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NEW ZEALAND IMMIGRATION LAW
AND FAMILY REUNIFICATION

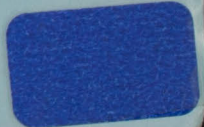
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CONTENTS

ABSTRACT	4
I INTRODUCTION	5
II BEING IN NEW ZEALAND LAWFULLY	6
<i>A New Zealand Citizenship</i>	7
<i>B Obtaining Permanent Residency</i>	8
<i>C What Having New Zealand Citizenship Means</i>	9
<i>D What Having a Permanent Residency Permit Means</i>	9
III HISTORICAL PERSPECTIVE OF AN IMMIGRANTS STATUS	10
<i>A Colonial New Zealand's Immigration Law</i>	10
<i>B Immigration Act 1964</i>	11
IV THE IMMIGRATION ACT 1987	14
<i>A Grant of a Residence Permit</i>	15
<i>B Removal Warrants</i>	17
<i>C Summary</i>	18
V GOVERNMENT RESIDENCE POLICY	19
<i>A The Family Category</i>	21
<i>B Genuine Relationship</i>	21
1 <i>New Zealand Bill of Rights Act 1990</i>	25
2 <i>Human Rights Act 1993</i>	28

C	<i>Family Reunion</i>	29
	1 <i>The humanitarian category</i>	30
	2 <i>Adoption cases and family reunion</i>	31
VI	JUDICIAL REVIEW	34
	A <i>Illegality</i>	35
	B <i>Irrationality</i>	37
VII	HOW JUDICIAL REVIEW IS APPLIED IN IMMIGRATION CASES	40
	A <i>Ashby v Minister of Immigration</i>	40
	B <i>Tavita v Minister of Immigration</i>	42
VIII	CONCLUSION	47
	BIBLIOGRAPHY	50

ABSTRACT

This research paper began by focussing on New Zealand's immigration legislation and policy and how they affected the family. As the paper developed it became apparent that this topic was not confined to an analysis of statute and governmental manuals. The topic of immigration law is entwined with the topic of administrative law and in particular judicial review. This factor often introduces such fundamental legal concepts as the rule of law and the separation of powers. Immigration law through its close relationship to judicial review is therefore constantly developing.

Common law developments in this topic have brought the question of the effect of international law on municipal law into the domain of immigration and the family issues. The enactment of legislation in New Zealand for the protection of fundamental human rights also impacts on the rights of migrants and New Zealand families to be together and must be examined.

This topic covers many facets of the law, most of which are less than certain and in a constant state of flux. This paper is an attempt to introduce the area and some of the questions it raises.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 13,200 words.

I INTRODUCTION

"In an ideal world there would be no restrictions on immigration. In the actual world accidents of history, geography and climate create pressures to emigrate which are not matched by facilities for reception. Hence the imposition of immigration controls designed to produce a logical and just system for admitting those numbers and categories of long-term and short-term applicants for entry who can be absorbed without disastrous economic, administrative or social consequences." (*R v Secretary of State for the Home Department, ex p Khawaja* [1983] 2 WLR 321, 357-358, per Lord Templeman).

State regulation of movement across national borders is an almost universal activity. The definition of those who are subject to this control, the purposes behind the regulation, and the process by which the law is regulated show wide variations between countries. But one startling similarity of all nations immigration policies is the effect upon the lives of those against whom the power is exercised. The wide reaching effects of the powers conferred through immigration law impacts most on the basic social unit of the family.

Few governmental powers may destroy family ties to the extent of immigration policy and process. When one thinks of immigration it is not difficult to perceive the potential effects it can have on the family attempting to live together in one country. The effects of separation and alienation on immediate and extended families are severe. This paper is primarily about the law that embodies New Zealand immigration policy and the legal and administrative framework within which family reunification is administered.

The subject of immigration arouses much interest and comment, not only from persons whose lives are directly regulated by immigration law. The magnitude of influence which immigration issues carry, can be exhibited by looking at the diverse areas they affect. For example; the conflict between national and individual interests, the foreign affairs ramifications, the economic impact of immigrants, the environmental issues, and the social, cultural, racial, and philosophical questions raised by immigration control all coalesce to make this area a prime target for heated discussion.

Recent dialogue in the New Zealand media has focused on a number of specific issues, including the treatment of illegal immigrants and the conferment of refugee status. But the debate has also generated larger questions that span race relations, and discrimination. Again the question of the impact on the families involved is often overlooked because of the multitude of complex social, economic and political questions which are raised in immigration cases.

This paper will analyse the substantive criteria and procedural rules that govern the admission of immigrants into New Zealand based on family reunification. The growing importance of the courts role in the overall system of immigration control will be examined with particular regard to; judicial review issues, the applicability of international instruments and recent national human rights legislation.

II BEING IN NEW ZEALAND LAWFULLY

There are two ways to be in New Zealand legally. Firstly by being a citizen of New Zealand, under the Citizenship Act 1977. Or by being entitled in terms of the Immigration Act 1987 to reside in New Zealand. It is relevant to examine in

more depth how to obtain the above status and what having citizenship or residency means. It is an important role facing any modern State to define who its citizens or permanent residents are. Those persons in other words who have the status of members of the community and through such membership important rights and obligations flow. The way in which a State defines those who belong to it may reveal something of the nature of the society.

Perhaps the most striking modern example is the State of Israel. Nationality law in Israel confers citizenship upon every immigrant to Israel under the law of the right of return. Every Jew is entitled to immigrate under this law. This establishes Israel as a Jewish state. However, the extent to which the definition of a Jew should be determined in accordance with religious law or by some wider test, perhaps that of lineage, has been a matter of acute controversy. This in turn reflects the disputed ideological foundation of the State.¹

A *New Zealand Citizenship*

The two most widely used basis for citizenship are birth in a state and descent from a citizen. Often a State will define its citizens through a combination of these two methods. Under section 6 of the New Zealand Citizenship Act 1977 any person born in New Zealand² obtains New Zealand citizenship.³ Acquisition of citizenship can also be obtained through descent.⁴ If a person is born outside

¹J M Evans *Immigration Law* (2 ed, Sweet & Maxwell, London, 1983) 90.

²Section 2 Citizenship Act 1977, states that "New Zealand" includes the Cook Islands, Niue, Tokelau, and the Ross Dependency.

³Unless their father or mother was in receipt of immunity from jurisdiction due to diplomatic or consular immunity and neither parent was a New Zealand citizen. See s 6(2)(a) Citizenship Act 1977.

⁴Section 7 Citizenship Act 1977.

New Zealand whose mother or father⁵ was born in New Zealand, they may acquire citizenship as of right of descent.⁶ This is the only statutory right to reside in New Zealand based on a family relationship.

The most common way to obtain citizenship is through a grant.⁷ A prerequisite of a grant is that the applicant is entitled pursuant to the Immigration Act 1987 to reside in New Zealand indefinitely.⁸ This entitlement means that the person has been granted a residency permit under the Immigration Act 1987.

B Obtaining Permanent Residency

A permanent residents permit is granted pursuant to the Immigration Act 1987. There are no specific statutory criteria to obtain a residency permit, it is dependant on Ministerial discretion. The relevant section states: "[T]he Minister may grant or refuse to grant a permit, as the Minister thinks fit..."⁹ The Act does provide review and appeal rights.¹⁰ Also developments in the judicial review of Ministerial decisions has fettered total discretion.¹¹

Therefore the requirements for granting a residency permit on family reunification grounds are subject to many uncertain influences. For example Government residency policy, Ministerial discretion and judicial review.

⁵Section 3 Citizenship Act 1977 relates to the presumption of parentage. A person is presumed to be the father of a child if he is married to the mother at the time of conception or birth.

⁶The right to citizenship because of descent is rescinded two years after a person reaches the age of majority if they have not made an application for citizenship. Section 7 Citizenship Act 1977.

⁷Section 8 Citizenship Act 1977.

⁸Section 8(2) Citizenship Act 1977.

⁹Section 35(1) Immigration Act 1987.

¹⁰For example ss 115-124 Immigration Act 1987.

¹¹See section VI Judicial Review.

C *What Having New Zealand Citizenship Means*

A statement about the determination of citizenship by a State is incomplete without examination of the legal rights conferred by the virtue of citizenship.

Citizenship rights for New Zealand citizens are protected by section 3 of the Immigration Act 1987. "Every New Zealand citizen has, by virtue of that citizenship, the right to be in New Zealand at any time." Section 3(3) proceeds to detail the rights of citizenship, without limiting the general premise stated above, no citizen is required to hold a permit to be in New Zealand. No permit is required by a citizen to undertake employment,¹² a course of study or training in New Zealand.¹³ No New Zealand citizen can be removed or deported from New Zealand in any circumstance.¹⁴

D *What Having a Permanent Residency Permit Means*

A residency permit enables the bearer to stay in New Zealand indefinitely. Permanent residency entitles the holder to the same rights to work or train in New Zealand, as citizenship does.¹⁵ The fundamental difference is that a residency permit can be revoked whereas citizenship cannot be. Under sections 19 and 20 of the Immigration Act 1987 a permit can be revoked in the case of an administrative error or if the permit was procured by fraud.¹⁶ These are

¹²This includes employment within the exclusive economic zone.

¹³"Study" includes primary through to high school state funded education.

¹⁴A New Zealand citizen can renounce or be deprived of their citizenship under ss15-16 Citizenship Act 1977. This is in the instance where the citizen has acquired citizenship of another country.

¹⁵Section 16 Immigration Act 1987.

¹⁶Other grounds for revocation are, where the permit was obtained through false or misleading information or concealment of relevant information, see s 20 Immigration Act 1987

exceptional circumstances, so practically a residence permit is very similar to having citizenship. Once a person has obtained a permanent residency permit the statutory criteria for obtaining citizenship are usually easily satisfied.

III HISTORICAL PERSPECTIVE OF AN IMMIGRANTS STATUS

A nation's immigration policy and implementation are inevitably and distinctively influenced by its history, prevailing political, social and economic climate. By examining the historical origins of New Zealand's immigration stance the developments, strengths and weaknesses of the present system become obvious.

A *Colonial New Zealand's Immigration Law*

New Zealand received in 1840 the body of English law; common and statutory law including the law of nationality. New Zealand inherited the common law principles regarding the freedom of British subjects to move freely in and out of the Crown's dominions.¹⁷ However the position of an immigrant regarding the freedom of entry was very different. One could only enter and remain within the realm by licence of the Crown. The issue of such licence was wholly within the Crown's prerogative.¹⁸

Early on in New Zealand's legal history statutes were passed restricting the entry of immigrants who were perceived as undesirable.¹⁹ But the basic distinction for the purposes of controlling the entrance of immigrants was whether they were British

¹⁷*DPP v Bhagwan* [1972] AC 60, 74, per Lord Diplock.

¹⁸*Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 171, per Lord Denning MR.

¹⁹The Chinese Immigrants Act 1881 and the Imbecile Passengers Act 1882.

subjects or not. The Immigration Restriction Amendment Act was passed in 1920 which introduced a permit system for entry into New Zealand. The essence of the Act was that unless a person was of British birth or parentage they were required to hold an entry permit. There was no other right of entrance by reason of family reunification. The Minister was vested with the power to issue permits with total discretion, the common law would not interfere with this royal prerogative.²⁰

The right of entry for people born in Britain or of British parentage lasted until 1961 with the enactment of the Immigration Restriction Amendment Act. This stated that only New Zealand citizens were entitled to unrestricted entry. This change indicated a further restriction of entry by establishing a more definite class of people who were automatically entitled to entry.²¹

B Immigration Act 1964

To consolidate the law relating to immigration in 1964 the Immigration Act was passed. The Act provided a procedural framework to regulate immigration. Apart from a few exceptions,²² the Executive of the day prescribed the criteria for immigrants who wished to enter New Zealand. A prospective immigrant who fulfilled the necessary policy criteria may have been granted a permit. Despite meeting the policy criteria the Minister could refuse entry. The Minister was

²⁰Above n 6.

²¹RA McGechan "The Immigration Restriction Amendment Act 1961" (1964) 4 VUWLR 34.

²²Section 3 paras (c) to (i) listed those persons who were exempted from obtaining a permit, for example diplomatic officials, officers and crew of mercantile ships or aircraft. Section 4(2) provided immigrants who were prohibited immigrants, for example a mentally disorder person, a person who had been convicted of a crime and having served a sentence for a year or more and a person who had been deported form New Zealand.

vested with very wide and general powers of discretion under the Act. There was no right to appeal a Minister's decision under the Act and the common law would not provide relief through judicial review.²³ The courts accepted the principle that an immigrant could not seek relief on the grounds that the Minister had failed to exercise the discretion fairly or in accordance with the principles of natural justice.²⁴

The history of judicial review of immigration cases is one of restraint and an unwillingness of the Courts to intervene. The courts perceived that the powers conferred on the Minister under the Act were statutory embodiments of Crown prerogative and therefore it was not the Courts role to intervene.²⁵ As recently as 1978 in the case of *Tobias*²⁶ the court held that there should be no fettering of the Crown's discretionary powers to issue or refuse permits under the Immigration Act 1964. This confirmed, that in cases concerning the entry and removal of immigrants from New Zealand, the principles of natural justice or fairness could not be invoked where there may have been an abuse of the Ministers discretionary powers.²⁷

Due to this judicial restraint, it seemed pointless to review Ministerial decisions on immigration because the Minister had failed to exercise the discretionary powers fairly or in accordance with the rules of natural justice. The Minister's arbitrary

²³The 'right of appeal' refers to an appellate body assessing the correctness of the decision itself this is more than a review of the legal process. See *Fraser v State Services Commission* [1984] 1 NZLR 116 and *R v Sloan* [1990] 1 NZLR 474 at 479.

²⁴M Nyein *Judicial Review of Immigration Law in Respect of Entry and Stay of Aliens* (Research Paper in Administration Law, LLM, Victoria University of Wellington, 1986), 4.

²⁵C Vincenzi "Aliens and the Judicial Review of Immigration Law" (1985) Pub L 93.

²⁶*Tobias v May* [1978] 1 NZLR 509.

²⁷See *Pagliari v Attorney General* [1974] 1 NZLR 86, *R v Governor of Brixton Prison, ex parte Soblen* [1963] 2 QB 243, and *R v Leman Street Police Station Inspector, ex parte Venicoff* [1920] 3 KB 72.

decision could go unchallenged. But developments in the rights of immigrants though judicial review have established some procedural restraints on the Minister's previously unfettered discretion in the exercise of decision making powers. Statutory Amendments in the 1970's established the first statutory review and appeal regime.

From the mid 1970's there was a substantial change in immigration policy, towards a more even handed approach. This corresponded with an increase in the volume and variety of immigrants entering the country.²⁸ The Immigration Amendment Act 1977 introduced an appeal on humanitarian grounds.²⁹ A 1978 Amendment Act created the Deportation Review Tribunal to safeguard the interest of deportees. Another statutory development was the Judicature Amendment Act 1972 (as amended 1977) which streamlined the judicial policing of statutory powers of decision, and gave New Zealand courts a wide review powers.

These statutory developments were paralleled with the common law reconsidering its stance that Crown prerogative in immigration cases need not comply with natural justice. In 1978 in the case of *Chandra*³⁰ the court held that the Ministers' discretionary powers were statutory powers³¹ and therefore the general rules developed to review the exercise of such statutory powers were applicable. The court considered the legislative trend of the mid 1970's to represent a move away from the concept of Crown prerogative towards purely statutory based controls. This case was landmark in New Zealand immigration law as it established the court's right to review the Minister's discretionary powers it also stated that the

²⁸Above n 24, 8.

²⁹Section 20A Immigration Amendment Act 1977.

³⁰*Chandra v Minister of Immigration* [1978] 2 NZLR 559.

³¹As defined under s 3 Judicature Act 1972.

Immigration Act 1964 did not contain any express exclusion of the principles of natural justice.³² Therefore an inference could be drawn that the obligations to comply with the rules of natural justice or fairness were applicable to the Minister's discretion under the Immigration Act 1964.

IV THE IMMIGRATION ACT 1987

Any person who is not a New Zealand citizen may only lawfully study, work or reside in New Zealand if they hold a permit³³ or if they are specifically exempt under the Immigration Act 1987.³⁴ The Immigration Act 1987 provides the essential legal framework within which immigration policies are given effect, but important policy considerations are not bound by the statute. The Act defines who is subject to immigration control³⁵ and who needs approval to enter or remain in New Zealand.³⁶ It also confers the necessary decision making and enforcement powers upon the immigration authorities, and provides appeal procedures. In the Immigration Amendment Act 1991 increased appeal procedures were provided for with the establishment of the Residence Appeal Authority and the Removal Review Authority.³⁷

³²*Wiseman v Borneman* [1971] AC 297, 318, "...the legislature may certainly exclude or limit the application of the general rules. But it has always been insisted that this must be done, clearly and expressly..." per Lord Wilberforce.

³³There are various types of permits available under s 24 Immigration Act 1987. For example residence, work, temporary, or student permits. Conditions vary according to the type of permit. A visa is not a permit, it is merely an endorsement by a visa officer that at the time of issue the officer knew of no reason why the holder should not be granted a permit. A visa does not entitle the holder to a permit as of right, s 14 Immigration Act 1987.

³⁴Sections 11-13 Immigration Act 1987. For example; citizens of Australia, diplomats, member of crew or passenger of craft in the course of its ordinary business, member of scientific expedition in the Ross Dependency associated with the Antarctica Act 1960.

³⁵Section 3, Immigration Act 1987.

³⁶Section 4, Immigration Act 1987.

³⁷Sections 18B and 63 Immigration Amendment Act 1991.

The Act's purpose was to reform the law relating to immigration and in particular to remove illegal immigrants through the civil jurisdiction of the District Court rather than by way of criminal prosecution. Another major distinction from the 1964 Act is that although the permit system is retained, permits are now required for people who wish "to be in New Zealand"³⁸ rather than to enter New Zealand.

A Grant of a Residence Permit

No person is entitled to a residence permit as of right.³⁹ Section 8 of the Immigration Amendment Act 1991 states that the question of whether or not to grant a residence permit is a matter of discretion for the Minister. No appeal on the facts shall lie against any decision the Minister makes pursuant to the granting of a residence permit.⁴⁰ This does not affect or limit the right to review the proceedings. As provided for in the Judicature Amendment Act 1972.

Immigration officers are given special delegation under the Act to also grant residency permits.⁴¹ But they are subject to section 13C of the 1991 Act, which states that they must comply with Government residency policy.⁴² Immigration officers decisions are also subject to appeals to the Residence Appeal Authority.⁴³ An applicant can appeal to the Authority where an immigration officer has refused to grant a residency permit on two grounds. That the refusal was not

³⁸Section 4 Immigration Act 1987.

³⁹Section 8(1)(a) Immigration Amendment Act 1991.

⁴⁰Section 8(2) Immigration Amendment Act 1991.

⁴¹Section 41 Immigration Amendment Act 1991.

⁴²The rules and criteria under which the eligibility for the granting of permits is to assessed is published as the Government's immigration policy in a manual which is available to the public for inspection, free of charge, at offices of the Department of Labour. This is pursuant to s 13A Immigration Amendment Act 1991.

⁴³Section 18C Immigration Amendment Act 1991.

correct in terms of Government residence policy which was applicable at the time of application for the permit.⁴⁴ The other ground is that the special circumstances of the appellant are such that an exception to the Government residence policy should be considered.⁴⁵

While only the applicant can appeal to the Residence Appeal Authority, either party can appeal to the High Court if they are dissatisfied with the decision of the Authority.⁴⁶ Appeals to the High Court can only be based on dissatisfaction with the appeal proceedings being erroneous in law, the party may only appeal on that question of law.⁴⁷ An appeal to the Court of Appeal by leave may be granted to any party who is dissatisfied with the decision of the High Court on a point of law.⁴⁸

The 1991 Amendment Act established grounds of appeal for decisions which refused to grant a residency permit, only when that decision was made by an immigration officer. The only ground for review of the Minister's decision not to grant a residency permit is under the Judicature Amendment Act 1972, review of proceedings. It is important to note that the Minister is not bound by Government residence policy. The Minister may grant or refuse a permit as the Minister thinks fit, whether this is an exception to policy or not.⁴⁹ Therefore the Ministers decisions are fettered only by the rules and precedents of judicial review.

⁴⁴Section 18C(1)(a) Immigration Amendment Act 1991.

⁴⁵Section 18C(1)(b) Immigration Amendment Act 1991.

⁴⁶Either the applicant or the Secretary of Labour can appeal the Authorities decision.

⁴⁷Section 115 Immigration Amendment Act 1991.

⁴⁸Section 116 Immigration Amendment Act 1991.

⁴⁹Section 35 Immigration Act 1987, s 13C(2) Immigration Amendment Act 1991.

B Removal Warrants.

Where people are in New Zealand illegally a removal order can be made by either the Secretary of Labour or a designated immigration officer.⁵⁰ The 1991 Amendment Act establishes the Removal Review Authority which hears appeals on the ground that the removal order should be cancelled because the person is not in New Zealand illegally.⁵¹ Determination of the appeal on this ground is based on whether the applicant's situation falls within the statutory framework of being in New Zealand legally.⁵²

Under section 63B of the 1991 Amendment Act any person on whom a removal order is served can appeal the order on the ground that because of exceptional circumstances of a humanitarian nature, it would be unjust or unduly harsh to remove the person from New Zealand.⁵³ Section 63B(3) states that if a person's circumstances are such that they would meet the applicable criteria of the Government's residence policy for the granting of a residence permit this in itself does not constitute "exceptional circumstances of a humanitarian nature".⁵⁴ When the Removal Review Authority is considering an appeal on grounds of a humanitarian nature they must be satisfied that to allow the person to stay in New Zealand would not be contrary to the public interest.⁵⁵

⁵⁰Section 50 Immigration Amendment Act 1991.

⁵¹Section 63A Immigration Amendment Act 1991.

⁵²For example is that person a New Zealand citizen, holds a valid permit, or are exempt under the Act.

⁵³Section 63B(2)(a) Immigration Amendment Act 1991.

⁵⁴Section 63B(3) Immigration Amendment Act 1991.

⁵⁵Section 63B(2)(b) Immigration Amendment Act 1991.

Appeals from either party to a decision by the removal Review Authority on a point of law can be made to the High Court.⁵⁶ Leave to appeal to the Court of Appeal on a point of law is granted under section 116 of the Amendment Act 1991.

C Summary

New Zealand immigration law is governed by legislation which rigidly preserves the unfettered discretion of the Minister of Immigration to make decisions concerning the migration of people into New Zealand. Ministerial decisions are only reviewable on a basis of judicial review. Appeals from decisions by immigration officers to the High Court and Court of Appeal are only allowable on points of law. The appeal procedure established by the Act reinforces the importance of the courts role in the judicial review of immigration cases.

The Act does not set out specific criteria for admission to New Zealand, or the specific terms and conditions of when it will be granted.⁵⁷ The substantive aspects of the law of immigration are found in Governmental immigration policy published in the Department of Labour's Manual of Immigration Instructions, together with the decisions of the immigration appeal authorities and the courts. The policy in relation to applications for residency permits is required by statute to be complied with by immigration officers. Therefore this policy is the basis for most family reunification decisions.

⁵⁶Section 115A Immigration Amendment Act 1991.

⁵⁷The Act does specify some instances when it will not be granted. Section 7 states that certain people are not eligible for permits. This includes anyone who has been convicted of any offence and served 5 years imprisonment, anyone the Minister has reason to believe is likely to commit an offence against the Crimes Act 1961 or the Misuse of Drugs Act 1975, and for that or any other reason the Minister considers would constitute a threat to the public interest or public order.

Through a closer examination of the 1987 Immigration Act and Amendments the significance of common law judicial review cases in the area and Governmental policy is now clear. These two areas will now be looked at in greater depth to determine how they impact on residency applications based on family reunification.

V GOVERNMENT RESIDENCE POLICY

An insight into the aims of current New Zealand immigration policy can be obtained through the Labour Department's Manual of Immigration Instructions.⁵⁸ The substance of New Zealand immigration policy is designed to attract quality migrants in greater numbers from a wider group of countries. The manual states that the principal goals of policy are;

1. To allow entry to those migrants who will make the highest contributions to employment and income growth.
2. To maximise the gain in productive human capital while maintaining provisions for migrants to enter New Zealand for social and humanitarian reasons.

These are the basic principles that Government residency policy is attempting to enforce. A more detailed look at the policy instructions will show what this means for families and individual family members involved in the immigration process in New Zealand. The manual of immigration instructions sets out specific

⁵⁸The manual is available for public perusal at all officers of the Labour Department. Section 13A Immigration Amendment Act 1991.

criteria applicants have to satisfy to be eligible for a residency permit. Bearing in mind that the Immigration Service is bound by statute to comply with immigration policy.⁵⁹

Prospective migrants can apply for permanent residence under four categories stated within Governmental policy;

1. **General Category.** Applicants are assessed and ranked under a points system according to the applicants qualifications, work experience, age and settlement factors.⁶⁰
2. **Business Investment Category.** Applicants are assessed on their skills, work or business experience, and their ability to invest funds into New Zealand.
3. **Family Category.** Those who wish to migrate to New Zealand because they are related to, or have a genuine relationship with, a New Zealand citizen or resident. How a nation defines the 'family' is of primary importance in developing its immigration policy.
4. **Humanitarian Category.** For people whose circumstances are exceptionally difficult and can only be resolved by being granted residence in New Zealand, and who have a close family connection in New Zealand.

⁵⁹Section 13C Immigration Amendment Act 1991.

⁶⁰"Settlement factors" include assets and financial investments.

For all the above categories there are the compulsory requirements of a character clearance⁶¹ and health certificates to ensure the applicant is of good health. Governmental policy on the granting of a residence permit on family and humanitarian grounds will be further reviewed.

A The Family Category

There are two broad aims of the family category policy stated in the immigration policy manual;

1. To permit New Zealand citizens or residents to be joined in New Zealand by their spouses, or partners.
2. To provide avenues, through which immigrants who have already settled in New Zealand may sponsor the entry of other eligible members of their immediate family and help them settle by providing practical and emotional support. This includes New Zealand citizens or permanent residents being joined by their parents or dependant children.

These categories can be summarised as family reunification through being related or having a genuine relationship with a New Zealand citizen or resident.

B Genuine Relationship

If an applicant is in a partnership with a New Zealand citizen or resident they may apply under this category for residency. The partnership must be either a

⁶¹ This is to ensure that the applicant does not come within section 7(1) Immigration Act 1987 category of people who are not eligible for a permit.

marriage, de facto relationship, or homosexual partnership living together. The criteria stated in Governmental policy which must be satisfied is that;

1. There is evidence that the partner is a New Zealand citizen or resident,
2. that there is evidence that the partner supports the application,
3. and that the couple are living together in a genuine and stable relationship.⁶²

The first two criteria are usually satisfied easily by the provision of a passport or permanent residence permit and a letter confirming that the partner supports the application.

The term 'genuine and stable relationship' has specific meaning in immigration terms based on the fulfilment of various criteria in the departmental manual. Assessment of a particular partnership as to whether it is 'genuine and stable' differs depending on the type of relationship it is.

In the case of marriage it is not automatically assumed that due to a valid marriage certificate the relationship is genuine and stable. Immigration officers must consider the intention of the parties at the time of marriage, that there was a genuine intention of maintaining a long-term, exclusive relationship. Usually immigration officers will assume the marriage to be genuine unless there is evidence to the contrary. This is where the duration of the marriage may be seen

⁶²Departmental Manual of Immigration Instructions. Department of Labour, Immigration Service.

as evidence of a sham marriage. If immigration officers suspect a sham marriage the married couple must produce evidence to prove that the marriage is genuine.

Evidence of the duration of a partnership is a prerequisite for homosexual and de facto partnerships. The duration of a marriage is only an issue when, as stated above, it is of such short duration that it leads the immigration officers to suspect that the marriage is not genuine or stable. Before homosexual and de facto relationships can be assessed as being genuine and stable based on documentary evidence they must satisfy an arbitrary duration requirement. The time period which must be proved varies depending on the type of partnership involved. In the case of a de facto relationship there must be evidence of at least a two year duration of this 'genuine and stable' relationship. In the case of homosexual partners they must produce evidence proving a four year relationship.

The Departmental Manual suggests that to prove the duration of a relationship or to show that it is genuine and stable the applicant should produce "as many documents as possible".⁶³ Suggested documents include; photos, letters, proof of shared accommodation (joint tenancy agreements), proof of shared income (bank statements), evidence of public or family recognition of the relationship. The onus is on the applicant to produce this evidence to satisfy the immigration service. Usually interviews of both the applicant and the partner will also be conducted by the immigration service in determining the true nature of the relationship.

The duration times used as determination factors in assessing if a relationship is genuine and stable are completely arbitrary. Why for a homosexual relationship to

⁶³Above n 62.

be considered genuine and stable by an immigration officer must there be evidence that the partners have been together for four years?. Why are there different criteria for assessing homosexual and heterosexual relationships as genuine and stable?. Why are the requirements much more onerous on a homosexual couple?. None of these questions are satisfactorily answered by Government residency policy at the moment. The assessment criteria are biased and discriminatory. The present system makes it easier for people in the relationship of marriage to obtain residency because they have less criteria to establish than do people in de facto or homosexual relationships.

In observance of the International Year of the Family the New Zealand Immigration Service has produced an educational information kit on current immigration policy involving families.⁶⁴ The last three to five years has seen the public sector acquire more of a private sector type structure and organisation. Eighteen months ago the Immigration Service established a 'rolling programme' for policy review. The aim of this programme is that all policy will be systematically reviewed every three to four years. Previously review of policy was done completely on an ad hoc bases. The present 'rolling programmes' time structure will see all immigration policy reviewed by 1998. Family reunification policy is scheduled for a full review starting the first of July 1995 and running through to mid 1996.⁶⁵

Family reunification policy has not been reviewed since 1988, this review resulted in the introduction of the de facto and homosexual partnership categories. The increase in New Zealand's commitment to the preservation of fundamental rights

⁶⁴Capital Letter vol 17 no 20 1994, 3.

⁶⁵Interview with Marion Little, Policy Analyst for the Immigration Service, 20 September 1994.

and freedoms and the unlawfulness of discrimination is evidenced by the enactment of the Bill of Rights Act 1990 and the Human Rights Act 1993. This has a direct relationship with the views expressed by the New Zealand public concerning discrimination in our society. The Immigration Service will be taking these changing public perceptions into account when it reconsiders family reunification policy in 1995.⁶⁶

With the enactment of the Bill of Rights Act 1990 and the Human Rights Act 1993 it is interesting to consider the possible relief these statutes may provide for the present Government residency policy.

1 New Zealand Bill of Rights Act 1990

The Bill of Rights specifically states that it applies to acts done by the executive.⁶⁷ Immigration policy is clearly formulated by the executive branch of Government. Immigration officers are also bound by the Bill of Rights when carrying out their duties prescribed under the Immigration Act 1987. For example being bound by statute to follow the Government's residency policy.⁶⁸ Under section 19(1) of the Bill of Rights Act everyone has the right to freedom from discrimination on the grounds of discrimination stated in the Human Rights Act 1993. These grounds include sexual orientation and marital status. Marital status is defined in the Human Rights Act to include "living in a relationship in the nature of a marriage."⁶⁹ This definition leaves no doubt that de facto relationships are

⁶⁶Above n 65.

⁶⁷Section 3(a) Bill of Rights Act 1990.

⁶⁸Section 3(b) Bill of Rights Act 1990.

⁶⁹Section 21(1)(b) Human Rights Act 1993.

protected from discrimination under the Human Rights Act and the Bill of Rights Act.

The Bill of Rights Act refers to "everyone" having the right to freedom from discrimination on the grounds stated above. This clearly confers the right on New Zealand citizens and residents. It is likely that the "everyone" will be interpreted by the Courts as everyone in New Zealand. Evidence of this is in section 12 which specifically states that "every New Zealand citizen who is over the age of 18 years" has the right to vote in an election. The rest of the Act prescribes rights to "everyone", therefore it is arguable that everyone is not only a New Zealand citizen, but the rights are owed to all people in New Zealand. Even if the potential migrant is not conferred with the rights of the Act, the New Zealand partner is having their rights breached under the Act.

Rights contained in the Bill of Rights Act may be subject to reasonable limits prescribed by law, so long as those limits can be demonstrably justified in a free and democratic society.⁷⁰ Under section 5 the courts must make a calculation as to where the balance of public welfare lies between unrestricted enjoyment of a particular right or freedom, and any limitations on it.⁷¹ When the courts consider a breach of rights under the Bill of Rights Act, due to discriminatory immigration policy, they will have to weigh up the public benefit conferred by limiting the right against the unrestricted enjoyment of that right. This type of question may necessitate the broadening of the judicial inquiry to accommodate the "Brandeis

⁷⁰Section 5 Bill of Rights 1990.

⁷¹Joseph PA *Constitutional and Administrative Law in New Zealand* (The Law Book Company Limited, Brisbane, 1993) 859.

Brief."⁷² This is a technique which brings before the court a whole raft of sociological evidence comprising statistical data, departmental reports, economic implications of decisions and expert evidence relevant to the inquiry.⁷³

Therefore although questions of discrimination in immigration cases clearly fall within the ambit and purpose of the Bill of Rights Act, under section 5 there may be justifiable limits placed on ones rights in the public interest. Immigration is an area which often focuses on balancing individual interests with those of public welfare. Immigration legislation and policy is concerned that no migrant will be a burden on, or injurious to New Zealand society.⁷⁴

The Bill of Rights does not make any express provision in respect of remedies, where its rights and freedoms have been found to be breached. It has been suggested in common law that the Act therefore impliedly empowers the courts to grant whatever remedies may be appropriate to safeguard the rights infringed on in each particular case.⁷⁵ But there is a degree of uncertainty surrounding the possible remedies available under the Bill of Rights Act.

⁷²This brief acquired its name from Louis D Brandeis counsel before the American Supreme Court in the case of *Muller v Oregon* 203 US 412 (1908). Mr Brandeis adduced copious evidence in the defence of a state statute which declared that the right to sell ones labour under the Fourteenth Amendment could lawfully be subjected to restrictions for reasons of public welfare.

⁷³Above n 71, 859.

⁷⁴For example s 7 Immigration Act 1987, persons not eligible for a permit; and s 63B Immigration Amendment Act 1991, no appeal on humanitarian grounds if it would be contrary to the public interest.

⁷⁵*Palmer v Auckland Maximum Security Prison* [1991] 3 NZLR 315, 318.

2 *Human Rights Act 1993*

The Human Rights Act 1993 states that it is unlawful to discriminate against anyone on the grounds of marital status or sexual orientation.⁷⁶ Complaints about unlawful discrimination can be investigated by the Human Rights Commission. Any act, requirement, condition or practice which has the effect of giving different treatment to a group, on the bases of any of the grounds of discrimination stated in section 21 of the Act, can be investigated.⁷⁷

An investigation of unlawful discrimination may go through various procedures including the Complaints Review Tribunal, High Court and Court of Appeal. An appeal to the Court of Appeal will only be granted on a question of law. The remedies available to the complainant are clearly set out in the Act.⁷⁸ These include an order restraining the defendant from continuing or repeating the breach, an order that the defendant perform any acts specified in the order with a view to redressing any damage suffered.⁷⁹ Damages can also be awarded to compensate for pecuniary loss, loss of benefit and any humiliation or injury to feelings suffered by the complainant.⁸⁰ Proceedings brought under the Act are civil and therefore the burden of proof to be satisfied is that of the balance of probabilities.

The specific wording of the Human Rights Act, with regards to discrimination on the grounds of marital status or sexual orientation, is encouraging as to how the

⁷⁶Section 21 Human Rights Act 1993. Clearly includes discrimination on the grounds of being in a de facto relationship.

⁷⁷Sections 13 and 75(e) Human Rights Act 1993.

⁷⁸Sections 86 - 92 Human Rights Act 1993.

⁷⁹Section 86 Human Rights Act 1993.

⁸⁰Section 88 Human Rights Act 1993.

courts may interpret the statute with regards the issue of immigration policy. There is no corresponding Bill of Rights Act section 5 in the Human Rights Act. This lessens the possibility of the courts regarding the public interest as a reason for lawfully fettering an individuals rights to non-discrimination. The remedies clearly expressed in the statute are also an advantage over the uncertainty revolving around possible remedies under the Bill of Rights Act.

The Human Rights Act clearly binds the Crown.⁸¹ But how far the courts are willing to go in enforcing the statutory rights expressed in the Human Rights Act over acts of the Crown which have previously been seen as part of Royal prerogative is debatable. Recent developments by the New Zealand Court of Appeal in judicial review cases may indicate that the courts are now more willingly to enforce issues of human rights on the discretionary power of the Minister in immigration cases.⁸²

C Family Reunion

When applying under the family reunion category the applicant needs to have a sponsor living in New Zealand lawfully and permanently. The definition of family in this category is modelled on the Western nuclear family. To qualify for residence under the family reunion policy an applicant must have parents, dependant children, single adult brothers or sisters resident in New Zealand.

⁸¹Section 3 Human Rights Act 1993.

⁸²For further discussion on this matter see section VII, How judicial review is applied in Immigration Cases.

If you are a parent you are eligible to be reunited with your adult children if the parents can satisfy the "centre of gravity" principle.⁸³ This basically means that you have an equal or greater number of children living lawfully in New Zealand as any where else in the world.

Unmarried dependent children under 17 years of age are eligible for residence if they are joining their parents in New Zealand and they have no children of their own.⁸⁴ Single adult brothers, sisters, and children of New Zealand citizens or residents are eligible for residence provided they have no children and are permanently alone in their home country.⁸⁵

This category of family reunion is governed by what the Government of the day believes to constitute a family. The present definition is based on the small nuclear type of family and it does not reflect New Zealand's bicultural nature. There is no consideration given in residency policy to other definitions of the family which are widely held in New Zealand, such as the extended family. This in some ways makes the family category an anomaly as the aim of such policy is to encourage family reunification. But the definition of family is so restrictive that many family ties and bonds are not catered for.

1 Humanitarian category

A further allowance is made for family reunification on the ground that the application is of a humanitarian nature. The application must be supported by a

⁸³See Appendix I.

⁸⁴Who are lawfully and permanently in New Zealand.

⁸⁵This includes widowed or divorced.

close family member who is a New Zealand citizen or resident. The criteria stated in the Governmental policy for an applicant to qualify for approval under the humanitarian category include, that their circumstances are of a degree that is causing serious physical or emotional harm to themselves or a New Zealand party. The applicant must produce evidence that their situation can only be resolved by being granted a New Zealand residence. Finally the immigration service must be satisfied that, under these circumstances, approval would not be contrary to the public interest.

2 *Adoption cases and family reunion*

'A close family member' is not defined in the residency policy. In the cases of *Application by Webster*⁸⁶ and *Re Adoption of Pate*⁸⁷ sponsorship of nephews by their uncles and aunts were considered to fall within the 'close family member' requirement. Residence permits were not granted in these cases, as the other criteria needed for satisfying the humanitarian category were not fulfilled.

These adoption cases reveal the limitations of the family reunion category. There are several cases which have come before the courts as adoption cases with overtones that the main reason they are there is so the child will not be deported. This paper will not explore the implications of adoption apart from saying that it severs all legal ties between a child and natural parents and therefore must not be entered into but for the welfare of the child. It demonstrates the inadequacies of family reunion immigration policy if families are forced to take drastic steps such as adoption to ensure family members can lawfully stay in New Zealand.

⁸⁶[1991] NZFLR 537.

⁸⁷[1991] NZFLR 512.

The court in *Re Adoption Patel*⁸⁸ and *Application by Webster*⁸⁹ stated that it would not grant an adoption order if the primary purpose of the adoption application was to obtain New Zealand citizenship for the child.⁹⁰ But in both cases it was admitted that immigration concerns were a motivation in bringing the application. Immigration issues should not be a factor in considering an adoption order, these concerns would be better met by an extension to the family reunification policy.

The facts of the above cases reveal that perhaps immigration concerns played more part in granting the adoption order, than did consideration to the extinguishing of the existing legal family relationship and reconstruction of a new family unit. In *Re Adoption Patel* the child was 19 and the aunt and uncle who made the application were 63 and 76 years of age. The child had lived with the applicants for three years. The natural parents in this case were alive and well and resident in India. It was intended that the child still have contact with the natural parents. At the time of the Family Court decision the child was in New Zealand illegally.⁹¹ The child stated that he would always regard his parents in India as his real parents and that he wanted to remain in New Zealand largely for economic reasons.⁹² The court in *Re Adoption Patel* stated that the dominant motive in this case was not to enable the child to reside in New Zealand. It is respectfully submitted that on the facts of this case the child's welfare was based on economic considerations which were contingent of the child residing in New Zealand.

⁸⁸Above n 86.

⁸⁹Above n 87.

⁹⁰See above n 86, 539 and n 87, 515.

⁹¹Above 87, 513.

⁹²Above 87, 514.

In *Application by Webster* the child was 18. The child's mother was dead and his father was living in poor conditions in Fiji. Three public policy principles were accepted by the court. Firstly, should an adoption order be made if there are other methods available to the court to give the child a secure and settled family life. Secondly, in relation to adoption by relatives, because it severs legal family ties on one side and distorts family relationships on the other, adoption should not be considered desirable unless the benefits gained by the adoption cannot be met by other means. Finally, if adoption is purely for immigration purposes the adoption should be refused.⁹³ These principles show that if the courts had an alternative to an adoption order which would meet the needs of the child then that should be taken, rather than severing family legal ties. This could easily be satisfied though changes to family reunification policy.

To reiterate the point that often immigration issues are prevalent in adoption cases and that this is not a proper forum for them, Boshier J stated in the 1992 case of *In the Adoption of L*,⁹⁴

L faces a Removal Warrant pursuant to the Immigration Act. This is a consideration for me, it rather forces my hand to adjudicate upon this application and not defer it and look for other possibilities. I really have no choice but to firmly grip this application and decide it one way or the other. I know that if I do not grant it [the adoption order] L will be removed and to back to Tonga.

⁹³Above n 86, 539.

⁹⁴[1992] NZFLR 847, 849.

The facts of this case make it more disturbing that the judge felt that his hand had been forced in deciding an adoption order due to the spectre of a Removal Warrant. The applicant applied to adopt her four year old nephew who was Tongan but had been living in New Zealand for two years, half of his life. The applicants husband was serving a term of imprisonment but was soon due for release. The husband had previously demonstrated violence towards L. The judge was concerned about the effect the husband's release from prison might have on L. L had no suitable environment in Tonga into which he could be placed. The adoption order was granted even though there were concerns for the child's safety.

An adoption order should not be a substitute for a Removal Warrant. It seems that these cases would be better dealt with in the context of immigration law and policy. If New Zealand's family reunion policy was extended to include a wider family grouping, adoption cases such as those cited above could be decided entirely by immigration law and never need to alter the family legal status of the child.

VI JUDICIAL REVIEW

Judicial review of immigration control presents the question of who should decide what? It goes to the allocation of power between the judiciary, on the one hand, and the legislature and executive on the other hand. This is the essence of the separation of powers doctrine which is a necessary condition of the rule of law.

Statute prescribes that Ministerial decisions in immigration cases can only be reviewed by the courts through judicial review.⁹⁵ How the courts review immigration cases is therefore determined on the scope of review allowed in administrative law. Administrative law and in particular judicial review has developed substantially in New Zealand over the last decade. From the decision of *Chandra*⁹⁶ the courts have extended the grounds of review and therefore the scope of their authority. The principal grounds of review are illegality, irrationality and procedural unfairness.⁹⁷ These grounds are however neither exhaustive nor mutually exclusive. New Zealand judges have suggested substantive (as distinct from procedural) fairness as another possible ground for review.⁹⁸

For the purposes of this paper the focus will be on the grounds of illegality and irrationality. A brief overview of these grounds of review will be followed by a closer examination of how these grounds have been interpreted by the courts in immigration cases.

A *Illegality*

Relevant considerations are encompassed within the area of illegality or ultra vires. Whenever an administrative authority fails to take into account relevant considerations it commits a reviewable error of law. The exercise of a discretionary power may be invalid if the decision maker is influenced by

⁹⁵See section IV, Immigration Act 1987.

⁹⁶Above n 30.

⁹⁷*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410, per Lord Diplock.

⁹⁸See *Canterbury Pipe Lines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347, 357, per Woodhouse and Cooke JJ; *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 149, per Cooke J.

considerations that ought not to be taken into account, or if the decision maker fails to take account of relevant considerations.⁹⁹

The Court of Appeal in the case of *CREEDNZ Inc v Governor-General*¹⁰⁰ discussed the requirement that a decision maker genuinely address relevant considerations. *CREEDNZ* adopted the approach that the relevant consideration need not be expressly stated but could be implied. The Court of Appeal quoted from Lord Greene's judgement in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*:¹⁰¹

If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters.

It is accepted in New Zealand law that relevant considerations need not be expressly listed in the statute but can arise through implication of the statutory scheme. Cooke J stated: "the more general and the more obviously important the consideration, the readier the court must be to hold that Parliament must have meant it to be taken into account."¹⁰² The more comprehensive the criteria listed in the statute the more likely the courts are to see this as exhaustive. If the criterion is open ended, for example the consideration of the public interest, the court may hold that the criteria are not exhaustive and can therefore be implied. Where criteria are not exhaustive or where none are specified, considerations

⁹⁹Above n 71, 679.

¹⁰⁰[1981] 1 NZLR 172.

¹⁰¹[1948] 1KB 223, 228.

¹⁰²Above 100, 183.

relevant to the exercise of discretion may be implied from the subject matter, purpose and scope of the empowering provision in the context of the legislative scheme.¹⁰³

The courts need to determine what are the relevant considerations, expressed and implied which must be addressed by the decision maker. It is not for the court to substitute its own opinion for the decision makers. The court must establish that the decision maker considered the facts they were required to by law and then used their discretion. With every set of facts there are a number of possible outcomes. The courts can only look to see that the decision maker considered all they had to and then made their decision. These are the basic principles behind the reviewable ground of illegality and review of procedural fairness.

B Irrationality

Following on from these established principles is the uncertain ground of irrationality or unreasonableness. This ground involves the courts determining a decision to be so unreasonable that the decision maker must have erred in law when making that decision. The original threshold for this test was that the court must consider the decision so outrageous that it appeared that the official must have "taken leave of his senses."¹⁰⁴ By applying this strict standard the courts were able to maintain the distinction between the legality (which is reviewable) and the merits (which are not reviewable) of a discretionary power. The courts would then not be usurping the policy functions given to the administrative

¹⁰³Above 71, 680.

¹⁰⁴*R v Hillingdon London Borough Council; Ex parte Puhlhofer* [1986] AC 484, 518, per Lord Brightman.

authority¹⁰⁵ In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*¹⁰⁶ the court followed the traditional threshold test that no reasonable person could have come to that decision.

But this standard has been questioned and in some cases relaxed by courts. Some judges in New Zealand have proposed a standard of substantive fairness as the threshold for review. It is debatable whether the threshold in New Zealand for unreasonableness is that stated in the case of *Wednesbury* or that of substantive fairness. By examining recent New Zealand cases the position may be clarified.

With particular relevance to family reunification issues is the New Zealand Court of Appeal case of *Daganayasi v Minister of Immigration*.¹⁰⁷ The facts of this case are that the applicant had unsuccessfully applied for a permanent residence permit. She was convicted of remaining in New Zealand after her temporary permit had expired. An automatic consequence of this conviction was her deportation. The appellant appealed against deportation under section 20A of the Immigration Act 1964.¹⁰⁸ This section gave the Minister the discretion to order that the offender not be deported if the Minister was convinced that the case was one which presented exceptional circumstances of a humanitarian nature which would render deportation unduly harsh or unjust. The appellants main ground for appeal was that one of her New Zealand born children had a rare metabolic disease and had to remain in New Zealand to receive the proper medical treatment.¹⁰⁹

¹⁰⁵Above n 71, 705.

¹⁰⁶[1948] 1 KB 223.

¹⁰⁷[1980] 2 NZLR 130.

¹⁰⁸As amended in 1977.

¹⁰⁹This was the same ground as had been advanced for the unsuccessful permanent residence permit.

Cooke J in delivering the principle judgement, suggested the possibility of substantive, as distinct from procedural, fairness as a ground for judicial review. The Court of Appeal was divided on the issue of mistake of fact, Cooke J followed Scarman L J in the House of Lords case of *Tameside*.¹¹⁰ Scarman L J stated that a discretionary power could not be exercised through a "misunderstanding or ignorance of an established and relevant fact."¹¹¹ Richmond P and Richardson J, in *Daganayasi*, reserved their opinion commenting this area of the law was far from settled.¹¹²

Whether the New Zealand courts will apply the *Wednesbury* threshold test of unreasonableness or the *Daganayasi* type of procedural unfairness remains a moot point. Cases which have broached the issue are divided and inconclusive.¹¹³ In the case of *Chan v Minister of Immigration*¹¹⁴ the High Court adopted an even broader view of reasonableness than *Daganayasi*. The court found that the Minister had failed to give the proper weight to the relevant factors and therefore quashed the decision.

This area of judicial review while legitimate, but uncertain, has wide reaching affects on immigration cases. If a *Daganayasi* substantive approach is taken the courts powers of review are extended and therefore the Minister's discretionary power is more fettered. This would result in immigration cases being open to judicial review on the substantive facts rather than just on procedural questions.

¹¹⁰*Secretary of State for Education and Science v Tameside Borough* [1977] AC 1014.

¹¹¹Above n 110, 1030.

¹¹²Above n 107, 149.

¹¹³See for example *Fowler & Roderique Ltd v Attorney-General* [1987] 2 NZLR 56 (CA), *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA).

¹¹⁴Unreported, 8 May 1989, High Court, Auckland Registry, CP 80/89.

VII HOW JUDICIAL REVIEW IS APPLIED IN IMMIGRATION CASES

New Zealand's common law has established that illegality and irrationality are grounds for judicial review in immigration cases. How are these grounds interpreted by the courts in the case of immigration issues?. By examining several recent New Zealand cases a more detailed analysis of how judicial review impacts on immigration can be formed. For example cases establish what relevant considerations the Minister is required to consider.

A *Ashby v Minister of Immigration*¹¹⁵

In *Ashby v Minister of Immigration* the Court of Appeal was required to consider the legitimacy of the Minister's decision to issue temporary visitors permits to the members of the Springbok rugby team. The first issue was whether the scope of the Minister's discretionary powers could only be exercised in conformity with New Zealand's international obligations under the International Convention on the Elimination of All Forms of Racial Discrimination of 1965.¹¹⁶ The second issue was that the obligations of the Convention were relevant considerations which the Minister of Immigration had to take account of.

Cooke J dismissed the first argument by stating that the Minister could not be bound by the international treaty obligations because they were not binding on domestic law until they had been incorporated into New Zealand law by an Act of Parliament.¹¹⁷ Somers and Richardson JJ, also dismissed this argument, but on

¹¹⁵[1981] 1 NZLR 222.

¹¹⁶New Zealand ratified this Convention on 22 November 1972.

¹¹⁷Above n 115, 224.

different grounds. Richardson J stated that whenever possible statutes are to be construed so as to accord with New Zealand's international obligations, but if the terms of the legislation are clear and unambiguous they must be given effect, whether or not they comply with international obligations.¹¹⁸ A quote which summarised this point was given from the dissenting judgement of Scarman LJ *Ahmad v Inner London Education Authority*:¹¹⁹

Today, therefore we have to construe and apply section 30 not against the background of the law and society of 1944 but in a multi-racial society which has accepted international obligations and enacted statutes designed to eliminate discrimination on the grounds of race, religion, colour or sex. Further, it is no longer possible to argue that because the international treaty obligations of the United Kingdom do not become law unless enacted by Parliament our courts pay no regard to our international obligations. They pay very serious regard to them: in particular, they will interpret statutory language and apply common law principles, wherever possible, so as to reach a conclusion consistent with our international obligations.

Richardson J found that the language of the statute was clear and unequivocal and did not expressly fetter the Minister's discretion in any way.

The question of whether the International Convention was a relevant consideration which the Minister had to take account of was dismissed on various grounds. Cooke J found that the Convention would only have to be considered by the Minister where it was of "such overwhelming or manifest importance that the

¹¹⁸Above n 115, 227.

¹¹⁹[1978] QB, 36,48; [1978] 1 All ER 574, 583.

Courts might hold that Parliament could not possibly have meant to allow it to be ignored."¹²⁰ In this particular case the Convention was found not to fall within this category. The Chief Justice in the High Court had found that the Convention was a relevant consideration.

The arguments presented in this case were mostly considered under the principles of illegality. Cooke J did mention that in a situation where there was found to be a relevant consideration then the question of irrationality would be asked. Could a reasonable Minister overlook that consideration or reach that result.¹²¹

Ashby is an important case as it establishes the possibility that in some immigration cases obligations incurred from international conventions may be relevant considerations. The ground on which the arguments failed was not that there was no case for the court to answer. It was decided on the particular facts of this case. This left the opportunity for the development of relevant considerations in immigration cases to be extended.

*B Tavita v Minister of Immigration*¹²²

Mr Viliamu Tavita arrived in New Zealand in 1987 on a temporary visitors permit. His application for residency was declined and he was issued with a removal warrant. Mr Tavita appealed under section 63 of the Immigration Act 1987 for the Minister to cancel the removal warrant on humanitarian grounds, this appeal was declined. During the time the Minister was considering this appeal Mr Tavita

¹²⁰Above n 115, 226.

¹²¹Above n 115, 226.

¹²²Unreported, 30 November 1993, Court of Appeal, CA 266/93.

and his wife had a child. As the child was born in New Zealand she is a New Zealand citizen, pursuant to section 6 Citizenship Act 1977. Mr Tavita's wife has applied for permanent residency and her application is being considered.

Judicial review proceedings were commenced in the Court of Appeal where the question of the applicability of certain international conventions was raised. Reliance was placed on the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.¹²³ The court was asked to consider whether the obligations established by these international instruments were relevant considerations the Minister had to take account of. The primary provisions of the Covenant invoked by the applicant are Articles 23(1) and 24(1):¹²⁴

Art. 23(1).The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Art. 24(1).Every child shall have, without any discrimination as to race, colour,...national or social origin...the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

The provision invoked by the applicant from the Convention on the Rights of the Child is Article 9(1):

¹²³New Zealand ratified the Covenant on 20 December 1978 and the Optional Protocol, which gives individuals who have exhausted all available domestic remedies the right to apply to the Human Rights Committee of the United Nations, on 26 May 1989. The Convention on the Rights of the Child was ratified by New Zealand on 13 March 1993.

¹²⁴Above n 122, 7.

(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

The two issues the court was required to consider in determining whether these international obligations were relevant considerations was to what extent international law can be invoked in domestic law and whether these obligations could be said to be impliedly relevant to the legislation.

The Crown argued that there was no legal obligation to take the international instruments into account. Cooke P, in delivering the single judgement, stated that this was an "unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing."¹²⁵

The Crown cited *Reg v Secretary for the Home Department, ex parte Brind*¹²⁶ in support of their proposition. His Honour distinguished *Brind* from *Tavita* on the facts. In *Brind* the Secretary of State had considered the European Convention, therefore the issue was whether the decision maker was bound to

¹²⁵Above n 122, 14-15.

¹²⁶[1991] 1 AC 696.

conform to the obligations of the Convention. Lord Ackner stated that if this proposition was accepted it would result in the courts incorporating the Convention into English domestic law.¹²⁷ This is similar to the argument advanced by the applicants in *Ashby*, in both cases the courts concurred. Somers J in *Ashby* observed that to accede to the applicants submission, that the Minister had to conform with the obligations of the Convention, "would not be to interpret but to legislate."¹²⁸

In *Tavita* the Minister admitted that the international conventions had not even been considered. It was not a question of whether the Minister was bound by these obligations but whether he was required to consider the Conventions. The difference between these two submissions is fundamental to the authority of the courts in judicial review cases. Judicial review of a relevant consideration is based on the procedural illegality of a decision, this is a question of law. The submission that the decision maker is bound by the obligations is requiring the courts to interpret international law to be a part of domestic law. This would result in the courts effectively legislating.

The Court of Appeal in *Ashby* had accepted the principal that there were "some international obligations so manifestly important that no reasonable Minister could fail to take them into account."¹²⁹ From this premise Cooke P proceeded in *Tavita* to question when an Act is silent on relevant considerations whether international obligations are required to be considered. Cooke P suggested that "a failure to give practical effect to the international instruments to which New

¹²⁷Above n 126, 761.

¹²⁸Above n 115, 232.

¹²⁹Above n 122, 15.

Zealand is a party may attract criticism."¹³⁰ The judgement also states that courts may receive legitimate criticism if they accept the executive ignoring international human rights or obligations when exercising discretionary powers prescribed by domestic statutes. Even if the power was conferred in general terms and the statute does not mention international instruments. Although a final decision on the argument, of whether the decision maker was entitled to ignore international instruments, was not reached the Court of Appeal made very strong references to it not being accepted..

The case was referred back to the Minister for reconsideration in the light of the new fact of Mr Tavita's New Zealand born child. The court stated that the future of the child as a New Zealand citizen was a responsibility of this country and therefore international human rights and obligations were involved. The court gave the Minister the opportunity to consider the rights of the child.¹³¹

Cooke P suggested that the case could "be seen as dependant on its own facts." But His Honour also indicated that it "emerges as a case of possible far-reaching implications."¹³² It is arguable that *Tavita* establishes that in cases concerned with family reunification the decision maker must consider relevant international instruments. For example the rights of children and the right to the protection of the family.¹³³ The Court of Appeal seems to be indicating that in cases of family reunification the considerations of the relevant international human rights obligations were so manifestly important that the decision maker must consider

¹³⁰Above n 122, 16.

¹³¹Above n 122, 16.

¹³²Above n 122, 16, see also Appendix II.

¹³³See Article 9 Convention on the Rights of the Child, Articles 23, 24 International Covenant on Civil and Political Rights.

them. This would mean that the international instruments containing these human rights and obligations of the family and the child are relevant considerations which decision makers must consider. If they do not then the courts may judicially review their decisions on the bases of illegality.

Following on from the establishment of a relevant consideration the courts may then question whether any reasonable Minister could have made that decision. This would be an example of the courts judicially reviewing a case on the ground of irrationality. *Tavita* by proposing that international human rights and obligations may be relevant considerations in family reunification cases opens the door for the contention that a Minister's decision may be unreasonable based on the an error of law. The ground of irrationality is uncertain and may be extended in New Zealand to include a review of substantive fairness. If this were the case the courts could judicially review an immigration case on the grounds that the Minister could not have reasonably come to that decision based on the facts. The practical effects of this would be that the courts would be augmenting Governmental policy.

The above comments on how *Tavita* may lead into cases of judicial review based on the ground of irrationality is conjecture, but it is possible that *Tavita* could open the flood gates of judicial review of family reunification immigration cases

VIII CONCLUSION

The impact immigration issues has on the family are severe and often final. New Zealand's Governmental policy concerning the family is out of date and biased. The present residence policy does not reflect the changing attitudes of New

Zealand society or the change in domestic jurisprudence. The Immigration Service when it reviews this policy should recommend to the Government that policy adhere to contemporary thinking and domestic legislation, such as the Bill of Rights Act 1990 and the Human Rights Act 1993.

Government should consider the present law in light of the new areas of developing law, such as judicial review and international law, have an enormous effect on immigration concerns. The principle of international law which was commonly advanced was the rule that States are free to control at will the entry and residence of aliens. The rule has been diluted with recent developments in the area. This emphasis on a State's freedom is now misplaced in contemporary international relations. The proliferation of treaties concerned with human rights parallels with the necessity of States to uphold their international obligations within their boundaries.

Several multinational legal instruments governing the protection of human rights place emphasis on the sanctity and unity of the family. Many international instruments now enable individuals complaints to be heard. Therefore individual human rights transgressions within States can now result in global embarrassment. It is amazing to think that a nations immigration policy could now be reviewed by an international court or committee.

New Zealand should give practical effect to the treaties it ratifies. International obligations should be incorporated into immigration legislation and policy. Otherwise New Zealand could be seen to merely giving lip service to the human rights contained within international instruments.

The potential extension of judicial review in family reunification cases is not the correct extension of immigration practices. The prospect of substantive review of these cases draws a very fine line in the doctrine of separation of powers. Government should consider the pressure from the courts in this area as an indication that the area is in need of reform. If the Government's policy observed human rights obligations set out in both domestic and international law the courts avenue to encroach on this area of foreign affairs would be substantially lessened. The courts have always been reluctant to interfere with immigration issues and it is submitted they are still reluctant. But in the present system of manifestly unfair Governmental family reunification policy it has been left up to the courts to rectify the unfairness.

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Assessing a parent application

Appendix I

- Family centre of gravity in New Zealand
- Parents meet the "centre of gravity" principle where
- if they have no dependent children**
- they have an equal or greater number of adult children lawfully permanently resident in New Zealand than in any other single country including their home country
- if they have dependent children**
- they have an equal or greater number of adult children lawfully permanently resident in New Zealand than in any other single country including their home country, and
 - the number of their dependent children is the same as or less than the number of adult children resident in New Zealand.

Examples The tables below give examples of how the "centre of gravity" principle is applied.

PARENTS WITH NO DEPENDENT CHILDREN

No of Children	In New Zealand	In Home Country	Third Country	Eligible?
2	1	1	-	YES
5	2	1	2	YES
4	1	1	2	NO
6	2	1	3	NO
6	2	2	2	YES

PARENTS WITH DEPENDENT CHILDREN

2	1 adult	1 depdt	-	YES
4	1 adult	1 adult 2 depdt	-	NO
4	1 adult	2 depdt	1 adult	NO
4	1 adult	1 adult 1 depdt	1 adult	YES
6	2 adult	2 depdt	2 adult	YES

Appendix II

22 DEC 1993

NZIH

Overstayer's case 'far ^{Immigration} reaching'

NZPA

Wellington

The Court of Appeal says universal rights and New Zealand's international obligations are part of an immigration case which involves the child of a Western Samoan overstayer.

It was a case which might have far-reaching implications, the court president, Sir Robin Cooke, said in an interim judgment.

The court adjourned the case so the appellant, Mr Viliamu Tavita, could apply to the Minister of Immigration to stay in New Zealand.

Mr Tavita arrived in New Zealand from Western Samoa in 1987 on a visitor's permit.

His application for a residence permit was declined and in 1990 the Lower Hutt District Court granted the Immigration Service's request for a removal warrant.

Mr Tavita's appeal to the Minister of Immigration was declined.

On June 29, 1991, Natia Tavita was born in New Zealand. Mr Tavita married the mother the following month.

While the mother worked the father looked after the child during the day. He also did some panelbeating at home.

Sir Robin noted neither parent received a Social Welfare benefit.

In October 1993, Mr Tavita swore an affidavit that he would lose contact with his daughter and wife if he were forced to leave New Zealand. He had no property

or job to go to in Samoa and he would be unable to support them.

Sir Robin said that in September 1993, Mr Tavita was taken to the airport but his removal was stopped by a stay in proceedings. After a judicial review of the case in the High Court, the stay on the removal order remained pending the present appeal.

Sir Robin said: "It may be thought that the appropriate minister would welcome the opportunity of reviewing the case in the light of an up-to-date investigation and assessment.

"Nothing of the sort appears to have occurred within the [Immigration] department. Still less has the case been reconsidered, in the light of current circumstances, at ministerial level."

While understandable, the case should be reconsidered.

The child, whatever the merits or demerits of either of her parents, was not responsible for them. Her future as a New Zealand citizen was inevitably a responsibility of New Zealand, he said.

In the appellant's case, reliance was placed on the International Covenant on Civil and Political Rights, giving a person subject to New Zealand jurisdiction a right to apply to the human rights committee of the United Nations. Reliance was also placed on the Convention on the Rights of the Child.

Sir Robin said criticism might result if there was a failure to give practical effect to international instruments to which New Zealand was a party.

Immigration - overstayers

EP

Case may be 'far reaching'

21 DEC 1993

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His application for a residence permit was declined and in 1990 the Lower Hutt District Court granted the Immigration Service's request for a removal warrant.

Mr Tavita's appeal against that, to the Immigration Minister, was declined.

On 29 June, 1991, the child Natia Tavita was born in New Zealand to Mr Tavita and the mother Keiana, whom he married the following month.

While the mother worked the father looked after the child during the day. He also did some panelbeating work at home.

Sir Robin noted neither parent received a Social Welfare benefit.

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Immigration - overstayers
Maxwell orders

removal review

21 FEB 1994

The New Zealand Immigration Service will overhaul the way it expels overstayers to minimise the potential trauma to those people and their families.

Immigration Minister Roger Maxwell has ordered the service to review its practices. He wants to ensure overstayers are interviewed shortly before they are placed in custody and then made to leave.

He cited the case where a woman who was breast feeding was arrested three years after a removal order had originally been served on her. Mr Maxwell said she had been released into the care of a responsible person once her situation was recognised but the situation highlighted the need for better practices.

"The personal circumstances of overstayers can change," he said. "Where the care of children becomes an issue during removal procedures an alternative to custody will be arranged."

Mr Maxwell said the execution of a removal order should be undertaken with a view to minimising potential trauma on the overstayer or their family. Where identity was questioned, removal procedures would be delayed until the matter was resolved.

ST 27 FEB 1994

Case may open door for illegal immigrants

Immigration-Overstayers

By JAMES GARDINER

THE Labour Department Immigration Service is grappling with a complex legal issue that may enable people living illegally in New Zealand to avoid deportation if their children are born here.

The department has to decide whether to recommend that Immigration Minister Roger Maxwell allow Western Samoan overstayer Viliamu Tavita to stay in New Zealand.

If it does, and the Government agrees, the door may be opened to thousands of would-be immigrants to skip normal channels by simply coming here and having children.

It does not, it could be argued New Zealand is breaching international covenants on civil and political rights and rights of children.

Mr Tavita's case is being cited as a reference point for the case of Nelson Bays rugby representative Tom Matakaiongo, of Tonga, who also faces being sent home but has a New Zealand-born child.

A spokesman for Mr Maxwell said this week the Matakaiongo investigation was being considered by the service's legal staff after Mr Matakaiongo's lawyer, Graeme Malone, wrote "requesting basically that he be allowed to stay in New Zealand".

Mr Tavita arrived in New Zealand on a visitor's permit in 1987 and was declined residence. In 1990 Lower Hutt District Court granted the service's request for a removal warrant.

His appeal to the immigration minister was declined but he had a child in June 1991 with a woman he married the following month.

He was taken to the airport for removal in September last year but the removal was stopped at the last minute by a court order.

A judicial review in the High Court followed, then the case went to the Appeal Court, which adjourned it to allow an application to the minister.

Mr Tavita told the courts he would lose contact with his daughter and wife if he was forced to leave New Zealand and, with no job or property to go to in Samoa, he would be unable to support them.

In an interim judgment in December, Appeal Court president Sir Robin Cook said, "It may be thought the appropriate minister would welcome the opportunity of reviewing the case in the light of an up-to-date investigation and assessment."

A child who was a New Zealand citizen was inevitably New Zealand's responsibility, whatever the merits of either parent, Sir Robin said.

Matakaiongo, 24, pleaded not guilty to assault with a weapon in Nelson District Court on February 15. He pleaded guilty to breach of bail.

Samoan mum

NZH

22 FEB 1994

in hidings

Immigration -
By TIM MURPHY

An overstayer freed before her deportation because she was breast-feeding a young child has breached an agreement with the Immigration Service and gone "underground" in South Auckland.

Mrs Meki Samauga, whose detention in police cells last week led to new instructions from the Minister of Immigration on the handling of overstayers, failed to appear for a flight to Western Samoa on Friday night.

The Immigration Service said last night that she had been released into the care of a "responsible" person before deportation on the agreement that she was to leave the country.

Immigration officers had taken three years to find her and execute a 1991 removal order. Last week Mrs Samauga's case was taken up by about 50 South Auckland Samoans who made an impromptu visit to the Mayor of Manukau, Sir Barry Curtis, pleading for intervention.

Her six children, mother and seven brothers and sisters have residency in New Zealand.

A supporter of Mrs Samauga, Mr Leifi Faleauto, confirmed last night that she had disappeared shortly before she was due to be taken to the airport on Friday.

He had been told by her family that she had become distraught at the prospect of leaving her children and landing in Western Samoa with no close family.

Mr Faleauto said the breaching of the agreement with immigration officials could make it impossible for the service to "trust anybody in a situation like this."

He had been unable to find out where Mrs Samauga, her husband — who is also the subject of a removal order — and their children had gone.

Mr Faleauto said there was nothing the couple could do but give themselves up. However, he called on the Immigration Service to allow them to prepare properly to return to Western Samoa with their children.

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