OFFICIAL

**In the Waitangi Tribunal**

**Wai 1428, 3.1.4**

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| **IN THE MATTER OF** | the Treaty of Waitangi Act 1975 |
| **BETWEEN** | **Rosina Hauiti**<br>Applicant |
| **AND** | **The Queen** |

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**FURTHER SUBMISSION FOR AN URGENT HEARING**
**WAI 1428 – CLAIM OF ROSINA HAUITI**

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Dated: 11 October 2007
**For Judge C M Wainwright**

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**FURTHER SUBMISSION FOR AN URGENT HEARING**
**WAI 1428 – CLAIM OF ROSINA HAUITI**

May your Honour please

1. This is a joint submission for your Honour's consideration by Tuariki Delamere and Evgeny Orlov of Equity Law. Mr Orlov has, because of his reputation and experience in the areas of human rights and immigration, been retained as counsel to clarify in the language of jurisprudence the intended meaning MrDelamere wished to convey as a lay litigant.

2. Your memorandum of directions dated 4 October 2007 advised the applicant that:

    a. The Waitangi Tribunal ("Tribunal") is, prima facie, not a forum for appeals against immigration decisions;

    b. It was not clear what policy Mr Fonua was affected by and nor was it clear why his marriage was considered invalid;

    c. Ms Hauiti did not show why the policies and/or actions of Immigration New Zealand ("INZ") were inconsistent with the principles of the Treaty of Waitangi;

    d. Even if Mr Fonua was a taonga to his wife the argument that INZ decisions affecting him somehow breach the applicant's treaty rights were not persuasive; and

    e. Unless the applicant can provide convincing arguments and evidence in response to the points identified by your Honour then the Tribunal will not hear this application under urgency.

3. It is submitted that the Tribunal not only has jurisdiction it is required under New Zealand legislation to investigate and rule on this claim. In this submission we will also submit to your Honour arguments for hearing this matter under urgency.

4. However, taking into consideration the directions in your memorandum of 4 October 2007 the applicant, Rosina Hauiti, acknowledges that it is not appropriate at this stage to determine either the factual question or the merits of her application in respect of her husband being a taonga, as it is first necessary for a determination to be made to the narrower question of ***"Under the Treaty of Waitangi can a person be considered a taonga?"*** Therefore, Ms Hauiti requests at this stage of the proceeding only that you determine in broad terms the jurisdictional issue, that is, whether or not the Tribunal has in fact the jurisdiction to determine this question and whether that question should be accorded urgency.

5. Should the Tribunal then find that a person is not a taonga under the Treaty of Waitangi ("the Treaty") that would of course bring Ms Hauiti's claim to a close.

However, should the Tribunal find in the affirmative then the second question the Tribunal must consider is ***"Is the claimant Rosina Hauiti's husband, Mofuike Fonua, a taonga under the Treaty of Waitangi?"*** And if the Tribunal decided that question in the negative then that would also bring Ms Hauiti's claim to a close. However, if Mr Fonua was deemed by the Tribunal to be a taonga under the Treaty of Waitangi then it is submitted that it would be right and proper for the Tribunal to determine what rights, if any, Mr Fonua would accrue for being a taonga of his wife, the claimant Rosina Hauiti.

6. It will be the applicant's submission that this Tribunal has the jurisdiction to determine in broad terms whether a human being can be considered under the Treaty to be a taonga. Whether or not it will follow from this that the particular human being in these proceedings is such and/or whether the Minister of Immigration failed to follow or take the principles of the Treaty of Waitangi into consideration is then only a question of fact to be determined a later hearing.

**Jurisdiction**

7. The Tribunal's jurisdiction for this application is drawn from the Treaty of Waitangi Act 1975 ("the Act") and in particular section 6 of the Act. Ms Hauiti claims that she has been prejudicially affected by the policies, actions and proposed actions of the Crown, and that those policies and actions are inconsistent with the Principles of the Treaty in terms of s6(1)(c) and s6(1)(d) of the Act.

> **[6] Jurisdiction of Tribunal to consider claims**
>
> **[(1)** Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—
>
> - (a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or
>
> - (b) By any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection; or
>
> - (c) By any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
>
> - (d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—
>
> and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the

Tribunal under this section.]

8. S6(2) requires the Tribunal to enquire into every claim submitted under s6(1) unless it is contrary to s6AA. The applicant states that her claim is not an historical claim and therefore is not prohibited in terms of s6AA of the Act.

### [6] Jurisdiction of Tribunal to consider claims

**[(2)** The Tribunal must inquire into every claim submitted to it under subsection (1), unless—

- (a) the claim is submitted contrary to section 6AA(1); or
- (b) section 7 applies.]

### [6AA Limitation of Tribunal's jurisdiction in relation to historical Treaty claims

**(1)** Despite section 6(1), after 1 September 2008 no Maori may—

- (a) submit a claim to the Tribunal that is, or includes, a historical Treaty claim; or
- (b) amend a claim already submitted to the Tribunal that is not, or does not include, a historical Treaty claim by including a historical Treaty claim.

### 2(a) <u>The Waitangi Tribunal ("Tribunal") is, prima facie, not a forum for appeals against immigration decisions;</u>

9. Ms Hauiti acknowledges that the courts may well be the appropriate body in which to seek a remedy as to how any rights her husband may have as a taonga should be considered against the rights of INZ to remove Mr Fonua from New Zealand. However, it is submitted that before the courts can consider such proceedings it is necessary for the Tribunal to make a determination of whether or not Mr Fonua can be considered a taonga under the Treaty.

10. However, before a determination can be made of whether Ms Hauiti's husband is a taonga it is necessary that a determination must be made on whether a person can in fact be a taonga pursuant to the Treaty. The applicant further submits that the Tribunal is the only body empowered and indeed competent to make such a determination and pursuant to the s6(2) of the Act the Tribunal must make that determination.

11. Although it is open for the applicant to challenge the decision of INZ on judicial review grounds invoking the principles of the Treaty of Waitangi, it is trite law and the court has stated this on numerous occasions that it is desirable, in fact virtually mandatory, for an applicant to first exhaust its available remedies in specialist tribunals before seeking the courts intervention in judicial review. This is especially so here, as the High Court simply does not have the depth or breadth of expertise to determine whether a human being is capable of being considered a taonga and further if the answer is yes, whether in this case the applicant's husband in fact is one.

12. Clearly s6 of the Act confirms that the Tribunal not only has the power to determine the content of the cultural or spiritual rights anticipated by the Treaty it has an obligation and requirement enshrined in legislation to in fact do so. The Tribunal is also empowered to make declarations and recommendations into how such rights are to be treated and whether or not such rights have been breached. Certainly the question whether a human being can be considered a taonga under the Treaty of Waitangi is acknowledged as being controversial and novel, but this should not deter Your Honour from exercising your power to grant urgency to this matter. And indeed to not act would be contrary to the obligations the Tribunal has to make a determination of this matter; and I quote the words of our Chief Justice:

> A judge cannot evade deciding a case just because it is controversial. Nor can the Judge decline to exercise a jurisdiction conferred by Parliament or the Constitution and properly invoked by a litigant. Abstention is itself a judicial determination with political repercussions. The courts are themselves subject to the rule of law. They cannot usurp powers lawfully exercised by other agencies, including Parliament. They operate at the boundaries, making sure that power is exercised only according to law. But that responsibility they cannot constitutionally shrug.)
>
> [Attachment A, page 10, Elias CJ, Speech to IBA, 2002]

13. The language and discipline of human rights terminology is deliberately invoked because the Tribunals powers and functions are extraordinarily similar to the United Nations Commission on Human Rights ("UNCHR") [since replaced with the United Nations Human Rights Council ("UNHRC")] where the principles of jurisprudence adhered to by that body, prior to its dissolution on 15 March 2006, were :

    a. There are no prescriptive or compulsive powers; there is only the power to make declarations and recommendations as to the legality of a government's actions.

    b. The actions of the government in question are considered in light of international conventions (and their guiding principles) ratified by that country. The sea of human rights jurisprudence thus feeds and guides the

actions of a state by providing a benchmark against which its actions may be judged.

c. The above functions of the commission are quasi political and quasi constitutional in that they are not strictly legal but by virtue of their influence and weight have the effect of guiding and possibly changing the government's understanding of its human rights obligations and hence changing its attitudes, policies and legislations. This internationalizes and gives legitimacy on an international level to the rule of law and democracy as an expression of an outside and uninfluenced view.

14. Whereas the UNCHR allowed for the expression of international jurisprudence to influence domestic law, by analogy this Tribunal's function is quasi constitutional in that it gives meaning and content to the Treaty which can equally be viewed as a quasi-constitutional and guiding document in largely the same manner and by the same route as can international treaties that have been ratified by New Zealand.

15. Simply speaking this Tribunal decides whether the principles of the Treaty have been followed in a particular case thus giving the Treaty actual rather than symbolic meaning and ensuring that the Treaty is more than an impotent rubber stamp used for political ends and contrary to justice.

16. Identically the UNHCR allowed individuals to apply to it when a country had breached their human rights so as to ensure that the treaties ratified by a country are not impotent and cynical gestures. The value of these processes is accepted as unarguable by the world's democratic judiciaries; and again to quote Dame Elias on New Zealand's Bill of Rights Act:

> "...it has wider public and educational value; it is a beginning for public debate; it is a marker"
>
> [Attachment A, page 6, Elias CJ, Speech to IBA, 2002]

17. The concept of the Bill of Rights as a quasi-constitutional torch in the darkness rather than a weapon or stick is directly analogous to the area of Treaty jurisprudence. Again to quote the Right Honourable Elias CJ:

> The Bill of Rights Act promotes democratic debate. The requirement in s7 that the Attorney-General must inform Parliament of any inconsistency in proposed legislation, though not in the positive form imposed by s 4 of the Human Rights Act (UK), is directed at better legislative processes. And the Court of Appeal expressly reserved a power to declare that legislation is in breach of the Bill of Rights Act because it thought such declaration had value in Parliament "if the subject arises in that forum". Although this decision has been criticised, it is difficult to see any democratic objection to a process which aims to inform the legislature, to whose actions the Bill of Rights Act applies by s3. As Sir Kenneth Keith puts it:
>
> *The enterprise of protecting rights should generally be seen as a cooperative rather than a divisive one.*

[Attachment A, page 6, Elias CJ, Speech to IBA, 2002]

18. These matters have a direct effect on domestic jurisprudence. As stated by Lord Cooke in Tavita v Minister of Immigration:

> (The argument that the Crown can ignore international conventions) " is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window dressing ..."
> [Tavita v Minister of Immigration 919940 2 NZLR 257, page 266]

19. Lord Cooke in the above case directed a minister to reconsider a decision to remove a family because the United Nations Convention On the Rights of the Child had not been considered. Relevantly and by analogy to this Tribunal's standing and powers

> If and when the matter falls for decision, an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the optional protocol the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to New Zealand courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the Executive is necessarily free to ignore them
> [Tavita v Minister of Immigration (1994) 2 NZLR 257, page 258 (Observations iii)]

20. Thus the doctrine of incorporation suggests that our law not only can but must be guided by the conventions we ratify lest indeed our citizens had recourse against us to the UNCHR, and now to its successor the UNHRC. This point was repeated at length by our own Chief Justice in her speech at Durban to the International Bar Association conference in October 2002 when she argued for a more rights based jurisprudence in judicial review of administrative action. To quote her at length. The Right Honorable Dame Elias specifically quoted from the principles of Tavita as:

> Seven years ago Lord Cooke of Thorndon, whose contribution to the development of human rights law in New Zealand has been immense, expressed the view that 'the world is moving towards an international law of human rights
> [Attachment A, page 1, Elias CJ, Speech to IBA, 2002]

21. To further quote from that speech:

> 3. It is the vital duty of an independent, impartial and well qualified judiciary, assisted by an independent, well-trained legal profession, to interpret and apply national constitutions
> and ordinary legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.

> 4. Fundamental human rights form part of the public law of every nation, protecting individuals and minorities against the misuse of power by every public authority and any person discharging public functions. It is the special province of Judges to see to it that the law's undertakings are realised in the daily life of the people.
>
> 5. Both civil and political rights and economic, social and cultural rights are integral, indivisible and complementary parts of one coherent system of global human rights. The implementation of economic, social and cultural rights is a primary duty for the legislative and executive branches of government. However, even those economic, social and cultural rights which are not justiciable can serve as vital points of reference for Judges as they interpret their constitutions and ordinary legislation and develop the common law. Likewise, even where human rights treaties have not been ratified or incorporated into domestic law, they provide important guidance to law-makers, public officials and the courts.
>
> [Attachment A, page 3, Elias CJ, Speech to IBA, 2002]

22. It is submitted therefore not only that this court can but it must exercise its jurisdiction to hear this case. If this court has the jurisdiction but fails to exercise it, this would indeed be inconsistent with the principles invoked by s 27 of the Bill of Rights.

## The Treaty of Waitangi

23. In the same manner that INZ cannot ignore the force of international law, even if that law is not part of domestic law, that is, not enacted in domestic legislation (circa Tavita), INZ and indeed all government departments cannot ignore the Treaty and the accompanying Principles of the Treaty of Waitangi as espoused many times by the Courts, as in for example, [*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR]. Following the 1987 Court of Appeal judgment, the Treaty principles were developed and have since been reconsidered in a variety of cases and in Tribunal hearings.

24. This case was brought to the High Court by Archie Taiaroa and concerned the 'Maori option' which required Maori, over a limited period in 1994, to choose between enrolment on the Maori electoral and general roll. While the case was lost the importance of this case to the pleadings of Ms Hauiti is that Justice McGechan identified a number of principles which would guide him. In particular he confirmed that the Treaty imposed on the Crown a positive and broad obligation of good faith.

> ...would readily accept it encompassed a claim to an ongoing distinctive existence as a people, albeit adapting as time passed and the combined society developed.....there is no doubt Treaty principles impose a positive obligation on the Crown, within constraints of the reasonable, to protect the position of Maori under the Treaty and the expression from time to time of that position . . . It is a broad obligation of good faith.
>
> [Justice McGechan, Tairoa v Minister of Justice, 29 Aug 1994, HC Wellington]

25. In hearing the appeal, Justice Cooke said:

> Special obligations to the Maori people, whether arising from the Treaty of Waitangi, partnership principles, fiduciary principles or all three sources in combination, are not needed to give rise to an implication that reasonable notice of such an option is inherent in it.
>
> [Taiaroa v Minister of Justice, [1995] 1 NZLR, 513, 517]

26. While the appeal was also lost it is submitted in support of these proceedings that the Court has impliedly recognized that Maori have individual human rights derived from the Treaty of Waitangi. And indeed in the many reports issued by the Tribunal itself these are numerous examples of the Tribunal confirming the recognition by the Tribunal that Maori are entitled to protection of their culture. This is perhaps best exemplified in the Te Reo Maori report where the Tribunal reported that:

> the word (guarantee) means more than merely leaving the Maori people unhindered . . . It requires active steps to be taken to ensure that Maori people have and retain the full exclusive and undisturbed possession of their language and culture.
>
> [Waitangi Tribunal, Report of the Waitangi Tribunal on Te Reo Maori Claim, 1996, p 20]

## International Covenant on Civil and Political Rights

27. The INZ Operations Manual makes and at all material times made (to a degree) provision for the taking into account of New Zealand's international obligations under (inter alia) the International Covenant on Civil and Political Rights, in particular articles 17 and 23, and as well the "other rights" of the "person being removed" and of "any immediate family associated with that person, (particularly those who are New Zealand citizens or residents)".

> **Article 17**
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.
>
> **Article 23**
> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.
> 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

28. Paragraphs D4.45 and D4.45.5 of the INZ Operations Manual requires INZ officers to take into account its obligations under international law. Should the Tribunal determine that her husband is a taonga and also determine that her rights and benefits of citizenship have been breached then Ms Hauiti will provide further submissions and documentary evidence showing that the actions of INZ have not complied with their own policies as per D4.45 and D4.45.5.

> **D4.45 Effect of International Conventions on removal action**
>
> a. As the New Zealand Government recognises New Zealand's obligations under international law **it is essential that such obligations be taken into account when executing removal orders**. International obligations which may apply in such circumstances are:
>
> ii the 1966 International Covenant on Civil and Political Rights and the optional Protocol relating to that Covenant;
>
> **D4.45.5 Necessity to consider other rights**
>
> a. **When determining whether or not to execute a removal order** it is necessary for the immigration officer to take into account the particulars of the case and the impact removal might have on the rights of:
>
> i. the person being removed; and
>
> ii. any immediate family associated with that person, (particularly those who are New Zealand citizens or residents).
>
> b. The immigration officer must then balance the factors set out in (a) above against:
>
> i. the rights and interests of the State in determining who should reside within its borders;
>
> ii. the principal goals of Government residence policy;
>
> iii. the intention of the Immigration Act 1987 to ensure a high level of compliance with immigration laws;
>
> iv. the need to be fair to other potential immigrants who have not met policy requirements and who have not been able to remain in New Zealand.

## New Zealand Bill of Rights Act 1990

29. THE New Zealand Bill of Rights Act 2003 protects everyone from the actions of anyone in government that interferes with their rights. The Act requires that everybody in government, including government departments, courts, state-owned enterprises and local authorities, must comply with New Zealand's Bill of Rights Act. The applicant submits that pursuant to section 9 the actions of INZ in forcing

her husband to leave New Zealand is an action that is cruel and degrading and a disproportionately severe treatment.

> **Section 9** states that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

30. Ms Hauiti further submits that pursuant to section 27(1), 27(2) and 27(3) she is guaranteed the right to pursue her rights in the Waitangi Tribunal.

> **Section 27(1)** states that every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law
>
> **Section 27(2)** states that every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination
>
> **Section 27(3)** states that every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals

## Can a person be a taonga?

31. The applicant submits that her case is well founded. However she recognizes also that this claim has generated significant national media coverage and comment; both supportive and against. The applicant regrets that her claim has generated national controversy but she wishes your Honour to understand that she is fighting for her right to be married to the person she loves and the person she wants to live her life with. She submits that the Treaty gives her the right to have her husband as a taonga. She submits the Treaty gives her the benefit and privileges of citizenship. Ms Hauiti submits that those rights, benefits and privileges are enshrined in the Treaty for the protection of Maori and include the right to marry a person of her choosing and to live that marriage in peaceful enjoyment free from the attacks on her marriage by the Crown. Furthermore, she notes that those rights are also enshrined in s17 and s23 of the United Nations Covenant on Civil and Political Rights.

32. The right to ones language as determined by the Tribunal recognized the Maori language as a taonga necessary for the ongoing culture of Maori to survive and flourish. The language was recognized as a fundamental element of the Maori culture. However, for the language to flourish it needs the Maori people and in particular its needs the Maori family unit to survive, to grow, and to flourish. It is therefore submitted by Ms Hauiti that in recognizing the language as a taonga that the Tribunal has already defacto recognized that the Maori people themselves must be a taonga which leads to the conclusions that the Maori family unit must also be a taonga. The *Te Roroa Report* in 1992 reiterated that the Treaty is a sacred covenant entered into by the Crown and Maori

> based on the promises of two people to take the best possible care they can of each other and that both parties have a common moral duty to abide by the Christian and traditional Maori values it embodies.
>
> [Waitangi Tribunal, *The Te Roroa Report 1992*, 1992, p 30]

33. While the principle of active protection was raised by the Tribunal prior to 1987, it was more widely developed following the Court of Appeal judgment. For example, the *Orakei Report* stated the position previously advanced in the *Te Reo Maori Report* that:

> the word 'guarantee' meant more than merely leaving the Maori people unhindered in their enjoyment of language and culture. It required active steps to be taken to ensure that the Maori people have and retain the full exclusive and undisturbed possession of their language and culture.

34. The applicant has asked your Honour to consider the question ***"Under the Treaty of Waitangi can a person be considered a taonga?"*** It has been reported in the media that there are those who say that to claim a person can be a taonga is frivolous and demeaning to the Treaty. Ms Hauiti rejects those criticisms as being ill-founded and simply plain wrong. In support of her contention that a person can be a taonga the applicant submits as supporting evidence:

    a. Copy of a press release from Tariana Turia and Dr Pita Sharples, the co-leaders of the Maori Party "***Children are our taonga***". Mrs Turia and Dr Sharples hold positions of great mana and influence within Te Ao Maori, and indeed within all of New Zealand, and quite clearly they and the Maori Party consider a person can be a taonga.

    [Refer Attachment B-1]

    b. References to "***The Active Kaumatua Taonga***" and the "***..He Taonga Servcies Chairperson...***" can be found on the Te Runanga o Ngati Kahungungu Internet web site.

    [Refer Attachment B-2]

    c. "***He aha te mea nui o te Ao? He tangata, he tangata, he tangata***". ***[What is the most important thing in the world? It is people, it is people, it is people].*** And finally it is to this most famous of all Maori proverbs that Ms Hauiti comes back to. She submits that no other meaning other than a person is a taonga can be ascribed to this proverb.

**Other Issues**

**2(b) <u>It was not clear what policy Mr Fonua was affected by and nor was it clear why his marriage was considered invalid</u>**

35. Your Honour will recall that in previous submissions on this matter the applicant was unable to provide full comment or evidence because INZ had not provided a copy of her husband's file. This information has now been provided and consequently the following comments can now be made.

36. Mr Fonua submitted another request under s35A of the Immigration Act 1987 for a work permit as the husband of Ms Hauiti. INZ officer Angela Ross reviewed this application and decided to refuse the request. One of the reasons for declining the application was "*The client's wife in her submission to the courts has advised that she will be unable to consider reconciliation with the client*". While this was true on 14 November 2006, it is submitted that Ms Ross was wrong to use this to justify her decision as Ms Ross records in her own assessment notes that Ms Hauiti was now supporting Mr Fonua's application for a new work visa and that she was aware Ms Hauiti and Mr Fonua were again living together. Further Ms Ross stated that "*...due to the current state of this relationship I am not satisfied that the client is in a relationship that is genuine and stable with the likelihood to endure.*" It is acknowledged that while the evidence fully supports that the relationship was not at that time stable it is also submitted that **the evidence clearly confirms that the relationship was genuine.**

[Refer Attachment C - pps 78-79]

37. Further, on 9 October 2007 the Minister of Immigration, the Honourable David Cunliffe, confirmed that he believed the marriage to be genuine, although he also stated that "*it cannot said to be stable*". We do not dispute the Minster's assessment. However, the Minister's statement confirms the original decision by Ms Ross to reject Mr Fonua's application, because she did not consider the marriage to genuine, was wrong.

[Refer attachment D - Hon D Cunliffe letter of 9 October 2007]

## 2(c) Ms Hauiti did not show why the policies and/or actions of Immigration New Zealand ("INZ") were inconsistent with the principles of the Treaty of Waitangi

38. Your Honour has asked the applicant to show how the policies and/or actions of INZ were inconsistent with the principles of the Treaty.

39. Immigration policy is in a special position under the Immigration Act 1987. Under section 13B, it is of a specified kind and must be certified as such by the Minister of Immigration ("the Minister"). It must be published in the NZIS Manual. Under section 13C(1), visa officers and immigration officers, and the Minister, must apply government policy in force as at the time the relevant application was made, and any discretion exercised shall be in terms of that policy.

40. The definitive statement of the principles of interpretation of government policy was provided by the Court of Appeal in Patel v Chief Executive of the Department of Labour [1997] NZAR 264, 271, as follows:

> b A policy document, such as the one in issue, is not to be construed with the strictness which might be regarded as appropriate to the interpretation of a statute or statutory instrument. It is a working document providing guidance to immigration officials and to persons interested in immigrating to New Zealand or sponsoring the immigration of a person to this country. It must be construed sensibly according to the purpose of the policy and the natural meaning of the language in the context in which it is employed, that is, as part of a comprehensive and coherent scheme governing immigration into this country.

41. To the Patel approach can be added a further principle drawn from the field of statutory interpretation which is particularly relevant in the present context. Adapting the well-known statement of the Court of Appeal in Commissioner of Inland Revenue v Alcan New Zealand Limited [1994] 3 NZLR 439, 444, "*One should certainly approach the question of ... interpretation [of the policy] on the premise that the [Minister] will not have intended absurdity or injustice*". As can be seen from its ruling the Court of Appeal requires that the NZIS interprets policy in a reasonable and sensible manner. It is the submission of Ms Hauiti that INZ notwithstanding the admitted difficulties in their relationship INZ have not acted in a way that is consistent with its own policies and therefore contrary to the ruling of the Court of Appeal, and therefore contrary to the Principles of the Treaty.

42. Should the Tribunal determine that a person can be a taonga and that for the purposes of this claim that Mr Fonua is considered a taonga and/or that Ms Hauiti's rights, benefits and privileges of citizenship have been breached as she alleges then she will make further detailed submissions to the tribunal on the policies that have been breached.

43. In particular Ms Hauiti will make submissions on sA1.5 of immigration policy which relates to a person's right to fairness and natural justice. In not acting with fairness and natural justice towards her husband the applicant claims her treaty rights were breached.

> **A1.1 Introduction**
>
> a. Good decision-making (as well as looking at the merits) requires attention to process, to how the decision is made. A fair process is more likely to ensure a fair outcome. Decisions that are not made in the proper manner may be reviewed by the Courts or become a subject of complaint to the Ombudsman (see A9).
>
> b. Making a decision in the proper manner involves acting on the principles of fairness and natural justice, which means:
>
> i giving the applicant a fair hearing, and
>
> ii avoiding bias.
>
> c. All visa and immigration officers must act on the principles of

fairness and natural justice when deciding an application.

**A1.5 Fairness**

a. Whether a decision is fair or not depends on such factors as:

- whether an application is given proper consideration;
- whether the applicant is informed of information that might harm their case (often referred to as potentially prejudicial information);
- whether the applicant is given a reasonable opportunity to respond to harmful information;
- whether the application is decided in a way that is consistent with other decisions;
- whether appropriate reasons are given for declining an application;
- whether only relevant information is considered;
- whether all known relevant information is considered.

b. How much fairness a visa or immigration officer must bring to bear in deciding an application may depend on the consequences of the decision for the applicant.

[Immigration New Zealand Manual – Administation]

44. In particular Ms Hauiti respectfully refers the Tribunal to A1.5(b) which requires the immigration officer to consider the consequences of the decision for the applicant. The records of INZ show that INZ officers did not do this. Should the Tribunal determine that a person is a taonga and that Mr Fonua would meet the criteria for such a determination then the applicant will make further submissions on these points. Further Ms Hauiti will also demonstrate breaches of A1.5(a).

## 2(d) Even if Mr Fonua was a taonga to his wife the argument that INZ decisions affecting him somehow breach the applicant's treaty rights were not persuasive

45. As stated above the applicant acknowledges that it is not appropriate for this matter to be addressed at this stage until the question of ***"Under the Treaty of Waitangi can a person be considered a taonga?"*** can be addressed by the Tribunal.

46. However, the applicant wishes to reconfirm her belief that that this submission has shown above that it is clear that people can be considered a taonga under the Treaty and that therefore it is this question that needs to be judicially determined by the Tribunal. Should this question be answered in the affirmative then the applicant will make further detailed submissions on why and how her treaty rights have been breached.

**The Right to Urgency**

2(e) **Unless the applicant can provide convincing arguments and evidence in response to the points identified by your Honour then the Tribunal will not hear this application under urgency**

47. The applicant believes that her situation is such that the Tribunal should grant her urgency in this claim. While it is mandatory for the Tribunal to inquire into this claim the applicant acknowledges that s7(1A) gives the Tribunal the right to defer any such inquiry if it thinks fit. However, should the Crown be allowed to carry out its threat to remove her husband from New Zealand then it is possible that any chance of getting a satisfactory remedy could be destroyed.

**[7 Tribunal may refuse to inquire into claim**

**[(1A)** The Tribunal may, from time to time, for sufficient reason, defer, for such period or periods as it thinks fit, its inquiry into any claim made under section 6 of this Act.**]**

**(2)** In any case where the Tribunal decides not to inquire into or further inquire into a claim **[**or to defer its inquiry into any claim,**]** it shall cause the claimant to be informed of that decision, and shall state its reasons therefor.

48. The applicant submits that pursuant to s6(3) and s6)4) her case is well founded.

**[6] Jurisdiction of Tribunal to consider claims**

**(3)** If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

**(4)** A recommendation under subsection (3) of this section may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

49. The applicant acknowledges that pursuant to s7(1)(a) and (b) of the Act the Tribunal may refuse to enquire into her claim if the Tribunal considers the subject matter is trivial, frivolous or not made in good faith. The applicant wishes to assure the Tribunal that her claim, far from being trivial, frivolous or not being made in good faith, is made from the deepest feelings of emotion and belief that as a matter of human civil rights and dignity that she has the right to have

peaceful enjoyment of family life and being married to her husband without the Crown unreasonably seeking to destroy that relationship.

### [7 Tribunal may refuse to inquire into claim

**1)** The Tribunal may in its discretion decide not to inquire into, or, as the case may require, not to inquire further into, any claim made under section 6 of this Act if in the opinion of the Tribunal—

- (a) The subject-matter of the claim is trivial; or
- (b) The claim is frivolous or vexatious or is not made in good faith; or

50. In conclusion the applicant notes that while this claim may be considered to be unique it is an important test case as it traverses territory that has never been crossed by the Tribunal before. And given the shrinking of international boundaries and the reality that the Act recognizes the treaty rights of ALL persons of Maori descent, irregardless of their citizenship, then the issue of people being a taonga, or not being a taonga, as the case may be, is an important matter for the tribunal to consider.

51. We ask that the Tribunal grant the applicant's request that the Tribunal hear this matter as a matter of great urgency.

**11 October 2007**

Honourable Tuariki Delamere
TDA

Evgeny Orlov
Equity Law

*"Judicial Legitimacy and Human Rights"*
**Address to the International Bar Association Conference**
**Durban, South Africa, 21 October 2002**

**The Rt. Hon. Dame Sian Elias**
**Chief Justice of New Zealand**

Those organising this conference suggested that I should talk today about the applicability of international human rights laws in domestic cases, and the independence of the judiciary. After overcoming some doubt about whether these suggestions related to two sessions or one, I now attempt both. Of course they are interconnected. The vindication of human rights in actual cases is left to domestic courts because of the independence of the judiciary. But because human rights vindication may raise issues which are highly contentious and which impact upon the roles of the legislative and executive branches of government, they also entail risks to judicial independence.

It seems a little presumptuous for a New Zealand judge to offer thoughts on this topic in South Africa. This is a legal system operating under a written constitution supervised by a Constitutional Court which is admired throughout the world. I am from a jurisdiction in which the constitutional arrangements are largely unwritten and orthodox thinking ascribes plenary power to the legislature.

But the theme of law and the function of the courts in upholding it is common to all the jurisdictions represented at this conference. The differences between us should not be overstated and are shrinking. Our methods are moving together. Indeed, the impact upon judicial method of human rights litigation is the main theme of what I have to say. Seven years ago Lord Cooke of Thorndon, whose contribution to the development of human rights law in New Zealand has been immense, expressed the view that "[t]he world is moving ... towards an international law of human rights" but that the process would be "lengthy".1 I agree about the movement. But its pace has been rapid indeed.

Three years ago I was asked to speak to a conference about "the impact of international conventions on domestic law". I said then that my initial reaction was "oh no, not again". Today we should accept that the role of international instruments in domestic law is no longer contentious. That is true even of countries like mine in which, unlike under the Constitutions of South Africa or Fiji and statutes such as the United Kingdom Human Rights Act 1998, the courts are not directed to consider international materials in applying domestic human rights instruments.2

1 *R v Barlow* [1995] 14 CRNZ 9.
2 See, in New Zealand, *Tavita v Minister of Immigration* [1994] 2 NZLR 257.



The fact of the matter is that our New Zealand Bill of Rights Act 1990, like many similar domestic measures in other countries, was adopted to fulfil obligations under international covenants, principally the International Covenant on Civil and Political Rights. For those countries which have ratified

it, the Optional Protocol to that Covenant permits direct scrutiny by the Human Rights Committee.3 It would be inconsistent and wasteful for the domestic courts not to draw on the body of thinking being developed by the Human Rights Committee. Just as it is idle to suggest that the domestic courts should not gain what help they can from the decisions of other jurisdictions based on the same foundation.4 These standards now 'march with the common law'.5 As Sir Anthony Mason put it plainly, in a speech to a New Zealand audience, a convention provision, like other legitimate material (whatever it may be), is something to be taken into account when formulating common law principles. It seems blindingly obvious - and makes all the brow furrowing about the theory upon which such material is to be received seem beside the point. My impression is that it is now standard practice for the courts of most common law countries to inform their decisions by reference to the authorities of international bodies and the decisions of national courts interpreting constitutions and legislation relating to human rights. In New Zealand it has been said that the New Zealand Bill of Rights Act has "internationalised" our rights jurisprudence as well as investing it with greater moral content.6

3 Cooke P in *Tavita v Minister of Immigration* at 267 suggested that since New Zealand's accession to the Optional Protocol "the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it." This is something of an overstatement. Certainly for the purposes of legal aid, the Human Rights Committee is not part of the judicial structure of New Zealand (*Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (PC)).

But it is valid to remind us that the decisions of our courts are now taken upon an international stage.

4 Professor Rosalyn Higgins QC has explained why in Higgins "The Relationship between International and Regional Human Rights Norms and Domestic Law" (1992) 18 Commonwealth Law Bulletin 1268 at 1273-1274:

> The old requirement that there be an ambiguity in domestic law is irrelevant. These obligations ... are already obligations of English law. Just like other such obligations, they will be overridden by a clear contrary directive in a statute; and otherwise will be a consideration of great weight in identifying exactly what the common law *is*. In short, there is not international law and common law. International law is part of that which comprises the common law on any given subject.
>
> ... An un-incorporated treaty can *always* be looked at, so long as rights of individuals are not founded upon it alone and so long as it is not suggested that it takes away rights under common law

5 See *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400 at
422 per Sedley J.
6 P Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed., 2001) 170. Thus in
*R v Butcher* [1992] 2 NZLR 257 at 267 Cooke P explained the adoption of a *prima facie* exclusion rule for evidence obtained in breach of the Act as lying not in "judicial discretion
but [in] the increasing international recognition of basic human rights."

The international judicial community has no doubts. At the Commonwealth Judicial Colloquium in 1998 at Bangalore, the principles of the Colloquium of 1988 were re-formulated to include the following statements:

3. It is the vital duty of an independent, impartial and well qualified judiciary, assisted by an independent, well-trained legal profession, to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.

4. Fundamental human rights form part of the public law of every nation, protecting individuals and minorities against the misuse of power by every public authority and any person discharging public functions. It is the special province of Judges to see to it that the law's undertakings are realised in the daily life of the people.

5. Both civil and political rights and economic, social and cultural rights are integral, indivisible and complementary parts of one coherent system of global human rights. The implementation of economic, social and cultural rights is a primary duty for the legislative and executive branches of government. However, even those economic, social and cultural rights which are not justiciable can serve as vital points of reference for Judges as they interpret their constitutions and ordinary legislation and develop the common law. Likewise, even where human rights treaties have not been ratified or incorporated into domestic law, they provide important guidance to law-makers, public officials and the courts.

We cannot be complacent about the performance of the common law in the domestic protection of human rights. In South Africa the inadequacy of the rule of law without the constitutionalism of human rights was manifest. But even in countries not subject to such strains, there was cause for concern. Those of us old enough to have practised in the early 1970s can recall the deference paid by the courts to authority of all types.7 In England, to which we looked largely for our common law at the time, the distinguished public lawyer, Sir William Wade, described the "deep gloom" that settled on English administrative law in the middle of the twentieth century.8 That mood changed from the 1960s as the courts realised "how much had been lost and what damage had been done to the only defences against abuse of power

7 In New Zealand, for example, see *Melser v Police* [1967] NZLR 437 where freedom of expression came a distant second to the freedom of Members of Parliament to entertain their
guests without the embarrassment of protesters chained to the pillars of Parliament.
8 H Wade and C Forsyth *Administrative Law* (1994) 17.

which still remained".9 Indeed, Taggart makes the point that administrative law "never lived up to the rule of law rhetoric": 10

> The law presupposes that there are reasons for the decisions reached and that the administrative process is rational and not arbitrary, but did not insist on the statement of findings of fact and reasons for decision.

The New Zealand Bill of Rights Act, like the Human Rights Act 1998 (UK), is an ordinary statute and yields to other statutes. But it is clear from its international and common law roots and legislative history, as well as from its subject-matter and evocative title, that the Act was designed to operate within the sphere that may broadly be termed "constitutional".
Like many comparable measures, the Bill of Rights Act in New Zealand applies "only to acts done:11

> (a) By the Legislative, Executive or Judicial branches of the Government of New Zealand; or
> (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

The scope of the English Human Rights Act is similar. The language of the provision suggests that the Bill of Rights Act applies to actions taken by the judiciary. It may well be that s 3 requires the Judges to develop the common law in conformity with the New Zealand Bill of Rights Act. The point has not yet arisen directly for determination in New Zealand (although it was assumed by Hardie Boys J in *Baigent's case*12 and by me in *Lange v Atkinson*).13 If so, through a "cascading"14 effect, the Act will come to influence private as well as public law. That is a conclusion reached extra-judicially by Lord Cooke of Thorndon.15 Similarly, the Lord Chancellor had no doubts that the United Kingdom Human Rights Act has the effect of requiring the Courts to develop the common law in conformity with the Act:16

9 Ibid. at 19.
10 M Taggart "Reinventing Administrative Law" in N Bamford and P Leylands (eds.) *Law in a Multilayered Constitution* [forthcoming 2003].
11 New Zealand Bill of Rights Act 1990, s 3.
12 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 at 702
13 [1998] 3 NZLR 424; and see the discussion by P Rishworth "Bill of Rights, Human Rights" [1998] New Zealand Law Review 585 at 605-607; and in I Leigh "Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth" (1999) 48 ICLQ 57 at 70-

71.
14 A concept used by Lord Justice Sedley in *Freedom, Law and Justice* (1999) 23, and which for
the reasons he gives I consider is to be preferred to the "horizontal" effect described by other
commentators.
15 R Cooke "A Sketch from the Blue Train" [1994] New Zealand Law Journal 10 at 11.
16 Lord Irvine of Lairg "The Impact of a Bill of Rights on English Law" (Address to the 3rd
Clifford Chance Conference, 28 November 1997).
- 5 -
Clause 6 makes it clear that "public authority" includes a
court and a tribunal which exercises functions in relation to
legal proceedings. That inclusion, as this audience will
recognise, does more than asking the courts to interpret
legislation compatibly with the [European Convention on
Human Rights]. It imposes on them a duty to act compatibly
with the Convention.
We believe it is right as a matter of principle for the courts to
have the duty of acting compatibly with the Convention.
They will be under this duty not only in cases involving other
public authorities but also in developing the common law in
deciding cases between individuals.
Under s 6 of the New Zealand Bill of Rights Act, an interpretation consistent with the rights and freedoms contained in the Bill of Rights Act, must be preferred to any other meaning. By s 5 where legislation conflicts with the Bill of Rights Act, the Bill of Rights Act is subject to:17
Such reasonable limits prescribed by law as can be
demonstrably justified in a free and democratic society.
If the limitation cannot be justified, there is an inconsistency with the Bill of Rights, but the statutory provision because of s 4 still stands and must be given effect.18 Some commentators have seen in discussions within the cases decided by the Court of Appeal an indication that the Courts will not assess whether a limitation is justifiable under s 5, but instead will simply apply it under s 4.19 The Court of Appeal has however indicated preparedness to examine the justifiability of a limitation before applying it under s 4:20
Ultimately whether the limitation in issue can or cannot be
demonstrably justified in a free and democratic society is a
matter of judgment which the Court is obliged to make on
behalf of the society which it serves and after considering all
of the issues which may have a bearing on the individual
case, whether they be social, legal, moral, economic,
administrative, ethical or otherwise.
17 McLean believes this provision is best viewed as directed principally to the Legislature (see J

McLean "Legislative Invalidity, Human Rights Protection and s 4 of the New Zealand Bill of
Rights Act" [2001] New Zealand Law Review 421 at 442 to 448.
18 *GA Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.
19 See, for example, A Adams "Competing Conceptions of the Constitution: The New Zealand
Bill of Rights Act 1990 and the Cooke Court of Appeal" [1996] New Zealand Law Review
368.
20 *Moonen* at 17.

The Court said that on an appropriate occasion it may be necessary for it to declare that a limitation cannot be demonstrably justified in a free and democratic society.21 In this, it has assumed a power specifically conferred upon the English Courts as a significant remedy under the Human Rights Act.
I do not speak here of the remedies the Courts in New Zealand have fashioned under the New Zealand Bill of Rights Act. But in developing them, the New Zealand Court of Appeal has invoked the decisions of the constitutional courts of other jurisdictions, as well as the growing body of case-law generated by international bodies such as the European Court of Justice.
The New Zealand Bill of Rights Act was many years in gestation. Original proposals for a statement of rights foundered on a belief that the legislative system in New Zealand was to be trusted and fears that judges lack democratic legitimacy. That view still has its adherents. And the question of democratic legitimacy is a general topic I will return to. But in New Zealand by the 1980s there was sufficient support for change, although it was insufficient to achieve the judicial review of legislation provided for in the original bill. Sir Kenneth Keith, one of the architects of the New Zealand legislation, believes that there nevertheless came to be a recognition that a bill of rights does not entail a choice between parliament and the courts, or elected politicians and non-elected judges. Rather, it is directed "at the law-making process as a whole":22

It has wider public and educational value. It is a beginning for public debate. It is a marker.

The Bill of Rights Act promotes democratic debate. The requirement in s7 that the Attorney-General must inform Parliament of any inconsistency in proposed legislation, though not in the positive form imposed by s 4 of the Human Rights Act (UK), is directed at better legislative processes. And the Court of Appeal expressly reserved a power to declare that legislation is in breach of the Bill of Rights Act because it thought such declaration had value in Parliament "if the subject arises in that forum".23 Although this decision has been criticised, it is difficult to see any democratic objection to a process which aims to inform the legislature, to whose actions the Bill of Rights Act applies by s3. As Sir Kenneth Keith puts it:

The enterprise of protecting rights should generally be seen as a cooperative rather than a divisive one.

21 Cooke P had earlier expressed some doubts as to whether such a remedy was available in New
Zealand: *Temese v Police* (1992) 9 CRNZ 425 at 427.
22 K Keith "The New Zealand Bill of Rights Experience: Lessons for Australia" (2002 Bill of
Rights Conference, 21 Jun 2002).
23 *Moonen* at 17.
24 Keith, above at n 22.

In March 1995 the United Nations Committee on Human Rights expressed regret that the New Zealand Bill of Rights Act "has no higher status than ordinary legislation and does not repeal earlier inconsistent legislation." It recommended that the Act be revised to "give the courts power as soon as possible to strike down or decline to give effect to legislation on the ground of inconsistency with covenant rights and freedoms as affirmed in the Bill of Rights."25
Whether granting the courts power to strike down legislation would transform the protection of human rights is not clear. The policy of leaving protection as a cooperative enterprise between Parliament and the courts may be as effective. The requirement that legislation is to be interpreted where possible to give effect to the rights contained in the legislation is a powerful tool.26 The infrequent recourse to the striking down powers in countries where review of legislation is possible illustrates that. Janet MacLean notes that "functionally the systems [in the United States and New Zealand] seem to be operating in much the same way" and makes the point that while s 4 has tended to be the focus of critical attention in New Zealand, in fact s 6 of the New Zealand Bill of Rights is the central provision in terms of judicial engagement. The requirement to construe legislation in conformity with the Bill of Rights Act is a potent one. Human rights requires both courts and legislatures to deliver protections and proper remedies":27
The focus should not be on what powers the courts have but what effect their decisions have in terms of administrative and legislative action and response. The converse is also true.
The same point has been made by Lord Bingham in *Brown v Stott.28* Judicial supervision of human rights is a complement for the processes of democratic government.
Sir Stephen Sedley has said that "how much or little Judges make of human rights seems to have not a lot to do with the tools the Legislature hands them'. He points to the earlier unhappy experience in Canada with the 1960 Bill of Rights. He suggests:29
But it is of only if you stand back, with the variegated experiences of Canada, Australia, South Africa and New Zealand (to take just the commonwealth examples) in your
25 Reproduced in *Human Rights in New Zealand* (Ministry of Foreign Affairs and Trade

Information Bulletin, No 54, 1995).
26 Although in New Zealand the case of *R v Pora* [2001] 2 NZLR 37 "has been condemned from
all sides" (both in respect of the strained interpretations to avoid breach of the Act and the inability to strike down a retrospective penalty), McLean, above at n 17, points out that the
result was that the legislature acted to remove the problem.
27 McLean, above at n 17, 448.
28 [2001] 2 WLR 817.
29 Sir Stephen Sedley *Colonels in Horsehair* (London Review of Books, 19 September 2002) 17.

hand, that you start to see that there is probably little direct cause or correlation between a Bill of Human Rights and judicial interventionism. New Zealand acquired in 1990 a Bill of Rights Act which is modest in the extreme, giving not even an interpretative nudge, much less a judicial over-ride on existing legislation: but in the hands of judges who wanted to make a reality of human rights it has taken wing. A peevish essay here by James Allen [in Campbell, Ewing and Tompkins (eds.) *Skeptical Essays on Human Rights* (Oxford, 2001)] criticises them for deciding that, even though they cannot interfere with incompatible legislation, they can at least declare that it is incompatible. For such critics I doubt whether judges can do anything right.

Such critics voice concerns about the legitimacy of judicial determination of rights. "Unelected" and "unaccountable" judges in their view usurp the functions of the legislative and executive branches of government. These criticisms need to be taken seriously. They are easy to make and difficult to answer simply. They have the capacity to shake confidence in the administration of justice and thus threaten judicial independence, ultimately based on public confidence.

The more simplistic criticisms can be taken head-on. Judges are highly accountable, through reasons given in public and through the appellate system. Accountability through readier dismissal for unpopular decisions risks, as Sedley points out, "the central attribute of judicial office: independence". No one with any experience of judicial elections and who believes that independence is central to judicial function would seriously suggest that model.

But there are more thoughtful concerns. Carol Harlow has raised the dangers of "campaigning litigation", which human rights litigation opens up and which may result in. "colonisation of the legal by the political process".30

If we allow the campaigning style of politics to invade the legal process, we may end up by undermining the very qualities of certainty, finality and especially independence fore which the legal process is esteemed, thereby

undercutting its legitimacy.
Her concern is with the extension of standing to allow campaiging groups to argue for particular outcomes and the readier invocation of techniques such as the Brandeis brief to ascertain legislative facts. This may "push courts into areas of policymaking to which their processes are inherently ill-adapted". In addition, it escalates the scrutiny of judicial officers for association with the causes advocated, as *Pinochet* and *Locabail31* illustrate. Harlow echoes TR
30 C Harlow "Public Law and Popular Justice" (2002) 65 Modern Law Review 1 at 2.
31 *R v Bow Street Magistrate, ex p Pinochet Ugarte (No 1)* [1998] 3 WLR 1456; *Lochabail v*
*Bayfield Properties* [2000] 2 WLR 870.

Allan in expressing concern that the triumph of pressure groups or factions or special interests may mark a corruption of the legal process: "To put this important point differently, too close a relationship between courts and campaigning groups may result in a dilution of the neutrality and objectivity of law".32 Statements of human rights recognise that politics cannot do everything. It is important to recognise that neither can law. The distinctiveness of law and politics needs to be recognised.
Lord Hoffman too has cautioned that it is important for courts to show restraint in interpretation of the limits which human rights impose upon democratic institutions. Particular care is needed in decisions, whether in application of human rights law or outside it, where the outcome is likely to impact upon public expenditure. Judges must recognise that they are "not appointed to set the world to rights":33

> However slow, obtuse and maddening the democratic process may be, there is a legitimacy about the decisions of elected institutions to which judges, however enlightened, can never lay claim.

I do not doubt the need for some circumspection, both in procedure and substantive review in human rights cases, particularly where public moneys are involved. And I certainly would agree that judges cannot expect to set the world to rights. But the role of the courts is to uphold legality. The doctrine of separation of powers was devised as an auxiliary safeguard,34 not to promote the efficiency of government or even to uphold majoritarian democratic process, but to prevent the exercise of arbitrary power.35 As Lord Steyn has argued, that function, the rule of law, itself serves a democratic ideal:36

> The democratic ideal involves two strands. First, the people entrust power to the government in accordance with the principle of majority rule. The second is that in a democracy there must be an effective and fair means of achieving practical justice though law between individuals and between the state and individuals. Where a tension develops between the views of the majority and individual rights a decision must be made and sometimes a balance has to be struck. The best way of achieving this purpose is for a

democracy to delegate to an impartial and independent judiciary this adjudicative function. Only such a judiciary acting in accordance with principles of institutional integrity, and aided by a free and courageous legal profession, practising and academic, can carry out this task, notably in
32 Harlow, above at n 30, 13.
33 *Separation of Powers* (The Comber Lecture, 2000).
34 James Madison writing in Bixby (ed.) *The Federalist* (No 51, 1992) 266.
35 *Myers v US* 272 US 52 (1926) per Brandeis J (dissenting).
36 Lord Steyn *Democracy through Law* (Inaugural Lord Cooke of Thorndon lecture, Victoria
University of Wellington, 18 September 2002).

the field of fundamental rights and freedoms. Only such a judiciary has democratic legitimacy.

A judge cannot evade deciding a case just because it is controversial. Nor can the Judge decline to exercise a jurisdiction conferred by Parliament or the Constitution and properly invoked by a litigant. Abstention is itself a judicial determination with political repercussions. The courts are themselves subject to the rule of law. They cannot usurp powers lawfully exercised by other agencies, including Parliament. They operate at the boundaries, making sure that power is exercised only according to law. But that responsibility they cannot constitutionally shrug.

The principal answer to suggestions of judicial overreaching lies in scrupulous adherence to judicial method. An important part of that method is attention to the limits of judicial scrutiny. While I have in my time done my share of railing against *Wednesbury* as a standard for review,37 it represents an enduring and important issue. Whether the limits of review are set at *Wednesbury* unreasonableness (a point which shades into bad faith, as Lord Greene in that case noted), or proportionality, or some stricter standard, boundaries are required wherever there is a legitimate area of discretion lawfully conferred upon someone other than the court. A great virtue of human rights litigation is that it demonstrates why there can be no single touchstone. Judicial method has only been enhanced by human rights litigation. And it is a benefit obtained by our legal systems which will not be confined to human rights cases. I need to explain.

The excitement that attends discussion about legislative compliance with human rights and how it is to be enforced has obscured the revolution that rights have brought to judicial methodology. Where official conduct is challenged by judicial review, the most difficult cases do not arise where the claimed illegality is manifest because the power purportedly exercised falls outside the purpose of the statute. That question may raise difficult points of interpretation, but ultimately it is a question of the statutory meaning. The greater difficulties rather arise where the claimed unlawfulness is that the decision-maker has struck the wrong balance among competing interests or where the attack on the decision is one of degree (as in challenges based on

standards such as reasonableness or proportionality). The Courts have been largely adrift in such challenges. They have had to seek answers in the statute, in the international context where applicable,38 and in enduring community values. Inevitably, the result has been deference to the decisionmaker and a lack of clarity and persuasiveness in judicial reasoning where, as Professor Taggart has put it, judgments are too often "characterised by assertions of unreasonableness or unfairness, and little else".39

37 S Elias "Hard Look" and the Judicial Function (1996) 4 Waikato Law Review 1.

38 See *Tavita v Minister of Immigration.*

39 M Taggart "Tugging on Superman's Cape: Lessons from Experiences with the New Zealand
Bill of Rights Act 1990 [1998] Public Law 266.



Where a margin of wide appreciation may be appropriate for an international tribunal, it may inappropriate for a domestic tribunal able to weigh competing demands in a local context.40 Limitations of rights under human rights statements must be "demonstrably justified" or "necessary" in a free and democratic society. This is the language of onus of proof. It invokes the idea of proportionality. The three-part approach adopted by Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries and Housing41* and adopted by Lord Steyn in *ex parte Daly42* points in a direction most of us are likely to travel.

First, the objective of the measure must be sufficiently important to justify limiting a fundamental right. Secondly, the measure must be reasonably connected to the objective. Thirdly, the limitation upon the right must be no more than is necessary to accomplish the objective.

The important judgment of the House of Lords in the *Alconbury*43 case indicates the extent to which traditional administrative law methodology is turned around by the context of human rights. Although the House of Lord upheld the determination of a Minister agreed not to be an impartial tribunal, it was on the basis that judicial review is sufficient protection of the right to the determination of an impartial tribunal under Article 6. Such review requires fairness and the correction of mistake of an established and relevant fact.44

Lord Slynn indicated that it is time to recognise that the principle of proportionality is part of English administrative law:45

> not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing. Reference to the Human Rights Act however makes it necessary that the court should ask whether what is done is compatible with Convention rights. That will often require that the question should be asked whether the principle of proportionality has been satisfied.

It remains to be seen whether this view will prevail.46 It has, however been foreshadowed for some considerable time.47 It is consistent with Lord Steyn's

approach in *ex parte Daly.*
Taggart sees the Bill of Rights methodology as:48
40 See *Brown v Stott.*
41 [1999] 1 AC 69 at 80
42 [2001] 3 All ER 433.
43 *R (on the application of Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions and other Cases* [2001] 2 All ER 929.
44 See Lord Nolan, Lord Clyde, and Lord Slynn.
45 *Alconbury* at 976.
46 Only Lord Clyde explicitly supported it in *Alconbury.*
47 *M v Home Office* [1993] 3 All ER 537 per Lord Templeman.

a more focused, consistent and transparent methodology
than that prevalent in administrative law adjudication, where
'rights' issues can be swept over in conclusionary findings
that the exercise of the power was or was not *Wednesbury*
unreasonable ..... As Professor Jowell and Lester
demonstrated a decade ago [in "Beyond Wednesbury:
Substantial Principles of Administrative Law" (1987) Public
Law 368] the concept of unreasonableness in administrative
law has obscured the underlying role of protecting rights.
Statements of rights therefore provide content to the standards by which the supervisory jurisdiction of the Courts is to be exercised and give judges a framework for reasons why executive action is or is not within the boundaries of proper administrative discretion.
But it does more than that. Where human rights are engaged, they can be expected to prevail unless the statute under which the authority is exercised requires a result inconsistent with the human right or unless the right claimed comes into conflict with another human right. This development is a logical extension of the principle that Parliament is not to be presumed to intend that discretionary powers created by it will be exercised inconsistently with its international obligations.49 It conforms with the view expressed by Lord Justice Thorpe that, where fundamental human rights are engaged, the margin of appreciation permitted to the decision maker will be correspondingly reduced.50 In human rights legislation Parliament has made explicit an approach the common law was already coming to through experience.
Values which the courts have identified with difficulty or glossed over are now accessible in legislation. As a result, recourse to them has gained legitimacy and has obtained organising principles. The courts have a register against which to assess whether the incursion upon rights in an actual case can be justifiable. As others have pointed out, the methodology of traditional judicial review has been profoundly affected.51 Review now starts with the right. If the right has not been limited in accordance with law, any public authority is required to give effect to the right. In Taggart's words, it becomes a "constitutional trump".52
Sedley points out that this enhanced focus is having a profound effect:53

48 Taggart "Tugging on Superman's Cape", above n 39, 278.
49 As to which, see *Tavita v Minister of Immigration*; and *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HCA).
50 *R v Ministry of Defence, ex p Smith* [1996] QB 517 at 564-565 (CA).
51 C Harlow "A Special Relationship? American Influences on Judicial Review in England" in Loveland (ed.) *A Special Relationship? American Influences on Public Law in the UK* (Oxford, 1995); Taggart "Reinventing Administrative Law", above at n 10.
52 Taggart, "Tugging on Superman's Cape", above at n 39.
53 Sedley, above at n 29.

The effect of the Human Rights Act has been to focus the sometimes fuzzy concept of reasonableness through a lens of proportionality, and so to make judicial reasoning about it both more structured and more intelligible. The liberal scattering of restrictive bail or parole conditions is likewise now having to be thought through in terms of proportionate restraints on freedom of movement. Courts and public administrators are still getting accustomed to this reorientation, and it does not make headlines: but it affects hundreds of thousands of people every year, and to them it matters a great deal.

Statements of human rights in domestic law therefore provide a measure against which executive action can be readily tested. It would be naive to think that they will not ultimately come to exercise a huge influence on the interpretation of all statutes and the development of the common law. As Cooke P remarked in *R v Goodwin*:54

> The Bill of Rights Act is intended to be woven into the fabric of New Zealand law. To think of it as something standing apart from the general body of law would be to fail to appreciate its significance.

I do not underestimate the challenges that such legislation brings to the Courts when its application moves beyond the criminal law to which it has till now been mostly confined, at least in my jurisdiction. Human rights adjustments may be complex. Where there are a range of valid outcomes, the case will not always be easy for judicial determination. But where a case is properly brought before the courts, they cannot avoid grappling directly with the issues.

As MacLean has persuasively argued, there is no illegitimacy in this. The courts act in dialogue with the legislature, not pulling against it. The function is democratic and judicial.55

> What is developing is an elaborate system of deference depending on the right at risk.....not all rights will be treated the same, and some rights, such as that to be free from unreasonable search and seizure, contain their own

modifiers.....over time, one would hope that a more explicit methodology will develop – adapting some version of proportionality doctrine, *Wednesbury* doctrine or a domestic version of the margin of appreciation doctrine. Such an approach has the potential to combine a sensitivity to democratic judgments, as well as providing a means by which to make quite forceful normative statements in a proper case. The existence of doctrines by which courts pay
54 [1993] 2 NZLR 153 at 156.
55 McLean, above at n 17, 447.

deference to legislative judgments does not depend on whether or not there is a striking down power. Equally, however, the normative force of a court's judgments will diminish the more contestable the "reasonableness" component, and according to the susceptibility of an issue to a legal analysis.

In developing standards, the judiciary of today is fortunate indeed in the comfort of an international register provided by comparable jurisdictions. As I have indicated, I do not think it matters greatly whether we operate under constitutional instruments which fetter legislative action or statutes which must yield to unambiguous legislation. We all work to convince by reason if we are to retain the confidence of the communities we serve.

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# Release: Our children matter - Maori Party

***He Taonga, He Mokopuna:***
***Call to restore the belief that our children are our taonga***
***Dr Pita Sharples and Tariana Turia, Co-leaders of the Maori Party***
***Thursday 15 February 2007***

The Maori Party today has issued a passionate call to restore the belief that children are to be nurtured and cherished as precious taonga.

"It makes one cry to see a report which scores the nation badly across most indicators of child health and wellbeing" said Tariana Turia. *[Child Poverty in Perspective: An overview of child well-being in rich countries; UNICEF].*

"We now rank at the bottom of the heap of OECD countries for children who die from accident and injury; and in the bottom four for children living past their first year of life".

"These are figures we would have thought belonged to the past" said Mrs Turia. "It is obvious from the plethora of research linking economic violence to family crises, that the depths of extreme poverty and severe hardship amongst families are placing us in the lower ranks of developed countries".

"In te Ao Maori our children are precious and should be revered" says Mrs Turia. "For the good of Aotearoa, and the future strength of our peoples, we must all do that we can to ensure the well-being of our tamariki is an urgent priority in every home; in every caucus room; in every school".

"The report also scores New Zealand the lowest of all 25 OECD nations in terms of the percentage of 15 to 19 year olds in fulltime or part-time education" said Dr Sharples.

"Although the Minister of Education is excusing these figures as out of date (the information was from 2003 data); reports released just this week show the particular urgency to address this system crisis for Maori education".

"The Māori truancy rate has shown a dramatic increase to 7.1% for females; and 6.6% for males" said Dr Sharples. "If that is not bad enough, the education data also shows the gap between European rates has widened from a 3% gap in 2004 to 4% in 2006".

"On top of figures released this week describing the appalling statistics for Maori school-leavers who exit school without even a level one NCEA qualification, it is evident that the failure of the schooling system to cater for Maori must be accorded urgency" said Dr Sharples. *[53% of Maori*

*boys; 45% of Maori girls leave school without gaining Level one NCEA qualifications].*

"I was very sad to see on the qualitative scales, that as a nation we rank 17th out 25 in terms of children whose parents spend time talking with them several times a week; and 24 out 25 when in comes to sharing a kai together, several times a week" said Mrs Turia.

"This is an urgent call for action for every single person, every single family member, in Aotearoa" said Mrs Turia. "One can't have any faith in a Government that consistently dismisses and denies any research which highlights their failings. We can either choose to dis-regard this report and indulge in a name and blame game; or we can commit to looking at our priorities and saying, *yes, our children matter.* The Maori Party says loudly and clearly – our tamariki matter".

**Search Results for Kahungunu.iwi.nz**

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wai262
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*http://www.kahungunu.iwi.nz/sections/homepage/CROWNBIOPROSPECTINGCONSULTATIONHUI.htm*

schedule of events
...of the 270 subjects in the Carnell collection. These were complemented by **taonga** selected from the collections of the Hawke's Bay Cultural Trust, and a...
...acknowledgement, together with a new and expanded collection of related **taonga** from Hawke's Bay Cultural Trust, National Library and Te Papa Tongarewa...
*http://www.kahungunu.iwi.nz/sections/arts_and_culture/old%20ka%20puta%20exhibition%20files/arts_exhibition.html*

Press Releases
...to the present day. These ancestral ties will be further reinforced with **taonga** relevant to tipuna represented in the exhibition. The exhibition will...
...acquired Lindauer paintings of Kahungunu kuia will be on show, along with **taonga** lent by Te Papa Tongarewa and the Hawke's Bay Cultural Trust. The...
*http://www.kahungunu.iwi.nz/sections/arts_and_culture/old%20ka%20puta%20exhibition%20files/arts_press1.html*

Kaumatua_sports_awards
...question is who will take home our new award for 2004, "The Active Kaumatua **Taonga**". This award allows us to pay homage to our leaders who are not only...
...Local Master Carver Tuhoe Huata will be designing and carving our Kaumatua **Taonga**. It will be on display for all to see at this years Maori Sports...
*http://www.kahungunu.iwi.nz/sections/homepage/Kaumatua_sports_awards.htm*

Hoeara
...Me nga **taonga** o te wa te reo karanga e katoa haere mai ki au Haere mai e tama ma Me nga **taonga** o te wa te reo karanga e katoa haere mai...
*http://www.kahungunu.iwi.nz/sections/arts_and_culture/kahungunu_waiata/Hoeara.htm*

Communication - Kahungunu 2026 Vision Plan
...Treaty Claims and return or reclamation of Ngati Kahungunu whenua and **taonga** (awa, moana, ngahere,) will form the foundation of our economic revival....
*http://www.kahungunu.iwi.nz/sections/iwi_development/visionplan/commun5.html*

Ngati Kahungunu- Our People
...HE **TAONGA** SERVICES CHAIRPERSON Name: Christine Surname: Teariki GENERAL MANAGER Name: Alayna Surname: Watene...
*http://www.kahungunu.iwi.nz/sections/our_people/Taiwhenua/Heretaunga.html*

The Launch of the Ngati Kahungunu Te Reo Strategy
...of the reo. A special part of the programme involved the presentation of **taonga** to Kaumatua who are practising this intergenerational transmission of te...
*http://www.kahungunu.iwi.nz/sections/homepage/TheLaunchoftheNgatiKahungunuTeReoStrategy.htm*

Arts and Culture - Information
...and contemporary development for the protection and safe keeping of **taonga**. A sub-committee has been meeting to implement strategies and policies to...
*http://www.kahungunu.iwi.nz/sections/arts_and_culture/information/arts.html*

## Kahungunu Sports Awards

**"KIA KAHA KAUMATUA"**

With this years "Ngati Kahungunu Maori Sports Awards" only a couple of weeks away the excitement grows as each day passes by, and there are a number of reasons why. Who will be the finalists for each category? Who will be our Maori Coach of the year? Who will be our overall Sportsperson of the year?

But this is not all, the question is who will take home our new award for 2004, "The Active Kaumatua Taonga". This award allows us to pay homage to our leaders who are not only striving to maintain an active life style but are succeeding to do so.

Local Master Carver Tuhoe Huata will be designing and carving our Kaumatua Taonga. It will be on display for all to see at this years Maori Sports Awards, a night of unity, celebrations, entertainment and a HUGE KAI! 6pm Friday November 12.

Tickets sales commence Monday 18th Oct $35 each. Tickets can be purchased from Sport Hawkes Bay, Ngati Kahungunu Iwi and Te Taiwhenua o Heretaunga.

Ka kite ano
Kia Kaha Always

Paora Winitana
Kaiwhakahaere
He Oranga Poutama Manager
Phone: 06 845 9336 ext 715
Mobile: 021 371 724
Fax: 06 845 3983
Email:paoraw@sporthb.net.nz
Back to Notices

**Office of Hon David Cunliffe**
**MP for New Lynn**
Minister of Immigration
Minister of Communications
Minister for Information Technology
Associate Minister for Economic Development

9 OCT 2007

Rosina Hauiti
429 Maungatapu Road
PO Box 7051
Tauranga

Dear Ms Hauiti

Thank you for your email of 4 October 2007 requesting my intervention in the case of Mofuike Fonua.

I have considered your case carefully and reviewed Immigration New Zealand's (INZ) decisions relating to Mr Fonua's applications and the correspondence between yourself, my office and Immigration New Zealand. Firstly, I would like to thank you for the honesty with which you have communicated with both my office and INZ.

I feel, however, that INZ made the correct decisions in relation to Mr Fonua's applications, as while I have no doubt your relationship is genuine, it cannot be said to be stable. I note Mr Fonua's call of 26 September 2007 to the INZ Contact Centre, stating that you both had separated and the numerous emails prior to that indicating that sometimes you were together and, at other times, not. Immigration policy clearly states that relationships must be genuine and stable. Therefore, I will not intervene and grant Mr Fonua a permit to remain in New Zealand.

Should you wish to return to Tonga with Mr Fonua to demonstrate your relationship is genuine and stable, I am willing to waive the 12 month co-habitation requirement and direct Immigration New Zealand to consider a residence application from Mr Fonua after only six months.

After 11 October 2007 Mr Fonua is at risk of being served a Removal Order. He should depart New Zealand immediately as he has been unlawfully residing here since 4 November 2006. Once served with a removal order, he would be subject to 5-year ban from re-entering New Zealand.

Yours sincerely

Hon David Cunliffe
Minister of Immigration

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Email: dcunliffe@ministers.govt.nz, Website: www.beehive.govt.nz