

grounds for judicial review

ILLEGALITY

Presumption of consistency: *Puli'uvea* *, *Zaoui*, *Helu* statutory discretion should be read so far as wording allows as consistent with unincorporated international treaty obligations

- error of fact
 - most courts nervous to apply, as strays into merits of decision, especially where reasonably possible to hold different views, and as primary decision makers often have specialist knowledge etc. courts will intervene where there is a clear mistake of fact, or the finding is so inexplicable it becomes unreasonable – the limits imposed on this court intervention are where there is a:
 - o reasonably held factual view OR
 - o genuinely formed value judgementneither of which the court will intervene in.

as in:

- *Moxon* {feasibility of mitigation measures for casino for the decision maker, not for the Court} sometimes serious and incontrovertible factual error may be reviewable.
- *Oggi Advertising* where decision maker makes incontrovertible factual error which is fundamental to the outcome
- *Daganayasi* Cooke J in minority arguing for general ground of mistake of fact, though not yet recognised in NZ
- *NZ Fishing* 'ordinarily on merits, otherwise challenged as reasonableness'

link legislation to factual error being applied

- material error in law
 - a decision maker must understand the law and apply it correctly
 - as in:
 - *Peters v Davison*, Commission Inquiry misunderstood / misapplied tax evasion law. held that a ground 'in and of itself', needed no discussion of bounds of court jurisdiction.
 - *Carter Holt Harvey* dispute of scope of power re: bylaw regarding "waste". held Court will reject interpretations that are uncertain, difficult to apply, and which lead to uncertain decisions
 - *M v Syms* High Court identified proper meaning of 'gross misconduct': where sufficiently grave to justify the punishment (removal from school). held decision was open to decision-maker, but error in procedure.

if a tenable decision, likely will concede to decision maker

if treaty incorporated into law, must be treated as such. see treaty application below.

Te Tiriti: 'must give effect to': *Ngai Tai* said wording important, an active work of upholding (must be used to give effect to, a positive obligation) is different to mustn't breach or thwart law.

- improper purpose

be cautious: limited to purpose of the power

power granted cannot be used where thwarts or runs counter to statutory purpose
can be used for ancillary purpose as long as doesn't go against intended purpose
as in:

- *Unison Networks* held subject to limits even if power granted without restrictive terms, discretion should be applied to advance policy and objects of Act, and decision invalid if (improper) purpose 'thwarts or runs counter to' purpose of Act.

Te Tiriti: discuss presumption of consistency / principle of legality from Lord Cooke, *NZMC (Lands)* case.

- relevancy

must take into consideration relevant mandatory considerations, express or implied, mustn't consider irrelevant ones; *Syms*

courts will not review the weight applied to each factor: *NZ Fishing* said for decision maker to conclude

as in:

- *NZ Fishing Industry* Cooke LJ: weight to be given to each factor is a matter for the Minister [decision maker], subject to reason – could a reasonable Minister do this? the Court enforced mandatory (obligatory) considerations
- *M v Syms* factual standard of misconduct, and discretion if suspension made if met – a school's zero tolerance policy is relevant as long as with other relevant considerations. headmaster failed to account for factual matters relevant to assessment of whether to suspend. court recognised headmaster as primary decision maker, and as such to determine whether gross misconduct had occurred
- *Ashby, Tavita* (*leading despite obiter) unincorporated international treaties are mandatory relevant considerations, if manifestly important or whenever ratified. decision maker obliged to consider treaty obligations, though weight given to them not a concern of court.

Te Tiriti: *Radio Frequencies* said principles are mandatory relevant considerations. affirmed in *Whale Watching*, and *Ngai Tai*.

Whale Watching and *Ngai Tai* [similar to *Wolf*] must consider and must afford due weight (*WW* esp), which can be scrutinised by courts. where this is not enough, can be made out in relevancy or unreasonableness, tho relevancy is easier.

- failure to exercise discretion

aka self-fettering

decision maker must genuinely exercise discretion, except where otherwise mandated (to delegate etc): **smith 35/5**

cannot blindly apply policy to exclude consideration of merits of an individual case (like treated alike) *Syms* says that is not an exercise of discretion

“policy” has got to be a non-legal rule, if in legislation then must be followed
can fail to exercise by:

- acting under dictation
- unauthorised delegation – decision maker must be in lawfully mandated role

PROCEDURAL IMPROPRIETY

CCSU: “failure to observe the basic rules of natural justice or failure to act with procedural fairness towards a person affected by the decision, [and includes] failure to observe procedural rules that are expressly laid down in the legislative instrument”

instrumental view: allowing fair processes leads to better decisions

- fair hearing rights (natural justice)

Taylor **CM56/5** “affording [directly affected] person an opportunity that is fair in the circumstances to put their views, information, and arguments to the decision maker.”

entitlement threshold: individual rights / impact: a low bar. conversely, a wide policy impact is harder to impose fair hearing elements to.

Daganayasi not for courts to decide whether unduly harsh or unjust

rights: to know opposing evidence (*Daganayasi*), and Cooke J in minority saying consistency in process (unlikely to be enforced), ability to meaningfully present case (advocate + interpreter), time to prepare, cross examination.

a significant issue where if all rights imposed, then inefficiency created, undermining purpose of Parliament’s delegation.

consider factors: *Daganayasi* ‘procedural requirements depend on circumstances’;

family deportation was of “major importance”

- statutory scheme (may fall into unlawfulness)
if silent on process, fair hearing rights are implied / inferred (*Daganayasi*)
consider purpose of delegation – *CREEDNZ*. (expediency would not lend to an oral hearing)
- nature of decision making process:
increased political decision maker means court has lower threshold to impose requirements (*CREEDNZ*)
some processes incompatible with decision maker (*CREEDNZ*, cabinet confidentiality meant can’t be an oral hearing)
purpose of decision making body, *Daganayasi* regularity of decision; for speed, efficiency, etc.
oral hearing awkward or impossible (pre-teleconference)
- nature of interest affected
‘more significant the implied rights, the higher level of process expected – *Daganayasi*
includes commercial interests, human rights, degree of affected
if a question of policy, then decreased fair hearing right

key analogy to facts: *Daganayasi* still didn't get an oral hearing

- what process?

general rule is that big general rights at stake likely lead to big oral hearing, though not always

if there is adverse material against you, should be told that information is and have a right to it – *Daganayasi*

where issue of credibility / written expression not possible, or disputed facts, an oral hearing is more likely – *Fraser*

'legitimate expectation' *CCSU* where promised practice followed, or has always been done a certain way

- bias

Taylor **CM56/10** "decision maker must be sufficiently free of any conflict of interest or pre-judgement"

can be actual, or apparent / presumptive:

- actual – based on improper external factors (own interest). difficult to prove, little cases resolved on this point
- apparent – allows intervention when there is a risk the decision maker swayed by those factors, regardless of whether they have been (diplomatic approach)
- presumptive – presumes risk arises when decision maker has financial interest in outcome

test from *Saxmere No. 1 and 2*: whether fair minded, reasonably informed observer would conclude that decision maker might bring an impartial mind to decision.

that case found that business debt and close friendship between judge and counsel was **acceptable. check 1 or 2**. an inherently factual inquiry, as found J beholden to counsel.

don't have to conclude actual bias, just apparent

factors include: family / friend ties, financial, or personal prejudice

identify what gives rise to the bias, then articulate connection, and how it creates bias

'reasonably informed' arose because NZ lawyers and Judges know each other, and so should a reasonable person

IRRATIONALITY (UNREASONABLENESS)

- original high threshold from *Wednesbury (and Woolworths)*:
so unreasonable, no reasonable authority acting in decision makers place would've decided so
so perverse, absurd, outrageous, in defiance of logic, that no sensible person would've made it – *Woolworths*. also said test is a high
- *Wolf**: allowed perhaps circumstances which would allow a lower standard of court intervention; policy decision, fair and transparent decision, human rights, importance of decision to affected person.
- *CCSU*: "decision so outrageous, in defiance of logic or accepted moral standard that no sensible person who had applied their mind to the question could have arrived at it"
- *Wolf ** "simple unreasonableness" an indication of modern tendency to selectively lower threshold. dependent on context: who made decision, nature of decision,

process, subject matter, policy content, importance of decision. an implication of treaty obligations may trigger a hard look or closer scrutiny

- more likely where human rights seriously affected
- *details of *Wolf*: regarded deportation, stopped on humanitarian grounds. decision set aside. circumstances for lesser test were: importance of decision to person, sanctity of family unit, and treaty obligations. absence of factors present in *Wednesbury* significant: tribunal (primary decision maker) not elected, with expertise on issue equal to that of courts, not a decision of high policy. tribunal decision did not survive close scrutiny: flawed facts and inferences on them, poor summaries, no opportunity to contest.

other substantive grounds:

{in order of most developed / crystallised to least}

- *Coughlan*, in **Knight 99/10** : substantive legitimate expectation
- inconsistent treatment
- disproportionality: Bill of Rights protects from disproportionate penalties
- substantive fairness

fun points of thought:

- inherent tension between Rule of Law and Separation of Powers: ROL and legislative supremacy has fuelled vigilance and process, whereas SoP inspired restraint regarding judgement of merits of a case, judgement, weight given, etc etc etc.

treaty application

dualism treats international law as a separate and independent system from the New Zealand legal system. as such, treaties and treaty obligations do not become binding until incorporated into law.

A-G for Canada v A-G for Ontario says well established in the Commonwealth that treaty making is an act of the Executive, and then any implementation of the treaty is an act of the legislative.

Brind expression rights under (unincorporated) EHCR did not need to be applied or considered when prohibiting broadcast of statements by terrorist organisation under Broadcasting Act.

Ashby weight considered by decision maker

Te Tiriti o Waitangi

Joseph and Palmer opposed on its constitutionality: Palmer took a realist view and said that it already affects the exercise of public power in NZ, and Joseph said it had an ambivalent enforcement status.

Article One:

- Te reo Pākeha, ceded sovereignty to Crown
- Te reo Māori, Crown takes kawanatanga (governor/chieftainship)

Article Two:

- Te reo Pākeha, iwi and hapu retain “undisturbed” possession of lands, estates, forests, and fisheries, with Crown right to pre-emption
- Te reo Māori, tino rangatiratanga retained (absolute sovereignty), over lands, villages, and taonga

Article Three:

- Te reo Pākeha, royal protection and extension of “rights and privileges of British subjects” to Māori.
- Te reo Māori, (protection of collective way of life?)

legal status:

do cases as grid?

- Waitangi Tribunal 1040: rangatira DID NOT cede sovereignty through Te Tiriti.
- relationship described takes precedence over language used
- tikanga māori perspective sees Te Tiriti as cementing, not ceding, the authority of rangatira, as this cannot be taken away. Te Tiriti was a welcoming, and considered binding as long as the relationship it described remained intact (Palmer).
- British Crown representatives did not treat it as the legal mechanism which they acquired sovereignty with, although was considered necessary to sharing public power. Te Tiriti was very vulnerable to political dynamics thereafter though.
- renaissance in 1960s and onwards.
- *Huakina Development* took dualist approach, unenforceable but is interpretative tool
- *NZ Maori Council v AG (Lands Case)* enforceable through legality / error of law
- *NZ Maori Council v AG (Radio Frequencies)* reasonable Minister would allow time for Tribunal, as Crown accepted that they are ‘bound to have regard to’ its recommendations, and ‘highly relevant’ discretion exercised
- *NZ Maori Council v AG (Broadcasting Assets)* prioritised principles over text, as ‘precise terms decrease in importance over time’
- *Ngai Tahu MTC v D-G of Conservation (Whales Case)* application of Te Tiriti principles means Ngai Tahu entitled to a ‘substantial degree of preference’, although not exclusive. affirmed in *Ngai Tai ki Tāmaki Tribal Trust v Minister of Conservation*.
- *NZ Maori Council v AG (Mighty River Power)* direct incorporation of principles as error of law. sale of shares of SOE not a breach, as didn’t materially impair redress

constitutional influence

- Cabinet Manual requires the legislation programme to bring attention to aspects of a Bill which have Te Tiriti implications, although not for compliance; and policy papers are consulted with AG or responsible Minister for any impacts on treaty settlements

- Public Service Act s14, to support Crown in relationship with Maori under Te Tiriti.
- te Tiriti increasingly present in jurisprudence
- Waitangi Tribunal, and in international domain is a valid treaty, tho without institutional support
- international instruments such as UN Declaration on Rights of Indigenous People

check if can be a Tribunal claim first:

ToW Act s6 (jurisdiction to cover claims)

- Maori, claims prejudicial effect by (Crown Act) [a) b) c) or d)]
- spell out effect on land and effect on people
- ss3: recommendations to Crown of relief
broad and powerful influence, despite being non-binding
Tribunal can recommend Crown to remove or compensate for prejudice
can't recommend the removal of private land
other key areas like fisheries and such also limited ss7

principles established in *NZ Maori Council (Lands Case)*, among other authorities

- partnership [leading one]
good faith, reciprocity, and mutual benefit
informed decisions and consultation = good partnership. this is tempered by reasonableness, only required where there is sufficient importance - a separate but related ground
'reasonably and in utmost good faith' *Radio Frequencies and State Owned Enterprises*
- active protection
what is the taonga to protect, and what is the Crown's responsibility for the current state of that taonga?
if Crown is responsible for the vulnerability of taonga, Crown has added responsibility
'active obligations' *Ngai Tahu, Whale Watching, Broadcasting Assets*
- freedom/right to govern
neither party can impinge on the other's matters
partnership obligations not absolute or unqualified- *Broadcasting Assets*
- adequate redress
Crown must always be able to provide it
would proposed action materially impair that ability?
mustn't materially impair ability to provide redress or recognition of Maori rights-
where asset is substitutable, there are other avenues and a degree of flexibility:
Broadcasting Assets, Mighty River Power
what is the state, and why? *Broadcasting Assets*
- consultation / adequately informed

should've waited for Tribunal report to ensure Crown fully informed – *Radio Frequencies*
no general duty to consult *State Owned Enterprises*
consultation must not be empty, may also be bare minimum *Whale Watching*

authority:

-*Huakina Development Trust* (1987) allowed Te Tiriti principles to be used as interpretive tools, which are used to help resolve questions where there is ambiguity. regarded effluent discharge into Waikato River tributary. planning tribunal said consideration of iwi irrelevant, but Chilwell J said though Te Tiriti not directly enforceable, as not incorporated, can be used as interpretive aid.

-*Radio Frequencies* said principles are mandatory relevant considerations. affirmed in *Whale Watching*, and *Ngai Tai*. this affects relevancy ground and all of it's limitations regarding merits and weighting and such too.

-relevancy and increased scrutiny: *Whale Watching* and *Ngai Tai* [similar to *Wolf*] must consider and must afford due weight (*WW* esp). identify departure from merits and weighting law in departure law, and the lowered threshold of unreasonableness.

-presumption of consistency / principle of legality is from Lord Cooke, *NZMC (Lands)* case.

Ombudsman

selected by Parliament, and must have moral authority.

jurisdiction derived from 1962 Ombudsman Act, OIA, and Local Government Meetings and Information Act

resolved primarily in early resolution: a provisional opinion, chance to comment, and then a final report otherwise

when find an unreasonable decision, can say that:

- authority should consider matter further
- omission should be rectified
- decision should be cancelled or varied
- practice / Act / regulation / bylaw which decision based on should be changed
- reasons should be given for decision
- other steps should be taken

OIA

purposes:

- increased accountability of state spending
- increased democratic participation
- outline of where / when information should not be shared

contentions:

- 'interference' w government decision making
- delays in providing information and processing requests

Regulations Review Committee

an Opposition member of Parliament

scrutinises: a check and balance on government authority (does regulation meet purpose of legislation?)

- regulation in accordance with primary legislation
- draft legislation and Bills
- laws that have already been made

jurisdiction from Standing Orders, a recommendatory role

a narrow focus on technical aspects

New Zealand Bill of Rights Act

philosophical justifications

- deontological: HR are good inherently, and are to be sought regardless of whether it advances any ulterior purpose
- teleological: associates HR with some further good which the exercise of HR advances, and advances either for society or individual.
- liberal rights: HR further individuals own aspirations, fullest expression to each individual's moral autonomy
- social rights: only useful if societal and economy structures provide sufficient range of choices to allow people's capacity for choice to be executed
- natural rights: law may be natural, because human nature makes it essential for people to be constrained by rules in order to survive / achieve some purpose which is thought to constitute the natural goal of humanity
- positive rights: utilitarianism. not from nature but from law passed by supreme political authority of state, sovereign legislative / international commentary passed by agreement.

jurisdiction: Section Three

- s3(a) act done by legislative, executive, or judicial branches of NZ government, or person in public power
- includes omissions
- Legislative:
 - o form and content of law
 - o Speaker's Ruling *Police v Beggs*
 - o removal or suspension proceeding against Judge, Ombudsman, Clerk of House
 - o Select Committee proceedings and reports
 - just because BORA applies doesn't mean all acts of Parliament are reviewable
- Executive:
 - o regulations and subordinate legislation
 - o exercise of prerogative, including of mercy and conduct of foreign affairs
 - o police and military actions
 - o acts done by agent, Goddard J in *M v Palmerston North Boys High School*

s3(b)

expands application to "by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law."

Low Volume Vehicle Technical Association v Brett decided whether action in performance of public function, etc etc, as in s3(b)

- CoA stressed act had to be in performance, as opposed to HC which looked more at nature of institution

Moncrief – Spittle v Regional facilities Auckland Ltd: if state acting in private capacity, BORA can be applied to it

Section Four: inconsistency with BORA cannot revoke or impliedly revoke any Act of Parliament

Section Five: Act subject only to “justifiable limitations prescribed by law that can be demonstrably justified in a free and democratic society”

Section Six: where meaning available consistent with BORA, that is to be preferred over any other meaning (including Interpretation Act, which requires a meaning consistent with purpose)

Section Seven: AG to report to Parliament when proposed Bill appears inconsistent with BORA

tests:

always begin with establishing the right, and then find the definition and ambit of that right, and where it is limited.

Morehelts NZ Ltd v South Taranaki District Council affirmed that victim must prove there has been a rights impingement, and government must provide that the impingement is justified in a free and democratic society and prescribed by law.

remedies:

Noort added remedies to BORA

- dismissal / stay of proceedings
- exclusion of evidence
- sentence reduction
- habeas corpus
- mandatory or prohibitory release
- damages added by *Baigent*, decided Parliament intentionally left remedies for Courts to develop
- declaration of inconsistency added by *Taylor*, a formal statement that enactment is inconsistent with the plaintiff's fundamental HR protected by BORA. declaration granted if in breach of Part **1A ss(1)**, **power granted under ss(2)**
- section seven

answering:

- BEGIN with an issue statement:
 - o who is affected
 - o what is the action
 - o what rights are engaged
 - o what is the crux of the problem
- s3: is action / actor subject to NZ BORA
 - o s3(a) by any of three branches of Government, and especially regarding executive can take a wide approach

- s3(b) any person or body in performance of any public function, power, or duty: a three part test from *Ransfield*, affirmed in *Low Volume Vehicle Technical Association v Brett*:
 - a) is there a performance of a function, power, or duty by any person or body?
 - b) is it conferred or imposed pursuant to law?
 - c) which is public?
 ten *non-exclusive* factors, as follows:
 - ownership (public or private);
 - economic purpose (for profit or not);
 - whether the source of the function, power or duty is statutory;
 - the extent of governmental control;
 - any public funding for the function, power or duty;
 - whether the entity is “effectively standing in the shoes of the government in exercising the function, power or duty”;
 - whether it is exercised in the broader public interest (as opposed to simply being of benefit to the public);
 - whether coercive powers analogous to those held by the State are conferred;
 - whether the functions, powers or duties affect the rights, powers, privileges, immunities, duties, or liabilities of any person;
 - whether the powers are extensive or monopolistic;
 - and whether the entity is democratically accountable

- distinguish between *Hansen* and *Moonen* tests: *M* is stricter, as it deals with social issues and a wider range of decisions to be made (Parliament, in giving discretion, realised there were a multitude of options and so delegated.) *H* is more often a yes / no scenario, “reasonably necessary” as regards cost efficiency

Hansen Test: for direct discretion

- define scope of right
- ascertain Parliaments intended meaning of the legislation
- ascertain whether consistent with right
 - if inconsistency is demonstrably justified as in **s5** then BORA compliant
 - if not, **s5** find a reasonable possible meaning consistent / less inconsistent with right by finding whether:
 - 1) limiting measure serves a purpose significantly important to justify the curtailment of a right / freedom
 - 2) a. the limiting feature is rationally connected with purpose
 - ★ b. the limiting feature impairs the right / freedom no more than reasonably necessary for sufficient achievement of its purpose
 - c. is the limit in due proportion to the importance of the objective
 - if not present, go to BORA **s4**
 - if there, adopt that meaning

permissible meanings must be “properly” or “fairly open”, “tenable” “intellectually defensible”: are inevitably subjective

- if there is no inconsistency, then BORA compliant
- [courts should acknowledge Parliament's expertise in regarding issues: the "margin of appreciation" decreases as Parliament decides on legal matters such as ambit of proof.]

Moonen v Film and Literature Board of Review Test: for less discretion

- define scope of right
 - state limitation experienced **s4**:
- identify different terms of Act which were properly open (what was Parliament's intention?)
 - only one meaning open:
 - meaning must be applied
 - more meanings open:
 - Identify meaning which constitutes least possible limitation on right **s5 and 6**
 - identify extent that meaning limits freedom / right
- if a limitation is present, is it demonstrably justified? **s 5**:
 - 1) identify objective of provision
 - 2) and it's importance and significance
 - 3) then the way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective
 - a) the means used must also have a rational relationship to the objective
 - ★ b) in achieving the objective there must be as little interference as possible with the right or freedom affected
 - c) limitation involved must be justifiable in light of the objective
 - yes, BORA **compliant**
 - no, BORA **s4** prevails, *Taylor* remedy available