



HUMAN RIGHTS CENTRE FOR LAW, POLICY & PRACTICE

2 March 2019

National update: policy and legislation 1
International update 2
Recent cases 3

NATIONAL UPDATE:
POLICY AND LEGISLATION

An Equal Pay Amendment Bill was introduced as part of the celebrations of 125 years of women’s suffrage. The Bill’s main aim is to eliminate and prevent sex discrimination in female dominated jobs and make it easier for workers to make a pay equity claim using a more simple and accessible process in New Zealand’s existing bargaining framework. The Bill reflects the recommendations of the Reconvened Joint Working Group of Pay Equity Principles appointed by the Minister of Workplace Relations and Safety and Minister of Women after the election to advise on an earlier piece of legislation which had been introduced by the previous government. The Education and Workforce Committee is due to report back on the Bill in April.

The Employment Relations Amendment Bill passed its third and final reading on 5 December 2018. It makes changes to collective bargaining and union rights in the workplace as a way of increasing fairness between employees and employers and promoting productive employment relationships. The changes take effect in two stages: the first on the day after the Bill receives the royal assent and the second which reflect extensive canvassing by employers relating to employers’ obligations to new and prospective employees who are not union members, on 6 May 2019. For further on the changes see www.parliament.nz/.../bills...laws/bills.../52PLLaw25711/employment-relations-amendment.

An amended Privacy Bill was introduced in March last year and referred to the Justice Committee. The Committee’s report is due in March this year. The Bill implements recommendations in 2011 made by the Law Commission which considered that the legislation needed updating to address the challenges of the digital age. In its present form it includes the promotion and protection of privacy by reference to the relevant international standards which, in turn, dictate its interpretation. For comment on the relationship of the Bill and the present legislation see Naidu v Royal Australasian College of Surgeons [2018] NZHRRT 23 at [44].

The Domestic Violence - Victims Protection Bill which aims to enhance legal protections in the workplace for people affected by domestic violence has had its third reading. The Bill amends a number of pieces of legislation including the Human Rights Act and the Holidays Act. It comes into force on 1 April 2019.

The Court Matters Bill (Tribunal Powers and Procedures Legislation Bill passed into law on 7 November 2018. The bill aims to establish a framework to help courts and tribunals provide what the Government describes as a more modern, customer-centred service. One of the more significant

changes is the Bill's attempt to address the backlog of cases in the Human Rights Review Tribunal by allowing for the appointment of deputy chairpersons.

Part 4A of the NZ Public Health and Disability Act, which bans families who care for their disabled family members from taking discrimination cases about the government's family care policy to court, looks likely to be quashed. Repeal of the provision was one of Labour's campaign promises. A proposal to revoke the law will shortly go before a Cabinet committee and, if approved, before Cabinet.

Changes to the **Protected Disclosures Act 2000** are currently being considered. The purpose of the Act is to encourage people to speak up about serious wrongdoing in workplaces and protect them from losing their jobs or being mistreated. The current legislation is considered not to afford enough protection to citizens who speak up in the public interest. A summary of the SSC recent review of the Act is accessible at www.ssc.govt.nz/sites/all/files/Targeted-Consultation-Summary-May-2018.pdf. Submissions to the SSC opened on 29 October and had to be received by 7 December. The SSC is to report to the Minister with suggested changes early this year.

A pilot **support service for victims of sexual violence** designed to reduce the trauma experienced by sexual violence survivors going through the criminal justice system has been announced. The service will be provided by the Auckland Sexual Abuse HELP Foundation Charitable Trust (HELP) for the next 12 months. Auckland was chosen as the pilot location because of its large metropolitan area with a highly diverse population and a Specialist Sexual Violence Court pilot in operation.

In March the UN Committee with oversight of the Covenant on Economic Social and Cultural Rights endorsed the **Mental Health Inquiry** urging that steps are taken to implement any recommendations it makes. It also recommended ensuring the availability and appropriate provision of mental health services, including community-based care, for those who need them, including prison inmates. Submissions to the Inquiry closed on June 5. Read the Centre's submission at <https://www.auckland.ac.nz/en/law/our-research/research-institutes-centres/human-rights-centre/e-bulletins/march-2019-e-bulletin/mental-health-inquiry-submission.html>.

The Inquiry reported back in November. The report *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* can be read on the Inquiry's website. A response from the Minister is expected this month

INTERNATIONAL UPDATE

In April 2018 the **UN Human Rights Committee** found that New Zealand had violated its obligations under the International Covenant for Civil and Political Rights when it kept two men convicted of rape in preventive detention after they had served their sentences. Although the Committee's decisions are not binding, in theory New Zealand should now reconsider the continued detention of the men and whether to take steps to facilitate their release. The decision – *Miller v New Zealand* - can be read on the UN website at www.CCPR/C/121/D/2502/2014. For comment on the implications in a similar situation see *Genge v Chief Executive, Department of Corrections* [2018] NZHC 1447 (below).

Jan Logie, Under-Secretary for Justice (Domestic and Sexual Violence Issues), presented the Government's most recent report to the **UN Committee on the Elimination of Discrimination against Women** in Geneva on 12 July 2018. The Committee's Concluding Observations on New Zealand's performance which highlighted some areas of progress and achievement including adoption of the Harmful Digital Communications Act and the Vulnerable Children Act and the launch of the Integrated Safety Response pilot, can be accessed at (CEDAW/C/NZL/CO/8).

In November the Human Rights Committee adopted **General Comment 36 on the right to life** in article 6 of the International Covenant on Civil and Political Rights, and provisionally decided that the topic of the next General Comment would be article 21 on the right to peaceful assembly. The General Comment on the right to life is available at: <http://www.refworld.org/docid/45388400a.html>

New Zealand's third **Universal Periodic Review** took place in January 2019. A five-yearly review of our domestic human rights record, the Government's report can be read at <http://www.mfat.govt.nz/assets/Uploads/New-Zealand-Third-National-UPR-Report-as-submitted-to-UN>

RECENT CASES

[Attorney-General v Arthur William Taylor \[2018\] NZSC 104](#)

Can the courts issue a declaration of inconsistency?

This case, which has been eagerly awaited by public law scholars, involved the issue of whether the High Court had the power to make a declaration that legislation is inconsistent with the provision of the NZBORA.

The matter arose out of litigation following the enactment of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act (the 2010 Act). The applicants were prisoners who claimed they had been unlawfully barred from voting in parliamentary elections. They took an action against the Attorney-General (who is responsible for exercising powers, duties and functions subject to the NZBORA) arguing the legislation was inconsistent with the right to vote in s.12 of the NZBORA. At the High Court, Heath J made a declaration that:¹

Section 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010) is inconsistent with the right to vote affirmed and guaranteed in s. 12(a) of the New Zealand Bill of Rights Act 1990 and cannot be justified under s.5 of that Act.

The Attorney-General appealed, arguing that the Court had no jurisdiction to make the declaration. The Court of Appeal dismissed the appeal, considering that it had the power to make a declaration and that it was not unreasonable to do so in this case.²

Section 7 of the Bill of Rights Act requires the Attorney-General to draw to the attention of Parliament the introduction of any Bill that is inconsistent with the Act. In relation to this legislation the Attorney General had found that the legislation did not amount to a justifiable limit. However, that did not impact on the current analysis, the majority of the Supreme Court finding that there was a power to make a declaration of inconsistency and was consistent with judicial function: at [65].

The Attorney-General had argued that making such a declaration was outside proper judicial function because the Court's function was adjudicatory rather than advisory since there was no ability to provide a remedy. The Chief Justice said:

*... the scheme of the NZBORA makes it clear that inconsistency with rights is indeed itself a question of right for which declaratory relief may be sought ... declaration of right is available if inconsistency is a result of executive or judicial action. In such cases declaratory relief may well be in addition to other relief, but will be especially important where no other relief is available... Otherwise there is a rule of law deficit, in relation not only to inconsistency with the right but in relation to absence of justification.*³

¹ *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791

² *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24

³ At 105

In such circumstances, she went on, the declaration is an available remedy for acts of the legislature constituting unjustified infringement of rights. It was the only response available for denial of the right to vote in circumstances which were acknowledged as unable to be justified.

William Young and O'Regan JJ disagreed and would have allowed the Attorney-General's appeal, setting aside the High Court's declaration.

[Smith v Attorney-General \[2018\] NZSC 40](#)

Does wearing a wig amount to freedom of expression?

In our last bulletin we noted the case of Philip Smith who claimed his right to freedom of expression was infringed when the manager of Auckland Prison refused to allow him to wear a wig. In the High Court Wylie J supported his right to wear the wig, seeing it as evidence of his freedom of expression. Although the prison manager subsequently reneged and gave Mr Smith permission to wear the wig – and the issue was therefore moot by the time the case reached the Court of Appeal - the Attorney-General appealed on whether Mr Smith's wish to wear a hairpiece genuinely engaged s.14 of the NZBORA.

The Court of Appeal considered it didn't and Mr Smith sought permission to appeal to the Supreme Court. While the Supreme Court accepted that while whether expressive conduct was confined to conduct which conveyed a meaning raised a question of law of public importance, it refused Mr Smith leave to appeal as it did not see the answer to the question as likely to be decisive of the outcome. The Judges considered that it would have been more relevant to ask whether interference with the way a detained person presented to others could be seen as interfering with s.23(5) NZBORA i.e. infringement of dignity⁴.

[Cook v Housing New Zealand Ltd \[2018\] NZCA 57](#)

The right to housing

Desmond Cook has been a Housing New Zealand (HNZ) tenant since June 2010. In 2012 he asked HNZ to transfer him to a different property claiming his current home was 'unsuitable' for various reasons. When HNZ refused to do so, Mr Cook began litigation that led to the Court of Appeal.

Initially Mr Cook questioned the quality of the housing that he had been provided with. He claimed he had noisy neighbours, did not feel safe, the house was cold and damp and he needed a second bedroom (for a live-in caregiver due to his health problems). When his request was declined, he took the matter up with the Tenancy Tribunal. In the litigation that followed, Mr Cook was asked to reformulate his causes of action and an *amicus curiae* ('friend of the court') was appointed as he insisted on representing himself.

In the High Court Downs J noted that HNZ had the right to make decisions that might otherwise amount to discrimination under the Human Rights Act 1993 about the allocation, reallocation, assignment and reassignment of state housing as a result of the Housing Restructuring and Tenancy Matters Act 1992⁵. State tenants can challenge assessments by HNZ under section 62 of the Social Housing Reform (Housing Restructuring and Tenancy Matters Amendment) Act 2013 which provides for an internal review process allowing a tenant to appeal to the State Housing Appeal Authority. The Residential Tenancies Act 1986 also provides protection.⁶ Despite this, Mr Cook's allegations were considered ill-founded, the Judge finding that it was not Parliament's intention to "confer a private civil right of action" for alleged breaches of the Housing Corporation Act. The legislation was for the benefit of society, not private individuals⁷.

⁴ At [8]

⁵ *Cook v Housing New Zealand Corp* [2017] NZHC 1781 at [22].

⁶ Section 45.

⁷ Above, n **Error! Bookmark not defined.**, at [30].

Under the 1992 Act HNZ was not under “any obligation to provide any housing or particular housing to a tenant”.⁸ As Hinton J had before him, Downs J found there was no proximity between Mr Cook and HNZ. A duty of care should not be recognised for policy reasons as it would “interfere with the administration” of legislation relating to the provision of State housing”.⁹ Mr Cook’s response was to seek special leave to appeal to the Court of Appeal. The Court of Appeal declined leave to appeal, endorsing Downs J’s judgment.

Although the New Zealand Bill of Rights Act 1990 does not include social and economic rights (and therefore a right to adequate housing), it is nonetheless part of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which New Zealand has ratified¹⁰ and the United Nations Committee on Economic, Social and Cultural Rights has recently supported a submission by the New Zealand Human Rights Commission that the Government adopts a human rights-based national housing strategy, asking it to report back on progress within 18 months.¹¹

Young v Attorney-General [2018] NZCA 307

Right to an effective remedy

Ms Young joined the New Zealand Navy in 2008. She was selected for officer training and training with the Royal Navy in the United Kingdom. While in the UK she continued to be paid by the New Zealand navy, the expectation being that she would return to New Zealand on completing her training. During her time with the Royal Navy she was subjected to sexual harassment including non-consensual sexual intercourse. Having made several unsuccessful attempts to complain she took her case to the High Court in New Zealand arguing that the UK Ministry of Defence (MOD) (UK) owed her a duty of care to take all reasonable steps to ensure her safety and not allow her to be subjected to behaviour that created an intimidating, hostile or humiliating environment. By not doing so, the MOD and the New Zealand Attorney-General jointly were vicariously liable for the tort of battery.

The MOD was served without leave of the High Court and claimed absence of jurisdiction¹². Simon France J ruled that the appellant’s challenge to the MOD’s claim of state immunity could not succeed for a number of reasons including that an exception to state immunity for allegations of breaches of fundamental rights is not recognised. While there was a commercial exception, to succeed it would need more ‘systemic state sponsored violations of human rights’ than those alleged. Further, absence of jurisdiction would not be consistent with the dignity of a foreign state as it could require investigation into the internal policies and procedures of the Royal Navy.

Ms Young appealed to the Court of Appeal arguing that New Zealand should recognise a public policy based “iniquity exception” which meant that state immunity did not apply if an impugned activity breached a fundamental principle of justice or some deep-rooted tradition of the forum state. Before the Court she broadened her argument to include the contention that New Zealand had a non-derogable obligation to provide her with an effective remedy for what she had suffered in the UK. This obligation was said to arise through the NZBORA and its affirmation of the Covenant on Civil and Political Rights and various other international treaties and international customary law including the *UN Principles and Guidelines on the Right to a Remedy and Reparation*¹³ and *Draft Articles on State Responsibility*¹⁴.

The issues raised by the appeal were whether New Zealand had an obligation to provide her with a remedy as a matter of domestic law or international law given the violation of Ms Young’s fundamental rights; whether the alleged wrongdoing breached a principle of justice to the extent that the iniquity

⁸ Section 76.

⁹ At [42].

¹⁰ The International Covenant on Economic, Social and Cultural Rights, art 11(1).

¹¹ Isaac Davison “UN ‘shocked’ by NZ’s record on housing, child poverty, incarceration” *The New Zealand Herald* (online ed, 24 April 2018).

¹² *X v Attorney-General* [2017] NZHC 768, [2017] 3 NZLR 115

¹³ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Human Rights Law* GA Res 60/147, A/Res/60/147 (2005).

¹⁴ *Draft articles on responsibility of States for internationally wrongful acts* [2001] vol.2 pt 2 YILC 26

exception to state immunity applied; and whether the Courts in the UK or NZ were the appropriate forum.

After dealing with the theory underlying the concepts of state immunity and jurisdiction generally, the Court addressed the issue of whether New Zealand owed Ms Young a remedy as part of its commitment to the ICCPR through its reference in the long title of the NZBORA. While the Court recognised that there was no reason in principle why the NZBORA could not apply to offshore acts that would otherwise be caught by s.3, the MOD (UK) was not an entity for the purposes of s.3. The appellant's argument that the New Zealand state had an obligation to provide an effective remedy under the NZBORA domestically irrespective of the identity of the wrongdoer was incorrect: at [53]. The question then became whether there was an obligation as a matter of international law as a result of various treaties or customary international law. In relation to customary law, the Court found that international practice did not support the argument that New Zealand had an obligation to provide a remedy for the conduct of Royal Navy personnel in the UK. As for the impact of the treaties, the content of the ICCPR, CAT and CEDAW did not remove the jurisdictional consequences of the doctrine of state immunity: at [79]. The appellant's argument that Ms Young was subject to the de facto and de jure control of the New Zealand state even though the wrongful conduct occurred in the UK was similarly unsuccessful. The Court of Appeal also agreed with the High Court that at common law there is no recognised exception to state immunity for allegations of fundamental human rights.

[WK v Refugee and Protection Officer \[2018\] NZCA 258](#)

Right to refuge

WK was a Turkish national who had made a number of claims for refugee status in New Zealand. The fourth application was declined on the grounds that it repeated what had already been said and was manifestly unfounded and abusive. Following the High Court's dismissal of W's subsequent application for judicial review¹⁵he appealed to the Court of Appeal.

The Immigration Act 2009 recognises a person as a refugee if they meet the requirements of the Refugee Convention. Namely, have a well-founded fear of persecution for reason of race, religion, nationality or membership of a particular group or political opinion, is outside his or her country of origin and is unable or unwilling to avail himself or herself of that country's protection. The risk of persecution must be "well-founded" in the sense of there being a real as opposed to a remote or speculative chance of it occurring. Successive claims may be made if there has been a significant change in the claimant's circumstances since the previous claims.

WK had arrived in New Zealand in 2011 and made his first claim for refugee status in 2012. The claim was based on his conversion to Christianity in 2001. He feared he would be killed or seriously harmed by his Muslim relatives and persecuted by ultra-nationalists and state agents if he returned to Turkey. While the RPO acknowledged there may be some substance to his claim, it was nevertheless dismissed as "speculative or remote". WK then lodged a second claim arguing that he wanted to be a Christian pastor and had posted comments on Facebook criticising Turkish nationalism and the Turkish government. The RPO established that a number of people had made similar posts but the resulting prosecution was limited. When he appealed to the Tribunal, WK added a further ground – his conversion to the Mormon faith. Again any persecution was considered only to be speculative and remote. Although he claimed he was abusing alcohol and had mental health issues as a result of his conversion, the Tribunal did not consider that this reached the threshold of exceptional circumstances of a humanitarian nature and dismissed his appeal. He then made a third claim, alleging he feared returning to Turkey because of his sexuality, political opinions and opposition to the Turkish government and claiming an increased risk of harm following an attempted coup d'état in Turkey. He was again unsuccessful the RPO considering that there was no firm evidence that the coup would have an impact on WK's claim.

The Tribunal, while acknowledging there had been no significant change in WK's actual circumstances, nevertheless found that the issue of his online activity was materially different to earlier information he

¹⁵ *WK v Refugee and Protection Officer* [2018] NZHC 514

had provided. It considered the Turkish government's responses to anti-government and anti-Islamic statements on social media, noting that while people had been investigated for anti-government social media postings there had been few convictions, the government largely responding to dissent by blocking websites. It concluded that WK's social media activity was not such that it gave rise to a well-founded fear of persecution and declined his claim.

His fourth claim - again based on his media activities - was that his profile had increased, people had abused him on twitter and a former acquaintance had emailed the police copying him in informing them of WK's activities. However, the RPO still considered the danger he faced was minimal declining his claim and declaring it abusive. In reviewing the decision Woodhouse J found that it was open to the RPO to decide as he had and his decision was not unreasonable. He also refused to allow WK to adduce further evidence.

WK appealed to the Court of Appeal claiming that:

- (a) The Judge had failed to interpret section 140 of the Immigration Act consistently with New Zealand's international obligations. In particular, he had not given enough weight to the level of scrutiny required under Art.33 of the Refugee Convention (the principle of non-refoulement);
- (b) Had he done so, WK's fourth claim would not have failed given the increase in views of his blog; changes to country information about Turkey that increased the possibility of his persecution; and an email from a former acquaintance dobbing him in to the police; and
- (c) The High Court had erred by refusing to allow him to present further information to the Court.

The Court of Appeal did not consider that the Woodhouse J had been wrong in how he dealt with the implications of Art.33. While New Zealand's international obligations may well be relevant to the exercise of a domestic statutory power, s.140 had been drafted to ensure New Zealand met its obligations under the Convention and was the means by which a proper balance could be achieved between the risk of refoulement and abuse of the system: at [44]. Central to this was allowing subsequent claims where there had been a significant change in the applicant's circumstances.

The Court did not consider that WK's fourth claim established a greater risk than previously because of the increase in the number of third party views of WK's blog. The RPO was entitled to conclude that the number was insignificant and did not realistically alter his risk of being arrested. In relation to the email sent to the police, the Court noted that the Tribunal had taken this into account in WK's third claim and recent convictions for insulting the Turkish President had only attracted suspended sentences. They did not consider this amounted to serious harm. While there was implicit criticism of the weight afforded by the RPO to the information, the Court did not consider the RPO's weighing of the material was unreasonable in the *Wednesbury* administrative law sense. The RPO was entitled to rely on the Tribunal's third decision that there was not an increased risk of WK being investigated but, even if it did happen, the potential consequences would not amount to serious harm. As to whether the fourth claim was "clearly abusive", Woodhouse J concluded that this could include a claim being lodged to prolong the appeal of deportation process. WK argued that this was not correct. If there was a chance of refoulement then the presence of other motives such as avoiding deportation did not render the claim "clearly abusive". The Court, however, held that the RPO was permitted to draw an adverse finding because of the timing of the claim (2 days after WK became liable for deportation), the history of his previous claims and the unmeritorious matter of his subsequent claim: at [61].

As for refusing to allow further evidence, Woodhouse J had pointed out that as the object of the judicial review was to decide whether the RPO had erred, it could not be wrong for a decision maker failing to take into account evidence that had not been before it. While WK's lawyer agreed with this in principle, he submitted that a different approach was required where an individual's human rights and New Zealand's international obligations were at stake. The Court of Appeal disagreed. Orthodox principles applied to an application for judicial review and this was not altered in the refugee context. The High Court's function is to correct jurisdictional, procedural and other errors of law. While mindful of the refugee context and the importance of high standards of fairness, the same rules apply: at [65]. Citing

*D v Immigration and Protection Tribunal*¹⁶ the Court noted that “judicial review should not be seen as a further opportunity to present or supplement evidence.” But in any case the generic country evidence that was to be admitted added nothing to the appellant’s case, the Court noting that “Any change of circumstances that may be taken from this information impacts on journalists and other persons seeking to factually report events and engage in constructive political discourse, rather than those who are primarily involved in expressing derogatory speech using social media”: at [75].

[Singh v Chief Executive Ministry of Business Innovation and Employment \[2018\] NZHC 673](#)

Right to judicial review

On 1 November 2017 Immigration New Zealand issued Pavneet Singh with a Deportation Order. Mr Singh sought judicial review arguing that he had been unable to challenge the decision as he was undergoing compulsory mental health treatment. He applied for an interim stay of the order, pending judicial review of his application.

The case was plagued by procedural difficulties. On 16th February and 21st March 2018 both parties sought, and were granted, adjournments, the Crown giving an assurance that Mr Singh would not be deported until the outcome of the review proceedings was known. Later that day, the Crown filed a further memorandum requesting a one-week extension to file its statement of defence. On the 27th of March, both parties requested another week’s adjournment to discuss alternate options. The Crown then sought a further week to file its statement of defence. Justice Peters granted the request, ordering proceedings to resume on 11th of April. The Crown missed the 5th April filing date and on the 6th of April filed a memorandum that discussions had been unsuccessful.

The Crown objected to Mr Singh’s application because it was outside the 28 days specified in s 237 of the Immigration Act 2009 and attempted to file a notice of appearance under protest to the Court’s jurisdiction under r 5.49 High Court Rules 2016. The Crown also objected to Mr Singh’s application for judicial review because he had missed a filing date - even though its own submission was outside the specified 28 days. When the proceedings were finally heard, the Crown argued that the Court did not have jurisdiction to consider the substantive review unless it extended the time under s 247. It also submitted that the Immigration Act 2009 circumscribed the Court’s inherent jurisdiction in relation to judicial review.

Mr Singh opposed the Crown’s position arguing it was the Court’s constitutional duty to uphold the rule of law. In this case there were special circumstances justifying an extension of time, Mr Singh not having had an opportunity to seek legal advice because he was receiving mental health treatment. He was simply seeking an interim order to preserve his position. The Crown claimed that Mr Singh’s position was contrary to the principle of legality and the rule of law even though the effect was to implicitly deprive the Court of its inherent jurisdiction to supervise abuse of power by the executive via judicial review.

Where there are “uncommon, not commonplace, out of the ordinary, abnormal”¹⁷ circumstances which warrant it, the Court can grant an extension of time to commence review proceedings. Justice Palmer found that there were special circumstances in Mr Singh’s case warranting the Court’s discretion to extend the statutory deadline in s 247 of the Immigration Act. He made an interim declaration under the Judicial Review Procedure Act 2016 stopping the Crown taking steps to deport the applicant pending the final outcome of the review and upholding Mr Singh’s right to judicial review under s 27 of the NZBORA, including his entitlement to have his proceedings determined on the merits rather than on a technicality.

¹⁶ [2014] NZHC 3017

¹⁷ *Rajan v Minister of Immigration* [2004] NZAR 615 (CA), affirmed in *Dahiya v Chief Executive of the Ministry of Business, Innovation and Employment* [2016] NZCA 546 at [11].

The implications of complying with the statutory requirements of the Immigration Act in a claim for refugee status were considered in some detail more recently by the Supreme Court in [H v Refugee and Protection Officer \[2019\] NZSC 13](#).

The appellant, H, was a Pakistani national who claimed refugee status on the basis that he risked being killed by the Taliban if he returned to Pakistan. On arriving in New Zealand he provided information in support of his claim. An interview with a RPO was scheduled for 10th May. On the 9th H developed stress-related diarrhoea and a headache. He visited an emergency clinic and was given a medical certificate saying he was unfit for a week from the 9th. On the 10th his lawyer emailed the RPO saying that his client would be unable to attend the interview. The RPO replied saying to reschedule the interview H would need a medical certificate that complied with the requirements set out by the Refugee status branch of MBIE in an explanatory booklet. When the lawyer emailed the medical certificate his client had received from the Clinic the RPO replied it was unacceptable because it wasn't in the proper format (picture not Word or PDF) and did not satisfy the requirements necessary to cancel an interview. Two days later the RPO declined the appellant's claim for refugee status because he had "failed to attend" the meeting and s.149(4) of the Act applied. As a result H was unable to appeal to the Tribunal about the decision declining him refugee status. Had he been able to do so the Tribunal would have decided his claim on the merits *de novo*.

Effectively the Act contemplates for two independent assessments of an applicant's claim. It is possible to appeal the Tribunal's decision to the High Court and Court of Appeal (with leave) and there is a right to seek judicial review (again with leave) but only after the right of appeal to the Tribunal has been exercised. H sought judicial review but both the High Court and Court of Appeal dismissed his application because there had been no initial determination by the Tribunal. The Supreme Court had to decide whether, given the circumstances in which the RPO reached the decision that H should not be recognised as a refugee, judicial review proceedings could be brought in relation to that decision (or the previous decision to determine the claim without having interviewed him) without the appellant having first appealed to the Tribunal and had the appeal determined by the Tribunal.

The Court found that the consideration of a claim for recognition as a refugee had miscarried in this case. The result was a decision that was, in substance, a refusal to engage with the intended statutory process based on incorrect application of s.149(4). This deprivation was not corrected by the appeal process. The Supreme Court allowed the appeal remitting the proceedings to the High Court finding that the Court was not precluded from dealing with his application and granting a remedy if it determined that it should.

[Te Whatu v Department of Corrections \[2017\] NZHC 3233](#)

Right to freedom of association

Mr Te Whatu is 43. He had a major head injury when he was young and is being treated for paranoid schizophrenia. Although he lives in a night shelter, he has been with his partner for about seven years. They have a child and his partner has an eight-year old child from a previous relationship. The children live with their grandparents, but sometimes stay with their mother. Between 1999 and 2003, Mr Te Whatu was convicted of a number of indecent and sexual assault charges against children. After serving his sentence, a 10 year Extended Supervision Order (ESO) was imposed on Mr Te Whatu as he was considered an ongoing risk. Under section 107Q of the Parole Act 2002 an ESO is put on hold if the person is sentenced to a period in prison and reactivated when they are released. The Department of Corrections (DOC) considered that Mr Te Whatu's ESO ran until 15/10/2018 because of his multiple periods of incarceration for breaching the order including not reporting to his Parole Officer, moving from an approved residential address without permission, not being at the address during curfew and having contact with children under 16 years old (including his son of 7).

An ESO allows a parole officer to make a Non-Association Direction (NAD). A NAD was considered necessary in Mr Te Whatu's case because his mental health condition meant he was unable to identify situations that put him at risk of offending and he did not avoid contact with children. His partner's neighbour had told police they were concerned that the partner was grooming the neighbour's 11 year-

old daughter for sexual offending. This led to the DOC imposing a blanket ban on Mr Te Whatu having contact with his partner. On 29th of March 2017, the Probation Officer asked Mr Te Whatu to sign the NAD. He refused, arguing that the neighbour was lying. DOC's own records showed that there was no evidence of what he was accused of and the parole officer was simply proceeding on the basis of a suspicion that he had been in contact with children. The reason for this was DOC's belief there was a factual similarity between one of Mr Te Whatu's previous convictions and his partner's behaviour with the neighbour's daughter. On 7th June 2017, Mr Te Whatu stole \$25.30 from a tip jar and the next day was arrested for breaching the NDA. He pleaded guilty and was sentenced to 18 months' imprisonment. Mr Te Whatu appealed.

The first appeal before Palmer J was against the sentence when it became apparent his lawyer's pre-trial advice had been given without her having seen the ESO. Had she done so, she might have advised him differently. She applied for leave to appeal Mr Te Whatu's conviction out of time. Leave was granted under s 231 of the Criminal Procedure Act. Subsequently, the Crown asked if the proceeding should be a judicial review as it concerned the Parole Officer exercising a statutory power under the ESO. Mr Te Whatu's counsel considered it should be an appeal against conviction and sentence, not judicial review. Justice Palmer confirmed that the proceeding was an appeal but could also be the subject of a judicial review.

Under s 229 of the Criminal Procedure Act 2011 a person convicted of an offence can appeal against the conviction. The appeal must be allowed if the court is satisfied a miscarriage of justice has occurred¹⁸. A miscarriage of justice may be said to have occurred when trial counsel has erred in their advice to an accused and there was a real risk it affected the outcome.¹⁹ Mr Te Whatu claimed a miscarriage of justice because his lawyer had not considered the NZBORA when providing advice as she did not have a copy of the NAD. Also the Parole Officer's concerns could not be substantiated as the neighbour's suspicions had not been pursued. Since there had been no further sexual offending by Mr Te Whatu, the 'high risk' assessment was inappropriate and a less restrictive direction could have achieved the same objective of protecting children. The conviction for breach of the ESO was unsafe because the NAD is itself a breach of s 17 NZBORA and therefore unlawful. The Crown countered this by arguing the risks were unacceptably high and militated against allowing Mr Te Whatu to continue associating with his partner. It followed that the power to issue the NAD was lawfully exercised and proportionate and the conviction was not a miscarriage of justice.

An ESO restricts a person's freedom because of what they might do in the future. The Courts must ensure an ESO is consistent with NZBORA²⁰. As must the DOC when making orders under the ESO regime²¹. Rights guaranteed under the NZBORA can only be limited to the extent allowed in s 5. The importance and significance of the object pursued is relevant in assessing what is a 'reasonable limit'²². Further the means to achieve it must be rationally connected to the purpose and only impair the right as far as reasonably necessary to achieve that purpose.²³

Justice Palmer recognised that the NAD was designed to protect children from harm and could therefore sufficiently important to justify curtailing a right. However, the neighbour's complaint to the police was not substantiated. While the partner might have facilitated contact, the records only noted a suspicion that this was the case. It followed that the directive was based on belief, not evidence. Although the DOC may have been motivated by a legitimate concern, the NAD was an indirect way of limiting contact with minors and there was no evidence the condition was not being met. Corrections needed to fully test information it relied on to curtail human rights. The blanket ban on Mr Te Whatu contacting his partner, who was his only emotional support, was setting him up to fail. This was compounded by

¹⁸ s 232(2)(c) CPA

¹⁹ *R v Le Page* [2005] 2 NZLR 845 (CA) at [13]; *R v Merilees* [2009] NZCA 59 at [24]; *Sungsuwanv R* [2005] NZSC 57, [2006] 1 NZLR 730 at [70].

²⁰ *Department of Corrections v Thorpe* [2017] NZHC 2559 at [14].

²¹ Parole Act 2002 s 197JA(k).

²² *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [18].

²³ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

the fact he had not committed a sexual offence since 2005. The only breach of ESO was a single occasion when he saw his son at his partner's place.

Justice Palmer allowed the appeal and quashed the conviction. In the circumstances, the blanket direction not to associate with his partner was a breach of s 17 NZBORA (freedom of association) that could not be justified under s 5. While his lawyer may have advised him differently if she had seen the NAD, the unlawful direction created a real risk that the outcome would be a miscarriage of justice.

The issue then was whether the sentence imposed by the District Court judge based on the 'need' to convey to Mr Te Whatu that he had to strictly comply with the ESO, was excessive. The Crown argued that the sentence was not manifestly excessive, given Mr Te Whatu's criminal history and the 2 months' imprisonment for the theft was appropriate given his history of dishonesty.

As the NAD was unlawful, the conviction for breach was quashed. Further the theft of \$25.30 did not justify a term of imprisonment and was manifestly unjust. As Mr Te Whatu had been in prison for six months, Palmer J declined to substitute a different sentence. Further the DOC's direction not to associate with his partner breached Mr Te Whatu's right to freedom of association, was too broad and a disproportionate response. It was therefore unlawful and Mr Te Whatu's conviction was a miscarriage of justice. The sentence of two month's imprisonment for taking \$25.30 was manifestly excessive. Palmer J declared Mr Te Whatu was free to associate with his partner although he was to continue to comply with the ESO's restrictions, including no contact with children.

[Genge v Chief Executive, Department of Corrections \[2018\] NZHC 1447](#)

Right to rehabilitation

Mr Genge was sentenced to life imprisonment for murder and rape in 1995 with a minimum non-parole period of 15 years. He remains in prison, having been repeatedly rejected for release because he refuses to cooperate with Departmental Psychologists or attend appropriate rehabilitative programmes arguing they were incompatible with his specific needs.

He asked the Court to make a declaration that he was arbitrarily detained, citing the statutory obligation under the Corrections Act 2004 to provide rehabilitation to "those who will benefit from the programmes"²⁴ and article 10(3) of the ICCPR which requires States to have penitentiary systems that have as their essential treatment of prisoners "reformation and social rehabilitation". Despite Corrections offering him access to rehabilitative programmes and services, Mr Genge has continually been obstructive, stating that he did not want to be in a situation where he was "dealing with other people's issues" and he needed one on one counselling "on his own terms".

Judge Clarke dismissed his argument stating there was no evidence that he had not been offered opportunities to engage in rehabilitative programmes which would have enhanced his eligibility for parole. In relation to the claim under the ICCPR the Judge referred to the case noted above in relation to the UN Human Rights Committee stating, however, that it could be distinguished as the international jurisprudence recognises that a prisoner's refusal to engage in appropriate rehabilitative activities can contribute significantly to delayed release. Here the determinant in Mr Genge's delayed release was his unwillingness to back down from his refusal to engage in group treatment²⁵. A further ground of review relating to the Parole Act was considered a collateral challenge to concluded proceedings and therefore an abuse of process.

In May this year Mr Genge filed proceedings challenging a decision by a Visiting Justice in which he had been found guilty of breaching a prison rule forbidding prisoners from sparring or fighting in prison. He challenged the legality of the rule. While he didn't deny he had been sparring, he claimed that it was exercise and if a regulation banned fighting motions for the purpose of fitness training it was invalid

²⁴ subject to available resources: s.52 Corrections Act 2004

²⁵ At [71]

because s.70 of the Corrections Act which provides that every prisoner is entitled to at least one hour of physical exercise a day. He was unsuccessful, the prohibition being justified for safety reasons.

In the course of the decision Nation J stated that Mr Genge had become a habitual complainant, using the judicial review process (for the most part) to unsuccessfully challenge disciplinary decisions made against him by Visiting Justices. The Judge observed that the prison disciplinary process provided an efficient and relatively informal way of dealing with disciplinary offences and Mr Genge's practice of filing judicial review proceedings to challenge decisions that he did not like ran counter to all that the Corrections Act and regulations were designed to achieve. Accordingly, the Judge used the power under the Senior Courts Act 2016 to make an order restricting Mr Genge from commencing civil proceedings for three years challenging validity of any part prison disciplinary process: [Genge v Visiting Justice, Christchurch Men's Prison \[2018\] NZHC 1457](#).

This didn't deter Mr Genge. In November he sought judicial review of his security classification which he claimed was motivated by malice on the part of prison staff. This included not returning him to a low security unit following revision of his security assessment and his consequent inability to avail himself of his minimum exercise entitlement. He was successful in part the Judge making a declaration that Corrections had erred in taking into account certain of Mr Genge's behavioural issues in determining his security classification. However, this had subsequently been redressed and there was no breach by prison staff in relation to his minimum entitlement to exercise given that he had "failed to avail himself of the opportunity to take exercise": at [87]. [Genge v Chief Executive, Department of Corrections \[2019\] NZHC 172](#).

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