is a without notice decision and involves the extreme rights infringement of cancelling her passport.[14] The Supreme Court agreed that this was a situation where a more stringent approach would be required, but said that the *Air Nelson* standard was a contextual one that could accommodate more stringency when required: what is fair, accurate or adequate varies in the circumstances, and a particularly searching standard was required in these circumstances.[15]

What is particularly notable about that heightened level of information required by the Court here is that there was some genuine urgency involved in the passport revocation decision.[16] The nature of this particular power is such that if officials have intelligence that someone is imminently going to leave to conduct terrorist fighting, that person's passport needs to be suspended or cancelled before they leave the country, otherwise the power is ineffective. The analysis from officials supporting the decision is thus necessarily going to be constrained by a degree of urgency.

But the Court is alive to these circumstances. It says that if officials are constrained by time, they must clearly note in the report that the analysis was limited by time and what those limitations are.[17] Advice to the Minister will be inadequate if it does not explain the potential deficiencies in the analysis, which the report at issue did not.[18] Further, the report failed to clearly map the advice given against the statutory criteria that the Minister was required to be satisfied of to make his decision, and the Court suggests that this is something that officials ought to consider correcting in future.[19]

The report was thus found to be inadequate, and the cancellation of Ms A's passport was overturned, based primarily on that deficient report.[20] The question that is not entirely answered in this judgment is what ground of review is relied upon. The Supreme Court says that such an error

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13 *Air Nelson*, above n 11, at [53]–[54].

14 *A*, above n 2, at [142].

15 At [147]–[148]. The Supreme Court at [149]–[150] also draws on a search warrant case, *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207, which concerned the obligation on police to provide information when applying for a without notice search warrant. The court agree that that was a useful model to use in the circumstances of *A* because of the similarly without notice context and the similar intrusion on rights.

16 *A*, above n 2, at [151].

17 At [151].

18 At [152].

19 At [151]–[152].

20 At [154]–[155].

leaves a decision "vulnerable to judicial review on illegality grounds,"[21] citing the Court of Appeal judgment in the same case.[22] That Court of Appeal judgment is slightly more specific about the applicable sub-ground without being definite, saying that it could "for example" be a question of relevant considerations.[23] It in turn cites *Air Nelson* for this proposition, but *Air Nelson* is *also* not particularly clear in what ground this sort of deficiency in a report might constitute. O'Regan J in that case says:[24]

> The particular ground of judicial review on which this finding is made is secondary… We think the failure… is *probably* best characterised as having led to the Minister's failing to take into account relevant considerations.

The finding that relevancy is implicated is thus equivocal at several levels.

Even more confusingly, the discussion of the matter in the Supreme Court judgment in *A* is contained under the heading "Was the process adopted by the Minister unfair or unreasonable?", *not* as a question of illegality.[25] And then, tacking back in the other direction, the Court's conclusion is that the deficient briefing means that the statutory requirement for the Minister to hold a reasonable belief that certain facts existed could not be met.[26] This suggests the basis for the decision being overturned a failure to satisfy that statutory criterion, which takes us back to an issue of legality. Illegality, unfairness, and unreasonableness are thus all implicated – the legal grounding for the decision certainly could be much clearer. What *is* reasonably clear from *A* is that failure to adequately inform a decision-maker will commonly constitute some sort of reviewable error, and that adequacy in these circumstances is a contextual concept.

III HIGH COURT: VICTORIES, BUT ON WHAT GROUNDS?

A number of cases from the High Court over the course of 2024 demonstrate similar themes to those found in *A*: successful judicial reviews based on inadequate information being placed before decision-makers, and variable conceptual clarity on exactly *why* this is a legally relevant error. A number of these cases touch on local government issues.

Endurance Holdings Limited v New Plymouth District Council was a challenge to a certificate of compliance for a residential development.[27] When a certificate of compliance is granted, it is

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21 At [146].

22 *A (CA677/2020) v Minister of Internal Affairs* [2022] NZCA 257.

23 At [82].

24 At [55].

25 *A*, above n 2, Heading between [141] and [142].

26 At [154].

27 *Endurance Holdings Limited v New Plymouth District Council* [2024] NZHC 2672 [*Endurance Holdings*].

effectively an end run around the normal Resource Management Act 1991 process: it certifies that the project is a permitted activity and can be undertaken without the need for any resource consent.[28] It was argued that the developer who applied for the certificate had provided insufficient information to satisfy the Council that all relevant District Plan rules had been complied with.[29]

Unlike *A*, the information-providing obligation here rested on the applicant, not officials. But it *was* still a judicial review where the determinative issue was the sufficiency of information upon which a public decision was based.

There is a relatively high evidentiary burden for a certificate of compliance, for reasons similar to (though obviously not as serious as) as the reasons we saw in *A*, namely that the certificate bypasses the normal opportunity for the public to have a say. That being the case, there needs to be a very clear factual basis that allows the Council to conclude all relevant rules are complied with.[30] The High Court concluded that in this case, the evidence provided by the applicant and the analysis done by Council did not demonstrate that sufficient information was in front of it to reach the conclusion that all rules would be complied with. The certificate of compliance was quashed on that basis.[31]

The grounds employed were somewhat unclear. The Court broadly described it is a matter of *ultra vires*: because Council did not have sufficient information, they did not have the power to issue the compliance certificate.[32] While a somewhat imprecise way to refer to legal error, this can broadly be classified as a finding of illegality, but not the same as the relevancy ground potentially identified in *Air Nelson*.[33]

A similar, though not identical, set of issues confronted another local authority in *New Zealand Motor Caravan Association v Queenstown Lakes District Council*.[34] This was a challenge to an almost entirely blanket bylaw banning freedom camping in all but a handful of locations in the Queenstown Lakes District.[35]

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28 At [1].

29 At [2].

30 At [35], citing *Pring v Wanganui District Council* [1999] NZRMA 519 (CA) at 523.

31 *Endurance Holdings*, above n 27, at [107]–[109].

32 At [37].

33 The way Grau J describes the nature of the error at [37] – "exercising a power in circumstances where the legislative requirements for that exercise have not been met" – suggests a more precise classification of the error would be illegality on the basis of failure to satisfy statutory criteria. This was the basis for the factually and legally similar (thought certainly not identical) case of *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

34 *New Zealand Motor Caravan Association v Queenstown Lakes District Council* [2024] NZHC 2729.

35 At [1]–[9].

There are a set of statutory criteria that have to be met under the Freedom Camping Act 2011 in order to justify making a bylaw restricting camping at particular sites. Under the Act, a bylaw may only be made if it is satisfied that it is: "…necessary to protect the area (the area protection criterion) and/or to protect the health and safety of visitors to the area and/or to protect access to the area."[36] The Council engaged a consultant to do some of the work on identifying the appropriate sites to ban freedom camping.[37] The analysis from that consultant on the area protection criterion included, among other matters, evaluating the impact of freedom camping on the area in terms of amenity and economic value.[38] The latter was later accepted to be an irrelevant consideration, and subsequent council processes attempted to address that fact, but the bulk of the report was still considered.[39]

The consultant's analysis fed into the Council's decision-making process. It was not the governing factor, but it did play a role and was, according the Court, irrelevant information (despite the Council's attempt to carve out the irrelevant aspects).[40] The Court also held that the amenity values factor was an irrelevant consideration, and the Council had taken no steps to mitigate consideration of that factor at all.[41]

Irrelevancy is a ground of review in and of itself, but the Court also found that considering these irrelevant matters led the Council to another reviewable error. In considering the irrelevant information, the Council ended up paying inadequate attention to the actual statutory basis for designating various sites no freedom camping zones.[42] So the decision was arguably *also* invalid based on a failure to consider enough information to be reasonably satisfied that the true statutory criteria had been met, due to over-reliance on that irrelevant information instead.[43] The ultimately determinative ground was not entirely clear, but some matter of relevancy did appear to be key, with failure to meet statutory criteria also at issue. Regardless, the decision turned on the quality and relevance of the information before the decision-maker.

Houkura Independent Māori Statutory Board v Auckland Council, on the other hand, was very clear about the ground it relied on to overturn the decision at issue, which again related to the particular information considered by the decision-maker. This was a challenge to the appointment of the Chair of Watercare on the basis that (among other grounds) "knowledge of tikanga Māori"—a mandatory

36 At [32].

37 At [43].

38 At [52].

39 At [77] and [98]–[100].

40 At [111].

41 At [154].

42 At [155]–[157].

43 At [157].

statutory consideration under s 57(3) of the Local Government Act 2002—was not considered by the Council.[44]

What was particularly interesting about this case was that the Council *did* consider and get advice on the importance of the candidate having an understanding of Te Ao Māori,[45] but the Court said this was not always synonymous with tikanga.[46] Thus, in considering "an understanding of Te Ao Māori" instead of "knowledge of tikanga", the Council was found to have failed to consider the true matter it was required to have in its mind.[47]

That was, the Court said, not just a matter of semantics. Had the Council given genuine attention and thought to the relevance of knowledge of tikanga to the governance of the Board, the distinction between the wider concept of Te Ao Māori and the more specific concept of knowledge of tikanga Māori would have been better understood.[48] There was a process problem in this case that led to the proper matters not being considered. Unlike the previous decisions covered in this note, the ground at issue here was clear: in failing to have information about the candidates' "knowledge of tikanga Māori" before it, the Council did not have regard to a mandatory relevant consideration.[49]

The final successful judicial review claim that in my view centres this sort of sufficiency of information issue is *Smith v Chief Executive of Department of Corrections*.[50] This was another claim made by frequent prison litigant Phillip John Smith. It concerned an application for supervised temporary release to attend a funeral.[51] The application was declined by the General Manager of Rimutaka prison on the basis (provided for in statute) that Mr Smith's release would be an undue risk to the safety of the community while he was out of the prison.[52]

These sorts of applications, by their nature, are reasonably urgent: a decision on allowing funeral attendance needs to be made before the funeral is held. Boldt J acknowledged the constraints produced

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44 *Houkura Independent Māori Statutory Board v Auckland Council* [2024] NZHC 2623 at [1]–[2].

45 At [49].

46 At [64].

47 At [65]–[66].

48 At [65]–[66].

49 At [78]–[80].

50 *Smith v Chief Executive of Department of Corrections* [2024] NZHC 3584.

51 At [1]–[2].

52 At [6]. The statutory criterion is that set out in s 62 of the Corrections Act 2004. The General Manager's reasons do not actually use this wording, instead saying (again at [6]): "I am unable to guarantee the safety and security of our staff, Phillip SMITH, or the wider community if the application for Temporary Removal were to be approved," but Boldt J seems satisfied to treat this as effectively matching the statutory criterion.

by the urgent timeframe.[53] However, he concluded that there was nothing in the written record provided that suggested the general manager had a rational basis for their conclusion on community safety.[54]

The decision was quashed, and the general manager was ordered to urgently reconsider the matter, taking the Judge's findings into account.[55] It was not entirely clear what the grounds relied upon were here. Is this an *Edwards v Bairstow* situation where there is no factual basis at all for the decision?[56] Unreasonableness in the *Wellington City Council v Woolworths New Zealand Ltd (No 2)* sense?[57] A species of error of law in the sense of failing to meet the statutory criteria? It is not made clear from the judgment.

The lack of clarity and consistency across the High Court cases reviewed above—all decided within a relatively short period—as to the grounds applicable to claims of insufficient evidence is striking. It is clear that this is a decision-making flaw that litigants are now quite regularly winning on in judicial review claims. It is much less clear why, precisely, courts think sufficiency of evidence before a decision-maker is a problem that is cognizable by judicial review.

IV HIGH COURT: DEEPENING PROCEDURAL DEMANDS?

Regardless of the lack of conceptual clarity on grounds, if there are indications that litigants are winning on a reasonably frequent (and possibly increasing) basis by attacking the evidentiary basis of a decision or the sufficiency of information before a decision-maker, what does it mean for the way that judicial review is actually conducted, procedurally? Surely if litigants are winning by focusing on the quality of the information underlying decisions, there is an incentive to ask for more and more detailed information from decision-makers.

Typically, evidence on judicial review is almost entirely on the basis of affidavit, with relevant documents appended to them. But discovery *is* available on a discretionary basis, and it has been requested a number of times over the course of 2024 and, in some cases, has been granted. It would be too sweeping a claim to say that there has been a huge shift over the past year, but there are at least some indications that applications for discovery have begun to increase.

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53 At [7].

54 At [13]–[20].

55 At [22]–[24].

56 *Edwards v Bairstow* [1956] AC 14 (HL) at [36] states that the very unusual circumstances where an error of fact will be a reviewable error is where "there is no evidence to support the determination" or "the evidence is inconsistent with and contradictory of the determination" or "the true and only reasonable conclusion contradicts the determination".

57 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545–546 and 552.

Judicial review as an institution is supposed to be convenient and expeditious.[58] It is supposed to be relatively simple, untechnical and prompt (at least in relative terms, when compared to general civil litigation).[59] If a person is challenging a public decision, any remedy the court might grant may well be ineffective if it takes months for the matter to be heard and then determined. Because of the presumptive expeditiousness of the process, a judge should only exercise their discretion to order discovery where it is necessary for a fair disposal of the matter.[60]

It should not often be the case that discovery is so necessary. Much of the work that is done with discovery in civil litigation generally is in judicial review done via the duty of candour imposed on decision-makers. This is a duty on public officials to amply explain the reasoning and provide as an annex to their affidavits any documents that directly impacted their reasoning.[61] This is by no means the full "train of inquiry" test from general civil litigation, but it is quite a broad requirement.

Thus, the default approach in judicial review is to minimise discovery and instead rely on the duty of candour and, in some circumstances, the ability of the Court to reach negative inferences as to matters of fact if the decision-maker has not provided any evidence about them.[62] When, then, will discovery be seen as necessary for fair disposal of the matter? As usefully summarised by O'Gorman J in *Hall v Brown (as members of Selection Body Established Under Local Government (Auckland Council) Act 2009)*:[63]

> Relevant considerations include the nature of the issues in dispute, the resources of the parties, delay to the proceedings, and the overall proportionality of making an order for discovery (weighing the prospect of finding relevant documents, their degree of relevance and the likely costs incurred).

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58 *Hall v Brown (as members of Selection Body Established Under Local Government (Auckland Council) Act 2009)* [2024] NZHC 1897 [*Hall v Brown*] at [7], citing *Attorney-General v Dotcom* [2013] NZCA 43, [2013] 2 NZLR 213 at [45] and [47]; and Judicial Review Procedure Act 2016, s 13(2)(a).

59 *Hall v Brown*, above n 58, at [7], citing *New Zealand Institute of Chartered Accountants v Chartered Institute of Management Accountants* [2015] NZHC 818, [2015] 3 NZLR 692 at [83]; *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 353; *Te Rūnanga o Ngāti Awa v A-G* HC Wellington, CIV-2006–485–1025, 28 March 2007 at [6]; and *BNZ Investments Ltd v CIR* (2007) 23 NZTC 21,078 (HC) at [14]–[15].

60 There is a useful summary of the contemporary law in this area by Cooke J in *Gama Foundation v Chief Executive of the Ministry of Social Development* [2021] NZHC 3146 at [6]–[10].

61 *New Zealand Institute of Forestry (NZIF) Te Pūtahi Ngāherehere O Aotearoa Inc v Attorney-General* [2025] NZHC 14 at [25]–[26] [*NZIF*]. See also *Hall v Brown*, above n 57, at [10]–[16]. In addition to the duty of candour, the Official Information Act 1982 gives broad access to public information, and many litigants will already have obtained substantial documentation via this route before commencing their claim.

62 *NZIF*, above n 61, at [25]–[26].

63 *Hall v Brown*, above n 58, at [9].

As noted above, if a claimant is basing their claim on the allegation that the facts before a decision-maker are insufficient, or that the quality of reasoning in a report from officials that the decision-maker is relying on are deficient, it seems rational to argue that more information might be required to prove that and thus there is a higher likelihood of genuinely relevant documents being discovered.

There have been a few cases in the High Court in 2024 where this was indeed what was argued. The first of these, the already mentioned *Hall v Brown*, was a challenge to a finding of ineligibility on the part of the applicant to be a mataawaka representative on the Independent Māori Statutory Board.[64] The applicant sought very, very broad discovery orders, covering virtually everything that anybody in the organisation had done vaguely related to the decision, from any secretarial work that might have been done to any social media postings and everything in between.[65] On its face this looked like a fishing expedition, and the Judge (correctly, in my view) did not grant the application in full, but some limited discovery for the documents underlying the specifics of the decision and the reasoning behind it was given.[66] Thus, we saw a broadening of access to information somewhat beyond the norm, if not nearly as much as Mr Hall initially sought.

New Zealand Institute of Forestry (NZIF) Te Pūtahi Ngāherehere O Aotearoa Incorporated v Attorney-General was a challenge to forestry levies set under secondary legislation. Broad discovery was sought beyond the initial disclosure and informal discovery provided by the Crown. This informal discovery was documents that the Crown did not think were relevant. It handed them over with some redactions for commercial sensitivity, seemingly on the expectation that the claimants would agree they were not relevant and could be put to one side.[67]

That was not, in fact, the view the claimants took. Instead, they insisted on the relevance of the documents and wanted the redactions removed, so applied for formal discovery.[68] This application was made very early in the litigation process; too early, McQueen J concluded.[69] The application for discovery was not substantively granted, but did have the effect of inducing the Judge to include some steps for formal discovery of this material that have been informally released in her timetabling orders.[70] So, like *Hall v Brown*, we see here at least potentially more information beyond simple affidavits from officials being disclosed.

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64 At [1].

65 At [2].

66 At [47]–[48].

67 *NZIF*, above n 61, at [9]–[10].

68 At [11]–[16].

69 At [46].

70 At [52]–[54].

This last procedural case this note will cover, *Kim v Minister of Justice*, was an unsuccessful application for leave to appeal the denial of discovery.[71] Despite its lack of success, the application ties back into the themes of this note because it shows the lawyers for Mr Kim arguing quite forcefully – likely too forcefully – about the effect of the Supreme Court's decision in *A*, what that meant for the sort of factual inquiry courts can go into, and what information might be required for the formal record in cases involving human rights.

Substantively, the case did not go well for the applicants. Not only did LaHood J conclude he was correct to decline discovery, but he also declined leave to appeal on the basis that there was no reasonable prospect of success.[72] Despite this, the decision is particularly interesting in the way he dealt substantively with the arguments based on *A*.

This application was one of the latest chapters in the long-running extradition saga involving Mr Kim, who is resisting deportation to China to face charges of murder.[73] A key argument Mr Kim wished to make was that the information provided to the Minister by officials was inadequate.[74] Mr Kim's lawyers claimed that extremely broad discovery was needed to allow arguments based on the standard set out in *A* and *Moncrief-Spittle* where an *Air Nelson*-style argument about the sufficiency of information is going to be made and fundamental human rights are at issue.[75] Counsel wanted everything that contributed to the Ministry of Foreign Affairs and Trade's knowledge of China and the criminal system in China.[76] They were asking for virtually everything within the institutional knowledge of the Ministry if it might potentially affect the advice given to the Minister (whether or not it in fact did).[77]

This breadth of discovery was necessary, they argued, on the basis that *A* gave the courts a role in reviewing *de novo* the rights analysis of decision-makers, and indeed all information available to officials regardless of whether it was put before the ultimate decision-maker.[78] That goes a bit further than *A* in fact held. To the extent that *A* did suggest that a court could substitute its judgment for that

71 *Kim v Minister of Justice* [2024] NZHC 3662.

72 At [40]–[46].

73 At [1]–[2].

74 At [27]–[28].

75 At [29]–[30].

76 At [10] and [30]–[31].

77 At [9].

78 At [9]–[11].

of the decision-maker, that was because of a specific statutory provision in the Passports Act 1991: this was not a finding that was generalisable to judicial review as a whole.[79]

Despite not quite landing the argument, Mr Kim's lawyers do surely have a point about evidence requirements in deeply fact-dependent decisions post-*A*. Where facts and evidence are in dispute, particularly in rights cases, there *are* some indications (as a number of the cases discussed above show) that the courts will look quite closely at the quality of evidence and litigants can have reasonable prospects of victory. A fact-dependent decision that implicates rights must surely require that, at least in some cases. That means that these sorts of applications for discovery, when similar matters arise, seem likely to keep coming.[80]

V CONCLUSION

It is clear from this brief survey of cases over the past year that adequacy of advice that decision-makers rely on, and sufficiency of information more generally, is a significant issue in contemporary judicial review. Claimants quite frequently point to deficiencies in the information provided to decision-makers, and they quite often succeed on that basis. It is less clear from the same cases precisely what ground of review is implicated by these evidentiary deficiencies. We have seen reasonableness, unfairness, illegality, irrelevant considerations, relevant considerations and ultra vires all being invoked in quite similar contexts without consistently saying what it is about the amount or quality of evidence before decision-makers that makes the decision deficient. This could be simple lack of conceptual clarity on the part of the courts, or it could be grasping towards a standalone sub-ground of insufficiency of advice in the *Air Nelson* sense. Some clarity on that front – or simply confirming and consistently applying the unenthusiastic and equivocal invocation of relevancy we saw in *Air Nelson* (and the Court of Appeal in *A*) as the appropriate ground in the circumstances – would be welcome. Grounds are not the "be all" and "end all" of review, but clear linkage of this type of flaw in the decision-making process to a ground of review will make it clearer why the courts think it is appropriate for them to intervene on that basis.

However it is classified, there is a clear message in these cases for officials. Demands for evidence and justification will continue and may intensify. The quality of reports and decision papers sent to Ministers *will* be scrutinised, and deficiencies will found judicial review claims. Lining up recommendations with statutory criteria, ensuring the facts are well canvassed and, when rights are at issue, ensuring that all implications have been covered off is very important. Being clear about the limitations of any analysis, particularly due to urgency, is similarly critical.

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79 At [12]–[16]. I agree with LaHood J's analysis here: see *A*, above n 2, at [86] and [93]2.

80 We may also see more applications for cross-examination, another procedural step that is very uncommon in judicial review but which has been deployed quite consequentially in recent months: see *Wallace v Chief Executive of the Department of Corrections* [2023] NZHC 2248 at [6]–[13].

On matters of procedure, it is too early to say we are going to see a rush of discovery requests, but I believe there is enough in the cases over the past year to suggest at least a modest uptick is in the offing. If, either in the depth of the justification the courts demand substantively or what information they order disclosed procedurally, there is a substantial increase in the evidentiary burden on the Crown, there are some real implications for the nature of judicial review as relatively simple, untechnical and prompt.

It is entirely possible to see this as a good thing. Government should justify itself to the public. It should pay attention to rights when it makes decisions. Public decision-makers should have good advice and sufficient facts in front of them when they make decisions. These are not bad things, but they do have practical resourcing implications for both the Crown and the courts.

Increasing the evidentiary burden of decision-making and the degree to which judicial review will inquire into the matter would mean it takes more time and more resourcing for the Crown to appropriately respond to judicial review claims. It would also likely mean more court time taken up with interlocutory matters such as discovery. As I note above, these demands may in many cases be justifiable given the importance of the issues being litigated, but they do involve a trade-off in simplicity and efficiency. As the courts make decisions in this developing corner of judicial review, both at case management conferences and in substantive judgments, they should do so with their eyes open to the appropriate balance.