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NZ CENTRE FOR HUMAN RIGHTS LAW, POLICY and PRACTICE

THE UNIVERSITY OF AUCKLAND FACULTY OF LAW

Human Rights Agenda e-Bulletin

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Edited by Deputy Director Christopher Mahony and Geraldine Burnett

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Centre News

Centre wins World Universities Network grant to examine Refugee Resettlement

WUN provides funding to projects focused on finding solutions to key issues of global concern: adapting to climate change, global higher education and research, public health (non- communicable disease) and understanding cultures.

The "Comparative analysis of international refugee resettlement international law obligations and policy", led by Chris Mahony (Law), will bring together researchers to compare refugee resettlement in New Zealand, Canada, Australia, the UK and Japan.

The research will depart from orthodox research of refugee resettlement practice and outcomes by concentrating on the states' legal resettlement support obligations and the extent to which those are met by policy.

"In practice," says Chris, "refugee resettlement is open to a range of interpretations and there is alarmed concern that policies that do not reflect international law obligations may drive poor resettlement outcomes – outcomes that often foster racial disharmony."

Human Rights Mooting Successes

Auckland students achieved great success in two major human rights moots. The 4th World Human Rights Moot Court Competition was held from 7 to 10 December 2012 at the University of Pretoria, South Africa. Georgina Woods-Child and Jeremy Wilson made it through to the Grand Final, where they were beaten by an experienced team from the Norman Manley Law School in Jamaica. Jeremy was judged the second best mooter over the whole competition. The team was coached by Isaac Hikaka, a partner at Lee Salmon Long, and Kris Gledhill, Director of the Centre. We are investigating having a national competition that will feed a New Zealand team into this established competition. (An expanded account of this event can be found at http://www.law.auckland.ac.nz/uoa/home/about/news/news-stories/news/template/news_item.jsp?cid=546490

In addition, Anna Devathasan and Gretta Schumacher, with Ben Prewett as coach and Anna Chin as researcher performed very well at the finals in Hong Kong of the International Humanitarian Law Moot, organized by the Red Cross. Having won the New Zealand competition, they made it to the semi-finals of the international competition, where they were beaten by the eventual competition winners, National Law University of Delhi. Gretta Schumacher was voted second best individual mooter. A full report can be viewed at http://www.law.auckland.ac.nz/uoa/home/news/template/news_item.jsp?cid=553007

Shadow Reporting

Monitoring of New Zealand's progress in implementing human rights standards involves input from civil society, groups who are allowed to present shadow reports that point out gaps in the government's account. The Centre has been picked as the partner for the Human Rights Commission in providing a road show on shadow reporting, which is going to the main centres in New Zealand and some secondary centres. The aim is to equip relevant NGOs with the knowledge and skills to be involved in the process. In

addition, it is hoped that law students and practitioners will become involved in helping the drafting of these important documents.

A recent roadshow event in Christchurch led to several community groups expressing a desire to work with Centre member and Senior Law Lecturer at Canterbury University, Natalie Baird, and a group of law students. They are making a submission for one of the main processes, the Universal Periodic Review, conducted by the UN Human Rights Council. Their submission will focus on the human rights issues arising from the 2010 and 2011 Canterbury earthquakes. If you are a community or non-governmental organisation and would be interested in getting involved or knowing more about their project, please email Natalie Baird at natalie.baird@canterbury.ac.nz or uc.uprsubmission@gmail.com. A short online presentation about their project can be viewed at http://prezi.com/5j0mbz1evj_n/untitled-prezi/.

The value of shadow reporting has been recognised by the Law Foundation, which has established an annual Shadow Report Award to encourage participation (http://www.lawfoundation.org.nz/?page_id=2224). The inaugural award was made to the Human Rights Foundation, which has promoted human rights through research based education and advocacy since its foundation in 2001. The grant has enabled the HRF to appoint a part-time coordinator, Stéphanie Bürgenmeier, who also works with the Centre as a researcher and convenor of our Working Paper Series. She will be helping to coordinate NGO involvement in the UPR. The next meeting on this will be held on Thursday 9 May at the Auckland Trades Union Building, 147 Great North Rd, Grey Lynn at 5pm. For more information, see http://humanrightsfoundation.wordpress.com/ or email: humanrightsfoundation@xtra.co.nz

Centre hosts conference on "Access to Justice in an Age of Austerity"

The motif of the present is that we are living in difficult fiscal times. Without getting into the debate as to whether this is accurate or is an ideologically-driven contention designed to secure a so-called smaller state, it is nevertheless worthwhile to explore what in the legal system is in the "nice to have" basket rather than the "must have" basket. This was the aim behind a conference held on 11 March 2013, hosted by the Legal Research Foundation and the Centre.

Attendees, who included practitioners, policy makers and academics, were presented with a series of papers designed to explore the interplay between fiscal efficiency and the need to secure access to justice. The starting point was a discussion by Professor Paul Rishworth of the rights-based framework to which New Zealand subscribes through the New Zealand Bill of Rights Act – a "badge of civilisation" as Lord Cooke called it. As Professor Rishworth noted, the right to a fair trial is clearly an absolute one and so a moral imperative: but that does not say much about how it is to be achieved. In short, there might be different approaches that met the necessary standard for securing a just outcome and also a fair process.

Where the question of resourcing becomes particularly relevant to the area of access to justice in practice is in two areas, one of which is the provision of legal aid and the other of which is the judicial process. These topics were the focus of an understated but powerful presentation by Maria Kazmierow, a well-known practitioner in the family courts, "the court for ordinary New Zealanders", as she described it. Her focus was on the changes that have occurred recently and those that are proposed, including court closures, the problems that arose from the centralisation of court files in Auckland (including delays in serving protective orders), and suggested fees for making use of court services, all of which have a chilling effect on access to justice. More worryingly, proposals to require court hearings without lawyers will mean that there is no legal aid for assistance before a hearing, but a party who can afford it will be able to involve

a lawyer in drafting relevant documents and providing coaching. This, Kazmierow noted, will systematically discriminate between spouses who have unequal access to funds; and will require people to represent themselves in matters where emotions may be high and objectivity of the sort that can be provided by a lawyer is essential.

The conference then turned to criminal justice issues. Professor Rishworth had introduced the issue of legal aid provision and the potential remedies for its inadequacy in a criminal context. Rodney Harrison QC expressed several concerns about recent developments, his theme being the view of Judge Learned Hand that the rationing of justice posed a real danger to democracy. The central problem, he noted, was that the reductions in legal aid funding – which followed a failure to increase rates in accordance with inflation for many years – simply meant that many good lawyers were no longer willing to be involved. Harrison was followed by the Senior Public Defender for New South Wales, Mark Ierace SC. Ierace outlined the long-established regime of the Public Defender in NSW, its role in law reform, and training for the profession, and in being available to offer advice to the independent bar. But, he added, it was his position, that the Public Defender should not be expanded in such a way as to put at risk the independent bar.

The afternoon sessions of the Conference turned to two discrete areas. The first, was the issue of access to justice by those subject to coercion under mental health legislation, was addressed by Judge Phil Recordon. His Honour's long career as a District Inspector and a District Court Judge, whose roster includes a significant number of mental health applications, meant that he was ideally placed to outline and comment on the issue in the context of a vulnerable group of people. Royden Hindle, until recently Chairperson of the Human Rights Review Tribunal, then provided a thoughtful account of modifications that could be made to the HRRT to improve its efficacy as a core component of the protection of access to justice in relation to arguments of discrimination.

A number of commentators were involved in the Conference. These included Brendan Horsley, Director of the Public Defence Service in New Zealand, who provided a brief commentary on the criminal justice papers, emphasising a concern that steps needed to be taken to ensure the quality of criminal defence advocates; and Rosslyn Noonan, formerly the Chief Human Rights Commissioner and now a Research Fellow at the New Zealand Centre for Human Rights Law, Policy and Practice. The Conference finished with a panel discussion, including questions and contributions from the floor.

The central message from the speakers was that access to justice is a constitutional fundament and so not one that can be compromised by claimed resource constraints; and that changes to processes, which governments can quite properly introduce, should be tested against this standard.

Centre Events

RECENT EVENTS

The Centre has an active programme of events for the remainder of the spring and the winter, including:

The Centre, in collaboration with Russell McVeagh, The New Zealand Law Society and the University of Auckland, Department of Politics, held a Panel on Syria in the Arab Spring at Russell McVeagh in Auckland. The panelists included United States Consul General, James Donegan and Centre academic members Associate Professor Stephen Hoadley, Dr Thomas Gregory and Chris Mahony. The event drew more than the capacity 80 people and drove discussion that continued in the Russel McVeagh bar, long after the panel's conclusion. Further details at http://www.humanrights.auckland.ac.nz/uoa/home/nzchrlpp-happenings/news/news/template/news_item.jsp?cid=563851

The audience gathers at Russell McVeagh in Auckland for the panel discussion on 'Syria in the Arab Spring'"

On 2nd May, Ben Keith from Crown Law addressed the important question of the relationship between international human rights law and domestic law at an evening lecture hosted by the Centre. Mr Keith described the level of potential enforcement of Human Rights law in New Zealand. Further details at http://www.humanrights.auckland.ac.nz/uoa/home/events/template/event_item.jsp?cid=558518

The Centre and Amnesty International Aotearoa NZ jointly hosted the annual Human Rights Conference at the Law School on the 4th of May. The conference was chaired by NZCHR Director Kris Gledhill and was a great success. The day included discussion on how New Zealand is stacking up in terms of Human Rights Law, a focus on international justice in Sri Lanka, and a candid discussion with three MP's on times their minds had been changed by activism. The day concluded with drinks and nibbles and the Human Rights Defender Award, which was taken away by Marilyn Waring for her tireless work in human rights. For conference details and more information about the speakers and people who contributed to the event, please visit http://www.humanrights.auckland.ac.nz/uoa/home/events/template/event_item.jsp?cid=559732

The Centre Hosted a public lecture by Justice Teresa Doherty of the Special Court for Sierra Leone on Thursday 9 May, titled: Assessing the Legacy of the Special Court for Sierra Leone: Jurisprudential Advances, Reconciliation, and Confrontation of Impunity. For details, please visit http://www.humanrights.auckland.ac.nz/uoa/home/nzchrlpp-happenings/events/events/template/event_item.jsp?cid=560708

Justice Teresa Doherty of the Special Court for Sierra Leone.

Deputy Director, Chris Mahony gave a public lecture titled "Hegemonic stability and narrative construction as instructing components of transitional process selection: Lessons from Sierra Leone" on Thursday 9 May. This detailed and insightful talk was co-hosted by the Politics Department of The University of Auckland.For details, including a podcast and videocast, please visit http://www.humanrights.auckland.ac.nz/uoa/home/nzchrlpp-happenings/events/events/template/event_item.jsp?cid=560708

FORTHCOMING EVENTS

As part of the Constitutional Review, the Centre will hold lectures and workshops on the question of how human rights should be protected within New Zealand's constitutional framework; this will be on 7-8 June at the Faculty of Law.

To keep up to date with the events we host, please check our website www.humanrights.auckland.ac.nz regularly or sign up to our mailing list.

The e-bulletin aims to provide an outlet for commentary from the legal profession and academia on the practical application of human rights law, policy and practice, and also to provide an alerter as to potential developments. This section includes case notes (in full), outlines of proposed legislation, an introduction to peer reviewed research working papers fostered by the Centre, and other commentary on human rights issues.

HUMAN RIGHTS CASE NOTES

The Right to life and exercise of medical judgment in abortion cases

Right to Life New Zealand Inc v The Abortion Supervisory Committee [2012] NZSC 68, [2012] 3 NZLR 762

Hanna Wilberg | The University of Auckland

This Case Note was formerly published as "New Zealand: Supreme Court, in split vote, confirms external oversight of decisions to allow abortions limited, *Right to Life New Zealand Inc v The Abortion Supervisory Committee*" [2013] PL 425-426. (Reproduced with permission)

This case is of interest for its interpretation of the abortion law in New Zealand, and for confirming the limited extent of external oversight over medical decisions in this area.

Abortion in New Zealand is governed by the Crimes Act 1961 and by the Contraception, Sterilisation, and Abortion Act 1977, which largely implemented the recommendations of a Royal Commission. Performing an abortion is an offence unless the person believes that one of the grounds set out in s 187A of the Crimes Act exist. Medical practitioners are protected under s 187A(4) if they act on a certificate issued by two certifying consultants appointed under the 1977 Act to the effect that one of the grounds is made out, unless it is proved that they did not actually believe this. In the case of pregnancies of no more than 20 weeks' gestation, one of the available grounds is that continuance of the pregnancy would result in serious danger to the mental health of the woman or girl. Matters that are specifically listed as relevant to this ground are that the age of the patient is near the beginning or end of the usual child-bearing years, and that the pregnancy is believed to be the result of sexual violation – but these are not exhaustive. Some 98% of abortions are reportedly authorised on this mental health ground.

The 1977 Act creates the Abortion Supervisory Committee which is responsible, among other functions, for appointing medical practitioners as certifying consultants; for ensuring provision of both abortion and counselling services; and for keeping the operation of the abortion law under review, ensuring its consistent administration across New Zealand, and making annual reports to Parliament on it (ss 14, 19, 30). Appointments as certifying consultant are for a renewable term of one year and may be revoked at any time (s 30(6)–(7)). In making appointments, the Committee must have regard to the desirability of not appointing practitioners with extreme views on either side of the abortion debate (s 30(5)). Consultants must submit such reports as the Committee requires "relating to cases considered by him and the performance of his functions in relation to such cases" (s 36), but the patient must not be identified, and neither the certificate nor the report are required to state reasons beyond reference to the relevant s 187A ground.

Right to Life New Zealand Inc is concerned that certifying consultants on the whole are using the mental health ground far more liberally than intended by the 1977 Act. Indeed, that much is conceded by the Committee, which has repeatedly reported to Parliament to this effect since 1988. However, the Committee takes the view that it has no powers to deal with this, other than by issuing advice to

consultants and by reporting its concerns to Parliament (it has recommended amendment to bring the law into line with practice, but so far there has been no response). In an application for judicial review, Right to Life challenged the Committee's interpretation of its powers in this regard, and claimed that the Committee is failing to exercise proper control over the work of certifying consultants.

Prior authority *(Wall v Livingston* [1982] 1 NZLR 734 (CA)) established that if individual decisions of consultants are at all open to challenge in court so as to prevent an abortion taking place (which was doubted), then this can only be on the application of one of the statutory participants in the process. The present case, however, concerned the powers of the Committee to review consultants' decisions after the fact.

The claim succeeded in the High Court, but on appeal was largely dismissed by a majority in both the Court of Appeal and the Supreme Court. The majority in the Supreme Court agreed with the Committee that it has no power under any circumstances to review individual diagnostic decisions by certifying consultants, even after the fact and anonymously: "[i]ndividual decisions are a matter of medical judgment and expertise in the particular case and not to be questioned" (at [40]). Neither the power to require reports nor the duty to consider consultants' views in decisions on reappointment or revocation of appointment extend to what the Court viewed as a "quasi-inquisitorial or disciplinary power" (at 44]). This is the point on which the dissenters in both appellate courts disagreed.

However, the Committee did have a measure of success in the Supreme Court. That Court unanimously considered that some review of consultants' practice was required for a proper discharge of the Committee's functions. In the majority's view (at [45]–[47]), this can only take the form of generalised reviews, for example by asking questions about the consultant's diagnostic criteria or techniques. It is required for the purposes of keeping the operation and effect of the law under review and of ensuring consistency of administration throughout New Zealand, but it may also play a role in reappointment or revocation decisions (and may lead to referrals to relevant disciplinary agencies). Since the matter was not argued on this basis, the Court could reach no concluded view on whether the Committee is complying with its obligation in this regard, but it expressed doubts. Whether and by whom practice in this area may eventually be brought into line with the letter of the law, or vice versa, remains to be seen.

Considering Access to Counsel, Freedom of Expression and Administrative Discretion in Commerce Commission Non-disclosure Orders

Commerce Commission v Air New Zealand [2011] NZCA 64

Edward Willis | PhD candidate, University of Auckland, and commercial and public lawyer, Webb Henderson.

Introduction

Commerce Commission v Air New Zealand (Air New Zealand)[1] is notable for those interested in promotion of fundamental rights for a number of reasons. The case involved a challenge by way of judicial review to the imposition of non-disclosure orders by the Commerce Commission pursuant to s 100 of the Commerce Act 1986. In allowing the Commission's appeal the Court of Appeal was required to address aspects of freedom of expression and the right to justice as affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA).[2] This note briefly summarises the background to the case before addressing the aspects of the case that touch on NZBORA. The Court's approach in respect of the right to justice is endorsed as appropriate, but it is contended that the methodology employed in respect of the Court's consideration of freedom of expression raises important questions over the robustness of rights protection in New Zealand.

1 *Commerce Commission v Air New Zealand* [2011] NZCA 64.

2 See New Zealand Bill of Rights Act 1990, ss 14 and 27 respectively.

Background

The Commerce Commission is empowered to issue non-disclosure orders in respect of certain information in the course of discharging its functions under the Commerce Act 1986, and other empowering legislation.[3] Section 100 of the Commerce Act provides that the Commission may, subject to prescribed timeframes,[4] make an order prohibiting the "publication or communication" of "any information or document or evidence" given to or otherwise obtained by the Commission in connection with its operations.[5] It is an offence to publish or communicate any information or document or evidence contrary to a s 100 order, punishable on summary conviction by a fine.[6]

The impetus for *Air New Zealand* was an investigation by the Commission into alleged cartel activity in respect of the supply of air cargo services.[7] As part of its investigation, the Commission required a number of Air New Zealand employees to attend a compulsory interview conducted by a member of the Commission and Commission staff.[8] Counsel representing the employees were present at each of the respective interviews. At the majority of those interviews, the Commission issued an order pursuant to s 100 to prohibit disclosure by the interviewee and his or her counsel of anything said at the interview. The order purported to cover both the questions put to the interviewee by the Commission, the interviewee's responses and any other documentary information exchanged between the parties.[9]

The Commission ultimately issued proceedings against Air New Zealand (and other airlines implicated in the Commission's investigation). In response, Air New Zealand's solicitors sought the discharge of the s 100 orders. The Commission indicated that it was willing to vary the orders so that the matters discussed at each of the interviews could be provided to named counsel and solicitors. Air New Zealand rejected that approach on the basis that "it did not allow the solicitors to discuss any of the information freely with their clients, potential witnesses (including those interviewed by the Commission) and counsel and solicitors for other defendants in the air cargo proceeding or defendants in the related proceedings".10 As a result, Air New Zealand applied to judicially review various aspects of the Commission's s 100 orders. This was the first opportunity for s 100 to be considered judicially in the context of alleged cartel conduct.

In the High Court, Air New Zealand made three contentions that were ultimately put in issue on appeal. The first was that the scope of s 100 is limited to the purpose of protecting third party confidential information supplied to the Commission.[11] The purpose of protecting the integrity of the Commission's investigative process, which the Commission claimed in this case, was not a legitimate use of the s 100 power.[12] Andrews J rejected this contention, finding that the Commission was empowered to prohibit disclosure of the contents of the interviews.[13]

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3 See, for example, Telecommunications Act 2001, s 15(i), which applies s 100 of the Commerce Act 1986 to the Telecommunications Act mutatis mutandis.

4 Commerce Act 1986, s 100(2).

5 Commerce Act 1986, s 100(1).

6 Commerce Act 1986, s 100(4).

7 See Commerce Act 1986, ss 27 and 30.

8 See Commerce Act 1986, s 98(c).

9 While the s 100 orders issued purported to extend to the underlying facts discussed in the interview, the Commission later conceded that this was not its usual practice nor was it its intention is the present case.

10 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [14].

11 This purpose had previously been upheld as a valid use of s 100 in a different context: see *Lion Corporation Limited v Commerce Commission* HC Wellington M666/86, 5 March 1987 at 15.

12 For an argument to this effect see David Goddard "Section 98 of the Commerce Act 1986: Where Do the Limits Lie?" (Paper presented to the Competition Law and Policy Institute of New Zealand, Wellington, 6 August 2006) at 19-23.

13 *Commerce Commission v Air New Zealand* HC Auckland CIV-2008-404-8352, 21 October 2009 at [44].

Air New Zealand's second contention was that questions put to the interviewee by the Commission were not within the scope of s 100. Only the information, documents, and answers given by an interviewee could be made subject to an order prohibiting disclosure. Air New Zealand's third contention was that the s 100 orders must necessarily expire on the commencement of High Court proceedings. Andrews J ultimately accepted both these contentions,[14] and provided declaratory relief that the s 100 orders be of no further effect.[15]

All three findings were appealed (the first by Air New Zealand, and the second and third by the Commission), with the Court of Appeal finding in favour of the Commission in respect of all three issues. Only the first and third issues are examined in detail in this note. Notably, the appeal proceeded at the level of principle rather than the specific application of the Commission's approach to the s 100 orders, as the Commission did not seek for the s 100 orders to be re-instated if the High Court judgment was overturned. Accordingly, the Court of Appeal judgment may be of limited precedential value where the application of s 100 is challenged. However, that approach allowed the Court to consider the right to justice and freedom of expression at a principled level, squarely addressing the nature of s 100 and its relationship with NZBORA.[16]

Surviving the Issuing of Proceedings and the Right to Justice

It is convenient to address the right to justice first, which is related to Air New Zealand's contention that s 100 orders must expire when proceedings are filed. At issue was s 27(3) of NZBORA, which provides for equality of treatment between the Crown and individuals in the bringing and defending of civil proceedings. Air New Zealand contended that continuation of the s 100 orders after proceedings had commenced conferred on the Commission an advantage in litigation in breach of s 27(3). Andrews J had agreed, describing the orders as having a "chilling effect" on the ability to instruct counsel, and for counsel to provide advice.[17]

The Court of Appeal ruled that s 27(3) does not require that the exercise of a statutory power cease or be deferred as the result of the commencement of civil proceedings. Section 100 orders may therefore survive the issuing of proceedings if their continuation is for a proper purpose.[18] In the context of *Air New Zealand* a proper purpose would be where the investigation into alleged cartel conduct was continuing, which the Court accepted was the case. However, the Court emphasised that despite the continuation of the statutory power, it should be exercised "with restraint", and both the Commission and the Court will monitor the effect of s 100 orders to ensure no unfairness results as litigation proceeds.[19] With respect, this must be the correct outcome if it is accepted that the Commission has a legitimate interest in protecting the integrity of its investigations.

It has been argued that *Air New Zealand* presents an unreasonable interference with the right to be effectively represented by counsel.[20] The criticism is that the case gives s 100 an effect that is "broad and effectively override[s] legal privilege, denying parties like [Air New Zealand] the ability to discuss interview contents with counsel and thereby hampering its defence".[21] However, the s 100 orders issued by the Commission did not prevent any party from consulting counsel fully and frankly. The issue was

14 Ibid at [37], [60].

15 Ibid at [103].

16 For this reason the Court of Appeal's judgment is likely to be directly relevant to analogous statutory provisions, such as the Financial Markets Authority Act 2011, s 44 and the Takeovers Act 1993, s 31X.

17 *Commerce Commission v Air New Zealand* HC Auckland CIV-2008-404-8352, 21 October 2009 at [70].

18 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [107].

19 Ibid at [114].

20 Lee Long Wong "Scope of Commerce Commission's powers under s100 of the Commerce Act 1986" [2010] 1 Human Rights Agenda 26 at 28.

21 Ibid at 27-28.

the inability of counsel for Air New Zealand to consult openly with third parties – potential witnesses and fellow defendants – and not the ability of counsel to consult openly with their clients.[22] Where counsel are present at compulsory interviews, s 100 orders are unlikely to interfere with the right to justice as counsel and client (ie, the interviewee) are both able to discuss all matters freely. Further, if any interference can be shown to exist at all on the circumstances of a particular case it is likely to be demonstrably justifiable: any restriction is temporary, subject to judicial supervision to avoid prejudice, and not directly concerned with the solicitor-client relationship.[23]

Scope of s 100 and Freedom of Expression

At the heart of *Air New Zealand* was the issue of the scope of s 100, which touched on the freedom of expression affirmed in s 14 of NZBORA. The Court observed the fundamental importance of the freedom of expressions,[24] but there is obvious potential for statutory powers to prohibit disclosure of certain information to interfere with this freedom. In resolving that tension, the Court applied the methodology for addressing NZBORA rights set out in *R v Hansen*.[25] The first step of that methodology is to ascertain Parliament's intended meaning in the absence of an NZBORA, values-based interpretative overlay. The Court found that the statutory language was deliberately broad, and there is nothing to indicate that the scope of s 100 is intended to be limited to third party confidential information.[26] The integrity of the Commission's investigatory process was a purpose related to the functions of the Commission under the Commerce Act, and so that purpose was found to fall within the ambit of s 100. The Court felt able to reach this interpretation quickly, and apparently without detailed consideration of the competing arguments.

With respect, the Court appears to have overlooked a tenable argument that s 100 is primarily concerned with the protection of third party information. Section 100 refers expressly to the circumstance where "any application for, or any notice seeking, any clearance or authorisation under Part 5" is before the Commission.[27] In this context, the Commission is not investigating potential breaches of competition law, but considering an application made to it. It is extremely unlikely that the Commission will find it necessary to protect its investigatory process, as the covert behaviour that characterises cartels is not present. Rather, the Commission will only be concerned to protect third party confidential information, so that parties engaging with the Commission do so fully and openly.

Only after this specific example is given does s 100 proceed in more generic terms to refer to "any other investigation or inquiry under this Act". It may be reasonable to infer that this generic language is intended to refer to processes similar to the specific clearance and authorisation applications specifically mentioned,[28] especially as analogous provisions are not expressed in this manner.[29] Accordingly, and despite the Court's conclusion, there does appear to be some rationale for preferring a narrow interpretation of s 100. This alternative interpretation is a tenable one, and as discussed below this may have important implications for the appropriateness of the methodology adopted and conclusion reached by the Court.

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22 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [14]. The issue of counsel potentially having more information than his or her clients only resulted because of the Commission's proposed variation to the s 100 orders.

23 A slightly different issue arises if counsel's ability to advise clients is interfered with because counsel is acting for both an employee and the company at the same time. However, this is likely to create a conflict of interest in any event, prompting responsible counsel to refuse to act for one or both parties.

24 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [67].

25 *Hansen v R* [2007] NZSC 7 at [92].

26 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [45].

27 Commerce Act 1986, s 100(1).

28 Application of the ejusdem generis maxim of statutory construction would appear to support this conclusion.

29 See Financial Markets Authority Act 2011, s 44; Takeovers Act 1993, s 31X.

The second step in the *Hansen* methodology is to determine whether Parliament's intended meaning is apparently inconsistent with a relevant right or freedom. It was accepted by the Court that s 100 does limit freedom of expression,[30] and given the inherent nature of a prohibition on disclosure imposed by a valid s 100 order this finding appears to be uncontroversial. The third step in the *Hansen* methodology is to determine whether any apparent inconsistency identified in step two is a justified limitation in terms of s 5 of the NZBORA. In undertaking this third step the Court applied the test established in *R v Oakes*.[31] The first limb of the *Oakes* test is to determine whether the limiting measure (s 100) is sufficiently important to curtail the right to freedom of expression.[32] The Court emphasised the generic importance of the preservation of investigative integrity, which is a conclusive reason for withholding information under the Official Information Act 1982,[33] and has been recognised as a general right in New Zealand case law with respect to police investigations.[34] The Court also accepted the Commission's contention that the covert and subversive nature of cartel conduct required particular techniques to ensure effective detection and prosecution, including confidentiality of investigatory processes. In this context, the proposition that a limited impairment of the right to freedom of expression was sufficiently important was described as "self-evident".[35]

The Court found there to be a rational connection between s 100 and the protection of the integrity of the Commission's investigatory process,[36] and that prohibitions on disclosure of information were necessary for this end.[37] The temporary nature of a s 100 order meant that s 100 was proportionate and no more than necessary to achieve the statutory objective.[38] Thus, the second limb of the *Oakes* test was also found to be satisfied. The jurisdiction within s 100 to prohibit disclosure of information for the purpose of protecting the integrity of the Commission's investigatory process in the context of cartels was therefore found to be a justified limit on the right to freedom of expression in terms of s 5 of NZBORA. This finding entailed a rejection of Air New Zealand's contention that the scope of s 100 is limited to the protection of third party confidential information.

If the *Oakes* test had not been satisfied, and s 100 was not found to be a justified limit on freedom of expression, the *Hansen* methodology would have then required application of s 6 of NZBORA. Section 6 requires that statutes be interpreted in a manner consistent with NZBORA rights where this "can" be done. *Hansen* makes this inquiry into interpretative consistency secondary to both an initial construction of the statutory provision and application of s 5. This is consistent with the understanding of NZBORA as a "bill of reasonable rights", not absolute rights.[39] In line with *Hansen*, the finding of a justified limitation on the right to freedom of expression in Air New Zealand meant there was no need to take the NZBORA analysis further.

While this effectively dealt with the primary NZBORA issue in the case, the court's application of *Hansen* in this context may reveal itself to be open to question on policy grounds. In particular, the "two-phase" interpretative approach promoted in *Hansen* does not appear to always afford due consideration to the promotion of NZBORA rights and freedoms.[40] That two-phase approach creates a separation between

30 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [65].

31 *R v Oakes* [1986] 1 SCR 103.

32 *Hansen v R* [2007] NZSC 7 at [104].

33 Official Information Act 1982, s 6(c).

34 *Commissioner of Police v Ombudsmen* [1988] 1 NZLR 385.

35 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [70], [73].

36 Ibid at [74].

37 Ibid at [75].

38 Ibid at [74], [76].

39 Paul Rishworth "Interpreting and Invalidating Enactments Under a Bill of Rights: Three Inquiries in Comparative Perspective" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 251 at 277. Compare the dissent of the Chief Justice in *Hansen v R* [2007] NZSC 7 at [6].

40 The phrase is borrowed from Claudia Geirigner "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*"

'ordinary' statutory interpretation, which appears to be largely textual,[41] and a secondary consideration of NZBORA rights. The wider context of values that might influence the Court's construction is only applied where text and purpose reveal some perceived deficiency. This approach has been described as "dangerous" from a rights-based perspective as it reduces s 6 of NZBORA to a supplementary consideration,[42] and *Air New Zealand* appears to bear out this concern. As argued above, a tenable alternative interpretation based on the text and purpose of s 100 appears to have been available to the Court, although it was not addressed.[43] If this alternative approach was recognised, the s 6 interpretative requirement might have proved decisive. However, on the *Hansen* approach s 6 never features. This is partly because of the mandated order for considering ss 5 and 6 under the *Hansen* methodology, but also because the two-phase interpretative approach provides for a provisional and limited construction of the relevant statutory provisions that may never be revisited. The result is that the *Hansen* methodology appears to have obscured a full consideration of the freedom of expression that might otherwise be expected in light of each of ss 4-6 of NZBORA.

None of this is to say that the Court of Appeal did not reach the correct result in *Air New Zealand*. Given the compelling and obvious interest in maintaining the Commission's investigatory integrity, and the legislative history underpinning s 100,[44] the Court's resolution probably accords best with Parliament's intent.[45] However, it is worth questioning whether this is sufficient where NZBORA rights and freedoms are involved. The Courts ought to ensure that NZBORA issues are fully and openly addressed in the interpretation of relevant statutes, as well as seeking to arrive at the correct construction of Parliament's intent. *Air New Zealand* suggests that the *Hansen* methodology does not guarantee this, and in some circumstances may stifle rather than encourage sophisticated consideration of the rights implications of particular interpretative approaches.

NZBORA and Administrative Discretion

A final NZBORA issue is the Court's approach to administrative discretion. In explicating its reasoning, the Court made much of the distinction between the conferral of a statutory power in terms consistent with NZBORA, and the subsequent exercise of that power in specific circumstances. For instance, the Court emphasised that despite the wide scope of the justified limitation that s 100 represents, the specific decision to impose or continue a s 100 order must be taken carefully, and any established orders should be kept under review.[46] This might be taken as recognition that NZBORA analysis does not stop with the valid conferral of a statutory power, but must also be undertaken in respect of the specific exercise or practical operation of that power.[47] However, the Court went on to reject a submission to this effect, stating that "[t]he *Hansen* analysis has justified the existence of s 100 and there is no need to repeat the exercise".[48]

This approach may be at odds with Supreme Court precedent, where it was found in the context of a compulsory urine sample taken pursuant to a validly and legally exercised rule-making power that the

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in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press in association with New Zealand Centre for Public Law, Wellington, 2008) 69 at 90-92.

41 In addition to *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [45] see *Hansen v R* [2007] NZSC 7 at [237]

42 Geirigner "The Principle of Legality and the Bill of Rights Act: A Critical Examination *of R v Hansen*", above n 40, at 91.

43 To be clear, it is not intended to argue that the more narrow interpretation advocated for by Air New Zealand is necessarily the better interpretation of s 100, just that the alternative interpretation is sufficiently strong that it is not "strained" in the sense suggested by Cooke P in *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 272.

44 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [52]-[55].

45 Under s 4 of the New Zealand Bill of Rights Act 1990, Parliament's intention is dispositive.

46 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [46].

47 See GDS Taylor and JK Gorman *Judicial Review: A New Zealand Perspective* (2 ed, LexisNexis, Wellington, 2010) at 804.

48 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [77].

individual instance of collection might still breach the right to freedom from unreasonable search and seizure affirmed in s 21 of NZBORA.[49] Perhaps *Air New Zealand* can be distinguished on the basis that it does not involve a rule-making power, but the Court of Appeal itself did not draw any such distinction. Regardless, it is unclear precisely what the position of the Court of Appeal is. One possible interpretation is that the Commission is merely required to act reasonably in an administrative law sense whenever it issues s 100 orders, but further NZBORA analysis is not required. Alternatively, NZBORA rights might be implicated in Commission decision-making as mandatory relevant considerations. The latter is the preferable approach. It is in the specific application of legislation and the exercise of administrative discretion that NZBORA rights and freedoms are most vulnerable. Despite the opacity of the Court's reasoning on this point, any interpretation to the effect of public decision-making on NZBORA rights and freedoms is irrelevant ought to be resisted.

What is advocacy and how does it effect an organisation's charitable status?

Re *Greenpeace of New Zealand Incorporated* [2013] NZSC 12

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The Supreme Court's decision to grant Greenpeace leave represents an opportunity for New Zealand to dramatically advance – or confirm – the law of charities. The case stems from Greenpeace's application for charitable status in 2008. The application was ultimately rejected by the Charities Commission in 2010, because, the Commission argued, some of its activities were not charitable in purpose. Greenpeace appealed this decision to the High Court.

Issues in the original appeal

The relevant statutory provision is s13(1)(b)(i) of the Act Charities Act 2005. The section provides that:

(1) An entity qualifies for registration as a charitable entity if,—
…
(b) in the case of a society or an institution, the society or institution—
(i) is established and maintained exclusively for charitable purposes …

"Charitable purposes" are defined in section 5, as "every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community". Section 5 also notes in subsections (3) and (4) that the organization may have other, non charitable purposes (and lists advocacy as such an example), but these will not defeat an application, so long as these purposes are merely ancillary.

These provisions are supplemented by the important holding in *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA), a case relied on heavily by the High Court and the Court of Appeal. It clarifies that the standard for involvement in political activities – which are non-charitable – is also the "merely ancillary" standard. For political activities therefore, the test is:

- whether the organization has a political purpose; and
- if so, whether it was no more than an ancillary purpose of the charity.

The Commission rejected the application because it felt that promoting "disarmament and peace" was political, and that this purpose was not ancillary. The Commission pointed to Greenpeace's objective 2.7, which states that Greenpeace will "[p]romote the adoption of legislation, policies, rules, regulations and plans … and support the enforcement or implementation through political or judicial processes".

49 *Cropp v Judicial Committee* [2008] NZSC 46 at [43].

In addition, the Commission expressed concern that by engaging in illegal activities (such as trespass) Greenpeace was not maintained exclusively for charitable purposes.

Greenpeace appealed this decision to the High Court, which found that the Commission had not erred. It agreed that the promotion of disarmament involved advocacy and that this went beyond Greenpeace's other educative purposes, standing as purpose in its own right. The many references to advocacy activities on the Greenpeace website, for example, underscored the importance of advocacy activities as a core Greenpeace objective. On the issue of illegality, the Court found simply that illegal activities such as trespass were "an independent object disqualifying it from registration as a charitable entity."

In response, Greenpeace amended its objects by adding a reference to nuclear weapons and weapons of mass destruction. It also clarified that its advocacy activities were an ancillary purpose of the organization (going so far as to use the word ancillary in its amended document). This more or less satisfied the Court of Appeal, which – by equating contentiousness with political activity – accepted that the anti-nuclear issue was not "political" in the New Zealand context. This objective could therefore qualify as a charitable purpose under the "community benefit" category. The issue of legality was dealt with by referring it back to the Commissioner (who, pursuant to an statutory amendment in 2012 [Charities Amendment Act No. 2 2012], replaced the Charities Commission), especially as no evidence of illegality had actually been produced.

Issues to be addressed by the Supreme Court

Though the Court of Appeal did instruct the Commissioner to reevaluate the application, Greenpeace has two ongoing concerns, which form the basis for the decision to grant leave.

The first relates to the Court's treatment of political purposes. In the Court of Appeal case, Greenpeace had urged the Court to take a much more general approach to the definition of charitable purpose, to include political activities. It preferring the Australian approach, outlined in *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539. In that case, the High Court of Australia extended the definition of charitable institution (which is not outlined in statute) to those undertaking political activities, as the law must reflect the context of the day. The Court of Appeal rejected that they could expand the notion in such a way, underlying Parliament's prerogative for resolving the issue in New Zealand. In the Charities Act, Parliament had chosen specifically not to include political purposes in its definition, despite opportunities to do so (including a recent amendment to the definition [Charities Amendment Act 2012]). In addition, this was an issue that relates to tax policy, which sat squarely within the domain of legislative decision making. The Court also headed off any potential human rights arguments, essentially arguing that the right of freedom of expression does not equate to a right to a tax break.

The second issue on appeal is the way in which unlawful activities may impact an application. Like the High Court, the Court of Appeal avoided making such a determination of illegal activity precluding registration in Greenpeace's case. However, it did describe factors that could be taken into account when the Commissioner is considering an application. These included: the nature and seriousness of the illegal activity, whether it is attributable to the organisation, any processes the organisation has in place to prevent this activity, whether the activity is inadvertent or intentional, whether it was a single occurrence or part of a pattern of behavior. These factors may indeed result in an adverse registration decision, given Greenpeace's policy of non-violent direct action, which has in some cases included trespass, hence the impetus for a further appeal.

Discussion

The challenge for Greenpeace lies in dealing with an unambiguous statute and in relying on precedent that had no such obstacles. For these reasons, it is almost inevitable that counsel will rely on policy arguments for political activity to be included as a charitable purpose. Indeed, we received a glimpse of this approach at the Court of Appeal, when the arguments for expanding the definition were framed in terms of modernisation and current context. However, emphasising good policy reasons for expansion only serves to underscore the importance of the Supreme Court leaving this reform to Parliament. The four categories of charity are one of the oldest institutions of the common law, and while that is no reason in itself to retain them, if the institution is to be dismantled, the Court is in no position to do so when carried when it is currently resting on statutory foundations. Herein lies the distinction between this case and Aid/Watch.

The law relating to illegal activities and registration, however, would certainly benefit from greater clarification by the Supreme Court. No party disputes that illegal activities cannot underpin charitable purposes. Yet, it is not the Commissioner's role to determine criminal liability and, as in this case, there may be illegal activities occurring (or yet to occur) which have not been formally sanctioned by the criminal law. These should no doubt be a relevant consideration in registration, and outlining appropriate factors (in the absence of such guidance in legislation) is certainly desirable.

Finally, the curious finding that promoting peace and nuclear disarmament are not political activities, but promoting peace and (conventional?) disarmament are may well find itself reviewed carefully by the Supreme Court. Certainly, whether something is "political" is a difficult determination for a Court to make. The reasoning in *Molloy* upon which both Courts relied focused on whether there was "a division of public opinion capable of resolution … only by legislative action". This is an awkward test that (despite intentions to the contrary) focuses more on the substance of political activities (i.e. the "what") than the process (the "how"), which may be a more relevant indicator. This is not surprising given the highly polarizing abortion debate, a debate that *Molloy* was confronting head on. The Court of Appeal did turn its mind to process considerations in its discussion of advocacy, but stopped short of this being the deciding factor. Perhaps the Supreme Court will be more adventurous.

The Court of Appeal considers claims for damages in judicial review proceedings

Attorney-General v Dotcom [2013] NZCA 43 at [27]

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In *Attorney-General v Dotcom* the Court of Appeal was required to deal with what it described as an "issue of principle": whether a civil action ought to be allowed to be joined to a judicial review claim.[50]

Background

Combining an application for judicial review with an ordinary civil action for damages can give rise to procedural difficulties. Judicial review is supposed to be a "simple, untechnical and prompt procedure".[51] For this reason, procedurally applications for review have a "special character".[52] For instance, evidence is

50 *Attorney-General v Dotcom* [2013] NZCA 43 at [27].

51 *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 353; *Commerce Commission v Powerco Ltd* CA123/06, 9 November 2006 at [40].

52 Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Brookers) at [JA9.06].

usually adduced by affidavit[53] and cross-examination is not permitted as of right but only with the leave of the court.[54] Similarly, discovery is not required as a matter of course (although decision-makers have a duty to disclose relevant material to the court).[55]

Such procedural rules are usually unsuited to determine ordinary civil actions for damages. Accordingly, if an ordinary civil action is heard with an application for judicial review the proceeding may need to proceed in the usual manner of a full civil trial. That can result in the resolution of the application for judicial review being delayed which may adversely affect not just the parties to the litigation but also, given the public law nature of most applications for review, third parties. For this reason there has been reluctance on the part of the courts to hear claims for damages in judicial review proceedings.

How the issue arose in Attorney-General v Dotcom

The issue arose in *Attorney-General v Dotcom* in a reasonably unusual set of circumstances. Mr Dotcom and others challenged the validity of search warrants authorising their property to be searched. Their application for judicial review was heard and a judgment was delivered finding that the warrants were invalid. However, the Judge reserved the issue of remedies for a further hearing (referred to as the remedies hearing).

Resolution of the application for review was then complicated by two factors. First, the Judge raised the issue of whether the police conduct in executing the warrants amounted to an unreasonable search and seizure for the purposes of s 21 of the New Zealand Bill of Rights Act. Second, at the subsequent remedies hearing it was revealed that the Government Communications and Security Bureau ("GCSB") had been involved in illegally monitoring Mr Dotcom and his associates.

As a result of these developments, Mr Dotcom and the other plaintiffs for review sought to make a series of amendments to their pleading. First, they sought to file an amended statement of claim against the police seeking damages for breach of s 21 of the Bill of Rights. Subsequently, they sought to file a further amended statement of claim joining GSCB as a defendant and seeking compensation against it for the unlawful monitoring. Both steps required the leave of the court.

At this point the proceeding ran into what the Court of Appeal described as a "procedural difficulty".[56]

Before the first amendment to the statement of claim was filed, the plaintiffs obtained leave (given by consent) to include a challenge to the warrant on the ground that its execution was in breach of s 21 of the Bill of Rights Act. However, the amended statement of claim subsequently filed also included a new cause of action against the police seeking damages for breach of s 21 (relying on *Baigent's case*[57]). Leave had not been given to include the claim for *Baigent* compensation.

Further procedural difficulty arose because although the Crown objected to the addition of the *Baigent* claim, the High Court had not dealt with that objection by the time of the Court of Appeal hearing. To complicate matters more, by the time of the Court of Appeal hearing, the High Court in the remedies hearing had already heard four days of oral evidence and cross-examination which was relevant to the *Baigent* compensation claim against the police.

53 Ibid at [JA9.05].

54 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 554; *Geary v Psychologists Board* [2009] NZCA 134, (2009) 19 PRNZ 409 at [22] and [23].

55 *Henderson v Privacy Commissioner* HC Wellington CIV-2009-485-1037, 29 April 2010 at [108].

56 See the heading above [24].

57 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*].

By contrast, the issue of leave to join the GCSB as a party and include a cause of action against it for *Baigent* compensation had been ruled on by the High Court. The Judge granted the plaintiffs leave to take both steps. The Crown appealed against that decision.

Court of Appeal decision

On appeal the Crown asked the Court to rule that a claim for damages can never be added to a judicial review proceeding. The Court declined to lay down an absolute rule, although it indicated that "it will not usually be appropriate for review proceedings to expand to include claims for compensation".[58]

As to the circumstances in which a claim for damages can be added to a judicial review claim, the Court said:[59]

In essence, we consider that the objective of dealing with judicial review proceedings in the way that is most convenient and expeditious will provide reason for a High Court Judge to be cautious about allowing the expansion of a judicial review claim by the addition of a claim for damages. We endorse what this Court said in *Orlov v New Zealand Law Society* in that regard, and stress that it is the expedition of the application for judicial review that must be the focus.

In the relevant passage from *Orlov v New Zealand Law Society*, the Court had said:[60]

If there is any justification for combining another claim or claims with an application for judicial review, it can only be that that course will be the most "convenient and expeditious" way of enabling the Court to determine "all matters in dispute … effectively and completely".

In coming to this view the Court relied on s 10 of the Judicature Amendment Act 1972 ("JAA") which gives judges the power to give directions in judicial review proceedings for the purpose "of ensuring that any application … for review may be determined in a convenient and expeditious manner, and that all matters in dispute may be effectively and completely determined".

The Court held that in exercising any powers under the High Court Rules in judicial review proceedings "including the powers for joinder of new parties and leave to add additional causes of action, judges ought to do so in a way which is consistent with the objectives of s 10".[61] In this regard, the Court stressed that the focus in s 10 is the expedition of the application for *judicial review*, not all matters of any kind that may be in dispute between the parties.[62]

In terms of the resolution of the *Dotcom* case, the Court decided not to overturn the High Court Judge's decision to allow the joinder of GCSB. It did so given the "unusual context of the decisions" made in that case.[63] This seems to have been a pragmatic decision reflecting the procedural difficulties. The Court appears to have concluded that given that much of the evidence on the *Baigent* compensation claim against the police had already been heard the most expeditious course was to deal with both *Baigent* compensation claims in the context of the same proceeding.[64]

58 At [41].

59 At [48].

60 *Orlov v New Zealand Law Society* [2012] NZCA 12 at [22].

61 At [45].

62 At [43] and [47].

63 At [50].

64 See [50(c)]-[50(e)]

Future litigants should not expect the Court to adopt the same approach. The Court warned that:[65]

If we were considering the present application on a blank canvass, that is the addition of a *Baigent* claim to an orthodox judicial review claim that was proceeding in the orthodox way, we would take the cautious view and require the *Baigent* claim against the GCSB to be commenced as a separate claim.

Comment

Although the Court of Appeal refused to lay down an absolute rule that ordinary civil claims may not be added to applications for judicial review, it has made it clear that ordinary civil claims may only be added where doing so is the most convenient and expeditious way of resolving the *judicial review* application. Such circumstances are likely to be unique.

When leave is required to take the necessary steps to include an ordinary civil claim with an application for judicial review – because of the time when the plaintiff wishes to amend her pleading[66] or because the plaintiff wishes to join further parties[67] - the requirement for leave will provide an opportunity for the Judge to determine whether adding a civil claim is the most convenient and expeditious way of resolving the review application.

However, in other cases leave may not be required. For example, a plaintiff may commence proceedings by filing a statement of claim that includes a cause of action seeking judicial review and another cause of action claiming damages for breach of statutory duty. What can a defendant faced with such a pleading do?

The answer is that the issue can be addressed as a matter of case management. Although a statement of claim can combine causes of action for judicial review with private law causes of action, the court is not obliged to hear them together. Under s 10 of the JAA the court has a wide power to give directions in respect of the application for review. It can direct that the judicial review claim be severed from the other causes of action and heard first.[68] The Court of Appeal has made it clear that the judicial review claim should be heard separately unless hearing the claims together is the most convenient and expeditious way of determining the application for review.

An accused's right to an interpreter at trial

Abdula v R [2011] NZSC 130, [2012] 1 NZLR 534 (SC).

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** The views expressed in this case note are not necessarily reflective of any position of Bell Gully and should be construed as personal to the author.*

The Supreme Court's decision in *Abdula v R* provides some clarity as to the underlying rationale, scope and practical effect of an accused's right to an interpreter.

Background

Section s 24(g) of the New Zealand Bill of Rights Act 1990 (NZBORA) states that:

65 At [50].

66 An amended pleading may not be filed after the close of pleadings date without leave: r 7.7 of the High Court Rules.

67 See r 4.56 of the High Court Rules.

68 *Orlov v New Zealand Law Society,* above n 11, at [14].

Everyone who is charged with an offence – (g) shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

The right to an interpreter relates closely to the right of an accused to be present at trial and present a defence (s 25(e)) and also forms part of the overarching right of an accused to a fair trial (s 25(a)).

Facts

The appellant and another accused were tried jointly for the rape of a young woman. The key issues at trial were the nature of the sexual activity, whether or not it was consensual and how the appellant's DNA came to be associated with the victim.

At trial, the defendants had the assistance of a single interpreter who interpreted between English and Oromo. The trial began with an interpreter from Australia. However, due to his unavailability, a different interpreter – a taxi driver from Wellington - was used from the second week onwards.[69]

The Judge intervened on a number of occasions throughout the trial to express concern about whether the interpreter was keeping up. As a result of this and further discussion with the interpreter, Crown counsel repeated his opening address and allowed time for the interpreter to interpret each passage before counsel continued. The process of allowing time for the interpreter to speak before another speaker proceeded to the next part of their dialogue was explained to witnesses. Crown counsel also provided hard copies of some documents to the interpreter.

Issues

The protected right and underlying rationale
McGrath J (on behalf of the unanimous Supreme Court) held that the fundamental objective of the right is for an accused to have "full contemporaneous knowledge of what is happening at trial" in order to understand the case against them and have a full opportunity to respond. The Court also observed that the right demonstrates the need for fairness in the criminal justice process in our increasingly multicultural society.

The standard required & was the right breached
The Court held that a high standard is required to satisfy the right, but that this standard is not one of perfection. The focus must be on the statutory rights (in ss 24(g), 25(a) and 25(e)) with the common law informing the content and scope of the rights.

Interpretation will not meet the required standard if, as a result of its poor quality, the accused is unable to sufficiently understand the "trial process or any part of the trial that affects the accused's interests, to the extent that there was a real risk of an impediment to the conduct of the defence."

The Supreme Court held that the right was not breached. In doing so, the Court emphasised two important factors:
(a) The trial judge played an active role in ensuring that the interpretation process worked effectively; and
(b) The accused never made a timely complaint *during the trial,* whether formally to counsel or the judge

69 The second interpreter did have some interpretation qualifications. However, the appellant argued that the second interpreter's qualifications were insufficient and therefore his rights were breached (see [47]-[52]). This issue is not addressed in this case note. However, the Supreme Court made it clear that whilst an interpreter having a high level of qualification is recommended, it is not a pre-requisite to the right being satisfied.

or informally to the interpreter, about the quality of interpretation.

The Court also considered it "relevant" that the appellant understood some English and that it was a "straightforward trial in which the issues were clear and no doubt well understood by the appellant at the outset."

The Court made a number of other observations, including:
(a) Where the standard of interpretation is challenged, the cumulative effect of the deficiencies must be examined;
(b) A consequence of s 24(g) being breached is that s 25(a) will not be satisfied and "...it is axiomatic that a substantial miscarriage of justice will have occurred..."; and
(c) The onus is on the appellant to establish on the balance of probabilities that any deficiencies in the interpretation process caused them to fail to understand any part of the proceedings.

'Simultaneous' and 'consecutive' interpretation

The appellant made specific complaints about the interpreter's use of 'simultaneous interpretation'.[70] However, the appellant conceded that 'simultaneous interpretation' only occurred on a very small and "insignificant" number of occasions.

The Supreme Court considered that the extent of the 'simultaneous Interpretation' was insufficient to mean the right had been breached. Nevertheless, the Court commented that the standards adopted at trial were not "best practice" and stated further that 'consecutive interpretation' is "highly desirable" because it:
(a) Enables an accused to react in response to what is said in court immediately and without being distracted; and
(b) Avoids the real risk that the interpreter will fall behind and miss passages of the evidence.

In addressing this issue, the Supreme Court more generally recommended that:
(a) The interpreter should speak loud enough for all in courtroom to hear; and
(b) An audio recording should be made of all criminal trials where an interpreter provides assistance.[71]

Comments

The case illustrates the difficult balance to be struck between theory and practice. In an already overloaded Court system with the pressure of time constraints, both Judges and counsel must be alert to the possibility that an accused may require interpretive assistance.

Whilst use of an interpreter may significantly lengthen a trial, especially when 'consecutive interpretation' is used, the consequence of the accused's right to an interpreter being breached is that s 25(a) will not be satisfied and a substantial miscarriage of justice will have occurred. The right is ever the more important in an increasingly multicultural society that can give rise to complex issues of interpretation.[72]

It will be interesting to see whether there is any development in relation to the Supreme Court's statement

70 'Simultaneous interpretation' is where the interpreter is speaking at the same time as the Judge, Counsel or witness who they are interpreting. This can be compared with 'consecutive interpretation' where only one speaker speaks at a time.

71 In *R v MR* [2012] NZHC 1813, the accused was both profoundly deaf and illiterate. Two interpreters 'mouthed the words' to the accused. Therefore, Heath J stated that the use of audio recording to asses the adequacy of the interpretation would be pointless. The case illustrates the potentially broad range of circumstances in with s 24(g) may apply and the need for flexibility in the application of the rules relevant to the operation of the right.

72 For example, in *R v West London Youth Court*; Ex parte J [2000] 1 WLR. 2368 (QB) an 11 year old girl was arrested for theft. Her only language was Bosnian Romany and no one could be found who could interpret directly between this language and English. In response to this problem, a 'double interpretation' process was adopted whereby one interpreter interpreted from English to Serbo-Croat and a second interpreter interpreted from Serbo-Croat to Bosnian Romany. The Court held that there was no reason why 'double interpretation' could not meet the objective of the accused having a fair and properly understood trial.

that the simplicity of the issues at trial (here described as "straightforward") is relevant. In the author's opinion, if too much weight is placed on this factor, there is a real risk that the underlying rationale of the right may be undermined.

You Have the Right to Google

R v McKay 2013 ABPC 13

Shelley Deng | Section Editor of the New Zealand Human Rights Blog

"We are at an unprecedented time in human history. The real world exists parallel to and in tandem with the virtual world."[i]

So began the substantive analysis of Lamoureux J in the Provincial Court of Alberta, Canada. *R v McKay* 2013 ABPC 13 is a short case; yet, in only a few pages, Lamoureux J has again expanded judicial recognition for the growing importance of the internet in rights discourse.

The accused

An unusually clueless young defendant sets the tone for this case. A 19 year old man was picked up by police on suspicion of driving while intoxicated after charging through a red light. An excruciatingly detailed minute-by-minute account of the precise actions on the night is set out in paragraph four of the judgment. For our purposes, the relevant facts are:

> 1:49 am: The accused was read his Charter rights. "Yup," he replied, when asked if he understood his rights and would like a lawyer.
>
> 2:00 am: The accused arrived at the police station. He was shown the station's resources to contact a lawyer: the White Pages, Yellow Pages, 1-866 toll-free number, and 411 operator.
>
> 2:04 am: The accused was given privacy to make his call.
>
> 2:09 am: The accused finished his telephone call. He replied, "yes" when asked if he spoke with someone.

But it turns out Mr McKay had no clue what to do at all. A university graduate and connoisseur of pop culture and Hollywood movies, he was under the mistaken impression that he could have one — and only one — phone call for legal advice.

Dialling the toll-free number, Mr McKay found the person on the other end "abrupt" and "did not want to talk to him" (at [6]). He testified at court that he received "no satisfaction at all" from his toll-free call (at [6]). He also testified that he "did not know what 411 was at the time" and that he "usually uses *Google*"; the 411, to Mr McKay, did not constitute "a viable search engine" (at [6]).

"A statement of deep ignorance", noted Lamoureux J (at [11]). But nevertheless, The Court very generously "[took] judicial notice that the average 19 year old will look to the internet for information to get legal advice *before* checking White Pages, Yellow Pages or 411" (at [11]).

The "computer generation"

The only way to truly appreciate the good-will of the Court towards the virtual revolution is to read Lamoureux J's own words at [10]:

It is uncontroverted that the vast majority of individuals born after the year 1980 first look to the virtual world for information, for education, for access to services, before they consider access to anachronistic services such as paper telephone directories and numbers posted on a wall. The computer generation considers the internet, the cell phone, the iPad, the Smartphone, essential partners in daily life. (Emphasis added).

In what could constitute an enthusiastic plug for Google, her Honour commenced her own "five seconds or less" search for "Calgary criminal defence lawyers" on Google Canada (at [13]), after continuing (at [10]):

The average 19 year old looks to Google as a source point for much of the information necessary to carry on daily life. Google mapping, driving motor vehicles with the assistance of Google, access to restaurants, access to medical care, access to Universities and educational information, and access to lawyers, along with millions of other items of information are all contained on the metasource – Google. Indeed Google seeks as one of its missions to become the source of original information for the world.

Although this born post-1980 law student personally considers the next statement a bit of a stretch, Lamoureux J further stated (at [17]):

There are sufficient numbers of individuals born post computer age who have no understanding of the paper world who have extensive knowledge and understanding of the virtual world. (Emphasis added)

Her Honour concluded (at [17] and [19]):

Every police station should have access to the internet so that accused persons can go to the internet to access the names of lawyers that they require… In the Court's view, in the year 2013 police providing access to the internet is part of a detainee's reasonable opportunity to contact legal counsel. (Emphasis added)

The growing right to the internet

A subtle distinction must be drawn in all fairness: Lamoureux J did not make internet access an explicit right. Rather, her Honour found that Mr McKay's reasonable opportunity to exercise his protected constitutional right to counsel would be infringed without the ability to "use other resources with which he might have been more familiar" (at [19]). Section 10(b) of the Charter imposes both an informational and procedural duty on police; the procedural duty was breached by not providing the detainee with a "reasonable opportunity to exercise the right" through access to the internet (at [20]).

Although commentary surrounding this case has focused on "creating" a right to the internet, fundamentally, this case is about upholding the ability for all people —ignorant teenagers included — to have access to justice and adequate legal representation in a potentially scary power differential situation. Its focus is on accessibility — an accessibility for teenagers that is best fulfilled through use of new technologies. It fits the argument of Vinton Cerf, father of the internet, that "technology is an enabler of rights, not a right itself".

But the legal world increasingly disagrees with Cerf. Implicitly, by declaring that "all police stations must be equipped with internet access" (at [21]), this judgment does strengthen the status of internet access in Canada. Lamoureux J's astute recognition of the changing role of technology in how we access and share information follows a growing legal-political recognition for the importance of the internet.

The 2011 United Nations Special Rapporteur report to the UN Human Rights Council called upon "all States to ensure that Internet access is maintained at all times, including times of political unrest" and considered

the internet "an indispensible tool for realizing a range of human rights, combating inequality, and accelerating development and human progress" (at [79] and [85]). States were asked to "develop a concrete and effective policy… to make the Internet widely available, accessible and affordable to all segments of population" (at [85]).

A right to internet access has been recognised in the Constitution of Greece, article 5A; the Constitutional Council of France declared internet access a "basic human right"; and Finland was the first country to make broadband access a legal right. The Supreme Court of Costa Rica has followed suit and held a "fundamental right of access to these technologies, in particular, the right of access to the Internet or World Wide web".

In Estonia, the government has called the internet "essential for life in the 21st century" and passed a law declaring internet access a fundamental right. Lord Justice Hughes in the United Kingdom Court of Appeal judgment of *R v Smith* stated, "A blanket prohibition on computer use or internet access is impermissible. It is disproportionate because it restricts the defendant in the use of what is nowadays an essential part of everyday living…" (at [20]).

Amongst the ordinary folk, people around the world have been ranking "phone and internet access" alongside "better healthcare" and "political freedoms" in the UN post-2015 Millennium Development Goals survey. New Zealand's very own 2013 Census application showed Facebook-using Aucklanders prioritising "free Wi-Fi hotspots" higher than "more job training" or "help with childcare".

Concluding thoughts on the purpose of law

In his Law and Information Technology class at the University of Auckland last year, Judge David Harvey often questioned the "rear view mirror" approach of the legislature and judiciary to the growing prevalence of technology. Far from being forward thinking, our law makers still primarily look to fit evolving technological issues "uncomfortably" within existing legal models, rather than designing new models to address new paradigms. Although *R v McKay* may "undoubtedly raise eyebrows" now, is it not perhaps an honest reflection of the changing practices amongst young people today? — "Young people" who will eventually grow into just "people" given another decade.

Perhaps Estonia should have the last word:

Some people still think of Internet access as a luxury… But 10 years ago, most people in Estonia looked at hot, running water as a luxury, and nobody would think that today. [i] *R v McKay* 2013 ABPC 13 at [10].

View this Case Note on the NZ Human Rights Blog at http://nzhumanrightsblog.com/overseas/you-have-the-right-to-google-r-v-mckay/

Ticks and Crosses

Wybrow v Chief Electoral Officer [1980] 1 NZLR 147

Shelley Deng, Section Editor of the New Zealand Human Rights Blog

How may citizens vote in an election? According to statute, the one correct method of voting was to "[strike] out the name of every candidate except the one for whom [the voter] wishes to vote" (Electoral Act 1956, s 106). On the other hand, according to ordinary citizens who had actually cast their vote at the polls, a mere tick or cross against a candidate's name should have been sufficient in expressing their democratic wishes.

Would an explicit and clear legislative provision triumph over the democratic expression of the citizen? *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147 was a case where the Court of Appeal upheld the right of every citizen to have their vote acknowledged and counted if the intention was clear.

The importance of human rights is ingrained in almost every process in society. *Wybrow* demonstrated that human rights considerations need not be solely protected through grand constitutional bills of rights, but can also be defended through the fundamental judicial skills of statutory interpretation.

Before we begin: Jurisdiction and discretion challenges

Wybrow was brought directly into the Court of Appeal under section 7 of the Declaratory Judgments Act 1908. The first challenge faced by the citizen was the preliminarily argument that the Court of Appeal did not have jurisdiction to address a ballot count issue (at 149). This was due to election petitions determined by the Supreme Court (then High Court) being "final and conclusive and without appeal, and shall not be questioned in any way" (Electoral Act 1956, s 168).

A prior Supreme Court decision in *Re Hunua Election Petition* [1979] 1 NZLR 251 had held that Returning Officers had no discretion to accept votes marked by ticks or crosses when the mandatory voting procedure required candidates' names to be struck out (*Hunua* at 298). The resulting law endorsed a very limited and narrow discretion for Returning Officers to accept incorrectly marked ballots.

The Court rejected the jurisdiction challenge. It stated that the purpose of the hearing would "not affect or question the results of elections in the past" (*Wybrow* at 148). This is a routine exercise in statutory interpretation, said the Court. It is the duty of the courts to clarify uncertainties in statutes. The Court was not questioning the vote count outcome of *Hunua* — that would be contrary to section 168, it explained — the Court was only questioning the interpretation of the law that *Hunua* was based upon (and if the practical effect was to invalidate the dicta of *Hunua* in the process…). "The question is one of statutory construction. It is purely a question of law", the Court concluded (at 151).

Further, the Court justified that Returning Officers "should know where they stand" on "future election controversies" and that the Supreme Court "would no doubt appreciate" guidance on this conflict (at 147). With that matter satisfied, the Court embarked upon answering its 'pure question of law'.

What the statute says: Voting procedure and vote counting

A unanimous Court of Appeal held that a voter's clear intention on an officially issued ballot paper is the paramount consideration for a Returning Officer in accepting or rejecting a ballot (at 153).

The Court was asked to determine the relationship between sections 106 and 115 in the Electoral Act 1956. It affirmed that statutory provisions must be "read as a whole, that each must be considered in its context, and that regard must be had not merely to the letter but also to the apparent object of the legislation" (at 152).

The Court concluded that section 106 and section 115 were separate and distinct in purpose and requirements (at 152 and 153). Section 106 provided instruction to the citizen; section 115 was aimed at the Returning Officer (at 152 and 153). Section 106 stated how voters must exercise their votes, but did not determine the validity of ballots; section 115 stated criteria for rejecting a ballot, but did not state requirements for how citizens must vote (at 152 and 153). Fortunately, from the non-conforming voter's perspective, the 'voting requirement' and 'validity' sections of the Act failed to overlap.

A ballot that may have been invalid by section 106's standards was saved if it met section 115's requirements (at 153). These requirements were: 1) an officially issued ballot paper, and 2) a ballot clearly indicating the voted for candidate (at 153). All ballots that met these requirements must be counted (at 153). "So obviously does s 115 state a wider test", the Court concludes, that Parliament must have "manifestly decided… the only test of the validity of a vote… is whether [the voter's] intention is clearly indicated" (at 153).

To meet criticism that this approach effectively left section 106 meaningless, the Court stated section 106's purpose was to bring "uniformity" to the voting procedure so that a majority of votes "automatically" denoted the voter's intention and were valid (at 153). After all, "…the ingenuity of voters exercising their franchise knows no bounds" (*Hunua* at 296 cited by *Wybrow* at 154), and it would become too uncertain and "illogical" to list and approve every possible method prospectively (at 154).

The human rights implications of a 'neutral law'

There is a line in the philosophical play *Jumpers* by Tom Stoppard that reveals the dangers of strictly upholding technical procedure over voter intention: "It's not the voting that's democracy; it's the counting." The right to cast a vote for an elected representative is a core principle of any democratic system. But the meaningful exercise of this right extends only so far as the intentions of voting citizens are given effect at the count. A strict approach, as in *Hunua*, leaves ordinary people vulnerable to having their democratic choice discarded.

And it is precisely who these people are that is particularly significant. Although on its face the Electoral Act 1956 set out a neural provision dictating a method for voting that was applicable to all equally, in practice the Act would have had disproportionately harsher ramifications on the most vulnerable groups in society. Particularly susceptible and more likely to mark their ballots incorrectly were the people from impoverished backgrounds, the under-educated, the disabled, and refugees and migrants. These vulnerable minorities already face enough difficulties participating in socio-political dialogue that it seems abhorrent that we should raise further barriers when these groups are trying to engage with our political system.

Sir Edmund Thomas, one of the counsel for the plaintiff in this case, has stated:

The individual who is destitute, jobless, homeless, semi-literate, disabled, underprivileged, marginalised, or otherwise disadvantaged, the 'losers' in a capitalist economy, is unlikely to receive the recognition his or her worth as a human being merits… minorities lack real political power.

No citizen should have their fundamental democratic rights stymied by procedural technicalities. But it is important for vulnerable minority groups, *especially*, to have a voice in electing officials that will represent their interests in the legislative process. A larger systemic danger of invalidating the votes of vulnerable minorities is that if these minorities are disproportionately more likely to make up the demographics of certain political parties, support for these parties may consistently be underrepresented. Fair and accurate representation is reliant on preventing this skewing of our election results. A threat to the vote is a threat to the heart of our democratic system.

This Case Note may be viewed on the NZ Human Rights Blog at http://nzhumanrightsblog.com/newzealand/ticks-and-crosses-wybrow-v-chief-electorial-officer-case-note/

What is a proportional breach of human rights?

Alberta v Hutterian Brethren of Wilson Colony 2009 SCC 37, [2009] 2 SCR 567

Sam Bookman | Co-Editor in Chief of the New Zealand Human Rights Blog.

The notion that breaches of rights may be "proportional" seems intuitively uncomfortable; one conception of human rights is that they are "moral side constraints" (Robert Nozick) or "trump cards" (Ronald Dworkin), concepts that will overrule any other consideration. Yet, the New Zealand Bill of Rights Act 1990 (NZBORA) s 5 and Canadian Charter of Rights and Freedoms (Charter) s 1 have been (logically) interpreted as legitimizing breaches of rights, provided they are proportional. This has given rise to tests, most famously the "*Oakes* test", which allows for rights-breaching government actions and enactments to be weighed against the rights –often statutory – that they infringe.

One of the most recent articulations and critiques of the "*Oakes* test" is found in the Supreme Court of Canada (SCC) case of *Hutterian Brethren*. This case concerned a claim by a religious group (the Brethren) that their freedom of religion under s 2 of the Charter was breached by a new state law that required all Albertan driver's licences to contain photo identification, reversing a 29-year exemption that the Brethren had enjoyed. This was inimical to the Brethren's interpretation of the Biblical Ten Commandments, which considered rendered images to be a form of idol worship. The Brethren further claimed that the enactment was a breach of s 15 of the Charter, which prevents discrimination.

The SCC was split 4-3. The majority (McLachlan CJ, Binnie, Deschamps, Rothstein JJ) found the breach sufficiently proportionate under the *Oakes* test. The minority, in their two separate judgments (Abella J and LeBel and Fish JJ) found that the breach was disproportionate. The case illustrates the way in which the framing of the four questions required of the *Oakes* test can deliver very divergent results.

The *Oakes* test

The *Oakes* test – formulated by Dickson CJ in *R v Oakes* – is comprised of four questions in two limbs. The first question, constituting the first limb, is to ask whether the government enactment addresses a pressing and substantial objective. The second limb is constituted of three questions of proportionality, namely:

1) Is the measure rationally connected to the aforementioned objective?
2) Is the measure a minimal impairment on the right in question?
3) Is the measure overall proportionate?

This test has emerged as the preferred Canadian test in Charter rights and discrimination cases since the SCC's comments in *R v Kapp*. Similarly, it has been adopted by the New Zealand courts for Human Rights Act 1993 (HRA) discrimination and NZBORA cases in *Ministry of Health v Atkinson* and *Hansen v R.*

The Majority decision

1) Pressing and substantial objective

The majority of the SCC found there existed an undoubtedly pressing and substantial objective. Their Honours accepted the state's argument that the measure intended not only to improve road safety, but to more broadly avoid identity theft. MacLachlin CJ found that this was indeed an issue of grave concern that required urgent attention. By accepting the state's contention that the measure was intended to guard not only against its direct objective (i.e. road safety) but also its auxiliary objective of identity theft, the majority allowed for the proportionality stage of the test to be framed in a far broader sense and in a context of

what was considered an extremely important objective.

2) Rational connection

There was little debate as to the connection between the objective and the measure – it was quickly accepted that the law would address its intended aims.

3) Minimal impairment

The majority took the view that the compromise offered by the state – that photos taken could be kept on a private storage system – was sufficient to meet the requirements of this stage. Their Honours further commented that a degree of deference was owed to the government in such circumstances.

4) Overall proportionality

This stage of the test has been criticised by Canadian scholars such as Peter Hogg as being redundant. He poses the question of whether a measure that addresses a pressing objective, is tailored to that objective, and does so in a minimal rights-infringing way could ever be considered disproportionate. Indeed, there have been very few cases that have fallen at this hurdle (one notable exception being *New Brunswick v G*).

However, the Court (rightly) rejected this argument. While Hogg is right to point out that instances where this stage proves decisive will be rare, such occasions will nonetheless sometimes occur. Both the majority and minority favoured the reasoning of former Israeli Chief Justice Aharon Barak, who has argued that this fourth stage is important as it allows the court to take a broader assessment of proportionality. A provision may, for example, be a minimally impairing one, but the overall deleterious effects may be so significant as to outweigh the ultimate objective. This is the only stage of the test where such an assessment can be made.

Ultimately, the majority found that the salutary effects of the enactment outweighed the deleterious ones. This was largely in light of the strong emphasis placed on the avoidance of identity fraud, identified by their Honours at the beginning of the judgment. Their Honours also considered the effects on the Hutterian way of life to be minimal, noting that discouraging Brethren members from driving did not deprive them of a meaningful choice. The provision was therefore considered proportionate.

The minority judgments

1) Pressing and substantial objective

Abella J agreed that the objective of the measure was a substantial one. However, she rightly noted that Alberta had never had a major problem with identity fraud – and in any event licences were not a solve-all solution to the problem, as there were 700,000 Albertans without licences. The 29-year exemption that the Brethren had enjoyed had not caused any major problems. As with the majority, her Honour's conceptualisation of this question, and her refusal to accept the state's reasoning, would frame her proportionality analysis in the remainder of the judgment.

2) Rational connection

This was largely unchallenged in the minority judgments. However, LeBel and Fish JJ rightly noted that a higher threshold ought to be adopted by the courts, as evidenced by the paucity of cases that have failed this question.

3) Minimal impairment

Abella J criticised the majority's findings that the "compromise" solution constituted a minimal impairment. Rather, she argued that the infringement on freedom of religion came not at the stage of publication of photos, but at the very taking of the photographs at the outset. As such, the fact that the photographs would not be reproduced was of little comfort to the Brethren.

4) Overall proportionality

Both judgments ultimately concluded that on this broad view that the enactment was disproportionate.

Abella J correctly noted there was no evidence to suggest that the 29-year exemption for Brethren members had ever threatened the integrity of the licencing system or caused identity fraud. Her Honour also gave greater weight to the effects on the Hutterian way of life. She criticised the assertion that members could simply utilise third-party transport – instead, this threatened the self-sufficiency that lay at the heart of the Brethren community's ethos. Accordingly, she found that the inability to obtain licences was harshly deleterious to the Hutterian community and was not justifiable.

LeBel and Fish JJ correctly noted that the state's objective should not be treated as an absolute, inferring that the majority had done so. Instead, they conceived the task of proportionality tests as tempering government objectives and requiring compromise on its part. They accordingly found that driver's licences are not a privilege to be issued at the state's whim, but rather deprivation on the grounds of breaching religious freedom was unjustifiable.

Taking cultural rights seriously

Hutterian Brethren is a stark reminder of the extraordinary discretion afforded to individual judges by proportionality tests and statutory provisions. That seven eminent jurists could come to three different conclusions illustrates the way in which the framing of questions – and the judge's individual outlook – can have profound consequences for victims of state rights infringement.

The primary distinction between the majority and minority judgments rests on questions of framing and overall effect of the measure. The minority judges' refusal to accept that the measure would have a large impact on identity fraud coloured their assessment of proportionality. Accordingly, it is not surprising they came to a different conclusion.

This case also raises questions as to the impact of state regulation in a world of diverse religious and cultural practice. The Hutterian way of life is unique, and it seems that only Abella J seriously considered the effect of the measure on them. It is disappointing that other judges did not engage in a more thorough assessment of cultural rights. Such rights have been hailed as an important sense of identity and well-being, often in the Canadian context (see for example the work of Charles Taylor and Will Kymlicka). They are deserving of more sophisticated analysis by such an esteemed judicial body.

It is submitted that the decision in *Hutterian Brethren* is an alarming distortion of rights analysis. Rights such as religious freedom and freedom *from* discrimination – while often framed as negative rights – inevitably have a positive dimension. This often makes them unique in traditional bills of rights, such as the Charter and NZBORA. They enable a particular action and way of life. If such rights are to be taken seriously, to consider them according to the low threshold of "proportionality" – that pervades decisions made under the Oakes test – is concerning. Such rights deserve greater credit.

This Case Note can be viewed on the NZ Human Rights Blog at http://nzhumanrightsblog.com/overseas/case-note-alberta-v-hutterian-brethren-of-wilson-colony-what-is-a-proportional-breach-of-human-rights/

Right to Counsel - even a foreign one?

Barrie v R [2012] NZCA 485

Zyanya Hill, BCom LLM(Hons)

Barrie v R [2012] NZCA 485 was an appeal against conviction to the Court of Appeal on the basis that, by failing to facilitate the consultation of a lawyer in Australia, the police had infringed upon Mr Barrie's rights. This case considered the definition of "lawyer" under s 23(1)(b) of the New Zealand Bill of Rights Act 1990 (NZBORA) and found that the definition did not extend to a foreign lawyer. The case upholds the principle that the right to counsel of choice is not absolute and is subject to reasonable and practical limitations, particularly in the drink driving context where time is of the essence.

The facts

Mr Barrie was stopped at a routine breath screening checkpoint set up by the police in Tauranga just before midnight on a Friday night in 2010. Despite denying the consumption of any alcohol at all, he failed the breath screening test and was told by police that he was required to attend the police station for an evidential breath test, blood test, or both. Both parties agree that Mr Barrie was told of his right to counsel under the NZBORA and that the Police held a list of local lawyers he could contact without charge.

Upon arrival at the police station, Mr Barrie expressed a desire to contact a lawyer in Australia. The police officer did not object. However, Mr Barrie was unfortunately not able to recall the name of his Australian lawyer and wished to call his brother to find out the name of the lawyer. The police officer said he could call his brother on his own cell phone. However, Mr Barrie's cell phone was flat and he was not given the option of using the police telephone for this purpose.

Consequently, Mr Barrie refused to give an evidential blood or breath test on the ground that he had not been given the opportunity to consult his lawyer. It is common ground between the parties that the police officer repeatedly told Mr Barrie of his right to contact a local lawyer from the list, free of charge, but he chose not to do so.

The relevant legislative provisions

Mr Barrie was convicted for failing to permit a blood specimen to be taken under the Land Transport Act 1998, s 60. However, the case turned on the statutory interpretation of the rights accorded under s 23(1)(b) of the NZBORA, which provides:

"23 Rights of persons arrested or detained
(1) Everyone who is arrested or who is detained under any enactment-

...

(b) shall have the right to consult and instruct a lawyer without delay and to be informed of that right;…"

The first issue: Is there an automatic right to consult a foreign lawyer?

In order to interpret the above provision, the Court of Appeal looked to the definition of lawyer as provided under s 6 of the Lawyers and Conveyancers Act 2006 (which limited the term "lawyer" to persons holding a current practising certificate) and ss 21 and 25 of the same Act, which deal with people holding themselves out to be lawyers (specifically foreign lawyers). Under s 25, foreign lawyers are permitted to provide legal services in New Zealand except in specific circumstances.

The Court of Appeal held that the definition in the Lawyers and Conveyancers Act does not impact on the

interpretation of the word "lawyer" in NZBORA: "unless expressly adopted, the meaning given to a word in one piece of legislation is not affected by the meaning given to that same word in a different enactment." [73]

The Court nonetheless found that the right to consult a lawyer does not automatically extend to the right to consult a foreign lawyer (a person who is not in New Zealand at the time and who does not hold a New Zealand practising certificate) in the drink driving context. It found that the right to advice "can only be given practical effect by advice from a lawyer familiar with the relevant law."[74]

Thus, due to practical issues arising in relation to the use of foreign counsel, and in order to give meaningful effect to s 23(1)(b), the appeal was declined.

Further issues for consideration by the Court

The Court of Appeal, by virtue of the above decision, was not required to consider whether a detainee who seeks to exercise the right to advice beyond New Zealand boundaries may need to justify that request. Nor was the Court required to consider whether the police would be justified in declining the request in the absence of such grounds. The Court did briefly consider whether the police were obliged to explain the limitations of s 23(1)(b) to detainees and found that the police should explain that there was no right to consult a foreign lawyer. However, the Court held that any failure to do so would not impact on the right to counsel, provided that the opportunity to consult and instruct a New Zealand lawyer had been given.

Discussion

It is important to note that the Court did not intend this decision to create precedent in areas other than drink driving, and specifically stated:[75]

The question of whether and in what circumstances the s23(1)(b) right may extend to consulting a foreign lawyer in other situations is not before us and we make no comment on this issue.

The drink driving situation is very specific in that time is of the essence. The body processes alcohol over time and thus a delayed evidential blood or breath test may show a lower result than a timely one would have revealed. Due to the importance of timeliness in this situation, the Court of Appeal has chosen a pragmatic and practical approach to the interpretation of the right to counsel, in balancing the interest of prompt enforcement of the Land Transport Act and the rights afforded by the NZBORA.

View this Case Note on the NZ Human Rights Blog at http://nzhumanrightsblog.com/newzealand/case-note-barrie-v-r/

Bargaining Rights during Employment Restructuring

Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd [2012] NZSC 8

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Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd [2012] NZSC 8 was a Supreme Court decision dealing with employees' bargaining rights for redundancy entitlements in the context of the restructuring of employment. This case showed that such 'rights' can be partially or absolutely extinguished by employment agreements (even where the courts acknowledge the vulnerable position of employees when entering into these agreements). In the decision's focus on statutory interpretation, it also became

73 *Barrie v R* [2012] NZCA 485 at para 36. The Court referred to JF Burrows and RI Carter Statute Law in New Zealand (LexisNexis, Wellington, 2009) at 423 in support of this decision.

74 *Barrie v R* [2012] NZCA 485 at para 44.

75 *Barrie v R* [2012] NZCA 485 at para 49.

clear that the wording of section 69N(1)(c) of the Employment Relations Act 2000 ("the Act") lacks clarity in an important respect.

The Facts

The appellants were cleaners at Massey University ("the University"), backed by their union. Following the expiration of the University's contract with the appellants' employer, OCS contracted with the University to take over the cleaning jobs, and the appellants elected to transfer to OCS as their new employer. Soon after, OCS informed the appellants that unless they accepted different (and less beneficial) terms and conditions of employment, they would be made redundant. Following this, issues arose concerning redundancy entitlements; the employees' employment agreements expressly excluded redundancy payments.

The Relevant Legislative Provisions

The basis of the dispute arose from the interpretation of provisions in the Employment Relations Act 2000 relating to redundancy entitlements when employees' work is affected by restructuring, as was the case here. Section 69A provides protection to specified categories of employees if, as a result of proposed restructuring, their work is to be performed by another person. This section gives these employees the right to elect to transfer to the other person as employees on the same terms and conditions of employment. Transferred employees, if made redundant for reasons/circumstances arising from/relating to the transfer of employees, have a right, subject to their employment agreements, to bargain for redundancy entitlements from the employer to whose employment they have transferred. If agreement cannot be reached such employees have a right for redundancy entitlements to be determined by an arbitrator.

The basis for dispute in this case was the interpretation of the related section 69N: *Employee who transfers may bargain for redundancy entitlements with new employer*

(1)This section applies to an employee if—

(a)the employee elects, under *section 69I(1)*, to tra*nsfer to a new employer; and*

(b)the new employer proposes to make the employee redundant for reasons relating to the transfer of the employees or to the circumstances arising from the transfer of the employees; and

(c)the employee's employment agreement—

(i)does not provide for redundancy entitlements for those reasons or in those circumstances; or

(ii)does not expressly exclude redundancy entitlements for those reasons or in those circumstances.

(2)The employee is entitled to redundancy entitlements from his or her new employer.

(3)If an employee seeks redundancy entitlements from his or her new employer, the employee and new employer must bargain with a view to reaching agreement on appropriate redundancy entitlements.

The First Issue: What was the correct interpretation of s 69N(1)(c)?

There was no dispute that (a) and (b) of s 69N(1) were fulfilled. The issue was whether (i) and (ii) of s 69N(1)(c) should be read alternatively or cumulatively. The employment agreement in this case expressly excluded redundancy payments (in deciding this issue, redundancy 'payments' and 'entitlements' were viewed as the same thing; the distinction between the two became important when deciding the second issue). As such, the appellants did not satisfy s 69N(1)(c)(ii), but, they argued, it was precisely for this reason that they satisfied s 69N(1)(c)(i) . They further argued that (i) and (ii) should be read alternatively, so that by satisfying only (i), they satisfied (c) as a whole. This argument was accepted by the Employment Court, but not by the Court of Appeal (*OCS Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2011]

NZCA 597, [2012] 1 NZLR 394 ("CA ruling")). The Supreme Court, while recognising that the legislation was designed to protect vulnerable employees with little bargaining power, agreed with the Court of Appeal on the basis that were the appellants' argument correct, (ii) would become redundant, as an express exclusion under (ii) would always be defeated by a fulfillment of (i). Because Parliament could not have intended that provision to be redundant it followed that a cumulative reading was the only way that (c) made sense (at [9]):

If express exclusion is treated as being the same as not providing for redundancy entitlements, the subparas would be inherently contradictory and the right to bargain could never be excluded by agreement.

Furthermore, s 69A(b) of the same act demonstrated that the right to bargain was intended to be subject to employment agreements. Thus, it had to be possible for an employment agreement to exclude redundancy entitlement with the actual effect of no redundancy entitlement having to be paid out. The conclusion was that in order to satisfy s 69N(1)(c), an employee must show that there is no provision for redundancy entitlements in the employment agreement and that the agreement does not expressly exclude redundancy entitlements.

The Second Issue: the effect of the employment agreement

The employment agreement contained a clause stipulating that no redundancy payments would be made as a result of redundancy due to downsizing of client contract or loss of client contract.

The Chief Judge of the Employment Court held that in this case there was a downsizing of client contract and so there was no entitlement to redundancy payments, but that redundancy *entitlements* under s 69N(2) were still available as long as these entitlements did not include monetary compensation (*Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd* [2010] NZEmpC 113, (2010) 8 NZELR 39 (EMC)at [54], [58], [73]). In contrast, the Court of Appeal held that the exclusion of redundancy payments meant the exclusion of all redundancy entitlements because a "payment"' and an "entitlement" are the same thing (*CA ruling* at [35]-[36]). The Supreme Court held that the Court of Appeal was in error, since under s 69B, "redundancy entitlements" *include* redundancy compensation – so other redundancy entitlements, such as the right to retraining, existed independently from rights to financial compensation. It was here that the second issue connected back to the first issue. The Supreme Court found that since the excluded redundancy payments were only one kind of redundancy entitlement, the employees retained the right to bargain for redundancy entitlements other than the expressly excluded payments, under s 69N.

Discussion

The basis for the decision that subparas (i) and (ii) of s 69N(1) must be read cumulatively rather than alternatively is logical. Parliament would not intentionally legislate in a manner that purports to allow employers and employees to contract out of redundancy entitlements in employment contracts, but actually make it impossible in practice. Indeed, there seems to be no situation in which an alternative reading would be appropriate: in a case where an employment agreement already provided for redundancy entitlements an employee would not be able to successfully argue that they still had rights to further bargain with their employer in regards to redundancy entitlements. Why, then, did parliament use the word "or" (instead of "and") in s 69N(1)(c)(i), which clearly suggests (i) and (ii) are to be read alternatively rather than cumulatively? The effect of this is unfair on any employee or union who may consult the Act – and believe, on the basis of this one word, that the section covers them. It is notable that the Court made absolutely no mention of the lack of clarity in the wording of s 69(N)(1)(c).

Also interesting is the Supreme Court's recognition that employee-employer bargaining on topics such as redundancy entitlements rarely take place on a level playing field. While the Court did not elaborate

on this point, this backdrop may help to explain why Chief Judge Colgan in the Court at first instance strove to interpret the Act in the appellant's favour. As for a remedy, the Court found on the facts that there were non-monetary redundancy entitlements that the employees could bargain for, and negotiation for these was left to the parties. One might question, however, what form these entitlements might take and how meaningful they might prove as a form of redress: the Supreme Court used the example of retraining, though was careful to state that it made no recommendation of what was appropriate in these circumstances.

View this Case Note on the NZ Human Rights Blog at http://nzhumanrightsblog.com/newzealand/service-and-food-workers-union-nga-ringa-tota-inc-v-ocs-ltd-2012-nzsc-8/

Is Working for Families inconsistent with the Bill of Rights Act?

Child Poverty Action Group Inc v Attorney-General [2009] HC Wellington CIV-2009-404-273

Lilla Dittrich is a fourth year Auckland University law student and volunteer in the Equal Justice Project Pro Bono Programme.

Child Poverty Action Group Inc v Attorney-General[76] was an appeal to the High Court on the Human Rights Review Tribunal's decision not to grant a declaration that the Working for Families (WFF) package is inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA). Child Poverty Action Group (CPAG) has now been granted leave to the Court of Appeal. An outline of the WFF package structure and the political climate in which it was introduced will be provided first. This will be followed by the history of the case to date.

Working for Families and the In-Work Tax Credit

By the early 2000s, the availability of real family income assistance had significantly decreased owing to a lack of inflation adjustment and general neglect.[77] Meanwhile, child poverty alleviation had gained prominence in policy discussions. It was in this climate that WFF was drafted. The 2004 WFF package had three objectives: to incentivise paid employment; to ensure income adequacy; and to create a social assistance framework that encourages movement into paid labour whilst giving families the support needed.[78]

The WFF package consists of four types of refundable tax credits: Family Tax Credit (FTC), In Work Tax Credit (IWTC), Minimum Family Tax Credit (MFTC), and Parental Tax Credit (PTC: not discussed). These credits are only available for eligible families with dependent children under 18 years of age.

A FTC is paid to families on the basis of the number of children they have, their ages and the net household income. An IWTC is paid on the same basis as the FTC with the exception that the IWTC is only available to families not already receiving another main benefit. It is not work related like the FTC. To be eligible for an IWTC, the primary caregiver of a child must work at least 20 hours per week if they are solo-parents, or 30 hours combined for partnered parents.

The FTC and IWTC are paid on top of the MFTC, which guarantees a minimum level of income for working parents with dependent children. The amount paid depends on the family income and abates at 100% for every dollar earned.

76 *Child Poverty Action Group Inc v Attorney-General* HC Wellington CIV-2009-404-273, 25 October 2009.

77 Susan St John and M Claire Dale "Evidence-Based Evaluation: Working for Families" (2012) 8(1) Policy Quarterly 39 at 41.

78 Ibid 42

Reception

Criticism of the WFF package has abounded from its introduction. Commentators noted that the poorest children had been left out. The Child Poverty Action Group estimated 185,000 children live in families not eligible for the IWTC, with 150,000 living in significant hardship.[79] Furthermore, as the IWTC is a lump sum payment, it may encourage recipients to only work the minimum number of required hours to receive it in full. This is enabled as the credit abates once earnings exceed the threshold. Reiterating this, the Business Roundtable concluded that it was unlikely to have a noticeable, if any, positive effect on employment.[80] The complexity of the package and the macro-economic nature of the IWTC have also made it difficult to evaluate the success with which it achieves its objectives, let alone how successful it will be in a recession.

The haste and lack of transparency with which the package was passed has also been criticised. The Human Rights Review Tribunal also commented on the lack of consideration which was given to potential human rights breaches despite New Zealand's international obligations.

Case History

The Child Poverty Action Group appealed to the Human Rights Review Tribunal under Part 1A of the Human Rights Act 1993. CPAG alleged that the WFF package breached New Zealand's international obligations under the United Nations Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. Commitment to these instruments is affirmed in the NZBORA. It was claimed that the IWTC discriminated against those on state benefits, in particular the children in these families. The Tribunal found that the package was inherently discriminatory and expressed concerns about its effects on children. However, it declined to grant a declaration that the Income Tax Act 2004 was inconsistent with s 19 of the NZBORA. The discrimination was of the kind justified in a free and democratic society given the social value that it pursued.

The appeal of the Tribunal's decision was brought to the High Court in 2009. CPAG sought a declaration pursuant to s 92J of the Human Rights Act 1993 that the IWTC breached the NZBORA. The case was of considerable international interest as it was the first time the government's own policies were challenged under Human Rights legislation in a class action.[81]

Was there discrimination?

In deciding whether to grant the declaration, the Court had to consider whether the provisions constituted discrimination on a prohibited ground,[82] and if so, whether it was demonstrably justified.[83] The appropriate comparator group was between those who are eligible for the IWTC and those who are excluded because they are recipients of another benefit.

The Court accepted CPAG's argument that the amount of other benefits paid to the beneficiaries was irrelevant to their claim in making out discrimination.[84] The full time earner requirement would still exclude a substantial majority of beneficiaries from the IWTC. However, it noted that the alleviation of poverty would not be addressed by removing the off-benefit rule, and only a small subset of families who elected to remain on the benefit despite working could claim a financial disadvantage.[85] CPAG had failed to make

79 Susan St John and M Claire Dale "Can the 'In Work Tax Credit' be Justified as an In-work Benefit?" (paper presented to NZEA Annual Conference, Wellington, July 2009).

80 Ibid 4

81 Ibid 2

82 New Zealand Bill of Rights Act, 1990, Section 19.

83 Ibid, Section 5

84 Child Poverty Action Group Inc, above n 1, at [115].

85 Ibid 122.

out a real disadvantage for the group they claimed were discriminated against, except for the small subset. Even for this subset, however, the court noted that the requirement of 'sufficient disadvantage' would not be made out.

Was the discrimination justified?

If prohibited discrimination was found, the Court went on to consider whether the enactment was a justified limit to the right as per s 5 of the NZBORA 1990. While the rights are contextual rather than absolute, the test is an onerous one. When deciding whether a limitation on a right is justified, the Court must ask whether the limiting measure serves a purpose sufficiently important to justify curtailment of the right; it must be rationally connected with its purpose, impair the right no more than necessary to achieve its purpose, and the limit must be in due proportion to the objective.[86]

Justified?

As there were two objectives which inevitably clashed, the Court focused on the narrower rationale of 'making work pay' when considering whether the limitation was justified. CPAG contended that, first, by trying to meet two opposing objectives in one act, the government had created unlawful discrimination. Secondly, CPAG argued that the government should be held account by reference to the objectives it stated at the time. Both of these arguments were rejected; the former, because it would impose a constraint on Government that the Court did not have jurisdiction to impose,[87][12] the latter, because the objectives of Government should be evaluated on its substantive basis, not the form in which it was explained.

The purpose of incentivising work in New Zealand was deemed important given the undesirable effects of welfare dependence for families in these predicaments. In order to 'make pay work' the Court not only considered that an income gap was inevitable, but that the aims of 'making pay work' and alleviating child poverty were consistent in the long term: moving people off the benefit would lift income levels and lift families out of poverty. Despite its fluctuating levels of success, the Court found that the purpose of incentivising paid employment was sufficiently important to justify the extent of discrimination.[88] Even if the broader objectives were considered, the Court was adamant that the infringement would be justified.

Rationally Connected and Proportionate?

For the same reasons, the Court held that discrimination based on employment was rationally connected with 'making work pay', as the gap was necessary to move people from the benefit into paid labour. Furthermore, the decision of the Tribunal reaffirmed that the extent of the intrusion into the right was reasonably necessary and proportionate. s 5 of the NZBORA requires a balance between the harm to the right and the social advantage; governments ought to be free to target social programmes.[89]

The Court found that the Act was a justified limitation on the right to be free from discrimination as the negative impact was not out of proportion to the objective pursued. The declaration of inconsistency sought by CPAG was declined.

Where to from here?

A key factor in the outcome of this case was the concept of deference. The Court reiterated that its function is to review the decision or substantive quality of the measure limiting the freedom — not to substitute

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

87 Child Poverty Action Group Inc, above n 1, at [156].

88 Ibid 191.

89 Ibid 212

its own views. Where macroeconomics is concerned, the Court was hesitant to alter the decision of government; it accepted a more modest limiting role.

However, the recent case of *Ministry of Health v Atkinson* may indicate a different outcome.[90] While *Atkinson* maintains that deference is appropriate when policy decisions require expert knowledge, the less well-considered a policy, the less weight will be given to deference. This is particularly relevant, first, because CPAG has been granted leave to appeal to the Court of Appeal earlier this year, and secondly, one of the main criticisms of the WFF package was the speed at which it was passed and the lack of consultation that occurred.[91]

Whilst deference continues to play an important role in the relationship between courts and parliament, *Atkinson* has opened the door to the possibility of success. It may be that CPAG's argument regarding the modest role deference should occupy in such cases will not be rejected on appeal. As the Human Rights Review Tribunal shared CPAG's concerns about the quality of analysis of the WFF package, it will no doubt add weight to their claim. In any event, the results of this case remain of both domestic and international interest — how will an appellate court respond to challenges to government policy on human rights grounds?

This Case Note can be viewed on the NZ Human Rights Blog at http://nzhumanrightsblog.com/newzealand/case-note-child-poverty-action-group-inc-v-attorney-general/

Extra-territoriality, the Right to Protest and the Law of the Sea

New Zealand Police v Teddy [2013] NZHC 432

Caroline Fergusson, Co-Chairperson, New Zealand Human Rights Lawyers Association

Acts of protest at sea can attract different legal repercussions to those on land. This is due to the international maritime law regime which applies to the sea outside our 12 mile territorial limit. The interaction of domestic law and the international law of the sea came before the Courts earlier this year in the case of *New Zealand Police v Teddy*. Although not a case directly centred on the right to protest, as an example of a protest action in extra-territorial waters this case raises the possibility of potential areas where the application of human rights law will face challenges. Subsequent government actions have highlighted these possibilities. A further human rights connotation of this decision is the apparent extension of police powers to authorize police actions beyond our territorial sea.

In 2010, the New Zealand government granted the Brazilian oil and gas exploration company Petrobras a five year permit to survey the Raukumara Basin, an area near the East Cape of New Zealand, for deep sea oil and gas prospects. The vessel used by Petrobras for this survey, the *Orient Explorer*, was being pursued by the vessel the *San Pietro* at an estimated 20m distance as part of a protest action by East Cape iwi Te Whanau a Apanui, Greenpeace and other groups. The respondent, Mr Teddy, was in charge of the vessel, and when the New Zealand Police boarded the vessel on 23 April 2011, he refused to relinquish the wheel, alter course or comply with Police instructions. He was arrested and charged with operating a vessel in a manner that caused unnecessary risk to the *Orient Explorer*, contrary to s 65(1)(a) or the Maritime Transport Act 1994 (*MTA*), and resisting a constable acting in pursuance of his duty, contrary to s 23(a) of the Summary Offences Act 1968.

In the District Court, the judge found that the charges against Mr Teddy were a nullity because the activities under question were extra-territorial. On appeal, the High Court was called upon to consider specifically whether the MTA has extra-territorial application (s 65(1)(a)), and whether police powers to stop and board vessels, and to arrest offenders, have any application to vessels at sea, including beyond New Zealand's territorial sea.

90 *Ministry of Health v Atkinson* [2012] NZCA 184.

91 St John and Dale, above n 2, at 43.

The MTA had no express wording creating extra-territorial effect, and the Court was wary of the presumption against the broad application of criminal statutes.[92] However, s 5 of the MTA provides that an objective of the legislation is to fulfill New Zealand's obligations under international conventions such as United Nations Convention on the Law of the Sea. Further to this, under UNCLOS a state has an obligation to ensure its ships are acting lawfully on the high seas, and to exercise jurisdiction over navigational matters.[93] Consequently, the application of the MTA to all New Zealand vessels, within or beyond our territorial sea, was found to be 'necessary' in order for New Zealand to meet its international obligations.

As to the applicability of police powers, these were found to stem from s 317 of the Crimes Act 1961, allowing policy the right of entry to premises where an offence was being committed, or was believed to be occurring.[94] The Court found that 'premises' included a vessel, and the Police sighting the *San Pietro* within 20m of the *Orient Express* was enough 'good cause' to meet that limb of the test. The Court concluded that this particular section of the Crimes Act applied extra-territorially, however noted that a Court may not in every instance have jurisdiction in this way: jurisdiction could only be found for those offences provided for in ss7A and 8 of the Act, in which extra-territorial jurisdiction is expressly provided for.[95]

Returning briefly to the issue of the right to protest, in December 2012 Petrobras pulled out of its operations in New Zealand. In order to attract further deep sea prospecting, the Government passed an amendment to the Crown Minerals (Permitting and Crown Land) Bill on 16 April 2013, to apply a 500m exclusion zone around vessels, and create new criminal penalties for "interference" with offshore vessels. The Hon Simon Bridges stated the purpose of this amendment as follows:[96]

Such protest actions can impose significant costs on companies carrying out legitimate activities under permits, and create very serious health and safety risks

Notably, in terms of the international law of the sea, the new provisions go further than our international obligations require. For example, UNCLOS expressly preserves rights of navigation, and only provides for "safety zones" around continental shelf installations.[97] It has been suggested that the limits on the right to protest that this amendment creates are contrary to the New Zealand Bill of Rights Act 1990, as well as our international obligations under the ICCPR.[98] In this context, the extra-territorial application of legislation raises challenges and issues for human rights. One wonders whether a Court would find the right to protest under the Bill of Rights Act 1990 as having extra-territorial effect.

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92 Section 8 of the Crimes Act 1961 states that if an act is done or omitted and is carried out beyond New Zealand on board a Commonwealth ship, then it will be treated as if that act or omission occurred in New Zealand. However, this section specifically states that nothing in it shall apply to a crime under the MTA.

93 Articles 92, 94 and 97, UNCLOS.

94 Now repealed but at force at the time:

S 317 Power to enter premises to arrest offender or prevent offence

Where any constable is authorised by this Act or by any other enactment to arrest any person without warrant, that constable, and all persons whom he calls to his assistance, may enter on any premises, by force if necessary, to arrest that person if the constable-

Has found that person committing any offence punishable by… imprisonment and is freshly pursuing that person; or

Has good cause to suspect that that person has committed any such offence on those premises.

95 *New Zealand Police v Teddy* [2013] NZHC 432, [36-8]

96 Hon Simon Bridges, Third Reading of the Crown Minerals Bill, 16 April 2013, available at <http://www.beehive.govt.nz/speech/crown-minerals-bill-third-reading-speech>.

97 Article 60 of UNCLOS allows states to create safety zones around artificial islands and continental shelf installations. Chapter VII, regarding the High Seas, requires that these safety zones be respected but apart from this states that freedom on the High Seas applies.

98 The right to protest is enshrined in the New Zealand Bill of Rights Act 1990 under the rights to freedom of expression and peaceful assembly.

BILLS BEFORE PARLIAMENT WITH HUMAN RIGHTS IMPLICATIONS

Parole Amendment Bill

(Currently awaiting first reading)
Lily Nunweek (Executive Committee, Human Rights Lawyers Association)

The objective of this Bill is to amend the Parole Act 2002 in order to improve efficiency and reduce stress for victims by making it easier for the Parole Board to prevent hearings where there is no prospect of release.

The Bill will increase the maximum interval between parole hearings from one to two years for all offenders. The maximum period for postponement orders (made by the Parole Board to postpone certain prisoners' hearings) would be extended from three to five years.

As a result of these changes, automatic annual parole hearings would no longer be the norm. This raises concerns about potential breaches of section 22 of the New Zealand Bill of Rights Act and article 9(1) and (4) of the International Covenant on Civil and Political Rights (that no person should be subjected to arbitrary arrest or detention).

Social Security (Fraud Measures and Debt Recovery) Amendment Bill

(Currently awaiting first reading)
Lily Nunweek

The objective of this Bill is to strengthen the approach to relationship fraud by making spouses and partners, as well as beneficiaries, accountable for fraud.

The Bill amends the law to create a new offence targeting partners or spouses of beneficiaries who are convicted of fraud. The Bill will also enable the Ministry of Social Development to investigate complains of fraud without informing the beneficiary and increase information sharing between departments.

The Bill raises questions regarding New Zealand's compliance with its domestic and international human rights obligations not to discriminate on the basis of employment status without justification. The Bill may also raise human rights issues in terms of the right to be free from discrimination on the grounds of family and marital status.

Current legislation requires a beneficiary to be informed of allegations unless there is 'reasonable cause' to believe that to do so would be 'likely to prejudice the maintenance of the law'. There is a risk that these changes to the Social Security Act may effectively amount to a presumption of guilt. The changes may also create prejudice and concern about an individual with other agencies without justification and raise human rights and privacy considerations.

Human Rights Amendment Bill

(Currently awaiting first reading)
Lily Nunweek

The Human Rights Amendment Bill proposes to enable the establishment of the position of a full-time Disability Rights Commissioner within the Human Rights Commission. The Bill also makes changes to the composition, governance arrangements, and functions and powers of the Commission. The current number of 3 full-time Commissioners and up to 5 part-time Commissioners will be changed to a total of 4 to 5 full-time Commissioners.

The Bill will remove the designations of the Race Relations Commissioner and Equal Employment Opportunities Commissioner. All of the Commissioners will be re-named 'Human Rights Commissioners'.

The changes to the structure of the Human Rights Commission raises concerns as to whether the main priority areas will retain the specialist knowledge and dedication that they were previously given. There is also a concern that with the reduced number of Commissioners, the diversity of New Zealand will not be reflected in those appointed to the roles. The appointment of Commissioners and other roles within the Human Rights Commission must be transparent and representative of New Zealanders.

Public Safety (Public Order Protection) Bill

(Currently awaiting first reading)
Lily Nunweek

The Bill empowers the High Court to issue a public protection order, in the case of offenders that pose a "very high risk" of imminent serious sexual or violent offending. The Bill would allow for detention of a subject in a secure facility indefinitely. The Bill would not only target offenders who are soon to be released from prisoners but also though who are "subject to an extended supervision order and is, or has been, subject to a condition of full-time accompaniment and monitoring". This proposal would effectively allow individuals who are already out in the community under supervision to be detained again.

The Department of Corrections conceded in its Regulatory Impact Statement that the introduction of a continuing detention order "is likely to be found inconsistent with both the BORA and New Zealand's international obligations, and may result in complaints to the UN Human Rights Committee". On the other hand, the Attorney-General has concluded that the Bill is not inconsistent with the Bill of Rights and has released his opinion giving reasons for that view.

The Bill raises clear concerns about its consistency with New Zealand's domestic and international human rights obligations, particularly the longstanding rights against arbitrary detention and double jeopardy

affirmed in sections 22 and 26 of the Bill of Rights Act.

NEW WORKING PAPERS

From a variety of authors on a diversity of issues, the following are synopses of papers recently posted on the NZ Human Rights Working Paper Series at http://www.humanrights.auckland.ac.nz/uoa/research-working-papers

NZ Human Rights Working Paper no 11

International Investment Treaties and Human Rights: A Historical and Interpretive Analysis

Dominic Dagbanja

International investment treaties and arbitration have generated serious debate about their potential, and in fact ability, to constrain the policy space and regulatory autonomy States need to protect human rights. This paper holds the view that understanding why investment treaty standards limit sovereign powers with respect to the protection of human rights requires an inquiry beginning from the history of investment protection by treaty and an assessment of the terms of investment treaties in relation to that history. From a historical and interpretive review, the paper argues that the primary objective of the investment regime as it developed then was to limit sovereign powers to protect private business interests. The terms of investment treaties affect their private business focus. The protection of human rights has never been a primary consideration of the international investment regime. The paper calls for a restructuring of investment treaty objectives and terms to include human rights and other broader societal interests. It also advises countries not to sign investment treaties that are inconsistent with their constitutional and international legal obligations to protect human rights.
View the full paper at
http://www.humanrights.auckland.ac.nz/webdav/site/humanrights/shared/Research/Investment-Treaties-and-Human-Rights-DNDagbanja.pdf

NZ Human Rights Working Paper no 12

The Commerce Commission v Air New Zealand

Edward Willis

This paper examines a recent challenge to the Commerce Commission's power to impose non-disclosure orders under the Commerce Act 1986. Argument before the Court claimed the orders unduly infringed on the NZBORA right to justice and freedom of expression. While the paper endorses the final result reached by the Court, it suggests that the treatment of freedom of expression raises questions about the robustness of rights protection in New Zealand.
View the full paper at
http://www.humanrights.auckland.ac.nz/webdav/site/humanrights/shared/Research/Commerce-Commission-v-AirNewZealand.pdf

NZ Human Rights Working Paper no 13

The Right to Health: An Introduction

Alison Blaiklock

The right to the highest attainable standard of health is a fundamental human right that encompasses the right to healthcare and determinants of health. This paper defines the right to health and examines what it means in practice. It outlines current issues that are being examined through a right-to-health perspective, including recent developments. An appendix describes leading organisations working to advance the right to health.
View the full paper at
http://www.humanrights.auckland.ac.nz/webdav/site/humanrights/shared/Research/Right-to-health-blaiklock.pdf

NZ Human Rights Working Paper no 15

Fact finding and the right to a fair trial at the International Criminal Tribunal for the Former Yugoslavia

Sophie Rigney

At the International Criminal Tribunal for the Former Yugoslavia, the taking of judicial notice of facts that have been previously adjudicated in other proceedings is designed to ensure the trial is conducted in a way that is both fair and expeditious. In contemporary times, the use of the rule has increased. It is now important to reexamine how this rule operates in practice, and how it impacts on the management of the trial for all parties.
View the full paper at

http://www.humanrights.auckland.ac.nz/webdav/site/humanrights/shared/Research/rigney-final.pdf

NZ Human Rights Working Paper no 14

Privacy: Right, Value or Fundamental Interest?

Sarah A Wilson

As time goes by legal recognition of privacy in New Zealand continues to develop, but terminology remains uncertain, and this provides restrictions on privacy being protected to its fullest extent. Part of this uncertainty stems from difficulties in defining what privacy is and what it means to people, but this difficulty should not deter New Zealand from attempting to clarify a matter of such importance.
View the full paper at
http://www.humanrights.auckland.ac.nz/webdav/site/humanrights/shared/Research/James-Carruthers.pdf

NZ Human Rights Working Paper no 16

Closed Material Proceedings in Civil Trials

James Carruthers

This paper considers the adoption of closed material procedures in civil trials in England. It does so in the of the adversarial system, European Convention and common law fair trial, and the procedure that currently exists to deal with situations that the government would like closed material procedures to deal with – public interest immunity.
View the full paper at
http://www.humanrights.auckland.ac.nz/webdav/site/humanrights/shared/Research/James-Carruthers.pdf

NZ Human Rights Working Paper no 17

The untold story of the girl soldiers of the Congo: The International Criminal Court case of Prosecutor v Lubanga

Noor Hamid

Abstract: Thomas Lubanga was convicted of the conscription, enlistment and active use of child soldiers in the International Criminal Court (ICC)[99]. The decision served to increase international awareness of child soldiers. However, the majority had ignored the plight of the girl child soldier by ignoring the role gender played in defining the experiences of girl soldiers. Yet, there is widespread evidence of the sexual abuse of girls by their commanders. Thematic prosecutorial focus on conscription of child soldiers, marginalizes attention and cultural change relating to gender based violence.
View the full paper at
http://www.humanrights.auckland.ac.nz/webdav/site/humanrights/shared/Research/Noor-Hami-final.pdf

NZ Human Rights Working Paper no 18

Drones: Mapping the Legal Debate

Thomas Gregory

The purpose of this paper is to provide a very preliminary sketch of the legal debates about the use of unmanned aerial vehicles (UAVs) – otherwise known as drones. I will focus on two main areas of contention: firstly, whether or not the United States is legally at war with those caught in its crosshairs and, secondly, whether or not these individuals qualify as legitimate targets within the dominant frames of war. At the same time, however, I will also consider if this reliance upon international law serves only to normalise the violence that is being inflicted, displacing important ethical and political questions with purely technical concerns about proportionality, discrimination and military necessity. The law, I argue, may be part of the problem, not a solution to it.
View the full paper at

99 Judgment pursuant to Article 74 of the Statute, *Prosecutor v Lubanga* ICC-01/04-01/06-2842, 14 March 2012Trial Chamber I (hereinafter the Lubanga judgement)

http://www.humanrights.auckland.ac.nz/webdav/

Prisoners Right to Vote

Alex MacKenzie

In late 2010, courtesy of a private member's bill by ex-National MP Paul Quinn, New Zealand amended section 80(1)(d) of the Electoral Act 1993 with the effect that no person incarcerated after the amendment could register on the electoral roll. To the untrained eye this flies in the face of section 12(a) of our Bill of Rights Act 1990 and section 25 of the International Covenant on Civil and Political Rights 1966 (ICCPR). But to the apparently learned eye of politicians, we can justify any measure that causes prisoners ill on the basis that they have already committed a wrong, and hence deserve to suffer the consequences of that wrong.

Alex is a Section Editor of the New Zealand Human Rights Blog.

Read the full post on the NZ HumanRights Blog at http://nzhumanrightsblog.com/newzealand/denying-voting-rights-to-prisoners-in-new-zealand-what-was-parliament-thinking/#more-265

New Zealand Defence Force plans to sell arms to Colombia

Sam Bookman

One News reported that Colombia may be "at the front of the queue" to purchase 20 underused light armoured vehicles (LAVs) from the New Zealand Defence Force.[1] The news came during John Key's historic visit to Colombia, the first ever visit by a New Zealand Prime Minister to the South American country, and amid talk of increasing trade links between the two countries.
Read the full post on the NZ Human Rights Blog at http://nzhumanrightsblog.com/overseas/new-zealand-defence-force-plan-to-sell-arms-to-colombia-should-raise-alarm-bells/#more-252

Protesting within the Exclusive Economic Zone

Tracey Turner

Once upon a time, the New Zealand Government played a key role in protesting things it thought inappropriate. In the 1970s, this extended to sending two navy frigates into the middle of a nuclear test area to express concerns against French nuclear testing in the Pacific. Those days are a distant memory, with the Minister of Resources and Energy, Simon Bridges, recently introducing a Supplementary Order Paper (SOP) to amend the Crown Minerals (Permitting and Crown Land) Bill 2013. The amendment will create two new offences and corresponding penalties for people protesting against oil and gas exploration in the Exclusive Economic Zone (EEZ).

The proposals are contentious, with the likes of Sir Geoffrey Palmer, Peter Williams QC and Dame Anne Salmond issuing a joint statement that describes the amendment as "a sledgehammer designed to attack peaceful protest". Although the Government is defending the amendment – citing both economic and safety concerns – the proposals have been heavily criticised as inconsistent with international law. The proposed offences create disproportionate penalties that impinge directly upon an individual's right to freedom of expression and freedom of peaceful assembly, both affirmed under the New Zealand Bill of Rights Act 1990 ss 14 and 16 (NZBORA).

This post briefly addresses some of the procedural and substantive concerns raised by the proposals. (Tracey Turner is an LLB (Hons) student at the University of Auckland)
Read the full post on the NZ Human Rights Blog at http://nzhumanrightsblog.com/policy/limiting-the-right-to-protest-within-the-exclusive-economic-zone/

Could MP Richard Prosser be Criminally Liable for comments about Muslim travellers?

Sam Bookman

New Zealand First MP Richard Prosser's extraordinary column advocating the banning of Muslims from "Western" airlines is now a viral hit. The Prime Minister, Leader of the Opposition and (to an extent) his party leader have all rushed to condemn or distance themselves from his comments, while others have called for his resignation. And rightly so – the column is absurd at best and dangerously racist at worst. But could Prosser have breached the criminal law?

Read this full post on the NZ Human Rights Blog at http://nzhumanrightsblog.com/commentary/is-richard-prosser-criminally-liable/#more-235

The Public Right to Know in New Zealand

Sam Bookman

The "right to know" is a human right that is not often invoked. Yet, it is one the Law Commission ("the Commission") has emphatically endorsed in its recent proposal for changes to the Official Information Act 1982 ("the Act"). The Commission – expressly reflecting the Universal Declaration of Human Rights Art 19 and the International Covenant on Civil and Political Rights Art 19 – noted that there now exists a presumption in favour of open government, verging on a human right. Accordingly, it suggested a range of recommendations that would facilitate a more open government – many of which were rejected by the very MPs that would have been made subject to the changes.

Read this full post on the NZ Human Rights Blog at http://nzhumanrightsblog.com/policy/both-poacher-and-gamekeeper-the-public-right-to-know/#more-231

Discrimination and the Santa Parade

Shelley Deng

For many years, the Trust Board banned the Falun Dafa Association of New Zealand's Divine Land Marching Band (Association) from participating in the Parade. Chairman Michael Barnett wrote curtly in the Santa Parade Trust Board's (Trust Board) 2008 rejection:[i]

The Auckland Farmers Santa Parade is a fun family occasion attended by hundreds of thousands of New Zealanders in the spirit of Christmas and to welcome Santa to town for the festive season. We are not prepared to have this family occasion hijacked by other organisations and their agendas. No further consideration will be given to this matter.

The Association responded by seeking an injunction from the High Court on grounds of discrimination. *Falun Dafa v Auckland Children's Christmas Parade Trust Board* [2008] NZHC 1860; (2008) 8 HRNZ 680 reviewed whether the Trust Board's decision to reject was in breach of the New Zealand Bill of Rights Act 1990 (NZBORA) or the Human Rights Act 1993 (HRA).

Read this full post on the NZ Human Rights Blog at http://nzhumanrightsblog.com/newzealand/christmas-special-discrimination-and-the-santa-parade/#more-226