INTERNATIONAL INSTRUMENTS IN ADMINISTRATIVE DECISIONS: MAINSTREAMING INTERNATIONAL LAW

Melissa A Poole*

This article considers the development of the role of international instruments in administrative decisions. It compares the changes in New Zealand after the Tavita *case with the developments which followed the* Teoh *case in Australia. The article then proposes the basis for a new attitude to international instruments which would result in the "mainstreaming" of international law.*

I INTRODUCTION

In a recent article, Sir Kenneth Keith commented that the New Zealand Court of Appeal had yet to consider the question of whether "ratification of a treaty gives rise to a legitimate expectation, in the absence of any legislation or executive indication to the contrary, that the executive would act in accordance with the treaty".[1] Sir Kenneth was referring to the decision of the High Court of Australia in *Teoh v Minister of Immigration and Ethnic Affairs*, in which the majority found that just such a legitimate expectation was created.[2] In New Zealand, *Tavita v Minister of Immigration* raised the possibility, for the first time, that ratification of a treaty might give rise to a mandatory relevant consideration.[3] There have been many cases since *Tavita* in which the role of

* Senior Lecturer in Law, Deputy Director of the New Zealand Institute of Public Law, Victoria University of Wellington. Thanks to Paul Myburgh, Claire Baylis, Janet McLean and Sandra Petersson for their helpful comments upon various drafts of this article. As usual, any errors and optimistic idealism remain the responsibility of the author.

1 "Roles of the Courts in New Zealand in Giving Effect to International Human Rights - with Some History" (1999) 29 VUWLR 27, 40.

2 (1995) 128 ALR 353 [*Teoh*].

3 [1994] 2 NZLR 257 [*Tavita*].

international instruments has been argued. *Teoh* has featured significantly in those arguments, but so far the promise of *Tavita*, in terms of "mainstreaming" international law, has yet to be fulfilled.

The immediate impact of the *Tavita* decision was to some extent softened by the commendable response of New Zealand Immigration Services which drafted and adopted a code of practice reflecting the Court of Appeal's comments on international obligations. This article will briefly summarise the law prior to *Tavita,* then analyse some of the developments since that decision. It will then raise some questions about the future treatment of international instruments in the exercise of statutory discretionary powers, and put forward some proposals for the next step in "mainstreaming" international law. It will consider the precedent created by the NZIS guidelines and their potential as compared to the Australian legitimate expectation approach. The possibility of the expansion of the fiduciary relationship, defined by the New Zealand Court of Appeal in relation to the Treaty of Waitangi, will be proposed. Finally, the new procedures for the Parliamentary scrutiny of treaties prior to ratification will be outlined, and the significance of those procedures for the "mainstreaming" of international law will be considered.[4]

II THE ROLE OF INTERNATIONAL INSTRUMENTS IN NEW ZEALAND

As is well-known, prior to *Tavita,* an unincorporated international instrument might be used as an aid to interpretation, but such consideration was not obligatory. For example, in the 1977 case of *Van Gorkom v Attorney General,* Cooke J, found that "... reference to certain international documents, though not essential, is not out of place".[5] He noted that, although the general statements contained within the Universal Declaration of Human Rights were not a part of New Zealand's domestic law, *Halsbury's Laws of England* was authority for the proposition that it was acceptable to regard them as "representing a legislative policy which might influence the Courts in the interpretation of statute law". [6]

Four years later in *Ashby v Minister of Immigration,* the Court of Appeal rejected the argument that an unincorporated convention constituted a mandatory relevant

---

4 It should be noted that it is the stated practice of the New Zealand government not to ratify any international instrument until it is satisfied that domestic law is for the most part compliant with the obligations about to be undertaken. New Zealand's commitment to the principles of the International Covenant on Civil and Political Rights are affirmed in the Preamble to the New Zealand Bill of Rights Act 1990. The Cabinet Office Manual requires Ministers proposing new legislation to report on its compliance with New Zealand's international obligations.

5 [1977] 1 NZLR 535, 542 (CA) [*Van Gorkom*].

6 *Van Gorkom* above n 5, 543.

consideration, stating that such an instrument could not override the clear and express words of an Act of Parliament.[7] The Court reiterated that it was only when "a statute expressly or by implication identifies a consideration as one to which regard must be had that the Courts can interfere for failure to take it into account".[8] Richardson J rejected arguments that the Minister's discretion could only be exercised in conformity with New Zealand's obligations under the Convention.[9] If the words of the domestic legislation were clear and unambiguous the Courts were bound to give effect to them whether or not they were consistent with New Zealand's international obligations.[10]

The decision left open a small window of opportunity for those seeking review of such matters. Somers J was prepared to assume (without deciding) that in the exercise of a Ministerial discretion "there may be some matters so obviously or manifestly necessary to be taken into account that a Minister acting reasonably would be bound to take them into account".[11] Cooke J noted the reluctance of the Courts to intervene in areas involving foreign policy, of which immigration issues form a part. However, he too left open the possibility that even in the area of immigration and foreign policy a "certain factor might be of such overwhelming or manifest importance that the Courts might hold that Parliament could not possibly have meant to allow it to be ignored".[12]

That window of opportunity was seized by the appellant in *Tavita* to argue that the rights of the child under particular international instruments must be regarded as the type of factors Parliament could not have intended to be ignored.

III THE CHANGING STATUS OF INTERNATIONAL INSTRUMENTS

A Tavita

In *Tavita v Minister of Immigration,*[13] Mr Tavita sought judicial review of a removal order on the grounds that the Minister had failed to give consideration to the

---

7 [1981] 1 NZLR 222 (HC) [*Ashby*].

8 *Ashby* above n 7, 224.

9 *Ashby* above n 7, 228. Nor could the Convention on the Elimination of All Forms of Racial Discrimination be regarded as a relevant consideration of such importance as to compel the Minister to refuse visas to the South African Rugby Football Union team members.

10 *Ashby* above n 7, 229.

11 *Ashby* above n 7, 233-234.

12 *Ashby* above n 7, 226.

13 *Tavita* above n 3. Mr Tavita was an overstayer who fathered a New Zealand-born child, born two months after the Minister had declined an appeal against removal. Tavita then married the child's mother. When the Immigration Service moved to execute the removal warrant, Tavita sought to invoke the international instruments.

International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention on the Rights of the Child (CRC).[14] In its decision, the Court of Appeal signalled that splitting up a family, the majority of whom had New Zealand citizenship, would be the sort of matter alluded to in *Ashby* that warranted the Court's engaging in review of matters touching on foreign policy. The Court of Appeal rejected the Minister's argument that the CRC and the ICCPR could be ignored. Cooke P expressed the view that such an attitude implied that "New Zealand's adherence to the international instruments has been at least partly window-dressing". Such an argument, he said, was "unattractive".[15]

Tavita was not an attempt to have the ICCPR and the CRC override the express words of the legislation. The international instruments were invoked to influence the exercise of a statutory discretion in a way which did not undermine the legislative intention. There do not appear to be any grounds for arguing that the consideration of the CRC would be *ultra vires* in the administrative law sense of being illegal or irrational; it is not an irrelevant consideration. Nonetheless, after *Tavita* it remained unclear exactly what role such international instruments could play.

B The NZIS Guidelines

In response to *Tavita*, NZIS developed a code of practice that has to a degree removed the need for continued debate of that role in the immigration context. The code of practice sets out guidelines, which include consideration of New Zealand's obligations under international law, particularly under the ICCPR, the Optional Protocol to that Covenant, the CRC, and New Zealand's reservations to that Convention.[16] The existence and content of the guidelines is also of interest in terms of lessons for other departments whose operations are covered by the terms of relevant international instruments.[17] They

---

14 The key provisions (for the purposes of those cases) of the CRC Articles 3(1), and 16 are, briefly, as follows. Article 3(1) states "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Article 16 protects a child from "arbitrary or unlawful interference with his or her... family [or] home...", and undertakes to give the child the protection of the law from such interference. The ICCPR offers much the same protection from arbitrary or unlawful interference with an individual's family or home, and recognises the role of the family as the natural and fundamental group unit of society, entitled to protection. In addition, the ICCPR guarantees every child the right to the State's protection as required by the child's status as a minor.

15 Above n 12, 266.

16 See *Elika v Minister of Immigration* [1996] 1 NZLR 741 (HC).

17 There is also an interesting lesson in the *Project Blue Sky Inc and others v Australian Broadcasing Authority* (1998) 153 ALR 490, which was decided on the basis of the presence in the Australian legislation of a reference to "acting in accordance with Australia's international obligations". The

are considered here in some detail because of their precedent value in the integration of international law obligations and because they illustrate some of the difficulties in integrating international law norms into domestic law.

The guidelines indicate both the need to take the ICCPR and the CRC into account, and the balancing exercise that must be conducted in every case: the weighing up of the conventions, their relationship to a particular case, and other relevant matters. They also identify the need to have regard to the rights and interests of the person's immediate family who are New Zealand residents or citizens, and to the significant emotional and financial hardship that may be caused by the break-up of the family. These matters should be given "substantial weight", in the deliberations. However, the interests of the State are also accorded substantial weight and the principal goals of the Government's residence policy must be borne in mind by the officer exercising the decision-making power.

By bringing the terms of the ICCPR and the CRC into the process as a mandatory relevant consideration, the NZIS guidelines remove the question of the consideration of relevant international instruments from the *Ashby* category.[18] The guidelines apply to all decisions taken in an immigration context by NZIS personnel. It is uncertain, though, whether they apply to decisions taken under those sections of the Immigration Act 1987 which give the Minister non-delegable powers to make certain decisions in individual cases. The inconsistencies resulting from that uncertainty will be addressed below.

C Application of the NZIS Guidelines

One of the main difficulties of integrating international instruments is the question of how much weight the decision-maker should accord the requirements of such instruments. The courts have indicated that neither a token nod in the direction of the NZIS guidelines, nor a restrictive interpretation of them, will be sufficient. As the guidelines indicate, the NZIS officer must also consider the Government's immigration and residence policies. The State still has the right to control its borders and access to its territory.

---

case involved a challenge to the Australian content broadcasting quota, which was found to be in breach of the statutory direction to act in accordance with Australia's international obligations. The quota, in effect, breached the terms of the Closer Economic Relations agreement.

18 That is, the courts will only compel the decisionmaker to have regard to a consideration when a statute expressly or by implication identifies it as one to which regard must behad.

The tension between the international human rights law and the state's interests is well-illustrated by *Puli'uvea v Removal Review Authority*.[19] Counsel for Mrs Puli'uvea argued that the Authority had failed to specifically refer to the ICCPR or the CRC, or to consider the interests of the children at all, let alone as a primary consideration. The Court of Appeal found that there is "no general obligation" on those exercising power to refer specifically to any particular relevant source of legal obligation.[20] The Authority's decision made reference to the circumstances surrounding the family, and it was clear from the overall reasoning of the decision that the Authority had given the relevant factors meaningful consideration. However, as the children were born in New Zealand they are automatically New Zealand citizens by virtue of an Act of Parliament. They have a right to remain when the parents are deported. At this point the straight forward application of the law can lead to potentially brutal results. At the same time, there is concern that an overly-generous interpretation of the *Tavita* principles leaves New Zealand's temporary permit system open to abuse. The most extreme scenario is that any such permit-holder need only to bear or father a child in New Zealand to circumvent the legal requirement that they must leave the country on the expiry of their permit or of extensions to that permit. Despite this concern, the Courts have made it clear that the guidelines must be adhered to, with full and proper consideration being given to the matters therein.

A similar set of issues arose in *Raju v Chief Executive, Department of Labour*.[21] The appellants challenged the decision of the Removal Review Authority on a number of grounds, including that the Authority had incorrectly applied the principles in *Tavita*. Although the Authority's decision referred to *Tavita*, McGechan J found that the Authority's considerations had not been "broad enough to encompass the general rights and interests of the child along Article 3(1) lines".[22] The Authority's decision focused too narrowly on specific factors: whether there would be separation of family members, and the right of protection under juvenile law without discrimination. In adopting this focus, the Authority had failed to consider the children's interests in a more general way.

---

19 (1995-96) 14 FRNZ 322. The Puli'uveas were in New Zealand illegally. They came on temporary permits but, after several consecutive extensions, failed to get residence permits and ultimately failed to obtain further temporary permits.

20 Above n 19, 326-327.

21 (8 October 1996) unreported, High Court, Wellington Registry, AP307/95, per McGechan J. The appellants had two New Zealand-born children, one born before and one after the expiry of the parents' student and visitor permits.

22 Above n 21, 4.

Raju was followed by *Mohamed & Ors v the Minister of Immigration*.[23] The Deportation Review Tribunal's report was highly critical of Mrs Mohamed's dishonest conduct in concealing from NZIS the fact of their having been granted refugee status in Italy. The Tribunal found that their claims of persecution were much overstated and fell far short of being a weighty consideration in the range of humanitarian factors that it had to consider. The Tribunal then concluded that it would not be unjust or unduly harsh for the family to be deprived of their right to be in New Zealand. A key point in *Mohamed* was that none of the children were New Zealand citizens. Although much of the focus of the immigration cases has been on the rights of New Zealand-born children, the ICCPR and the CRC actually deal with the rights of any child present in a given state's territory.

Mohammed was appealed on the ground that the Tribunal had failed to have proper regard to Article 3(1) of the CRC. Following *Puli'uvea* and *Raju*, Chisholm J found that the Tribunal should have given Article 3(1) "meaningful consideration" in their decision-making process. The decision bore no evidence of the children's situation being accorded primacy and the Tribunal's reaction to Mrs Mohamed's deceit appeared to have been the paramount consideration. On the evidence before him, Chisholm J was not prepared to assume that Article 3(1) had been given proper consideration. It is apparent that, having adopted the guidelines, NZIS will be held to them, and will not be permitted to engage in rubber-stamping exercises or token gestures.

The fact that these cases all deal with arguments about the rights of children not to be separated from their family or one parent brings to the fore the basic tensions in the area of international instruments in domestic law. There is an understandable tendency to argue that the children's rights should be paramount. The CRC requires that the "best interests of the child" is to be a primary consideration, not *the* primary or *paramount* consideration. The provisions of the CRC cannot automatically outweigh the other considerations, unless one accepts the argument that the very existence of our international obligation must outrank all other considerations. The inescapable conflict between the supremacy of Parliament and the increasing importance of international law forces us to consider the primacy of one over the other. In constitutional terms, the supremacy of Parliament is undeniable, but we cannot ignore the reality of international law norms. Are those international norms fundamental, inherent and inviolable, or are they a gloss on whatever constitutional rights an individual may have by virtue of being a citizen of a particular state? Given the number of instances where the removal occurs,

---

23 (11 November 1996) unreported, High Court, Wellington Registry, AP262/95, Chisholm J. Mrs Mohamed and her husband, Mr Ali, came to New Zealand with their four children claiming to be refugees from Somalia. They deliberately concealed the fact that they had been granted first refugee status and, subsequently, citizenship in Italy. The deception was exposed some months later and the family's New Zealand refugee status cancelled.

they appear to be the latter.[24] Even the adoption of the NZIS guidelines left it unclear as to whether the Minister of Immigration was subject to them. These arguments illustrate the Court's concern about an expansive approach to the application of international law.

D Weighing It Up: Should The NZIS Guidelines Bind The Minister?

The question of whether the Minister's non-delegable discretion to revoke residence permits should be read as subject to relevant international instruments was argued before the Court of Appeal in *Rajan v Minister of Immigration*.[25] The Court considered factors for and against reading the Minister's power to revoke residence permits as subject to those international obligations. The Court's analysis is relevant to the broader consideration of the mainstreaming of international law.

1 Minister's power is subject to international obligations

The Court identified four factors suggesting that the Minister was subject to the ICCPR and the CRC. The first was the presumption of statutory interpretation that, so far as its wording allows, legislation should be read in a way which is consistent with New Zealand's international obligations.[26] This obviously supports the view of an unincorporated international instrument being an aid to interpretation. However, it also

---

24 One of the latest, and interestingly high profile, examples of this is *Schier v Removal Review Authority*, (7 December 1998) unreported, Court of Appeal, CA123/98. The removal of Mr Schier and his wife, Petra Lerner, attracted heavy criticism from the small community in which they lived, and more widely from the New Zealand community because of the impact on their three New Zealand born children.

25 [1996] 3 NZLR 543 (CA). The Rajans were granted New Zealand permits on the basis of an Australian resident's permit fraudulently obtained by Mr Rajan. In essence the Rajans argued that the immigration authorities had failed to take into account the obligations of the New Zealand government under the ICCPR and the CRC [Rajan].

Section 20 of the Immigration Act 1987 reads

> (1) The Minister may at any time revoke a residence permit on any of the following grounds, but no other:
>
> (a) That the permit was granted as a result of administrative error:
>
> (b) That the permit ... was procured by fraud, forgery, false or misleading representation, or concealment of relevant information:
>
> (c) That the permit ... was granted to a person who had been a holder of a visa or another permit procured by fraud, forgery, false or misleading representation, or concealment of relevant information:
>
> (d) That any requirement imposed on the permit holder under section 18A of this Act has not been met.

26 *Rajan* above n 25, 551.

permits a broader approach. Rather than merely assisting the interpretation of an ambiguous statutory provision, it permits the instrument to influence the interpretation and exercise of a broadly worded discretion in legislation up to the point where the two documents are clearly inconsistent. In other words, it enables a treaty to be a permissible relevant consideration. To that extent, New Zealand's international commitments and domestic policies can more easily be construed to reflect each other.

The second factor is that the Minister's section 20 power is a discretion.[27] The Minister is not compelled to revoke the permit if the relevant factors exist. This distinguishes section 20 from other sections which impose a duty to act. It must be remembered, however, that to exercise the discretion in accordance with the principles of administrative law, it must be a genuine exercise of the discretion.[28] The Minister must turn his or her mind to the relevant facts surrounding each individual's case. The existence of the individual's New Zealand-born child and New Zealand's obligations under the ICCPR and the CRC are obviously relevant facts. That moves them into the realm of mandatory relevant considerations, which may appear to bring them into conflict with the *Ashby* rule. However, in *Ashby,* Somers and Cooke JJ foreshadowed the possibility that some matters could be so important that they might well be regarded as a mandatory relevant consideration, in the sense that they would be something that no reasonable Minister would ignore. The *Tavita* decision can be seen as indicating that the protection of the rights of children is one such matter.

The third factor is the great importance of the right involved.[29] It would, the Court commented, not be surprising if humanitarian considerations were mandatorily relevant to the exercise of that power, particularly if the person concerned has been here for some time and the ties with New Zealand have grown. Arguably, those ties would be even stronger should they include the existence and rights of a New Zealand-born child. It would be surprising if humanitarian provisions were not relevant (mandatorily or permissibly) to the exercise of that power.

The fourth factor is that the very existence of an "appeal" on humanitarian grounds might be seen as implying that the initial decision-maker will have regard to humanitarian grounds. The Court's point here, that appellate procedures do not ordinarily raise new issues, is reinforced by the argument that humanitarian issues, such as those addressed by the terms of the CRC should be in the minds of all decision-makers involved in the Immigration area, not just those at the initial level of the process.

---

27 *Rajan* above n 25, 551.

28 *Padfield v Minister of Agriculture* [1968] AC 997 HL.

29 *Rajan* above n 25, 551.

2 *Minister's power is not subject to international obligations*

The Court also identified four factors which argued against the proposition that international obligations should be read into the exercise of the Minister's power.

The first factor is that a discretion does not necessarily have mandatory considerations attached to it.[30] In other words, the power might be conferred as a discretion rather than a duty to enable the Minister not to revoke residency in situations where the error was minor, or a long time had lapsed between the grant of the residence permit and the discovery of the error. However, attaching a mandatory relevant consideration to a discretion still does not bind the decision-maker, it merely requires that he or she genuinely consider that factor in the exercise of the discretion.

The second factor is that while section 20 was silent on the question of humanitarian considerations, other sections have express requirements for those exercising powers which lead to the removal of persons from New Zealand to have regard to humanitarian considerations.[31] In addition, the fact that there were other explicit grounds laid out in section 20 might be construed as militating against the inclusion of other mandatory considerations.

Although section 20 does have grounds explicitly set out, it must be noted that they are the grounds upon which the Minister may revoke a residence permit. Setting out an exhaustive list of grounds which trigger the discretion does not of itself preclude the attachment of a mandatory relevant consideration to the exercise of the discretion, to be included in the weighing up process of each individual case. There are no specific grounds for not revoking a permit, so reading in a mandatory relevant consideration is not altering the grounds for the exercise of the discretion, but providing a factor to be weighed in consideration if one or more of the grounds are established.

The third factor is that the rights identified in the international instruments as those which must be protected by the state appear to fall clearly within the explicit duty of an independent tribunal.[32] The Deportation Review Tribunal (to which the Rajans had also appealed) would consider the interests of the appellant's family in determining whether it would be unjust or unduly harsh for the appellant to lose the right to be in New Zealand. In making that determination, the Tribunal is required to give the parties a fair and public hearing and is given the powers of a Commission of Inquiry. It is not, therefore, critical that the Minister also consider those matters.

---

30 *Rajan* above n 25, 551.

31 *Rajan* above n 25, 551.

32 *Rajan* above n 25, 551.

The nature of the power in question and who exercises it is central to the Courts' willingness to review. The Courts are more cautious in exercising their supervisory role when the power in question is the non-delegable power of a minister of the Crown. However, both for humanitarian reasons and for administrative consistency within the area of immigration, any person whose decisions fall within the scope of the international obligation should be required to bear that obligation in mind.

Finally, the fourth factor was that although the 1987 Act had originally imposed an express obligation on the Minister to have regard to humanitarian considerations, the 1991 amendments imposed that obligation only upon the independent tribunals.[33] This might suggest, the Court said, that Parliament had decided that only the tribunals and not the Minister are now to make the humanitarian assessments. While this is an arguable interpretation, it is important to note a procedural difference. Humanitarian grounds are just one basis upon which the person concerned may, for example, appeal to the Removal Review Authority. In other words, the Act enables a person to initiate an appeal on one or both of two grounds; humanitarian and factual. Appealing on humanitarian grounds by definition puts the matter before the Authority for consideration. By contrast, the Minister's powers in section 20 have defined in that section the grounds upon which a decision to revoke a residence permit may be made. Section 20 does not identify any factors which might be considered by the Minister when that discretion is exercised. It is not, therefore, fatal to the argument in favour of "reading in" international obligations, that section 20 does not explicitly refer to humanitarian grounds. By extension, it means that the change effected by the 1991 legislation is also not fatal to that argument.

3 Some rights so fundamental ...

It is not difficult to tip the scales in favour of the Minister being required to exercise his or herdiscretion subject to the international obligations. In *Rajan*, the Court of Appeal did not make a final decision on the point because the Rajans were still awaiting the final determination of the Authority. It is, however, a determination that will have to be made by the Court at some time. The arguments set out for and against show there are no overwhelming reasons against reading the power as subject to the international obligations. The adminstrative law requirements that processes and those executing them demonstrate consistency is reason enough to compel the Minister to consider international obligations when exercising his or her non-delegable powers. The increasing pressure to recognise the rights guaranteed in international instruments as fundamental and inviolable is likely to become an increasingly compelling reason for the

33 *Rajan* above n 25, 551-552.

Minister to also be subject to those considerations. If it is a recognised international right not to be separated from one's family, it is a right whether it is considered by the Minister or by an officer of the NZIS. It is increasingly difficult, even "unattractive", to argue that any decision-maker, at whatever level in the immigration hierarchy, should be free of the obligation to turn his or her mind to such matters. These arguments apply equally to the exercise of any statutory discretionary power affected by international instruments.

IV LEGITIMATE EXPECTATION AND FUNDAMENTAL RIGHTS

An alternative to the guidelines is to regard ratification of international instruments as creating a legitimate expectation that the executive would act in accordance with the treaty. In Australia, the *Teoh v Minister of Immigration and Ethnic Affairs* decision created significant alarm because of the potential for the legitimate expectation recognised by the High Court to be applied in respect of every treaty to which Australia was a party.[34] The NZIS guidelines effectively create a legitimate expectation analogous to that defined by the High Court of Australia, with some differences that may prove critical to the role of international instruments.

In appealing the refusal to grant Teoh a permanent entry permit, it was successfully argued in the Full Federal Court of Australia that the Australian Government's ratification of the CRC created a legitimate expectation that administrative decision-makers would act in conformity with its provisions. The majority in the High Court confirmed that a legitimate expectation did in fact exist, although they were not unanimous on the point of who held the expectation. Gaudron J thought that the expectation arose out of the rights of the child as citizens of Australia, with the CRC being "only of subsidiary significance".[35] Citizenship involves "obligations on the part of the body politic to the individual, especially if the individual is in a position of vulnerability".[36] She considered that it was the right of children who were citizens of

---

34 (1995) 128 ALR 353. Teoh was an immigrant on a temporary visa, whose application for a permanent entry permit conferring resident status was declined. His conviction and imprisonment for importation and possession of heroin was regarded as evidence that he could not satisfy the good character requirement. Teoh was certain to be deported on completion of his prison sentence, leaving seven dependent children in Australia. The children would be left with only the protection of their mother, a drug addict with a record of drug convictions and custodial sentences.

35 *Teoh* above n 34, 375. Mason CJ and Deane J took the view that the children might hold the expectation, with Teoh being their mouthpiece and asserting their claim through his own appeal. Toohey J regarded the respondent as having the legitimate expectation that the Minister's delegate would give the best interests of the respondent's children the consideration required by the wording of the Convention.

36 *Teoh* above n 34, 375.

Australia to have the State recognise their particular vulnerability and accordingly afford them particular protection. The CRC gives expression to "a fundamental human right taken for granted by Australian society", and in that sense the ratification of the CRC could be seen as creating an expectation.[37] What Gaudron J's approach does not accommodate is the point made in *Mohamed*, that the CRC guarantees those rights and protections to any child because he or she is a child in the jurisdiction of the State, not because they are a citizen of that State. There is an obvious danger, in arguing that fundamental human rights are triggered by citizenship, of reducing the importance of those rights and making them a characteristic of citizenship rather than a fundamental entitlement. With respect, it appears that Gaudron J was not mindful of the fact that the fundamental human right which she regarded as taken for granted did not appear to exist in Australia prior to that country's adoption of the international human rights standards.[38]

Teoh provoked a heated response from the Federal government, which initially made an announcement designed to "undo" any representation creating a legitimate expectation. When the Court indicated that a public revocation could not be relied upon, legislation was introduced to expressly override the impact of the decision. The progress of that legislation has been slow, but may well accelerate. The Federal Government was and is quite clear that it will not be constrained by an approach which not only requires those exercising a statutory discretion to be mindful of relevant international obligations, but appears to require that such obligations be paramount. Transported to the New Zealand context, the *Teoh* decision stretches the doctrine of legitimate expectation beyond

---

37 *Teoh* above n 34, 376.

38 The current controversy over the "Lost Generation", those aboriginal children who were taken from their families to be assimilated by adoption into white Australian families, would suggest that these rights were not taken for granted thirty years ago, or, if they were, because Aboriginals were not "citizens" until 1967, that those rights did not apply to them. This is exactly the kind of discrimination which universal human rights seek to eliminate. Obviously, one can argue that human rights in Australia have changed in those thirty years. That is not the issue so much as the fact that attaching qualifications, such as citizenship, to human rights does leave them vulnerable to unhelpful restrictions in their application.

our usual procedural boundaries.[39] *Teoh* creates a "global" expectation in every citizen whether or not he or she is aware of the international "undertaking" giving rise to it.[40]

VI PROPOSALS FOR CHANGE

A Legitimate Expectations or Self-Imposed Guidelines?

Setting aside the administrative problems which may well arise from adopting the Australian approach, the obvious attraction of *Teoh* is that it translates the ratification of a treaty by the State into something meaningful for the individual in the State's jurisdiction.[41] The NZIS guidelines are analogous to the *Teoh* legitimate expectation, but there is a significant difference.

In New Zealand, the representation upon which the legitimate expectation is founded was knowingly and deliberately made by the NZIS. It is a published policy upon which all concerned may rely. It may not be arbitrarily amended or revoked, and any changes to it must be duly notified to the public in an appropriate fashion.[42] Arguably, this creates a legitimate expectation which may prove more enduring than the one enunciated in *Teoh*. A policy change removing the obligation to consider the CRC and the ICCPR would almost certainly be reviewable on the grounds of unreasonableness, falling as it would within the scope of the Court of Appeal's decision in *Tavita*. By contrast, the judgment in *Teoh* pronounced a more wide-ranging obligation, based upon a representation extrapolated from an executive act in the international arena. It would be easier to legislate to prevent such an act being interpreted as a representation. In

---

39 See, for example, M Poole "Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety" [1995] NZ Law Rev 426. Consider as well the decision of Fisher J in *Faave v Minister of Immigration* (9 May 1997) unreported, High Court, Auckland Registry, M1434/96 and HC 122/96, 11. The marked reluctance of the courts to move into "substantive fairness" suggests that for the time being, legitimate expectation will remain a procedural mechanism, at best entitling the holder to a hearing prior to the defeat of the expectation.

40 Margaret Allars "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government" (1995) 17 Sydney LR 204, see also Cheryl Saunders "Articles of Faith or Lucky Breaks - The Constitutional Law of International Agreements in Australia" (1995) 17 Sydney LR 150.

41 One of the objections raised after the Teoh decision was that Australia is party to some 900 treaties. The logistics of accommodating legitimate expectations in respect of such a number of treaties does give pause for thought in terms of administrative efficiency.

42 See *R v Secretary of State for the Home Department, ex parte Khan* [1984] 1 WLR 1337 (CA), where the applicants relied on a published policy indicating what criteria must be satisfied for the grant of immigration rights regarding an adoption from overseas. The policy gave the applicants a legitimate expectation which entitled them to be heard as to why they should not be treated on the basis of the published policy. The Immigration office actually applied a different set of criteria to the decision.

administrative law terms, the decision to rescind a particular set of procedures adopted in recognition of relevant international instruments is likely to give rise to a direct and sustainable challenge. The terms and scope of the NZIS code were self-defined, not imposed by the Court.

A second consideration is that the legitimate expectation created by the NZIS guidelines is limited to matters of immigration dealt with by NZIS officers. Whilst this might appear to be less attractive than the Australian "global" expectation, it can be seen as creating an advantage. NZIS has created a specific precedent from which one might argue that all reasonable administrators whose areas of responsibility are addressed by international instruments would turn their mind to those instruments and consider adopting an internal policy to reflect them. A reasonable administrator would follow the NZIS example and prepare internal policy guidelines setting out how those international instruments are to be implemented. This is undeniably a slower process than the Australian global legitimate expectation, but as the responsibility for creating the process would rest with the relevant administrator, it would, in the long run, be a more clearly defined and constitutionally sound set of practices. While such guidelines could still be overidden by express legislation, advance consultation to ensure that the guidelines reflected the Government's long-term plans would prevent an usurpation of Parliament's rights. The guidelines would be a developmental step prior to legislation. In that sense, Parliament and the Executive would be working together to legitimise the use of international instruments at every stage of the administrative process.

B Weighing the Balance: Merely Factors for Consideration or Fundamental and Determinative?

Another matter that cannot be ignored is the weight to be given to the content of the international instruments. Put baldly, the question is, if these human rights are fundamental, should they also be paramount? Whilst no-one would suggest that these rights are absolute, obviously the protection of children must be a priority. Rather than treating the rights of the children under the ICCPR and the CRC as paramount, a more practical approach would be to develop a "rebuttable presumption". The family should stay together *unless* the government can show other overwhelming factors. This approach might well resolve the difficulty referred to by the courts, though not for the first time, in *Schier v Removal Review Authority*.[43] In *Schier*, one of the main arguments came down to whether the rights of the New Zealand born children were given sufficient weight in the considerations of the Removal Review Authority. Arguments focused on whether the decision to deport the Schier parents was effectively an indirect decision to

43 *Schier* above n 24.

deport their New Zealand born children, or whether the parents' decision to take the children with them, in the absence of any viable alternative, was still a matter of their free choice. This is an artificial distinction which does little to address the conflict facing the family and offers equally little protection for the rights of the children under the international instruments. A rebuttable presumption in favour of the protection of those rights offers a mechanism which is not only more responsive to the very real difficulties facing these children and their families, but also accords greater significance in the wider context to international law.

C Expanding the Treaty of Waitangi Fiduciary Duty Concept

In the New Zealand context, there is arguably a second, perhaps unique element, which could be developed from the Court of Appeal's judgment in the *New Zealand Maori Council* case.[44] The Treaty of Waitangi partnership, in which both parties are bound by a duty to act reasonably and in good faith, offers a starting point in respect of international treaties. The Court of Appeal accepted that the Treaty of Waitangi created a relationship analogous to a fiduciary relationship, with a burden on the Crown to actively protect Maori people in the exercise of their Treaty rights to the fullest extent possible. The Court was clear that the Treaty could not be used to override Acts of Parliament, but it was equally emphatic on the point that the principles of the Treaty should be guiding considerations always in the mind of the Crown in determining any matter affecting Maori and their rights under the Treaty of Waitangi. In the *Whale-Watching* case, the High Court suggested that, *in certain circumstances*, a party relying upon the principles of the Treaty would be entitled to "a reasonable degree of preference".[45]

It is both possible and logical to apply this line of thinking to international human rights treaties. Ratification of an international human rights treaty would create, between the Crown and those individuals whose rights are protected in the treaty, a fiduciary duty under which the Crown, as a signatory to the treaty and the party with power, has an obligation to act in good faith and actively protect those rights. This is not to suggest that those rights should become absolute, but it does suggest that the threshold to defeat those rights by other considerations should be higher. Parliament remains sovereign, but that sovereignty must be exercised with regard to the fiduciary relationship, that is, in a manner that gives a reasonable degree of preference to the rights of the individual or individuals involved. This approach places international instruments in a more fundamental position than the legitimate expectation approach, going beyond the

---

44 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 644 (CA).

45 *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 562 (CA).

procedural limitations legitimate expectation appears to have in this jurisdiction.[46] Those fundamental rights would be located more in the substantive area and, thus, not be as vulnerable to defeat by the presence of other factors. In addition, this approach sustains the distinction to be drawn between international human rights instruments and those treaties and conventions which deal with the practical matters of life in the global village.[47] The former involve the protection of basic human rights and it is that fact which gives rise to the fiduciary-like responsibilities which vest in States.

D The Changing Role of Parliament

One of the fundamental objections to the Courts' considering international instruments not yet formally approved by Parliament is that such an approach to statutory interpretation usurps the powers of Parliament. It violates the basic premise of Westminster-style democracy that Parliament is supreme. However, a recent and most welcome development has been the adoption of the practice of putting certain international treaties before Parliament for consideration. This provides a crucial opportunity for Parliament to express its views on international law proposals and developments before any attempt to introduce incorporating legislation into Parliament. It also provides a basis for the argument that reliance upon international instruments does not undermine Parliament's supremacy.

Not all treaties will be included in the new procedures. Those treaties included are:

- any treaty that is to be subject to ratification, accession, acceptance or approval by New Zealand;
- any treaty that has been subject to such action on an urgent basis in the national interest; and
- any major bilateral treaty of particular significance, not otherwise covered by the first category, that the Minister of Foreign Affairs and Trade decides to present to the House.

Every treaty must be accompanied by a National Interest Analysis (NIA), a document prepared by the department with the main policy interest in the subject matter of the treaty. The NIA must address:

- the reasons for New Zealand becoming party to the treaty;

---

46 *Faave* above n 39.

47 For example, maritime law, insurance law, or conventions governing international commercial or service transactions.

- the advantages and disadvantages to New Zealand of the treaty entering into force for New Zealand;
- the obligations which would be imposed on New Zealand by the treaty, and the position in respect of reservations to the treaty;
- the economic, social, cultural, and environmental effects of the treaty entering into force for New Zealand, and of the treaty not entering into force for New Zealand;
- the costs to New Zealand of compliance with the treaty;
- the possibility of any subsequent protocols (or other amendments) to the treaty, and of their likely effects;
- the measures which could or should be adopted to implement the treaty, and the intentions of the Government in relations to such measures, including legislation;
- a statement setting out the consultations which have been undertaken or are proposed with the community and interested parties in respect of the treaty; and
- whether the treaty provides for withdrawal or denunciation.

The treaty and the NIA will be referred to the Foreign Affairs, Defence and Trade Select Committee, which may choose to refer them to another Select Committee. That Committee must report to the House on any treaty referred to it.

This procedure occurs as a part of the treaty-making phase, but arguably can add weight to the arguments made above. The fact that Parliament has considered the treaty prior to ratification legitimises the requirement that all relevant departments must adopt clear policies along the lines of those developed by NZIS. Moreover, if Parliament, and the parliamentary process has already fully considered the scope and impact of a particular international instrument, the argument that ratification creates a fiduciary duty becomes even more compelling.

E The Floodgates

Opponents would argue that such an approach would open the floodgates of litigation from those seeking to assert rights embodied in international instruments. This need not be the case. Firstly, there is, in effect, a hierarchy of rights, and that the lower down the hierarchy a right is, the less critical it is that those rights be given preference.

Consider the *Lawson* case, which challenged the increase to market rates for Housing New Zealand properties.[48] One of Mrs Lawson's arguments was that Housing New

48 [1997] 2 NZLR 474 (HC).

Zealand had failed to have proper regard to the United Nations Declaration of Human Rights, the International Covenant on Economic, Social and Political Rights (ICESPR) and the CRC. Williams J found that the Declaration and the ICESPR:[49]

> are both phrased in general terms as far as matters in issue in this proceeding are concerned. The former vouchsafes an adequate standard of living including housing and necessary social services as components, and the latter is a recognition of the right of all to such a standard of living including adequate housing. The policy of the government on housing since 1990 does not appear to run counter to that obligation given the continuation of the state housing rental stock and the other measures undertaken such as facilitating transfers to more appropriate accommodation and the accommodation benefit.

Further, he found that it was not within the competence of the Court to determine whether the Government had fully complied with those international obligations. The Government had made an effort to balance the competing factors. Whether or not those efforts discharged any international obligation was a question to be determined in the international arena.

In the immigration cases, the challenge is being made to the application of the NZIS guidelines to a given individual. Mrs Lawson, by contrast, was challenging the alleged failure to consider relevant international obligations much earlier in the process, in the policy-making phase, prior to the 1992 legislative reform. Mrs Lawson was in essence asking that the policy itself be declared invalid because it did not wholly reflect the spirit and substance of the relevant international instruments. As the law currently stands, the Court cannot do that. However, applying the "fiduciary duty" approach, the Court would be able to say that the government has adopted a duty under the UN Declaration of Human Rights and the ICESPR, to provide an adequate standard of living including housing. Anyone who was homeless but wanting accommodation might expect to be provided with emergency accommodation, and assistance to locate more permanent housing, with financial assistance as appropriate.[50]

A government policy which did away with all government assistance in the housing area would amount to a breach of the fiduciary duty. The determination of what is adequate is, of course, a highly contentious and political issue, and in that sense beyond the scope of this paper. The important point is that we could as a society be certain that the right to housing was a fundamental one, with place in the rights hierachy, and one upon which the government had a duty to act. Moreover, with the combined weight of the fiduciary duty and the Parliament's pre-ratification scrutiny, it might become possible

---

49 *Lawson* above n 48, 498.

50 Williams J, in the *Lawson* case, noted that the current government policies do just that.

to challenge in the Courts the early policy-making stages which have traditionally been beyond the scope of judicial review.

There is an obvious danger in revisiting cases to speculate on different outcomes. It has some value, however, in addressing the concerns of those alarmed by the prospect of the floodgates opening. For example, the *Tangiora* case may well founder on the same arguments.[51] Setting aside the question of whether the United Nations Human Rights Committee is covered by the Legal Services Act 1991, the ICCPR does not provide for either legal aid for civil proceedings or for any other form of financial assistance for ensuring access to justice. To advance Mrs Tangiora's case, one would have to go beyond what is proposed in this article and "read in" substantive matters to the provisions of the ICCPR. In this respect, *Tangiora* and the *Quilter* (same sex marriages) case[52] anticipate the next issues facing international law when the problems considered by this article have been resolved. It is appropriate to signal, at this stage, that whilst the Courts might be reluctant to read various substantive rights into an international human rights instrument, any silence or absence in such an instrument should not be used to read down or deny such rights as might otherwise be within the scope of the common law to develop.

VII CONCLUSION

We have available to us the tools to construct a new approach to the mainstreaming of international human rights law. The NZIS guidelines precedent in both form and substance, the potential to recognise a fiduciary duty in respect of international human rights obligations, and Parliament's new procedures for considering international treaties prior to ratification offer us an almost serendipitous opportunity to take a further step in the mainstreaming of international law. Of course, Parliament remains supreme and the suggestion that we infringe a little further on that supremacy may appear constitutionally unsound. In fact, it is part of the ongoing evolution of the relationship between domestic and international law. The latter must be recognised for the critical role it plays as a major source of human rights norms, and that role must be legitimised by every branch of government in every way possible.

It is an appropriate time for New Zealand to take an initiative in the recognition and integration of international law in the domestic legal system. The mainstreaming of

---

51 *Wellington District Law Society v Tangiora* [1998] 1 NZLR 129 (CA). Mrs Tangiora was arguing that the provisions of the Legal Services Act 1991 should extend to coverage of her dealings with the United Nations Human Rights Committee. The majority in the Court of Appeal found that the Committee was not within the scope of the provisions of the Act.

52 *Quilter v Attorney-General* [1998] 1 NZLR 523.

international law will not be without challenges and there will certainly be some constitutional issues to be debated. Nonetheless, we should not put off any longer the task of "working out truly fundamental rights and duties", and embodying them in our administrative processes.[53]

53 Sir Robin Cooke "Fundamentals" [1988] NZLJ 158.