

The Functional Convergence of Appeal and Judicial Review

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“Judicial review is not the same as appeal” is one of the more common epithets found in administrative law in New Zealand. As neat as it is, however, it is not truly reflective of reality. Often, when considering the determinations of administrative decision-makers, a court will find itself engaging in the same task in judicial review proceedings as it does in certain types of appeal. Despite that functional similarity, however, courts have insisted that the distinction between the procedures is a valid one. In this article, I argue that the epithet above is a significant overstatement, and that in administrative law, there is no functional distinction between review and two types of appeal: those on questions of law and against exercises of discretion. In making my argument, I will first outline the different procedures, before showing that the rationales for differentiating them from one another are no longer sufficient and that the distinction is no longer desirable.

I The Procedures Outlined

At first glance, any argument that suggests appeals and judicial review are indistinguishable appears unorthodox. Peter Cane argues the distinction is “central to understanding the mechanisms and procedures by which ...

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administrative law norms are enforced”.¹ Christopher Forsyth states that the systems are “radically different”² and Michael Fordham notes that to conflate the two is part of the “forbidden method”.³ In New Zealand, Philip Joseph notes that the courts have proclaimed “an essential difference between appeal and review”⁴ whereas Graham Taylor is perhaps the most concise: “Judicial review is not appeal.”⁵

Closer examination, however, reveals a more complicated situation, such that the distinction is “misleading in its simplicity”.⁶ Fordham explains why:⁷

Whether judicial review is like “an appeal” depends on what sort of “appeal”, and what sort of issue, is in mind. There is no universal model of an “appeal”, and some appeals (eg on a “point of law”) are no different from judicial review.

In the context of judicial supervision of administrative decision-making, this nuance matters. Courts in New Zealand, however, seem somewhat determined to ignore it in favour of maintaining the simplified over-generalisation that review and appeal are always fundamentally different procedures. In this article, I want to examine this resistance and argue such a slavish adherence to the distinction can have real, deleterious effects.

To be clear, I do not argue that the distinction between appeal and review is *completely* unviable, although this is an argument that has currency. Arguably, the most ardent New Zealand supporter of such a view is Philip Joseph. Joseph has argued against the proposition advanced by Lord Nicholls of Birkenhead in *Brannigan v Davison*⁸ — that the distinction “is not a piece of empty formalism”⁹ — on the basis that it serves neither as useful guide as to the limits of judicial review nor prevents the court from exceeding those limits.¹⁰ Joseph notes that the distinction fails all three of the purposes it is intended to serve — as the touchstone of judicial review; a restraint on

1 Peter Cane *Administrative Law* (5th ed, Oxford University Press, Oxford, 2011) at 248.

2 HWR Wade and CF Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 26.

3 Michael Fordham *Judicial Review Handbook* (6th ed, Hart Publishing, Portland, 2012) at [15.2].

4 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [23.3.3].

5 Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [4.01].

6 At [4.01].

7 Fordham, above n 3, at [15.2].

8 *Brannigan v Davison* [1997] 1 NZLR 140 (PC).

9 At 148.

10 Joseph, above n 4, at [22.3.4].

unjustified judicial intrusion; and legitimating the Court's power to quash defective decisions — such that it should be regarded as a “relic of the ultra vires era and might be read its burial rites”.¹¹

My argument differs from Joseph's in three important respects. First, Joseph bases his argument on the demise of the ultra vires doctrine. My argument does not depend upon accepting this conclusion, although as I will discuss later in the article, I agree that the ultra vires doctrine no longer suffices as a complete justification for the appeal/review distinction. Second, I have restricted my argument to analysing the convergence between judicial review and two types of appeal: those on questions of law and those against exercises of discretion. Finally, my argument focuses only on appeals against determinations by administrative decision-makers. I express no view on whether the division between appeals and review generally is also untenable. Rather, my argument is that the distinction between appeal and review does not, and should not, always exist. It is an over-simplification, and a problematic one at that.

The over-simplification stems from the fact that New Zealand does not have a universal concept of an “appeal”. The popular conception of what an appeal involves — merits review — only describes one of many types. Those types include “de novo appeals”, “general appeals”, “appeals from discretionary decisions”, “appeals on a question of law” and “appeals by way of case stated”.¹² It is, however, the popular conception that the court has in mind when it makes statements such as: “[a]n application for judicial review is not an appeal, nor is it a fresh hearing of the matter”.¹³ Since some appeals will focus on the merits of a decision and review theoretically focuses on the process, the distinction the court draws here is only accurate regarding some types of appeal but completely inaccurate regarding others. Given the multiplicity of different types of appeal, however, it is perhaps understandable that courts are eager to generalise and simplify. It is an urge that I argue they must resist.

My argument focuses on appeals on questions of law and against exercises of discretion, because, as Matthew Smith observes, there are particular overlaps between the court's role in these two types of appeal and judicial review.¹⁴ However, my argument goes one step further than this observation: there is no functional distinction between these types of

11 At [22.3.6].

12 See Taylor, above n 5, at [4.01] and MB Rodriguez Ferrere “The Unnecessary Confusion in New Zealand's Appellate Jurisdictions” (2012) 12 Otago LR 829 at 830 for a detailed analysis of each type of appeal.

13 *Anderson v Commissioner of Inland Revenue* (2007) 23 NZTC 21,472 (HC) at [25].

14 Matthew Smith *The New Zealand Judicial Review Handbook* (Brookers, Wellington, 2011) at [6.3].

appeals and judicial review. Regardless of the procedure adopted, the court is engaging in the same process of supervising administrative decision-making. The first step in this argument is to outline the court's role in each of these procedures.

A Appeals against exercises of discretion

The distinguishing feature of an exercise of discretion is that it involves an irreplicable decision-making process.¹⁵ Instead of making factual determinations and then applying an appropriate legal norm or standard to arrive at a particular outcome, the decision-maker is faced with having to choose between several and equally valid outcomes.¹⁶ Quintessential examples of exercises of discretion include the granting of bail or name suppression: decision-makers, having regard to several factors, must carefully consider the range of available outcomes and select that which they consider most appropriate.¹⁷ In this way, an exercise of discretion lies in contrast to simple applications of law to fact,¹⁸ and is “to a significant degree an osmotic process and cannot be simply explained”.¹⁹

Since there are several valid outcomes, and the decision-maker may arrive at them through its own view of the situation and weighting of particular factors, an appellate court cannot replicate the decision-making process: it is a matter of subjective appreciation. As neatly explained by Panckhurst J in *A v N*:²⁰

The discussion centres upon whether the area for personal appreciation by the decision-maker is large, in which case the judgment is likely to be discretionary. Where by contrast only one view is legally possible, so that the decision-maker does not have the margin of appreciation inherent in the exercise of a discretion, then the judicial decision is not an exercise of discretion.

Where a decision is discretionary, the appellate court's view is no better and carries no greater weight than the original decision-maker's. The resulting margin of appreciation owed to the decision-maker manifests in a restriction

15 Rodriguez Ferrere, above n 12, at 833.

16 At 832–833.

17 *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [43].

18 At [43].

19 *Whangamata Marina Society Inc v Attorney-General* (2006) 18 PRNZ 565 (HC) at [11].

20 *A v N* HC Christchurch AP37/02, 18 March 2003 at [37].

of the circumstances when the appellate court will intervene and reverse the decision. The Supreme Court in its decision in *Kacem v Bashir* has restated those circumstances.²¹ The decision-maker must have: committed an error of law or principle; taken into account irrelevant considerations; failed to take account of relevant considerations; or arrived at an outcome that was plainly wrong.²² In other words, in circumstances where the decision-maker was acting beyond the scope of its discretion, the court may intervene. Otherwise, the court must not disturb the original decision. As White J explained in the context of an appeal against a decision of the Broadcasting Standards Authority:²³

The requirement for the Court to hear and determine an appeal as if the decision of the Authority had been made in the exercise of discretion means that the Court may not simply substitute its judgment on the issues for that of the Authority. ... In the present context the High Court is entitled to give due deference to the decision of the Authority which is, as has already been noted, a specialist tribunal.

Unfortunately, this relatively straightforward approach to discretionary decisions is stymied by problems of categorisation. Statute seldom indicates when the decision on appeal is discretionary, and in the absence of that statutory guidance, determining whether a decision had one or several permissible outcomes is extremely difficult.²⁴ Writing in 1969, Kenneth Keith identified three factors that only increased the likelihood of a decision being discretionary, with eight additional factors indicating the breadth of that discretion (and thus the degree of deference owed to the decision-maker).²⁵ Over 40 years later, the same issues persist. For example, as Taylor notes, two parallel lines of authority existed as to whether decisions of professional disciplinary bodies on penalties were discretionary.²⁶ In the face of myriad conflicting decisions, a Full Court of the High Court in *Sisson v Standards Committee 2 Canterbury-Westland Branch* determined the matter in early

21 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

22 At [32].

23 *Reekie v Television New Zealand Ltd* HC Auckland CIV-2009-404-003728, 8 February 2010 at [21]–[22].

24 Appeals against decisions of the Broadcasting Standards Authority — that which was at issue in *Reekie* — are one of the few instances where statutory guidance is provided. Per s 18(4) of the Broadcasting Act 1989: “The court shall hear and determine the appeal as if the decision or order appealed against had been made in the exercise of a discretion.” Such guidance is the exception rather than the norm.

25 KJ Keith “Appeals from Administrative Tribunals: The Existing Judicial Experience” (1969) 5 VUWLR 123 at 135–151.

26 Taylor, above n 5, at [4.07].

2013, holding that these types of decisions were value judgements and thus not discretionary in nature.²⁷ Later that year, the Court held in *Davidson v Auckland Standards Committee 3* that *Sisson* ought to be followed because “it [was] the most recent view of a Full Court of this Court”,²⁸ indicating that it might be the final word on the matter. However, only two months prior to that second decision, the Court adopted a contrary approach in *Kumandan v Real Estate Agents Authority*.²⁹ The only certainty, therefore, is that distinguishing discretionary decisions from non-discretionary decisions is a complicated task. Thus, while there is consensus over the court’s role in appeals against discretionary decisions, the preliminary question of when it needs to adopt that role is the difficulty.

B *Appeals on questions of law*

Appeals on questions of law suffer from a different, but equally problematic, issue of classification. Unlike appeals against exercises of discretion, appeals on questions of law are necessarily demarcated by statute.³⁰ Faced with a statutorily restricted right of appeal, appellants are incentivised to frame their grounds of appeal as questions of law, and the court must prevent the appellant from exceeding its statutory appeal rights. The classification issue is thus not what type of appeal is before the court — statute always provides the answer to this — but instead whether the matter on appeal is truly a question of law.

Justice Blanchard, for a majority of the Supreme Court in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, stated both the role of the court in such appeals and the classification issue that arises:³¹

These are appeals on questions of law. They are not general appeals. We were not asked to say whether the [Commerce] Commission’s decision is the best outcome. It may not be. The questions asked of us, instead, were the much more limited ones of whether the Commission has, in the first place,

27 *Sisson v Standards Committee 2 Canterbury-Westland Branch* [2013] NZHC 349, [2013] NZAR 416 at [14]–[15]; and Taylor, above n 5, at [4.07].

28 *Davidson v Auckland Standards Committee 3* [2013] NZHC 2315, [2013] NZAR 1519 at [9].

29 *Kumandan v Real Estate Agents Authority* [2013] NZHC 1528 at [7].

30 For example, s 100(2) of the Telecommunications Act 2001, the statute at issue in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153, discussed below, restricted appeals against decisions of the Commerce Commission to questions of law only.

31 *Vodafone*, above n 30, at [50] (footnotes omitted).

misinterpreted what is required of it by the Telecommunications Act and, secondly, if not, whether what it has done is nevertheless so misconceived that it is an unlawful decision.

Thus, a question of law can arise either when the decision-maker misinterprets the law or arrives at a “misconceived” outcome. An earlier decision of the Supreme Court — *Bryson v Three Foot Six Ltd*³² — held that “misconceived” means that the “proper application of the law requires a different answer”.³³ This is the second type of error of law enunciated by Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow*.³⁴ Where a decision is baseless, contradictory and/or unreasonable, the decision-maker must have misconstrued or misapplied its legal powers, therefore justifying an appellate court’s intervention.³⁵

The meaning of reasonableness in Lord Radcliffe’s formulation is a matter of debate. In the recent decision of *New Zealand Transport Agency v Architectural Centre Inc*,³⁶ Brown J was clear that reasonableness in the context of a question of law is not used in the same way regarding exercises of discretion, where different decision-makers could “reasonably” arrive at different outcomes without appealable error.³⁷ Instead, as Brown J notes, Lord Radcliffe was clear that reasonableness meant “only one possible conclusion was in contemplation as being reasonable: one in which the true and only reasonable conclusion contradicts the determination”.³⁸ This is in contrast to the view of Wild J in *Wolf v Minister of Immigration*,³⁹ who held a decision that is “unreasonable” in administrative law terms (a standard that will vary with the context, and does not suggest that only one reasonable conclusion exists) is erroneous in law for the purposes of appeals on questions of law.⁴⁰

Regardless of which formulation is accepted, however, it is folly to think that there is any objectivity in second type errors of law. As Timothy Endicott notes, Lord Radcliffe’s formulation risks manipulation and misappropriation by an appellate court.⁴¹ There is a degree of objectivity in determining whether an outcome is “baseless” or “contradictory”, since it focuses on the parity

32 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

33 At [26].

34 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL).

35 At 36.

36 *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, [2015] NZRMA 375.

37 At [21].

38 At [22].

39 *Wolf v Minister of Immigration* [2004] NZAR 414 (HC).

40 At [41].

41 Timothy Endicott “Questions of Law” (1998) 114 LQR 292 at 306.

between that outcome and its justification. In contrast, and despite Brown J's insistence otherwise, an "unreasonable" outcome is inherently subjective. To illustrate: Endicott posits an instance of an unreasonable outcome as one where the decision-maker has determined that a "statutory term applies when it clearly does not, or that it does not apply when it clearly does".⁴² Where the statutory term is complex or opaque, "proper application" becomes a difficult task, and determining the "true and only reasonable conclusion" is not necessarily straightforward. Since it has the last word on the correct application of a statutory term, in these circumstances, an appellate court can simply reverse engineer its analysis to legitimate its otherwise unjustified intervention: because it disagrees with the outcome, there must have been a clear misapplication of the statutory term, and therefore it is an unreasonable outcome and an appealable second type error of law. The ease with which a court can manipulate the concept of "reasonableness" in this context increases the risk of jurisdictional creep.

Accordingly, although issues of classification arise at different points, the problem that persists in appeals against exercises of discretion similarly persists in appeals on questions of law. At the core of such appeals, the court's jurisdictional limits are clear. However, since the fringes of the definitions of "discretionary decisions" and "questions of law" are so unclear, the appellate court may find itself examining aspects of a decision that, in theory, it should not. The appellate court's role in these respective types of appeal is therefore simple to define in theory — the court must only intervene in matters regarding *x* and defer to the decision-maker's view on *y*, but in practice, since the division between *x* and *y* is blurred, the court's role may deviate significantly from its theoretical bounds.

C *Applications for judicial review*

Encapsulating the court's role when determining applications for judicial review is a very difficult task if one wishes to avoid providing a view on *why* the court possesses this role. This is because, as Hammond J noted in *Lab Tests Auckland Ltd v Auckland District Health Board*, "one of the fundamental difficulties which afflicts judicial review is that there is a widespread disagreement about the fundamental task of the reviewing judge".⁴³ As Hammond J neatly summarised in that decision, the traditionalist view of judicial review's purpose is to restrain administrative decision-makers from acting beyond their legal powers, and the modernist view sees

⁴² At 306.

⁴³ *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776 (CA) at [370].

it as encompassing the additional functions of preventing abuses of public power and incentivising good governance.⁴⁴

However, the core functions of the court in judicial review are not in dispute. The Court of Appeal in *Peters v Davison*⁴⁵ accepted the House of Lords' formulation in *Re Preston* of when judicial review is available: "where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers".⁴⁶ The majority joint judgment of Richardson P, Henry and Keith JJ in *Peters* summarised those different bases by stating that it was the court's constitutional duty to "ensure that public bodies comply with the law".⁴⁷ Ten years later, in arguably its only substantive consideration of the issue, the Supreme Court supported this perspective and formulation of the court's role in judicial review. In *Unison Networks Ltd v Commerce Commission*, McGrath J for the Court advanced a series of simple propositions:⁴⁸

Public bodies must exercise their statutory powers in accordance with the statutes which confer them. If they make decisions that are outside the limits of their powers they abuse them. The courts control any misuse of public power through judicial review.

Those limits might not be explicit, but as McGrath J adds: "[a] statutory power is subject to limits even if it is conferred in unqualified terms".⁴⁹ Thus, as was argued in *Unison*, even if an expert body such as the Commerce Commission is granted by its parent statute a wide discretion to exercise its power as it wishes, that exercise will nevertheless "be invalid if the decision maker 'so uses his discretion as to thwart or run counter to the policy and objects of the Act'".⁵⁰ While this specifically describes improper purpose as a ground of judicial review, taking a very broad perspective, any ground of review fits within this rubric; each can be framed as simply an additional requirement for the proper and valid exercise of public power, and therefore a limit on that power. As McGrath J concludes, the focus is always on the identification of the limits of public power — in all its forms — and not the

44 At [362]–[370].

45 *Peters v Davison* [1999] 2 NZLR 164 (CA) at 180.

46 *Re Preston* [1985] AC 835 (HL) at 862 per Lord Templeman.

47 *Peters v Davison*, above n 45, at 188.

48 *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 (SC) at [51].

49 At [53].

50 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1030, as cited in *Unison*, above n 48, at [53].

merits of its exercise.⁵¹ As long as the decision-maker is acting within the limits of its power, the court will not disturb its decision.

D *A common technique*

The description of each procedure above shows that while there might be differences in justification and rationale, they share significant commonalities. I will discuss this in depth later in this article, but for now, it suffices to note that each of the procedures utilises the same technique: the court is charged with determining the limits of an administrative decision-maker's power, and then determining whether it has exceeded them. That technique is necessary because of the opacity of the procedures. While formal categories such as exercises of discretion, questions of law, and grounds of review might have technical definitions that apply well enough in core cases, at the penumbra there is no clarity. Exercises of discretion are hard to identify; questions of law easily miscategorised; grounds of review hard to distinguish. More often than not, the court must engage in a taxonomical procedure — what power was the decision-maker exercising, and thus when is the court permitted to intervene — before actually determining whether the decision-maker breached the limits of its power. This functional similarity forms the core of my argument for a convergence of the procedures. Before it is possible to make this argument however, I must examine courts' insistence that the procedures are different, and show that this insistence is misconceived.

II The Bases for Delineation

I posit that there are two general reasons why courts, when examining administrative-decision making, feel compelled to delineate appeals and review: the procedures have different genealogies and different effects. This part will explain those reasons, but will also explain why they cannot act as a rationale for delineating judicial review from the appeals with which I am concerned.

A *Differences in genealogy*

As Taylor neatly explains, “[j]udicial review is the product of the common law, reflecting not the direct will of Parliament on who should do what”.⁵²

⁵¹ *Unison*, above n 48, at [54].

⁵² Taylor, above n 5, at [1.01].

Instead, as detailed in the previous part, it is a “separate assessment by the courts”⁵³ as to the limits on public power and whether administrative decision-makers have exceeded them. Appeals are the reverse: a delegation of power by Parliament to the courts to correct certain aspects of administrative decision-making.

Appeals are only as old as the statutes that first provided for them.⁵⁴ Judicial review, in contrast, can trace its lineage to the development of the prerogative writs by the Court of King’s Bench in the late 13th century, making it very much separate to, and potentially older than, Parliament itself.⁵⁵ When New Zealand’s Supreme Court was created in 1841 it was granted a jurisdiction “as fully as Her Majesty’s Courts of Queen’s Bench Common Pleas [sic] and Exchequer at Westminster have in England”,⁵⁶ and thus inherited the same inherent jurisdiction possessed by the Queen’s Bench. The inherent jurisdiction of the High Court (as it is now termed) is preserved by s 16 of the Judicature Act 1908, and although the Judicature Amendment Act 1972 and the High Court Rules streamline judicial review procedures, at no point does statute grant, confirm or otherwise modify the Court’s inherent jurisdiction to engage in judicial review.⁵⁷

The different sources of the court’s power in appeal and judicial review might seem sufficient reason to distinguish them. However, that these procedures have different geneses does not by logical necessity mean that they are different in substance. There was an additional rationale for why the distinction was important, which came through the rise of the Diceyan model of ultra vires in the 19th century.⁵⁸ As Paul Craig identifies, a conceptual distinction between appeal and review was a necessary consequence of this traditional ultra vires model — and fundamental to its validity.⁵⁹ The ultra vires model saw Parliament as unassailably sovereign and omni-competent with a legislative monopoly over the scope of all government power.⁶⁰ Under this model, the court’s inherent jurisdiction to engage in judicial review

53 At [1.01].

54 In New Zealand, the first reference to any type of appeal was the Municipal Corporations Ordinance 1842 5 Vict 6, cl 71 and the first reference to appeals on questions of law the Land Claims Settlement Act 1856 (19 and 20 Vict 32), s 13. For the first reference to appeals on exercises of discretion see *McGregor v McGregor* (1889) 7 NZLR 538 (SC) at 547.

55 Philip A Joseph “The Demise of Ultra Vires — Judicial Review in the New Zealand Courts” [2001] PL 354 at 357 and 363–364.

56 Supreme Court Ordinance 1841 5 Vict 1, cl 2.

57 Marcelo Rodriguez Ferrere “The Inherent Jurisdiction and its Limits” (2013) 13 Otago LR 107 at 113.

58 PP Craig *Administrative Law* (7th ed, Sweet & Maxwell, London, 2012) at 6.

59 At 7.

60 At 4.

is framed as simply a mechanism to safeguard Parliament's legislative monopoly; the core task of a court in judicial review is to determine the validity of an administrative decision-maker's actions measured against the breadth of their statutory mandate to act.⁶¹ Appeal, on the other hand, was a statutory grant by Parliament to a court that allowed it to substitute its view for a decision-maker's in certain areas. Adherence to this model forced an adherence to a general distinction between appeal and review.

As the *ultra vires* model has fallen out of favour, the foundational principles that fortified the approach, such as the appeal/review distinction, have come under closer scrutiny. As Joseph identifies, “[u]ltra vires review was rooted in the appeal/review distinction, although on any view of the case law the distinction was inherently unstable”.⁶² Writing in 1961, *ultra vires* proponent Wade himself acknowledged that courts “have in effect forgotten the distinction” between appeal and review with regards to appeals on questions of law.⁶³ Fifty years later, the orthodox theory behind the distinction has come under “sustained intellectual assault”⁶⁴ and Wade's reasoning behind the distinction is “outdated”.⁶⁵

It is unquestionable that appeals and judicial review have different genealogies. The question of greater import is the effect and relevance of that difference. As long as there was an adherence to the *ultra vires* model of judicial review, the effect and relevance was fundamental. With the model thrown into doubt, however, it is a difference that may have little impact on whether there is a principled reason for generally delineating appeal and review.

B *Differences in effect — appeals against exercises of discretion*

Separate from the principled, genealogical reason for generally delineating appeal and review is the practical reason for delineating the procedures: they have different effects. The difference is obvious when comparing review with general and *de novo* appeals: in these appeals, simple disagreement by an appellate court with a decision is all that is required to warrant intervention, a threshold considerably lower than judicial review. Less

61 At 7.

62 Joseph, above n 55, at 368.

63 HWR Wade *Administrative Law* (Oxford University Press, Oxford, 1961) at 43.

64 TRS Allan “Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction” [2003] PL 429 at 429.

65 JWF Allison “History to Understand, and History to Reform, English Public Law” (2013) 72 CLJ 526 at 555–556, n 143.

obvious is the difference in effect between review and the appeals that my argument focuses on.

Turning to appeals against exercises of discretion, Cooke P in *Shotover Gorge Jet Boats Ltd v Jamieson*⁶⁶ held appeals against exercises of discretion and judicial review were fundamentally different procedures with different effects. The case involved a challenge by Shotover as to the scope of an appeal to the District Court against a discretionary decision. Specifically, Shotover had sought to argue that in the appeal, “the District Court should not hear evidence and should restrict its inquiry to ‘one of review only’”.⁶⁷ To justify this proposition, the appellant had used judicial review cases such as *Wednesbury*⁶⁸ and *CREEDNZ*⁶⁹ as guidance as to the scope and nature of its appeal. The appellant based this argument, Cooke P (as he then was) held, on a misconception that such judicial review precedents were relevant in determining the scope of a statutory appeal right:⁷⁰

They are not. They are directed solely to the supervisory jurisdiction of the Courts by way of judicial review or the prerogative writs or declaratory proceedings or the like. The grounds on which an appellate Court will interfere with a discretionary decision are wider than those available in judicial control proceedings.

This statement has retained its currency. In particular, it is applied with regularity in appeals against decisions of the Broadcasting Standards Authority: one of the few instances where the governing statute identifies that the court must treat the appeal as one against the exercise of a discretion.⁷¹ One such appeal was the 2011 decision of *Television New Zealand Ltd v West*,⁷² where Asher J strongly reiterated the sentiment of Cooke P, holding that appeals against discretionary decisions are not as “constrained” as judicial review proceedings, and importantly: “There are differences at least in nuance between a Court’s appellate jurisdiction and its supervisory judicial review jurisdiction.”⁷³ One difference suggested by Asher J was that when

66 *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA).

67 At 438.

68 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

69 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

70 *Shotover*, above n 66, at 439.

71 See above n 24. See generally *Television New Zealand Ltd v Ministry of Agriculture and Fisheries* HC Wellington AP89/95, 13 February 1997 at 20; and *Television New Zealand Ltd v Viewers For Television Excellence Inc* [2005] NZAR 1 (HC) at [19]. See also Hanna Wilberg “The Bill of Rights in Administrative Law Cases: Taking Stock and Suggesting Some Reassessment” (2013) 25 NZULR 866 at 877–879.

72 *Television New Zealand Ltd v West* [2011] 3 NZLR 825 (HC).

73 At [11].

determining whether a discretionary decision was “plainly wrong”⁷⁴ — one of the grounds that justifies appellate court intervention⁷⁵ — the court is “not required to consider the contours of *Wednesbury* unreasonableness and depth of review”.⁷⁶ Similarly, in a different context, the earlier decision of *Evans v New Zealand Parole Board*⁷⁷ applied *Shotover* to refuse the application of the administrative law theory of relative invalidity to a decision of the Parole Board under appeal. Justice Miller held that since an “appellate Court’s jurisdiction in relation to a discretionary decision is not synonymous with judicial review”, judicial review authorities, and thus, presumably, its principles, were not relevant to the determination of an appeal.⁷⁸

Thus, there is a firm insistence in *Shotover*, since accepted and reiterated, that the powers of the court in appeals against discretionary decisions are different in effect to those it possesses in judicial review. Whether the *Shotover* principle remains valid nearly 30 years after it was first established is an issue that I will examine in the next part, but for now, it is worth assessing whether it was accurate in the first instance. Both Cooke P’s original statement in *Shotover* and Asher J’s reiteration of the principle in *TVNZ v West* cited the House of Lords’ 1985 decision in *G v G*⁷⁹ as precedent for the proposition, but closer examination indicates that the precedent simply does not apply, and if anything, stands for an opposite conclusion.

The issue in *G v G* was when an appellate court could interfere with a discretionary decision of a county court judge. In his judgment, Lord Fraser of Tullybelton held that the Court of Appeal could not intervene in the decision of a county court judge unless the “judge exercised his discretion upon a wrong principle or that, the judge’s decision being so plainly wrong, he must have exercised his discretion wrongly”.⁸⁰ However, the reason that both Cooke P in *Shotover* and Asher J in *TVNZ* cite *G v G* is what Lord Fraser goes on to say is *not* the threshold for intervention. In an earlier, different decision of the English Court of Appeal, a dissenting judge argued that the threshold should instead be where the appellate court “concludes that the course followed by the judge is one that no reasonable judge having taken into account all the relevant circumstances could have adopted”.⁸¹

74 At [11].

75 See *Kacem*, above n 21.

76 *Television New Zealand Ltd v West*, above n 72, at [11].

77 *Evans v New Zealand Parole Board* [2005] NZAR 328 (HC).

78 At [39].

79 *G v G* [1985] 1 WLR 647 (HL).

80 At 652, quoting Lord Scarman in *B v W (Wardship: Appeal)* [1979] 1 WLR 1041 (HL) at 1055.

81 At 653, quoting Stamp LJ in *Re F (A Minor) (Wardship: Appeal)* [1976] Fam 238 (CA) at 254.

Lord Fraser held that the other members of that Court rightly rejected this threshold, because:⁸²

That is the [*Wednesbury* reasonableness] test which the court applies in deciding whether it is entitled to exercise judicial control over the decision of an administrative body ... It is not the appropriate test for deciding whether the Court of Appeal is entitled to interfere with the decision made by a judge in the exercise of his discretion.

Lord Bridge of Harwich agreed with Lord Fraser, and emphasised the distinction:⁸³

I am sure it is important to keep well in view the distinction, although a fine one, between grounds on which the court will allow an appeal from an exercise of a judicial discretion on the one hand and the more restricted grounds on which it will review the exercise of an administrative discretion on the other hand.

These dicta show that the distinction made by their Lordships in *G v G* is not one between appeal and review, but instead judicial and administrative discretions. The focus of their Lordships' analysis is upon the nature of discretionary decisions by judges in particular and how appellate courts ought to be slow in interfering with them. At no point in the judgment is there analysis of the differences between judicial review and appeals against discretionary decisions; the distinction is made between judges and administrative decision-makers. In light of this, Cooke P's reliance on *G v G* in *Shotover* for the proposition that judicial review and appeals against discretionary decisions are different was misconceived. *G v G* is not authority for this proposition, and if anything, by making a distinction not between the procedures but instead between administrative and judicial decision-making, it stands for the reverse. Had the case involved an appeal against an administrative decision-maker and not a county court judge, it appears that their Lordships might have accepted that the nature of the discretion exercised was administrative, and a *Wednesbury* reasonableness test was appropriate. Their focus was on the nature of the power and who was exercising it rather than what procedure brought the matter before them.

If Cooke P's reliance on *G v G* for the proposition that there is a difference between appeals against discretionary decisions and judicial review proceedings was a mistake, then it was a problematic one, for his statement on the difference — now without sufficient authority or substantive

82 At 653.

83 At 656.

explanation — has been applied and adopted in numerous cases since. As noted above, Miller J applied the *Shotover* principle in *Evans* to support the proposition that administrative law concepts such as the relative theory of invalidity have no place in the court's appellate jurisdiction, despite the fact the Parole Board in that case was exercising a discretion that was arguably more administrative than judicial. Had he applied *G v G* directly rather than the corrupted version in *Shotover*, he might have arrived at a different result. Justice Asher's decision in *TVNZ* is even more concerning, for he cites both *Shotover* and *G v G* for the propositions that judicial review and appeals against discretion are different, and that *Wednesbury* has no utility in the latter procedure. Once again, it is highly unlikely that the proper application of *G v G* stands for the proposition that administrative law principles simply are not relevant in appeals against administrative bodies. This perhaps explains why the many cases in the United Kingdom that apply *G v G* involve appellate courts interfering with judicial decisions, usually involving family law, whereas *Shotover* is applied in cases that involve administrative decision-makers.⁸⁴

If the *Shotover* principle is based on an erroneous application of authority, then it is an error that has been carried forward and given ostensible legitimacy through its consistent application. However, given the error, there is no substantive reasoning for the difference between the appeals and review of administrative decision-making. The rationale seems to be — sometimes explicitly so — that there *must* be a difference because it has always been this way.

C *Differences in effect — appeals on questions of law*

In contrast, it is only a recent development that there has been an insistence on a substantive *difference* between appeals on questions of law and judicial review. Dean Knight and Rayner Thwaites argue that “[w]here an appeal is restricted to points of law, it has been recognised that the approach adopted in appellate review tends to mimic the approach adopted in judicial review”,⁸⁵ and, as those authors note, Keith was of the view in 1969 that distinctions between appeals on questions of law and review “can and

84 Based on searches of citation references for *G v G* in Westlaw UK KeyCite and *Shotover* in LexisNexis New Zealand.

85 Rayner Thwaites and Dean Knight “Review and Appeal of Regulatory Decisions: The Tension between Supervision and Performance” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 215 at 226.

often [do] disappear”.⁸⁶ Even Wade has noted the courts had forgotten the distinction, referring to a 1955 case.⁸⁷ Moreover, Taylor describes error of law as the “basic building block of judicial review” before citing the “classic statement” of *Edwards v Bairstow* — that which also defines the ambit of appeals on questions of law — meaning that the two procedures share a common jurisprudence.⁸⁸ Nevertheless, two recent decisions of the High Court have insisted that they are different procedures, and the principles from one are not transferrable to the other.

The first decision is *Bay of Plenty Energy Ltd v The Electricity Authority*,⁸⁹ which involved appeals on a question of law against decisions of the Electricity Authority. In detailing the relevant authorities for the determination of appeals on questions of law, Ronald Young J adopted the approaches of the Supreme Court in *Bryson* and *Vodafone*,⁹⁰ before making the following observation:⁹¹

It is important to keep in mind in making these assessments that the [Electricity] Authority is an expert body in the electricity industry and that this expertise plays an important part in its fact finding. Many of the decisions in this area are judicial review decisions. There is a clear difference between review and, as here, appeal. Here, a direct challenge to the correctness of the decision is authorised.

In making these comments, Ronald Young J cited the Court of Appeal’s decision in *Major Electricity Users’ Group Inc v Electricity Commission*,⁹² which indicated that the expertise of the Electricity Commission, the Electricity Authority’s predecessor, was relevant to the standard and intensity of review in judicial review proceedings, justifying a more deferential approach by a reviewing court. In holding that there was a “clear difference” between proceedings such as those,⁹³ and the appeal currently before him, Ronald Young J thus appeared to be saying that the expertise of the Authority was not relevant to the determination of a question of law. His use of the word “correctness”⁹⁴ indicated that he would not defer to the Authority at all

86 Keith, above n 25, at 159 as cited in Thwaites and Knight, above n 85, at 226.

87 *Woollett v Minister of Agriculture and Fisheries* [1955] 1 QB 103, as cited in Wade, above n 63, at 43.

88 Taylor, above n 5 at [15.04].

89 *Bay of Plenty Energy Ltd v The Electricity Authority* [2012] NZHC 238.

90 See *Bryson*, above n 32, and *Vodafone*, above n 30.

91 *Bay of Plenty Energy*, above n 89, at [82] (citations omitted).

92 *Major Electricity Users’ Group Inc v Electricity Commission* [2008] NZCA 536 at [56].

93 *Bay of Plenty Energy*, above n 89, at [82].

94 At [82].

when determining the question of law, and this means that the proceedings were in sharp distinction to equivalent judicial review proceedings. Thus, the argument of Ronald Young J is that the key differentiation between appeals on questions of law and review is that the concepts of deference and intensity that apply to the latter are simply not relevant to the former, which is always based on a correctness standard of zero deference to the original decision-maker.

In *T v Immigration and Protection Tribunal*,⁹⁵ decided only four months prior, Collins J adopted a similar approach to Ronald Young J in *Bay of Plenty Energy*. This decision involved an application for judicial review of a decision of the Immigration and Protection Tribunal to deport the applicant to Ethiopia. The focus of the review proceedings was whether the Tribunal made a reviewable error of fact in its decision. Justice Collins noted that while challenging an error of fact would be difficult in an appeal on a question of law, since the applicant had elected to seek judicial review of the decision, the court's approach could be more flexible:⁹⁶

[A]n application for judicial review that is based upon reviewable errors of fact does not necessarily face the same hurdle as an appeal on a question of law that is based upon erroneous factual findings. This is particularly so in cases where the decision-maker's conclusions will have serious consequences for an applicant. In cases such as the present it is incumbent upon the Court to carefully scrutinise the IPT's factual finding ...

This is the same approach taken by Ronald Young J with the opposite result. Whereas a less intense standard of review would have applied to the Electricity Authority, but was irrelevant given the proceedings were an appeal on a question of law, a more intense standard applied to the Immigration and Protection Tribunal, and this was relevant because the proceedings were in judicial review. The judgments thus unintentionally work in concert to prove the rule they invented: the role and approach of the court depends on the type of proceeding, the proceedings were different, and so different approaches were appropriate. This argument is circular, but viewed from a result-based perspective, if that rule was consistently applied, a manifest difference between the two procedures will result in a similar way to that which occurred in the *Shotover* line of jurisprudence: they are different because the courts have treated them differently.

95 *T v Immigration and Protection Tribunal* [2012] NZHC 1871.

96 At [21] (citations omitted). Curiously, and perhaps proving my point, Collins J relied upon, inter alia, *Wolf*, above n 39, for this proposition, which as discussed earlier (and again below), was an appeal on a question of law (not an application for review) that nevertheless imported an administrative law approach to reasonableness.

The High Court, however, is not consistent on this point. In *Chorus Ltd v Commerce Commission*,⁹⁷ Kós J followed United Kingdom precedent and held that there was no material difference between the two procedures. The proceeding involved an appeal by Chorus against a determination of the Commerce Commission. The Commission is essentially an equivalent body to the Electricity Authority in terms of its regulatory role and its expertise, but Kós J's approach to the applicability of judicial review principles in the appeal was in significant contrast to Ronald Young J's approach in *Bay of Plenty Energy*. Justice Kós began his analysis by stating that the two procedures were essentially identical:⁹⁸

There was little disagreement before me on the relevant principles applying to appeals of law ... The governing principles may be drawn from either appeals on questions of law, or judicial review proceedings involving alleged error of law. As the Court of Appeal of England and Wales observed in *E v Secretary of State for the Home Department*, it has become a generally safe working rule that these grounds for intervention are identical across the two streams.

This is a similar approach to that of Wild J in *Wolf*, who held that unreasonableness, as it applies in judicial review, will similarly apply in appeals on questions of law.⁹⁹ Additionally, the House of Lords held in *Gillies v Secretary of State for Work and Pensions*¹⁰⁰ that a “breach of the principles of natural justice is essentially a question of law”.¹⁰¹

However, the most forceful explication of this approach is the decision that Kós J cited in *Chorus*, *E v Secretary of State for the Home Department*.¹⁰² *E* related to the Court's ability to hear an appeal against an earlier determination of the Immigration Appeal Tribunal and the availability of introducing new evidence in the appeal. In resolving the discussion about whether the grounds for challenge of a Tribunal decision would change if the proceeding was a judicial review instead of an appeal on a question of law, Carnwath LJ held for the Court that “[i]t would certainly be surprising if the grounds for judicial review were more generous than those for an appeal. ... There is certainly no logical reason why the grounds of challenge should be wider in such cases.”¹⁰³ Moreover, Carnwath LJ did not restrict

97 *Chorus Ltd v Commerce Commission* [2014] NZHC 690.

98 At [11].

99 *Wolf*, above n 39, at [41].

100 *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781 (HL).

101 At [6].

102 *E v Secretary of State for the Home Department* [2004] QB 1044 (CA).

103 At [40].

that equivalence between appeals on questions of law and judicial review only where the judicial review proceedings involved an error of law. Instead, the dividing line is not between appeal and review, but instead between the various types of appeals themselves.¹⁰⁴

The main practical dividing line is between appeals (or review procedures) on both fact and law, and those confined to law. The latter are treated as encompassing the traditional judicial review grounds of excess of power, irrationality, and procedural irregularity.

There are, of course, some differences between the two procedures, but the subject matter — the grounds giving rise to challenge — are identical.¹⁰⁵

After diverging from Ronald Young J's approach to the general issue as to whether judicial review and appeals on questions of law are similar, Kós J in *Chorus* also diverged from his approach to the relevance of the expertise of the body under appeal. Whereas this was an essentially irrelevant issue for Ronald Young J, once Kós J had accepted that the approaches to error of law under appeal or review were equivalent, he accepted that "greater latitude in reviewing the exercise of a tribunal's fact-finding function will be given where that function involves determination within the tribunal's particular area of expertise".¹⁰⁶ Justice Kós's authority for this principle was the Supreme Court's decision in *Unison*, and as if to underscore the point, he stated that although *Unison* was "a judicial review challenge, as I have already said the principle applies equally in appeals confined to questions of law".¹⁰⁷

Despite the historical ambivalence over the difference between review and appeals on a question of law, in the past three years, one High Court decision has stated that there is a "clear difference"¹⁰⁸ between them, and another High Court decision has stated that they "are identical".¹⁰⁹ There is thus no clear consensus that there is a substantive difference in the effect of the two procedures, and thus this is not a sufficient basis for their continued divergence. Instead, as the next part will discuss, the confusion that these cases represent is instead a good justification for their convergence.

104 At [42].

105 At [42].

106 *Chorus*, above n 97, at [20].

107 At [21].

108 *Bay of Plenty Energy*, above n 89, at [82].

109 *Chorus*, above n 97, at [11].

III The Argument for Convergence

The focus of my argument is functional. The grounds available for appeals against exercises of discretion and questions of law and judicial review are indistinguishable and directed to reviewing the same exercise of power by administrative decision-makers. Any distinction is simply to serve a fruitless task of categorisation for categorisation's sake and serves no useful task in guiding a court as to its proper role when intervening in administrative decisions. Moreover, abandoning the distinction would not represent a leap into the great unknown. There are already indications in statute that such a convergence would represent a gain in practical efficiency, and the merger has not caused difficulty in other jurisdictions. In that sense, the argument has two parts: the redundancy of the status quo, and positive practical impact of convergence.

A *The redundancy of the status quo*

The first step in showing a functional equivalence between the three procedures outlined in the first part of this article is to show the similarities between appeals on questions of law and against exercises of discretion, expanding on the preliminary remarks I made in that first part. The question has never received thorough examination by the courts, with Duffy J's decision in *B v B* perhaps providing a reason for this paucity of analysis.¹¹⁰ This judgment was an attempt to determine the import and application of the Supreme Court's decision in *Austin, Nichols & Co Inc v Stichting Lodestar (Austin Nichols)*.¹¹¹ *Austin Nichols* provided guidance to appellate courts as to their role on general appeals, so long as the decision appealed from was one involving a judgement of fact and degree and not an exercise of discretion.¹¹² The clarity of the guidance was undermined by problems of classification and application, leading to many decisions following *Austin Nichols* spending time determining whether the guidance applied in particular circumstances.¹¹³ In *B v B*, Duffy J held that *Austin Nichols* applied to an appeal against a decision by the Family Court granting a parenting/relocation order under s 143 of the Care of Children Act 2004. In coming to this conclusion, Duffy J noted that:¹¹⁴

110 *B v B* [2008] NZFLR 1083 (HC).

111 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

112 At [17].

113 Rodriguez Ferrere, above n 12, at 829.

114 *B v B*, above n 110, at [43].

to read the appeal right in s 143 as if it were an appeal from the exercise of a discretion would be to constrain an appellant's rights. It would remove from the appellant the right to have his or her appeal dealt with in accordance with the *Lodestar* principles. It would effectively convert the general appeal right, given in s 143, into something resembling a right to appeal on a question of law only.

Justice Duffy, in holding that the effect of treating the decision as an exercise of discretion would mean that the appeal rights would resemble those available on a question of law, is revealing and accurate. Each type of appeal has a restricted set of grounds for intervention by an appellate court. Although the reasons for the restriction are different — it is the *type of decision* that restricts the grounds in appeals against exercises of discretion but the *type of appeal* that restricts the grounds in appeals on questions of law — there is no practical difference between the restricted grounds themselves. This is reflected in the Supreme Court's guidance for such intervention, which is near identical. *Kacem v Bashir* indicated that appellate courts can intervene in discretionary decisions when the decision-maker has: committed an error of law or principle; taken account of irrelevant considerations; failed to take account of relevant considerations; or arrived at an outcome that was plainly wrong.¹¹⁵ *Bryson v Three Foot Six* indicated that appellate courts can intervene in appeals on questions of law when the decision-maker has misinterpreted the law — which includes both error of law and irrelevant/relevant considerations — or arrives at a misconceived outcome that indicates such a misinterpretation has occurred.¹¹⁶ Although the types of appeal are different, the thresholds for appellate intervention are functionally identical.

The second step is to determine whether judicial review shares commonalities with the different types of appeal. Regarding appeals on questions of law, this is not a significant hurdle. In light of the considered analysis in *E*,¹¹⁷ it is safe to assume that the decisions in *Bay of Plenty Energy* and *T* are incorrect, and cases such as *Wolf*, *Gillies* or *Chorus* are correct: the grounds for intervention in appeals on questions of law and review are identical. This view is not only consistent with long-standing House of Lords precedent¹¹⁸ but also New Zealand's historical approach to the issue.¹¹⁹

The cursory discussion of the point in both *Bay of Plenty Energy* and *T* indicates there was an erroneous assumption that the different procedures

115 See *Kacem*, above n 21, at [32].

116 See *Bryson*, above n 32.

117 See *E*, above n 102.

118 *Re Preston*, above n 46, relied upon in *E* at [42].

119 See discussion at above n 85 and 86.

required different approaches — a direct effect of overstating the general distinction between appeal and review. This conclusion is only bolstered by the fact that *T*, in stating that judicial review “does not necessarily face the same hurdle as an appeal on a question of law”,¹²⁰ since judicial review’s approach to reasonableness can vary with the context, ironically relies upon, inter alia, *Wolf*, which was not an application for judicial review, but rather an appeal on a question of law.¹²¹

Equating the grounds for intervention in appeals against exercises of discretion with judicial review is slightly more difficult since there is no equivalent precedent that is as considered and as definitive as *E* or *Chorus*. The decisions of *TVNZ v West* and *Evans* insisted that there was a nuanced difference between the two procedures, but did not articulate a substantive reason for why the difference existed beyond citing *Shotover*, which for the reasons explained above, incorrectly relied upon the House of Lords’ decision in *G v G*. Indeed, it seems the only substantive reason for the difference articulated by the courts is that: they must be different, for otherwise, why do the different procedures exist? Such was the reasoning in *Brownlow v Ministry of Social Development*,¹²² which involved an appeal against sentence after the appellant was convicted on charges of benefit fraud. Justice Williams held that the appeal was one against an exercise of discretion,¹²³ and that this meant any concept of *Wednesbury* unreasonableness was inapplicable. His reasoning behind this conclusion was as follows:¹²⁴

Sometimes these distinctions are more apparent than real, but it is important to remember that the *May v May* [equivalent to the *Kacem v Bashir*] standard is not merely a repeat of the orthodox administrative law grounds of relevance and rationality (in the sense of *Wednesbury* reasonableness). *If it was, there would be no point in having an appeal provision at all.* The respondent goes too far therefore in suggesting that “plainly wrong” means unreasonable or irrational in the *Wednesbury* sense.

Had Williams J made a distinction on the basis of the nature of the decision-maker rather than the nature of the appeal, he might have been on sounder ground. However, the simple presence of an appeal provision cannot suffice as substantive justification for the difference between the two procedures. There will always be substantial overlap in the content of the common law and equivalent statutory provisions, and there is nothing inherently

120 *T*, above n 95, at [21].

121 At n 7 (albeit spelled incorrectly). See also n 96.

122 *Brownlow v Ministry of Social Development* [2013] NZHC 3538.

123 At [11].

124 At [42] (emphasis added).

problematic in cross-pollinating the principles of one with the other. As Lord Steyn noted in *R v Secretary of State for the Home Department, ex parte Pierson*: “[u]ltimately, common law and statute law coalesce in one legal system”.¹²⁵ Parliament consistently codifies or incorporates common law principles in legislation and assumes that the court will apply other common law principles to fill any gaps.¹²⁶

This cross-pollination is clear regarding appeals on questions of law and review. Indeed, the court has *promoted* such overlap in this area. In a Full Court decision of the High Court in *Police v Aylwin*,¹²⁷ Baragwanath J indicated to Parliament that the provision of an appeal on a question of law — rather than existing mechanism of an appeal by way of case-stated — would be a better approach, given it essentially already existed “in the analogous sphere of judicial review [and] may be considered simpler and more efficient”.¹²⁸ Moreover, in its explanation of why appeals on questions of law and judicial review were identical, the England and Wales Court of Appeal in *E* stated that “the history of remedies in administrative law has seen the gradual assimilation of the various forms of review, common law and statutory”.¹²⁹ Far from proving that the two procedures are functionally different, the existence of a parallel statutory procedure may instead show that Parliament has assimilated the extant common law processes.

Moreover, it seems courts have shown no reluctance to apply administrative law concepts such as *Wednesbury* unreasonableness in proceedings other than judicial review. This includes appeals against the granting of a discharge of conviction under s 106 of the Sentencing Act 2002,¹³⁰ and a review of the limits of a trustee’s discretion under the relevant trust deed.¹³¹ Accordingly, a much more efficient and justifiable approach is that of Fogarty J in the recent decision of *Shotover Park Ltd and Remarkables Park Ltd v Queenstown Lakes District Council*.¹³² *Shotover Park* involved an appeal on a question of law against a decision of the Environment Court on the basis that the judge failed to consider a case that dealt with similar factual and legal issues. Determining whether the judge was obliged to consider that

125 *R v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539 (HL) at 589.

126 At 587–588.

127 *Police v Aylwin* HC Auckland, CRI-2005-404-440, 14 September 2006.

128 At [53].

129 *E*, above n 102, at [41].

130 *Commerce Commission v Shukla* HC Auckland CRI-2007-404-229, 21 November 2007 at [2]–[3].

131 *DNZ Property Fund Ltd v Argosy Property Management Ltd* HC Auckland CIV-2011-404-4220, 29 July 2011, applying *Craddock v Crowhen* (1995) 1 NZSC 40,331 (HC).

132 *Shotover Park Ltd and Remarkables Park Ltd v Queenstown Lakes District Council* [2013] NZHC 1712.

similar case, Fogarty J held that “[t]he principles guiding the exercise of statutory discretion do not differ depending on whether the exercise is being judicially reviewed, or heard on appeal”,¹³³ before applying administrative law authorities and arriving at the conclusion that the similar case was not a mandatory relevant consideration.¹³⁴

This simple statement of principle by Fogarty J in *Shotover Park* is conceptually preferable to Cooke P’s assertion in *Shotover Gorge Jet Boats*¹³⁵ that there is a substantive difference between the review of a statutory discretion and an appeal against the same discretion. There is not. The principles that apply are one and the same, sharing all the hallmarks of judicial reticence to intervene unless there is a substantive or procedural legal error. Rather than splitting categorical hairs, I favour an approach akin to that of the England and Wales Court of Appeal in *Noorani v Merseyside TEC Ltd*, which dealt with an appeal against a discretionary decision of the Employment Tribunal:¹³⁶

Such decisions are, essentially, challengeable only on what loosely may be called *Wednesbury* grounds, when the court at first instance exercised the discretion under a mistake of law, or disregard of principle, or under a misapprehension as to the facts, where they took into account irrelevant matters or failed to take into account relevant matters, or where the conclusion reached was “outside the generous ambit within which a reasonable disagreement is possible”, see *G v G* [1985] 1 WLR 647.

The ease with which the Court of Appeal in this decision simply applied *Wednesbury* to an appeal against an exercise of discretion is an acknowledgement, just as Fogarty J stated in *Shotover Park*, that there is essentially no daylight between the applicable principles on review and such appeals. More importantly, in citing *G v G* for this proposition, it shows the misplaced reliance on this decision by Cooke P in *Shotover Gorge Jet Boats* and provides an opportunity for New Zealand courts to use this authority for its proper purpose.

As was the focus in *G v G*, the crux of the analysis is not what mechanism brought the review of the discretionary power to the court’s attention, but instead, the nature of the discretionary power. The House of Lords in *G v G* made a distinction between administrative and judicial discretion. The Supreme Court in *Unison*, similarly, indicated that the court must give proper

133 At [70].

134 At [109].

135 The curious similarity in name to the authority it diverged from is pure coincidence.

136 *Noorani v Merseyside TEC Ltd* [1999] IRLR 184 at 187.

latitude to the expertise of certain administrative bodies. *E* acknowledges that the application of the principles:¹³⁷

will vary according to the power or duty under review; and, in particular, according to whether it is a duty to decide a finite dispute (such as that of a tribunal), or a continuing responsibility (such as that of a minister or local authority).

None of these cases stand for the proposition that the mechanism — review or appeal — will determine the court’s role, and appropriately so, since these mechanisms can and do rely upon the same principles.

Thus, the argument is that the principles applicable to each of judicial review, appeals on questions of law and appeals against exercises of discretion are identical and the mechanism that invokes those principles is irrelevant to their content; the distinction between them is redundant from a principled and functional perspective. The three procedures may have different genealogies and different sources and those differences may have created a legacy of courts enforcing a distinction. However, at their hearts, each procedure involves a court examining the same exercise of public power. It makes sense from the perspective of theoretical consistency and administrative certainty that they are treated as functional equivalents.

B *The practical implications of convergence*

Despite arguing for that functional equivalence, however, I acknowledge that there are some important practical differences between the different procedures. As *E* acknowledges, judicial review will sometimes have an advantage of “relative procedural flexibility”¹³⁸ over appeals since a court has the discretion to expand the scope of the review to subsequent or other decisions.¹³⁹ Taylor makes a similar observation, focusing on the potential advantages judicial review provides over appeals with regard to the admissibility of evidence.¹⁴⁰ Rule 20.16 of the High Court Rules only permits parties to adduce further evidence — that is, beyond that which was

137 *E*, above n 102 at [43].

138 At [43].

139 *R v Secretary of State for the Home Department, ex parte Turgut* [2001] 1 All ER 719 (CA) as cited in *E*, above n 102, at [43].

140 Taylor, above n 5, at 4.03.

before the original decision-maker — in appeals with leave of the court, which it can only grant if special reasons exist for hearing that evidence.¹⁴¹

Acknowledging that different procedures regarding the evidential record apply in appeal and review, it remains questionable whether they have significant impact on the content of that record. The High Court Rules provide the ability to seek a report from the decision-maker¹⁴² and a transcript of evidence before it.¹⁴³ Evidence in judicial review proceedings is usually adduced by way of affidavit, and this method of evidence can properly contextualise the original decision in the same way a report can.¹⁴⁴ Where the focus of an appeal and review is upon the same subject matter — an administrative decision — then it only makes sense that the evidential record will also be the same. As the Court of Appeal noted in *Fiordland Venison v Minister of Agriculture and Fisheries*, “administrative law is not a formal or technical field, but one in which it is vital for the Court to be as fully informed as reasonably possible of the facts and issues as they presented themselves at the time to the authority whose decision is under review”.¹⁴⁵ This must also be a touchstone for an appellate court. The technical differences in these procedures will often be inconsequential, and certainly not sufficient reason for the courts to apply different principles when determining the proceedings.

Taylor indicates that it will be sometimes be advantageous to simultaneously maintain appeal and judicial review proceedings, especially when fresh evidence is likely to be adduced, in order to maximise the chances of that evidence being heard.¹⁴⁶ The case he cites, however, *Marlborough Aquaculture Ltd v Chief Executive of the Ministry of Fisheries*,¹⁴⁷ involved the “complicated”, “difficult” and unique Aquaculture Reform (Repeals and Transitional Provisions) Act 2004 and cannot be considered indicative of normal review and appeal proceedings.¹⁴⁸ In any case, as Clifford J notes in that decision, it would be “somewhat impracticable to distinguish” between the two proceedings in terms of the available evidential record, citing

141 See High Court Rules, rr 20.16(2) and 20.16(3). Different rules apply to those appeals where questions of fact are at issue, but do not concern us for the purposes of this article.

142 High Court Rules, r 20.15.

143 Rule 20.14.

144 *C v Legal Complaints Review Officer* [2012] NZAR 924 at [11] (HC).

145 *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA) at 346.

146 Taylor, above n 5, at [4.03].

147 *Marlborough Aquaculture Ltd v Chief Executive of the Ministry of Fisheries* HC Wellington CIV-2009-485-500, 13 August 2010.

148 At [5].

Fiordland Venison as authority for this approach, thus perhaps indicating that separation is also unnecessary.¹⁴⁹

Finally, I also acknowledge the numerous occasions where the court has entertained simultaneous appeal and review proceedings.¹⁵⁰ However, it is arguable that the existence of such simultaneous procedures is the result of the misconceptions I detailed earlier. In *Tiumalu v Removal Review Authority*,¹⁵¹ Robertson J directed that both the applicant's appeal (on a question of law) and application for review regarding a removal order be heard simultaneously, given "the administrative law nature of many of the arguments" and to ensure "all possible lines of attack" were advanced.¹⁵² Such an approach indicates there was some difference in the effect of each procedure. However, the grounds of judicial review — mistake of fact, failure to take into account relevant considerations, taking into account irrelevant considerations, and substantive unreasonableness — mimicked the grounds of appeal to such a degree that they were essentially all dismissed for the same reasons.¹⁵³ There might have been a perception (by the appellant) that there was a tactical advantage in both appealing and applying for review. Certainly, well-resourced (or desperate) appellants may welcome an opportunity to challenge an administrative decision through two different routes. However, given the similarity of the functions of each procedure, such an advantage is illusory.

The only explanation for the court and an appellant choosing to maintain the two procedures is an obstinate adherence by the court to the misconception that the procedures are fundamentally different and thus would lead to different results. It is an obstinacy that has led Parliament to intervene in immigration law, an area that has attracted many simultaneous appeal and review proceedings. As Taylor notes, the Immigration Act 2009, in response to the popularity of simultaneous appeal and review proceedings against decisions of the various bodies that are under that Act's purview, made it compulsory to consolidate such proceedings into one.¹⁵⁴ Given the cost of maintaining two sets of proceedings — both for the litigants and the court — consolidation is a sensible course in all areas of the law; the functional equivalence of the procedures means there is no practical benefit in maintaining parallel proceedings.

Thus, acknowledging that there are practical differences between the appeals I am concerned with and judicial review, but also arguing they are of

149 At [3] and [56].

150 Smith, above n 14, at [28.5.1].

151 *Tiumalu v Removal Review Authority* HC Auckland HC67/96, 21 October 1996.

152 At 3 as cited in Smith, above n 14, at [28.5.1].

153 At 8; and 12.

154 Immigration Act 2009, s 249; and Taylor, above n 5, at [4.10].

little substantive consequence, I wish to conclude with a forecast as to what proceedings would look like if the distinction between the procedures was abandoned. Helpfully, this is not a difficult task, for such proceedings have already occurred in New Zealand and have occurred in Canada for many decades without incident. Put simply, the practical effect of abandoning the distinction is that one procedure will suffice to cover the issues that would hitherto have required both an appeal and review.

As referred to earlier, one of the most important recent administrative law cases, *Wolf v Minister of Immigration*, provides, as Thwaites and Knight observe, a “vivid example” of abandoning the distinction between appeals on a question of law and judicial review.¹⁵⁵ *Wolf*, standing as it did for a stocktake of New Zealand’s approach to intensity of review, was very important to administrative law jurisprudence. Many, if asked to recount what type of proceeding *Wolf* was, would instinctively reach for judicial review as the answer. It was, however, as I have indicated earlier, an appeal on a question of law under s 117 of the Immigration Act 1987. At no point, however, did Wild J in the decision engage in a justification for why administrative law principles were relevant or why it was legitimate to fuse the two procedures; he simply did so efficiently and without incident.¹⁵⁶ Other cases have taken the same approach, applying administrative law jurisprudence to appeals on questions of law, leading to a rich and thorough analysis of the relevant issues and, most importantly, an attempt to truly clarify the proper role of the court’s intervention without the distraction of considering which type of procedure brought the issue to court.¹⁵⁷

New Zealand courts appear far more reticent in taking a similar approach to appeals against exercises of discretion and applying administrative law principles to those appeals. Canadian jurisprudence provides an excellent example of why that reticence is misplaced. In the Supreme Court of Canada’s decision of *Q v College of Physicians & Surgeons of British Columbia*,¹⁵⁸ McLachlin CJC held that the assumption that “because the Act grants a right of appeal, the matter could be dealt with without recourse to the usual administrative law principles” was “erroneous”.¹⁵⁹ In Canada, the curial approach to administrative decisions does not change simply because a proceeding was brought by way of appeal and not review: an “administrative

155 Thwaites and Knight, above n 85, at 226.

156 *Wolf*, above n 39, at [41].

157 An excellent example is the decision of Mallon J in *Zafirov v Minister of Immigration* [2009] NZAR 457 (HC), in which counsel for both appellant and respondent accepted the applicability of judicial review principles on appeal, making it a thorough and considered judgment.

158 *Q v College of Physicians & Surgeons of British Columbia* [2003] 1 SCR 226.

159 At [20].

decision on a statutory appeal is to be addressed in the same manner as is a judicial review".¹⁶⁰ The existence of a statutory right of appeal — and its various forms — is simply a factor in determining the appropriate standard of review.¹⁶¹

The Canadian jurisprudence shows that any concern in New Zealand about the depth, breadth or intensity of review polluting the proper appellate role is unfounded: courts would find it easier to calibrate their approach to this question once they focus on the nature of the power and the surrounding statutory landscape rather than rigidly conforming to categories of procedure. Indeed, two of the most influential Supreme Court of Canada decisions in administrative law that established approaches for dealing with all aspects of judicial review were originally statutory appeals — not applications for review.¹⁶²

The focus is similar to that of the House of Lords in *G v G*: it is the nature of the power that is relevant; and whilst the procedure used to review that power will obviously have an impact, it should not be so significant that it alters the principles the court adopts. When cases in other jurisdictions — and occasionally, our own — show that a convergence of the different procedures raises no alarm and has significant jurisprudential benefit, it is time for a close consideration as to the worth of maintaining outdated and unjustified distinctions between them.

IV Conclusion

I have argued that there is no functional difference between appeals against exercises of discretion, appeals on a question of law and applications for judicial review. I have done so by, first, outlining the different roles of the court in each procedure and showing that they are all concerned with examining the same type of public power. I then examined the traditional bases for delineating the procedures, and found them wanting: they are either based on doctrine that has fallen out of favour, misinterpreted precedent, or assertions that they have different effects. Finally, I have argued that the commonalities in the procedures make it sensible and efficient to abandon

160 *Meier v Saskatchewan Institute of Agrologists* 2014 SKQB 389 at [23]; and *Ontario Society for the Prevention of Cruelty to Animals v Johnson* 2013 ONSC 7038 (SC) at [4].

161 See *Minister of Citizenship and Immigration v Khosa* 2009 SCC 12, [2009] 1 SCR 339 at [28].

162 *Pezim v British Columbia (Superintendent of Brokers)* [1994] 2 SCR 557; and *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748.

the distinction, as per the long-standing practice in Canada and the approach in some cases in New Zealand.

New Zealand's approach to administrative law craves taxonomies and classifications. Often, those taxonomical exercises can yield significant theoretical benefit.¹⁶³ The distinction between the appeals I have analysed in this article and review is not one of those beneficial exercises. The over-simplified and overstated distinction between appeal and review does not provide the usual benefit of such classification: refined and clear guidance. Instead, that generalised distinction has led to courts applying the same administrative law principles whilst simultaneously insisting that the procedures are different. Worse, a commitment to a universal difference between appeal and review has constrained the courts, forcing the justification and development of parallel approaches to the same exercise of public power for no other reason than to maintain the distinction itself. This makes the distinction between judicial review, appeals on questions of law and appeals against exercises of discretion costly, inefficient and unjustified. Far from clarifying matters, it makes the court's role all the more difficult, distracting it from focusing squarely on the issues that apply to each procedure equally: what circumstances warrant the court's intervention in administrative decision-making.

To adopt the statement of Williams J in *Brownlow*: “[s]ometimes ... distinctions are more apparent than real”.¹⁶⁴ Administrative law is a field replete with problematic distinctions and classifications; it surely does not need another that is, in reality, a phantom.

163 Michael Taggart's “rainbow of review” being an obvious candidate: see Michael Taggart “Proportionality, Deference, *Wednesbury*” [2008] NZ L Rev 423.

164 *Brownlow*, above n 122, at [42].