

JUDICIAL REVIEW

- Either High Court Rules (Pt. 30) or Judicial Review Procedure Act 2016.

1. ISSUE

2. IS IT JUSTICIABLE?

- **Ansiminic**: all material errors of law are justiciable.
 - All of the grounds are material errors of law.
- **CCSU**: can review prerogative powers.
- **Curtis**: policy e.g. armament is not for the courts.
- **Labtests**: Look at the nature of the public body, the particular function, the context within which that function is being performed and what it is said had gone wrong.
- **NZ Fishing**: threefold duty – fairly, lawfully and reasonably.

3. ISSUE SPOTTING

4. WHAT GROUND CAN APPLY TO THE POTENTIAL ISSUE?

5. WHAT ARE THE TESTS FOR THAT GROUND/SUBGROUND? (CCSU)

a. ILLEGALITY: DM got the law wrong and so was acting ultra vires

- Error of Law**: Not been interpreted/applied right - effects the decision.
 - **Carter Holt Harvey**: meaning of the word 'waste.'
 - **Peters v Davidson** (Winston): DM doesn't have to be u.v for ground 2 apply.
 - **M v Syms** (Drunk kids): meaning of 'gross,' (supplemented by relevancy and fettering problems).

- Error of Fact**: DM got a established and incontrovertible fact wrong.

Must actually effect the exercise of their power.

- **Oggi** (billboard): only reviewable in very narrow circs.
- **Daganayasi**: Cooke P - any material error of fact could be.
- **Riverside Casino v Moxon**: court doesn't assess evidence strength.
 - o Error of fact usually cannot be reviewed.
- **NZ Fishing** (fish rentals): relevant considerations incl. facts obviously material to the statute as or ought to have been known by the minister or their department.

- Improper Purpose**: Power granted for one purpose is exercised for an unrelated purpose.

- **Unison Networks**: invalid if decision/purpose "thwarts or runs counter to the policy and objectives of the act." No invalidity if ancillary purpose, provided statutory purpose is pursued and the statutory policy is not compromised.
- **Roncarelli v Duplessis**: can't be personal purposes.

- Relevancy**: Must take into account mandatory considerations, must not taken into account irrelevant considerations.

- **M v Syms**: school rules are a permissible consideration, other circumstances were mandatory considerations and can't be ignored.
- **NZ Fishing**: Weight given to considerations not 4 judge.
- **Ashby and Tavita**: courts slow to imply mandatory considerations.

- Fettering of discretion**: DM must actually make the decision themselves.

- **M v Syms**: applying policy that does not allow case by case consideration of circs is ultra vires.
- Also includes: dictation, invalid delegation.

b. PROCEDURAL IMPROPRIETY:

- Fair Hearing Rule/Natural Justice**:

- Fairness triggered?: individual rights at stake?
- Flexible, depending on context.
- **Daganayasi**: if something prejudicial, must have right of response.

TEST:

- Nature of decision/DM:
 - o **CREEDNZ**: reluctant to read in implied right to hearing where against policy, DM is cabinet or G-G, or decision effects large number of people.

- o **Daganayasi**: higher policy = lower procedure.
- Admin efficiency
- o **Daganayasi**: must be workable to the scheme
- Statutory scheme:
 - o **CREEDNZ**: statute wanted thing to be fast tracked.
 - o **Daganayasi**: further into the process, less procedure.
 - o The more the scheme will be effected, less likely rigid obligations.
- Nature of rights and interests:
 - o **Daganayasi**: How important? Serious consequences?
- Legitimate expectations?
 - o **CCSU**: can be assured or because of practices.
- [Consultation: ONLY for non-adjudicative i.e. legislative decisions.
 - o **Labtests**: where a statute requires, it is a must.]

ii. Bias – TEST

- Justice done AND seen to be done.
- **Saxmere**: "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide."
- **Ebner**: "real and not remote" risk of bias.
 - o Relationship that could cause bias?
 - o Logical connection between the relationship and the 'deviation' from deciding the case on its merits?

c. UNREASONABLENESS/IRRATIONALITY

- Only merits based thing - usually means unfair process.

i. **Wednesbury** unreasonableness:

- "If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere."
- High threshold.

ii. **Wolf**: simple unreasonableness/"hard look". **Wednesbury** not always the best test. (Affirmed in **Pharmac, Ports of Auckland**).

TEST FOR WHICH TO APPLY (**Wolf**):

- Nature of the decision.
 - Discretion/factual?
 - Factual = more likely to intervene.
- Who is the DM?
 - Elected? Prob won't intervene (**WCC v Woolworths**).
- Importance of the decision?
 - Human rights = **Wolf**.
- Subject matter/Policy Content?
 - High policy = **Wednesbury**.
- Process?
 - Good process = **Wednesbury**.

d. OTHER GROUNDS?

- Substantive legitimate expectation.
- Proportionality.
- ALL mistake of fact? **Daganayasi** – Cooke P.
- Substantive fairness (**Thames Valley**).

6. APPLICATION TO THE FACTS.

7. CONCLUSION ON THAT GROUND.

- Ground is/is not likely made out because...

8. LIST THE TESTS FOR ALL THE OTHER SUBGROUNDS THAT YOU DON'T THINK ARE MADE OUT REALLY BRIEFLY.

9. OVERALL CONCLUSION

- o Declaration/Injunction.
- o Mandamus (performing duty) – Certiorari (quashing) – Prohibition (can't act as told).

INTERNATIONAL LAW – **Zaoui and Tavita are NZ position**

Dualism	Relevancy Principle	Presump. Consistency
Only incorporated int'l law has a domestic effect: A-G for Ontario	Tavita : Unincorporated treaties are mandatory considerations where important and relevant to the statute.	Puli'Uvea : courts should strive to interpret statutes consistently with int'l obligations.
Unincorporated int'l law can be used where the words of a domestic statute are ambiguous: R v Secretary of State (ex p Brind) .	Ashby : some int'l obligations are so important no reasonable minister would fail to take them into account. No need ambiguity.	Zaoui : Powers conferred are required to be read and exercised in accordance with int'l obligations.

OTHER AVENUES OF REVIEW

- OFFICIAL INFORMATION ACT : (obm looks at fairness, legality and reasonableness)
 - o Anyone can make a request for an Official Information.
 - Dept. and then Ombudsman (can investigate their own accord).
 - Have to do it within 20 working days (can extend).
 - o Will then: give you info or not – can redact things.
 - o Can make recommendations – not binding 2 dept, but can take to PM or House. Binding after 21 days unless vetoed by Cabinet.
- DELEGATED LEGISLATION:
 - o Benefits: time, money, expertise.
 - o Risks: have to trust local authority, may exercise own ends.
- REGULATIONS REVIEW COMMITTEE:
 - Elected each parliament.
 - Give recommendations on regs – present to parliament.
 - Committee can recommend strike down: self-executing if Parl. doesn't deal with it in 21 sitting days.

TREATY OF WAITANGI

Justiciability on Treaty Principles

- There can be express references to the Treaty in legislation, but in other times when there is no explicit reference, Treaty principles may have some indirect impact.
 - o **Huakina Developments**: Context might bring the Treaty principles in to be relevant as well: looking at the wider legislative scheme.
 - If the treaty is incorporated in older legislation.
 - "Fabric of NZ society."
 - o **Radio Frequencies**: no explicit reference in the specific legislation, but context (in terms of subject matter) mens Treaty principles are indirectly relevant.
 - Crown needed to at least wait for the Tribunal report to be able to realise the full effect of their policy.
 - Similar to **Ngai Tahu** case – dealing w taonga or something linked?

Principles - (**NZMC v A-G**) [1987]

GOOD FAITH/PARTNERSHIP:

- Treaty partners should act towards each other in partnership with utmost good faith – **NZMC**, honour of the Crown (Richardson J).
 - o E.g. developing a mechanism to make sure that Treaty claims are dealt with appropriately, in line with the Treaty principles.
 - o When interpreting legislation, court will assume parliament wants to be consistent w the Treaty principles.

- If Crown assesses options w good faith, can't review outcome (*Radio*).
 - WT mandatory relevant considerations – must be informed (*Radio*).
- REDRESS:** discussed by Somers J in *NZMC*
- "Will the action now or in the foreseeable future impair, to a material extent, the crown's ability to take the reasonable action which it is under an obligation to take?" - *Broadcasting Assets*.

- o **Broadcasting Assets:** are the assets substitutable?
- o **MRP:** There can be infinite types of redress - if the Crown's ability to provide redress isn't effected then the action is ok.
 - Material impairment can be shown even if no redress becomes impossible post-action.
 - Preventing redress that was never a "reasonable or substantial prospect" is not material impairment.
- a) Court must conclude that proposed action is inconsistent w Treaty Principles.
- b) Is there a material impairment?
- c) Court addresses issue and forms judgment.

ACTIVE PROTECTION

- Active protection by the Crown is required - *Ngai Tahu Māori Trust Board*.
 - o **Ngai Tahu:** cannot read down what is required by the Crown, must read treaty principles as broadly as reasonably possible.
 - o Recognised fiduciary duties – *NZMC v A-G*.
- **Broadcasting Assets:** crown only required to do what is reasonable.

ORAKEI CLAIM - NWO

Tribunal Info

GOOD FAITH/PARTNERSHIP:

- Orakei Report
- Normanby's Instructions:
 - o All dealings conducted in good faith – didn't do anything injurious.
 - o Pre-emption created a duty 4 Crown: (Durie).
 - Māori wanting to sell – 'waste lands.'
 - Retaining enough land so could maintain/support life.
- Lord McNair's Principles:
 - o Avoid reliance on text.
 - o Contra-proferentum, US Supreme Court/Canadian position.

REDRESS:

- Tāmaki Makaurau Report
- Negotiating settlement is a political act.
- Overlapping claims – only mandated group gets settlement is not fair.
- Needs to give funding to others too.
- Must know what is given to one group so can assess other's chances.
- Non-exclusive redress only after exclusive redress considered.

ACTIVE PROTECTION:

- Orakei Report
 - Omission to provide protection is a breach too.
 - Tamaki Makaurau Report
 - Suggests a duty that is beyond consultation – more than written subs.
 - Crown's job to engage with iwi and help maintain relationships.
- REMEMBER: Tribunal will try to follow courts, but courts don't rly care.

Naāti Whātua ō Ōrākei Trust v A-G [2018]

- Concerns OTS giving RFR land to other iwi, process not outlined in the Collective Settlement Act in 2012.

MAJORITY: declarations (a)-(d) allowed.

- The final two deal with policy of the contents of the settlements and decision to legislate, so can't interfere.
 - Wrong to think impact on rights only from legislation.
- MINORITY – Elias CJ: allowed in full.
- **Milroy** test distinguishable because rights are affected.
 - o Asks if only impact on rights is via the legislation/declaration seeks to prevent this action.

- Follows *Port Nicholson*: not interfering w the legislative process to ask for a determination of rights.
- Can't take 'comity' too far – courts are only forum.
- Continuing obligations means NWO have a right to know position.

NZBORA

- Use the interpretation principles in your answers.

Conceptions of Rights

Religion: rights 2 extent they are defined by religion.

Deontological: they are good in themselves.

Teleological: they advance us as a society.

Liberal Rights: further our own individuality.

Social Rights: useful when our order allows them.

Natural Rights: need them so we can live in order.

Positivist: we have them bc we said so.

Burdens:

- V to prove infringements, Govt. to prove justification.

Interpretation Principles

Purposive Approach: generous, s 5 (1) Int. Act.

BORA as a scheme: locate provision in context, ensure it contributes.

Existing common law and statute (*South Taranaki District Council*)

ICCPR: Used in *Baigent's*.

Comparative Law – the White Paper.

Section 3:

3(a): ensures that the D is always the gov't. Applies BORA to all 3 branches.

- Applies to PROCESSES AND OUTPUTS.

3(b): Applies 2 private ppl exercising public functions – so gov't can't just delegate its rights obligations away.

- **R v N:** generous approach given to 3(b).

Direct BORA application: under s 3.

Indirect BORA application: when BORA is used as an interpretative tool (s6).

Ransfield v Radio Networks Ltd [2004]:

- 2 ppl banned from the Radio.
- Radio found to be exercising private function.

Indicia [69]:

- Publicly/private owned – exists for profit?
- Statutory function/governmental control?
- Public funding/public interest?
- Democratically accountable? Affects rights of ppl? Coercive?

- **Eldridge:** how close is the function governmental in nature?

- Application highlighted in *LVVTA v Brett*: exercising a public function when signing an agreement re defamation of their public functions.

Sections 4, 5 and 6

(ss 4 + 6 DON'T apply to prerogative)

Section 5: justification-balancing approach (but we don't know which conception of rights BORA takes) – can be used for prerogative powers.

- Schematic approach.

- Intensity depends on how close it is "to the legal end of the spectrum" – Tipping J – *Hansen*.

- **Hansen:** s 5 forms part of the s 6 inquiry (Elias CJ dissenting).
 - o Cf. *Moonen*: where the two enquiries are distinct.

Section 4: limited protection to prevent implied repeal, directed to the judiciary but does not cover regulations.

- Courts can go straight to it if there is no right consistent meaning: *Exley*.

Section 6: interpretative obligation, should be used generously to advance BORA where possible (*Noort, Minister of State Services v Fisher*).

- Doesn't differentiate between 2 rights compliant meanings.
- No ambiguity for it to be invoked (*Hansen, AMM and KJO*).
- Unless expressly excluded from statute – mandate in itself to apply: **AMM**

Tension between ss 4 and 6: s 6 suggests judges can interpret as they wish, s 4 suggests words only have a set of meanings that are bound.

- **Hansen:** court can interpret but not legislate.
- **AMM v KJO:** hard to balance b/w judicial duty + parliaments intent.

How ss 4, 5 and 6 fit together:

MOONEN – Tipping J:

1. Define the scope of the right: "ambit" - what does it allow? Internal qualifier?
2. Identify interpretations that are reasonably + properly open.
3. More than one meaning open?: did parl. Intend decision maker discretion?
4. s 6: Identify the meaning which constitutes least possible limitation.
5. s 5: Identify the extent to which the meanings limits the rights or freedom:
 - a) Identify the objective of the provision.
 - b) Importance and significance: enough to curtail rights? (abstract).
 - c) The way in which the objective is statutorily achieved must be in reasonable proportion to the importance to the objective.
 - i. Means must have rational relationship w objective.
 - ii. "there must be as little interference as possible with the right or freedom affected."
 - iii. Limit involved must be justifiable in light of the objective.
6. Demonstrably justified? Yes = BORA consistent, No = s 4 applied w s 6 meaning.

HANSEN – Majority

1. Define the scope of the right: "ambit" - what does it allow? Internal qualifier?
2. Ascertain parliament's intended meaning of the provision in question.
3. Ascertain whether intended meaning of the provision is inconsistent with right.
4. s 5 test: Demonstrably justified (**R v Oakes**):
 - a) Is the limiting measure rationally connected with its purpose? (abstract).
 - b) Does the limiting measure impair *no more than reasonably necessary for sufficient achievement of its purpose*:
 - i. Margin of appreciation – *Daley*.
 - ii. Shooting target approach – Tipping J.
 - c) Is limit in due proportion to the importance of the objective? (abstract).
 - i. Yes = BORA compliant, if no...

5. s 6 test: reasonably possible meaning consistent or less inconsistent?

- Yes: adopted No: s 4 w parliament's intended meaning.

Elias CJ: court's job stops after s 6 – can look into s 5 sometimes (*Temese*). s 5 is primarily a legislative tool. This ensures rights are protected.

A-G v TAYLOR [2018]

Ellen France and Glazebrook JJ: In order for BORA to be effective, must have remedies (ICCPR, *Baigent's*). No other remedy here, extension of judicial function. Elias CJ: scheme allows it – declarations of rights. Does not infringe text or purpose. Vindication, cannot take comity too far. Discretionary anyway. No clause no prob! William Young and O'Regan JJ: if there is jurisdiction, must be statutory from BORA.

Re AN APPLICATION BY AMM AND KJO TO ADOPT A CHILD: Wild and Simon France

- Spouse could be extended to include de-facto couples based on s 6.
- **Hansen** approach not obligatory – but used here.
- No ambiguity required to engage s 6, inaction not enough to invoke s 4.
- But "must be meaning that is consistent with the purpose of the enactment and available on its text."
- Reasons against expanding not on text or purpose.
 - o Implications predictable and contained.

Section 7

Boscawen v Attorney-General

- Attempt to review A-G decision not to s 7 report on the Electoral Finance Act.
- A-G's duty in s 7 is a parliamentary function; contrary to comity, separation of powers, and at. 9 of Bill of Rights 1688 to make it justiciable.
- A-G's role only arises in introduction.
- Says prob shouldn't have declarations but ultimately leaves it open.