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THE BASIS OF JUDICIAL REVIEW IN ADMINISTRATIVE LAW

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THE BASIS OF JUDICIAL REVIEW IN ADMINISTRATIVE LAW

In 1969[1], I ventured to suggest that judicial review, whether it concerned the exercise of legislative, judicial or administrative powers, was based on these grounds:

(1) the decision or act being without jurisdiction or *ultra vires*:

(2) the decision being affected by an error of law apparent on the face of the record[2]:

(3) the decision being taken in breach of natural justice. It is recognised that cases falling under this head are merely examples of *ultra vires* decisions, but, because natural justice applies only to a minority of decisions, it is preferable that it be identified as a separate head.

Writing in 1981, it would be necessary to add:

(4) the decision being taken in breach of the obligation of fairness.

It is now reasonably clear that, except in the case of the exercise of legislative authority[3], all other powers must be

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1 (1969) 3 N.Z.U.L.R. 426. It will be seen that, when undertaking review, the Courts are concerned solely with legality; findings of fact may be reviewed only if they go to jurisdiction.

2 This ground is, of course, available only if the rules governing certiorari are satisfied. Errors of law going to jurisdiction fall within (1); the means for correcting such errors are not limited to certiorari.

3 Such authority, it would seem, may be exercised without complying with either natural justice or fairness. Megarry J. (as he then was) made this observation in *Bates* v. *Lord Hailsham* [1972] 1 W.L.R. 1373, 1378:

> The case [*R.* v. *Liverpool Corporation ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299] supports propositions relating to the duty of a body to act fairly when exercising administrative functions under a statutory power: see at pp. 307, 308 and 310. Accordingly, in deciding the policy to be applied as to

exercised fairly[4]. It is remarkable, and the reasons are more fully explained later in this paper, that it should have taken so long for the Courts to articulate this general obligation of fairness.

THE AUSTRALIAN SOLUTION

In 1977, the Australian Government after careful deliberation and on the advice of three advisory committees, adopted an entirely different strategy from that accepted in New Zealand[5]. The Administrative Decisions (Judicial Review)

> the number of licences to grant, there was a duty to hear those who would be likely to be affected. It is plain that no legislation was involved: the question was one of the policy to be adopted in the exercise of a statutory power to grant licences.
>
> In the present case, the committee in question has an entirely different function: it is legislative rather than administrative or executive. The function of the committee is to make or refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration of solicitors generally; and the terms of the order will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheles these considerations do not seem to me to affect the process of legislation, whether primary or delegated.

The decision of the Court of Appeal in R. v. Secretary of Sta for Home Affairs ex parte Hosenball [1977] 1 W.L.R. 766; [1977] 3 All E.R. 452 in relation to deportation of an alien seems to involve a decision to which neither natural justice nor fairness applied.

4. Because fairness is seen as less onerous duty to discharge than the duty to act judicially, those who satisfy the higher standard necessarily discharge the less demanding obligation of fairness. The separate duties were recognised by Sir Robin Cooke in "Third thoughts on administrative law" [1979] N.Z. Recent Law 218, 225-226; but he appears to have resiled from that position in Daganayasi v. Minister of Immigration [1980] 2 N.Z.L.R. 130, noted in [1981] N.Z.L.J. 48.

5. The Australian reforms have been discussed by G. D. S. Taylor "The new administrative law" (1977), 51 A.L.J. 804, M. D. Kir "Administrative law reform in action" (1978), 2 U.N.S.W.L.J. 203, L. J. Curtis "Judicial review of administrative acts"

Act 1977 not only codifies the grounds for review but also requires all persons, unless exempted, to state the reasons for the decision taken. The grounds for review are set out in ss. 5 and 6[6]. Under the Act, review may be granted on one or more of the following grounds:

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorised by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision;

(i) that the decision was otherwise contrary to law.

(1979) 53 A.L.J. 530, F. G. Brennan, "The future of public law: the Australian Administrative Appeals Tribunal" (1979) 4 Otago L.R. 286; M. D. Kirby, "Administrative review on the merits: the right or preferable decision" (1980) 6 Monash U.L.R. 171 and L. Katz, "Australian federal administrative law reform" (1980) 58 C.B.R. 341.

6 Section 6 includes prospective as well as past conduct giving rise to a complaint of abuse of power. Section 7 deals with situations where there has been a failure to make a decision. The Act applies only to decisions of an administrative character; see s. 2, and p. 26, infra.

The reference in (e) to an improper exercise of a power is said to include:

(i) taking an irrelevant consideration into account in the exercise of a power;

(ii) failing to take a relevant consideration into account in the exercise of a power;

(iii) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(iv) an exercise of a discretionary power in bad faith;

(v) an exercise of a personal discretionary power at the direction or behest of another person;

(vi) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(vii) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(viii) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(ix) any other exercise of a power in a way that constitutes abuse of the power.

Ground (h) is not to be taken to be made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he was entitled to take notice) from which he could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

It will be seen that nearly all of these grounds have been recognised by the common law as falling within the category of jurisdictional errors[7], but it is not at all clear where breach of the duty to act fairly is included[8]. Once the grounds for review are in effect codified, the common law becomes frozen at that point.

FAIRNESS

It is the area of fairness with which the balance of this paper will be concerned. Though there may be little difference in popular speech between the obligations of acting judicially and acting fairly, the maintenance of the distinction is vital in Administrative Law. Acting judicially calls for observance of the principles of natural justice, and especially the requirement that a hearing be given. If one's obligation is to be fair, a hearing is not ordinarily required. It is obvious that to require those making administrative decisions to act judicially would slow down the process of administration and eventually bring it to a standstill. On the other hand, to permit those who at present are expected to discharge the obligations associated with acting judicially to satisfy them if they are merely fair will substantively reduce the procedural protections now available under the principles of natural justice. The identification of fairness and natural justice would have most unfortunate results.

Though the question of the obligations or duties of statutory tribunals, including Ministers, has often been the subject of judicial pronouncements and has also received some attention from law teachers and others who contribute to learned journals, there remains a sufficiently substantial area of uncertainty justifying further probing. This note will concentrate on judicial

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7 This category was expanded by the House of Lords in Anisminic, Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147; [1969] 1 All E.R. 208.

8 This possibility, that the common law might continue to expand and develop additional grounds for review, was one reason for the Public and Adminstrative Law Reform Committee not following the Australian example. See Sixth Report (1973), para. 19 and Twelfth Report (1978), paras. 30 - 51.

statements[9] (because in the long run only the Courts can clarify and settle the common law). The various articles and books dealing with the issue may well be decisive in the influence they have on the judiciary; they are included in the bibliography attached to this paper. Of primary concern is the question - what is the obligation the legislature expects the various authorities it creates to discharge? Is it a duty to be fair or, in a minority of cases, to act judicially? From that question one moves almost automatically to consider the contents of those duties. Are they synonymous, as has been frequently suggested, or are they distinct, thereby recognising that different procedures are appropriate to the two broad categories of decision-making, judicial and administrative?

SUGGESTED CLASSIFICATION

It will be suggested that the relevant cases can be divided into four categories, according to the date when they were decided. First, there are the cases decided before 1924, when the Courts used the terms acting judicially or acting fairly as if they were synonymous. Typical of that period are the remarks of Lord Loreburn L.C. in Board of Education v. Rice[10]:

> Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both

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9 Some of the extracts from the cases may be longer than is usual but it is important that the precise words be seen in their context.

10 [1911] A.C. 179, 182 (emphasis added). The proposition italicised is obviously too wide.

> sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

In the second period from 1924 to the early 1960s, the distinction was drawn sharply, both in terms of the remedy available and the obligation of the decider. The well known statements of Atkin L.J. in R. v. Electricity Commissioners, ex parte London Electricity Joint Committee Co. and Lord Hewart L.C.J. in R. v. Legislative Committee of the Church Assembly, ex parte Haynes-Smith serve to illustrate the limits on remedies. Atkin L.J. summarised the law thus[11]:

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs [of certiorari and prohibition].

Lord Hewart made explicit what was implicit in the Atkin dictum when he declared[12]:

> It is to be observed that in the last sentence which I have quoted from the judgment of Atkin L.J. the word is not "or", but "and". In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially.

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11 [1924] 1 K.B. 171, 205.

12 [1928] 1 K.B. 411, 415.

The distinction continued to be drawn in the cases following World War II. For example, Lord Thankerton in the House of Lords in Franklin v. Minister of Town and Country Planning[13] had this to say:

> In my opinion, no judicial, or quasi-judicial, duty was imposed on the respondent, and any reference to judicial duty, or bias, is irrelevant in the present case .... I could wish that the use of the word "bias" should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator .... But, in the present case, the respondent having no judicial duty, the only question is what the respondent actually did, that is, whether in fact he did genuinely consider the report and the objections.

The Minister was expected to act in an administrative or executive capacity; it was wholly inappropriate to attach to those duties obligations accepted as essential to judicial decision-making. The Minister's obligation was expressed in terms of compliance with the statute, which included consideration of the report of the official conducting the public inquiry and the terms of the objections.

The third period begins in the early 1960's, when the Courts began to expand the area over which their powers of review would be exercised. Clearly, if review were to be confined to powers exercisable judicially, there would be large new areas, where supervision was necessary or desirable but unavailable, because of the self denying ordinance of the judiciary. A convenient starting point is the often misunderstood decision in Re H.K.[14], where immigration officers at ports of entry into the United Kingdom were described as being required to act fairly, not

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13 [1948] A.C. 87, 102, 103, 104; [1947] 2 All E.R. 289, 295, 296

14 [1967] 2 Q.B. 617; [1967] 1 All E.R. 226.

judicially. The text of Lord Parker C.J.'s remarks follow[15]:

> That [Shareef v. Commissioner for Registration of Indian and Pakistani Residents [1966] A.C. 47] is a clear case where not only was the Commissioner acting judicially or quasi-judicially but also he was required to adopt the judicial processes envisaged by the statute. This, as it seems to me, is a very different case, and I doubt whether it can be said that the immigration authorities are acting in a judicial or quasi-judicial capacity as those terms are generally understood. At the same time, however, I myself think that even if an immigration officer is not acting in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but of acting fairly, and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly.

It will be noted that Lord Parker, while extending the powers of review to those obliged to act fairly, did not see the concepts as synonymous. Rather was he at pains to distinguish them.

There were other Judges who contributed to the extension of the Courts' powers of review to include administrative actions and decisions. One such was Roskill, L.J., who in R. v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association declared[16]:

> Even where the function is said to be administrative, the Court will not hesitate to intervene in a suitable case if it is necessary in order to secure fairness .... For my part, I am not prepared to be deterred by the

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15 Ibid., 630; 231 (emphasis added).

16 [1972] 2 Q.B. 299, 310; [1972] 2 All E.R. 589, 596.

> absence of precedent if in principle the case is one in which the Court should interfere.

The fourth and final period dates from the mid 1970's, by which date it had become clear, at least to the more perceptive Judges, that to treat natural justice and fairness as synonymous was to impair the usefulness of both concepts. An extract from the judgment of Lord Denning, M.R., who was responsible for much of the expansion of review in the preceding period, will serve as an illustration. In Selvarajan v. Race Relations Board[17], it was seen to be necessary to distinguish the Board, a numerous body, from those statutory tribunals which accorded a hearing and otherwise conducted themselves in accordance with the principles of natural justice. Lord Denning, M.R., made these comments[18]:

> In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion. Notably the Gaming Board, who have to enquire whether an applicant is fit to run a gaming club (see R. v. Gaming Board for Great Britain, ex parte Benaim)[19] and inspectors under the Companies Acts, who have to investigate the affairs of a company and make a report (see Re Pergamon Press Ltd.)[20], and the tribunal appointed under s. 463 of the Income and Corporation Taxes Act 1970, who have to determine whether there is a prima facie case (see Wiseman v. Borneman).[21] In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it.

At present we are faced with early authorities, such as Board of Education v. Rice[22], which speak of the obligation of a tribunal conducting a hearing in terms of fairness (which was then identified with natural justice) and recent cases where the word has a quite

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17 [1976] 1 All E.R. 12.

18 Ibid., 19 (emphasis added).

19 [1970] 2 Q.B. 417; [1970] 2 All E.R. 528.

20 [1971] 1 Ch. 388; [1970] 3 All E.R. 535.

21 [1971] A.C. 287; [1969] 3 All E.R. 275.

22 [1911] A.C. 179; supra.

different and much narrower meaning. Unless care is taken, there is a risk that remarks will be taken out of their historical context. An illustration of the need to recall the period when the decision was made will be offered. In Franklin v. Minister of Town and Country Planning,[23] the Minister had been given the power of initiative in relation to schemes for New Towns adopted in the immediate post-war era. If objections were received, he was to arrange for a public inquiry. The inspector would report to him and he would then decide whether to confirm or modify the original scheme. "Bias" in the context of this legislation, given the role in which the Minister was cast, was seen as irrelevant; that principle of natural justice had no application to the duties the Minister was obliged to discharge. If that case were to be argued today, counsel would not be obliged to nail the principles of natural justice to his mast; and, with some mixing of metaphors, sink or swim with those principles; instead he would settle for establishing the lesser obligation, the obligation to be fair, which is expected of those with administrative (non-judicial) functions, such as the immigration officers and the Race Relations Board.

It is appropriate here to discuss in a general way the contrasting obligations. The principles of natural justice have been evolved over hundreds of years and embody the essential elements our legal system demands of those whose functions are akin to the judicial; it may not too inaccurately be described as the essence of justice.[24] Natural justice is recognised as a flexible concept, but in the writer's opinion, while there can be an exclusion by legislation of the nemo judex in sua causa element,[25] hearing requirements and protections are eliminated only at the risk of having the courts find that the function and obligation is administrative (non-judicial) because audi alteram

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23 [1948] A.C. 87; [1947] 2 All E.R. 289. See p. 8, supra. The decision was cited with approval in Hamilton City v. Electiricty Distribution Commission [1972] N.Z.L.R. 605, but the fairhess argument was not presented to Richmond J.

24 See the anthology of phrases collected by S. A. de Smith, Judicial Review of Administrative Action (4th ed., 1980), 156-158. See also the comments of Lord Parker in Re H.K., supra, and the remarks of Lord Wilberforce in Wiseman v. Borneman [1971] A.C. 297, 320; [1969] 3 All E.R. 275, 287, where he spoke of the justice not being so rough as to justify intervention.

partem has been rendered inapplicable. Both natural justice and fairness are flexible concepts, taking their contents from the context and circumstances in which the power is exercisable, but each has its defined area. In many aspects, the content will be similar, but the person with judicial functions will inevitably have a more onerous duty to perform, and, if he fails to discharge it, this will render the resulting decision open to attack in circumstances not available in respect of administrative (non-judicial) decision-making.

The circumstances when the duties attaching to natural justice or fairness must be discharged are determined primarily by the legislation, but some sub-rules of interpretation have developed.[26] The Courts insist that they are looking for evidence of legislative intent; it has not been difficult to find legislative intent that natural justice apply in many, if not most, licensing statutes. But such an intent would be unlikely to be imputed to the legislature in citizenship, immigration, deportation, or passport legislation under which powers of decision are commonly assigned to a Minister. If the legislation calls for numerous decisions, e.g., social security or similar benefits, there is a greater likelihood that fairness will be the test, not natural justice with its accompanying procedural protections which necessarily slow down decision-making.

The decisions bear this out. The first list which follows includes decisions taken since 1960 where the function of the decider was held to be judicial; the second list includes those tribunals which the Courts required to satisfy the principle of fairness.[27]

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25 This was done by the Act examined in Jeffs v. New Zealand Dairy Production and Marketing Board, [1967] N.Z.L.R. 1057; [1967] 1 A.C. 551.

26 Consider for example the relevance of the so called Durayappah factors to the question whether natural justice applies.

27 Too much should not be taken from the examples in each list; they are placed where they appear by a Court attempting to construe the particular legislation to discover legislative intention.

Judicial: compliance with natural justice expected.

Town planning decisions made in New Zealand by local bodies (and the appellate authority;[28]
decisions made by the Public Service Appeal Board;[29]
decisions involving the taking over of private school;[30]
the exercise of zoning powers;[31]
the exercise by a local authority of powers to close a street;[32]
the exercise of the power of exclusion from a University;[33]
the exercise of the power to fix rentals;[34]
the decision removing persons from office;[35]
the determination of tax issue;[36]
the expulsion from school;[37]
the cancellation of a boxing licence;[38]
the cancellation of a horse trainer's licence.[39]

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28 Denton v. Auckland City Council, [1969] N.Z.L.R. 256; Turner v. Allison, [1971] N.Z.L.R. 833; Anderton v. Auckland City Council, [1978] 1 N.Z.L.R. 657.

29 Thompson v. Turbott, [1962] N.Z.L.R. 298.

30 Maradana Mosque v. Mahmud [1967] 1 A.C. 13; [1966] 1 All E.R. 545.

31 Jeffs v. New Zealand Dairy Production and Marketing Board [1967] N.Z.L.R. 1057; [1967] 1 A.C. 551.

32 Lower Hutt City Council v. Bank, [1974] 1 N.Z.L.R. 545.

33 R. v. Aston University Senate, ex parte Roffey, [1969] 2 Q.B. 538; [1969] 2 All E.R. 964.

34 Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannan, [1969] 1 Q.B. 577; [1968] 3 All E.R. 304.

35 Ridge v. Baldwin, [1964] A.C. 40; [1963] 2 All E.R. 66; Durayappah v. Fernando [1967] 2 A.C. 337; [1967] 2 All E.R. 152; See fn. 47 for contrary decisions.

36 Wiseman v. Borneman, [1971] A.C. 287; [1969] 2 All E.R. 275; Pearlberg v. Varty, [1971] 1 W.L.R. 728; [1972] 2 All E.R. 6.

37 Rich v. Christchurch Girls' High School Board of Governors [1974] 1 N.Z.L.R. 1.

38 Stininato v. Auckland Boxing Association, [1978] 1 N.Z.L.R. 1.

39 Reid v. Rowley, [1977] 2 N.Z.L.R. 472; Calvin v. Carr (1979), 4 A.L.R. 418; [1980] A.C. 574; [1979] 2 All E.R. 440. These cases concern domestic tribunals; statutory interpretation was not involved.

Administrative (non judicial): fairness required.

The entry by non citizens;[40]
some planning decisions made under Australian legislation;[41]
the fixing of a fire levy;[42]
an inquiry into the affairs of company;[43]
the admission to hospital staff;[44]
deportation;[45]
the grant of permanent residence;[46]
removal from some offices;[47]
the grant of a film exhibitor's licence;[48]
the determination of an allegation of discrimination;[49]
the grant of a certificate of character;[50]
the making of a contract;[51]
the grant of an offensive trades' licence;[52]
the grant or refusal of parole;[53]
the investigation and audit of accounts of a chiropodists or podiatrists;[54]
the status of refugees.[55]

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40 Re H.K. [1967] 2 Q.B. 617; [1967] 1 All E.R. 226; p. 8, supra; Schmidt v. Secretary of State for Home Affairs, [1969] 2 Ch. 149; [1968] 3 All E.R. 795.

41 Dunlop v. Woollahra Municipal Council [1975] 2 N.S.W.L.R. 446. For the Privy Council decision on damages, see [1981] 1 All E.R. 1202.

42 T. Flexman, Ltd. v. Franklin County Council [1979] 2 N.Z.L.R. 690.

43 Re Pergamon Press, Ltd., [1971] Ch. 388; [1970] 3 All E.R. 535; Maxwell v. Department of Trade & Industry [1974] 1 Q.B. 523; [1974] 2 All E.R. 122.

44 Roper v. Executive Committee of the Medical Board of Royal Victoria Hospital (1974) 50 D.L.R. (3d) 525.

45 Pagliara v. Attorney General, [1974] 1 N.Z.L.R. 86; cf. Salemi v. Minister of Immigration and Ethnic Affairs (1977) 14 A.L.R. 1 and the other cases discussed by G. A. Flick, "Natural justice before the High Court of Australia: three recent cases" [1978] N.Z.L.J. 90.

46 Chandra v. Minister of Immigration, [1978] 2 N.Z.L.R. 559; Daganayasi v. Minister of Immigration [1980] 2 N.Z.L.R. 130.

47 Buller Hospital Board v. Attorney-General, [1959] N.Z.L.R. 1259; Brettingham-Moore v. Municipality of St. Leonards (1969) 121 C.L.R. 509.

48 Modern Theatres (Provincial) Ltd., v. Peryman, [1960] N.Z.L.R. 191.

Some cases are difficult to categorise. The suspension of a teacher is probably classed as judicial,[56] but the majority in Furnell, having decided that the legislation constituted a code which had been observed, did not need to decide this issue. On balance, the licensing function in the Liverpool Corporation[57] case is seen as administrative, not judicial.

It would be erroneous to conclude, on the basis of these lists, that it was the subject matter which determined whether the function was judicial or non-judicial. Though the subject matter has some influence on the duty of the decider, it is the legislation and the interpretation given to it which determines

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49 Selvarajan v. Race Relations Board, [1976] 1 W.L.R. 1686, [1976] 1 All E.R. 12; R. v. Commissioner for Racial Equality, ex parte Cottrell & Rothon (a firm), [1980] 1 W.L.R. 1580; [1980] 3 All E.R. 265.

50 R. v. Gaming Board for Great Britain, ex parte Benaim, [1970] 2 Q.B. 417; [1970] 2 All E.R. 528.

51 A.B.C. Containerline v. New Zealand Wool Board, [1980] 1 N.Z.L.R 372, [1980] N.Z. Recent Law 169; Waitaki N.Z. Refrigerating Ltd. v. New Zealand Meat Producers Board, unreported, 10 March 1981, Davison, C.J., noted in [1981] N.Z. Recent Law 137.

52 Meadowvale Stud Farm, Ltd., v. Stratford County Council, [1979] 1 N.Z.L.R. 342.

53 Howard v. National Parole Board, (1974) 50 D.L.R. (3d) 349; Ex parte Beauchamp [1970] 3 O.R. 607.

54 Re Weston and Chiropody (Podiatry) Review Committee, (1980) 29 O.R. (2d) 129.

55 Re Taabea and Refugee Status Advisory Committee, (1980) 109 D.L.R. (3d) 664.

56 See the minority opinion in Furnell v. Whangarei High Schools Board, [1973] 2 N.Z.L.R. 705; [1973] A.C. 660; Pratt v. Wanganui Education Board [1977] 1 N.Z.L.R. 476; cf. Malloch v. Aberdeen Corporation [1971] 1 W.L.R. 1578; [1971] 1 All E.R. 1278.

57 [1972] 2 Q.B. 299. In Nakkuda Ali v. Jayaratne [1951] A.C. 66, 78, cancellation of a licence was classified as non-judicial; the legislation called for the Controller to have reasonable grounds for believing that cancellation was called for. Reasonableness and fairness may not coincide.

58 Durayappah v. Fernando, [1967] 2 A.C. 337, 380; [1967] 2 All E.R. 152, 155, per Lord Upjohn. This case added the so-called Durayappah factors when interpreting the legislation to discover legislative intent. See Furnell, [1971] N.Z.L.R. 782 where the Durayappah factors were applied by the New Zealand Court of Appeal.

function. This explains why removal from office features in both lists, as do planning decisions. The terms of the legislation differ; hence legislative intent may be seen to differ. There is an expectation that certain decisions, those which affect livelihood are an example, will be held to be preceded by a judicial procedure, but if the legislation is clear that such a procedure is not intended, cadit quaestio.[58]

CONTENT OF FAIRNESS

We turn now to the next question, what is the content of fairness or, put in another way, in what respects can a person charged with a duty to be fair depart from the principles of natural justice and still satisfy the obligation placed upon him?

We begin with Re H.K.[59] There, the immigration officer, who had formed the impression that the person seeking entry was not a "child", was obliged merely to disclose his impression so that the immigrant could disabuse him.[60] He was not required to give the hearing natural justice would demand.[61] In the Gaming Board case,[62] the applicant was seeking the reasons for the adverse decision refusing him a certificate[63] and details of the adverse evidence. It was held that reasons need not be given and that so long as the gist of the adverse evidence was

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59 [1967] 2 Q.B. 617; [1967] 1 All E.R. 226. It is worth noting that different procedures now govern entry into the United Kingdom. They were of course established by legislation.

60 Ibid., at 633; 231, per Lord Parker C.J. This he had done; there was no unfairness: ibid., 631; 229.

61 See Lord Upjohn in Durayappah v. Fernando [1967] 2 A.C. 337, 346; [1967] 2 All E.R. 152, 154, where it was recognised that urgency might limit, but not deny the opportunity to be heard.

62 R. v. Gaming Board for Great Britain, ex parte Benaim, [1970] 2 Q.B. 417; [1970] 2 All E.R. 528.

63 The circumstances were contrasted with dismissal, as in Ridge v. Baldwin, or deprival of property, as in Cooper v. Wandsworth Board of Works (1863) C.B. (NS) 180; see Denning M.R. at pp. 430-431; 534.

given, this satisfied the requirements of fairness. Chapter and verse were unnecessary. A similar position was taken in Re Pergamon Press Ltd.,[64] where the applicant attempted to convert an investigation under the Companies Act 1948 into a trial, with the right to cross examine witnesses who had given evidence adverse to him. The Court of Appeal, appreciating that reputations or careers might be ruined,[65] expected the inspectors to discharge their administrative tasks fairly. Benaim was applied.

In Maxwell v. Department of Trade and Industry,[66] an attempt was made to require that the inspectors put their tentative conclusions to the witnesses (including Maxwell) to give them the opportunity to refute them. Because of their wider application, Lord Denning's observations about the role of the inspectors deserve to be quoted in full:[67]

> First and foremost: when a matter is referred to an inspector for investigation and report, it is a very special kind of inquiry. It must not be confused with other enquiries which we have had to consider. Remember what it is not. It is not a trial of anyone, nor anything like it. There is no accused person. There is no prosecutor. There is no charge. It is not like a disciplinary proceeding before a professional body. Nor is it like an application to expel a man from a trade union or a club, or anything of that kind. It is not even like a committee which considers whether there is a prima facie case against a person. It is simply an investigation, without anyone being accused....

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64 [1971] Ch. 388; [1970] 3 All E.R. 535; see p. 14, supra.

65 Ibid., 399-400; 539, per Lord Denning M.R. Buckley L.J. described the function of the inspectors as inquisitorial, not judicial; ibid., 406-407; 545.

66 [1974] 1 Q.B. 523; [1974] 2 All E.R. 122.

67 Ibid., 533-536; 126-129. Lawton L.J., too rejected a result which would put inquiries into legal strait jackets; ibid., 539; 132.

> They [the inspectors] should state their findings on the evidence and their opinions on the matters referred to them. If their report is to be of value, they should make it with courage and frankness, keeping nothing back. The public interest demands it. It may on occasion be necessary for them to condemn or criticise a man. Before doing so, they must act fairly by him. But what does fairness demand? That is the question.
>
> Forbes J. thought that, in order to do what was fair, after hearing the evidence and studying the documents, the inspectors ought to come to a conclusion (which was necessarily tentative) and put the substance of that conclusion to the witness. He was led to that view by the observation of Sachs L.J., in In re Pergamon Press Ltd., [1971] Ch. 388, 405. I do not think that is right. Just think what it means. After hearing all the evidence, the inspectors have to sit down and come to tentative conclusions. If these are such as to be critical of any of the witnesses, they have to reopen the inquiry, recall those witnesses, and put to them the criticisms which they are disposed to make. What will be the response of those witnesses, They will at once want to refute the tentative conclusions by calling other witnesses, or by asking for further investigations. In short, the inquiry will develop into a series of minor trials in which a witness will be accused of misconduct and seek to answer it. That would hold up the inquiry indefinitely. I do not think it is necessary. It is sufficient for the inspectors to put the points to the witnesses as and when they come in the first place. After hearing the evidence, the inspectors have to come to their conclusions ....
>
> The inspector is entitled to at least as much consideration as the advocate. To borrow from Shakespeare, he is not to have "all his faults observed, set in a notebook, learn'd, and conn'd by rote," to make a lawyer's holiday. His task is burdensome and thankless enough as it is. It would be intolerable if he were liable to be pilloried afterwards for doing it. No one of standing would ever be found to undertake it. The public interest demands that, so long as he acts honestly and does what is fair to the best of his ability, his report is not to be impugned in the courts of law.

The contrast between judicial and administrative functions was put most strongly, again by Lord Denning, in Selvarajan v. Race Relations Board,[68] where the Board had investigated a complaint that non promotion resulted from discrimination. Lord Denning emphasised some of the differences in the duties placed on judicial and administrative decision-makers when he declared:[69]

> In all these cases [Benaim, Pergamon and Borneman] it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decisions and make its own report.... The most troublesome point is that several members of the board did not have all the papers. Four of them had only the summary of a 'clearly predictable case' of 1-1/2 pages and a recommendation that the committee should form the opinion of no unlawful discrimination. It may reasonably be inferred that these four were not in a position to form an opinion of their own. They must have gone by the opinion of the other three members who had received all the papers and had read them.
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> If this had been a judicial body, I do not think this would be right. Every member of a judicial

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68 [1976] 1 All E.R. 12; see p. 10, supra.

69 Ibid., 19-20. Refer also to the extract quoted on p. 10, supra.

> body must have access to all the evidence and papers in the case, he must have heard all the arguments, and he must come to his own conclusion. The maxim delegatus non potest delegare applies strictly to judicial functions. But it is different with a body which is exercising administrative functions or which is making an investigation or conducting preliminary enquiries, especially when it is a numerous body. The Race Relations Board has 12 members. The employment committee has seven members. It is impossible to suppose that all of them need sit to determine a matter. Nor that all of those who sit should have read all the papers or heard all the evidence. But I do think that two or three, at any rate, must have done so. If there is a quorum of, say, three, I should think a quorum must have done so. That is the ordinary accepted method of carrying on business. It should be applied here also.

Lord Scarman also emphasised the differences between judicial and administrative procedures in these terms:[70]

> The Race Relations Board does not exercise judicial functions.... the Act is absolutely clear.... The board is an administrative agency charged with a number of critically important functions in the administration of the law; but it is not a judicial institution. ... The procedures are not adverserial but conciliatory: settlement, not litigation, is the business of the board, and it is left to the board to decide how best to perform the functions which the Act requires it to perform, namely, investigation.

That statement was cited with approval by Lord Lane, C.J., in R. v. Commission for Racial Equality, ex parte Cottrell & Rothon (a firm),[71] where it was alleged that reliance on a report made by officers of the Commission rather than the presentation of witnesses for cross-examination was a breach of natural justice. This argument was rejected. As to

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70 Ibid., 24.

71 [1980] 3 All E.R. 265.

cross-examination, Lord Lane declared:[72]

> It seems to me that there are degrees of judicial hearing, and those degrees run from the borders of pure administration to the borders of the full hearing of a criminal cause.... It does not profit one to try to pigeon-hole the particular set of circumstances either into the administrative pigeon-hole or into the judicial pigeon-hole. Each case will inevitably differ.... It seems to me that [the present investigation] is so near an administrative function ... and is the type of investigation or proceeding which does not require the formalities of cross-examination.

The decision of the House of Lords in Wiseman v. Borneman[73] is inconclusive on the point being examined. Provision was made in the Finance Act 1960 for the submission of the tax-payer's statutory declaration and the Commissioner's counter-statement to a tribunal responsible for deciding whether a prima facie case for proceeding further existed. The issue concerned the disclosure of the counter-statement to the tax-payer. Some of the members of the House of Lords placed emphasis on the fact that the tribunal was concerned only with whether a prima facie case existed and did not make a final determination. Lord Wilberforce, who rejected that distinction, said that the "roughness in justice"[74] of statutory procedure had not reached the point when the Court ought to intervene. Probably the function of the tribunal was administrative, with fairness as the appropriate test. Lord Pearson, in another tax case, Pearlberg v. Varty,[75] recognised the narrow range of situations to which natural justice applied and the wide ranging principle of fairness with these remarks:

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72 Ibid., 271. Despite Lord Lane's view that it is unprofitable to pigeonhole each set of circumstances, he does in fact do so, holding that the Commission's tasks, like those discussed in Selvarajan, are principally administrative.

73 [1971] A.C. 297; [1969] 3 All E.R. 275.

74 Ibid., 320; 287.

75 [1972] 1 W.L.R. 534, 547; [1972] 2 All E.R. 6, 17.

> A tribunal to whom judicial or quasi-judicial functions are entrusted, is held to be required to apply [the principles of natural justice] in performing those functions, unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions, there is no presumption that compliance with the principles of natural justice is required, although, as "Parliament is not to be presumed to act unfairly", the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality of hearings or representations and counter-representations.

Barker J. in the Flexman case concerning the fixing of a fire levy had this to say about the duty of fairness:[76]

> I take the view from a consideration of the statute, that the legislature did not intend the rules of natural justice to apply to the first instance determination and imposition of the levy by the fire authority; nevertheless the authority is under a duty to act fairly....
>
> What is "fair" will vary greatly, depending on the circumstances. Should a fire authority, as a matter of fairness, disclose a report to the persons affected, and receive other submissions on it before deciding the matter. Any case of complexity will require as a basis for discussion a report for the benefit of the fire authority prepared by somebody with the qualifications of [the assessor]. His report shows that he gave consideration to the various factors set out in [the statute].... Had the first defendant not commissioned such a careful report from somebody clearly familiar with the problems involved, but instead had attempted some sort of arbitrary apportionment, then fairness would have required it to act differently. Fairness in this case was complied with by the prompt forwarding of [the assessor's] report by the first defendant to the plaintiff on request.

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76 T. Flexman, Ltd. v. Franklin County Council, [1979] 2 N.Z.L.R. 690, 697-698. The award was set aside because the reasons for it were not stated; this amounted to unfairness because it prejudiced the plaintiff's appeal right.

> The plaintiff thus had the award and supporting material upon which it could evaluate its chances of appeal.

The content of the duty to act fairly will depend upon the circumstances of the case. The content of that duty, unlike the requirements of natural justice, remains to be determined. This was recognised by Mahon J., who declared:[77]

> As the decided cases sufficiently show, there is an inherent difficulty in appraising the objective fairness of a purely administrative decision which attracts judicial review. Unlike the principles of natural justice, which have been shaped in definitive form by centuries of experience, the doctrine of fairness defies any general classification. Its application to the administrative decision represents the function of a group of variables comprising the intermingled elements of fact and law which control the decision, and it is not possible, as it is with natural justice, for the law to prescribe a code of administrative procedure. Everything turns on the circumstances of the case. Conduct which is fair in one situation may be conduct which is unfair in another.

Halsbury will be allowed the final word on the content of fairness: it declares:[78]

> The content of the rules of natural justice is not stereotyped, and a duty to act judicially does not necessarily connote an obligation to observe the procedural and evidential rules of a court of law. In some situations, where it has been said that a deciding body is under a duty to act fairly, a distinction appears to have been drawn between such a duty and a more rigorous duty to act judicially in accordance with natural justice; but, given the flexibility of the rules of natural justice, the meaning of this distinction

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77 Meadowvale Stud Farm, Ltd., v. Stratford County Council [1979] 1 N.Z.L.R. 342, 346. "Impartiality is subsumed within the whole concept of fairness"; ibid., 348.

78 Halsbury's Laws of England (4th ed., 1973), V.1.,para 66. The footnotes have been omitted.

> is not always clear, and a duty to act fairly can generally be interpreted as meaning a duty to observe certain aspects of the rules of natural justice, though in some situations the expression is used without reference to procedural duties.

As to the need for a hearing, fairness does not require that the parties be accorded this opportunity in every case. In the words of Wootten J. in Woollahra:[79]

> Fair exercise, as contrasted with natural justice, would not necessarily involve a hearing, or might involve a hearing on some occasions and not on others.

NEED FOR CLASSIFICATION

If the general principle that functions characterised as judicial demand compliance with the principles of natural justice, but that those classified as administrative require the duty of fairness to be discharged, it remains necessary in any given case first to settle the question of categorisation - was it intended that the function be exercised judicially or administratively? It can then be determined what in the particular case is called for. The content of the duty will obviously be different if the tribunal is seen to be at that end of the spectrum bordering on a criminal cause[80] from one at the other end where few characteristics of a criminal trial will be found. Most administrative decision-making is of the latter kind. Where decision making is "departmentalised",[81] rather than the work of an identifiable individual or group of individuals, a hearing in the strict natural justice sense will be impossible: decisions will be taken on the basis of the

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79 Dunlop v. Woollahra, [1975] 2 N.S.W.L.R. 446, 471.

80 Lord Lane, C.J., in R. v. Commission for Racial Equality, ex parte Cottrell and Rothon (a firm) [1980] 3 All E.R. 265, 271.

81 See the remarks of Lord Shaw of Dunfermline in Local Government Board v. Arlidge, [1915] A.C. 120, 135-139.

information available on the file and the decision-maker's knowledge of policy and procedure. It is becoming clear, however, and perhaps the trend will be accelerated by the results of the Inquiry into Governmental Information, that the Courts are insisting on broader disclosure, including statements of reasons, than hitherto. The reply that the function is administrative (and therefore immune from review) is no longer acceptable. We can look forward to more cases of the A.B.C. Containerline kind,[82] where the exercise of statutory powers to enter into contractual relations with a third party, will be reviewed. Not only tribunals, but other statutory corporations including local bodies, can be expected to be subject to review under the Judicature Amendment Act 1972.[83]

POSTSCRIPT

The conclusion implicit in the foregoing account is that the conceptual approach, calling for a classification of function into legislative, judicial or administrative, in order to determine the obligations to be discharged by the particular decider, remains essential to the understanding of much of Administrative Law. There are some who do not support that point of view and who treat natural justice and fairness as

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82 A.B.C. Containerline v. New Zealand Wool Board, [1980] 1 N.Z.L.R. 372, noted in [1980] N.Z. Recent Law 169.

83 The decisions taken by the High Court are summarised in the Reports of the Public and Administrative Law Reform Committee. They are grouped under these five heads:

(a) Decisions taken by Ministers:
(b) Decisions taken by Government officers:
(c) Decisions taken by local authorities:
(d) Decisions taken by statutory tribunals: and
(e) Decisions taken by Courts.

synonymous.[84] Others have suggested that the classification is unproductive and is going out of favour.[85]

But there are indications of a contrary kind, quite apart from the numerous decisions already cited, where the distinction between natural justice and fairness has been deliberately drawn. For example, the Australian Administrative Decisions (Judicial Review) Act 1977, s. 3., defines the decision to which the Act applies as a "decision of an administrative character...." But when regard is had to the grounds of review in ss. 5 and 6, breach of natural justice in the making of the decision heads the list. It is presumably legitimate to conclude that to be reviewable the final decision must be "administrative",[86] while the earlier process or procedure to be observed is "judicial" in that natural justice must be observed.

The Canadian Federal Court Act 1970 calls for the distinction to be made.[87] The Ombudsmen Act 1975 also makes the distinction.[88] A recent decision of the House of Lords[89] in relation to the extent of the contempt power also distinguished between "courts" which exercise judicial as distinct from administrative duties. The broadcasting of a programme by the B.B.C. was said to be contempt by reason of proceedings before

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84 Cf. the remarks of Lord Morris of Borth-y-Gest in Furnell v. Whangarei High Schools Board [1977]: "Natural justice is but fairness writ large and judicially. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions".

85 See, e.g., Lower Hutt City Council v. Bank [1974] 1 N.Z.L.R. 545, 548, per McCarthy P. who declares that the "former clear-cut distinctions have been blurred of recent years ...." and K. J. Keith, "The courts and the administration: a change in judicial method" (1977), 7 N.Z.U.L.R. 325, 339.

86 See G. D. S. Taylor, "The new administrative law" (1977) 51 A.L.J. 804 and L. J. Curtis, "Judicial review of administrative acts" (1979) 53 A.L.J. 530 for a discussion of the phrase which has now been judicially considered; see Hamblin v. Duffy, unreported 15 April 1981, Lockhart J.

87 Section 28, noted by L. Katz, "Australian Federal administrative law reform" (1980) 58 C.B.R. 341, 353, fn. 81. See also Re Weston and Chiropody (Podiatry) Review Committee (1980) 29 O.R. (2d) 129, 135-136, distinguishing Nicholson v. Haldermand-Norfolk Regional Board of Commissioners of Police [1979] 1 S.C.R. 311; 88 D.L.R. (3d) 671.

a local valuation court. The House of Lords rejected the argument; the court was seen as discharging administrative, not judicial functions. In doing so, it was required to act judicially in the sense of the Atkin dictum[90] and was therefore amenable to certiorari and prohibition. Viscount Dilhorne's judgment includes this statement:[91]

> To sum up, my conclusions are as follows: (1) a local valuation court is a court; (2) it is a court which discharges administrative functions and is not a court of law; (3) consequently, the jurisdiction in relation to contempt of the Divisional Court does not extend to it; and (4) that court's jurisdiction only extends to courts of law and RSC Ord 52, r 1 when it refers to 'inferior courts' must be taken to mean inferior courts of law.

One final question should be raised. In the context of damages for abuse of statutory authority, reference has been made to the doctrine of the separation of powers and to the possibility that immunity from an action for damages may by available in respect of the exercise of judicial and legislative powers. Liability may attach to the mis-use of administrative powers.[92] Will the distinction between acting judicially and acting administratively determine the result in a civil action for damages?

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88 Section 13(1) refers to "a matter of administration" when conferring jurisdiction on the Ombudsman.

89 Attorney-General v. British Broadcasting Corporation, [1980] 3 W.L.R. 109; [1980] 3 All E.R. 161.

90 This is quoted on p. 7, supra.

91 [1980] 3 W.L.R. 103, 116-117; [1980] 3 All E.R. 161, 167.

92 See especially the discussion of these issues by Richardson J. in Takaro Properties Ltd. v. Rowling, [1978] 2 N.Z.L.R. 314, 333 - 337.

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