WHETHER IMMIGRATION OFFICERS SHOULD BE EMPOWERED BY STATUTE TO EXERCISE DISCRETION AND GRANT LEAVE IN FAILED IMMIGRATION APPLICATIONS OUTSIDE IMMIGRATION LAW

BY GEORGE LUCHIRI WAJACKOYAH

Q68/38392/2020

A RESEARCH PROJECT REPORT SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF THE POST GRADUATE DIPLOMA IN MIGRATION STUDIES, DEPARTMENT OF ECONOMICS, POPULATION AND DEVELOPMENT STUDIES UNIVERSITY OF NAIROBI

DECEMBER 2021

A RESEARCH PROJECT REPORT SUBMITTED TO THE SCHOOL OF POPULATION STUDIES IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE POST GRADUATE DIPLOMA IN MIGRATION AT NAIROBI UNIVERSITY

DECEMBER 2021

DECLARATION

I **GEORGE LUCHIRI WAJACKOYAH** do hereby declare that this research project is my original work and has not been presented for an award of a post-graduate diploma or any other certification in any other university.

Signature _____ Date 19/11/21

Student: George Luchiri Wajackoyah

Q68/38392/2020

APPROVAL

This research project has been submitted for examination with my approval as university appointed supervisor.

Signature _____ DATE 19/11/21

Mr. Alexander Muteshi

Director General Department of Immigration

Ministry of Interior and Coordination

DEDICATION

To my wife Lee, children Hajara Titus and Salimah

ACKNOWLEDGEMENT

The following people are hereby acknowledged. My dear wife Meller Lee Cheatham, Daughters Marjorie and Salimah, son Titus, my grandson Jay. Much gratitude goes to Professor Upendra Baxi (Emeritus), The late Mr. and Mrs. Peter Bostock, the late Ram Lal Sharma of City High School, the International Society of Krishna Consciousness (ISKCON) and above all the Almighty God for having kept me alive

Table of Contents

LIST OF ABBREVIATIONS AND ACRONYMS

IDPs – Internally Displaced Persons

UNCHR – United Nations Commission on Human Rights

ICCPR – International Covenant on Civil and Political Rights

ILO – International Labor Organization

UDHR – Universal Declaration of Human Rights

UK – United Kingdom

DL – Discretionary Leave

DG – Director General of Immigration

DUI -Driving Under Influence

DWI – Driving While Intoxicated

INA – Immigration Nationality Act

DACA – Defer Action for Childhood Arrivals

TPS – Temporary Protected Status

DHS – Department of Homeland Security

NELM – New Economic of Labor Migration

MSHTU – Modern Slavery Human Trafficking Unit

ICE – Immigration Customs and Enforcement

ABSTRACT

The constitution and the operationalizing Immigration Act are silent on whether temporary absences by the applicant break the seven-year link to those seeking variation of status. Such applications face a hard task due to considerable delays due to procedural bottlenecks and lack of timelines or guidelines which renders applicants to overstay their leave thus becoming irregular.

This research investigates whether there is need to empower immigration officers with discretionary powers to grant immigrants relief on humanitarian and discretionary applications. Elsewhere, leave to vary status is usually granted under exceptional circumstances and outside immigration rules. It looks at the fact that discretionary applications are not currently accepted or institutionalized anywhere within the Kenyan legal framework. The legal requirements for acquiring permanent residence or citizenship or variation of status are stringent in that you either affirmatively fall into the category that qualifies you to apply, or you do not. Immigration officers do not have the mandate to grant status on compassionate or humanitarian grounds outside migration rules.

The study relied on several theories were used in the study including; New Haven school theory, multiple streams theory, functional migration theory, new economic labor migration theory, and securitization theory. This relied on qualitative research design and the target population included various stakeholders in the Kenyan immigration system. These stake holders included officials from the depart of immigration, immigration law practitioners and foreigners directly affected by Kenyan immigration law and system. Data was collected through interview and analyzed through descriptive analysis. The outcome

of this study was to demonstrate the need to implement the application of discretionary powers within the department of immigration.

CHAPTER ONE: INTRODUCTION

1.0 Background to the Study

International treaties or the Immigration Act is designed to accord compliance respectively. Immigration Act lays the rules and regulations to direct compliance and punishment, failure to which punishment is imposed and whether such includes avenues that enable migrants to lodge humanitarian applications on compassionate grounds.

The underlying research investigates whether there is need to empower immigration officers with discretion powers to grant immigrants whose cases failed applications with permission to stay on humanitarian or exceptional circumstances outside immigration rules. The research further investigates whether the law provides a procedural mechanism to allow compassionate grounds based on humanitarian applications.

Currently, UK, US Canada and the European Union grant such authority to the immigration and customs. Kenya does not. Fettering discretion has a long-standing tradition under common law as an alternative to the restrictive immigration laws. Secondly, the research traces the historical development of immigration tracing its roots in precolonial days, the current and emerging human rights and the effect on the rights of immigrants. The meaning and the wording of the Immigration Act which requires an applicant to have met the criteria of residency requirements of the seven years 'continuous lawful residence' are explored. The Act creates uncertainty and ambiguity as it makes provision for only two standards; 'ordinary' and 'continuously' which proffers the provision as rather equivocal since as the two terms do not mean the same thing (Nalule2020).

The constitution and the operationalizing Immigration Act are silent on whether temporary absences by the applicant break the seven-year link to those seeking variation of status.

Such applications face a hard task due to considerable delays due to procedural bottlenecks and lack of timelines or guidelines which renders applicants to overstay their leave thus becoming irregular.

First, Kenya subscribes to various international human rights treaties that protects the rights of immigrants found within her territory. The research questions whether the minister in charge of immigration could be fettered with discretionary powers outside the Immigration Act and grant amnesty to those applicants whose cases have failed to meet the legal requirements. Currently, there's no law that grants the minister or the person or commission appointed to fetter discretion.

Kenya hosts various categories of migrants from both developed and developing countries. Immigration practice has developed as a new phenomenon to march the growing needs of migrant workers, smuggled migrants, international students, asylum seekers and refugees, Internally Displaced Persons (IDPS), irregular migrants' environmental migration and mass or survival migration. Others include stateless, regular or irregular workers (labor migrants), missionaries, leisure or tour temporary migrants. There are many 'push' and 'pull' factors that have raised a global concern regarding the rights of migrants.

The paper seeks to enumerate the problems facing immigrants and whether immigrants' rights are legally protected under various international instruments of which Kenya is signatory.

Secondly, the paper investigates the historical development of immigration law as derived from Pre-Colonial era, the emerging legal issues and how the law affects the rights of immigrants. It gives a descriptive and comparative narrative on the application of

Discretionary Leave (DL) and whether Kenya should formulate a policy that will help resolve the pertinent problems.

Thirdly, Discretionary Power is coined around the word 'prerogative'. The theory of prerogative power ventures into the realm that the Crown is the ultimate source of power within the English constitutional law. The word 'prerogative' comes from the Latin *prae* (before) and *rogo* (I demand). William Blackstone defined it to have special pre-eminence which the King got his divine authority that he alone enjoys in contradistinction to others (Molan 1995). Dicey noted that the prerogative was residual and arbitrary authority which only the crown was obligated to deal with legally. Lord Denning extended the discussion that the prerogative power could be checked when it injured Her majesty's subjects' rights. The Judge approached the question of prerogative power in *Laker Airways v Department of Trade* [1977] QB 643 on the basis that apart from several justiciable exceptions, (such as declaring war, conduct of foreign affairs and so on, prerogative powers was as reviewable as any other form of discretionary power).

Fourthly, Immigration law, regulations, naturalization, citizenship, refugees and asylum, statelessness, work authorization are protected by various international instruments and incorporated under Chapter 4 of the Constitution of Kenya and the Bill of Rights. Regularization of immigration is founded on the Kenya Citizenship and Immigration Act, International Conventions on Refugees and Human Rights, Judicial decisions and Common law. And any treaty entered and touching on rights of foreigners becomes law as of the 2010 constitution of Kenya. The development of human rights took a center stage in the aftermath of conflicts in Europe, first and second world wars, the extermination of the Jews by the Nazi regime, the inhuman and degrading treatment of human beings and the

Nuremberg trials (O'Malley, 2017). The United Nations Commission on Human Rights took a leap by organizing the International Covenant on Civil and Political Rights (ICCPR) to cater for a framework that would require member states to formulate mechanisms to transform individual rights. International labor organization (ILO) caters for labor rights and the 1951 Convention relating to the status of refugees was constituted following the Universal Declaration of Human Rights (UDHR). Article 14(1) of the UDHR guarantees any person to seek asylum in any member state.

Countries such as the United Kingdom have expanded these rights to include the Asylum and Immigration Appeals Act 1993 and the Asylum and Immigration Act 1996.

The United Kingdom operates on Conventional laws balancing the rights of aliens by expressively or impliedly applying the Royal Prerogative (Bartlett & Everrett, 2017). This allows the minister in charge of immigration at the Home Office to exercise discretion and determine matters on case-to-case. The Minister's determination is guided by rules and policies under the Discretionary Leave (DL) while exercising caution as adversity attracts the whims of the 1993 Appeals Act subject to Judicial Review (Supra). Policing immigration ranks top in matters security that requires strict scrutiny to offset terrorism, drug and human trafficking as well as smuggling. However, most jurisdictional approach to immigration matters is penalized by the penal or criminal code. Literature review dwells exclusively on whether such powers can guide policy framework that may lead into the creation of space to confer discretion. Immigrants (or aliens) are perceived in a manner that their rights are not protected. The Immigration, Asylum and Labor Acts in Kenya operate strictly under the penal code through criminal penalty. Compared to the United Kingdom, Canada, Australia and the United States including the European Blue Card system, the

Kenyan Acts lack discretion system that would enable applicants to apply to the minister concerned to exercise discretion (Bartlett& Everett, 2017).

This paper intends to fill in the gaps by qualitatively interrogating the known and emerging debate on the legitimacy of policing immigration without giving room to exceptions based on situational characterized on case-to-case application. The effect of colonialism, the push and pull factors and the human conflict as well as the changing trends in international protective mechanisms have simulated debate to relook into policing immigration.

The paper seeks to question merits and demerits by filling into the gaps by introducing a social phenomenon as to whether powers like the Royal Prerogative empowering the Home Office Immigration Department in the United Kingdom can be structured and applied to the Department of Immigration in Kenya.

Would this be an alternative to the rigorous and punitive application by the Ministry of Interior & Co-ordination of National Government on cases that would attract discretionary appendage while sealing the gaps that causes distress to applicants.

The first section sets the foundation of the current legal policy and framework that guides immigration in Kenya. Immigration carries with it political, social and economic dynamics in a way that raises tensions in the receiving countries (Lawrence, 2013). Economic in that immigrants are seen as competitive parasites that raises outcry in them (immigrants) taking over the business and job opportunities and social as it produces alien cultures, religions, and unwanted tensions (Lawrence, 2013). In Germany and the United States, politicians use the immigrant tool to cause tensions during electioneering period (Burke, 2010). The

Department of Homeland Security tightens enforcement of immigration policies to warn immigrants to toe the line (*Supra*).

Decision making on humanitarian grounds is a global phenomenon pegged on economic and political stability for purposes of human existence. Policies that create instability in human mobility raise issues that hinder economic growth. The United Kingdom Boarder Agency (UKBA), Norway, Finland and Sweden have championed the existence of tolerance in line with the existing humanitarian law.

1.2 Statement of the Problem

Immigration policy is often considered as a discretionary policy and the word in its real sense is used in respect to the application of immigration law (Honohan, 2014, p.36).

Immigration and the rights of immigrants are protected under various international human rights treaties, conventions and domesticated by various legislations in member states. Migrants face challenges due to policing practices that result in the mistreatment of foreigners by restrictive laws that discriminate them (Romero, 2011).

Immigrants in Kenya whose cases are not successful are often deported without applying to the minister to exercise discretion as neither the constitution nor the immigration act avails such powers. Elsewhere, various countries have streamlined their legal mechanisms to grant the ministers in charge of migration with statutory powers granting them to exercise discretion and grant relief in humanitarian and compassionate applications subject to judicial review. UK, Canada and the US have each formulated mechanisms in which each has prescribed, enforced and adjudicated to grant authority to public bodies to apply jurisdiction (Rochel, 2021).

This research investigates whether Kenya has put into practice measures to safeguard the rights of immigrants and whether such rights are exercised within the power of discretion outside immigration rules.

1.3 Research Questions

The study sought to answer the following questions:

1. What current discretionary powers (if any) are afforded to immigration officers in Kenya?
2. Does lack of discretionary powers affect the directorate of immigration in decision making on a compassionate and humanitarian basis?
3. How would the introduction of an application based on humanitarian and compassionate grounds interject the nexus on state security versus individual human rights?

1.4 Objectives of the study

1.4.1 General Objectives

The main objective of this paper is to assess the feasibility and effect of fettering discretionary powers to Immigration Officers in Kenya.

1.4 Specific Objectives:

The study sought to:

1. Perform a comparative study with other jurisdictions, such as the UK, US, Australia, EU and Canada who have adopted applications based on humanitarian and compassionate grounds.

2. Examine the current legal framework on procedure and whether the minister in charge immigration could be fettered with discretionary powers

1.5 Research Premises

The study was premised on the following assumptions

1. Decisions at the Directorate of Immigration are made on arbitrary basis without taking into consideration the prevailing circumstances
2. The Minister in charge of immigration does not consider mitigating circumstances or apply discretion
3. Immigration officers are not familiar with the provisions of the law and international humanitarian law as applied in other countries.
4. Immigration officers understand that any challenge to the Act is challenge to the autonomous decisions

1.6 Justification and significance of the Study

The rationale of this study is to manifest the deficiencies of the Kenyan legal framework governing immigration, eventually overthrowing its human rights objectives enshrined in the Constitution of Kenya 2010. It seeks to contribute to current immigration policies and address the lacuna in the law that fails to protect a category of vulnerable migrants who are victims of unfortunate circumstances but determined by an exclusive administrative process. The rationale therefore is affixed on both academic and policy perspectives.

This study sought to create an academic or scientific discussion focused on whether there's need for policy change that can encourage stakeholder participation to reach an alternative dispute resolution which may direct changes in the law. Failure by the government and its academic institutions to encourage the study in this area and make available the structural

reforms for orientation purposes is a major underscore to state the least. This study is justified on the ground that there's needed to create room for practitioners to challenge the minister in charge of immigration for abuse of fettered discretion. The umbilical of state sovereignty should not outweigh the rights of immigrants to challenge arbitrary outcomes (Aggarwal, 2008). Fettered discretion has guided courts to make decisions based on the principles of equity measuring the legitimacy of government interest in the matter and whether such legitimate concerns outweigh public interest (Baxi, 2000).

1.7 Policy Consideration

Currently, there exists no evidence of research on the impact of introducing discretionary immigration applications into the legal framework governing migration in Kenya. Information on internal policies within the department of immigration is not accessible, rendering the possibility of understanding the due process behind application decisions limited. This study aims to contribute and add to the existing body of knowledge of rights protection and regularization against punitive regimes that aim to limit the number of immigrants in Kenya. Additionally, the study will contribute towards the existing literature for students and academics to explore and further research on this topic.

Policy breeds the law and outlines what the government can achieve in the context of improving immigration standards in Kenya. Internal policies within the department of immigration have at several times precluded and determined immigration applications in a prejudicial way; failing to provide reasons for doing so. By highlighting the policy considerations behind fettered discretionary powers afforded to immigration officers, this paper seeks to explore the remedies and recommendations that can be adopted to address the current gaps in the law.

1.8 Scope and Value of the Study

The scope of this study goes beyond conventional binaries and conceptions. Kenya basically formulates the interests of individual migrants as standing in opposition to the interests of the community, obscuring migrant reality. This paper engages with the migration-development-security nexus and its intersection with the migratory legal framework in Kenya; in the hopes of creating space for a more inclusive recast of the migratory framework.

Case studies, including the European Blue Card Directive will be crucial in the comparative legal analysis of this study.

CHAPTER TWO: LITREATURE REVIEW

2.0 Introduction

The chapter is sub-divided into various parts. The first explores the academic review (empirical studies). The next dwells on the theories applicable to the research question and the general global overview on discretionary powers. The review inquires at length on the political social and economic aspects of the restrictive rules of the immigration Act. A comparative analysis forms the basis of review on whether Kenya could reconstruct its policy to allow humanitarian remedies to failed applications.

2.2 Empirical Literature

2.2.1 Historical background on Kenya's legal framework governing immigration and the Whims of Discretionary Powers in Other Jurisdictions

Kenya Citizenship and Immigration Act 2011 is the backbone of the legal framework governing citizenship and immigration policy in Kenya. The Act was enacted following the repeal of the Immigration Act, Cap 172 owing to the promulgation of the 2010 Constitution; and Article 18 of the Constitution, mandates Parliament to enact legislation governing entry into and residence in Kenya.

The Act is restrictive and exclusionary on its face as it nurtures state sovereignty; tightening strict control on aliens 'entry in the country seeking to vary status to permanent residence or citizenship. The restrictive Act further illuminates the principles by asserting its domestic jurisdiction to regulate immigrants without having recourse to discretionary powers. This position was stated in *Republic v Minister for Home Affairs & 2 others Ex-parte Leonard Sitamzee and the courts affirmed that,* an immigrant could not contend that the right was non-variable as it was within the prerogative of the state to assert

sovereignty." The necessity to rigidly observe the conditions set by the Immigration Act provisions and regulations is of extreme prevalence.

Accordingly, the Act remains silent on the discretionary powers rendering immigration officers with no opportunity but to stick by the strict law. Whilst immigration officers conduct pre-liminary assessments of applications, the mandated Committee is bound by the eligibility requirements and rules set out by the Act in making recommendations to the Director General (DG) of Immigration on the issuance of the relevant immigration statuses. S.40(9) of the Kenya Citizenship and Immigration Act stipulates that in the issuance of permits, the deliberations by the committee are regulated by the procedures formulated by the committee themselves. These regulations are not within the policy guidelines and the arbiters are appointees of the Executive paid by the state and the likelihood of fairness is in play.

The Director General maintains the right to reject an application where issuance would prejudice interests of the country or for any other sufficient reason. Such powers include placing an immigrant on the watch list without due process with surprise arrests and detentions due to national security an act void by international law and the constitution. Where an application is rejected, the Director is under a statutory obligation to furnish the applicant with reasons, in writing, as to why the application was rejected.

The Director can subsequently either refer the matter back to the committee for further consideration; or reject the application all together. The categories of permits, citizenship and immigration are already limited, only to be exacerbated by limited discretionary powers afforded to immigration officers. Eligibility criterion is designed in an exclusive

capacity, denying those rightfully entitled to exercise their residence from effectively doing so.

Review and Appeals

The Kenya Citizenship and Immigration Act 2011 provides for statutory mechanisms in circumstances where an applicant is aggrieved by a decision issued by the Director General of Immigration. The applicant must appeal to the Cabinet Secretary for Interior and Co-ordination of National Government, requesting for re-consideration and re-examination of the decision arrived by the committee and the Director, asserting their legal entitlement to the immigration status applied for therein. Notably, there is no proper governance regulating appeals to the Cabinet Secretary in this context, with no proper process described within the act which one ought to follow. The lack of proper procedure renders the process inherently complex and administrative; an issue of much inaccessibility plaguing the enforcement of rights within the Immigration Act. The Kenyan immigration legal framework traces its origin in pre-colonial days.

The purpose was to serve the interests of the British Empire. Prior to colonialism, communities were characterized by ethnicity, 'highly acephalous and segmented, and governed by masculinity' (Ndege, 2009). The discovery of trade routes led to the scramble of territories benchmarked by the Berlin Conference of 1884-5, and the land that became Kenya was hived in the disputed area between the Germans and the British. And in 1895, the British declared Kenya a protectorate (Ndule, 2020).

In terms of socio-economic and political governance structures, Kenya was segmented into three-tier racial entities. The Asians were sourced to build the railway and formed the

second tier, while the Europeans controlled large farms and commercial activities ranking first, whereas the natives occupied the bottom tier.

The development of immigration law and the word 'citizen 'in Kenya was associated with a set of civic laws that governed the elite urban population who enjoyed exclusive array of civil and political rights (Mamdani 1996). Africans were governed by traditional or customary norms and customs (Shaw, 1995). The divide and rule theory introduced a concept of 'citizenship' which did not apply to the black population whereas the elite metropolitan population was considered as British subjects, a status reserved for people born in any of Her majesty's dominions and allegiance' (Ndule, 2020).

The word 'citizen' was intended to serve the interests of the British and their settlers within what became known as the Dominions as stipulated within British Nationality Act, 1948. The Act was intended exclusively for persons of British heritage (Supra). The Act was discriminatory on its face as it was meant to give freedom of movement to the settlers while ordinances were passed to restrict the natives' movements.

The development of immigration law has been confined to restrictive policies following harsh political undertones that depict immigrants as 'aliens', 'illegal', 'irregular' and further labeling them as thieves (Sinha, 1996).

If the appeal is unsuccessful, the Applicant can seek redress to review the minister's decision at the High Court.

In the US, immigration scholars have focused on the Federal, state and local governments in regularization of immigrants to the exclusion of civil rights (McKanders, 2013). There exists a power struggle between the federal and state governments on who has the

legitimate authority to regulate unauthorized migrants. Part III of the US Constitution ('the Commerce Clause') gives exclusive powers to Congress to regulate immigration. States and local authorities assert that they should be able to apply their Tenth Amendment police powers to police unauthorized immigrants within their borders. The federal government however asserts exclusivity on immigration and policy. The question is whether states can abrogate individual civil rights and civil liberties under police powers.

The Australian immigration policy grants 'God-like powers' to the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs with an extended scope of s 501 of the Migration Act 1958 (Cth) with non-delegable, non-reviewable and non-compellable discretion to expel aliens deemed to be of bad character. Such powers do not give room for a negotiated discretionary settlement where the applicant provides humanitarian and compelling circumstances of his or her case for consideration by the review board and the minister exercises discretion while taking account of public interest.

Instead, the Migration Act is too restrictive regardless of the type of visa, the minister must be satisfied that the applicant meets the character test (Duckett, 2020). S 501 refusal or cancellation of visa on character grounds requires that for an applicant to pass the character test, one must have a substantial criminal record within the meaning of subsection (7) or commit an offense while in immigration detention, attempting to escape while in detention or after escaping but before one is taken into immigration detention. The Character test requirement further allows the minister to cancel the visa if he reasonably believes that one is a member of an association or an outlawed group and that such group is or was involved in criminal activities (Supra).

The power of discretion is the opposite of the United Kingdom's where Discretionary Leave (DL) is granted upon application to immigrants who fail to meet the conditions provided for in the Immigration Rules but there are nevertheless extraordinary or benevolent circumstances enabling them to obtain express leave to stay there. These rules are operationalized outside immigration rules and do not include asylum cases. The Australian rules (mandatory or discretionary) are based on character test which allows arbitrariness where the minister can refuse or cancel the visa on character grounds (Duckett, 2020). There are no mechanisms of accountability. Duckett further illustrates that such discretion may be mystified, erratic and politically charged (Duckett, 1998).

International law and the framework on the Convention Relating to the Status of Refugees as modified by the 1967 Protocol encourages a host state on a compromise between humanitarianism and the safety of her subjects CPCF v Minister for Immigration and Border Protection (2015) 255 CLR 514, 583 [213].

The United Kingdom immigration rules are derived from statute where the crown empowers the minister in charge of immigration to revise immigration rules depending on the prevailing circumstances. Questions arise whether such powers are subject to judicial control if found to be excessive of *ultra-vires* in of its being irrational or unfair. Unlike the Australian restrictive rules pegged on character test, such powers would fail in the UK as enumerated in the Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 where the minister had passed law restricting civil servants from joining trade unions.

The argument in this case was that the courts could not participate in cases where the minister had relied on common law and not statute. Lord Diplock for the majority

introduced a benchmark where he prescribed the measure to be adopted on three grounds on which administrative action was subject to control by the courts: 'illegality', 'irrationality', and 'procedural impropriety'. It was further pointed out that prerogative decisions would usually involve the application of government policy of which the courts were not the appropriate arbiters.

According to Lord Diplock: '...the kind of evidence that is admissible under judicial review procedures and the way in which it has to be addressed tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another-a balancing exercise which judges by way of their upbringing and experience are ill-qualified to perform' (Molan, 1996).

Modernly, the issue of discretion has taken a center stage in the aftermath of the European Union, the exit of Britain and the Obama admiration. The UK has provided new guidelines on its discretionary policy on immigration to include cases of children and those with the children. Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Home Office to perform carry its existing responsibilities in a manner that scrutinizes the necessity to protect and upgrade the welfare of children in the UK (Guidelines published for the Home Office on 10 September 2018). These guidelines streamline methods under which a person may apply for Discretionary Leave (DL).

Persons applying must demonstrate current residence in the UK, and where an individual is a victim of modern slavery, a competent authority must make a positive finding satisfying that the person meets the criteria. And where DL application is made on behalf of the children and or those accompanying them, the Minister takes account of the

necessary statute that protects the children and the test applied is in the children's best interest. The powers empowering the minister to exercise discretion are outside immigration rules are grounded in the UK Immigration Act 1971. Part 9 of the Immigration Rules covers the general grounds for refusal and must be consulted and applied before DL is granted.

And the circumstances in which DL may be appropriate depends on the totality of evidence on case-to-case basis. Some of the factors taken under consideration may include (list not conclusive) whether the immigrant may be qualified for more favourable form of leave such as asylum or humanitarian protection, if the leave is essential because there's a real likelihood or real risk in light of objective evidence that the applicant may be re-trafficked or become victim of modern slavery again where consideration is assessed on whether the risk is higher in the UK or in the source country (Supra). Whether if returned to the person's home country there's likelihood of danger or risk of harm, ill-treatment from the tormentors or exploiters.

Whether the objective evidence and information found in a particular case the receiving state is willing to provide through its legal system a reasonable level of protection to the applicant if returned. Other circumstances may be the role played by the applicant who may seek compensation through the courts, or where such an applicant is assisting the police either as an informant or a witness in criminal investigation or compensation. Additionally, an applicant may apply for DL on medical grounds. The Applicant needs to demonstrate that such treatment may only be available in the UK and in cases involving specialist trafficking where consequences of trafficking result into psychological needs as stated in EM v SSHD. In this case, it was found that leave issued to enable the applicant to

stay for medical treatment should be granted for the period of the course of treatment or up to 30 months whichever is cheaper.

In the United States and unlike Australia, Executive circumspection over immigration cases is illuminated (and in some instances, circumscribed) by statutory delegations and authority and constitutional considerations (Manuel & Garcia, 2014). Such an application is dependent on a particular immigration policy or initiative or the multiple sources of immigration authority which includes express delegations of discretion by statute, prosecutorial or enforcement discretion deriving from the executive's independent constitutional authority or discretion in interpreting and applying immigration law (Supra).

Express delegations of discretionary authority by statute grants the Immigration Nationality Act (INA) provides the Executive with a wide range of subtlety to offer certain forms of relief or subsidies. This includes work authorization or temporary protected status. The Act permits immigration authorities waiver powers to grant certain applicants' waiver on cases which otherwise would disqualify an immigrant for immigration benefits. The INA also gives the Executive broad "parole" authority which allows aliens to physically enter in the country without such entry or presence constituting "admission" for immigration purposes, (Supra).

Prosecutorial or enforcement discretion deriving from the Executive's independent constitutional authority allows the Executive some independent authority to assess whether to prosecute apparent violations of federal law. This is in relation to a compromise on certain specific immigration offenses such as Driving under influence (DUI) or driving while intoxicated (DWI) statutory and deportable offences which might be mitigated if the applicant books himself in a rehabilitation without recourse to public funds. In most

circumstances, a compromise is inevitable where inter agencies are involved mitigating the plea, leniency and mercy hence invoking dropping the charge or leniency with the court's permission (Manuel and Garcia 2014).

Discretion in interpreting and applying immigration law allows the Executive to defer in less formal statutes and in interpreting its own regulation and the agency interpretations must 'conform to the 'unambiguously expressed intent of Congress' (Supra). Article III of the U.S Constitution expressly grants the power to legislate to congress, and congress has exercised this power as to Immigration, in part, by enacting the INA (8 U.S.C. §1101). In 2012, the Executive applied discretionary power conferred to it by Congress to Defer Action for Childhood Arrivals (DACA), under which certain unlawfully present aliens who were brought to the United States as children may be granted "deferred action" (a type of relief from removal) and work authorization.

The US immigration law and policy on discretion is granted through Congress both expressively and impliedly. Aliens who have entered or have overstayed in the US in violation of INA requirements may be permitted to remain and at times legalize their status, through the discretionary avenue. Temporary Protected Status (TPS) is another type of relief from removal that authorizes the executive to grant aliens without status leave to remain in the US. Section 244 of INA imposes several conditions upon who may be granted TPS.

This includes those from a foreign state that the Department of Homeland Security (DHS) has designated due to an ongoing armed conflict, an earthquake, flood, drought, or other environmental disaster that may prevent an alien from safe return. The alien must have been 'continuously present', and the list is long. One cardinal relief to those with TPS is

they are afforded significant relief by being accorded documentation and work authorization and cannot be removed.

Elsewhere, scientists have suggested that immigration policy is discretionary (Rochel, 2019). Costello alludes to the description of discretion as propagation of political inclusion of the citizens to participate in immigration policy (Costello, 2009).

The paper after interrogation of various relevant citations will review once more whether there are gaps that can be streamlined to provide social change in Kenya's immigration policies and the predictive recommendations in the relevant chapters. Procedural checks are vital (Heyman, 1994).

2.3 Theoretical Framework

Theoretical paradigms prescribe tools to enable social science researchers to dissect society on various hypotheses. Various norms are then grounded on the assumption that the world is mythical (Rubin & Babbie, 2017). A theory can be defined as a systematic set of intertwined statements purported to expound some facet of social life (Supra). In this study, various theoretical concepts are measured to construct an ideal theory that purposes the researcher to construe the model.

2.3.1 New Haven School

Decision-makers must focus on the policy-oriented perspective that is drawn on formulation and implementation rather than mere rules and laws (McDougall & Lasswell, 1994). Implementation of such rules are the focus of this study. The Haven theory requires decision makers to implement more usable construct that encourages the incorporation of international norms that are practiced and not mere rules and regulations which empowers authority and control (Supra). Universal doctrines and the notion of sovereignty, domestic

jurisdiction and the 'non-interference' construct are usages of resistance used to deter strategic and humanitarian norms that would enrich society with free liberties (McDougall, 1994).

The New Haven doctrine states that resistance to the implementation of international law in domestic arena results into strict measures that overreach rights and deter discretionary application as this softens resistance (Supra). The Kenyan scenario dictates lack of vibrant and protective rights of immigrants, lack of policy considerations and lack of fettered discretion to open space for a negotiated settlement.

The New Haven school of thought propounds that law and policy should not be a coveted system of rules that accosts injury. Decision-makers following a particular norm should be willing to recognize situations where an exception needs to be made and the stringent law or policy departed from (Molan, 1996). Law and policy should reflect the changing needs of society to achieve human dignity (Scobbie, 2006). Quantification of the needs and the operationalization of the law/policy must serve the purpose and balance the equilibrium.

The Immigration Act in Kenya relates that to vary status to either permanent residence of citizenship, one must fulfil the requirement of seven 7-year continuous residence. The same law is silent on whether absences by the applicant breaks the 7-year continuous presence. The Immigration department has no guidelines putting the applicant in limbo whereas scoring for the department. The Haven Theory breaks this silence by requiring the need and room for discretion.

McDouglas J.M. and Lasswell H (1994) and the proponents of this theory exhibited three features: The resistance to realism and the rejection of the doctrine of sovereignty, the non-

interference of theory on territorial integrity and the interdisciplinary approach to international conventions/policy where law, social sciences, politics, policymaking and implementation are linked. Critics assert that the theory is a disaster to erasing international norms to mere policies. Proponents assume libertarian approach where the law should aim at protecting and developing policies based on shared values with maximization of equity in rights. The theory is relevant and creates progressive approach to laminating immigrants' rights to fairness

2.3.2 Multiple Streams Theory

The theory posits policies that can be established independently from problems (Kingdon, 1984). Kingdon (Supra) contemplates a metaphor of three streams to describe the gap between the policymaker, a politician and the problem and how to resolve the same. Solution oriented policy to a problem is a precursor to prevention. He recommends that the "three streams" should manifest the 'window of opportunity' where we identify a policy change open but shield it from exploitation. The theory helps to identify gaps in the law and whether discretionary powers should be grounded to make a resolve.

2.3.3 Functional Migration Theory

This theory views society as moving towards the equilibrium. Commonly known as "push and pull models", the neo-classic theory" and "human capital theory" in their clustered school of thinking rely on the assumption that 'migrants are rational influenced by larger capitalistic structures (EASO, 2016). Critics view this theory for being unable to explain social change, contradictions, conflicts and the theory's limited concept of agency. One functionalist explains that migration research is 'founded on 'push and pull' gravitating towards one construct, (De Haas, 2011). Migration tilts an imbalance as it tends to be one

sided from low to high income destinations (Ravenstein, 1885) as it remains prominent in the movement upwards (Assefaw, 2014).

The assumption of 'push-pull' gravitates towards spatial disequilibria and views society as a system whose role interplay at a fixed time with limited progress and feedback mechanisms. De Haas continues to project that identifies many factors that include unhappy life, poor infrastructure, unemployment conflicts food and water shortage, natural disasters and poor transport services (De Haas, 2011). For this reason, pegged on the Push factors, immigrants strive to reach their destination with an intention to pull resources to improve the macro society or those left behind. The pull factors make this model static and portray migrants as 'passive pawns' (Supra). The model depicts migrants as planeness people lacking ability to plan, to make independent choices and viewing human movement as a transformation process (De Haas, 2011).

Neo-classical theory locates migrants on geographical formation and variation on inequity in labor provision and markets. Migrants are viewed as individuals and with scattered ability to rotate on income through the macro, meso and micro triangle, (Supra). Migrants with access to information migrate to search for greener pastures expecting to yield higher returns (Assefaw, 2014). This theory may or may not be applicable in the underlying research as it relates to the reasons why immigrants may not want to be treated unfairly by forced return in the absence of the decision- makers not exercising discretion where their visa is cancelled for reasons of character test (Australia) or being accorded fairness in the dispensation of justice.

2.3.4 New Economic of Labor Migration (NELM)

The New Economic of Labor Migration (NELM) provides a different conceptualization of migration as household or family (rather than individual) strategy to diversify (rather than maximizing) the income; reduce relative deprivation and overcome (market) constraints (vital role of remittances) (Stark, 1991, Taylor 1999). Taylor (2001), Hagen-Zanker (2008) and De Haas (2010) (proponents of NELM) opined that the theory effectively reconciles agency and structure that allows 'greater variety of outcome. They note that the decision to migrate informs the norms of family participation as it involves communitarian financial and logistical support and contribution. It ties the market and minimizes the risk that emanates from market failure (Stark, 1991).

The theory, it is argued that connects with poverty and risk conditions that cannot befit a neo-classic explanation. Migration is viewed as a collective strategy to overcome market failures and spread income upsets (Stark & Bloom 1985; Stark 1991; Taylor 1999).

The NELM theory contends that migrants move for temporary basis to earn and improve their families' livelihood and return once the time is ripe. Return migration is viewed as an improvement in status. The new economy of migration proponents' failure to break away from the neo-classical notion of the failed returnee (Abreu, 2012). The theory fails to explain migration in developing countries and situations and risks that face migrants. The theory is also applicable in other areas such as refugee migration (De Haas 2010; Lindley 2007).

2.3.5 Securitization Theory

This theory, deponed by Leonard & Kaunert (2010) posits on the notion that securitization is a social construct, rather than an issue arising naturally. Security in the context of

migration is identified as emergency politics, thereby justifying the urgent action rather than applying normal democratic rules of policymaking. It is therefore categorized as an intersubjective construction. Kenya has been pushing for punitive regimes for migration, giving precedence to securitization of migrants rather than protection. This informs their policy and frameworks; sometimes over and above the mandate provided for under the relevant statutory provisions. It is not relevant to the study of discretion.

2.4 Summary and Research Gaps

In this chapter, literature is reviewed, and a few gaps identified. For instance, Statutory provisions to grant discretion to the immigration department is lacking neither is scientific discussion. Availability of literature review is found in other jurisdictions where migrant influence and participation advocating for justice and recognition for their communities pursuant to political participation plays a leading role.

The Immigration Act is restrictive without room for discretion. There's no scientific discussion or existing literature on the exercising of discretion on immigration in Kenya. The power of discretion has changed the face of immigrants in countries which have resolved to include immigrants in their development programs. The issue of ethnic minorities and their participatory role in socio-economic and political development has taken a center stage through with resistance to extreme extent has improved through policies to encourage the absorbing immigrants. *It has been discussed that policies that encourage settlement through assimilation such as* the United Kingdom and the Blue Card approach by the European Community increased development. For our case, the principles of equity previously reviewed by the Appellate courts and the emerging policies applied on work related permits is central in contributing to our research. Contributing to social

justice, filling in the gap and interrogating the source pillars of immigration statutes and whether the procedural aspects compound an interest in re-enacting policies that can benefit stakeholders.

Scholars have engaged in the study of migratory framework drawn analysis on trends in which the global south have been implicated in. Scholarly engagement ranges from theoretical underpinnings of migration governance and securitization of the law to the protection of migrants in different jurisdictions. However, there still exists a gap on a critical assessment of migration policies in the global south. Researchers have not lent themselves to analyze ways in which the current framework in Kenya can advance opportunities for regulated migration underpinned by human rights rationales.

2.5 Conceptual Framework

This study is conceptualized based on the outcome of independent and dependable variables. The interplay is represented as follows:

	Rigidity of the law and lack of discretionary power • Lack of legal framework • Language proficiency
	Policy framework • Role in policy development • Lack of guidelines • Lack of case management

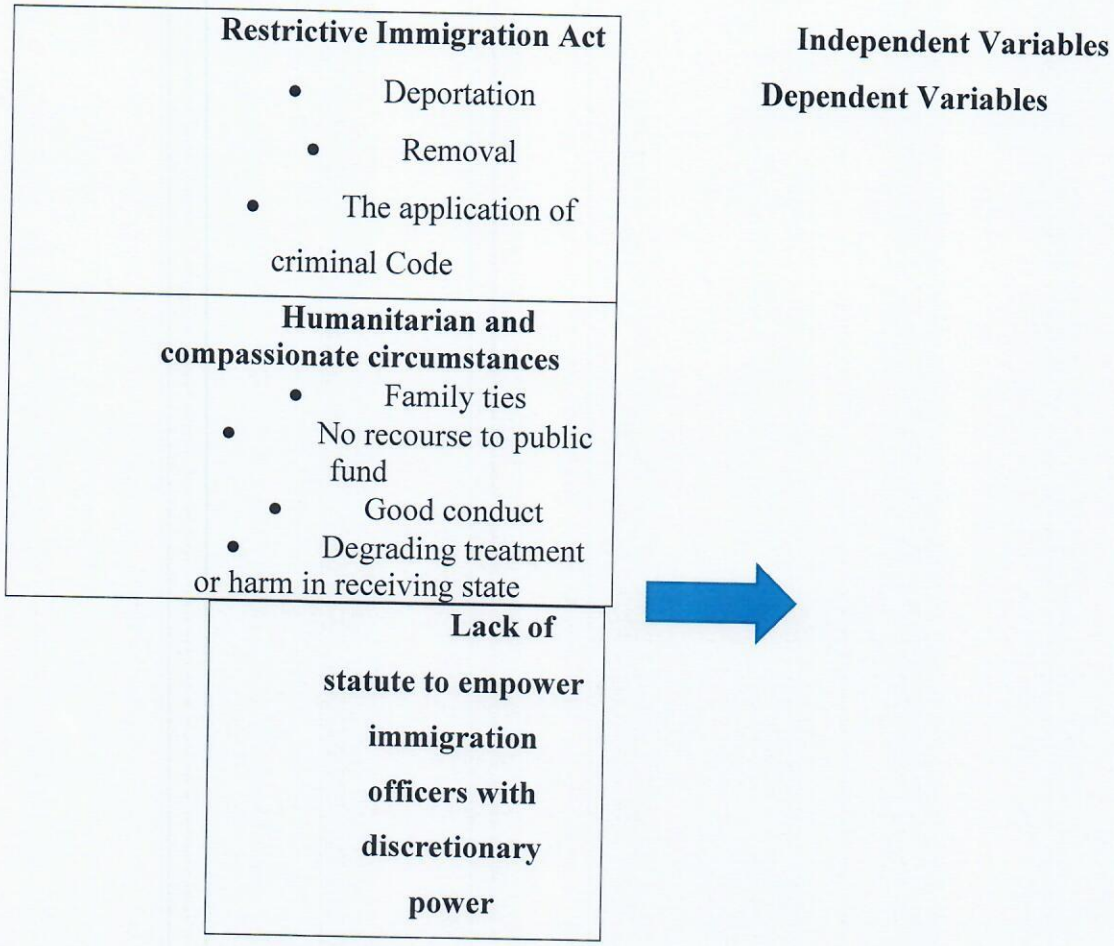

Figure 1: Conceptual Framework

Source: Researcher (2021)

Figure 2.1 which is the conceptual framework refers to three elements that affect immigrants faced with removal/deportation variation of status or procedural delays without a framework or guidelines. Language barriers, lack of understanding of the law and procedure, the cost of litigation and the red tape of interagency involvement stagnates applications accumulating into backlog of cases. The knowledge of the law, inadequate manpower, limited training programs, lack of resources to introduce welfare programs to prepare and integrate successful applicants in the community hinders assimilation and integration.

The immigration Act lacks the power to empower immigration officers with discretion to grant failed immigrants who would have been granted leave to remain under compelling circumstance. The law would give legitimate expectation in willing applicants to justify the reasons why the immigration officers should grant them relief subject to judicial review.

In conclusion, the research, amongst others, justifies the reason to explore the nuance of this topic and bridge this knowledge gap with the overall objective of strengthening migration governance in Kenya.

CHAPTER THREE: RESEARCH METHODOLOGY

3.0 Introduction

This chapter adopts qualitative method. The discussion targets population, sample size, sample selection procedure, data collection and analysis while taking into consideration ethical considerations.

3.1 The Study Area

The seven year 'continuous residence' requirement to variation of status to permanent resident or citizenship is a mischief. It does not state whether short visits out of the country breaks the chain. Does the applicant who has made an application to vary status start afresh or does he forfeit the application? Could one apply for dependent pass and make an application to vary status? May a dependent pass holder apply for a work authorization without losing his status? There are many pending applications which if the immigration officers were given discretionary powers would ease the impact of backlog.

The current Immigration Act neither gives timelines nor permission to travel without forfeiture or status. Immigrants find themselves between the lions' teeth and without relief when faced with immigration issues due to the rigidity of restrictive immigration rules. Work permit holders, stateless persons, lack of timelines and the red tape on applicants, lack of coherent policies and fettered discretion to the Minister in charge of Immigration is comingled with misery for lack of clear policy or law empowering discretion.

3.3 Design and Rationale

Secondary material through qualitative research design and questionnaires may help to identify the gaps. The rationale is to have willing participants to express what can impact social change. Questions as to why, what, how, may rationalize empirical research to assist in decision making by appropriate players in the field.

3.4 Target population

A target population is the people a researcher approaches as respondents to assist in the study and play a leading role in helping achieve the objective (Kombo & Tromp, 2006). And for the purpose of this research, six employees of the immigration department, one academic and one immigration lawyer were randomly selected to participate through questionnaire forms sent through email.

3.5 Sample Size and Sampling Procedure

The study employed stratified random sampling. This method guarantees that individuals in the population have similar probability of being appointed in the sampling process. A stratified sample warrants to the researcher that the desired sample is acute portrayal of all respondents (Mugenda & Mugenda, 2003).

3.6 Data Collection

The researcher inquired from the Institute whether permission was required to interview the respective respondents. The Institute gave a go ahead to do the interviews but also referred the researcher to National Commission for Science, Technology and Innovation if need be. The researcher contacted the respondents via phone to secure their consent. The respondents agreed and forwarded their email addresses for the facilitation of questionnaire forms. The Questionnaires were collected immediately after the exercise, to ensure efficiency in data collection.

3.8 Data Analysis

Data was compared and analyzed. The Immigration Act was further scrutinized to ascertain and confirm the presence or the absence of discretionary powers. The outcome was then determined on the existing research to weigh the missing gaps.

3.9 Ethical Consideration

Ethics are necessary to protect participants in the research (Flick, 2018). It is considered that four criteria are to be taken into consideration when conducting research study according to Swedish Research Council (2002). Confidentiality, Consent, Information, and utility requirements are achieved because these requirements were communicated both orally and in writing. The utility requirement was adhered to as information gathered was never disclosed other than the usage in the post-graduate diploma thesis.

3.10 Research Instruments

The researcher used the following instruments: Questionnaires. Telephone and email

3.11 Questionnaire

Questionnaires consist of several questions printed or typed in a definite order on a form or set of forms (Kothari, 2008). The researcher constructed close-ended and open-ended questionnaires, which were administered to the respondents.

The questionnaire was cost effective, free from bias and covid sensitive. The respondents had adequate time to enable them to make an informed opinion as to whether they were free and without coercion to find time to provide adequate answers that were dependable and reliable (Kothari, 2008). Mugenda states that questionnaires are the best means of data collection on population, since each research question seeks to address a specific outcome (Mugenda & Mugenda, 2003). The questionnaire contained specific questions whose outcome was to assist in analyzing contents to inform the researcher on the direction and outcome.

3.12 Interview Schedule

Interview is defined as a method of data collection that represents oral verbal stimuli and responses in terms of oral verbal response (Kothari, 2003, Oson & Onen 2005). The study

involved questionnaire forms being emailed to the respondents who in turn did their part and returned the completed questionnaire via the same method. The questions were completely under the interviewer's control.

The Questionnaire contained the same questions, and the respondents were given one week to complete answering and return them to the researcher.

3.13 Pilot Study

The questionnaire used in this study was pre-tested before data was collected. The purpose was to test the accuracy of the questions to ascertain validity and reliability. Two intern law students were students that did not take part in the final data interviews.

3.14 Validity

To guarantee validity, the research tools were done through expert opinion. This involved the researcher presenting the research questions to the supervisor for objectivity of the questions before forwarding them to the respondents. The questions were also presented to other peers for scrutiny and opinion. The same questions were forwarded to the respondents.

After the return of the questions, further scrutiny was carried out to ascertain whether the questions were relevant to the scientific research.

Confidentiality was observed and there were no provisions made where the respondents provided their particulars except for research purposes only. Consent from the respondents was sought first by phone then via email before questionnaires were administered.

3.15 Limitations to the Study

The researcher faced various limitations during the study. Lack of empirical literature and enough resources to carry out comprehensive research on the entire target population and

confidentiality issues limited the scope of the research. Size sampling to include aliens as respondents and operating through timelines further complicated the entire processes.

CHAPTER FOUR: RESEARCH FINDINGS AND ANALYSIS

4.0 Introduction

The purpose of this study was to understand the problems encountered by immigrants after they applications have been denied by the immigration department. Qualitative method was applied, and semi-structured questions were administered through questionnaires. Bryman, Bell and Harry (2019) explain that qualitative facilitates data collection through organized dialogue. A qualitative approach was significant in this study since it focused on words rather than quantitative numbers (Eisenhardt and Graebner, 2007). It was meant to understand and to reflect on the experiences and the interpretations of the respondents (Denscombe, 2017).

The method was preferred because the respondents were given the opportunity to 'describe, define and elaborate on their responses (Supra). The semi-structured questions used via questionnaire helped to manage the interview through follow-up questions that enabled flexibility (Bryman et al., 2019). Qualitative application was also important as "it was advantageous because of the many facets of the interviewed respondents." Bryman, emphasized on applying questions that are open and neutral aimed at receiving comprehensive responses to facilitate the analysis (Bryman et al., 2019).

4.1 The Respondents

The respondents in this post-graduate diploma in migration were senior immigration officers charged with administrative responsibilities and upcoming immigration lawyers. The selection of respondents was based on a non-probability sample criteria based on accessibility, availability, willingness (Dornyei, (2007).

4.2 Data Collection

The primary data collection was through five semi-structured questions to the respondents. The time frame of the interview was limited to this post-graduate diploma in migration thesis. Two pilot or mock interviews were administered to test the hypothesis. This was intended to prepare the interview questions for the determination of relevancy. Pilot Interviews often result in development and improvement of the questions (Brinkman & Kvale 2015).

Two immigration students participated in the interview based on the convenient sample and their answers were not utilized in this thesis. The respondents got the opportunity to evaluate the questions by synthetizing whether there need to add, change, or remove. In the pilot interviews, the question of whether 'discretionary powers' should be introduced to assist immigration officers with fettered powers was included in the questionnaire. However, it became evident that one of the respondents reluctantly supported whereas the other agreed that discretionary powers were already structured in the Immigration Act.

The respondents were emailed the questionnaires with a request to participate. All respondents were given the opportunity to respond within a time frame of one week. This was a preferred method to avoid the risk of disruption or influenced answers if the interview was to be face-to-face.

4.3 Interpretation of the material

All interviews were in the form of questionnaires purposed to avoid incorrect interpretation. The collected data of experiences and perceptions of the interviewees was processed through concentration of sentences and themes. It is stated that the "concentration of sentences summarizes explanations into shorter sentences" (Brinkmann

& Kvale, 2015). And this was facilitated through summaries to the interview questions in a separate document.

This chapter presents and interprets the analyzed data along research theories relied upon. In the end, the research seeks to establish whether it is ripe to clock the Department of Immigration with discretionary powers. The date is presented in analytical discussion. The Questionnaire form was attached to the interview form which stated that participation was voluntary with assurances of an option to opt out and that there was no compensation as well as skipping some questions if need be.

The respondent were further informed of the ethical consideration and approval of the interview by signing the statement of consent. It has been stressed how it is of great importance that the interviews are free from preconceived values to avoid angled results (Yin, 2009). Yet it has been argued that it is almost impossible to subjectively conduct a study (Bryman et al., 2019). This was considered as a learning lesson that the purpose of this post-graduate diploma was not to reinforce prejudiced beliefs.

There were five semi-structured questions in a questionnaire form. There were five respondents (hereby referred to as 'R1', 'R2', 'R3', 'R4' and 'R5'). By the time of analyzing this research, 'R5' had not yet provided a response. R1's response to question 3 on whether "Immigration officers can benefit from discretionary powers in the performance of their duties to administer various immigration statutes e.g., permanent residence"

'R1' stated:

"I believe now, although the procedures for the various applications are set out in

Law, Immigration officers (including the Director General) have huge discretion as to the decision-making matters on immigration. If the decisions made are in line with the letter and the spirit of the constitution and the law, discretionary powers should be beneficial."

'R1' ascertains that the Director General and immigration officers have huge discretion. And as a former employee of the department. The response implies that immigration officers exercise discretion. 'R1'' further suggests that such discretion should be tailored in the law. The assertion implies or confirms why discretionary powers should be anchored into the law to avoid litigation.

This question probably needed another dimension or a follow-up question but due to time constraint further research may be required to fil the gap or to ascertain the criteria to be applied by the officers to fetter discretion outside the immigration the law. The question calls for the miscellaneous guidelines or memos to confirm 'R1's pronouncements. Whether 'R1's response to question three is convincing is dependent of reliability.

Reliability is pegged on the FOUR criteria which includes: credibility, confirmation, dependability, and transferability (Bryman et al., 2019). Credibility refers to how well identified and described the phenomena of the study is purposed for the research questions. Credibility on 'R1's response to the question needs further clarity as the question is key in this research. 'R1's response to questions four and five is premised on the assumption that there's discretion in the Act.

'R2's response to the key question (Q3) states:

"Immigration officers are purely guided by statute which renders decisions often

free from any consideration of individual circumstances."

'R2's response differs from R1's response as it negates discretion from the statute. R2 further states that "categories are binary, with immigrants failing in one of only two categories. Denying immigration officers of critical discretionary powers exemplifies the laws exclusionary capacity to prevent foreigners an equal and fair chance to an immigration status. Administrative procedures, such as breaks in continuous residence become conclusive upon their eligibility and ability to acquire permanent status. 'R2' concludes question three by stating:

"Such decisions cannot be reconciled with the constitutional obligations of upholding the rule of law and good governance."

Here 'R2' agrees that the rigidity of the law without description causes an imbalance with the law taking it all and the applicants left with no remedial considerations. Restrictive laws deny an applicant to apply humanitarian and compassionate reasons to assist in their application.

'R2's response to question five assumes that;

'an individual who does not fit into the punitive binary categories stipulated under statute can qualify for compassionate and humanitarian grounds outside immigration rules. R2 concludes that 'migrants should not be denied their right purely on administrative barriers.'

'R3's response to the key question (Q3) implies that discretionary power would lead abuse of power. 'R'3 further raises issues on accountability. 'R3's (is a senior immigration officer

and decision maker at the immigration department). 'R3's differs with countries that have discretionary powers are applied arguing,

"that accountability is a prerequisite of the rule-based systems in other countries and computer-generated outcomes can cure the problem".

On Q5, 'R3' concludes that;

"Humanitarian and compassionate grounds applications are not yet ripe for the Kenyan situation".

R4's response to the main question is that the power of discretion should be provided to the immigration department.

"Issuance of permits, residence and citizenship is on case-by-case basis as failure to recognize peculiar circumstances that arise in the different applications may endanger the socio-economic growth of our country as migrants are an important tool in fostering this growth".

'R4" continuous,

"I therefore strongly, believe that immigration officers can rightfully benefit from discretionary powers in the performance of their administrative duties"

'R4's answer to question four states.

"a vast majority of asylum seekers seek admission in Kenya on humanitarian and compassionate grounds as the recent directive by the minister to order closure of major refugee camps causing an unrest".

Finally, 'R4' states,

"Such powers are arbitrary, and the cure is to empower the immigration officers with statutory powers of discretion whose purpose is to procure discretionary application amenable to judicial review where applicable".

'R5' by the time of compiling this research had not yet responded

The credibility of this interview was achieved since the respondents contributed the relevant information and answered research questions. This study confirms the application of qualitative method as unbiased, accurate and can be mirrored between the theoretical framework and the data collected.

This research is dependable as the same results is likely to occur with the changing patterns as observed in the United Kingdom, the US and Canada whose initial approach to immigrants face strong resistance for decades. The dependability, therefore, was believable as the respondents considered their perceptions, experiences, and knowledge. Some of the respondents were senior immigration officers who meet the above criteria. However, undependability is likely to be present because opinions tend to alter and there's know guarantee that the respondents in this research would perceive the phenomenon should a similar study be undertaken.

Whether there's a likelihood of transferability:

Transferability implies if the phenomenon is more likely to be transferred. It is further argued that generalization and transferability is unachievable in qualitative research (Grenier, 2019). The transferability in this post-graduate diploma in migration is likely to be deficient as integration may be interpreted to various definitions. Transferability is not

complete as the respondents corresponded through questionnaires and emails and in the absence of the interviewer. Truthfulness in the answers may not be convincing.

4.4 Critical Analysis of Research Method

The research carried out above, the arguments and reasons, the reliability of the study may be relied upon even though characterized by a few methodological shortcomings. The referred references are both current and closer in time whereas some such as Sinha 1996 are older times and too close to rely on. Times and situations may have changed. It is considered that sources should be comparatively closer in publication (Gustavsson, 2010).

The respondents were given the opportunity to answer questions willingly, but it appears that some of the respondents were not familiar with the discretionary powers. It is stated that in qualitative interviews, structures often adopt a subjective and unsystematic form when interviews are administered. In this interview, the interviewer and the respondents were not familiar to each other and the respondents' answered questions at will.

The small number of respondents and the application of qualitative methodology might have led to the assumption of smaller sample selections as factors to determine lack of enforceability in this post graduate diploma in migration thesis. Most respondents were equally persons of experience with immigration issues. This however confirms that lack of transferability should not limit the purpose as the research may be of added value to knowledge even if not transferable.

CHAPTER FIVE: SUMMARY OF THE FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This chapter summarizes and concludes on the outcome of the study with proposed recommendations.

5.1 Summary of Findings

This study had one objective.

*5.2.*1 to assess the feasibility and the effect of fettering discretionary powers to the minister in charge of immigration officers in Kenya

The Department of immigration is headed by the Minister in charge of Internal Security and National Coordination. The minister is accorded statutory powers to police immigration. Applicants whose cases are denied by the Director General of Immigration have the right of Appeal to the Minister whose decision is final. The only avenue open to the applicant is judicial review and the process in complicated cumbersome and lacks direction and though the procedure is eschewed to foreigners who are limited in the knowledge of the immigration appeals, language proficiency and the money to hire legal representatives.

People who would not under normal circumstances qualify to differ their status either to permanent resident, citizenship, variation of permits, stateless persons or any other category are not able to apply on humanitarian and compassionate grounds. In Canada, humanitarian and compassionate grounds apply to those with exceptional circumstances. These include: the duration of stay, family ties, the best interest of the child (if involved) and what could happen to the applicant if the grant was rejected

(www.canada.ca/en/immigration-refugees citizenship/services/refugees). Such applications exclude an applicant whose asylum case is still pending.

In the United Kingdom as stated above, discretionary powers are fettered to immigration officers to exercise discretion and grant discretionary leave. These powers have been extended to include victims of modern slavery who are further referred to Modern Slavery Human Trafficking Unit (MSHTU) before one is permitted to apply discretionary leave at the Home Office. Applicants must demonstrate that they were victims of human trafficking or victims of drug trafficking.

This is further extended to those seeking compensation, through the courts or where the victim is assisting the police with a criminal investigation or prosecution. Additionally, a person may apply for discretionary leave on health grounds. He/she must demonstrate that removal from the UK would accelerate deterioration of his health due to lack of healthcare or affordable treatment in destination country. In the UK, those granted discretionary leave to remain must not have recourse to public funds but are required by responsible agencies to seek work training and placement as well as enrolling for higher education. Those with limited leave are not eligible for higher education.

5.2.2 Immigration Policy

Immigration policy in Kenya is silent on the power of discretion. There are thousands of backlog cases and bureaucracy hinders progress as there neither guidelines nor hotlines or caseworkers to handle such cases. The Immigration Act is silent on timelines and the requirement of the law for purposes of variation of status does not inform as to whether shorter visits abroad cut off the seven-year continuous residence. Bottlenecks such

requiring the applicant to submit the permit he/she has held for the last seven years, a certificate of good conduct, personal bank statement, proof of contribution made to national development, copy of passport, declaration concerning residence, and oath of allegiance and declaration fee (currently $2000) are some of the issues that can be determined under discretionary powers depending on the circumstances.

Policy is lacking yet offsetting of backlog of cases could ease the burden. The stated issues above further complicate matters on applicants who are stateless and the marginalized communities. There needs to be a market friendly policy that can introduce reforms to cater for applicants' cases and such are achievable when fettered discretion is introduced.

5.2.3 Ambiguity in Law

Despite unclear procedural guidelines and lacking in timelines, schedules, and lacunas as to the involvement of other agencies without informing the applicants of their role to matters privacy, there have been numerous complaints of violation of the law. The long delays in the handling and processing injures the applicants in various ways. Applications for special passes stipulate the categories as to who can apply but does not waive fee for academics who are invited to give a talk for two hours.

Considerable delays after an applicant's application for citizenship has been approved got the wrath of the High Court where the judge described the respondent's failure to issue a certificate of citizenship as 'contumelious and inexcusable', SN v cabinet Secretary, Ministry of Interior and Coordination and national Government Misc. Civ. Appl. No. 406 of 2015 [2016] eKLR, para. 20.

5.2.4 Conclusion

The Immigration department is the pillar of hope for immigrants and the law must accommodate changing patterns of science. The department has embraced technology and streamlined procedures to facilitate applications while focusing on accountability. There would be no issue of mandamus in the stated case had the applicants been issued with citizenship certificate if the powers of discretion would have been exercised. Kenya is a progressive country facing migrant challenges and security concerns meaning balancing immigrants' needs as stipulated in the international human rights convents and public concerns.

There need to be codified standards procedures operationalized with law and alternative dispute resolutions. The research findings revealed inadequacies in the law and its restrictiveness to exclude immigrants who could be encouraged to stay to spur development. Developed countries have systems in place to encourage skilled migrants to stay. Rwanda's immigration policy is inclusive where immigrants with skills and investors are given opportunities to participate in business. Kenya could benefit much by empowering immigration officers to grant amnesty to cases that meet the criteria and standards set by statute.

5.3 Recommendations

Based on this study, the following was recommended

5.3.1 Policy on Guidelines and introduction of case work management

The country could benefit more from guidelines that stipulate timelines to applicants so that they do not stay and wait for years. It is good that the immigration department's

introduction of online application and e-citizen is a relief to painful paperwork and long queues at Nyayo house. The introduction of caseworkers allocated to handle inquiries through a hotline or emails may play a big role to foster public confidence and reduction of anxiety.

5.3.2 Provision of Legislation

Parliament should introduce legislation to fetter immigration officers with discretionary powers. Such laws should contain mechanisms of check and balances to wit bias, corruption, and equity subject to administrative review.

5.3.3 Immigration Rights Awareness

Rights awareness is key in creating and promoting immigrants' rights. Universities and institutions should establish the teaching of the subject and encourage people to take it as a career.

5.3.4 Introduction of Immigration Tribunals

Immigration Tribunals and Appeals courts should be introduced to deal with immigration matters. UK and Canada and the US 4th and 7th Circuit courts were established to deal with immigration matters. Furthermore, there are specialized practitioners in immigration matters who deal with asylum work authorization permits and variation of status.

5.3.5 Prosecutorial Discretion

Prosecutors should be mandated with prosecutorial discretion to dismiss cases of immigrants with certain special concerns or situations (Lahoud, 2021). The Biden administration has in a memo dated May 27, 2020, to the U.S. Immigration Customs and

enforcement (ICE) given the prosecutors the autonomy to follow up or drop cases. Previously, they had limited decision-making powers during previous administration (Supra). Some of the guidelines stipulated include long-time permanent residents who are pregnant or elderly or have a serious health condition and have been in the US since childhood. The memo also encourages prosecutors to take humanitarian grounds into consideration.

However, serious criminal convictions may hinder an applicant from being considered. In Kenya, the Director of Public Prosecutions has the mandate to prosecute criminal offenses. In the U.S. there are conflicting decisions as proponents of immigration reform argue that immigration offences are civil in nature save for where a crime is committed (Sinha, 1996). The Immigration Act in Kenya applies criminal code to criminalize immigration offenders. However, it is suggested that the Act be reviewed, and new category of immigration offences be classified to enable immigrants to purse

5.3.6 Commission on Discretion

There should be a statutory commission to scrutinize discretionary applications. It is suggested that the commission should be comprised of at least a judge, immigration officer(s), police and intelligence officers, technical team and an immigration practitioner. Such a body should compile a report and make recommendations to the minister with guidelines timelines as to the final decision.

5.4 Suggestions for Further Study

Immigration law and further studies should be encouraged with frequent trainings to the immigration officers in technical areas. More research is advised to enlist views of

immigrants and the failed cases to construct statistical data that may help inform and to prepare he government future assessments, analysis and solutions.

REFERENCE

A brew, A. (2012.) The new economics of labour migration beware of neoclassicals Bearing Gifts. *Forum for social economics*,41(1):46-47.

Aggarwal (2014): Migration hump and development: A look at migration patterns in Turkey. *GRIN Verlage open publishing GmbH*

Assefaw, B. (2014). international migration and development in eastern and southern Africa. Addis Ababa, Ethiopia: *Organization for Social Science Research in Eastern and Southern Africa (OSSREA)*

Caroline N. (2020) Report on Citizenship Law. *Retrieved from* www.eui.eu/RSCAS/Publications/cadmus.eui.eu

De Haas H (2011). The determinants of international migration Palgrave Macmillan

De Haas, H. (2010). Migration and development: A theoretical perspective, *International Migration Review* ,44(1): 227-264

Discretionary leave consideration for victims of modern slavery version 2.0.P 10 September 2018

Discretionary leave version 8.0 published for home office staff 27May 2021

Duckett S. C.W. God like power: *the character test and unfettered ministerial discretion*

Humanitarian and compassionate grounds-Canada .ca https://canada.ca/en/immigration refugees-citizenship/services/refugees /claim-protection –inside-Canada

In D Haas, T.C.A., & In Tol, G.W. (2017). The economic Integration of Roman Italy : Rural communities in a globalizing world.

Juarez M., Gomez A. B., Sonia P.B. (2018). The rise of immigrant detention and its effects on Latino communities across the nation: *journal on migration and human security vol. 6* (1) 74-96

McKanders, K. M. (2013), federal pre-emption and immigrants 'rights, *3 wakke forest J.L. & Pol'y 333*(2013)

Kate M.M., Michael J. G. (2012), Executive Discretion as to Immigration: legal overview, congregation research service. Retrieved from https//www.crs.gov

Lahoud R.G., ICE prosecutorial Discretion to Dismiss Immigration Cases: *Bidden administration gives more discretion to prosecutors to pursue or drop immigration cases Vol. xi (301)*

Legal analysis and use of discretion/USCIS (https://www.uscis . *gov/policy-manual/volume -7-part-a-chapter-10)*

Nationality policy: naturalisation as a British citizen by discretion. *Version 8.0(Published for Home Office staff on 01 July 2021*

LIST OF APENDICES

APPENDIX 1: COVER LETTER FOR THE STUDY

CONSENT FORM

You are invited to take part in a research study of **whether immigration should be empowered by statute to exercise discretion and grant leave in failed immigration applications outside immigration law.** You were chosen for the study because your engagement with the immigration department of Kenya and/or your knowledge of the law and practice. Please read this form and ask any questions you have before agreeing to be part of the study.

This study is being conducted by a researcher named George Luchiri Wajackoyah, who is a post-graduate student at University of Nairobi.

Background Information:

The purpose of this study is to find out whether the Kenyan immigration system can benefit from according to discretionary powers to immigration officers upon performance of their duty.

Procedures:

If you agree to be in this study, you will be asked to:

• Participate in an interview

Voluntary Nature of the Study:

Your participation in this study is voluntary. This means that everyone will respect your decision of whether or not you want to be in the study. If you decide to join the study now, you

can still change your mind later. If you feel stressed during the study, you may stop at any time. You may skip any questions that you feel are too personal.

Risks and Benefits of Being in the Study:

Participating in the study might make you feel uncomfortable while sharing your thoughts about the subject of study however, sharing your thoughts may make a great contribution to the recommendations that will be made in this study and possibly implementation of the same.

Compensation:

There is no compensation for your participation.

Confidentiality:

Any information you provide will be kept confidential. The researcher will not use your information for any purposes outside of this research project. Also, the researcher will not include your name or anything else that could identify you in any reports of the study.

Contacts and Questions:

The researcher's name is George Luchiri Wajackoyah. The researcher's faculty advisor is Dr……. You may ask any questions you have now. Or if you have questions later, you may contact the researcher via phone ……..or email:

The researcher will give you a copy of this form to keep.

Statement of Consent:

I have read the above information. I have received answers to any questions I have at this time. I am 18 years of age or older, and I consent to participate in the study.

Name of Participant .....

Participant's Signature .....

Researcher's Signature .....

Date .....

APPENDIX II: INTERVIEW GUIDE

My name George Luchiri Wajackoyah a Post-graduate student from the University of Nairobi. This Interview guide seeks to collect information for a study titled: **whether immigration should be empowered by statute to exercise discretion and grant leave in failed immigration applications outside immigration law.** The information you give will be confidential and will not be shared with any this party without your consent.

1. What is your name?
2. What is your role at the department of immigration?
3. What legal procedures do you follow
4. when issuing various permits and citizenship?
5. Are these procedures based on the immigration act only?
6. When issuing permits and citizenship do you strictly adhere to the legal procedures without exercising any discretion?
7. As immigration officers are you allowed to exercise any form of discretion in issuing permits and citizenship on a case to case basis?
8. In your experience as an immigration officer do you think immigration officers and the cabinet secretary in charge of immigration should be empowered by legislation where applicable to employ discretionary powers in granting an immigration permit or citizenship?

Thank you for your participation.