IMMIGRATION AND JUDICIAL REVIEW

By Justice Susan Glazebrook[1]

I concentrate in this talk on two intertwined themes in relation to judicial review and immigration[2]:

- expansion of grounds of review
- blurring of boundaries (and I will explain what I mean by this later).

New Zealand has no written constitution and so the boundaries of judicial review cannot be defined by any words in a constitution.[3] Moreover, the appropriate scope of judicial review is not defined by any other statute. While there is legislation related to judicial review,[4] the better view,[5] is that this legislation is procedural only.[6] Even if that is not the case, the statute in question does not set out the grounds of review and it is quite clear that the common law and inherent jurisdiction of our High Court survives. Accordingly, the setting of limits or boundaries to the grounds of judicial review is a task that falls squarely on the courts.

Traditionally it has been considered that the province of the courts is to ensure that administrative decisions and actions are lawful and procedurally fair, with a residual

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[1] Oral presentation to Australian Supreme and Federal Court Judges at a conference held in Hobart from 24-28 January 2009. I express my thanks to Natasha Caldwell for her work on the footnotes. As this is an unpublished address, please seek permission before quoting from it.

[2] For a general discussion of the judicial developments in New Zealand immigration law see Keith "Administrative Law Developments in New Zealand as seen through Immigration Law" in G Hushcroft and M Taggart (eds) *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (2006).

[3] For discussion of New Zealand's constitutional structure and the foundations of judicial review see Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2007) at 121-145 and 815-884. The position in New Zealand differs from that found in Australia where it is accepted that the Constitution will influence judicial review: see discussion in Matthew Groves and H P Lee " Australian Administrative Law: The Constitutional and Legal Matrix" in *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) at 1-33.

[4] Judicature Amendment Act 1972.

[5] By which, like most who use the phrase, I mean my view.

[6] As noted in G D S Taylor *Judicial Review* (1991) at 31, the legislative history surrounding the Judicature Amendment Act 1972 indicates that the legislation was intended merely to renovate the procedure for judicial review. However, there is a view that the Act substantively alters the underlying jurisdiction of the High Court: for discussion see Jenny Cassie and Dean Knight "The Scope of Judicial Review: Who and What May be Relevant" in *Administrative Law* (NZLS, August 2008) at 72-77.

role granted to the judiciary in the assessment of reasonableness. Judges in New Zealand, like in Australia, are of course very concerned to maintain their proper role in judicial review. However, the views on what that role entails have been subject to expansion and, as a consequence, boundaries between key concepts (such as fact and law, and law and discretion) and also between the roles of the various branches of the government have become increasingly blurred.

I first turn towards procedure. There has been an evolution in terms of procedural requirements in immigration cases from a view in the 1970's that would be immigrants were aliens who had no substantive rights, and thus no procedural rights,[7] to an acceptance that natural justice applies to entry or exclusion decisions taken at the border.[8] Procedural rights were first accorded in a decision in the late 1970's that emphasised the importance of natural justice rights in regards to an administrative decision involving the deportation of a woman whose child had a rare metabolic disease.[9] The earlier decisions denying natural justice in such cases did not even warrant a mention for the Court of Appeal. That decision was also interesting in terms of the boundary blurring that could be seen in the Court's decision-making process. For example, there were judicial comments made suggesting that the case could have been decided on the basis of mistake of fact and even on the basis that the appellant had a legitimate expectation of a favourable outcome.[10]

The strength of the requirements with regard to procedure was more recently shown by the case of Mr Zaoui, a refugee from Algeria.[11] A certificate had been issued by the Director of Security declaring Mr Zaoui to be a threat to national security. This, if upheld by the procedure set out in the legislation, would have allowed his removal from New Zealand, despite his refugee status.

There were a series of interlocutory skirmishes and one of the issues arising related to the possibility, raised by Mr Zaoui, that he might be tortured should he be sent back to Algeria. The difficulty was that there were very tight timeframes in the legislation as

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[7] *Pagliara v Attorney-General* [1974] 1 NZLR 86 (SC); *Tobias v May* [1976] 1 NZLR 509 (SC).
[8] *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA).
[9] *Daganaysi v Minister of Immigration* [1980] 2 NZLR 130 (CA). It must, however, be noted that it had earlier been accepted that natural justice applied to other administrative decisions, see, for example, *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 at 718 (PC).
[10] Ibid at 145.

to removal if the security risk certificate was upheld. Mr Zaoui argued that there would be no time to put his case, regarding the prospect of his imminent torture, to the relevant Minister before he was removed from the country.

When the case got to our then quite new Supreme Court, that Court, in a way that one commentator has said overrode the clear indications within the statutory scheme,[12] engrafted major procedural safeguards onto the legislation in order to ensure that the procedure could be undertaken in a timeframe that would allow adequate consideration of all issues.

However, these procedures were never put to the test as a compromise was forged. The Director of Security withdrew the security risk certificate on the basis of Mr Zaoui's agreement that there had been matters of concern that had justified the issue of the certificate, but not its continuance.[13] Mr Zaoui then settled as a refugee in New Zealand.

Turning now to legality, it is apparent that from the early 1980's the New Zealand courts have seen their task as being to police the law. They draw no distinction between jurisdictional and other errors. Any error of law can justify intervention.[14] However, what is contained within the concept of legality has also expanded. This is exemplified by the attitude to international law obligations, particularly those arising out of international human rights conventions.

In the early 1980's, in the controversial context of the 1981 Springbok tour of New Zealand, the idea that a broad discretion in the immigration arena could be read down as being subject to the Convention on the Elimination of Racial Discrimination was rejected.[15]

By contrast, just ten years later it had become a given that decisions on removal had to take into account the Children's Convention and, therefore, the best interests of any

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[11] *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC).
[12] Claudia Geiringer "Zaoui Revisited" [2005] NZLJ 285 at 288.
[13] The undertakings that Mr Zaoui provided to the Director of Security, that led to the withdrawal of the security risk certificate, are recorded at http://www.stuff.co.nz/stuff/asset/Undertakings.pdf.
[14] *Peters v Davidson* [1999] 2 NZLR 164 (CA).
[15] *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).

children.[16] Such an outcome is achieved by the presumption that Parliament cannot have intended to legislate in a manner that is contrary to New Zealand's international obligations. The way in which this presumption operates is not confined to cases of ambiguity but, at its strongest, would effectively require Parliament to legislate specifically to exclude New Zealand's international obligations.[17] Broad statutory discretions are now seen to be a prime candidate for reading in international obligations.[18] On one hand, there is a view that this is undemocratic in a dualist system where Parliament has not specifically incorporated the international obligation. The other view is that the Executive has entered into these obligations and it should therefore comply with them until told not to by Parliament.[19] It is probably obvious that I subscribe to the latter view.

This presumption has, however, led to more blurring of boundaries – obviously a blurring between domestic and international law but also a blurring of boundaries between both law and discretion and law and fact (seeing issues relating, for example, to the best interest of children are often factual).

The blurring of boundaries between fact and law is occurring in other judicial review contexts. This leads to concerns that the courts in judicial review proceedings are becoming inundated with factual material, meaning that judicial review can no longer be seen as providing a simple, prompt and untechnical response to administrative law issues.[20]

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

[17] For a comprehensive discussion of the increasing influence of international law on the judicial interpretation of domestic law provisions see Melissa Waters "Creeping Monism: The Judicial Trend Towards Interpretative Incorporation of Human Rights Treaties" (2007) 107 *Columbia Law Review* 628. Waters has coined the phrase "creeping monism" to refer to the phenomenon whereby common law courts are abandoning their traditional dualist orientation to utilise unincorporated human rights instruments, despite the absence of domestic legislation giving domestic legal effect to these treaties.

[18] See generally Claudia Geiringer "Parsing Sir Kenneth Keith's Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (2006) 182.

[19] For discussion see Susan Glazebrook "Filling the Gaps" in Rick Bigwood (ed) *The Statute: Making and Meaning* (2004) at 175 – 176, Treasa Dunworth "Public International Law" [2007] NZ Law Rev 217 at 221, Melissa Poole "International Instruments in Administrative Decisions: Mainstreaming International Law" (1999) 30 VUWLR 91 at 107 and Lord Steyn "Democracy Through Law" in (New Zealand Centre for Public Law Occasional Paper-No 12I 2002) at 8

[20] See the Court of Appeal decision in *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776 at [342] where Hammond J expressed disappointment that the "factual and other subtleties" in the case were "too great to be dealt with in what is supposed to be a 'relatively simple, untechnical and prompt procedure' …which normally does not involve cross-examination".

This brings me to the final ground of review – reasonableness. It is well settled that the courts in judicial review are not concerned with the merits of a decision.[21] That is easy to say, but not necessarily an easy distinction to draw.[22] Such difficulties are most clearly shown in the residual reasonableness *Wednesbury* ground. There have been murmurings (mostly from academics) that New Zealand should move to a proportionality standard, particularly in human rights cases.[23] The courts have not yet conducted what one commentator has called a "Wednesburial".[24] However, it does seem clear (although not necessarily articulated) that intensity of reasonableness review will vary according to the subject matter and context and that matters involving individual rights call for more care by the courts.[25]

The more intense the review the greater the obvious risk of blurring into merits review. The Supreme Court has recently granted leave to appeal in two cases where the standard of review in an immigration context is at issue[26] so watch this space. We are hoping for definitive guidance as to the proper limits of the courts' role in reasonableness review, at least in the immigration context.

I want to finish off by discussing the issue of blurring of roles through dialogue among the three branches of government. I will concentrate on one instance of dialogue between the judiciary and the Executive and it is thus necessary to first provide a bit of background.

In the wake of the first decision in the early 1990's[27] that required international law obligations to be taken into account in immigration decisions, the Immigration

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[21] *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 at 211 (CA).
[22] Even when examining whether decisions are lawful and fair.
[23] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2007) at 857, Michael Taggart, "Administrative Law" [2006] NZ Law Rev 75 at 87-89, Michael Taggart "Proportionality, deference, Wednesbury" in NZLS *Judicial Review Intensive* (September 2007) at 23.
[24] Rodney Eric Harrison "The New Public Law? A New Zealand Perspective" (2003) 14 PLR 41 at 56.
[25] See for example, *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 at 403 (CA), *Pring v Wanganui District Council* [1999] NZRMA 519 at [7] (CA).
[26] *Ye v Minister of Immigration*; *Qui v Minister of Immigration* [2008] NZSC 92 and *Huang v Minister of Immigration* [2008] NZSC 103. The Ye appeal was heard on 21-23 April 2009 and the transcript of the oral argument can be accessed at the following website address: http://www.courtsofnz.govt.nz/from/transcripts/supreme-court-transcripts-2009/SC-53-56-2008-Ye-and-Qiu-v-Minister-of-Immigration.pdf. The Huang appeal was heard on 29 April 2009, and the transcript of the oral hearing can be accessed at the following website adress: http://www.courtsofnz.govt.nz/from/transcripts/supreme-court-transcripts-2009/SC-74-2008-Huang-v-Immigration.pdf.
[27] *Tavita v Minister of Immigration* above n 11.

Service designed what it called an humanitarian questionnaire. This is administered before any removal from the country takes place and is designed to find out if there are any humanitarian impediments to removal (including issues relating to any children). This therefore provides an example of the Executive reacting positively to address judicial concerns.

The humanitarian interview procedure was before the Court of Appeal recently in the two cases which I mentioned earlier are under appeal to the Supreme Court.[28] For now I discuss these two cases as an example of dialogue.

The first case was *Ye*,[29] which concerned the removal of the parents of two families of failed refugees who had New Zealand born citizen children. Because a number of novel matters were before the Court of Appeal a five judge court was convened and three judgments resulted.

My judgment effectively took the approach that the humanitarian interview, or something similar, was required to ensure New Zealand's international obligations were complied with.[30] The judgment of Hammond and Wilson JJ took the view that the interview was desirable but really an optional extra.[31] On the other hand, Chambers and Robertson JJ took the view that the humanitarian interview procedure could not survive the changes that had been made by Parliament in 1999 to the immigration legislation and that it was essentially an unlawful procedure.[32]

In the face of the Court of Appeal's finding that the interview was at most optional, one may have expected the Immigration Service to drop the interview procedure but this is not what occurred.[33] This was seen in a case that came before the Court of

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[28] Above n 26.
[29] *Ye v Minister of Immigration; Qui v Minister of Immigration* [2008] NZCA 291.
[30] Ibid at [225].
[31] Ibid at [412]
[32] Ibid at [574].
[33] This may, in part, be due to considerations of comity until the Supreme Court has provided definitive guidance on the issue. Even in the Supreme Court, however, the Immigration Service's acceptance of the humanitarian interview procedure was evident in its oral arguments in both the *Ye* and the *Huang* appeals. In the *Ye* appeal, the Minister of Immigration acknowledged that the humanitarian interview was an administrative procedure adopted by the Department. It was also accepted that the humanitarian interview procedure reflected the fact that Article 3, Convention on the Rights of the Child and Article 23 of the International Covenant of Civil and Political Rights were mandatory relevant considerations. See http://www.courtsofnz.govt.nz/from/transcripts/supreme-court-transcripts-2009/SC-53-56-2008-Ye-and-Qiu-v-Minister-of-Immigration.pdf. In the Huang hearing the Crown

Appeal shortly afterwards which also involved a failed refugee claimant with a New Zealand born child.[34] In argument in that case, the Immigration Service resisted the temptation to take the approach advocated by Chambers and Robertson JJ or even the view adopted by Hammond and Wilson JJ. It considered that it was obliged to comply with the policy that remained extant, thus implicitly accepting that the humanitarian interview was still an appropriate means of checking for any humanitarian concerns which had not been already addressed. In the result, Chambers J recanted from his position in *Ye* and accepted that somehow or other the humanitarian interview procedure had become part of the fabric of immigration procedure in New Zealand.[35]

These series of cases therefore not only show the Executive's commitment to comply with its international obligations,[36] but also the two way process of dialogue between the branches of government as to how these obligations are to be carried out in the context of the statutory scheme.

In conclusion, the New Zealand courts are conscious that there have to be limits on judicial review and that a proper distinction between the roles of various branches of government must be maintained. While it is presently uncertain as to where those limits and boundaries lie, what is clear is that they are in a different place from even ten or so years ago.

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similarly did not dispute the validity of the procedure itself. See http://www.courtsofnz.govt.nz/from/transcripts/supreme-court-transcripts-2009/SC-74-2008-Huang-v-Immigration.pdf.

[34] *Huang v Minister of Immigration* [2008] NZCA 377. The claimant's other child in that case had been born in China. Hence concerns were raised that the New Zealand child was born in breach of China's one child policy.

[35] Ibid at [100].

[36] For a further example of the Executive's commitment to meeting its obligations under international law see the discussion regarding the Executive's actions in relation to the issue of detention pending determination of refugee claims in Susan Glazebrook "To the Lighthouse: Judicial Review and Immigration Law in New Zealand" (Paper presented to the Supreme and Federal Court Judges' Conference, Hobart, 24-28 January 2008) at 46-48.