

HUMAN RIGHTS VIOLATIONS FACILITATED BY IMMIGRATION DISCRETION:
FINDING THE BEST WAY TO USE IMMIGRATION PROMOTE HUMAN RIGHTS
AND THE DIGNITY OF MIGRANT WORKERS.

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DECLARATION

I MICHELLE WAIRIMU MWAURA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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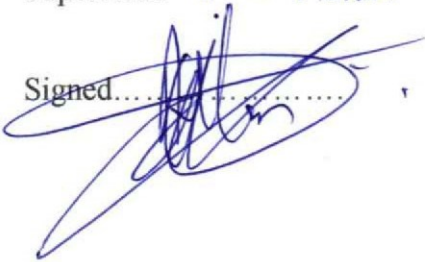


Date 29 February 2024.

This dissertation has been submitted for examination with my approval as university

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Signed.....



LIST OF CASES

AZ v Cabinet Secretary Interior & Co ordination of National Security & another [2021] e KLR.

Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons & 2 others
[2014] e KLR.

*Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising
Association of Kenya* [2019] e KLR.

*Republic v Director of Immigration Services Ex- parte Planet Motors Company Limited &
Another* [2016] e KLR.

LIST OF LEGAL INSTRUMENTS

1. The African Charter for Human and Peoples' Rights.
2. The Constitution of Kenya, 2010.
3. The Counter-Trafficking in Persons Act, 2012.
4. The International Covenant on Civil and Political Rights.
5. The International Convention on Economic, Social and Cultural Rights.
6. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
7. The International Labour Organization Convention on Migration for Employment.
8. The International Labour Organization Convention on Migrant Workers.
9. The Judicature Act.
10. The Kenya Citizenship and Immigration Act, 2011.
11. The Kenya Citizenship and Immigration Regulations, 2012.
12. The Protocol Against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000.
13. The Protocol on the Establishment of the East African Community Common Market.
14. The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.
15. The Statute of the International Court of Justice.

16. The Treaty Establishing the East African Community.

17. The Universal Declaration of Human Rights.

18. The United Nations Convention against Transnational Organized Crime.

ABBREVIATIONS

<i>ACHPR</i>	<i>African Charter on Human and Peoples Rights</i>
<i>EAC</i>	<i>East African Community</i>
<i>EAC Treaty</i>	<i>The Treaty for the Establishment of the East African Community.</i>
<i>ICCPR</i>	<i>International Covenant on Civil and Political Rights.</i>
<i>ICESCR</i>	<i>International Convention on Economic, Social and Cultural Rights</i>
<i>ICPRAMWMF</i>	<i>International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.</i>
<i>ILO</i>	<i>International Labour Organization</i>
<i>IOM</i>	<i>International Organization for Migration</i>
<i>UDHR</i>	<i>Universal Declaration of Human Rights</i>
<i>UN</i>	<i>United Nations</i>
<i>UNCATOC</i>	<i>United Nations Convention Against Transnationally Organized Crime</i>
<i>UNICEF</i>	<i>United Nations Children's Fund</i>

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ABSTRACT

This dissertation undertakes the essential task of reassessing and enhancing the exercise of immigration discretion in the issuance of visas and work permits. Its primary objective is to recommend the establishment of a framework to guide immigration discretion that ensures the protection of the fundamental rights and freedoms of migrant workers. The significance of immigration discretion is underscored by its profound influence on the lives of individuals seeking opportunities in foreign countries.

Instances frequently emerge where immigration officials, wielding discretionary powers, render decisions that encroach upon the basic rights and freedoms of migrant workers. This dissertation sheds light on this issue through a comprehensive examination of cases where the abuse of discretion has led to unjust denials, detentions, or deportations.

The research critically evaluates existing protocols, such as the United Nations Convention Against Transnational Organized Crime (UNCATOC) and its associated Protocols. It meticulously assesses the effectiveness of these instruments in preventing the misuse of immigration discretion and proposes necessary improvements in Kenya.

A central focus of the dissertation revolves around the development of guidelines for immigration officials, accentuating the imperative of safeguarding human rights in visa and work permit processes. The proposed framework aims to strike a delicate balance between national interests and the rights of migrant workers, emphasizing principles of fair treatment, transparency, and adherence to international standards. Furthermore, the dissertation addresses challenges stemming from corruption within government departments and collaboration between embassy staff and criminals, offering measured proposals to mitigate such practices.

In conclusion, this dissertation aspires to present a comprehensive and refined approach to immigration discretion, advocating for a system that steadfastly upholds the dignity and rights of migrant workers, thereby cultivating a more equitable and humane immigration process.

CHAPTER ONE

THE USE OF IMMIGRATION DISCRETION THAT UNDERMINES HUMAN

RIGHTS

1.1 INTRODUCTION

One of the primary responsibilities assigned to the state and all its organs by the Constitution is to uphold, honor, safeguard, advance, and fulfill the rights and essential freedoms outlined in the bill of rights, as embedded in the Constitution¹. The Constitution stands as the highest law in the Republic, compelling adherence from all individuals and state entities across both levels of government². According to the Constitution of Kenya, every individual possesses inherent dignity and the entitlement to have that dignity acknowledged and safeguarded³. Furthermore, it explicitly prohibits the practice of holding people in slavery or servitude, as well as compelling individuals to engage in forced labor⁴. Slavery, as defined, refers to the status or condition of a person over whom any or all powers associated with ownership are exercised⁵. Forced labor, on the other hand, is described as the extraction of work or services from an individual for the purpose of exploitation⁶. Importantly, the Constitution asserts that these rights are not subject to limitations⁷. The Bill of Rights, entrenched in the Constitution, applies universally to all state organs and individuals, encompassing not only Kenyan citizens but also Kenyans, refugees, migrant workers, asylum seekers, and every other human being within the borders of Kenya. International law also plays a role in protecting migrant workers and human rights in general. International Law applies in Kenya as provided for by Judicature

¹ Article 21 (1) of the Constitution of Kenya, 2010.

² Article 2 (1) of the Constitution of Kenya, 2010.

³ Article 28 of the Constitution of Kenya, 2010.

⁴ Article 30 (2) of the Constitution of Kenya, 2020.

⁵ Section 2 of the Counter-Trafficking in Persons Act, 2012.

⁶ Section 2 of the Counter-Trafficking in Persons Act, 2012.

⁷ Article 25 of the Constitution of Kenya, 2010.

Act⁸. Like the Constitution, the Universal Declaration of Human Rights (UDHR) provides everyone with the rights highlighted above⁹. These rights are instrumental in advancing the dignity of individuals. Furthermore, they afford all individuals the entitlement to seek redress through competent national courts for actions that violate the fundamental rights conferred upon them by the constitution or by law¹⁰.

In this research, the concept of human dignity refers to what applies to all human beings by virtue of them being human regardless of their backgrounds, and it is an inherent part of their being and cannot be taken away and it is more important than any other consideration¹¹. The rights above provided for under international conventions and the Constitution of Kenya are inherent to all human beings in both Kenya and in the world. They are not determined by their nationality or any other considerations. This shows that they are inherent to human dignity.

Kenya has been making proactive efforts to safeguard human rights. In instances where any rights outlined in the Bill of Rights are breached, the Constitution permits any individual to initiate legal action, asserting that a right or fundamental freedom guaranteed in the bill of rights has been denied, violated, infringed upon, or is under threat¹². The Constitution gives the courts authority to uphold and enforce the Bill of Rights¹³. Courts are empowered to provide remedies including issuing declarations of rights, injunctions, conservatory orders, declarations of invalidity for laws that contravene or endanger rights or fundamental freedoms outlined in the Bill of Rights without justification, compensation orders, and orders for judicial review¹⁴.

⁸ Section 3 (1) of the Judicature Act.

⁹ Article 4 of the UDHR.

¹⁰ Article 8 of the UDHR.

¹¹ Riley S, 'Human Dignity' Internet Encyclopaedia of Philosophy <https://iep.utm.edu/human-dignity/> 8 March 2023.

¹² Article 22 (1) of the Constitution of Kenya, 2010.

¹³ Article 23 of the Constitution of Kenya, 2010.

¹⁴ Article 23 (3) of the Constitution of Kenya, 2010.

Distinguishing between the smuggling of persons and trafficking is crucial for the focus of my study, as these terms are often confused. The act of smuggling individuals entails acquiring, whether directly or indirectly, a financial or other material gain for the unauthorized entry of a person into a State Party, where the individual is neither a citizen nor a permanent resident¹⁵. On the other hand, trafficking involves activities like abduction, deception, transportation, harboring, or reception of another individual for the purpose of exploitation which often takes place through threats, coercion, abduction, deception, abuse of power, or exploitation of a person's vulnerability and also involves providing payments or benefits to gain the consent of the victim or the individual controlling another person¹⁶. As it is clear from the two definitions, trafficking has the element of exploitation of the person. This definition of trafficking will be used in the research.

Kenya has also taken steps towards stopping human trafficking. It enacted the Counter-Trafficking in Persons Act which criminalises human trafficking¹⁷. It provides for imprisonment of a term not less than thirty years to life imprisonment or a fine not less than thirty million for persons found guilty of trafficking¹⁸. A Resident Magistrate in Shanzu sentenced a businessman in Mombasa to a thirty (30) years imprisonment for trafficking, twenty (20) years for promoting human trafficking and ten (10) years for interfering with travel documents after he was found guilty of trafficking twelve (12) Nepalese women¹⁹. The businessman owned a bar and restaurant and had unlawfully employed the Nepalese nationals

¹⁵ Article 3 of the Protocol Against The Smuggling of Migrants By Land, Sea, and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000.

¹⁶ Section 3 of the Counter-Trafficking in Persons Act, 2012.

¹⁷ Section 3 (1) of the Counter- Trafficking in Persons Act, 2012.

¹⁸ Section 3 (5) of the Counter- Trafficking in Persons Act, 2012.

¹⁹ Muyanga P, 'Trader who trafficked 12 Nepalese women jailed for 60 years' Daily Nation, 26 November 2020 <https://nation.africa/kenya/counties/mombasa/man-who-trafficked-nepalese-women-jailed-for-60-years-3632006> on 8 March 2023.

there. He had kept the women there illegally with the purpose of exploiting them through deception.

Kenya has also empowered The Director of Immigrations and Registration of Persons with discretion in giving visas and work permits²⁰. This discretion has however been used to make arbitrary decisions that infringe of the migrant workers rights. An example of abuse of this discretion was seen in *AZ v Cabinet Secretary Interior & Coordination of Security*²¹, a British national, who had fulfilled all the requirements for a Kenyan visa, was refused entry by an immigration officer at the airport without any given cause, explanation, or rationale for the denial. When he sought clarification, he was informed of being unwelcome in Kenya and facing deportation to the United Kingdom. Subsequently, he was held at the airport for two days without access to food or water, denied consular services or legal representation, and was not presented before a court to address any accusations. The court held the administrative decision to be illegal, null and void.

1.2 BACKGROUND

According to an Enact Project, Kenya has been identified as a country that serves as a source, transit point, and destination for men, women, and children who are trafficked for forced labor²². In its role as a source country, Kenya is noted for exporting its workforce primarily to the Middle East, where individuals fall victim to enslavement by traffickers who exploit their vulnerabilities and take advantage of gaps in legal protections for migrant workers. The Enact Project also acknowledged that while Kenya has numerous labor laws, these laws do not explicitly address the issue of labor exportation, leaving migrant workers inadequately protected. Despite the involvement of government ministries such as labor, foreign affairs, and

²⁰ Section 40 of the Kenya Citizenship and Immigration Act, 2011.

²¹ *AZ v Cabinet Secretary Interior & Coordination of National Security & another* [2021] eKLR.

²² Department of State, 'Trafficking in Persons Report' 195.

interior, as well as various other departments, councils, and funding boards in regulating labor exportation, the lack of coordination among these entities weakens the enforcement of protective measures²³.

Kenya has made efforts to enter bilateral treaties with countries in the gulf region. One specific treaty Kenya entered in 2022 with Saudi Arabia which led to the formation of a Joint Committee to ensure the enforcement of the treaty²⁴. This would be helpful in protecting the dignity of the migrant worker if the states abide by it. However, as it has been noted that these countries in the gulf region have little regard for the protection of the migrant workers' rights because of the Kafala system that creates a power imbalance between the employees and the workers²⁵. This shows that Kenya's effort to enter these treaties is futile at the end of the day because there will be little gained in the end. This shown by the number of deaths of Kenyan Migrant workers in the region. There are recruitment agencies who work together with embassy staff to conduct human trafficking²⁶.

To curb trafficking in Kenya, the Counter-Trafficking in Persons Act was enacted. It criminalises human trafficking and carries huge penalties²⁷, has been in force for more than ten years but hasn't curbed the crime.²⁸

²³ Daghar M, 'Gaps in laws and their enforcement expose trafficking victims to a well organised criminal market' ENACT Project, 2020.

²⁴ Kenya and Saudi Arabia Sign Agreement to enhance Cooperation <https://mfa.go.ke/kenya-and-saudi-arabia-sign-agreement-to-enhance-cooperation/> on 8 March 2023.

²⁵ Whitson S, The Kafala System and Human Rights Abuses against Migrant Workers in the Gulf, Human Rights Watch, Newyork, 2012,8; Khalaf A, The Migrant- Kafala in the Gulf Arab States, Palgrave Macmillan, UK, 2012,88.

²⁶ Haddadi A, 'Kenyan Graduates Trafficked to Saudi Arabia, UAE, Qatar and Kuwait by Embassy Staff', International Business Times, 26 March 2012 <https://www.ibtimes.co.uk/embassy-staff-help-human-trafficking-cartel-send-319444>.

²⁷ Section 3 of the Counter- Trafficking in Persons Act, 2012.

²⁸ Daghar M, 'Gaps in laws and their enforcement expose trafficking victims to a well organised criminal market' ENACT Project, 2020.

1.3 PROBLEM STATEMENT

Kenya has taken steps to protect the migrant workers. It has made provisions for the prosecution of the people in charge of trafficking as a step towards protecting migrant workers. Kenya has also granted immigration officers with discretion in the process of granting visas and work permits. These steps have however not been very efficient in protecting migrant workers. These steps therefore do not sufficiently promote human dignity. My study sought to evaluate whether the discretion afforded to immigration officers in immigration laws protects the dignity of migrant workers by preventing human trafficking in Kenya.

1.4 JUSTIFICATION

Kenya continues to export its labour to the Middle East and other parts of the continent. Kenya also receives migrant workers from other countries in the continent. This study sought to address the problem that arises from the discretionary power of immigration officers. Addressing protection of human dignity by preventing human trafficking not only ensures the dignity of migrant workers but also saves the lives of migrant workers in Kenya and Kenyan migrant workers.

1.5 LITERATURE REVIEW

This section is divided into three and covers arguments made on the principles that should inform immigration law to protect the migrant worker, arguments for the role played by discretion in giving visas and work permits in denying migrant workers access into the country and infringing on their rights, and lastly arguments for the regulation of discretion to promote the dignity of immigrants.

i. Principles that should inform immigration law to protect the migrant worker.

Granting of visas and work permits is an administrative decision by the Department of Immigrations. One of the key elements of administrative decisions is discretion. Central to such administrative decisions is the concept of discretion, wherein the decision-maker possesses the authority to choose whether to take action, approve or disapprove, or approve with conditions²⁹. The designated responsibility of the decision-maker involves exercising judgment based on all pertinent information³⁰. The exercise of discretion is governed by various overarching principles, such as acting in good faith and for valid reasons, following legislative procedures, taking into account only pertinent factors while disregarding irrelevant ones, making decisions based on rationality and supported by adequate evidence, carefully evaluating significant issues, ensuring procedural fairness for affected parties, and exercising discretion independently without external influence³¹. In this dissertation, these principles, alongside the national values and principles listed in Article 10 of the Constitution, formed the basis for arguing how discretion should be employed in immigration laws as an administrative decision. The study examined the Office of the Director of Immigration as a decision-making entity endowed with administrative functions.

Johnson lists some principles needed for immigration reforms which include immigration laws should treat immigrants fairly and they should be consistent with other bodies of law³². Additionally, he argues that immigration laws should be reformed to reflect their purpose. He argues that the immigration laws should create a balance between rights of

²⁹ Ombudsman Western Australia, Exercise of Discretion in Administrative Decision Making- <https://www.ombudsman.wa.gov.au/Publications/Documents/guidelines/Exercise-of-discretion-in-admin-decision-making.pdf> on 8 March 2023.

³⁰ Ombudsman Western Australia, Exercise of Discretion in Administrative Decision Making <https://www.ombudsman.wa.gov.au/Publications/Documents/guidelines/Exercise-of-discretion-in-admin-decision-making.pdf> on 8 March 2023.

³¹ Ombudsman Western Australia, Exercise of Discretion in Administrative Decision Making <https://www.ombudsman.wa.gov.au/Publications/Documents/guidelines/Exercise-of-discretion-in-admin-decision-making.pdf> on 8 March 2023.

³² Johnson K., 'Ten Guiding principles for Truly Comprehensive Immigration Reform: A blueprint' 54 The Wayne Law Review 4, 2009, 1622-1628.

non-citizens and some state interests. He argues that the laws should show the goals of immigration laws. Additionally, he argues that after a comprehensive law has been enacted, the amendments made should not disturb the balance in the laws³³. This dissertation adopted his argument and went on to look at how the immigration laws in Kenya are consistent with other bodies of law such as rights guaranteed by the Constitution and International laws. It also went further to make recommendations on some amendments that could be made to immigration laws.

Hanson presents a case outlining ethical principles essential for immigration reform³⁴. These principles encompass a dedication to human and civil rights, particularly considering that numerous large-scale migrations stem from conflicts. Additionally, they involve acknowledging the inherent right of every individual to security, sustenance, and shelter, even when these necessities are unattainable in their home countries. The argument emphasizes the global community's collective responsibility to ensure the safety of immigrants, underscores the importance of basic empathy towards immigrants and refugees, and advocates for a steadfast commitment to non-discrimination. This dissertation used these principles that Hanson sets out to evaluate whether the immigration laws in Kenya meet the criteria that ensures dignity of all migrant workers.

ii. Role played by discretion in giving visas and work permits in denying migrant workers access into the country and infringing on their rights.

Bouchard contends that immigration and refugee officers, responsible for executing immigration policies, wield a significant level of discretionary authority that can influence the

³³ Johnson K., 'Ten Guiding principles for Truly Comprehensive Immigration Reform: A blueprint' 1638-1639.

³⁴ Hanson K., 'Ethical Principles for Immigration Reform in 2019' Markkula Center for Applied Ethics, Santa Clara University, 2019, <https://www.scu.edu/ethics/all-about-ethics/ethical-principles-for-immigration-reform-in-2019/> on 30 November 2023.

results of these policies³⁵. She adopts Kelly's argument³⁶ that the officers tend to be guided by their views and values which may reflect their personal philosophical outlook. Bouchard continues to compare some officials to gatekeepers who exclude and restrict entry into the country and also compares some officials to facilitators who remove obstacles to entry. This dissertation advanced this argument by showing instances in which immigration officers in Kenya acted as both gatekeepers and facilitators and used their discretion to infringe on human rights of migrant workers. It also furthered the discussion by showing that a lack of strong moral values which guides the immigration officers in the exercise of their discretion can lead to instances of corruption which affects the implementation of immigration policies and subsequently the rights of migrant workers. This dissertation illustrated how such corruption can lead to human trafficking.

Wadhia also argues that discretion can have negative effects in immigration laws. He refers to this as 'darkside discretion' and continues to argue that it arises when a noncitizen meets all the statutory requirements and satisfies the statutory requirement set out but an adjudicator rule to their detriment on the basis of discretion³⁷. He gives an example of a spouse of a citizen of the United States who qualifies for a green card based on the marriage and has met the statutory criteria but is denied status without any reason by the exercise of immigration discretion. Wadhia highlights that the discretion is abused even though there is a robust statute in a country. This dissertation adopted this argument and proceeded to illustrate using the case law how in Kenya discretion is abused even though Kenya has robust laws on immigration.

³⁵ Bouchard G., Policy- Making and administrative discretion: The case of Immigration in Canada,45 Canadian Public Administration 2,2022, 247.

³⁶ Kelly M, 'Theories of justice and street level discretion' 4 Journal of Public Administration: Theory and Research 2, 119-140.

³⁷ Wadhia S, 'Darkside Discretion in Immigration Cases' Pennsylvania State University, 72 Administrative Law Review 3 , 367.

Manuel and Garcia argue that immigration officials have an executorial role and formulate policies following their statutory mandate³⁸. They argue that immigration officials through their executive role can abuse their discretion by adopting policies that constitute an abdication of their statutory duty. They also argue that the officials can interpret and apply statutory laws in a way that goes beyond the intended scope of their authority. This dissertation adopted the argument and sought to evaluate case law where the immigration officials have abused their powers in the ways Manuel and Garcia have argued.

iii. How the discretion in allocating visas and work permits can be used to promote dignity of the migrant worker in immigration laws.

The International Organization for Migration (IOM) highlights one of the stages of identifying a victim of trafficking is during the movement stage³⁹. The Organization's guide observes that individuals subjected to trafficking frequently utilize the identity or travel documents of another person or may entirely lack travel documentation⁴⁰. The IOM also affords immigration and law enforcement officers with the discretion to investigate by questioning immigrants who are coming from a location known for human trafficking and those immigrants who have obvious signs of physical abuse as they could be victims of trafficking⁴¹. This dissertation made arguments for the use of immigration discretion to help identify human traffickers as provided by the guide by the IOM. It also discussed the use of such discretion in line with the principles of Administration law that guide discretion use in making such administrative decisions.

Shelley posits that the expansion of human trafficking is a consequence of increasing economic differences and demographic inequalities and an effective countermeasure requires

³⁸ Manuel K. and Garcia M., Executive Discretion as to Immigration: Legal Overview, Congressional Research Service, 4-17.

³⁹ IOM Training Guide, Trafficking in Persons: Victim Identification and Assistance 2020, 16.

⁴⁰ IOM Training Guide, Trafficking in Persons: Victim Identification and Assistance 2020, 17.

⁴¹ IOM Training Guide, Trafficking in Persons: Victim Identification and Assistance 2020, 17.

collaborative efforts involving civil society, government, the business community, multilateral organizations, and the media⁴². Ondieki argues that government should continue to exercise oversight and demand accountability of overseas recruitment agencies⁴³. This dissertation further argued that there is a need for coordination between the lawmakers and the immigration officers to ensure that the immigration discretion is checked, and they are held accountable for their decisions. More coordination with the Judiciary will enhance the checking of the discretion of immigration officers through judicial review.

Wadhia suggests that to manage discretion, the Executive Branch should develop a regulation establishing a rebuttable presumption favoring the noncitizen⁴⁴. This dissertation uses this recommendation to make arguments for how such a regulation would help regulate the discretion of immigration officials in Kenya.

1.6 MAIN OBJECTIVE

To find out the best way that discretion in granting visas and work permits in immigration laws can be used to promote the dignity of migrant workers in Kenya.

SPECIFIC RESEARCH OBJECTIVES

1. To find out what are the principles that should inform immigration law to protect the migrant worker.
2. To find out the role played by discretion in giving visas and work permits in denying migrant workers access into the country and infringing on their rights

⁴² Shelley L, Human Trafficking: A Global Perspective,295.

⁴³ Ondieki J, 'Human Trafficking and Its Impact on National Security in East Africa: A Case Study of the Vice in Kenya' Published, University of Nairobi, 2017, 111-112.

⁴⁴ Wadhia S., Darkside Discretion in Immigration Cases, 414.

3. To find out whether the discretion in allocating visas and work permits can promote dignity of the migrant worker in immigration laws.

1.7 MAIN RESEARCH QUESTION

What is the best way to use discretion in granting visas and work permits in immigration laws to promote the dignity of migrant workers in Kenya.

SPECIFIC RESEARCH QUESTIONS

1. What are the theories that inform immigration discretion in granting visas and work permits
2. What role played by discretion in giving visas and work permits in denying migrant workers access into the country and infringing on their rights
3. How can the discretion promote dignity of the migrant worker in immigration laws

1.8 METHODOLOGY

This research was desk-based. This research was qualitative. It used qualitative data from books, journals, and reports. It also used numerical data from reports by the government and other international organisations trying to curb human trafficking. This was deductive research and used the known facts to reach my solution.

For the first research objective, I relied on books and journal articles to explain the theoretical frameworks of immigration laws and how laws have been developed from a historical perspective.

For the second research objective, I used primary data such as, the Constitution of Kenya, 2010, The Kenya Immigrations and Citizenship Act, and international conventions to evaluate what the law on immigration and preventing trafficking looks like. I relied on reports from the government, international organizations and projects that have conducted research on human trafficking to get the human trafficking data.

The third research objective used discussions by authors, philosophers and academics in their journal articles, books, and papers to investigate the oversight needed for immigration officers who use discretion in allocating work visas and permits to promote the dignity of the human person in immigration laws.

1.9 CHAPTER BREAKDOWN

This chapter is the introduction to the dissertation. It covers the background, research questions and objectives, hypothesis, justification, theoretical framework, methodology to be used and the literature review.

Chapter two looks at the theoretical frameworks for immigration law. It looks at what the various authors say on immigration law. It looked at the history of immigration law and the milestones taken to prevent human trafficking.

Chapter three looks at the various things that contribute to human trafficking and the role that discretion plays in trying to curb trafficking. It looks at the ways discretion has failed to respond to the trafficking problem and what role the various players have played in discretion failing.

Chapter four makes arguments for the proper way to use discretion in allocating work visas and permits to promote the dignity of the human person in immigration laws.

Chapter five concludes this dissertation with recommendations.

CHAPTER 2

BALANCING DOMESTIC INTERESTS AND HUMAN RIGHTS IN THE USE OF IMMIGRATION DISCRETION

2.1 Introduction

Immigration laws and policies have over the years been shaped by multiple theories. Property related theories, labour related theories, national interest related theories, and human rights related theories influence Immigration laws and policies in different countries especially relating to migrant workers. This chapter will look at two theories that shape immigration laws and how they influence the discretion in immigration laws and policies.

The first theory is the domestic interest theory. This theory is state-centric. It looks at the reasons for allowing or denying migrant workers access based on what the nations stand to benefit from the immigration⁴⁵. This theory is based on state sovereignty that is recognised by international law.⁴⁶

The second theory is the individual rights theory. This theory looks at the rights of a prospective migrant and the right of entry of that migrant.⁴⁷ In this theory, natural law and labour law theories will influence the arguments greatly. This theory advocates for equal protection of human beings as they move around the world as migrant workers.

⁴⁵ Johnson K., ‘ Theories of Immigration Law’, 46 Arizona State Law Journal 4, 2015, 1224
https://arizonastatelawjournal.org/wp-content/uploads/2015/08/Johnson_Final.pdf on 8 January 2024.

⁴⁶ IOM, State Sovereignty and Human Rights, Human Rights Of Migrants: An Overview
<https://emm.iom.int/handbooks/human-rights-migrants-overview/state-sovereignty-and-human-rights#:~:text=In%20migration%20governance%2C%20States%20have,the%20State%20under%20international%20law> on 17 January 2024.

⁴⁷ Johnson K, ‘ Theories of Immigration Law’, 1224.

The chapter will conclude by looking at the reasons why there should be a balance between domestic interest theory and the individual rights theory in immigration laws and especially in the exercise of the discretion in immigration laws by immigration officials.

2.2 Domestic Interest theory

This theory is based on the consequentialist philosophy⁴⁸. It advocates for granting of citizenship where the country has a domestic interest and makes arguments for the focus of immigration laws being for the benefit of the country⁴⁹. This theory is based on utilitarianism which is also based on consequentialism. Utilitarianism states that the best outcomes are those that provide maximum happiness for the greatest number of individuals in a society⁵⁰. Bentham argued that a good had utility if it enabled the greatest happiness for the greatest number⁵¹.

John Stuart Mill also supported utilitarianism, contending that actions are deemed morally right if they contribute to the overall increase of happiness, but he however diverged from Bentham by arguing that not all pleasures are equal and when considering utility, quantity and quality should be considered⁵². Moore criticised Bentham and Mill's analysis of utilitarianism based on pain and pleasure and suggested that an action should be judged based on the ability of its consequences to present a greater intrinsic value compared to all other alternatives⁵³.

There are two limitations to this theory⁵⁴. The first one is that the interests of a country are bound to change over time. Using this theory to make immigration laws and decisions would lead to unpredictability in the future. The second limitation is tyranny with regards to social

⁴⁸ Johnson K, 'Theories of Immigration Law', 1224.

⁴⁹ Johnson K, 'Theories of Immigration Law', 1224.

⁵⁰ Bentham J, A fragment of Government, 1776, 1, <https://www.earlymoderntexts.com/assets/pdfs/bentham1776.pdf> on 5 January 2024.

⁵¹ Bentham J, A fragment of Government, 1776, 12.

⁵² Mill J, Ethics, International Encyclopaedia of Philosophy, <https://iep.utm.edu/mill-eth/> on 8 January 2024.

⁵³ Moore G, Principia Ethica, Cambridge University Press, 1922, Ch 6, para 128, <https://www.gutenberg.org/files/53430/53430-h/53430-h.htm> on 8 January 2024.

⁵⁴ Johnson K, 'Theories of Immigration Law', 1229-1230.

goods. Johnson cited Walzer's argument that it would be unjust to allow entry into a country to only men and women who possess goods such as money and would benefit the nation without considering what it means to be a member of that country⁵⁵.

This theory is fundamental for this dissertation. Kenya has been named both a source and destination for migrant workers. As a source it has been reported to export labour to the Middle East. Kenyans working in foreign nations benefit Kenya as they have been reported to send millions of shillings yearly back to the country⁵⁶ to benefit their kin which in turn improves the livelihoods of Kenyans in Kenya. This in turn benefits the country. As a destination, Kenya benefits from migrant workers who are skilled and take part in building the nation by putting their skills into work here in Kenya and thereby building the nation. This theory is therefore important in the use of immigration discretion in allocating visas and work permits. Immigration officers should allocate them in the best interest of the country.

2.3 Individual Rights Theory

This theory is deeply rooted in the natural rights theory⁵⁷. It focuses on the rights of individual migrants that are present in natural law. This theory focuses on the rights of the migrant by their virtue of being a human being and the right of entry into a foreign nation.

From a natural law perspective, nature is free to all human beings⁵⁸. In the natural rights theory to property, the earth is God-given to all human beings to sustain them without excluding or favouring anyone⁵⁹. Property should therefore not be used in a way that only favours a few⁶⁰.

⁵⁵ Johnson K, 'Theories of Immigration Law', 1230.

⁵⁶ Okafor C, 'Kenyans abroad send home extra Sh. 2.3 billion defying previous trends' Business Insider Africa, 20 November 2023 <https://africa.businessinsider.com/local/markets/kenyans-abroad-send-home-extra-sh23-billion-defying-previous-trends/8tq3v5k> on 17 January 2024.

⁵⁷ Johnson K, 'Theories of Immigration Law', 1219.

⁵⁸ Kariuki F, Ouma S, and Ng'etich R, Property Law, Strathmore University Press, 2016, 29.

⁵⁹ Pope John Paul II, Encyclical letter, Centesimus annus (1 May 1991) 31, AAS, 83 (1991), 831.

⁶⁰ Pope John Paul II, Homily at mass for farmers, Recife, Brazil (7 July 1980): AAS 72 (1980), 926.

Hobbes argued for the right of nature, *jus naturale*, with regards to man's liberty for his own preservation⁶¹. Hobbes argued that man should give up these natural rights to form a social contract and get a sovereign⁶². He however believed that even in the social contract society, the natural rights remained because man strives to obtain all that is necessary for his self-conservation⁶³. Additionally, he argued that the society should cast out individuals who endeavour to accumulate more than they need or what they don't need to the detriment of society⁶⁴.

Locke built up on Hobbes' work by using the natural rights argument to explain the grounds and limitations of the moral duty to obey the laws of the state⁶⁵. Locke recognized that property rights are inherent rights of individuals, guided by principles of natural justice, which entail the general allocation of property to all humans⁶⁶. Natural law that is based on reason dictates that all human beings are equal and independent⁶⁷. Locke therefore argued that all human beings being free and independent and able to exercise their reason should not harm each other's life, liberty, or possessions⁶⁸. Locke, advancing his argument for the labour theory that justified acquisition of private property when human beings mix their labour with the common property, argued that a state cannot lay exclusive rights to resources leading it control of the resources and interference.⁶⁹

Kant advanced the argument of 'hospitality'. He described hospitality as the entitlement of an individual to not be regarded as an adversary or with hostility when he or she arrives in a

⁶¹ Hobbes T, *Leviathan*, London, 1651, 79

<https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf> on 8 January 2024.

⁶² Hobbes T, *Leviathan*, 106.

⁶³ Hobbes T, *Leviathan*, 106.

⁶⁴ Hobbes T, *Leviathan*, 93.

⁶⁵ Johnson K, 'Theories of Immigration Law', 1219.

⁶⁶ Locke J, *Second Treatise of Government*, Hafner Publishing, New York, 1690, Ch 5, para 26.

⁶⁷ Locke J, *Second Treatise of Government*, Ch 5, para 26.

⁶⁸ Locke J, *Second Treatise of Government*, Ch 2, para 6.

⁶⁹ Locke J, *Second Treatise of Government*, Ch 5, para 26.

foreign country⁷⁰. Kant argued that a foreigner should be received if he does not cause destruction to the citizens of that country⁷¹. He argued that the state should get some benefit before granting the right of citizenship. Johnson quoted Rawls who relied on the arguments by Locke and Kant, to argue that freedom of movement should be in the list of basic liberties and as such nations infringe on that right when they deny entry into their borders⁷².

Johnson argues that according to Hobbes' argument a country should not deny a migrant entry into its borders as a means of self-preservation if that denial is based on the country having a surplus population and based on Kant's theory such a refusal is impermissible because it would cause the destruction of the migrant⁷³.

Carens and Johnson using the theories above argue for the individual rights theory by calling for open borders to allow for free and unrestricted movement of people across all borders. Carens using Rawls' argument that freedom of movement is a basic liberty right argued that free migration is a principle of just social order⁷⁴. Johnson argued that it is difficult to protect the rights of non-citizens in closed borders which have entry restrictions⁷⁵.

A limitation of the individual rights theory is that it has a potential to be limitless because it considers all persons free and equal and can all therefore migrate to any part of the world and this is problematic because it requires abolition of all immigration laws, yet it is theory underpinning immigration laws⁷⁶. Carens addressed this limitation by calling for restrictive immigration laws that are based on individual rights if they conform to a public order

⁷⁰ Kant I, Perpetual Peace: A Philosophical Sketch, http://fs2.american.edu/dfagel/www/Class%20Readings/Kant/Immanuel%20Kant,%20_Perpetual%20Peace_.pdf on 8 January 2024.

⁷¹ Kant I, Perpetual Peace: A Philosophical Sketch, http://fs2.american.edu/dfagel/www/Class%20Readings/Kant/Immanuel%20Kant,%20_Perpetual%20Peace_.pdf on 8 January 2024.

⁷² Johnson K, 'Theories of Immigration Law', 1220.

⁷³ Johnson K, 'Theories of Immigration Law', 1220.

⁷⁴ Carens J, 'Aliens ad Citizens: The Case for Open Borders', 49 Cambridge University Press 2, 1987, 255-262.

⁷⁵ Johnson K, 'Open Borders?', 51 UCLA Law Review 193, 2003, 205.

⁷⁶ Johnson K, 'Theories of Immigration Law', 1222-1223.

restriction⁷⁷. He argued that if immigration can lead to a breakdown of order in the society, it should be limited⁷⁸.

This theory is important for this dissertation because of its deontological roots that call for the consideration of human rights of the migrants. It looks at the migrant as a human being with needs and their nature to want to meet their needs. It calls for protection of their rights to enable them to meet their needs. It also calls for opening up of borders. This is important for this dissertation because the dissertation focuses on migrant workers who move into foreign countries to look for jobs both in Kenya and out of Kenya to meet their needs and their rights in the destination country. This dissertation also focuses on the discretion of immigration officers that limit free movement of people across borders which is discouraged in this theory. This theory therefore advocates for the use of discretion by immigration officers in a way that promotes human rights.

2.4 Balancing the Domestic Interests theory and the Individual Rights theory

The IOM argues state sovereignty is recognized by International Law and it gives states the right to control the entry and stay of foreigners in their territory together with granting of nationality⁷⁹. The states should however be guided by their obligations under international law which come from the treaties negotiated in good faith, established, and entered by the states for maintenance of global order⁸⁰. Kenya is a party to international treaties such as the UDHR, UN Convention on the Protection of the Rights of All Migrant Workers and their Families, Protocol Against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the

⁷⁷ Carens J, 'Aliens and citizens: The Case for Open Borders', 259.

⁷⁸ Carens J, 'Aliens and citizens: The Case for Open Borders', 259.

⁷⁹ IOM, State Sovereignty and Human Rights, Human Rights Of Migrants: An Overview.

⁸⁰ IOM, State Sovereignty and Human Rights, Human Rights Of Migrants: An Overview.

UNCTOC, 2000, and the International Covenant on Civil and Political Rights that protect human rights (ICCPR).

According to the IOM, nations are duty-bound to uphold human rights by abstaining from actions that impede the exercise of these rights, safeguarding individuals, and groups from human rights violations as a protective measure, and actively promoting the realization of human rights by facilitating their enjoyment⁸¹. This obligation is towards all human beings within the state's territory regardless of their status⁸².

The IOM allows for limitation of some rights relating to nationality or regular migration status that should be established by national law to safeguard state concerns such as national security, public safety, and health⁸³. It emphasizes that these limitations should align with other international agreements, avoid discrimination, and only extend to the extent necessary to address the legitimate interests of the state⁸⁴. The immigration officials use their discretion to assess the state interests when allocating visas and work permits.

An example is in *Republic v Director of Immigrations Services Ex-parte Planet Motors Company Limited*, where the defendant, the Director of Immigrations, rejected a work permit application on the grounds that the work could be performed by a local instead of a foreign national and did not inform the applicant⁸⁵.

Article 4 (2) of the ICCPR provides the list for non-derogable rights⁸⁶ which include; the right to life⁸⁷, the prohibition of torture or cruel, inhuman or degrading treatment or punishment⁸⁸,

⁸¹ IOM, State Sovereignty and Human Rights, Human Rights Of Migrants: An Overview.

⁸² IOM, State Sovereignty and Human Rights, Human Rights Of Migrants: An Overview.

⁸³ IOM, State Sovereignty and Human Rights, Human Rights Of Migrants: An Overview.

⁸⁴ IOM, State Sovereignty and Human Rights, Human Rights Of Migrants: An Overview.

⁸⁵ Republic v Director of Immigration Services Ex-parte Planet Motors Company Limited & Another [2016] eKLR.

⁸⁶ Article 4 (2) of the ICCPR.

⁸⁷ Article 6 (1) of the ICCPR.

⁸⁸ Article 7 of the ICCPR.

the prohibition of slavery⁸⁹, the right to recognition everywhere as a person before the law⁹⁰, and the right to freedom of thought, conscience and religion⁹¹. These rights should not be limited anywhere in the world or for any human being in any part of the world.

In Kenya, the use of immigration discretion on visa allocation has seen it breach its obligations on human rights under International law. In *AZ v Cabinet Secretary Interior & Coordination of Security*⁹², a British national, fully eligible for a Kenyan Visa, was inexplicably denied entry by an immigration officer at the airport. The officer provided no cause, explanation, or reasons for refusal. Following inquiries, the individual was informed of being unwelcome in Kenya and faced deportation to the United Kingdom. Subsequently, he was detained at the airport for two days without access to food, drink, consular services, or legal representation. Moreover, he was not presented in court to address any allegations. The court deemed the administrative decision illegal, null, and void. The utilization of discretion to detain the British national without cause, depriving basic needs, and denying access to consular services or legal representation, all without a court arraignment, infringes on the individual's rights, which Kenya is obligated to protect. This dissertation focuses on protecting the human rights of migrant workers from such abuse of immigration discretion.

2.5 Conclusion

In conclusion, the domestic interest theory allows states in the exercise of their sovereignty to choose who to allow and who to deny entry into their country based on their state's interests. Where entry of an immigrant benefits the state at large, according to the domestic interest theory, the country will allow the immigrant into their territory. Where the migrant worker does

⁸⁹ Article 8 of the ICCPR.

⁹⁰ Article 16 of the ICCPR.

⁹¹ Article 18 of the ICCPR.

⁹² *AZ v Cabinet Secretary Interior & Coordination of National Security & another* [2021] eKLR.

not benefit the country or is a danger to the public interest of the country, the migrant will not be allowed into the country and will not be granted a visa or work permit.

In the individual rights theory, immigration laws are drafted while considering the human rights of the person which promotes the dignity of immigrants in that country. The immigration officers are required to respect human rights in their dealings with foreign nationals. They should use their discretion in a way that does not infringe on the rights of the foreign nationals.

Creating a balance between the application of the two theories allows for protection of human rights in the exercise of state sovereignty to protect the interests of that particular state. It ensures that all foreign nationals are treated with the respect and human dignity as all other human beings.

CHAPTER 3

HUMAN RIGHTS VIOLATIONS AS A RESULT OF ARBITRARY DECISIONS FACILITATED BY IMMIGRATION DISCRETION

3.1 INTRODUCTION

Immigration discretion in Kenya is a statutory power enshrined in the Kenya Citizenship and Immigration Act. This chapter will begin by looking at the legal framework that provides for immigration discretion in Kenya. It will then look at the human rights obligations that Kenya has with regards to migrant workers. The chapter will then analyse the use of the discretion and how it affects human rights using case law. It will also look at the steps Kenya has taken to prevent human trafficking and the human trafficking situation in Kenya including what role the various players have played in discretion failing.

This chapter will look at the way immigration discretion is used in Kenya and how it affects the rights of migrant workers. It will show the loopholes in the application of discretion that facilitate the infringement of the rights of migrant workers. It will also look at Kenya's obligations towards preventing and suppressing human trafficking and how Kenya's efforts have not been sufficient to prevent human trafficking and protect rights of migrant workers. It will therefore form the basis for the arguments on the best way to use discretion in granting visas and work permits in immigration laws to promote the dignity of migrant workers in Kenya.

3.2 LEGAL FRAMEWORK FOR IMMIGRATION DISCRETION IN KENYA

The primary immigration law in Kenya is the Kenya Citizenship and Immigration Act, which establishes the Department of Immigration and delineates its functions and authority. The Director of Immigration is granted discretion to execute certain functions outlined in the Act.

The Director has the authority to grant or revoke a permit upon the recommendations of the Permits Determination Committee⁹³. The Committee may request additional information and documents from applicants when deemed necessary⁹⁴. After receiving recommendations from the Committee, the Director issues a permit within fourteen days⁹⁵. However, the Director can exercise discretion to refer the matter back to the Committee or reject the application if issuing the permit is not deemed in the country's best interests or for other valid reasons⁹⁶. Additionally, both the Director and officers acting under delegated powers have the discretion to approve or deny visa applications⁹⁷. Visa applications are submitted to the Director, who, after evaluating the applications, may issue the visas⁹⁸. Immigration officers are authorized to inquire about citizenship, request documents⁹⁹ and can even require individuals to undergo examination by a medical practitioner to determine eligibility for entry.¹⁰⁰ Furthermore, these officers have the power to arrest individuals without a warrant if there is reasonable belief that they have committed an immigration offense or are unlawfully present in Kenya.¹⁰¹

3.3 THE RIGHTS OF MIGRANT WORKERS IN KENYA

The Constitution of Kenya acknowledges the inherent human dignity of every individual and ensures the right to have that dignity respected and safeguarded¹⁰². Additionally, the Constitution enumerates certain rights that must not be restricted, including the right to be free from torture, cruel, inhuman, or degrading treatment or punishment, freedom from slavery or servitude, the right to a fair trial, and the entitlement to an order of habeas corpus¹⁰³.

⁹³ Section 40 (4) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

⁹⁴ Section 40 (5) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

⁹⁵ Section 40 (6) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

⁹⁶ Section 40 (7) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

⁹⁷ Sections 35 (3) and (4) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

⁹⁸ Regulation 17 (2) of the Kenya Citizenship and Immigration Regulations, 2012.

⁹⁹ Section 48 (b) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

¹⁰⁰ Section 48 (d) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

¹⁰¹ Section 49 (2) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

¹⁰² Article 28 of the Constitution of Kenya, 2010.

¹⁰³ Article 25 of the Constitution of Kenya, 2010.

Furthermore, the Constitution guarantees the right to freedom and security of the person, encompassing protection against arbitrary deprivation of freedom, detention without trial, violence from both public and private sources, physical or psychological torture, corporal punishment, and any form of cruel, inhuman, or degrading treatment or punishment¹⁰⁴.

According to Article 38 of the ICJ Statute, treaties are one of the sources of international law¹⁰⁵. Article 2 (6) of the Constitution of Kenya recognises treaties and conventions ratified by Kenya as a source of law¹⁰⁶ thereby imposing an obligation on Kenya to uphold human rights as stipulated in the ratified treaties and conventions. Kenya has a responsibility to protect the human rights listed in the UDHR, International Covenant on Civil and Political Rights (ICCPR) International Covenant on Economic, Social and Cultural Rights (ICESCR), and as a member of the African Union, African Charter for Human and Peoples' Rights (ACHPR). As a member of the International Labour Organization (ILO) Kenya ratified the ILO Convention on the Migration for Employment and ILO Convention on Migrant workers. Kenya also ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965) which prohibits all forms of discrimination for all human beings which includes migrant workers.

The UDHR, in its Article 1, asserts that all individuals are inherently free and equal in dignity and rights¹⁰⁷. Article 4 (2) of the ICCPR outlines a set of non-derogable rights¹⁰⁸ which include the right to life¹⁰⁹, prohibition of torture, inhumane, cruel, or degrading punishment¹¹⁰, prohibition of slavery and servitude¹¹¹, prohibition of imprisonment for failure to fulfil a

¹⁰⁴ Article 29 of the Constitution of Kenya 2010.

¹⁰⁵ Article 38 of the Statute of the International Court of Justice.

¹⁰⁶ Article 2 (6) of the Constitution of Kenya, 2010.

¹⁰⁷ Article 1 of the UDHR.

¹⁰⁸ Article 4 (2) of the ICCPR.

¹⁰⁹ Article 6 of the ICCPR.

¹¹⁰ Article 7 of the ICCPR.

¹¹¹ Article 8 of the ICCPR.

contractual agreement¹¹², the prohibition of criminal conviction or punishment outside pre-existing law¹¹³, the right to recognition as a person before the law¹¹⁴, and the freedom of thought, conscience and religion¹¹⁵. These rights are also enshrined in the UDHR and the ACHPR¹¹⁶. These rights should be enjoyed by all human beings in the world and governments have a duty to protect them which includes guaranteeing these rights for migrant workers in their country.

Other rights listed in the UDHR, ICCPR, ICESCR, ACHPR, and ILO Convention on the Migration for Employment and ILO Convention on Migrant workers include the right to liberty and security of the person¹¹⁷, freedom from arbitrary arrests¹¹⁸, freedom from discrimination¹¹⁹, right to equal protection of the law¹²⁰, freedom from arbitrary arrest, detention, or exile¹²¹, rights to a fair trial¹²², freedom of movement and residence within the borders of each state¹²³, and the right to leave any country¹²⁴. In addition, Article 9 of the ICCPR safeguards the rights of an arrested individual to be promptly informed of the reasons for arrest and the charges against them¹²⁵. Furthermore, arrested, or detained persons are entitled to a prompt appearance before a judge,¹²⁶ and they have the right to proceedings to ascertain the lawfulness of their

¹¹² Article 11 of the ICCPR.

¹¹³ Article 15 of the ICCPR.

¹¹⁴ Article 16 of the ICCPR.

¹¹⁵ Article 18 of the ICCPR.

¹¹⁶ Article 3 of the UDHR, Article 4 of the UDHR, Article 5 of the UDHR, Article 6 of the UDHR, Article 4 of the ACHPR, Article 5 of the ACHPR, Article 9 of the ACHPR,

¹¹⁷ Article 3 of the UDHR, Article 9 (1) of the ICCPR, Article 6 of the ACHPR

¹¹⁸ Article 6 of the ACHPR, Article 9 (1) of the ICCPR

¹¹⁹ Article 2 of the UDHR, Article 2 of the ACHPR, Article 6 of the ILO Convention on Migration for Employment, Article 12 of the ILO Convention on Migrant Workers, Article 2 of the ICESCR.

¹²⁰ Article 7 of the UDHR, Article 3 of the ACHPR

¹²¹ Article 9 of the UDHR.

¹²² Articles 10 & 11 of the UDHR, Article 7 of the ACHPR

¹²³ Article 13 (1) of the UDHR.

¹²⁴ Article 13 (2) of the UDHR, Article 12(2) of the ACHPR

¹²⁵ Article 9 (2) of the ICCPR.

¹²⁶ Article 9 (3) of the ICCPR.

detention¹²⁷. These rights should be equally applicable to immigrants detained at entry and exit points of a country, as well as during their stay in that country.

Other rights guaranteed by the ACHPR are right to receive information¹²⁸, freedom to association as long as he abides by the law¹²⁹, freedom to assembly¹³⁰, and the freedom to move and reside within the borders of a state provided he abides by the law of that country¹³¹. This Charter is important as it ensures rights for citizens in members of the African Union and their movement across borders of countries in the Union. The member states of the African Union have an obligation under International Law to facilitate realisation of these rights. These rights have also been articulated as principles in the African Guiding Principles on the Human Rights of all Migrants, Refugees and Asylum Seekers.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRRAMWMF) outlines the rights afforded to migrant workers and their families, incorporating the non-derogable rights listed above from the UDHR and the ICCPR. The convention mandates that states must uphold the rights of migrant workers and their families without discrimination, in line with other international instruments¹³². It affirms their right to liberty and security of the person¹³³ forbidding arbitrary arrests and detention¹³⁴. Migrant workers and their families are entitled to be informed of the reasons for their arrest at the time of arrest and promptly notified of the charges against them¹³⁵. The convention mandates a swift appearance before a judge or relevant judicial authority,¹³⁶ granting arrested

¹²⁷ Article 9 (4) of the ICCPR.

¹²⁸ Article 9 of the ACHPR.

¹²⁹ Article 10 of the ACHPR.

¹³⁰ Article 11 of the ACHPR.

¹³¹ Article 12 of the ACHPR.

¹³² Article 7 of the ICPRRAMWMF.

¹³³ Article 16 (1) of the ICPRRAMWMF.

¹³⁴ Article 16 (4) of the ICPRRAMWMF.

¹³⁵ Article 16 (5) of the ICPRRAMWMF.

¹³⁶ Article 16 (6) of the ICPRRAMWMF.

or detained migrant workers the right to consular services¹³⁷. It emphasizes humane treatment and respect for the inherent dignity of arrested or detained migrant workers¹³⁸ and prohibits the destruction of identity documents, entry or stay permits, and work permits, unless performed by a duly authorized public official¹³⁹.

Kenya is a member of the East African Community (EAC) that is established by the Treaty for the Establishment of the East African Community (EAC Treaty)¹⁴⁰. Article 5 (2) of the Treaty establishing the community provides for the establishment of a common market¹⁴¹. A common market is a formal trading agreement among countries featuring a common external tariff and permitting free trade, as well as the unrestricted movement of labor, goods, services, and capital.¹⁴² A crucial condition for the designation of a common market is the unhindered movement of factors of production, including labor and capital, among member countries¹⁴³. To achieve Article 5 (2) of the EAC Treaty, The Protocol on the Establishment of the EAC Common Market was signed and entered into force in 2010¹⁴⁴. Part D of the Protocol on the Establishment of the EAC Common Market specifically addresses the free movement of persons and labour. Article 7 of the Protocol facilitates entry of citizens of other partner states without visas, allowing them to stay in the host territory, and exit freely¹⁴⁵. Within Part D, member states assume responsibilities for safeguarding migrant workers originating from the community. Article 7 of the Protocol requires states to ensure non-discrimination of the citizens

¹³⁷ Article 16 (7) of the ICPRRAMWMF.

¹³⁸ Article 17 of the ICPRRAMWMF.

¹³⁹ Article 21 of the ICPRRAMWMF.

¹⁴⁰ East African Community, <https://www.eac.int/eac-history#:~:text=The%20Treaty%20making%20process%2C%20which,Arusha%20on%2030%20November%201999> on 31 January 2024.

¹⁴¹ Article 5 (2) of the Treaty Establishing the East African Community.

¹⁴² CFI Team, Common Market, <https://corporatefinanceinstitute.com/resources/economics/common-market/> on 24 January 2024.

¹⁴³ CFI Team, Common Market <https://corporatefinanceinstitute.com/resources/economics/common-market/> on 24 January 2024.

¹⁴⁴ East African Community, <https://www.eac.int/integration-pillars/common-market> on 24 January 2024.

¹⁴⁵ Article 7 of the Protocol on the Establishment of the East African Community Common Market.

of the other Partner States based on their nationalities¹⁴⁶. The partner states are obliged to guarantee the protection of the citizens of the other Partner States within their territories¹⁴⁷. Article 10 of the Protocol elaborates on employment-related aspects by permitting workers to apply for, accept, and conclude employment contracts and further guarantees the freedom of association and collective bargaining, free movement of workers, the right to stay in a Partner State for employment, and entitlement to social security rights and benefits¹⁴⁸. The protocol also recognizes the right of a worker to move with their spouse and/or child¹⁴⁹. As a source, transit, and destination country for migrant workers within the common market, Kenya bears the listed obligations towards migrant workers. Conversely, migrant workers from Kenya to other partner states in the EAC enjoy the rights outlined in the Protocol establishing the Common Market.

3.4 THE USE OF IMMIGRATION DISCRETION IN KENYA AND RESPECT FOR HUMAN RIGHTS

In *AZ v Cabinet Secretary Interior & Coordination of Security*¹⁵⁰, a British national who fulfilled all the requirements for a Kenyan visa faced refusal of entry by an immigration officer at the airport, without any explanation. When seeking clarification on the denial, he was informed of his undesirability in Kenya and was threatened with deportation to the United Kingdom. Stranded at the airport for two days without sustenance, he was deprived of consular services, legal representation, and was not subjected to any court proceedings to address the alleged reasons for his denied entry. The court declared the administrative decision as illegal, null, and void. In this instance, discretion was arbitrarily exercised, resulting in the violation of several human rights, including the right to liberty, freedom from arbitrary arrest, access to

¹⁴⁶ Article 7 (2) of the Protocol on the Establishment of the East African Community Common Market.

¹⁴⁷ Article 7 (3) of the Protocol on the Establishment of the East African Community Common Market.

¹⁴⁸ Article 10 (3) of the Protocol on the Establishment of the East African Community Common Market.

¹⁴⁹ Article 10 (5) of the Protocol on the Establishment of the East African Community Common Market.

¹⁵⁰ *AZ v Cabinet Secretary Interior & Coordination of National Security & another* [2021] eKLR.

consular services, a fair administrative decision, notification of the reason for detention at the time of arrest, and the right to be promptly brought before a judge. These rights are protected by various international instruments and the Constitution of Kenya.

Similarly, in *Republic v Director of Immigrations Services Ex-parte Planet Motors Company Limited*, the defendant rejected a work permit application contending that a local individual could perform the job instead of a foreign national, without notifying the applicant. Upon reapplying for a work permit, not only was the application denied, but the visa was also modified without a hearing or legal basis, and the concerned party was instructed to leave the country within five days. When seeking a special pass to return to the country, verbal communication conveyed that the individual had been placed on the immigration watch list following their departure. The court mandated the respondent to remove the second applicant's file from the watch list and deemed their actions unacceptable. The discretionary decisions in this case resulted in the infringement of human rights, including the right to free movement when ordered to leave the country, the right to a fair administrative decision, the right to be informed of the reason for expulsion, and the rights to a fair trial—all of which are rights protected by various international instruments and the Constitution of Kenya and should be safeguarded by the state. This case underscores the importance of balancing national interests and the human rights of migrant workers in the treatment of such individuals.

In *Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons & 2 others*¹⁵¹ the petitioner presented a case on behalf of his son, who was denied entry into the country. As a Kenyan citizen by birth, the petitioner argued that his son was entitled to Kenyan citizenship. Despite holding a British Passport, the son was refused entry on grounds of alleged involvement in terrorist activities. Subsequently, he was deported to the United Kingdom,

¹⁵¹ *Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons & 2 others* [2014] eKLR

where he lived without facing any charges. The Department of Immigration, in response to the petition, claimed that a letter from the Intelligence Service was sufficient evidence justifying his denial of entry based on national interests. The court expressed reservations about the casual use of the term "national interest" to bar entry into the country, noting that the Immigration officer in Kenya neither detained the suspected terrorist nor was he interrogated by British authorities upon his return to the United Kingdom. The court concluded that the discretionary decision in this case amounted to a violation of human rights, including the right to free movement when ordered to leave the country, the right to a fair administrative decision, the right to be informed of the reason for expulsion, and the rights to a fair trial—all of which Kenya is obligated to protect under international instruments and its Constitution.

3.5 LAWS ON HUMAN TRAFFICKING IN KENYA

Kenya is a party to the United Nations Convention against Transnational Organized Crime (UNCTOC) that came into force in 2003. The primary objective of the Convention is to encourage collaboration among its state parties to prevent and combat transnational organized crime¹⁵². The Convention mandates state parties to criminalise involvement in an organized criminal group¹⁵³, money laundering¹⁵⁴, and implement measures to combat money-laundering¹⁵⁵. It also compels state parties to criminalize corruption of public officials to facilitate the transnational organized crime¹⁵⁶. The Convention is supplemented by several Protocols, but this dissertation will only look at the provisions of two protocols; the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children and the Protocol Against the Smuggling of Migrants by Land, Sea, and Air.

¹⁵² Article 1 of the UNCTOC.

¹⁵³ Article 5 of the UNCTOC.

¹⁵⁴ Article 6 of the UNCTOC.

¹⁵⁵ Article 7 of the UNCTOC.

¹⁵⁶ Article 8 of the UNCTOC.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UNCTOC requires states to establish comprehensive policies, programmes, and measures to prevent and combat trafficking in persons, as well as safeguarding the victims of such trafficking¹⁵⁷. It necessitates state parties to engage in research, information dissemination, and mass media campaigns, along with social and economic initiatives to counteract trafficking in persons¹⁵⁸. The protocol requires collaborative efforts among law enforcement, immigration, and other relevant authorities of state parties to identify both perpetrators and victims of trafficking, detect the travel documents used for trafficking, and unveil the means and methods used by organized criminal groups for trafficking¹⁵⁹. It obliges state parties to train their law enforcement, immigration, and other relevant authorities in prevention of human trafficking¹⁶⁰. It requires states to implement without hindering the free movement of people provided for in other international instruments border controls that prevent and detect the trafficking in persons¹⁶¹.

To fulfil its international obligations under the protocol, Kenya enacted the Counter-Trafficking in Persons Act in 2010. The Act criminalises trafficking in persons¹⁶² and enumerates specific actions that facilitate child trafficking, such as adoption, fostering, and offering guardianship for the purpose of trafficking.¹⁶³ The Act also deems it illegal to promote trafficking by leasing properties, publishing materials, or managing job recruitment agencies for trafficking, with a penalty of at least twenty years imprisonment or a fine of at least twenty

¹⁵⁷ Article 9 (1) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

¹⁵⁸ Article 9 (2) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

¹⁵⁹ Article 10 (1) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

¹⁶⁰ Article 10 (2) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

¹⁶¹ Article 11 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

¹⁶² Section 3 of the Counter-Trafficking in Persons Act, 2012.

¹⁶³ Section 4 of the Counter-Trafficking in Persons Act, 2012.

million shillings, or both¹⁶⁴. Additionally, it criminalizes the fraudulent acquisition of travel documents to facilitate trafficking, with a minimum sentence of ten years imprisonment or a fine of ten million shillings, or both¹⁶⁵. It also imposes criminal liability on people facilitating entry and exit out of the country for trafficking by imposing a sentence of not less than thirty years or a fine of not less than thirty million shillings or both¹⁶⁶. It also imposes life imprisonment for people found guilty of trafficking in persons as part of the activities of an organized group¹⁶⁷. The Act also establishes an Advisory Committee that advises the Cabinet Secretary on effective measure to enhance cooperation between Kenya and other countries through agreements to prevent and suppress international trafficking in person¹⁶⁸.

Kenya expressed its interests to be bound by Protocol Against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the UNCTOC through accession on 5 January 2005. The protocol requires states to establish legislative measures to criminalize acts committed intentionally to obtain directly or indirectly a financial or a material gain from the migrant smuggling or facilitating migrant smuggling by producing counterfeit travel or identity documents, as well as obtaining and possessing such documents¹⁶⁹. Furthermore, the protocol requires states to cooperate extensively to prevent and deter migrant smuggling by sea¹⁷⁰. Additionally, it requires states to implement border control without hindering the movement of people provided for in other international instruments border controls that prevent and detect the smuggling of persons¹⁷¹.

¹⁶⁴ Section 5 of the Counter-Trafficking in Persons Act, 2012.

¹⁶⁵ Section 6 of the Counter-Trafficking in Persons Act, 2012.

¹⁶⁶ Section 7 of the Counter-Trafficking in Persons Act, 2012.

¹⁶⁷ Section 10 of the Counter-Trafficking in Persons Act, 2012.

¹⁶⁸ Section 20 (2) (i) of the Counter-Trafficking in Persons Act, 2012.

¹⁶⁹ Article 6 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime.

¹⁷⁰ Article 7 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime.

¹⁷¹ Article 11 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime.

3.6 PREVENTION OF HUMAN TRAFFICKING IN KENYA

In 2014, two years after commencement of the Counter- Trafficking in Persons Act, Kenya prohibited the recruitment of Kenyan citizens by employment agencies to work in foreign countries following complaints by victims of trafficking who were living abroad, returnees, workers unions and civil society organisations¹⁷². Subsequently, the government established a multi-agency taskforce two months after the ban, primarily tasked with making recommendations to eliminate illegitimate employment agencies and ensure the protection of migrant workers¹⁷³. This was a step towards fulfilling its obligation to conduct research on human trafficking in Article 9 (2) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UNCTOC.¹⁷⁴ The recommendations of the taskforce have however been critiqued because they had an excessive focus on the trafficking of Kenyans in foreign nations and the taskforce neglected to address the trafficking processes within Kenya that lead individuals to be taken to foreign countries and it also failed to make recommendations on how to investigate and sentence foreign and local employment agencies¹⁷⁵. One of its notable recommendations that was implemented was the inter-ministerial committee that was formed to vet the registration of new employment agencies and it was however noted that some members of the committee solicited bribes to expedite the registration process¹⁷⁶.

¹⁷² Daghar M, 'Gaps in laws and their enforcement expose trafficking victims to a well organised criminal market' ENACT Project, 2020.

¹⁷³ Daghar M, 'The New Slavery, Kenyan Workers in the Middle East', Enact Policy Brief 16, 2020, 8, <https://enact-africa.s3.amazonaws.com/site/uploads/2020-06-30-east-africa-trafficking-policy-brief.pdf> on 5 February 2024.

¹⁷⁴ Article 9 (2) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

¹⁷⁵ Daghar M, 'The New Slavery, Kenyan Workers in the Middle East', 8.

¹⁷⁶ Daghar M, 'The New Slavery, Kenyan Workers in the Middle East', 8.

In 2016, the Kenyan government established the National Employment Authority, tasked with approving employment agencies facilitating the overseas employment of Kenyans¹⁷⁷. Despite these governmental efforts, an Enact Project revealed the continued existence of human trafficking in Kenya. It identified two groups involved in human trafficking: firstly, foreign criminal networks masquerading as job recruiters, exhibiting a high level of organization with a horizontally structured approach, ensuring different links in the process operate independently, and collaborating with local criminal networks disguised as employment agencies and secondly, local criminal networks posing as Kenyan employment agencies, lacking proper licenses, yet highly organized with a vertical operational structure that maintains a clear hierarchy of command across various factions, working in conjunction with foreign criminals¹⁷⁸. The Project also found that corruption in the relevant government departments continue to facilitate human trafficking¹⁷⁹. Embassy staff have also been accused of colluding with these criminals to enable human trafficking¹⁸⁰. The Enact Project also made a finding that Kenya treats human trafficking as a human rights issue rather than a criminal issue¹⁸¹, a stance inconsistent with Section 3 of the Counter-Trafficking in Persons Act, which explicitly criminalizes human trafficking¹⁸².

Manuel and Garcia argue immigration officials, in their executive capacity, have the potential to misuse their discretion by implementing policies that amount to a neglect of their mandated

¹⁷⁷ Daghar M, 'The New Slavery, Kenyan Workers in the Middle East', 9.

¹⁷⁸ Daghar M, 'The New Slavery, Kenyan Workers in the Middle East', 4-6.

¹⁷⁹ Daghar M, 'The New Slavery, Kenyan Workers in the Middle East', 9.

¹⁸⁰ Haddadi A, 'Kenyan Graduates Trafficked to Saudi Arabia, UAE, Qatar and Kuwait by Embassy Staff', International Business Times, 26 March 2012 <https://www.ibtimes.co.uk/embassy-staff-help-human-trafficking-cartel-send-319444>.

¹⁸¹ Daghar M, 'The New Slavery, Kenyan Workers in the Middle East', 11.

¹⁸² Section 3 of the Counter- Trafficking in Persons Act, 2012.

responsibilities¹⁸³. The immigration officials using their statutory discretionary power can facilitate human trafficking by colluding with these criminals.

To fulfil its duty under Article 10 (1) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UNCTOC of cooperating with other countries to combat human trafficking¹⁸⁴ Kenya has made efforts to enter bilateral treaties with countries in the gulf region. One specific treaty Kenya entered in 2022 with the Kingdom of Saudi Arabia which led to the formation of a Joint Committee to ensure the enforcement of the treaty¹⁸⁵.

Despite all these efforts, it has been reported that human trafficking continues to thrive in the criminal market in Kenya¹⁸⁶. This clearly shows that Kenya is yet to fully fulfil its obligations under the UNCTOC and its protocols. Addressing the issue of human trafficking as a human rights issue only rather than a crime, makes it hard to deal with the transnational organised crime, corruption of public officials as provided for by Article 8 of the UNCTOC¹⁸⁷, and dealing with the proceeds of this crime as provided for in Article 6 of the UNCTOC¹⁸⁸.

3.7 CONCLUSION

In conclusion, the Kenya Citizenship and Immigration Act provides Immigration officers with discretion in granting visa and work permit. The discretion as provided for under the Kenya Citizenship and Immigration Act enables an immigration officer to balance between national interests and human rights when granting visa applications, work permits, and entry into the

¹⁸³ Manuel K. and Garcia M., Executive Discretion as to Immigration: Legal Overview, Congressional Research Service, 4-17.

¹⁸⁴ Article 10 (1) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

¹⁸⁵ Kenya and Saudi Arabia Sign Agreement to enhance Cooperation <https://mfa.go.ke/kenya-and-saudi-arabia-sign-agreement-to-enhance-cooperation/> on 8 March 2023.

¹⁸⁶ Daghar M, 'Gaps in laws and their enforcement expose trafficking victims to a well organised criminal market' ENACT Project, 2020.

¹⁸⁷ Article 8 of the UNCTOC.

¹⁸⁸ Article 6 of the UNCTOC.

country. Kenya has human rights obligations under international law and the Constitution of Kenya also provides a list of human rights. As a body with decision-making powers, the Office of the Director of Immigrations should observe human rights in their decision-making processes. Discretion has however been used to make arbitrary decisions and this has led to a violation of these human rights. Kenya also has obligations to prevent and suppress human trafficking under international law. The Immigration officers have discretion to allow or to deny access into the country. The discretion enables them to detect human trafficking. Discretion has also been used by immigration staff to promote human trafficking thus frustrating the efforts by the government to suppress human trafficking. In both ways the dignity of the human person is affected as they are denied some fundamental human rights and freedoms. This chapter therefore shows that in as much as discretion is a powerful immigration tool, it can also cause serious harm and therefore there is a need to regulate it.

CHAPTER 4

COMBATTING THE CHALLENGES OF IMMIGRATION DISCRETION

4.1 INTRODUCTION

The issuance of visas and work permits constitutes an administrative decision within the purview of the Department of Immigration. A pivotal aspect of administrative decisions is the exercise of discretion. The decision-maker possesses the authority to decide whether to take action, refrain from acting, approve, disapprove, or approve with specific conditions¹⁸⁹. The role set out for the decision maker is to make a judgment considering all relevant information¹⁹⁰.

As noted in the previous chapter, the Kenya Citizenship and Immigration gives the Director of Immigration the power to issue or revoke a permit upon the recommendations of the Permits Determination Committee¹⁹¹ which has discretion to request additional information and documents from applicants¹⁹². The Director can issue a permit within fourteen days following the Committee's recommendations¹⁹³ or use his discretion to refer the matter back to the Committee or reject the application if issuing the permit is deemed contrary to the country's interests or for any other valid reason¹⁹⁴. Both the Director and officers acting under delegated powers also possess the discretion to approve or deny visa applications¹⁹⁵. Applicants submit visa requests to the Director, who, after evaluation, may issue the visas¹⁹⁶. Immigration

¹⁸⁹ Ombudsman Western Australia, Exercise of Discretion in Administrative Decision Making <https://www.ombudsman.wa.gov.au/Publications/Documents/guidelines/Exercise-of-discretion-in-admin-decision-making.pdf> on 8 March 2023.

¹⁹⁰ Ombudsman Western Australia, Exercise of Discretion in Administrative Decision Making <https://www.ombudsman.wa.gov.au/Publications/Documents/guidelines/Exercise-of-discretion-in-admin-decision-making.pdf> on 8 March 2023.

¹⁹¹ Section 40 (4) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

¹⁹² Section 40 (5) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

¹⁹³ Section 40 (6) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

¹⁹⁴ Section 40 (7) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

¹⁹⁵ Sections 35 (3) and (4) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

¹⁹⁶ Regulation 17 (2) of the Kenya Citizenship and Immigration Regulations, 2012.

officers, with the authority delegated by the Director, can pose inquiries or request documents from individuals seeking entry to verify their citizenship,¹⁹⁷ and they may even require them to undergo examination by a medical practitioner.¹⁹⁸ Additionally, these officers have the power to arrest individuals without a warrant if there is a reasonable belief that they have committed an immigration offense or are unlawfully present in Kenya.¹⁹⁹

Additionally, the International Organization for Migration highlights one of the stages of identifying a victim of trafficking is during the movement stage²⁰⁰. The Organization's guide highlights that individuals subjected to trafficking frequently employ someone else's identity or travel documentation, or they may entirely lack travel documents²⁰¹. The International Organization for Migration also immigration and law enforcement officers with the discretion to investigate by questioning immigrants who are coming from a location known for human trafficking and those immigrants who have obvious signs of physical abuse as they could be victims of trafficking²⁰². Discretion in immigration laws is therefore an important tool for identifying and combatting human trafficking thereby enabling Kenya to achieve its human rights obligations highlighted in Chapter three. However, as noted in the cases highlighted in Chapter Three immigration discretion has been used to make arbitrary decisions to deny visas²⁰³ and work permits²⁰⁴.

In chapter two, this dissertation looked at the domestic interest theory which allows states in the exercise of their sovereignty to choose who to allow and who to deny entry into their country based on their state's interests where entry of an immigrant benefits the state at large

¹⁹⁷ Section 48 (b) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

¹⁹⁸ Section 48 (d) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

¹⁹⁹ Section 49 (2) of the Kenya Citizenship and Immigration Act, No 12 of 2011.

²⁰⁰ IOM Training Guide, Trafficking in Persons: Victim Identification and Assistance 2020, 16.

²⁰¹ IOM Training Guide, Trafficking in Persons: Victim Identification and Assistance 2020, 17.

²⁰² IOM in Persons: Victim Identification and Assistance 2020, 17.

²⁰³ *AZ v Cabinet Secretary Interior & Coordination of National Security & another* [2021] e KLR.

²⁰⁴ *Republic v Director of Immigration Services Ex- parte Planet Motors Company Limited & Another* [2016] e KLR.

the country allows the immigrant into their territory and where the migrant worker does not benefit the country or is a danger to the public interest of the country, the migrant is not allowed into the country and is not granted a visa or work permit. It also looked at the individual rights theory, immigration laws are drafted while considering the human rights of the person which promotes the dignity of immigrants in that country where the immigration officers are required to respect human rights in their dealings with foreign nationals and use their discretion in a way that does not infringe on the rights of the foreign nationals. It recognized a need to create a balance between the application of the two theories to allow for protection of human rights in the exercise of state sovereignty while protecting the interests of that particular state. As it was noted in the previous chapter, the term national interest has been casually used to deny access into the country and infringe on human rights²⁰⁵.

Acknowledging the important role played by discretion in immigration law, this chapter will look at two ways to combat the use of discretion in immigration law that leads to arbitrary decisions in allocating visas and work permits. It will begin by looking at the principles of administrative law relevant to discretion that immigration officers should rely on, the need for oversight on the Department of Immigration and will make arguments for the creation of a rebuttable presumption in favor of the noncitizens that would combat the tainted use of discretion.

4.2 PRINCIPLES OF ADMINISTRATIVE LAW

As a State Office, the Office of the Director of Immigration is bound by the national values and principles of governance set out in Article 10 of the Constitution²⁰⁶. Article 10 lists some of the values and principles to include human dignity, equity, human rights, non-

²⁰⁵ Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons & 2 others [2014] e KLR.

²⁰⁶ Article 10 (1) of the Constitution of Kenya 2010.

discrimination, integrity, transparency, good governance, and accountability²⁰⁷. In the exercise of their discretion, all officers with power emanating from the Office of the Director of Immigration should adhere to these values and principles. Article 47 of the Constitution also affords everyone with the right to administrative action that is lawful, reasonable, expeditious, efficient, and procedurally fair²⁰⁸.

Migai Aketch highlights the main principles of administrative law. The first that is relevant to the exercise of discretion is the principle of legality. He states that this principle requires actions of government to be justified by law and the administrators should show how their actions that affect the human rights of people are supported by law²⁰⁹. The court in *Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya* stated that engaging in actions beyond prescribed powers, commonly known as acting ultra vires, constitutes an obvious example of illegality and furthermore, decisions made for improper purposes or when the decision-maker misinterprets the law also fall under the umbrella of illegality and in instances where discretionary power is exercised, if it is influenced by considerations that are not lawful or neglects relevant factors mandated for consideration, a court typically deems the exercise as illegal²¹⁰. Adherence to this principle in the exercise of Immigration law is important because the decisions of Immigration officers often affect the rights of migrants such as their right to liberty.

The second principle relevant to discretion is the principle of proportionality. According to Aketch, administrators should use means that are proportional to the objectives set and their decisions should be rational in permissible ways and the ends they seek should not unjustifiably

²⁰⁷ Article 10 (2) of the Constitution of Kenya 2010.

²⁰⁸ Article 47 of the Constitution of Kenya 2010.

²⁰⁹ Aketch M, Administrative Law, Strathmore University Press, Nairobi, 2016, 29-31.

²¹⁰ Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya [2019] e KLR.

invade protected rights and freedoms²¹¹. Kenya has obligations to ensure the fulfillment of Migrant workers' rights under international law and the Immigration officers' decisions should be with consideration of these human rights obligations both in international law and in the Constitution of Kenya.

Thirdly, the principle of justification. Aketch states that justification is the giving of satisfactory reasons in writing for an administrator's decision²¹². Some of the advantages of these principle that he gives out include that it enables administrators to keep their decisions legal, it enhances accountability because the administrator's power is exposed to scrutiny, it enables transparency in decisions enabling discussions and criticism of government actions, it ensures fairness, and it encourages a careful examination of the relevant issues²¹³. Immigration officials should adhere to this principle as it helps avoid making arbitrary decisions. It enables them to be held accountable for the use of their discretionary power which affects protected rights and freedoms of migrants.

Lastly the principle of accountability which he defines as the obligation to explain and justify conduct²¹⁴. This principle allows some actors to hold others accountable for their actions which creates room for oversight of administration decisions and departments²¹⁵. Adherence to this principle is important in the exercise of discretion in immigration law because it allows for immigration officers to be held accountable for the decisions, they make with regards to whom to allow in the country granting of visas and work permits. This principle allows for judicial review of administrative decisions made by the department of immigration which allows for protection of human rights.

²¹¹ Aketch, Administrative Law, 35.

²¹² Aketch, Administrative Law, 40.

²¹³ Aketch, Administrative Law, 40-41.

²¹⁴ Aketch, Administrative Law, 49.

²¹⁵ Aketch, Administrative Law, 49.

This dissertation seeks to find the best way discretion in granting visas and work permits in immigration laws can be used to promote the dignity of migrant workers in Kenya. The principles of administration law looked at in this section enable the use of discretion in granting visas and work permits to promote the dignity of migrant workers in Kenya in the following ways: First, alignment with Constitutional Values because the Office of the Director of Immigration is guided by national values and principles of governance outlined in Article 10 of the Constitution. These principles include equity, human rights, non-discrimination, human dignity, good governance, integrity, transparency, and accountability. The exercise of discretion should be in harmony with these constitutional values to ensure the dignity of migrant workers. Secondly, Migai Aketch's discussion on legality is crucial in the context of immigration law because it emphasizes that government actions, especially those affecting human rights, must be justified by law. Examples of illegality cited above include acting beyond prescribed powers or making arbitrary decisions that lead to the infringement of migrant workers' rights. Adherence to the legality principle in the exercise of immigration law is important to safeguard the rights of migrants, including their right to liberty. Thirdly, the principle of proportionality that requires administrators, including immigration officers, to use means that are proportional to the objectives set. This is relevant in the context of migrant workers' rights, as decisions should align with international obligations and constitutional provisions, ensuring that protected rights and freedoms are not unjustifiably invaded.

Fourth, the principle of justification as discussed by Aketch, emphasizing the importance of giving satisfactory reasons in writing for administrative decisions. The advantages of this principle, including keeping decisions legal, enhancing accountability, enabling transparency, and ensuring fairness, are presented. Adhering to this principle in the context of immigration law is essential to avoiding arbitrary decisions to deny visas and work permits and holding immigration officials accountable for the use of discretionary power impacting the rights of

migrants. Lastly, the principle of accountability: The text which has been defined as the obligation to explain and justify conduct. Adherence to this principle is crucial in the exercise of discretion in immigration law, as it allows immigration officers to be held accountable for decisions regarding visa and work permit approvals. This principle facilitates judicial review of administrative decisions, thereby protecting human rights.

4.3 Rebuttable presumption in favor of the noncitizen

Wadhia makes arguments on the perils of the use of discretion in immigration cases in the United States which he refers to as ‘Darkside discretion’. He defines Darkside discretion as a scenario in which a noncitizen meets the criteria established by Congress to qualify for a remedy, but the decision-maker ultimately uses discretion as the justification for denying the noncitizen, leading to tangible adverse consequences²¹⁶. He noted that Darkside discretion has led to arbitrary decisions that have negative consequences in Immigration law²¹⁷. Some of the consequences he noted include eroding the objectives of Congress, when it comes to humanitarian protection, which are aimed at safeguarding individuals escaping harm, hindering the process of family reunification through adjustment of status, and inflicting substantial hardships on individuals whose close family members are confronting deportation²¹⁸. He also argues that the widespread negative effects of discretionary denials of waivers can result in a system where immigration decision-making is no longer guided by principles of compassion and common sense²¹⁹. He argues that Congress or the Executive Branch should formulate a regulation that establishes a rebuttable presumption of discretion favoring a noncitizen²²⁰. In this scenario, opting for the creation of a presumption in favor of the noncitizen is a reasonable

²¹⁶ Wadhia S, ‘Darkside Discretion in Immigration Cases’ Pennsylvania State University, 72 Administrative Law Review 367, 2020, 367, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544110 on 20 February 2024.

²¹⁷ Wadhia S, ‘Darkside Discretion in Immigration Cases’ Pennsylvania State University, 368.

²¹⁸ Wadhia S, ‘Darkside Discretion in Immigration Cases’ Pennsylvania State University, 372.

²¹⁹ Wadhia S, ‘Darkside Discretion in Immigration Cases’ Pennsylvania State University, 372.

²²⁰ Wadhia S, ‘Darkside Discretion in Immigration Cases’ Pennsylvania State University, 414.

choice, as it mitigates the identified harms and aligns with the robust statutory language, which encompasses multiple prongs that an individual must substantiate and various disqualifying factors²²¹. Introducing a rebuttable presumption is also in harmony with the legislative intent of the statute, which aims at humanitarian protection in asylum cases, regularization of status for individuals already present in the United States through adjustment and fostering family unity in cases involving waivers²²². Similarly, Johnson lists some principles needed for immigration reforms which include immigration laws should treat immigrants fairly and they should be consistent with other bodies of law²²³. Additionally, he argues that immigration laws should be reformed to reflect their purpose. He argues that immigration laws should create a balance between the rights of non-citizens and some state interests. He argues that the laws should show the goals of immigration laws²²⁴.

Establishing a rebuttable presumption favoring a noncitizen allows for the combatting of arbitrary outcomes and amplifies chances for judicial review, especially in cases where noncitizens face denial of relief grounded in discretionary reasons²²⁵. This strategic option not only aligns with the overarching objective of curtailing the detrimental effects of discretionary decisions in immigration adjudication by calling for adherence to administrative law principles but also advocates for the paramount significance of transparency and accountability within the administrative process²²⁶. It provides that decisions must be anchored in clear standards rather than succumbing to arbitrary judgment²²⁷. This approach argues for a delicate equilibrium between the imperative need for flexibility and the imperative duty to safeguard the rights of noncitizens, thereby definitively enhancing the overall fairness and predictability

²²¹ Wadhia S, 'Darkside Discretion in Immigration Cases' Pennsylvania State University, 414.

²²² Wadhia S, 'Darkside Discretion in Immigration Cases' Pennsylvania State University, 414.

²²³ Johnson K., 'Ten Guiding principles for Truly Comprehensive Immigration Reform: A blueprint' 54 The Wayne Law Review 4, 2009, 1622-1628.

²²⁴ Johnson K., 'Ten Guiding principles for Truly Comprehensive Immigration Reform: A blueprint' 1638-1639.

²²⁵ Wadhia S, 'Darkside Discretion in Immigration Cases' Pennsylvania State University, 415.

²²⁶ Wadhia S, 'Darkside Discretion in Immigration Cases' Pennsylvania State University, 410.

²²⁷ Wadhia S, 'Darkside Discretion in Immigration Cases' Pennsylvania State University, 410.

of immigration outcomes. The presumption also shifts the burden towards the government to justify any denial of relief, promoting consistency and fairness in decision-making. Introducing the rebuttable presumption in favor of the noncitizen in the Kenya Immigration laws would enable better use of discretion. The Immigration officer would avoid making arbitrary decisions based on their discretion. Balancing human rights and national interests would be enabled because the immigration officers would go an extra step to show the exact national interests they seek to protect by denying visa and work permit applications.

This dissertation seeks to find the best way discretion in granting visas and work permits in immigration laws can be used to promote the dignity of migrant workers in Kenya. Introduction of the rebuttable presumption in favor of the noncitizen promotes the positive use of discretion in granting visas and work permits in the following ways: First, it enables the combatting of arbitrary outcomes curbs the detrimental effects of discretionary decisions on the fundamental rights and freedoms of migrant workers. Second, the strategic introduction of a rebuttable presumption is a means to amplify chances for judicial review, especially in cases where noncitizens face denial of visas and work permits based on discretionary reasons. Additionally, this aligns with principles of transparency and accountability within the administrative process, ensuring that decisions are subject to legal scrutiny.

Third, it enables the balancing of flexibility and safeguarding rights. Wadhia argues for a delicate equilibrium between the imperative need for flexibility in immigration decisions and the duty to safeguard the rights of noncitizens. This approach aims to enhance overall fairness and predictability in immigration outcomes, acknowledging the complexities of immigration cases while ensuring the protection of individual rights. Lastly, it shifts the burden and promotes consistency. The introduction of a rebuttable presumption is argued to be a way to shift the burden towards the government to justify any denial of work permits and visas. This,

in turn, promotes consistency and fairness in decision-making, ensuring that immigration officers adhere to clear standards rather than relying on arbitrary judgment.

4.4 Conclusion

As a governmental body, the Office of the Director of Immigration is obligated to adhere to the national values and governance principles delineated in Article 10 of the Constitution. Moreover, it is subject to the provisions of Article 47 of the Constitution, which ensure the right to administrative action that is prompt, effective, lawful, rational, and procedurally equitable for all individuals. The key principles of administrative law relevant to the exercise of discretion include the principle of legality which mandates government actions to be legally justified, especially when affecting human rights, proportionality which requires administrators to use means aligned with objectives without unjustifiably infringing on protected rights, the principle of justification that necessitates administrators to provide satisfactory written reasons for their decisions, fostering legality, accountability, transparency, fairness, and thorough examination of issues and lastly, the principle of accountability which obliges explanation and justification for conduct, enabling oversight of administrative decisions in immigration law, ensuring protection of human rights through judicial review. Adherence to Articles 10 and 47 of the Constitution would reduce the making of arbitrary decisions through the use of discretion in granting visas and work permits. Introduction of the rebuttable presumption in favour of the noncitizen would further enable adherence to Articles 10 and 47 of the Constitution.

Wadhia and Johnson highlight concerns about discretionary decisions in U.S. immigration cases, known as 'Darkside discretion,' leading to adverse consequences such as arbitrary decisions, similar to those in Kenya. Wadhia proposes a rebuttable presumption of discretion in favor of noncitizens to address these issues, aligning with statutory language and legislative intent. Johnson emphasizes principles for immigration reforms, supporting Wadhia's proposal,

which aims to reduce arbitrary outcomes, encourage judicial review, and enhance transparency and accountability. Introducing a rebuttable presumption in Kenya's immigration laws, as suggested, would improve discretion, prevent arbitrary decisions, and strike a balance between human rights and national interests, ultimately fostering a fair and transparent immigration system.

In conclusion, this chapter makes arguments for two ways to address the need to balance the rights of migrant workers and national interests highlighted in chapter two, and the human rights challenges caused by arbitrary decisions because of the use of discretion in granting visas and work permits noted in chapter three. The two ways are first, aligning immigration discretion with constitutional values, legal justifications, proportionality, justification, and accountability principles because they enable system that ensures fairness, transparency, and adherence to the rule of law in the exercise of discretion and second, the adoption of a rebuttable presumption in immigration laws in Kenya which addresses the perils of arbitrary decisions and enhance the overall fairness, predictability, transparency, and accountability of immigration outcomes, all of which contribute to promoting the dignity of migrant workers in Kenya. The overall goal of this dissertation is to find the best way to use immigration discretion in allocating visas and work permits to promote human rights and the dignity of migrant workers. The two ways argued in this chapter enable the achievement of the main goal as they address the challenges faced in the exercise of discretion with regards to human rights.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

This chapter will serve as the conclusion to this dissertation. It will be divided into two parts which are the conclusion and the recommendations. The conclusion will summarize chapter one and then summarize the three major thematic areas of the dissertation which are found in chapters two, three, and four. It will then finish by making recommendations to the various stakeholders on how to achieve the main objective of this dissertation which is finding the best way to use immigration discretion in granting visas and work permits to promote the fundamental human rights, freedoms, and dignity of migrant workers.

5.1 Conclusion

The main goal of this dissertation was to explore ways to improve the use of immigration discretion in granting applications for visas and work permits to promote fundamental human rights and freedoms of migrant workers in Kenya. This dissertation looked at the background to the use of immigration discretion in the granting of visas and work permits applications in Kenya.

It then proceeded to examine the two theories that shape immigration laws and influence the discretion in immigration laws and policies. The first theory discussed was the domestic interest theory which enables states to exercise their sovereignty by making decisions on who to permit or deny entry into their country based on their state's interests. In this theory, if the entry of an immigrant is beneficial to the overall interests of the state, the country will allow them into its territory. Conversely, if the migrant worker does not contribute to the country's interests or poses a threat to public welfare, they will be denied entry, and no visa or work permit will be granted.

The second theory discussed was the individual rights theory. This theory focused on the rights of a prospective migrant and their right of entry and made arguments for drafting immigration laws while considering the human rights of individuals, aiming to uphold the dignity of immigrants within the country. Natural law and labour law theories greatly influence the arguments in this theory, advocating for equal protection for all human beings as they move around the world as migrant workers. This theory called for the respect of the human rights of foreign nationals by immigration officers in the exercise of their discretion to make decisions.

The dissertation made arguments for the need of striking a balance between the application of these two theories which is crucial for safeguarding human rights while exercising state sovereignty to protect the interests of the state.

It then proceeded to examine the legal framework that provided for immigration discretion in Kenya and the human rights obligations that Kenya has when it comes to migrant workers. It scrutinized how immigration discretion was employed in Kenya and its effects on the rights of migrant workers highlighting the loopholes in the application of discretion that facilitated the infringement of migrant workers' rights.

Additionally, it delved into the measures Kenya has implemented to combat human trafficking and assessed the human trafficking situation in Kenya, including the roles various players played in instances where discretion failed. It discussed Kenya's obligations in preventing and suppressing human trafficking, emphasizing that the efforts made by Kenya were insufficient to effectively combat human trafficking and protect the rights of migrant workers. Consequently, this brought out the gaps in the use of discretion to make decisions to grant visas and work permits in immigration laws by highlighting the infringement on human rights of migrant workers facilitated by the immigration discretion in Kenya.

Recognizing the significant role discretion plays in immigration law, it then explored approaches to address the exercise of discretion in immigration law, which was shown to result in arbitrary decisions when allocating visas and work permits. It advocated for two approaches to address the necessity of balancing the rights of migrant workers and national interests and the human rights challenges arising from arbitrary decisions due to the use of discretion in granting visas and work permits.

The first approach involved aligning immigration discretion with constitutional values and administrative law principles such as legal justifications, proportionality, justification, and accountability principles, as they facilitate a system ensuring fairness, transparency, and adherence to the rule of law in the exercise of discretion. The second approach proposed the adoption of a rebuttable presumption in immigration laws in Kenya, addressing the risks of arbitrary decisions and enhancing overall fairness, predictability, transparency, and accountability of immigration outcomes. These two approaches contribute to promoting the dignity of migrant workers in Kenya, aligning with the main goal, which aims to find the best way to use immigration discretion in allocating visas and work permits to uphold human rights and the dignity of migrant workers.

5.2 Recommendations

From the arguments made from chapter one to four of this dissertation, the following recommendations are necessary to achieve the main objective of this dissertation which is finding the best way to use immigration discretion in granting visas and work permits to promote the fundamental human rights and freedoms and dignity of migrant workers:

1. Adherence to Constitutional values and principles of good governance

The Office of the Director of Immigration needs to ensure adherence to the constitutional values and principles in Article 10 of the Constitution of Kenya in their use of discretion in the granting of visas and work permits. The Immigration officers also need to adhere to the administrative law principles given that the Office of the Director of Immigration has administrative functions.

Ensuring adherence to constitutional values and principles provides a legal framework that guides the actions of immigration officials which includes respecting fundamental rights and freedoms as outlined in Article 10 of the Constitution of Kenya. Clear guidelines and procedures aligned to the Constitutional principles and values should be established to guide the use of immigration discretion.

By prioritizing compliance with constitutional values and principles, immigration officials exercise their discretion transparently, fairly, and responsibly, while upholding human rights. This aligns with the overarching aim of this dissertation, which is to safeguard the human rights and dignity of migrant workers.

2. More training of Immigration Officials

There is a need for more training of Immigration Officials on the human rights obligations that Kenya has and how to use their discretion in a manner to facilitate realizations of these fundamental rights and freedoms. There is also a need for training to detect cases of human trafficking to combat human trafficking.

Regular training immigration officials on human rights obligations equips them with the knowledge needed to make informed decisions in granting visas and work permits. It also enhances their ability to identify and address potential cases of human trafficking, contributing to a more ethical and responsible immigration process.

The training directly relates to the aim of this dissertation of ensuring the protection the human rights and dignity of migrant workers by ensuring that immigration officials have the necessary expertise to handle cases with sensitivity and respect for fundamental rights.

3. Adoption of a rebuttable presumption in favour of the migrant workers

A rebuttable presumption should be adopted in the Kenya immigration laws to curb arbitrary decisions made because of immigration decisions. This would encourage accountability in the use of immigration discretion by immigration officials.

Introducing a rebuttable presumption in immigration laws establishes a default position that favors migrant workers unless proven otherwise. This mechanism encourages immigration officials to justify their decisions and ensures accountability.

This recommendation directly addresses the prevention of arbitrary decisions, reinforcing the commitment to ensure human rights by imposing the responsibility to provide evidence on immigration authorities to justify any deviation from a favorable presumption in favor of migrant workers. This encourages better use of immigration discretion by allowing for justified decisions thereby protecting the rights and freedoms of migrant workers.

4. Human rights watch in the Immigration Department

There should be oversight in the Immigration Department on their decisions on granting visas and work permits and how they affect the rights of migrant workers to curb arbitrary decisions.

Oversight mechanisms involve independent bodies like the Kenya Human Rights Commission established under the Constitution which monitors human rights abuses in Kenya who can review immigration decisions to ensure they align with human rights standards. This oversight helps prevent abuse of discretion.

Oversight ensures that immigration decisions are scrutinized for their impact on migrant workers rights, creating a checks-and-balances system that promotes fairness and upholds human rights. This encourages better use of immigration discretion by making decisions that do not infringe on human rights thereby protecting the rights and freedoms of migrant workers which is the main aim of this dissertation.

5. More Judicial Review on decisions made by the immigration officers.

Migrant workers should be encouraged to seek judicial review for decisions by the immigration department whose procedure infringes on their fundamental rights and freedoms.

Encouraging judicial review allows migrant workers to challenge immigration decisions in court, providing a legal avenue to address the potential infringements upon their fundamental rights and their freedoms.

This recommendation reinforces the commitment to human rights by empowering migrant workers with the ability to seek redress through the judicial system, thereby holding immigration officials accountable for decisions that may infringe on their rights. This encourages better use of immigration discretion by making decisions that do not infringe on rights and holding the immigration department accountable for human rights violations thereby safeguarding the rights and freedoms of migrant workers which is the main aim of this dissertation.

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