

# TO THE LIGHTHOUSE: JUDICIAL REVIEW AND IMMIGRATION IN NEW ZEALAND

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## **Abstract:**

Immigration law throws into relief the fine balance between the courts and the Executive when ascertaining the limits of grounds of judicial review of administrative actions. This paper examines the expansion of the grounds of review as well as the blurring of boundaries between the differing branches of government and also between the key concepts of fact and law and between domestic and international law that has occurred over the last decade.

## ***I THE VOYAGE BEGINS***

New Zealanders like to think of themselves as a nation of voyagers. All of our peoples, including our indigenous people, have travelling stories, both recent and ancient. Many have family in what they still think of as their home countries. Perhaps that is one reason why, even though we are a seabound and isolated nation,

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we have struggled and continue to struggle to achieve justice in our immigration procedures.<sup>2</sup>

Immigration law is an area that classically pits the rights of the State to control its borders against the rights of individuals seeking to enter or remain in New Zealand. As such, it throws into relief the fine balance between the courts, the traditional guardians of the rights of individuals, and the Executive as it pursues the national interest. This paper discusses how this relationship has developed under the auspices of judicial review in the sphere of immigration law. The key themes that will be explored are the expansion of the grounds of review and the blurring of borders that has occurred between the key concepts of fact and law and domestic and international law. The blurring of boundaries between the roles of the various players, including the judiciary, will also be examined.

The rest of the paper is divided into six sections. After a general description of judicial review in New Zealand, I explore each of the three main heads of review: fairness, legality and reasonableness. The realm of fairness shows an increasing concern on the part of the courts to secure the natural justice rights of immigrants. The judicial concern for justice has been echoed in relation to the ground of legality, although the ride has not been smooth. My particular focus under the heading of legality is the evolution of the New Zealand courts' understanding of human rights in immigration, driven in particular by an increasing awareness of New Zealand's international obligations. I then turn to the issue of reasonableness and the problem of variegated review, in particular as a mechanism to protect human rights. In the next section of the paper I explore the intensive level of dialogue between the three branches that has helped to shape our country's approach to immigration. In the conclusion I try very briefly to draw some of the threads together.

## ***II A BRIEF DESCRIPTION OF THE SEASCAPE***

Hammond J's recent description of judicial review as a lighthouse in the fog seems particularly apt in the immigration context.<sup>3</sup> It conjures up the image of a small boat of migrants, struggling through treacherous waters towards the shores, with the light of judicial review shining through the mist, showing whether they may pass the reef or whether they must turn back. But the light provided by this precarious beam has

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<sup>2</sup> It could less charitably be said that precisely because New Zealand is so isolated and seabound it can afford to strive for justice in this area.

<sup>3</sup> *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, para 373 Hammond J.

not been steady over the years and it is still not clear what responsibility the lighthouse-keeper has to rescue the shipwrecked.

As a small democracy, New Zealand faces particular problems in developing a coherent theory of judicial review (and not just as it pertains to immigration). These difficulties were outlined by Hammond J in his judgment in *Lab Tests Auckland v Auckland District Health Board*.<sup>4</sup> Because there is a limited number of cases that come before the courts, there is less opportunity to develop the law. Indeed, as Hammond J remarked: “There is ... an intermittent and somewhat mad-headed chase after the “latest case” on the part of the bar and commentators, and seminars sprout up as if there has been a seismic shift when one case is decided.”<sup>5</sup> This has the effect that each individual case has a disproportionate impact on the law in this country. As a result, it seems that progress occurs in occasional leaps and bounds, rather than at the more sedate pace that is usually acceptable for those wearing judicial robes.

Judicial review in New Zealand is substantively uncharted (as our metaphor would have it), tracing its roots to the English common law prerogative writs. A simplified procedure for reviewing the exercise of statutory powers was introduced by the Judicature Amendment Act 1972.<sup>6</sup> That Act does not, however, attempt to set out the grounds of review. Rather, it merely states that, on application for review, the High Court may grant relief in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power.<sup>7</sup> That relief may consist of anything that the applicant would be entitled to in any proceedings for a writ or order in the nature of mandamus, prohibition or certiorari, or for a declaration or

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<sup>4</sup> [2008] NZCA 385.

<sup>5</sup> *Ibid* at para 396.

<sup>6</sup> Statutory power is defined in s 3 of the Judicature Amendment Act 1972 as a power or right conferred by a statute: to make any form of subordinate regulation or direction; to exercise a statutory power of decision; to require a person to do or refrain from doing anything that he or she would not otherwise be required by law to do or refrain from doing; or to do anything that would, but for such power or right, be a breach of the legal rights of any person. This definition was extended in 1977 to include the power to make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person, and to encompass powers bestowed by the constitution or other instrument of incorporation, rules, or bylaws of any body corporate.

<sup>7</sup> While the view I have outlined in this paper describes the Judicature Amendment Act as procedural, there is also 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) 72 – 77.

injunction.<sup>8</sup> The exercise of non-statutory powers remains reviewable at common law.<sup>9</sup>

The courts, therefore, have a great expanse before them upon which to chart the borders of review. As Hammond J points out in *Lab Tests*, there has been no shortage of attempts to sketch an enduring outline.<sup>10</sup> It is probably fair to say that in New Zealand the courts broadly follow the approach suggested extra-judicially by Lord Cooke: “[T]he substantive principles of judicial review are simply that the decision-maker must act in accordance with law, fairly and reasonably.”<sup>11</sup> Australia’s Chief Justice, French CJ, would add good faith to that list,<sup>12</sup> a ground that would be subsumed by lawfulness or fairness in New Zealand jurisprudence. Lord Bingham has recently said that he would add only proportionality.<sup>13</sup>

I think it can now be said that the grounds of legality and fairness are relatively settled in New Zealand, except at the borders. The jury is still out, however, on the ground of proportionality and confusion continues to mount over what constitutes reasonableness in various contexts. In particular, there is the question of whether we should be making preparations for what Rodney Harrison QC has called a

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<sup>8</sup> Section 4(1) of the Judicature Amendment Act 1972. Note, under s 4(3) of that Act, the Court has a discretion to refuse to grant relief. See generally, Philip A Joseph *Constitutional and Administrative Law in New Zealand* (Thomson Brookers, Wellington, 3<sup>rd</sup> ed, 2007) 1093.

<sup>9</sup> *Mercury Energy Ltd v Electricity Corporation of NZ Ltd* [1994] 2 NZLR 385, 388 (PC) Lord Templeman. Last year the New Zealand Law Commission embarked on a review of prerogative writs, suggesting that they may now be redundant: *Review of Prerogative Writs* (Issues Paper 9, August 2008). However, the project has now been put aside following widespread concern about its implications.

<sup>10</sup> Hammond J’s view of this is critical: “[G]rand theorem approaches fail to drill down far enough to enable respectable advice to be given to parties who are supposed to abide by the law”: *Lab Tests*, above n 3 para 378. He suggests a functional rather than doctrinal analysis. With regard to review of decisions themselves, rather than the procedure or the reasoning followed, he tentatively suggests an abuse of power notion as used by Sedley LJ and the development of distinct substantive principles in relation to merit decisions: *Lab Tests* above n 3, para 386 and para 390 Hammond J. See also on this topic Anthony Lester and Jeffrey Jowell “Beyond Wednesbury: Substantive Principles of Administrative Law” [1987] PL 368.

<sup>11</sup> Lord Cooke “The Struggle for Simplicity in Administrative Law” in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) 5. This trichotomy has echoes of Lord Diplock’s three pronged approach to grounds of review – illegality, procedural impropriety and irrationality – in *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 (HL) Lord Diplock. South Africa’s constitution also takes the same approach, s 33 stating: “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”

<sup>12</sup> Robert French CJ “Administrative Law in Australia: Themes and Values” in Matthew Groves and H.P Lee (eds) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, New York, 2007) 15, 23.

<sup>13</sup> Lord Bingham “What is the Law?” (Robin Cooke Lecture Victoria University of Wellington, 4 December 2008).

“Wednesbury”,<sup>14</sup> as suggested by Lord Cooke in *R(Daly) v Secretary of State for the Home Department*:<sup>15</sup>

I think that the day will come when it will be more widely recognised that [*Wednesbury*] was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.

The next part of this paper is arranged in terms of Lord Cooke’s triptych. I begin, in a somewhat unorthodox fashion, with fairness. This is because fairness is where immigration first appeared on the horizon of judicial review.

### **III FAIRNESS**

#### **A Natural justice**

Cooke J, as he then was, identified the use of the term “fairness” as a broad indicator of the ideas encapsulated in the long-established concept of “natural justice”.<sup>16</sup> The two key principles of natural justice are that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*) and that the decision-maker be disinterested and unbiased (*nemo debet esse iudex in propria sua causa*). Natural justice is a deceptively simple concept and a way for the courts to ensure that justice is done, without usurping the difficult policy evaluations required of administrative decision-makers. Natural justice (otherwise known as “fair play in action”<sup>17</sup>) was firmly established in New Zealand in the wake of *Ridge v Baldwin*<sup>18</sup> and *Wiseman v Borneman*,<sup>19</sup> and it was accepted that the concept’s application should not be limited only to judicial or quasi-judicial bodies.<sup>20</sup>

However, the requirements of natural justice will vary with the power in question and the circumstances in which it is exercised.<sup>21</sup> The contemporary perception of the

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<sup>14</sup> Rodney Eric Harrison “The New Public Law: A New Zealand Perspective” (2003) 14 PLR 41, 56.

<sup>15</sup> *R(Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 549 (HL).

<sup>16</sup> *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 141 (CA) Cooke J.

<sup>17</sup> *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705, 718 (PC) Lord Morris.

<sup>18</sup> [1964] AC 40 (HL).

<sup>19</sup> [1971] AC 297 (HL).

<sup>20</sup> See *Furnell* above n 17, 718 Lord Morris.

<sup>21</sup> *Daganayasi* above n 16, 141 Cooke J. See also *Lab Tests* above n 3, paras 57 – 58 Arnold and Ellen France JJ.

circumstances of immigration saw natural justice review off to a rocky start in New Zealand's immigration law. Even post-*Ridge v Baldwin* two decisions in the 1970s refused to enforce an immigrant's right to be heard prior to deportation.<sup>22</sup> The Judge in *Tobias v May* stated:<sup>23</sup>

The audi alteram partem principle is now well recognised and established in its application to the decisions of administrative authorities as well as to judicial and quasi-judicial tribunals. It is, nevertheless, clear that the case of aliens is firmly retained under a different category.

The reasoning was that "aliens" had no right to be in the country, except by licence of the Crown.<sup>24</sup> It was therefore not a breach of their rights if that licence was revoked without consultation.<sup>25</sup>

But the 1980s proved a watershed. When the natural justice rights of a Fijian applicant for residence were interrogated in 1980, the earlier decisions did not even warrant a mention. In *Daganayasi v Minister of Immigration*<sup>26</sup> it was held that a decision by the Minister not to prevent deportation of the appellant, whose child had a rare metabolic disease, was invalid. The reason was that the appellant had not had a chance to see or respond to a report by a medical referee which conveyed the impression that her child's doctor had been fully consulted and agreed there was a low risk to the child. In fact, the doctor had not been consulted and was not of that opinion. The Court found the decision invalid on the grounds of procedural unfairness and held that the prejudicial contents of the report should have been shown to the appellant so that she could have an opportunity to answer them. *Daganayasi* represented a fundamental shift in attitude from the cases of the 1970s, but it should be noted that the watershed was not an administrative law revolution, but rather a re-evaluation of the position of migrants.<sup>27</sup>

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<sup>22</sup> *Pagliara v Attorney-General* [1974] 1 NZLR 86 (SC) and *Tobias v May* [1976] 1 NZLR 509 (SC). At this time, the New Zealand High Court was named the Supreme Court, which sat above the lower Magistrates Courts. In 1980, following the Royal Commission on the Courts Report 1978, the Supreme Court was renamed the High Court, and District Courts were established to replace the Magistrates Courts.

<sup>23</sup> *Ibid*, 511 Quilliam J.

<sup>24</sup> *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170 (CA) Lord Denning MR, applied in *Pagliara* above n 22, 94 Quilliam J.

<sup>25</sup> Sir Kenneth Keith notes a contrast with the role of ombudsman at that time. He states that the ombudsman reviewed revocation of permits much more effectively than the courts, in part because of the accumulation of experience and more extensive procedures available to the ombudsman: "Administrative Law Developments in New Zealand as Seen through Immigration Law" in Grant Huscroft and Michael Taggart (eds) *Inside and Outside Canadian Administrative Law* (University of Toronto Press, Toronto, 2006) 134 – 137.

<sup>26</sup> Above n 16.

<sup>27</sup> Sir Kenneth Keith "Administrative Law Developments" above n 25, 137 – 140. Discussed further below in section IVA.

In 1990, natural justice rights gathered added force from the enactment of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). That Act applies to acts done by the Legislature, Executive, and Judiciary, and affirms a range of rights, although it does not grant courts the power to override inconsistent legislation. Section 27(1)(a) of the Bill of Rights affirms the right of every person to “the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law”. Section 27(1)(b) affirms a concurrent right to apply for judicial review of such a decision. A majority of the Court of Appeal has recently held that the Bill of Rights guarantee of natural justice is at least equal to that required under administrative law.<sup>28</sup> The Executive’s respect for the Bill of Rights in the immigration context is evidenced by the Crown’s acceptance in *Attorney-General v Udompun* that immigration officials are subject to the requirements of s 27 of the Bill of Rights when making decisions about the grant of permits at the border.<sup>29</sup>

The law has since been challenged to take another leap forward and recognise not only the procedural rights of the would-be immigrant, but also the procedural rights of citizen children. Two recent Court of Appeal cases dealt with the removal from New Zealand of would-be immigrants who had children born in New Zealand: *Ye v Minister of Immigration*<sup>30</sup> and *Huang v Minister of Immigration*.<sup>31</sup> The *Ye* case concerned two families of Chinese citizens who had been in New Zealand on temporary permits and had failed in their applications for refugee status. As the children were born in New Zealand, they were automatically New Zealand citizens.<sup>32</sup> The *Huang* case also related to the removal of parents with New Zealand born children where the parents’ applications for refugee status had been unsuccessful. The issue was how the interests of the children should be taken into account in the decision-making process, when considering whether the parents should be removed following the expiry of their temporary permits. In particular, the focus was on the “humanitarian interview”,<sup>33</sup> a procedure that had been instituted by the immigration

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<sup>28</sup> *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, paras 11 – 18 (CA) Glazebrook and Hammond JJ.

<sup>29</sup> *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) McGrath, Glazebrook, William Young and O’Regan JJ, para 87. There was no attempt to make the possible argument that the Bill of Rights did not apply because the applicant in that case was at the relevant time undergoing immigration processing and had not been admitted to New Zealand.

<sup>30</sup> [2008] NZCA 291 (CA).

<sup>31</sup> [2008] NZCA 377 (CA).

<sup>32</sup> As citizens the children have “the right to be in New Zealand at any time”: s 3(1) Immigration Act 1987. The Citizenship (Amendment) Act 2005 has now removed the right to citizenship by birth (*jus soli*) and children born in New Zealand after 1 January 2006 inherit the most favourable immigration status of either of their parents (*jus sanguinis*).

<sup>33</sup> I discuss the development of the humanitarian interview procedure further below in the context of the dialogue between the courts and the other branches of government (section VI(A)). The humanitarian

service in the wake of *Tavita v Minister of Immigration*<sup>34</sup> to ensure that humanitarian considerations are taken into account immediately prior to removal.<sup>35</sup>

In *Ye*, there were a number of substantive arguments which I will deal with later. However, a major plank of the argument in that case was that the children had been denied their separate right to be heard in relation to their parents' removal. The five-Judge court<sup>36</sup> was split, resulting in three judgments. Mine was the only judgment in *Ye* to address the children's right to be heard (and the judgments in *Huang* did not mention the issue).<sup>37</sup> It was my view that the presumption of consistency with international law requires that, when a citizen child's parents are subject to a removal order, the views of the child ought to be ascertained in the same way as required for overstayer children under s 141B of the Immigration Act 1987.<sup>38</sup> The international law in question was art 12 of the United Nations Convention on the Rights of the Child (UNCROC), which requires States to give children an opportunity to be heard in matters affecting them. In the case of the two families at issue, I considered that the children had never been given the opportunity to exercise their right to be heard. Further, while the parents' interests had been considered on numerous occasions, the interests of the children had not been separately considered and, in particular, their

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interview is not the only, or even the primary, stage at which humanitarian considerations are taken into account. As soon as an immigrant is unlawfully in the country (that is, as soon as his or her permit expires) he or she is required to leave, but may appeal to a quasi-judicial tribunal, the Removal Review Authority. That authority has jurisdiction to make a decision on humanitarian grounds (s 47). By s 130 an application may also be made to the Minister of Immigration for a special direction. There are also other tribunals dealing with other matters. For example, the Residence Review Board has the power to hear appeals against the refusal of a visa officer or an immigration officer to grant an application for a residence visa or a residence permit (s 18B), while the Deportation Review Tribunal has the power to make orders quashing deportation orders (s 104).

<sup>34</sup> *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA). This case is discussed in more detail below in section V(A)(b).

<sup>35</sup> An amendment in 1999 meant that any appeal on humanitarian grounds to the Removal Review Authority (s 47) had to be instituted within 42 days of the person becoming unlawfully in New Zealand (that is, when the temporary permit expires), rather than subsequent to the making of a removal order, as had previously been the case. Subject to appeal to the High Court on a question of law, the Removal Review Authority's decision is final and cannot be reconsidered (s 51), although the right to judicial review remains if exercised within three months of the impugned decision (s 146A). In *Ye* above n 30 and *Huang* above n 31, the parents' appeal rights were either exhausted or had expired.

<sup>36</sup> The Court of Appeal usually sits as a panel of three Judges. However, s58D Judicature Act 1908 provides that the Court must sit as a full Court of five Judges to hear and determine: cases that are considered to be of sufficient significance to warrant the consideration of a full Court; any proceeding, case or question referred by the Court for hearing and determination by a full Court and any appeal from a decision of the Courts Martial Appeal Court.

<sup>37</sup> Chambers and Robertson JJ in *Ye* above n 30, para 547 left open the question of whether citizen children had any right to be heard earlier in the process, for example before the Removal Review Authority. They, however, took the view that no-one had any right to be heard at the time of removal.

<sup>38</sup> Section 141B of the Immigration Act requires an overstayer child to be represented by a parent or responsible adult in proceedings relating to the child's immigration status. The responsible adult is required to attempt to elicit the views of the child and make them known (s 141C(c)) and due weight must be given to those views by the decision-maker (s 141D(b)).



status as “hei haizi”,<sup>39</sup> the fact that they had never been to China and the length of time they had spent already in New Zealand.<sup>40</sup> Both *Ye* and *Huang* are currently subject to appeal before the Supreme Court. The extent of any rights to a hearing is one issue in those appeals.<sup>41</sup>

In another context, the Supreme Court<sup>42</sup> has shown itself willing take a hands-on approach where fair process rights are at stake. In *Discount Brands Ltd v Westfield (New Zealand) Ltd*<sup>43</sup> the Court took a relatively intrusive approach to review of a local council’s procedure in granting a resource consent, in order to ensure that it met the requirements of natural justice. That case involved the North Shore City Council’s decision not to notify publicly an application for resource consent, on the basis of statutory criteria set out in the Resource Management Act 1991.<sup>44</sup> In contrast to the Court of Appeal’s application of a *Wednesbury* standard,<sup>45</sup> the Supreme Court Judges held that this was a decision which should be carefully scrutinised.<sup>46</sup> Keith J went so far that one commentator has described his approach as a “correctness standard”.<sup>47</sup>

The extent to which the Supreme Court is willing to take a proactive approach to procedural issues was particularly evident in the case of Mr Zaoui, a Member of Parliament in Algeria, who had fled that country following a military coup.<sup>48</sup> Upon arrival in New Zealand in December 2002, Mr Zaoui was detained under s 128 of the

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<sup>39</sup> “Black children”, that is, children born in breach of China’s one child policy.

<sup>40</sup> At the time of the Court of Appeal judgment the children of the two families were aged between three and eleven years old. The United Nations Human Rights Committee has found that the length of time the family have spent in the host country is a significant factor to be taken into account in deportation decisions: see for example *Winata v Australia* (16 August 2001) CCPR/C/72/D/930/2000 and *Sahid v New Zealand* (11 April 2003) CCPR/C/77/D/893/1999.

<sup>41</sup> Discussed at n 161.

<sup>42</sup> The New Zealand Supreme Court was established in 2004 as New Zealand’s highest appellate Court pursuant to the enactment of the Supreme Court Act 2003. The Supreme Court replaced the Privy Council as New Zealand’s Court of final appeal.

<sup>43</sup> *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC).

<sup>44</sup> The relevant statutory criteria at the time of the authority’s decision required an application to be notified unless the consent authority was satisfied that the adverse effect on the environment for which consent was sought would be minor, s 94(2)(a), and unless written approval had been obtained from every person whom the council is satisfied may be adversely affected by the granting of the resource consent s 94(2)(b).

<sup>45</sup> *Discount Brands v Northcote Mainstreet Inc* [2004] 3 NZLR 619 (CA).

<sup>46</sup> *Discount Brands* above n 43, para 26 Elias CJ; paras 53-54 Keith J; para 116 Blanchard J; paras 147-150 Tipping J; para 178 Richardson J.

<sup>47</sup> Dean R Knight “A Murky Methodology: Standards of Review in Administrative Law” in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 180, 190.

<sup>48</sup> Relevantly, the decisions in *Zaoui v Attorney-General* [2005] 1 NZLR 666 (HC) and *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA and SC) addressed the issue of whether Mr Zaoui could be granted bail pending determination of his case (the Supreme Court ultimately granted bail), and *Zaoui v Attorney-General* [2004] 2 NZLR 339 (HC), *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (CA) and *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC) concerned judicial review of the security risk certificate.

Immigration Act. For the first ten months he was held in conditions akin to solitary confinement in a high security prison, and was only transferred to less onerous conditions following representations from his lawyers. Mr Zaoui's application for refugee status was initially declined, but he was subsequently granted refugee status after an appeal to the Refugee Status Appeals Authority in August 2003.<sup>49</sup> In the meantime, on 20 March 2003, the Director of Security issued a security risk certificate under s 114D of the Immigration Act, indicating that Mr Zaoui was seen as a threat to national security. The certificate could be relied upon to secure Mr Zaoui's removal from New Zealand, notwithstanding his refugee status. In *Zaoui v Attorney-General (No 2)*,<sup>50</sup> the Supreme Court was asked to assess a procedure proposed by the Inspector-General for Intelligence and Security<sup>51</sup> to review the certificate that was issued declaring Mr Zaoui a security risk. The Court held that the Inspector-General's role was statutorily limited to assessing the security criteria set out in s 144C of the Immigration Act 1987. However, the Court put a gloss on the statute, holding that, if the certificate was confirmed, the Minister was required to conduct a sufficiently thorough inquiry into Mr Zaoui's circumstances to ensure that New Zealand's non-refoulement obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) were fulfilled. It held that the three-day time frame for removal in s 114K of the Immigration Act did not apply to such an inquiry. One commentator has stated that: the Supreme Court in coming to that conclusion had "overridden or ignored the clear indications within the statutory scheme."<sup>52</sup>

Although *Zaoui (No 2)* could be classed as a fairness issue, the reasoning upon which the Court relied places it more comfortably under the umbrella of legality, and I therefore propose to return to it in more detail below. However, a final point is worth noting. In the High Court it was held that, on natural justice grounds, Mr Zaoui was entitled to a summary of the allegations against him.<sup>53</sup> This was against the protests of the Director of Security<sup>54</sup> that such a summary would prejudice the operations of

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<sup>49</sup> *Refugee Appeal No 74540* 1 August 2003. The RSAA is an independent quasi-judicial review body established in 1991 to determine appeals from decisions of the Refugee Status Branch of Immigration New Zealand, declining refugee status.

<sup>50</sup> *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC).

<sup>51</sup> The position of the Inspector-General of Intelligence and Security was established under the Inspector-General of Intelligence and Security Act 1996. The Inspector-General is entrusted with assisting the Minister responsible for New Zealand's intelligence and security agency to ensure that the activities of the agency complies with the law, and to ensure that complaints relating to that agency are properly investigated.

<sup>52</sup> Claudia Geiringer "Zaoui revisited" [2005] NZLJ 285, 288.

<sup>53</sup> *Zaoui v Attorney-General* [2004] 2 NZLR 339, para 171 (HC) Williams J.

<sup>54</sup> The Director of Security serves as the Chief Executive of the New Zealand Security Intelligence Service, and is appointed under the New Zealand Security Intelligence Service Act 1969.

the Security Intelligence Service.<sup>55</sup> The matter was briefly raised again in the Court of Appeal, and the Court reinforced the High Court's finding. It was stated that if, after the Inspector-General had reviewed all of the classified material, he was of the opinion that a fuller summary could have been provided to Mr Zaoui, then he should ensure that this was done.<sup>56</sup> This matter did not arise for consideration again in the Supreme Court.

## ***B Blurred borders***

The borders of procedural review are (of course) blurred. The paper's discussion of my judgment in *Ye* relating to the children's right to be heard could equally have been placed under the heading of "legality", as the basis for my view was not primarily the principles of natural justice, but the presumption of consistency with international law.

Another interesting procedural ground with substantive tendencies is the idea of legitimate expectation. In one manifestation, legitimate expectation simply requires that the decision-maker adhere to the policy or procedure that has been advertised to those subject to it, or at least give those affected fair warning and an opportunity to respond to any proposed changes.<sup>57</sup> This approach was picked up in *Daganayasi*, which also included a hint of something more, as Cooke J (as he then was) stated that the appellant had "a legitimate expectation of a favourable decision."<sup>58</sup> Despite this indication of a judicial leaning towards the more expansive ground of substantive legitimate expectation, the ground has remained problematic in New Zealand (as it has in Australia). However, the Privy Council seems to have endorsed it, at least in the context of promises made by the government in relation to Treaty of Waitangi settlements.<sup>59</sup> Even the notion of procedural legitimate expectation has not been much relied upon. Although the discussion in *Minister for Immigration and Ethnic Affairs v Teoh*<sup>60</sup> has been picked up in New Zealand,<sup>61</sup> it remains very much a

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<sup>55</sup> *Zaoui* (HC) above n 53, para 42 Williams J.

<sup>56</sup> *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690, para 72 (CA) Glazebrook J.

<sup>57</sup> *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 (PC), *R v Home Secretary, ex parte Khan* [1985] 1 All ER 40 (CA) and *R v Liverpool Corporation, Ex Parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, 308 (CA) Lord Denning MR.

<sup>58</sup> Above n 16 at 145. Richmond P and Richardson J, both delivering separate judgments, made no comment on this aspect of Cooke J's judgment, but both agreed with the Judge's conclusion that the principles of fairness required that the memoranda and reports of the medical referee should have been disclosed to the appellant or her solicitor before the decision was made to allow her a reasonable opportunity of answering them – see 132 and 149 respectively.

<sup>59</sup> *NZ Maori Council v Attorney-General* [1994] 1 NZLR (PC) 513, 525 Lord Woolf. See discussion in Helen Aikman QC "The Scope of Judicial Review – Scalpel or Chainsaw?" in *Judicial Review Intensive* (NZLS September 2007) 18 – 19.

<sup>60</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HCA).

background issue in the broad sweep of judicial review, tending to operate in an alternative or backup capacity.

Distinctions between grounds of review are also blurred in cases involving mandatory relevant considerations. New Zealand courts have not been shy to hold decision-makers to relevant considerations, even ones that are “implied,” rather than expressed by statute. In the leading case of *Fiordland Venison Ltd v Minister of Agriculture and Fisheries*, the Minister’s decision to consider a criterion outside of those identified in the statute in a licensing decision was given short shrift by the Court of Appeal.<sup>62</sup> The Court also noted that the Minister had failed to consider the relevant statutory consideration as to the stability of the game industry in the decision-making process. Often this ground will shade into fairness considerations. On the one hand, failure to consider a relevant factor, or the mistaken consideration of irrelevant factors, may be a result of the decision-maker’s breach of natural justice rights. Similarly, the omission could be a result of wilful blindness, the product of bias, or the effect of adherence to a pre-determined policy.

On the other hand, a failure to take into account the correct considerations may amount to a substantive failing in the sense that it will be an error of law or render the decision unreasonable. In this manifestation, as with substantive legitimate expectation, there is a risk of the courts intruding into the merits of a decision, traditionally a forbidden area for judges in judicial review. Arguments about leaving out relevant considerations, or taking into account irrelevant considerations are often as much about fact as they are about law. This has the effect of blurring the borders between fact and law. In *Fiordland Venison* the stability of the game industry could be viewed to be a factual matter. Moreover, Wild J in *Wolf v Minister of Immigration* held that the Deportation Review Tribunal had failed to take into account evidence on the “vital issue of the effect on the two children of their father’s deportation”<sup>63</sup>. In *Ye*, I noted a range of factual matters that pertained to the interests of the children that had not been considered, although my view on these matters was not shared by the other Judges.

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<sup>61</sup> As noted by Stephen Gageler “The Impact of Migration Law on the Development of Australian Administrative Law” (Paper presented at the Supreme Court and Federal Court Judges Conference, Hobart, 24 to 28 January 2009). See for example *Elika v Minister of Immigration* [1996] 1 NZLR 741 (HC).

<sup>62</sup> *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA). In that case the Court went so far as to grant a declaration that the appellant was entitled to a licence.

<sup>63</sup> *Wolf v Minister of Immigration* [2004] NZAR 414, para 72 (HC) Wild J.

There are also cases where a decision-maker has operated on a mistaken factual premise. It is not clear whether a mistake of fact is a ground of review of itself, although it clearly operates as a factor under all three of the major heads of review. For example, Cooke J was of the view that *Daganayasi* could be decided on two separate grounds of review. Cooke J argued that the Minister's decision could be deemed invalid either on the grounds of failure to give the appellant a chance to be heard, or on the grounds of the resulting mistake of fact, because the Minister had a mistaken impression of the risks to the child in that case.<sup>64</sup> The Hammond and Wilson JJ judgment in *Ye* could also be characterised as relying on mistake of fact – that is, the failure of the immigration officer to realise that the children were most likely to remain in New Zealand if their mother was removed.<sup>65</sup> Mistake of fact was also argued in conjunction with a relevant consideration argument in *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*. Here, Cooke P, for the Court, noted that to jeopardise validity on the ground of mistake of fact, the fact itself must either be established, or it must be an established and recognised opinion. He said, that it cannot be a mistake to adopt one of two differing views of the facts, if either may reasonably be held.<sup>66</sup> The comment does, however, appear to accept a mistake of fact as a ground of review.

If mistake of fact is indeed a separate ground of review in itself, then this serves to blur the boundaries between law and fact even further. It also creates other issues. Judicial review is intended to be “a relatively simple, untechnical and prompt procedure”<sup>67</sup> and is not well equipped with fact-finding processes.<sup>68</sup> It appears to be a universal trend in judicial review cases for a myriad of factual matters to be put forward under one or the other heads of review. This arguably jeopardises the very nature of the review procedure.

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<sup>64</sup> Richmond P and Richardson J declined to comment on the ground of mistake of fact – see at 132 and 149 respectively.

<sup>65</sup> Above n 30, para 404 Hammond and Wilson JJ.

<sup>66</sup> *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544, 552 (CA) Cooke P, citing *Secretary of State for Education and Science v Tameside Borough Council* [1977] AC 1014, 1030 (CA) Scarman LJ. The tendency of the New Zealand courts to see error of fact as an error going to substance or outcome rather than an error going to procedure is criticised in Woolf and others (eds) *De Smith's Judicial Review* (6<sup>th</sup> ed Sweet and Maxwell 2007), paras 11-120 as being contrary to the Privy Council decision in *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662, 671 (PC) Lord Diplock.

<sup>67</sup> *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348, 353 (CA) Cooke P.

<sup>68</sup> See comments in *Lab Tests* above n 3, paras 342 – 343 Hammond J.

#### **IV LEGALITY**

Legality has traditionally been seen as the true basis of judicial review.<sup>69</sup> Decision-makers can only act on the basis of their lawful powers and it is the responsibility of the courts to police the perimeter, and more importantly, to discover where, in fact, the perimeter is.

The modern understanding of substantive judicial review in New Zealand traces its roots to *Bulk Gas Users Group v Attorney-General*.<sup>70</sup> *Bulk Gas*, riding the wave of *Anisminic Ltd v Foreign Compensation Commission*,<sup>71</sup> marked the shift from traditional jurisdictional error to error of law. Faced with a privative clause, the judgment in *Bulk Gas* applied Lord Diplock's statement in *Re Racal Communications Ltd*,<sup>72</sup> holding that when Parliament confers a power on an administrative authority to decide a particular question, there is a presumption that this power is confined to answering the question as defined. If any doubt exists as to what the question may be, it is a matter for the courts to resolve "in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity."<sup>73</sup>

This conclusion was restated definitively in *Peters v Davidson*,<sup>74</sup> the four-Judge majority stating that error of law was a ground in and of itself and commenting that the idea of jurisdictional error was now essentially redundant.<sup>75</sup>

##### **A The Rising Tide: International law and human rights**

It is a basic truth of our political system that every person, including the government, is subject to the rule of law. But what about the rule of international law? The growth area in the judicial analysis of legality over the last thirty years has been the understanding of international legal obligations and this has been particularly so in the immigration arena. I mentioned above that the swift movement of the law in relation to the natural justice rights of immigrants was driven by a change in the general attitude towards migrants. Thought of previously as without rights or legitimate

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<sup>69</sup> Ibid, para 363 Hammond J.

<sup>70</sup> *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

<sup>71</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

<sup>72</sup> *Re Racal Communications Ltd* [1981] AC 347 (HL).

<sup>73</sup> Ibid, 382 – 383 Lord Diplock, quoted in *Bulk Gas* above n 70 at 133 Cooke J.

<sup>74</sup> [1999] 2 NZLR 164 (CA).

<sup>75</sup> Ibid, 180 – 181. The Court specifically contrasted its approach with the different approach taken in Australia in *Craig v State of South Australia* (1995) 184 CLR 163 (HCA).

expectations, the position of the immigrant has changed dramatically with the increase in international human rights treaties including the Protocol to the Refugee Convention,<sup>76</sup> the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>77</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>78</sup> and UNCROC.<sup>79</sup>

These international conventions have been bolstered in New Zealand by the fundamental values of the common law and by the explicit legislative directions in the Bill of Rights, a phenomenon described by Professor Taggart as the “double helix approach.”<sup>80</sup> The term “double helix” refers to the intertwining of the presumption of consistency with international obligations and the presumption of consistency with fundamental rights – in particular those contained in the Bill of Rights.<sup>81</sup>

Although New Zealand still describes itself as a dualist system<sup>82</sup>, the reality is that the relationship between international and domestic law is far from clear. New Zealand law treats international treaties as having to be specifically incorporated into domestic law before they have effect.<sup>83</sup> However, the common law customary international law applies domestically regardless of whether there has been incorporation by a domestic lawmaker (although, like the common law, this is subject to legislative override).<sup>84</sup>

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<sup>76</sup> Ratified in 1973.

<sup>77</sup> Ratified in 1973.

<sup>78</sup> Ratified in 1978.

<sup>79</sup> Ratified in 1993.

<sup>80</sup> Michael Taggart “Rugby, the Anti-apartheid Movement, and Administrative Law” in Rick Bigwood (ed) *Public Interest Litigation* (Lexis Nexis, Wellington, 2006) 82.

<sup>81</sup> 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.

<sup>82</sup> Dualism is the theory that the spheres of domestic and international law are separate and that international law must be incorporated into domestic law before it can have effect within a State. Under a monist system the opposite is the case and international treaty law becomes national law at the time it is ratified by the State.

<sup>83</sup> In New Zealand, as treaties are signed and ratified by the Executive, one view is that their incorporation by courts is undemocratic (despite the more recent practice of putting some treaties before Parliament for consideration). The other view (to which I subscribe) is that it is not unreasonable to require the Executive to abide by obligations it has entered into, at least where these affect individual rights. For discussion see Susan Glazebrook “Filling the Gaps” in Rick Bigwood (ed) *The Statute: Making and Meaning* (Lexis Nexis, Wellington, 2004) 175 – 176, Treasa Dunworth “Public International Law” [2007] NZ Law Rev 217, 221, Melissa Poole “International Instruments in Administrative Decisions: Mainstreaming International Law” (1999) 30 VUWLR 91, 107 and Lord Steyn “Democracy Through Law” in (New Zealand Centre for Public Law Occasional Paper-No 121 2002) 8.

<sup>84</sup> See discussion in Treasa Dunworth “The rising tide of customary international law: will New Zealand sink or swim?” (2004) 15 PLR 36 and Treasa Dunworth “Hidden Anxieties: Customary International Law in New Zealand” (2004) 2 NZJPIL 67. See also Ben Keith “Seeing the World

Further, a strong presumption of consistency of statutes with international law, including unincorporated treaties, has arisen.<sup>85</sup> The engrafting of international and other human rights law requirements onto discretions has been instrumental in breaking down the traditional dividing line between domestic and international law and between questions of law and the exercise of discretionary power.<sup>86</sup>

The influence of international law has placed limitations on the traditional prerogative of the Executive to determine the fundamental questions as to who can transverse the borders of the state, and who can remain in New Zealand and under what conditions.<sup>87</sup> There has also been a shift in focus and the rights of those seeking either refugee status or a permit to stay in New Zealand are now firmly within the spotlight of the courts. The rights and interests of family members, in particular citizen children, are considerations that occupy the minds of immigration officers and members of the judiciary alike.<sup>88</sup>

a) *Phase one: Cooke J dips his toe in the water (and finds it a bit cold)*

The presumption of consistency with international obligations had an inauspicious start<sup>89</sup> in the New Zealand courts in the controversial context of the 1981 Springbok Tour.<sup>90</sup> In *Ashby v Minister of Immigration*,<sup>91</sup> where the decision of the Minister of Immigration to grant temporary permits to the South African rugby team members was under judicial review, the presumption was rejected by the Court of Appeal. In

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Whole: Understanding the Citation of External Sources in Judicial Reasoning” in Claudia Geiringer and Dean R Knight above n 47, 163. See also *Ye* above n 30, para 89 Glazebrook J and *Zaoui (No 2)* above n 56, para 34 Glazebrook J.

<sup>85</sup> John F Burrows *Statute Law in New Zealand* (3 ed, Lexis Nexis, Wellington, 2003) 341 – 343.

<sup>86</sup> Michael Taggart “Proportionality, deference, Wednesbury” in NZLS *Judicial Review Intensive* (September 2007) 27-28.

<sup>87</sup> See Lord Atkin’s classic statement of the Executive’s power in *Attorney-General (Canada) v Cain; Attorney General for Canada v Gilhula* [1906] AC 542, 546 (PC) Lord Atkin.

<sup>88</sup> Sir Kenneth Keith “Administrative Law Developments” above n 25, 148 and 149. See for example *Huang* above n 31, *Ye* above n 30

<sup>89</sup> Or perhaps rebirth. Sir Kenneth Keith has expounded the view that the presumption is much older, tracing its use in New Zealand back at least a hundred years: “The Role of the Courts in New Zealand in Giving Effect to International Human Rights – with Some History” (1999) 29 VUWLR 27, 37.

<sup>90</sup> The national obsession with rugby in both South Africa and New Zealand generated particular friction in New Zealand the 1970s and early 1980s as tours went ahead despite international boycotting of sporting contacts with South Africa during apartheid. When successive New Zealand governments refused to intervene in the New Zealand Rugby Football Union’s decision-making process, the anti-tour movement sought recourse to the courts. The 1985 tour was successfully stalled by a private law action brought under the constitution of the Rugby Union which resulted in an interim injunction preventing the All Black team from leaving New Zealand, and effectively put an end to the tour: *Finnigan v New Zealand Rugby Football Union (No 1)* [1985] 2 NZLR 159 (HC and CA) and *Finnigan v New Zealand Rugby Football Union (No 2)* [1985] 2 NZLR 181 (HC). See Michael Taggart above n 80, 84 - 98.

<sup>91</sup> *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).



*Ashby*, Cooke J (as he then was), who would later champion the international cause in *Tavita*,<sup>92</sup> held that it is only when a statute expressly or by implication identifies a consideration as one to which regard *must* be had that the courts can intervene for failure to take it into account. Despite the rejection of the ground, the seed of the presumption of consistency was sown. Cooke J stated that he would not exclude the possibility that a certain factor might be of such overwhelming or manifest importance that the courts might hold that Parliament could not possibly have meant to allow it to be ignored. In his view, New Zealand’s obligations under CERD did not reach that level of importance.<sup>93</sup>

By contrast, Richardson J took a more reticent approach and held that s 14 of the Immigration Act 1964 was a clear and unambiguous discretion which left no room for interpretation in accordance with the international obligations under CERD.<sup>94</sup> The widely cast discretionary provision was the deciding factor for Richardson J. Relying on the fact that immigration policy “is a sensitive and often controversial political issue”, Richardson J held that the considerations that must be taken into account by decision-makers exercising the broad discretionary powers that were provided by statute ought not to be tampered with by the courts.<sup>95</sup> Somers J demonstrated a similar reluctance to rely on the presumption of consistency, stating that to rely on the presumption would “not be to interpret but to legislate.”<sup>96</sup>

In a similar vein, in the case of *D v Minister of Immigration*<sup>97</sup> the Court did not feel it was able to give any effect to New Zealand’s international obligations under the Refugee Convention, despite being clearly aware of them. Rather, the judgment contained a rather pointed suggestion that the government reconsider the legislation in question. In that case the appellants were Pakistanis who were seeking refugee status in New Zealand, but had not been granted security clearance by the New Zealand police and were therefore held in detention. Being unlawfully in New Zealand, the Immigration Act 1987 required that they be either released, or removed from New Zealand within 28 days. The Court held that the detention was lawful, but noted there was a “deficiency” in the legislation, as it lacked a specific provision for detention pending determination of refugee status. Detention could only be with a view to removal, rather than with a view to determining status. Further, the determination of refugee status, required to enable persons claiming refugee status to stay in New

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<sup>92</sup> Above n 34.

<sup>93</sup> *Ashby* above n 91, 225 – 226 Cooke J.

<sup>94</sup> *Ibid*, 229 Richardson J

<sup>95</sup> *Ibid*, 231 Richardson J.

<sup>96</sup> *Ibid* at 232 Somers J.

<sup>97</sup> *D v Minister of Immigration* [1991] 2 NZLR 673 (CA).

Zealand, would be unlikely to be carried out within the prescribed 28 day period.<sup>98</sup> The outcome of that decision was a clear breach of the non-refoulement provisions in the Refugee Convention, as it allowed the removal from New Zealand of refugee claimants. Professor Hathaway has recently described this case as a blot on New Zealand's otherwise good record in refugee decisions.<sup>99</sup>

b) *Phase two: Taking the plunge*

The application of international obligations in the immigration law context did not founder at *Ashby* and *D*. In fact, the New Zealand legal system has become increasingly malleable with respect to international obligations.<sup>100</sup> Over the following decade, there was a perceptible shift in the legal mood and the idea that international obligations had to be taken into account was endorsed in *Tavita*. The case concerned the execution of a warrant to remove Mr Tavita from New Zealand. He had appealed to the Minister of Immigration to cancel the warrant on humanitarian grounds, but the Minister had declined to do so. Shortly after that decision, Mr Tavita's daughter was born in New Zealand. Two years later, the Immigration Service sought to execute the removal warrant. In the High Court Mr Tavita brought an application for an interim order under s 8 of the Judicature Amendment Act 1972, prohibiting the Minister from requiring him to leave New Zealand, and from removing him or causing him to be removed from New Zealand. McGechan J dismissed the application, but made an interim order for a stay of removal pending appeal. Mr Tavita subsequently appealed the order refusing interim relief. Ultimately, the Court of Appeal adjourned the appeal so that an application could be made for reconsideration in light of the altered circumstances. However, the discussion in the judgment was squarely focussed on the Minister's argument that he was entitled to ignore international obligations in immigration decision-making. The obligation in question was that in art 3(1) of UNCROC which provides that in all public actions concerning children, the best interests of the child shall be a "primary consideration".

Although the Court denied that it was making any decision on the extent to which international obligations were to be taken into account by domestic decision-makers, some not so subtle hints regarding the significance of international obligations were given by the Court. Cooke P, for the Court, chastised the Minister of Immigration and

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<sup>98</sup> Ibid, 676 Cooke P.

<sup>99</sup> James C Hathaway "Leveraging Asylum" (Address to the New Zealand Legal Research Foundation Conference Human Rights at the Frontier: New Zealand's Immigration Legislation – an International Human Rights Law Perspective Auckland, 12 September 2008).

<sup>100</sup> Claudia Geiringer "International Law through the lens of Zaoui: Where is New Zealand at?" (2006) 17 PLR 300.

commented that the Minister's argument was "unattractive". He was of the view that "legitimate criticism could extend to the New Zealand courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them."<sup>101</sup> Importantly, the Court observed that, under the two international instruments relevant to that case (UNCROC and the ICCPR), "the rights of the family and the child are the starting point".<sup>102</sup> Moreover, Cooke P made the prophetic statement that the law as to the bearing on domestic law of international human rights instruments was undergoing evolution. As the warrant was cancelled on reconsideration, however, the Court was not required to make any final determination on these issues.

In 1996, two years after *Tavita*, the Court of Appeal handed down a judgment that further clarified the issue. *Puli'uvea v Removal Review Authority*,<sup>103</sup> like *Tavita*, concerned overstayers who had New Zealand citizen children. The Court emphasised that, in accordance with UNCROC, the child's interests were to be considered as *a* but not *the* primary consideration. Rather, it was held that, in the immigration context, "the starting point must be the position of the person who is unlawfully in the country".<sup>104</sup> As in *Tavita*, the Court avoided making a definite ruling on the question of international obligations, as it held that any such obligations had been adequately addressed in the decision-making process. However, it was clear that the Court's commitment to international treaties was solidifying, as it was stated that "the Court should strive to interpret legislation consistently with the treaty obligations of New Zealand."<sup>105</sup>

The issue arose a third time in *Rajan v Minister of Immigration*,<sup>106</sup> where a Fijian couple had dishonestly obtained residence in Australia and then relied on their Australian residency permits to obtain residency in New Zealand. They had two children, one born in Australia and one in New Zealand. When their permits were revoked, the couple applied for judicial review in the High Court as well as appealing to the Deportation Review Tribunal. When the matter came on appeal, the Court of Appeal shied away from making a binding determination, concluding that the concerns raised would be met in the consideration of the Deportation Review Tribunal. However, the Court did not hesitate to state that there was a presumption of

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<sup>101</sup> *Tavita* above n 34, 265 – 266 Cooke P.

<sup>102</sup> *Ibid*, 265 Cooke P.

<sup>103</sup> *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 (CA).

<sup>104</sup> *Ibid*, 517 Keith J.

<sup>105</sup> *Ibid*, 516 – 517 Keith J.

<sup>106</sup> *Rajan v Minister of Immigration* [1996] 3 NZLR 543 (CA).

statutory interpretation that, so far as its wording allows, legislation should be read in a way which is consistent with New Zealand's international obligations.<sup>107</sup>

Following *Rajan*, the presumption of consistency reached a high-water mark in two Court of Appeal cases in the late 1990s, both outside of the immigration context but necessary to note for our discussion.<sup>108</sup> In *New Zealand Airline Pilots' Association v Attorney-General*<sup>109</sup> the issue was whether a judicial officer, issuing a search warrant in relation to the investigation of a plane crash, had to have regard to the Chicago Convention on International Civil Aviation. The Court identified a series of factors that were relevant to the question as to whether the legislation in question could be interpreted consistently with the Convention. These factors included the clarity of the national statute, the "indeterminacy" of the treaty obligation, its "very limited binding force", and its "relative unimportance" compared to other international obligations (suggesting the presumption could have more force in cases where the international obligations in question were of more significance).

Important international obligations were at stake again in *Sellers v Maritime Safety Inspector*.<sup>110</sup> This case concerned the Director of Maritime Safety's power to issue guidelines in regards to the safety equipment that was to be carried by vessels departing from New Zealand. Mr Sellers protested "on religious grounds" against the Director's requirement that he carry a radio: "[m]y maritime art is based on the mystery of the sea. It is religious to me, being alone, simple and strong with the sea – not with radios."<sup>111</sup> In a decision written by Keith J, the Court of Appeal found for Mr Sellers. It held that the legislation in question could be read consistently with the international law of freedom of the high seas, and so the Director's ability to regulate the equipment carried was limited.<sup>112</sup> The judgment stated:<sup>113</sup>

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<sup>107</sup> Ibid, 551 Henry and Keith JJ. The Rajan family's case came before the courts again when the Minister refused to grant a character waiver that would allow them to qualify for work permits. An application for an extension of time to review the Minister's decision was declined in the High Court and the Court of Appeal. Both courts considered the merits of the application were not strong because the Minister had considered the application, including the best interests of the children. In that case, no information was put forward to show the children would have any particular difficulties if their parents took them to Fiji: *Rajan v Minister of Immigration* (2 May 2003) HC AK M465-PL03; [2004] NZAR 615 (CA). The commitment to international law evidenced in *Rajan* was, however, applied in *Wolf v Minister of Immigration* above n 63 in which the High Court overturned a decision of the Deportation Review Tribunal on the basis that it had not correctly evaluated the interests of the children involved.

<sup>108</sup> The high tide in New Zealand came several years after the wave crested in the UK with *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 (HL).

<sup>109</sup> *New Zealand Airline Pilots' Association v Attorney-General* [1997] 3 NZLR 269 (CA).

<sup>110</sup> *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA).

<sup>111</sup> Ibid, 46 Keith J.

<sup>112</sup> It has been noted that Keith J could equally have come to the opposite conclusion on the basis that the international law had evolved to the point where, having regard to the continued development of coastal State rights and the need to ensure safety on the high seas, a State would be justified in

... for centuries national law in this area has been essentially governed by and derived from international law with the consequence that national law is to be read, if at all possible, consistently with the related international law. That will sometimes mean that the day-to-day (or at least year-to-year) meaning of national law may vary without formal change.

c) *Phase three: Things going swimmingly*

The landmark case in the Supreme Court of *Zaoui v Attorney-General (No 2)*<sup>114</sup> represents the first and only judicial offering on the presumption of consistency from New Zealand's highest court. This case represents a sophisticated strengthening of the presumption of consistency with international law via convergence with other common law principles and the Bill of Rights.

The Supreme Court judgment was one of a string of cases regarding Mr Zaoui, who was, as noted earlier, granted refugee status in New Zealand. As noted above, the Director of Security had issued a security risk certificate under s 114 D of the Immigration Act indicating that Mr Zaoui was seen as a threat to national security. The criteria for concluding that a threat existed was that in s 114C(6) of the Immigration Act, which in turn referred to both s 72 of the Act and art 33.2 of the Refugee Convention. Article 33.2, which would become central to the case, states that protection may not be claimed by a refugee:

whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Four days after the certificate was issued, the Minister of Immigration made a preliminary decision to rely upon it. Mr Zaoui then applied for review of the certificate (s 114I) which had the effect of prohibiting his removal while the review process was under way (s 114H(3)). The review has to be undertaken by the Inspector-General of Intelligence and Security (the Inspector-General). The Inspector-General made an interlocutory decision as to the manner in which he intended to review the certificate and the scope of review. Mr Zaoui challenged that decision in the High Court. Two main issues were at stake: first, whether the Director of Security was obliged to provide a summary of security information to Mr Zaoui,<sup>115</sup>

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imposing regulation: Gerard van Bohemen "Commentary: Sir Ken's Contribution to the Making of International Law – Observations from a Practitioner" in Claudia Geiringer and Dean R Knight above n 47, 148.

<sup>113</sup> Above n 110, 62 Keith J.

<sup>114</sup> Above n 50.

<sup>115</sup> Discussed above at n 51.

and second, whether the Inspector-General was required to have regard to international human rights standards, and in particular the Refugee Convention.<sup>116</sup>

The Crown submitted that it was not the Inspector-General's role to consider issues relating to removal, but only issues relating to security. It was therefore not appropriate for him to take into account international human rights instruments, including the Refugee Convention. It was argued that those considerations should be taken into account by the Minister of Immigration, who would make the decision whether to remove Mr Zaoui from New Zealand if the security risk certificate was upheld.

In the Court of Appeal, I wrote the main judgment, with which Anderson P agreed, and William Young J agreed in part (although both writing separate judgments). In my judgment I concluded that the Inspector-General's role was limited to determining whether the security criteria upon which the certificate relied were fulfilled. This meant that the Inspector-General was not to consider human rights considerations that might affect the decision as to whether to remove Mr Zaoui from New Zealand.<sup>117</sup> However, focusing on the fact that s 114C(6) of the Immigration Act, which sets out the "relevant security criteria", refers to the Refugee Convention, I held that this statutory provision required that, when determining whether there were reasonable grounds for regarding Mr Zaoui as a danger to the security of New Zealand, New Zealand's obligations under the Refugee Convention had to be considered.<sup>118</sup> The Court was unanimous on those points. Anderson P commented in his judgment that it was "unthinkable that the Legislature intended New Zealand's state obligations in relation to the Convention to be read down by implication".<sup>119</sup>

Anderson P and I also held that art 33.2 of the Convention required a balancing of the seriousness of the risk to national security with the possible consequences to Mr Zaoui of confirming the security risk certificate.<sup>120</sup> We concluded that the security criteria in s 114C(6) of the Immigration Act would be met only if there were objectively reasonable grounds, based on credible evidence, that Mr Zaoui constituted

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<sup>116</sup> In addition, there was an interesting issue as to whether the procedures could be reviewed at the interlocutory stage. The High Court and the Court of Appeal considered that it was appropriate to undertake such a review. See *Zaoui* above n 53, paras 67 – 73 Williams J, *Zaoui* above n 56, para 19 Anderson P, para 106 Glazebrook J, para 186 William Young J. The issue as to whether judicial review was premature because of the blanket application of a ripeness doctrine was not raised in the Supreme Court. However, the Supreme Court seemed to implicitly accept this finding by noting that the Inspector General had yet to resume the process of review of the interlocutory decision.

<sup>117</sup> *Ibid*, paras 112 – 117 Glazebrook J.

<sup>118</sup> *Ibid* para 123 Glazebrook J.

<sup>119</sup> *Ibid* para 25 Anderson P.

<sup>120</sup> *Ibid* para 23 Anderson P, paras 153 – 157 Glazebrook J.

a danger to the security of New Zealand of such seriousness that it would justify sending a person back to persecution. The threshold was high and had to involve a danger of substantial threatened harm to the security of New Zealand. We also took the view that there must be a real connection between Mr Zaoui and the identified danger and that an appreciable alleviation of that danger must be capable of being achieved through his deportation.<sup>121</sup> William Young J preferred not to comment on the suggested balancing test in relation to meeting the security criteria.<sup>122</sup>

That balancing test was challenged by the Crown in the Supreme Court. Following a careful analysis of art 33.2, using the interpretation techniques mandated by the Vienna Convention on the Law of Treaties 1969,<sup>123</sup> that Court concluded that no balancing test was intended under the Refugee Convention.<sup>124</sup> It was only necessary that the person in question is, on objectively reasonable grounds, thought to present a threat, and that the threatened harm is substantial.<sup>125</sup> The Supreme Court, however, agreed with the Court of Appeal's finding that it was not the Inspector-General's role to look at the consequences of confirmation of the security risk certificate, but that his role was only to assess the application of the security criteria.<sup>126</sup> This did not stop the Supreme Court engrafting a number of procedural requirements for the Minister to adhere to before any refoulement could take place.<sup>127</sup>

The question then tackled by the Supreme Court was how these protections were to be implemented.<sup>128</sup> It thus turned to the decision-making process that would follow if the Inspector-General confirmed the security risk certificate. The legislation provided that the Minister of Immigration would have three days to decide whether or not to rely on the certificate for deportation (s 114K). If the Minister then certified to the

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<sup>121</sup> Ibid, para 26 Anderson P, para 169 Glazebrook J.

<sup>122</sup> Ibid, para 196 William Young J.

<sup>123</sup> The Vienna Convention on the Law of Treaties 1969 states the rules of customary international law for the interpretation of treaties. See generally, *Fothergill v Monarch Airlines Ltd* [1981] AC 251,282-283 (HL) Lord Diplock and *Edwards v United States of America* [2002] 3 NZLR 222, para 26 (CA) Keith J.

<sup>124</sup> This approach is contrary to the view of Lauterpact and Bethlehem who argue that a requirement of proportionality is required under the Convention. See *Ye* above n 30, para 154 Glazebrook J.

<sup>125</sup> The argument that the Refugee Convention had no application was not renewed by the Crown in the Supreme Court.

<sup>126</sup> One of counsel's arguments on this head, which had not been advanced in the Court of Appeal, was that the Refugee Convention provision allowing refoulement was void (as being contrary to jus cogens) if there was a risk of torture. The Immigration Act would as a consequence incorporate the "amended" version of the Refugee Convention Treaty. This meant, so the argument went, that the Inspector-General was obliged to consider the issue of torture. The Supreme Court, however, held that, while there was overwhelming support for the view that the prohibition against torture was jus cogens, there was no support for the proposition that the prohibition on refoulement to face torture had that status.

<sup>127</sup> *Zaoui (No 2)* (SC) above n 50, para 93 Keith J.

<sup>128</sup> Ibid, paras 75 – 77 Keith J.

Governor-General that the person in question was a threat to national security, the Governor-General could, by Order in Council, order the deportation of that person (s 72). There was nothing, the Supreme Court said, to prevent the Minister and the Governor-General from having regard to factors militating against deportation. Section 72 was therefore to be read subject to the Bill of Rights,<sup>129</sup> the CAT, and the ICCPR.

The “double helix”<sup>130</sup> was working overtime, and as a result major substantive and procedural requirements were engrafted onto s 72 in order to meet the obligations it entailed. The substantive requirement was that a refugee could not be deported if it would mean that the deportee would be returned to a country where he or she would be in danger of torture or arbitrary deprivation of life.<sup>131</sup> The procedural aspects read in were:<sup>132</sup>

- (a) There is no pressing prescriptive time requirement under s 72 for the Minister to make his decision. The Court stated that “those charged with the responsibility, while having regard to the purpose stated in s 114A(f) that a decision can when necessary be taken quickly and effectively, should have adequate time to address the issues of fact and judgment involved”;
- (b) The bar on the Minister’s obligation to give reasons when confirming the certificate<sup>133</sup> does not apply to decisions under s 72; rather, the general right to have reasons on request found in s 23 of the Official Information Act 1982 applies, although there may be applicable provisions under that Act limiting the statement of reasons; and
- (c) The right to natural justice affirmed in s 27 of the Bill of Rights and found in the ICCPR would provide procedural protection under s 72.

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<sup>129</sup> Section 9 of the Bill of Rights Act 1990 provides that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

<sup>130</sup> See discussion at n 80

<sup>131</sup> I note, however, that the Crown had throughout accepted that it was obliged to comply with the relevant international obligations protecting Mr Zaoui from return to torture or arbitrary execution.

<sup>132</sup> *Zaoui (No 2)* (SC) above n 50, para 92 Keith J.

<sup>133</sup> Section 114K(7) of the Immigration Act states that the Minister is not obliged to give reasons for his or her decision to rely on a security risk certificate, and that s 23 of the Official Information Act 1982, which provides that where a department or Minister of the Crown or organisation makes a decision or recommendation in respect of a person, that person shall, in certain circumstances, have the right of access to the reason for the decision affecting that person, does not apply in respect of the decision.



In the event, Mr Zaoui's case never reached this stage of proceedings, so the Supreme Court's new procedures have not been tested. Mid-way through the Inspector-General's hearing, the security risk certificate was withdrawn as a result of a settlement reached between the parties,<sup>134</sup> and Mr Zaoui remained in residence in New Zealand as a refugee.

Like the procedural aspects of the *Zaoui* litigation, the Supreme Court's judgment on the question of bail drew deeply on the fundamentals of the both the common law and international law.<sup>135</sup> The question for the Court was whether bail could be granted under the High Court's inherent jurisdiction, and its answer was an unequivocal yes. This was despite the fact that the statute appeared to envisage that there should be detention during what was expected to be a relatively quick determination of the detainee's status. The Court said that clear statutory wording would be required to oust the inherent jurisdiction of the High Court because that inherent jurisdiction protects the fundamental right of the individual to be free from detention, and ensures fulfilment of New Zealand's international obligations under the Refugee Convention.<sup>136</sup> The Court showed a willingness to engage with the Refugee Convention – determining that art 31.2 “plainly contemplates that individuals who are detained should be entitled to challenge their detention” and bolstered it with the common law's strong protection of the basic liberty of the individual.<sup>137</sup> Another example of the two sides of the “double helix”<sup>138</sup> combining to produce a doubly reinforced presumption of statutory interpretation was thus seen in the judgment.

The Supreme Court's view on this issue was so strong that it not only held that jurisdiction existed to grant bail, but also took it upon itself to exercise that jurisdiction. After a further hearing that occurred shortly after the main bail judgment was handed down, the Court released Mr Zaoui on bail.<sup>139</sup> The bail decision shows a willingness on the part of the Court not only to impose substantive limitations where important rights are at stake, but also to act directly to ensure that those rights are protected.

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<sup>134</sup> 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> (last accessed 3 March 2009).

<sup>135</sup> *Zaoui v Attorney General* [2005] 1 NZLR 577 (SC).

<sup>136</sup> *Ibid*, paras 44, 51 and 52 Elias CJ.

<sup>137</sup> *Ibid*, para 44 Elias CJ.

<sup>138</sup> See discussion above at n 80.

<sup>139</sup> *Zaoui* above n 135, para 100.

d) *Phase four: Rocking the boat*

The evolution from *Ashby* to *Zaoui* in the immigration sphere demonstrates the courts taking up the mantle of the protection of human rights and fundamental freedoms within their judicial review role. Without doubt, the influence of international law in New Zealand's domestic setting has increased hugely.<sup>140</sup> However, it has been suggested that there are indications that the impetus of this evolution is waning.

One of the changes noted by Claudia Geiringer is the departure of one of New Zealand's pre-eminent jurists, Sir Kenneth Keith, who now sits on the International Court of Justice. Geiringer comments:<sup>141</sup>

It is probably no coincidence that the dramatic swell in references to international law in the New Zealand Law Reports in the period 1996-2005 documented above coincides almost exactly with the period of his Honour's tenure on the Bench.

Given that *Zaoui (No 2)* was the last contribution of Sir Kenneth Keith to New Zealand's jurisprudence, Geiringer says that it is less clear whether the same approach will hold true with the current members of the Supreme Court.<sup>142</sup>

Two recent decisions of the Court of Appeal may show a developing uncertainty in the jurisprudence. I have outlined the procedural issue in *Ye* and *Huang* above. I now return to the ongoing saga for a discussion of the substantive issues, with the brief reminder that we are concerned with Chinese parents, threatened with removal from New Zealand, whose children are New Zealand citizens.

In *Ye*, it was argued that the changing domestic and international views of children's rights require their welfare and best interests to be the first and paramount consideration in any removal decision affecting their parents. If that were the case, the decision to remove the parents could not stand. As a secondary argument, it was submitted that, even if the test was that set out in *Puli'uvea*<sup>143</sup> was followed, removing the parents could result only in a detrimental outcome for the children. If they were to be taken to China with their parents, the children, born in breach of China's one child

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<sup>140</sup> In Claudia Geiringer's article "International law through the lens of *Zaoui*" above n 100 at 309 she states that the phrase "international law" appears in only eight cases in the NZLR during the period 1966 – 1975, 15 from 1976 – 1985, 20 from 1986 – 1995 but 63 from 1996 – 2005. See also Ben Keith above n 84 at 163 – 179.

<sup>141</sup> *Ibid*, 310.

<sup>142</sup> *Ibid*, 319.

<sup>143</sup> Above n 103

policy, could be subject to educational and welfare restrictions. If the children were to remain behind in New Zealand (the declared intention of at least one of the families), they would be deprived of their parents at a young age.

In the High Court, Baragwanath J focussed not on international obligations, but rather on what he said was a common law duty on the State to protect its citizens.<sup>144</sup> He considered that the domestic equivalent of the presumption of consistency – the principle of legality – required the Court to secure that duty. The Judge’s decision can thus be seen to represent an interesting manifestation of Professor Taggart’s “double helix” approach. Baragwanath J said that, were he free to do so, he would align the *Puli’uvea* test with the test provided by s 47 of the Immigration Act. Section 47(3) states that appeals against deportation may only be brought where there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from the country, and that it would not be contrary to the public interest to allow them to remain. However, the Judge felt he was bound by previous authority to apply the more limited *Wednesbury* review standard under which the Court was not authorised to consider the weight given by the decision-maker to the interests of the children.<sup>145</sup>

As noted earlier, there were three different judgments delivered in the Court of Appeal. The Court was unanimous, however, on the first argument. It held that the test in *Puli’uvea* remained the correct test. Under international law, the best interests of the child are a primary (not the paramount) consideration. Further, the domestic standard of paramountcy did not extend to the Immigration Act.<sup>146</sup>

The judgments then diverged. I concluded that, as a matter of international law, weight is built into the *Puli’uvea* standard – of a “primary consideration”.<sup>147</sup> The best interests of the children were, however, to be weighed against what is another fundamental of international law – the right to control borders. As a guide, I considered that the balance would not favour removal where a significant and sustained breach of a child’s basic human rights (including the child’s economic, social and cultural rights) was likely if the parents were removed.<sup>148</sup> I rejected the

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<sup>144</sup> *Ding v Minister of Immigration* (2006) 25 FRNZ 568 (HC). Note, that at High Court level Ms Ding, the mother of the Ye children, had brought judicial review proceedings. The children were joined as plaintiffs to the judicial review proceedings in the High Court and the children themselves appealed against this decision. Their surname was Ye, hence the change of name at Court of Appeal level.

<sup>145</sup> *Ibid*, para 280 Baragwanath J.

<sup>146</sup> *Ye* above n 30, paras 65 – 78 Glazebrook J.

<sup>147</sup> *Ibid*, para 88 Glazebrook J. I will return to the issue of assessing weight below in relation to the topic of intensity of review.

<sup>148</sup> *Ibid*, para 130 Glazebrook J.

Crown's argument that it was the parents' choice whether or not to take their children with them, rather than a "choice" forced on them by Crown action.<sup>149</sup> Like Baragwanath J, I considered the children's citizenship rights to be an important factor in the equation, although such rights played a different role in my analysis. I concluded that the child's citizenship rights gave an absolute right to remain in New Zealand and therefore to enjoy all the advantages of citizenship.<sup>150</sup> The children's citizenship rights were thus to be separately identified and weighed when an immigration officer considered the best interests of the child. Lesser disadvantages to citizen children than those in the case of overstayer children could mean the parents should not be removed.<sup>151</sup>

I held the humanitarian interview process to be a legitimate way of taking into account New Zealand's international law obligations,<sup>152</sup> even though there could be other ways of doing so. From the legislative history, I also thought it clear that the 1999 amendments had been passed in knowledge of, and thus tacit approval, of that process. I also considered, based on the Supreme Court's approach in *Zaoui (No 2)*<sup>153</sup> of engrafting procedural requirements onto statutory wording to ensure that international obligations are properly considered, that a process which specifically addressed the situation of any children, such as the humanitarian interview, was necessary before removal. Such a process was required to ensure that there were no humanitarian or international law impediments to any removal.<sup>154</sup> While there was no need, at the time of removal, to review decisions that had been made earlier in the process, including decisions by the Removal Review Authority, any updating information should be considered before any removal took place. Additionally, there could well be cases where humanitarian considerations had never been taken into account at any time prior to the commencement of the removal processes. I would have thus returned both cases to the Immigration Service for reconsideration.

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<sup>149</sup> In the recent case of *Minister of Immigration v Al Hosan* [2008] NZCA 462 the Court considered the dilemma that arises where there are two or more options available to a family where one of the parents is to be removed from New Zealand – in that case the options for the wife and children were to accompany the father to Jordan or to remain in New Zealand without him. The Court stated that: "the fact that two unattractive options are available does not diminish their unattractiveness" and held that the decision-maker (the Deportation Review Tribunal) was required to take that into account: at [62].

<sup>150</sup> In this I relied in part on *Kaufusi v Minister for Immigration and Ethnic Affairs* (1985) 70 ALR 476, 482 – 483 (FCA) and Murphy J's judgment in *Pochi v Macphee* (1982) 151 CLR 101, para 11 (HCA) Murphy J. For discussion of the judicial articulation of citizenship rights in New Zealand see Doug Tennant "Citizenship of New Zealand" [2009] NZLJ 26.

<sup>151</sup> *Ye* above n 30, paras 123 and 133 Glazebrook J.

<sup>152</sup> I also raised the possibility that the obligations under UNCROC had become customary international law obligations and thus directly applicable in New Zealand.

<sup>153</sup> Above n 50.

<sup>154</sup> *Ye* above n 30, paras 222 – 224 Glazebrook J.

By contrast, Hammond and Wilson JJ were of the view that although the humanitarian interview procedure was consistent with the legislative framework, it was not an obligatory requirement. However, the Judges argued that if the procedure was undertaken, it was reviewable. Following this approach, they sent the case of one family back for reconsideration, but only if the Immigration Service wished to do so.<sup>155</sup> This was on the basis that the decision-making had not taken into account that the children might be left in New Zealand after their mother's removal. They rejected the other family's application for judicial review on the basis that they could see no proper basis on which the Court could intervene on public law grounds.<sup>156</sup> While they saw the humanitarian interview as an "optional extra", they did, however, comment that they thought that the Immigration Service had "got it about right".<sup>157</sup>

Chambers and Robertson JJ took a more extreme stance. They concluded, based on the statutory scheme after the 1999 amendments to the Immigration Act, that there was no power for any humanitarian review to occur prior to making a removal order. They analysed the legislation in three periods (before and after amendment in 1991, and after amendment in 1999), and saw *Tavita* as specific to the first phase.<sup>158</sup> They were of the opinion that the current legislation left no room for an humanitarian review at the time of removal, and the interests at stake were adequately catered for by the other appeal and review procedures in the Immigration Act. Interestingly, this approach had not been advanced in argument by the Crown. Nor was the opportunity to do so taken up in *Huang* – an example of the Executive demonstrating a firm commitment to their responsibilities under international law.

International law arguments came to the forefront again in *Huang*, which seems to represent somewhat of a rapprochement between the divergent approaches in *Ye*. William Young P, writing for both himself and Hammond J, directly considered the question of how New Zealand's international obligations were to be satisfied. He concluded that a determination, both properly carried out and reasonably proximate, by the Removal Review Authority on a s 47 appeal would satisfy those obligations. However, if for some reason there had not been such an assessment or circumstances had changed, William Young P suggested the humanitarian interview would "assume greater significance". This appears to mean that the humanitarian interview would, by default, bear the burden of ensuring adherence to New Zealand's international

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<sup>155</sup> The voluntary nature of the reconsideration was questioned by me, *ibid*, para 229 and by Chambers and Robertson JJ, para 586, who noted that an order for the Immigration Service to reconsider if it thinks fit was, not being mandatory, a most unusual order.

<sup>156</sup> *Ibid*, para 421 Hammond and Wilson JJ.

<sup>157</sup> *Ibid*, para 412, Hammond and Wilson JJ.

<sup>158</sup> See Sir Kenneth Keith "Administrative Law Developments" above n 25 for a full history.

obligations.<sup>159</sup> Chambers J agreed with the President’s conclusions and recanted from his position in *Ye*, accepting that “somehow or other, the humanitarian interview process has become part of Immigration New Zealand’s procedure”.<sup>160</sup> In result, the Court held that the interests of the children had been taken into account in that case and thus the appeal was dismissed.

The Supreme Court recently granted leave to appeal the decisions in *Ye* and *Huang* on the same grounds:<sup>161</sup>

- (a) What mandatory considerations and/or standard (if any) apply to a decision under the Immigration Act 1987 to order and/or to implement the removal from New Zealand of the overstayer parent(s) of a New Zealand-resident child, in particular a child who is a New Zealand citizen?
- (b) What processes of hearing and inquiry (if any) apply to such a decision?
- (c) What approach should the courts adopt to judicial review of such a decision?
- (d) In light of the Court’s answers to the foregoing questions, what relief (if any) are the appellants entitled to?

## ***B Reflections***

Ten years after *Tavita* the New Zealand courts’ approach to unincorporated treaties was discussed in an excellent article by Claudia Geiringer entitled “*Tavita* and all that”.<sup>162</sup> She identifies two conceptual models that the courts had been using. The first is the mandatory consideration model (whereby relevant unincorporated treaties are considered to be a mandatory consideration for executive decision-makers). The second is a presumption of consistency model (whereby the courts assume, when interpreting legislation, that Parliament did not intend to legislate inconsistently with

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<sup>159</sup> *Huang* above n 31, para 53 William Young P and Hammond J.

<sup>160</sup> *Ibid*, para 100 Chambers J.

<sup>161</sup> [2008] NZSC 92 and [2008] NZSC 103.

<sup>162</sup> Claudia Geiringer “*Tavita* and all that: confronting the confusion surrounding unincorporated treaties and administrative law” (2004) 21 NZULR 66.

its international obligations).<sup>163</sup> Geiringer suggests that the two models have not been clearly distinguished by the courts, resulting in “a remarkable degree of confusion”.<sup>164</sup> She argues that the focus on the mandatory consideration model, in the context of the rights of children in immigration decisions, was limiting the potential for review in an environment where the courts were still wary of assessing the “weight” a decision-maker attached to particular considerations.

The issue is exemplified in *Ye* and *Huang*. In *Ye* I expressed my view that in immigration matters there is no such conceptual distinction. Under international law, the best interests of the child are not suggested to be the only consideration but merely a primary one. The courts thus, by approaching the best interests of any children as a mandatory relevant consideration, are directly applying international law. However, I also noted that weight is built into the standard through the term “primary” and thus any assessment by the courts of consistency with international law has to take weight into account.<sup>165</sup> In *Huang* the Court took the mandatory consideration approach combined with a limited intensity of review, stating that “how conflicting considerations are weighed is for the decision-maker and not the Court”.<sup>166</sup> For the time being at least, Geiringer’s comments therefore have force.

The Supreme Court, albeit in a different context, could arguably be seen as taking a more robust approach. Although the context of the review was procedural in *Zaoui (No 2)*<sup>167</sup> the Court effectively added both a procedural *and* substantive gloss on to the statute, leading commentators to suggest that the Court is to play an “active role” in judicial review of these matters:<sup>168</sup>

In *Zaoui*, it would seem, little or nothing short of express statutory wording would have sufficed to overcome the presumption that a broadly phrased Executive discretion is capable of being read consistently with domestic and international human rights law.

The Supreme Court’s approach provides a marked contrast to the more reticent approach to judicial review taken by the Court of Appeal in *Ashby* and shows that

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<sup>163</sup> Geiringer saw *Tavita* as exemplifying the mandatory consideration approach and *Sellers* as representing the presumption of consistency approach.

<sup>164</sup> Above n 162, 67.

<sup>165</sup> *Ye* above n 30, paras 86 – 90 Glazebrook J.

<sup>166</sup> *Huang* above n 31, para 67 William Young P and Hammond J. Intensity of review is discussed further below in section V.

<sup>167</sup> Above n 50.

<sup>168</sup> 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* (Lexis Nexis, Wellington, 2006) 182. .

broad statutory powers are now seen as prime candidates for keen judicial attention. Geiringer comments that *Zaoui (No 2)* demonstrates the principle of legality at its most potent and suggests that the more exigent the international obligation, the greater the inclination of the courts to read in procedural and substantive requirements which accord with international law, the common law and Bill of Rights obligations.<sup>169</sup> This, she points out, is in accord with what Treasa Dunworth's thesis described as the "pedigree approach" to the presumption of consistency. This means that the inclination of courts to interpret a decision-maker's powers in line with international obligations will vary according to the "potency and persuasiveness of the particular obligation and the egregiousness of the particular breach".<sup>170</sup> There has also been an increase in cross-pollination of approaches from other jurisdictions, due in large part to the importance of international law within this area.<sup>171</sup>

Geiringer, however, also argues that, while the Supreme Court in *Zaoui (No 2)* may have been the champion of international obligation compliance in a procedural sense, it was rather more reluctant to engage with the scope of these obligations, preferring to defer to the views of international bodies such as the Human Rights Committee.<sup>172</sup> It should be noted, however, that the content of the rights in question was not at issue in *Zaoui (No 2)*, given that the Crown had conceded it would not remove Mr Zaoui to face torture or arbitrary deprivation of life. In addition, the *Zaoui* bail decision<sup>173</sup> does show the Supreme Court engaging with substantive human rights matters, albeit in a context that is perhaps more traditionally seen as the province of the courts.

## V REASONABLENESS: A RAINBOW IN THE FOG?

While issues of legality are (or should be) black and white, reasonableness is a delicately shaded concept. Questions about intensity of review do not arise in the context of legality – the courts simply look to see whether the decision-maker has done what the law requires.<sup>174</sup> As one Judge stated bluntly: "courts do not defer to

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<sup>169</sup> Claudia Geiringer "Ding v Minister of Immigration; Ye v Minister of Immigration" (Paper for Legal Research Foundation conference: Human Rights at the Frontier Sept 2008) 23.

<sup>170</sup> Ibid, 24; Treasa Dunworth "Hidden Anxieties" above n 84.

<sup>171</sup> Sir Kenneth Keith "Administrative Law Developments" above n 25, 150.

<sup>172</sup> Claudia Geiringer "International law through the lens of Zaoui" above n 100, 314. Geiringer contrasts the New Zealand Supreme Court's reluctance to extend the status of "peremptory norm" beyond the bare prohibition of torture to encompass the consequential protection against re-folement to torture with the Supreme Court of Canada's refusal to follow international jurisprudence and to recognise an inherent non-refolement protection when construing the right not to be subject to cruel and unusual treatment: *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 (SC).

<sup>173</sup> Above n 135.

<sup>174</sup> See David Goddard "Review for Error of Law – Some Comments" in NZLS *Judicial Review Intensive* (September 2007) 69 and Francis Cooke "Lest We Forget" in NZLS *Judicial Review Intensive* (September 2007) 88. Anthony Lester and Jeffrey Jowell above n 10, 370–371 argue that one



anything or anybody: the job of the courts is to decide what is lawful and what is not.”<sup>175</sup> However when it comes to reasonableness, the extent to which the courts should review the decision-maker’s reasons is crucial.

The courts’ reluctance to step into the arena of reasonableness is understandable. Not only is the concept of reasonableness almost impossible to measure objectively, it also raises difficult constitutional issues. Any determination of reasonableness takes the courts beyond the role of simply policing the limits imposed by statute, or the procedural aspects of decision-making, into the forbidden arena of merits review. The problem of recognising constitutional roles, often referred to as deference, involves a “complex matrix of competing factors, such as the constitutional allocation of functions, relative expertise and competence, functional suitability of decision-makers and courts to assess certain questions, and the nature of other controls on the decision-making process”.<sup>176</sup>

Traditionally, the New Zealand courts have applied the *Wednesbury* review standard in the reasonableness area.<sup>177</sup> While the lure of strict *Wednesbury* review is that it purports to articulate an objective and narrow standard of reasonableness, it has, however, been remarked that semantics were never capable of providing an objective test, and that, in practice, judicial decisions do not necessarily reflect the severity of the test.<sup>178</sup>

#### **A Variable intensity of review**

From the late 1980s, under the guidance of Cooke P, the New Zealand courts began to shift away from reliance on *Wednesbury* formula, preferring to refer simply to a decision being “within the limits of reason”.<sup>179</sup> Even a sharp reprimand from the

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of *Wednesbury*’s failings was that it did not distinguish between review on the basis of legality and on the basis of irrationality.

<sup>175</sup> *Lab Tests* above n 3, para 379 Hammond J.

<sup>176</sup> Dean R Knight “A Murky Methodology” above n 47, 139.

<sup>177</sup> *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223 (CA). Here, Lord Greene MR stated that a authority acts unreasonably if its decision is “so absurd that no sensible person could ever dream that it lay within the powers of the authority”, 229.

<sup>178</sup> *Waitakere City Council v Lovelock* [1997] 2 NZLR 385, 399 and 400 (CA) Thomas J. Jowell and Lester above n 10 at 372. Despite the limited nature of *Wednesbury* review, it is interesting to note that intervention on the basis of *Wednesbury* unreasonableness appears to be much more common in the United Kingdom than in New Zealand: *Lab Tests* at above n 3, para 366 Hammond J. See for example the cases set out by Andrew Le Sueur, “The Rise and Ruin of Unreasonableness?” [2005] JR 32, 44 – 47.

<sup>179</sup> See *Webster v Auckland Harbour Board* [1987] 2 NZLR 129, 131-132 (CA) Cooke P; *Hawkins v Minister of Justice* [1991] 2 NZLR 530, 534 (CA) Cooke P.

Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand*<sup>180</sup> only put a damper on things for a short while.<sup>181</sup>

Academics in New Zealand and some members of the judiciary have again started to chip away at the dominance of *Wednesbury* unreasonableness.<sup>182</sup> The result has been a proliferation of terminology and theorising, prompting Hammond J's recent description of judicial review in New Zealand as "stand[ing] somewhat in a fog of mushy dogma".<sup>183</sup>

The idea of variegated review, the intensity of which depends on the context and the subject matter, is now attaining traction in this country. This is despite the fact the concept still has not been definitively endorsed by the appellate courts, a situation described by one commentator as "curious and unsatisfying".<sup>184</sup> This may, of course, be because of the paucity of cases that have come before the courts, lessening the opportunity for a full discussion of the principles.

There have, however, been some indications in the Court of Appeal of a judicial acceptance and desire to articulate the variability of standard of review. For example, it has been suggested that courts will undertake a more intensive level of review where human rights are at stake. As Thomas J commented in *Waitakere City Council*:<sup>185</sup>

It is incongruent that the Court should ask of an authority's decision affecting, say, the life of an individual, whether the decision is so unreasonable that no reasonable authority could have arrived at it. Such a vital decision surely need not be outrageous, absurd or perverse before the Courts would be prepared to intervene.

In a slightly milder fashion, Blanchard J accepted that "a less-restrained approach" might be taken in the circumstances where judicial review is sought against another type of statutory body or against a local authority when it is performing a different function.<sup>186</sup> In *Pring v Wanganui District Council*, the Court of Appeal noted that, where individuals are directly affected by a decision, the Court will scrutinise what has occurred "with a less tolerant eye" than in the situation where there are broad

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<sup>180</sup> Above n 9.

<sup>181</sup> See *Wellington City Council v Woolworths NZ Ltd (No 2)* [1996] 2 NZLR 537 (CA) and Thomas J's criticism of it in *Waitakere City Council* above n 178 at 402.

<sup>182</sup> See above n 14 and n 15.

<sup>183</sup> *Lab Tests* above n 3, para 373 Hammond J.

<sup>184</sup> Dean R Knight "Murky Methodology" above n 47, 185.

<sup>185</sup> Above n 178, 403 Thomas J.

<sup>186</sup> *Ibid*, 419 Blanchard J. Richardson P considered that *Woolworths* (above n 150) must be taken as stating the law and did not enter into the discussion (at 397).

policy considerations that have a less direct impact.<sup>187</sup> The Court of Appeal in *Discount Brands* also made comments to similar effect.<sup>188</sup> While the invitation to deal with standard of review was not taken up by the Supreme Court in that case, all of the Judges applied more stringent tests than a pure *Wednesbury* standard.<sup>189</sup> The idea of a more intensive approach in relation to human rights (albeit in a different context) was also discussed by Tipping J in *R v Hansen*,<sup>190</sup> in the context of defining reasonable limits on rights in a free and democratic society.<sup>191</sup> He referred to Lord Hoffman's discussion in *R (SB) v Governors of Denbigh High School*<sup>192</sup> as to the need for judges to find a balance between protecting rights and deferring to the Legislature where appropriate on democratic grounds.<sup>193</sup>

Even though the idea of variable standards of review has not been fully articulated by the appellate courts, variable standards have been applied in practice. It is worth briefly sketching the standards that have been applied.<sup>194</sup> Starting at the most restrictive end are decisions that are non-reviewable, for example decisions made during the legislative process.<sup>195</sup> However, it has been noted that the categories of non-reviewable decisions are narrowing.<sup>196</sup> Lord Steyn, in particular, does not recognise that there are areas in which the courts should never interfere but rather states that the courts may “recognise that in a particular case and in respect of a particular dispute, Parliament or the Executive may be better placed to decide certain questions”.<sup>197</sup>

Next on the spectrum come decisions that are reviewable only on the basis of fraud, bad faith, or corruption.<sup>198</sup> These are closely followed by decisions that are only

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<sup>187</sup> [1999] NZRMA 519 (CA) para 7 Blanchard J.

<sup>188</sup> Above n 45, para 50 Hammond J.

<sup>189</sup> See discussion above n 46.

<sup>190</sup> *R v Hansen* [2007] 3 NZLR 1 (SC).

<sup>191</sup> Section 5 of the Bill of Rights.

<sup>192</sup> [2007] 1 AC 100 (HL) Lord Hoffman.

<sup>193</sup> *R v Hansen* above n 190, paras 113 – 119 Tipping J. Note, these comments were made in the context of examining whether a legislative provision could be justified pursuant to the justification provided by s 5 of the Bill of Rights.

<sup>194</sup> I am indebted to Professor Michael Taggart's helpful spectrum which is appended to “Proportionality, Deference, Reasonableness” above n 86, 62 – 63 (also published in Michael Taggart “Administrative Law” [2006] NZ Law Rev 75, 84 – 85). See also table at Figure 1 in *de Smith* above n 66, 11,086.

<sup>195</sup> For example, *Milroy v Attorney-General* [2005] NZAR 562 (CA).

<sup>196</sup> Helen Aikman above n 59, 1 – 10.

<sup>197</sup> Lord Steyn “Deference: A Tangled Story” (Judicial Studies Board Lecture Belfast 25 November 2004).

<sup>198</sup> For example the decision of a state-owned enterprise to enter into a commercial contract: *Mercury Energy* above n 9, 391 (PC) Lord Templeman. Of course these types of decisions are also subject to legality and natural justice review under the other heads, although natural justice will only apply to the extent that the context requires: *Lab Tests* above n 3, para 91 Arnold and Ellen France JJ.

reviewable on the basis of patent (*Wednesbury*) unreasonableness.<sup>199</sup> These decisions tend to be ones with a high policy content, requiring assessment of a wide range of considerations and possible outcomes. As Tipping J has put it, these types of decisions are ones “in respect of which there is no satisfactory legal yardstick by which the issue can be resolved.”<sup>200</sup> Deference to the decision-making body may also be due on the basis of democratic principles (as in the case of council rating decisions) or expert specialisation (as in the case of electricity infrastructure).<sup>201</sup>

An example of this low standard of review of expert bodies is the Supreme Court’s decision in *Unison Networks Ltd v Commerce Commission*.<sup>202</sup> The Commerce Commission was responsible for setting price thresholds which, if breached by an electricity line company, would trigger the Commission’s power to investigate and take control of the company. Submissions from the line companies had to be examined before setting these thresholds. Unison was dissatisfied with the decision made and increased its prices above the thresholds put in place by the Commission. Unison brought judicial review proceedings against the Commerce Commission arguing that the thresholds were set in a manner that was inconsistent with the purpose and requirements of the legislation. Despite giving the Commission “a wide margin of appreciation” in the assessment,<sup>203</sup> the Court of Appeal found that one set of thresholds did breach the statutory purpose, but declined to give relief on the basis that the regime had been in place for some time, and the interests of third parties would be affected.<sup>204</sup>

The Supreme Court took a deferential approach.<sup>205</sup> It referred to the Commerce Commission’s expertise in the subject-matter and the broad and expansive powers it

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<sup>199</sup> See *Woolworths* above n 181, 545 Richardson P.

<sup>200</sup> *Curtis v Minister of Defence* [2002] 2 NZLR 744, para 27 Tipping J. The case related to a decision to disband the air combat force of the Royal New Zealand Air Force. Tipping J described it as “par excellence a non-justiciable question”: para 28.

<sup>201</sup> On Council rating decisions see *Woolworths* above n 181 and *Waitakere City Council* above n 178. On Electricity Commission decisions see *Major Electricity Users’ Group Inc v Electricity Commission* [2008] NZCA 536.

<sup>202</sup> *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 41.

<sup>203</sup> *Unison Networks Ltd v Commerce Commission* 19 December 2006 CA285/05, para 58 Hammond and Ellen France JJ.

<sup>204</sup> *Ibid*, para 87 Hammond and Ellen France JJ.

<sup>205</sup> This can be contrasted with the Supreme Court’s approach to specialist bodies on appeal, set out in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC). That case held that, on appeal, a Court must come to its own view of the merits of the case. The weight to be given to the Commissioner of Trade Marks’ conclusions in that case was seen to be a matter of judgement but, if the High Court held a different view from the decision-maker, it must act on its own view. The Supreme Court said that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. The Court drew attention to the fact that a general appeal cannot

had been granted, that were designed to achieve economic objectives.<sup>206</sup> The Court then stated that, in the case where a body is given broad discretionary powers, the courts are unlikely to intervene unless the body exercising the power has acted in bad faith, has materially misapplied the law, or has exercised the power in a way which cannot rationally be regarded as coming within the statutory purpose.<sup>207</sup>

A higher intensity of review has been applied in other cases. The New Zealand courts have toyed with a more intense standard of review through the doctrine of substantive unfairness. This doctrine requires the Court to give consideration to the adequacy of the administrator's reasons, meaning that both the substance and the process of a decision is open to review. Writing in 1991, G D S Taylor noted that substantive fairness "appears to have passed its peak already", suggesting that the substantive element had merged into other grounds of review.<sup>208</sup> The existence of such a ground was, however, accepted by Cooke P in *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd*.<sup>209</sup> He noted that "the merit of the substantive unfairness ground is that it allows a measure of flexibility enabling redress for misuses of administrative authority which might otherwise go unchecked."<sup>210</sup> The Judge noted that substantive fairness was not a precise category, and that in some cases more weight might need to be given to recognise human rights, or less weight to recognise legitimate administrative discretion.<sup>211</sup> Similarly, in *Pharmaceutical Management Agency Ltd v Rouse Uclaf Australia Pty Ltd* the Court of Appeal seemed to suggest that there was life in the notion of substantive unfairness: "The concept of substantive fairness ... also requires further consideration. The law in this country applicable to situations of that kind will no doubt be developed on a case by case basis."<sup>212</sup>

One of the grounds that has arguably usurped the potential of substantive unfairness is the "anxious scrutiny"<sup>213</sup> test, which has been deployed in the context of human

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be treated as tantamount to judicial review. They are different exercises of the Court's jurisdiction and require differing approaches: para 7.

<sup>206</sup> *Unison* above n 202, para 55 Hammond and Ellen France JJ.

<sup>207</sup> This could even be seen as arguably allowing the Commerce Commission to interpret its own legislation. See generally Mai Chen and Richard Harker "Commerce Amendment Act 2008" [2008] NZLJ 421.

<sup>208</sup> G D S Taylor *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington, 1991) 349.

<sup>209</sup> *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] 2 NZLR 641 (CA).

<sup>210</sup> *Ibid*, 652 Cooke P.

<sup>211</sup> *Ibid*, 653 Cooke P. McKay J at 654 accepted that unfairness could be a ground of judicial review, but that it did not follow that anything that could be described as unfair would suffice and that in each case the particular facts must be examined, including the nature of the unfairness relied upon, and whether it was such to justify the intervention of the Court. Fisher J at 164 noted that on each occasion that the expression "substantive unfairness" was applied to a case that it would continue to be necessary to identify a more specific and principled administrative law basis for intervention.

<sup>212</sup> [1998] NZAR 58, 66 (CA) Blanchard J. See also *Lab Tests* above n 3, para 392 Hammond J.

<sup>213</sup> Recently suggested by me in the case of *Ye* above n 30.

rights. The concept has been referred to and used in a series of New Zealand cases (at High Court level at least) to signal a greater intensity of review where important rights are at stake.<sup>214</sup> For example, Venning J in *Wright v Attorney-General* accepted that “in cases involving human rights a ‘hard look’ is appropriate”.<sup>215</sup> It appears to have been endorsed by the Court of Appeal in *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd*.<sup>216</sup> The Court also used the terminology of “hard look” review (which is a North American concept), but it appears to have been referring to an anxious scrutiny standard.

The North American “hard look” concept is a standard under which the Court asks whether the authority has adequately reviewed all relevant factors and considerations and made a properly reasoned choice.<sup>217</sup> It has had some judicial support,<sup>218</sup> but has been strongly criticised by Professor Taggart as an unnecessary and ill-adapted transplant from North America. It also, in his view, suffers from the fatal flaw that it does not tell a judge how hard to look in any particular case.<sup>219</sup>

The anxious scrutiny standard dovetails with the governing presumption under the principle of legality that Parliament does not intend to legislate inconsistently with human rights. Thus, the standard shades into issues of legality as well as unreasonableness.<sup>220</sup>

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<sup>214</sup> *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531 (HL) Lord Bridge cited in *Waitakere City Council* above n 178, 403 Thomas J. See also *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9, para 12 (CA) Glazebrook and William Young JJ and *Shortland vs Northland Health Ltd* [1998] 1 NZLR 433, 444 (CA) Richardson P, Keith and Tipping JJ. Note that, although *Shortland* refers to anxious scrutiny being used in a refugee case, *Butler v Attorney-General* (now reported as [1999] NZAR 205 (CA)), that case referred used the concept, but did not use the anxious scrutiny terminology. The notion that intensity of review varies when fundamental human rights are jeopardised was recognised as a settled principle of the common law in *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, para 18 (CA) Laws LJ. Laws LJ held that this principle exists “entirely independent of our incorporation of the European Convention by the Human Rights Act 1998” and that the variation of the intensity of review “... will depend on the subject matter at hand; and so in particular any interference by the action of a public body with a fundamental right will require substantial objective justification”: para 18.

<sup>215</sup> *Wright v Attorney-General* [2006] NZAR 66, para 78 (HL) Venning J.

<sup>216</sup> *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58, 66 (CA) Blanchard J. See also *Pring* above n 187, and *Waitakere City Council* above n 178.

<sup>217</sup> *Thompson* above n 214, paras 214 – 219.

<sup>218</sup> Professor Taggart points to Hammond J’s decisions in *Thompson* *ibid* and *Hamilton City Council v Waikato Electricity Authority* [1994] 1 NZLR 741, 759 (HC) Hammond J as supportive of hard look review (although I understand that Hammond J considers that Professor Taggart has not fully understood his approach). Sian Elias “ ‘Hard Look’ and the Judicial Function” (1996) 4 *Waikato LR* 1, 16, although limited to where human rights or fundamental values are at stake.

<sup>219</sup> Michael Taggart “Proportionality, deference, *Wednesbury*” above n 86, 63 – 65.

<sup>220</sup> For the classic statement of the principle of legality see *R v Home Secretary ex parte Simms* [2000] 2 AC 115, 131 (HL) Lord Steyn. It should be noted that in New Zealand the Bill of Rights operates in a similar manner to require statutory consistency with human rights where possible (s 4).

## **B Proportionality**

Anxious scrutiny has been criticised as not going far enough to protect human rights.<sup>221</sup> Accordingly, academic commentators in New Zealand have suggested the alternative of proportionality review, a relatively new development which, while established in England, is yet to be embraced by the New Zealand courts. Proportionality review does not simply involve greater scrutiny where human rights are at stake, but provides a sequenced methodology to be used in assessing any limitation on rights. A Court must assess whether:<sup>222</sup>

- (a) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (b) the measures designed to meet the legislative objective are rationally connected to it; and
- (c) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

In *Daly*, Lord Steyn noted that proportionality review differs from traditional review in that it may require the Court to assess the balance the decision-maker has struck, and not merely determine whether the decision is reasonable. This form of review may thus require the Court to evaluate the relative weight of the relevant considerations.<sup>223</sup> The test also has the effect of putting the onus on the decision-maker to justify any imposition on the right in question, rather than leaving it to the claimant to show that the right has been unjustifiably limited. Such a test is not foreign to the New Zealand courts. The Bill of Rights states that “the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>224</sup> In assessing such limits, the New Zealand courts use the Supreme Court of Canada’s proportionality analysis in *R v Oakes*.<sup>225</sup>

Professor Joseph has suggested that the proportionality approach could do the work of the sliding reasonableness/substantive unfairness grounds, except where decisions do

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<sup>221</sup> *Daly* above n 15, 547-548 Lord Steyn and *Smith and Grady v UK* (2000) 29 EHRR 493.

<sup>222</sup> *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (PC) Lord Clyde cited in *Daly* above n 15, 547-548.

<sup>223</sup> *Daly* *ibid*, 547-548.

<sup>224</sup> Section 5 New Zealand Bill of Rights Act 1990.

<sup>225</sup> *R v Oakes* [1986] 1 SCR 103 (SC). See *R v Hansen* [2007] 3 NZLR 1, para 64 (SC) Blanchard J.

not lend themselves to the proportionality methodology.<sup>226</sup> Correctness and *Wednesbury* review could be retained as residual grounds. In Professor Joseph's view, the proportionality standard is advanced as an approach that is more capable of responding to the sophisticated and nuanced issue of conflicts between the exercise of state power and fundamental rights than that of the traditional reasonableness review.<sup>227</sup>

Professor Taggart, in his article "Proportionality, deference, *Wednesbury*",<sup>228</sup> has suggested a more nuanced approach. He uses the analogy of a rainbow for assessing the appropriate standard of review in any particular case. At one end of the rainbow is a full merits review. At the other is non-justiciability. The merits end of the rainbow shades upwards into a proportionality methodology with its companion, deference (or respect). This part of the rainbow should, in Professor Taggart's view, replace the *Wednesbury* unreasonableness standard in cases where fundamental rights and values are involved. The other part of the rainbow (leading down to non-justiciability) relates to what he calls public wrongs, which he defines as those situations where fundamental rights are not directly implicated. This part of the rainbow should, in his view, remain under the *Wednesbury* doctrine, at least for the time being.

The New Zealand courts have been cautious about adopting the proportionality approach in administrative law. There has been a reluctance to depart from the orthodox approach, which advocates that proportionality is no more than a criterion to decide whether a decision meets the *Wednesbury* unreasonableness standard.<sup>229</sup> Thomas J noted in *Waitakere City Council* that "the close affinity of proportionality to the concept of unreasonableness is plain to see" because any assessment of reasonableness requires an assessment of the relationship between the means and the end. However, the Judge said that it was uncertain whether proportionality would establish itself as a separate ground of review, or would be subsumed into the *Wednesbury* test.<sup>230</sup> In *The Institute of Chartered Accountants of New Zealand v Bevan* the Court of Appeal took a small step by endorsing proportionality in terms of

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<sup>226</sup> Philip A Joseph *Constitutional and Administrative Law in New Zealand* above n 8, 857.

<sup>227</sup> See Lord Steyn's judgment in *Daly* above n 15.

<sup>228</sup> Michael Taggart above n 86, 23. See also Taggart "Administrative Law" [2006] NZ Law Rev 75, 82.

<sup>229</sup> *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606, 636 (HC) Tipping J. See also *Waitakere City Council* above n 178, 408 Thomas J and the discussion in Jason Varuhas "PowerCo v Commerce Commission: Developing Trends of Proportionality in New Zealand Administrative Law" (2006) 34 NZJPIIL 339.

<sup>230</sup> *Ibid*, 407 Thomas J.



penalties, but left open whether it is a distinct head of review.<sup>231</sup> In 2008, there were some positive signs towards a wider judicial acceptance of proportionality, as seen in *Mihos v Attorney General*,<sup>232</sup> my judgment in *Ye*<sup>233</sup> and Hammond J’s judgment in *Lab Tests*.<sup>234</sup> However doubt was expressed late in the year in *Huang*.<sup>235</sup> The idea of a proportionality test was also rejected by the Supreme Court in the context of the Refugee Convention in *Zaoui (No 2)*, but it does not appear that this was necessarily intended to have any general application.<sup>236</sup>

### **C      *The jurisprudence charted so far***

In *Ye*, looking more closely at the comments on intensity of review in *Ye* and *Huang*,<sup>237</sup> I argued that art 3 of the United Nations Convention on the Rights of the Child (UNCROC) had an in-built standard which required the decision-maker to consider the best interests of the child as a primary consideration. I stated that it must also be borne in mind that, since the standard in UNCROC has a in-built weight (“a primary consideration”), any decisions which clearly do not accord the proper weight to the best interests of any child must be reviewable as errors of law – i.e. under the legality rather than the fairness heading. I also argued that, given that weight is built in, a standard administrative law inquiry may in any event not be sufficient. I suggested that, even if understood as a reasonableness inquiry, at the least, the “anxious scrutiny” standard was appropriate, because the fundamental rights of citizen children were at stake. I also expressed some support for Professor Taggart’s argument that the trend seen in the United Kingdom towards full proportionality review should replace administrative law review where fundamental rights are at stake.<sup>238</sup> However, I considered that even if the standard administrative law inquiry prevailed, that decision-makers must be required to do more than simply “tick the box”, as decisions that clearly did not accord weight to the best interests of the child must be reviewable as errors of law.<sup>239</sup>

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<sup>231</sup> *The Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154, para 55 (CA) Keith J.

<sup>232</sup> *Mihos v Attorney General* [2008] NZAR 177, paras 87 – 91 (HC) Baragwnath J. Proportionality was rejected in that case, which concerned property rights, but the possibility of its application where more important rights are at stake was left open.

<sup>233</sup> *Ye* above n 30, paras 304 – 305 Glazebrook J. No opinion was expressed on this point in the other judgments.

<sup>234</sup> *Lab Tests* above n 3 para 391 Hammond J.

<sup>235</sup> *Huang* above n 31, paras 63 – 65 William Young P and Hammond J.

<sup>236</sup> *Zaoui (No 2)* above n 50, para 42 Keith J.

<sup>237</sup> The other judgments in *Ye* above n 30 did not discuss the appropriate standard of review in any detail but Hammond and Wilson JJ applied a standard administrative law approach.

<sup>238</sup> *Ibid*, paras 303 – 305 Glazebrook J.

<sup>239</sup> *Ibid*, para 305 Glazebrook J. In *New Zealand Fishing Industry Association* above n 66, 522 Cooke P suggested that the weight given to considerations might be relevant to the limits of reason. This was

By contrast, in *Huang*, the Court of Appeal relied on the conclusion in *Puli'uvea*<sup>240</sup> that the Court does not have the right to review the balance struck by the decision-maker between the conflicting considerations and thus to specify the weight to be attached to different interests.<sup>241</sup> *Puli'uvea* stated that the question was whether there was a reviewable error of law and that the *Wednesbury* unreasonableness standard is to apply.<sup>242</sup> Therefore, the Court in *Huang* rejected a variable standard in immigration cases. The Court also commented that, as a final checking process, the humanitarian interview process is “far from an obvious candidate for an intense proportionality review exercise”.<sup>243</sup> The Court in *Huang* rejected the proportionality argument on the basis that New Zealand’s legislative and human rights environment was very different to the England and European review standards that have been influenced by s 6 of the Human Rights Act 1998 and also the European Convention on Human Rights.<sup>244</sup>

#### ***D Navigating the jurisprudence***

It is apparent that, in practice, the courts are applying different standards of review in order to respond to the requirements of the context, but the appellate courts have yet to articulate any integrated concept of a varying standard of review.<sup>245</sup> The topic has been mooted obiter in the Court of Appeal, but not enough momentum has gathered for the idea to become embedded in the fabric of the institution.<sup>246</sup> The Supreme Court, in its early cases, has not articulated any general theory of judicial review. However, the Court has taken an expansive approach where procedural rights are at stake and also, as seen with the *Zaoui* bail decision, where human rights more generally are in issue. By contrast, a restricted approach has been followed where the issues are economic, there has been consultation and the decision-maker is a specialist body.<sup>247</sup> On the other hand, it is apparent that support, indeed perhaps impatience, for

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applied in the immigration context by Randerson J in *Kumar v Minister of Immigration* (25 March 1999) HC AK M184/99.

<sup>240</sup> Above n 103.

<sup>241</sup> *Huang* above n 31, para 65 William Young P and Hammond J.

<sup>242</sup> Above n 103, 522 Keith J.

<sup>243</sup> Above n 31, para 66 William Young P and Hammond J.

<sup>244</sup> *Ibid*, para 64 William Young P and Hammond J. However, I note that in *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, para 18 (CA) Laws LJ, it was stated that the heightened standard of review exercised in the United Kingdom was not mandated by the European Convention and the Human Rights Act 1998, but on common law principles.

<sup>245</sup> Dean R Knight “A Murky Methodology” above n 47, 134. See *Huang* above n 31, paras 62 – 67 and *Ye* above n 30, para 569 Chambers and Robertson JJ.

<sup>246</sup> *Ye* above n 30, paras 303 – 305 Glazebrook J, *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia* above n 216, 66 Blanchard J for examples of where the idea was mooted.

<sup>247</sup> But see *Austin Nichols* above n 205 in the appeal context.

a sliding scale of review and clear guidance on its application is building in the High Court and from academic commentators.<sup>248</sup>

The Supreme Court's decision to grant leave in both *Ye* and *Huang* has brought the issue of variegated review squarely before that Court, which will lead to such guidance being given, at least in the immigration context. It seems that we can look forward to another "mad-headed chase" and flourishing of seminars<sup>249</sup> when the decision in those appeals is handed down.

## ***VI DECODING THE SIGNALS: THE DIALOGUE BETWEEN THE COURTS, THE EXECUTIVE AND PARLIAMENT***

It has long been recognised that the three branches of government are in a symbiotic relationship and that, although separation of powers is a fundamental tenet of our constitutional composition, from a practical point of view the three branches are interdependent.<sup>250</sup> The dialogue that has developed between the courts, Parliament and the Executive via the mechanism of judicial review in immigration and refugee matters has displayed this interdependence aptly.

The comments of the courts on immigration matters in New Zealand have been responded to in a very direct way by the Executive via the Immigration Service policies and operational instructions. Parliament has also responded with legislation. Some striking examples are evident in the circumstances surrounding *Tavita*, *Attorney-General v Refugee Council of New Zealand Inc*,<sup>251</sup> *Mohebbi v Minister of Immigration*,<sup>252</sup> and *Zaoui (No 2)*. These cases can be seen to represent the courts' participation in the dialogue between the three branches, through both responding to and motivating new developments in the overall operation of New Zealand's

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<sup>248</sup> Dean R Knight above n 41 at 123. Knight cites in particular the efforts of Baragwanath J (now of course on the Court of Appeal) in *Ports of Auckland v Auckland City Council* [1999] 1 NZLR 601 (HC), *Tupou v Removal Review Authority* [2001] NZAR 696 (HC), *Progressive Enterprises v North Shore City Council* [2006] NZRMA 72 (HC) and *Ding v Minister of Immigration* [2006] FRNZ 568 (HC), and Wild J in *Wolf v Minister of Immigration* above n 63, as well as comments by other judges in *B v Commissioner of Inland Revenue* [2004] 2 NZLR 86 (HC) and *A v Chief Executive of the Department of Labour* (19 October 2005) HC AK CIV-2004-63. See also *Powerco Ltd v Commerce Commission* (9 June 2006) HC WN CIV-2005-485-1066.

<sup>249</sup> See above n 5.

<sup>250</sup> Philip A Joseph "Parliament, The Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321, 322.

<sup>251</sup> *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA). For more general discussion see Section VIC.

<sup>252</sup> [2003] NZAR 685 (HC).

immigration law and policy.<sup>253</sup> They do, however, also show to an extent the blurring of roles among the three branches of government.

### **A     *The humanitarian interview***

The Court's pointed comments in *Tavita*<sup>254</sup> spurred the Executive into action and it appears that, since then, the Immigration Service has taken a pro-active role in ensuring that New Zealand adheres to its international obligations in the immigration and refugee spheres. In the wake of *Tavita*, the Immigration Service produced an entire brochure relating to the need for immigration officers to take into account international obligations, and the humanitarian interview procedure<sup>255</sup> was instituted to ensure compliance. The procedure has never been legislated for, despite a series of amendments to the Immigration Act,<sup>256</sup> but is provided for in the Operational Manual of the Immigration Service. It was this procedure that presented something of a challenge to the courts in *Ye* and *Huang*.

Baragwanath J, in the High Court decision in *Ye*, looked to the Legislature for the answer. His suggestion of using the test already legislated for in the Immigration Act, albeit in a different procedural context, shows the Court attempting both to respect the Legislature, and to amend its perceived shortcomings.<sup>257</sup> In the Court of Appeal, the three way split marked a stark division in the Court's understanding of the Executive's actions. Taking the lead from both the Supreme Court's approach in *Zaoui*, and the surrounding legislative history, I saw the interview itself (or something similar) as essential to ensure New Zealand met its international obligations. As noted above, Hammond and Wilson JJ's conclusion in *Ye* that there was nothing

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<sup>253</sup> I should note that other organs of government are also part of this dialogue. See for example the discussion of the ombudsman's role in Sir Kenneth Keith "Administrative Law Developments" above n 25, 130–132. The United Nations Human Rights Committee has also had a role to play. Its criticism of New Zealand for differential treatment of children unlawfully in New Zealand in relation to education has prompted inclusion in the Immigration Bill No 132-1 currently before Parliament of a clause allowing overstayer children to attend school: CRC Committee "Consideration of Reports Submitted by States Parties under Article 44 of the Convention Second Periodic Report of States Parties: New Zealand" (12 March 2003) CRC/C/93/Add.4, 2001 para 24(i). The Bill has been reinstated following the change of government (Reinstatement of Business, 9 December 2008), and, as it commands bipartisan support, is unlikely to be significantly hindered. See also CERD/C/NZL/CO/17 (2007) para 23. New Zealand proposes to withdraw this reservation following enactment of the Immigration Bill currently before Parliament (see Appendix 2: Progress on UNCROC Work Programme [www.myd.govt.nz](http://www.myd.govt.nz) (accessed 18 January 2008). See discussion in Susan Glazebrook, Natalie Baird and Sacha Holden "New Zealand: Country Report on Human Rights" (forthcoming in the VULWR).

<sup>254</sup> Discussed in section IV.

<sup>255</sup> See discussion above at n 33.

<sup>256</sup> The procedure also has not been included in the Immigration Bill No 132-1.

<sup>257</sup> Discussed in section IVA.

requiring immigration officers to undertake the humanitarian interview, but once such an interview was undertaken, the courts could subject it to scrutiny. By contrast, Chambers and Robertson JJ's conclusion was that the procedure instigated by the Executive was illegitimate: "nothing could be further from the statutory purpose".<sup>258</sup>

The Hammond and Wilson JJ approach presents its own interesting perspective on the intra-governmental relationship. That judgment took a very hands off approach in the legal sense, but interestingly, made non-binding comments on what those Judges saw as the appropriate course of action. For example, while the humanitarian interview was not legally required, the Judges said that it was "entirely sensible and appropriate"<sup>259</sup>.

The interpretations advanced in the judgments delivered by Wilson and Hammond JJ and Chambers and Robertson JJ were not advanced by the Immigration Service in *Huang*. In fact, Chambers J resiled in that case from the position he had taken in *Ye*. In its argument in *Huang* the Immigration Service continued to proceed on the basis that the interview was a proper response to New Zealand's international law obligations.<sup>260</sup> *Huang* thus constitutes an example of the courts taking a lead from the Executive.

## ***B How to determine refugee status***

New Zealand ratified the Refugee Convention in 1960. Fifty years later we are still working through our methods of implementation. It was not until 1999 that the Refugee Convention was (partially) incorporated into the Immigration Act.<sup>261</sup> Prior to this partial incorporation, the government had discharged its obligations to refugee status claimants through processes established by the Executive. *D v Minister of Immigration* seems to have prompted the establishment of the Refugee Status Appeals Authority in 1991 under the prerogative powers of the Executive. The unlegislated nature of the processes gave rise to difficulties that had to be confronted by the High Court in *Singh v Refugee Status Appeals Authority*<sup>262</sup> and the Court of Appeal in

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<sup>258</sup> *Ye* above n 30 para 527 Chambers and Robertson JJ.

<sup>259</sup> *Ibid*, para 412 Hammond and Wilson JJ.

<sup>260</sup> As I noted in my judgment in *Ye* above n 30 para 204, the Crown accepted the interview process as necessary, at least to gather any updating information before final removal.

<sup>261</sup> Immigration Amendment Act 1999.

<sup>262</sup> *Singh v Refugee Status Appeals Authority* [1994] NZAR 193 (HC).

*Butler v Attorney-General*.<sup>263</sup> *Butler*, decided in 1997, included a request for legislative attention, in particular in relation to the Refugee Status Appeals Authority. In 1999, Parliament sought to clarify matters, by adding Part IVA to the Immigration Act. The new part provided a comprehensive regime for making and determining claims for refugee status, including giving statutory recognition to the Refugee Status Appeals Authority.

Here, it is worth also noting that what amounts to an expansion of the protection regime has been proposed in the current Immigration Bill. This provides a basic non-refoulement protection for people who are not refugees, but are at risk of arbitrary deprivation of life, torture, or cruel or degrading treatment if they are removed from New Zealand.<sup>264</sup> It is possible that this development reflects, at least in part, the Executive acceptance in *Zaoui (No 2)* that New Zealand is bound to offer such protection by its international obligations under the ICCPR and the Convention Against Torture. It is clear that the Legislature intends to take the lead in ensuring compliance with these obligations.<sup>265</sup>

### ***C Detention pending determination of a refugee claim***

The problem of whether, when and how to detain refugee claimants has resulted in an extended exchange between the three branches. As noted above, the Court of Appeal in *D v Minister of Immigration* had pointed to a serious legislative deficiency in the detention and removal provisions as they applied to refugees.

After the 1999 revisions of the Immigration Act, the issue of detention of refugees came before the Court of Appeal again in *Attorney-General v Refugee Council of New Zealand*. That case concerned an executive operational instruction relating to the exercise of discretion pursuant to s 128(5) of the Immigration Act 1987 to detain persons who were refused a permit pending removal “on the first available craft”. Both the High Court and Court of Appeal held that the provision included refugee claimants, although the immediate turnaround was subject to s 129X’s prohibition on removing refugee claimants prior to determination of their claim.

The operational instruction listed situations in which a refugee claimant should be detained in a penal institution or at the Mangere Refugee Resettlement Centre. That

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<sup>263</sup> *Butler v Attorney-General* [1999] NZAR 205 (CA).

<sup>264</sup> Cls 120 – 121.

<sup>265</sup> See Select Committee Report, 14. However it should be noted that the rights of children are not specifically addressed in the new Bill.

centre is operated as an administrative, as opposed to a penal detention centre. To an extent the centre operates as an open detention facility, as persons can be granted permission to leave the centre and return at stipulated times. Residents can also reside in family groups. They are expected to observe the rules of the centre but a statement of residents' rights is also provided to the detainees. There is a strong focus on the need to facilitate rights of access to legal representation.<sup>266</sup>

In the High Court, Baragwanath J held that the operational instructions were unlawful because they appeared to fetter the discretion of officials to decide whether or not to detain a person, instead addressing only *where* the person should be detained.<sup>267</sup> Prior to that, he had issued an interim judgment holding that, although s 128(5) of the Act did create a power to detain claimants for refugee status, they could apply to the District Court for bail under s 128A. As this was a possibility that had not been advanced by the plaintiffs it was necessary to defer a final judgment to allow the Crown to make submissions.<sup>268</sup> The Legislature acted quickly and a month after the delivery of Baragwanath J's interim judgment it introduced an amendment to the Act which allowed for conditional release of certain detainees, including refugee claimants.<sup>269</sup> In an attempt to extend the dialogue, the Crown argued that this change should be used in the construction of the pre-amendment legislation. Baragwanath J flatly rejected that possibility.<sup>270</sup>

On appeal, the Court of Appeal unanimously held that the operational instruction was not unlawful. Writing in three separate judgments, the Court opined that the instruction did not in fact fetter the discretion of officials, although the way it had been applied in practice did give that impression.<sup>271</sup> In my judgment, I suggested some alterations to the wording of the instruction to remove some of the issues that had concerned Baragwanath J in the High Court. Most of these were adopted in the NZIS Operations Instructions effective from 1 April 2004.<sup>272</sup> The main alterations related to the criteria set out for detaining individuals at the Mangere Detention Centre.

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<sup>266</sup> In my judgment in the Court of Appeal, above n 251, para 133 I noted that some 94 percent of refugee claimants had been detained in the period between 19 September 2001 and 3 January 2002. I understand that the percentages declined significantly in the wake of the judgment.

<sup>267</sup> *Refugee Council of New Zealand Inc v Attorney-General (No 2)* [2002] NZAR 769 (HC).

<sup>268</sup> *Refugee Council of New Zealand Inc v Attorney-General (No 1)* [2002] NZAR 717 (HC).

<sup>269</sup> Immigration Amendment Act 2002, s 10.

<sup>270</sup> Above n 216, para 139.

<sup>271</sup> Above n 251, paras 20 and 27, Tipping, Anderson and Blanchard JJ, paras 119 – 120 McGrath J and paras 287 – 288.

<sup>272</sup> The Operations Instructions are available at <http://www.immigration.govt.nz/opsmanual/index.htm> at A16.2 of the Operations Manual (last accessed 22 January 2009).

For example, I pointed out that the instruction ought to make clear that there should not be a presumption in favour of detention where identity is uncertain if no other factors suggest detention is necessary.<sup>273</sup> This suggestion was incorporated into the Operations Instructions by ensuring that this factor was coupled with an assessment of the individual's potential danger to the community. The new Instructions also incorporated my suggestion that the decision of whether to detain an individual ought to be separated out from the decision of where the individual should be detained. I had also suggested that it ought to be made clear in the Instructions that difficulties in getting documents for the individual would not alone be sufficient to justify detention without the presence of other factors, and that its importance as a consideration declines after the initial period.<sup>274</sup> This was incorporated in the new Operations Instructions where it was stated that the absence of valid travel documents is just one factor which may be taken into consideration and that there is no predetermined view that an asylum claimant without valid travel documents should be treated as high risk.

What is remarkable about the Immigration Service's response in this case is that it made alterations to a document, the validity of which had been upheld by the Court of Appeal, in response to suggestions made in a single concurring judgment. This is a striking example of the Immigration Service's commitment to meeting its obligations under international law.

#### ***D Detention pending removal***

Shortly after the Court of Appeal's judgment in *Refugee Council* was handed down, another high profile case would prompt reassessment of detention proceedings in the Immigration Act. *Mohebbi v Minister of Immigration*<sup>275</sup> concerned an Iranian who arrived in New Zealand without a passport, failed to obtain a permit, and utilised every avenue to remain in New Zealand, including marrying a New Zealander despite already being married to another woman. He refused to sign the application that would allow him to obtain a new passport and Iran refused to grant a passport without the application. Mr Mohebbi was detained by the Immigration Service, but 60(7) of the Immigration Act set a statutory limit on immigration detention of three months. Chambers J held that there was no statutory authority for a longer detention, and Mr Mohebbi was released. Five days after the judgment was handed down an Afghani

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<sup>273</sup> Above n 251, paras 281 and 283 Glazebrook J.

<sup>274</sup> Ibid, para 281 Glazebrook J.

<sup>275</sup> Above n 252.



immigrant, who had been released from detention on the basis of that decision, was charged with shooting a woman in her back yard.<sup>276</sup>

Parliament (and the general populace) was horrified.<sup>277</sup> An amendment was presented to the House in the form of a Supplementary Order Paper and the Immigration Amendment Act (No 2) 2003 was passed with an amendment to s 60. The new s 60(6) stated that a judge reviewing a warrant of commitment on an immigration case could not order the release of the detainee if the detainee could not be removed from the country by reason of his or her action or inaction. Release was only permissible where there were exceptional circumstances.

The new legislation was shortly before the Court again, this time in a difficult case involving an Iranian who refused to sign his passport documents on the grounds that as a Christian he feared persecution in Iran. Mr Yadegary had been in custody for 29 months when he was granted bail by the High Court on the grounds that the length of his detention constituted exceptional circumstances: *Yadegary v Manager, Custodial Services, Auckland Remand Prison*.<sup>278</sup> The Court of Appeal upheld that decision by a majority, but the two majority Judges, O'Regan and Baragwanath JJ, disagreed over the correct interpretation of the legislation.

O'Regan J took the view that circumstances would be exceptional if the only method of removing Mr Yadegary was with his co-operation and detention with the purpose of coercion could not be expected to succeed. He acknowledged that the point at which the purpose of coercion could be said to have failed was a matter on which views can reasonably differ, but he considered that after 29 months of detention it had been reached in this case. Baragwanath J considered that the statute required an assessment as to whether detention was for an unreasonable period. Taking that into account, along with the principle of legality and proportionality to imprisonment for criminal offending and contempt of court, Baragwanath J concluded that the length of detention now amounted to an exceptional circumstance.

The third Judge, William Young P, placed decisive weight on the legislative history. The Judge stated that, although Baragwanath J's interpretation was available on the literal words of the section, "[the Legislature] introduced s 60(6) on a particular

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<sup>276</sup> Patrick Gower, "Accused set free four days before woman shot" (10 September 2003) *NZ Herald* Auckland 1.

<sup>277</sup> See (2 September 2005) 611 NZPD 8254.

<sup>278</sup> *Yadegary v Manager, Custodial Services, Auckland Remand Prison* [2007] NZAR 436.

assumption as to its effect. In this context I am reluctant to construe the section on the basis that the legislature missed its mark.”<sup>279</sup>

The Legislature’s response to this decision is still in the pipeline, but it appears from the Select Committee report on the current Immigration Bill<sup>280</sup> that it is not happy with the position post-*Yadegary*. The Select Committee report responds pointedly to the decision.<sup>281</sup>

... courts have determined that the length of time spent in detention itself constitutes “exceptional circumstances” under which a non-citizen may be released from detention. This may result in non-citizens choosing to hinder their departure by “waiting out” time in detention in order to create an “exceptional circumstance” to justify their release.

We recommend an amendment to clause 285 to create a presumption that, except in exceptional circumstances, a non-citizen who hinders their departure will be detained. We also recommend an amendment to exclude length of detention from the “exceptional circumstances” to be considered.

The Select Committee report also responded negatively to the conclusion in the *Zaoui* bail case that the courts have inherent jurisdiction to grant bail:<sup>282</sup>

We note that the detention provisions in the bill have been developed to comply with the human rights standards in the New Zealand Bill of Rights Act 1990. There may be instances where the courts, in considering a warrant of commitment application, could exercise their inherent jurisdiction to grant bail to a non-citizen.

We consider that this power could be used to undermine the specific provisions for immigration detention and monitoring in the bill, and we recommend new clause 271A to clarify that the bill constitutes a code for the immigration detention of noncitizens.

## ***E Special advocates***

In immigration matters there are times when the refusal of a permit, or expulsion of an individual is decided on the basis of classified information. If the individual does not have access to that information, this offends against basic principles of due process and natural justice. As a result, New Zealand has followed the leads of both Canada and the United Kingdom, as in the Immigration Bill No 132-1 provision has been

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<sup>279</sup> Ibid, para 223.

<sup>280</sup> See discussion above n 253.

<sup>281</sup> “Immigration Bill” reported from the Transport and Industrial Relations Committee (21 July 2008) at 28.

<sup>282</sup> Select Committee Report, 27.

made for the creation of special advocates.<sup>283</sup> This represents a statutory endorsement of the ad hoc procedure utilised during the Zaoui saga. In that case the Inspector-General appointed two special advocates to examine classified security information and make submissions on Mr Zaoui's behalf.<sup>284</sup>

Under New Zealand's new Immigration Bill, decisions involving classified information are to be made by the proposed Immigration and Protection Tribunal.<sup>285</sup> The Bill sets out a special procedure that the Tribunal must follow where classified information is involved. The Tribunal must approve a summary of allegations and provide this to the appellant and the special advocate.<sup>286</sup> (This clause tracks Williams J's decision in the High Court prior to the drafting of this Bill where he held that Mr Zaoui ought to be provided with a summary of the allegations as it is a basic principle of natural justice.<sup>287</sup>) However, while there is a need to provide this summary, the clause does not require the summary to list any documents or source material containing the classified information; detail the contents of any documents or other source material containing the classified information; or specify the source of any documents or other source material containing classified information.<sup>288</sup> The special advocate is not to be involved in the process of approving, amending or updating the summary of allegations.<sup>289</sup>

## ***F Judicial review***

Another interesting point to note in this intra-governmental dialogue is the retention of the judicial review mechanism in immigration legislation. Despite having various appeal mechanisms, Parliament has not tried to remove judicial review rights, albeit these have been time limited. The effect of this is to give litigants a choice as to the route by which they challenge the decision at stake.<sup>290</sup>

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<sup>283</sup> The special advocate procedure has appeared in various manifestations but the basic concept is that a lawyer with high level security clearance is briefed by the defendant and is then allowed to see the classified information and make representations on behalf of the defendant. Usually there are restrictions on communications between advocate and client once the advocate has seen the classified information.

<sup>284</sup> See John Ip "The Rise and Spread of the Special Advocate" [2008] Public Law 717, 728.

<sup>285</sup> This Tribunal will replace the Residence Review Board, the Refugee Status Appeals Authority, the Removal Review Authority, and the Deportation Review Tribunal (cl 193).

<sup>286</sup> Immigration Bill No. 132-2 cl 216.

<sup>287</sup> John Ip above n 284, 730; *Zaoui v Attorney-General* [2004] 2 NZLR 339 at [172] (HC)

<sup>288</sup> Immigration Bill No. 132-2 cl 216(4).

<sup>289</sup> Immigration Bill No. 132-2 cl 216(6).

<sup>290</sup> The hazards of such an approach were recently demonstrated in *Vilceanu v Minister of Immigration* [2008] NZCA 486, para 22 where the Crown "brought the review proceedings for the not very satisfactory purpose of obtaining for itself a right of appeal to [the Court of Appeal] should it be unsuccessful in the High Court." The Court gave short shrift to the argument that the review could be revived when the Crown was dissatisfied with the result on appeal.

It seems that Parliament has (in the general immigration arena) attempted to limit the availability of review by a less direct route, principally by eliminating any requirement that reasons be given. The formula in s 58, which confers on immigration officers the power to cancel a removal order, is a classic example. Subsection (5) states that nothing in the section gives any person the right to apply for cancellation of a removal order, and where a person does make such a request the immigration officer is under no obligation to consider the request, nor to give any reasons relating to any decision.

Despite this provision, the Immigration Service continues to undertake the humanitarian interview procedure and the reasons for the decision are recorded. Once again, this shows a commitment to abiding by New Zealand's international obligations, although the recording of reasons is probably also at least partly a requirement of internal operation purposes.<sup>291</sup>

### **G      *Privative clauses***

Privative clauses are perhaps the ultimate in "dialogue" as they attempt to shut off the conversation altogether. Where privative clauses are included, the New Zealand courts, like their Australian counterparts, have shown an intention not to be dissuaded easily.<sup>292</sup> In the immigration sphere the courts' attitude towards privative clauses has been recently demonstrated in the Zaoui litigation. Here, a provision prohibiting review of any proceeding, report or finding of the Inspector-General<sup>293</sup> was held not to prevent the court from considering the Inspector-General's interlocutory decision as to the manner in which he intended to review the Director of Security's decision to declare Mr Zaoui a security risk.

Agreeing with the High Court, the Court of Appeal unanimously found that this privative clause did not prevent review of material errors of law, which were considered to be jurisdictional errors. The errors alleged in this case were material

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<sup>291</sup> As I noted in *Ye* above n 30, para 164. It will be interesting for the future to see whether in the new environment of a "culture of justification" (see Michael Taggart "Proportionality, Deference, *Wednesbury*" above n 86, 50) a failure to give reasons might lead more readily to a view that a decision was or might be unreasonable as it has not been recorded that relevant factors have been taken into account in the decision-making process. See for example the comments in *De Smith's Judicial Review* above n 66, 597-598 on a possibly increased tendency on the part of the courts to require more fulsome justification of decisions and to review the adequacy of those reasons. See also William Wade and Christopher Forsyth *Administrative Law* (10 ed Oxford University Press, Oxford, 2004) 365 on the possible consequences of a failure to give reasons.

<sup>292</sup> Philip A Joseph *Constitutional and Administrative Law* above n 178, 859 and discussion of *Bulk Gas* above n 70.

<sup>293</sup> For discussion of the role of the Inspector-General see above n 51.

errors of law: the failure to provide a summary of the allegations against Mr Zaoui was a denial of natural justice, and failure to have regard to the Refugee Convention (as mandated by the statute) a fundamental misconception of the Inspector-General's task.<sup>294</sup> Both Anderson P and I emphasised the importance of judicial review where an individual's rights were at stake. The strength of the Court's view is evidenced by Anderson P's statement:<sup>295</sup>

That the High Court must regard as impliedly excluded its supervision in respect of any statutory power, to ensure its lawful exercise, let alone a power as relevant to personal liberty as the Inspector-General's power of review, is a proposition I refuse to accept.

## ***VII THE END OF THE VOYAGE***

As this review has shown, the boat of voyagers I began with must brave an uncertain sea, but it is undeniable that the beam from lighthouse has shone progressively brighter over the last fifty years. And, of course, the courts do not have the only, or even the most important, role to play in securing the rights of would be immigrants. It is the Executive that enters into international human rights agreements and, as we have seen, the Executive has shown itself willing to implement them. Likewise the Legislature has played an important role in providing for human rights and incorporating New Zealand's international obligations into domestic law.

The courts' role is complementary, sometimes as the lighthouse keeper providing the life buoy for those who have fallen overboard; other times lighting the channel ahead for safe passage towards the coast. Although the New Zealand courts are cognisant that limits need to be placed on judicial review and acutely aware that a proper distinction between the various branches of government must be maintained, the question as to where these significant lines should be drawn remains inherently uncertain. However, it is clear that, as these significant boundaries have become increasingly blurred, the role of the judiciary in this fundamental exercise has changed from that of even ten or so years ago.

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<sup>294</sup> *Zaoui (No 2)* (CA) above n 56, para 101 Glazebrook J.

<sup>295</sup> *Ibid*, para 18 Anderson P. This point was not in issue in the Supreme Court (see leave decision [2005] NZSC 5).