NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE https://legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 50/2023
[2023] NZSC 123

BETWEEN	G (SC 50/2023) Applicant
AND	COMMISSIONER OF POLICE First Respondent
	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Second Respondent
	DISTRICT COURT AT WELLINGTON Third Respondent

Court:	Glazebrook, O'Regan and Kós JJ
Counsel:	Applicant in person A M Powell, M W McMenamin and I M C A McGlone for First and Second Respondents A P Lawson for Third Respondent
Judgment:	14 September 2023

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the first and second respondents costs of $2,500.

REASONS

[1] G is a New Zealand citizen, convicted in Australia of supplying prohibited drugs in commercial quantities. He received a sentence of eight years' imprisonment in September 2015. In November 2015, the Returning Offenders (Management and Information) Act 2015 was enacted.[1] Released on parole in 2019, G was deported to New Zealand. A determination was made under the ROMI Act that G was a "returning prisoner". As the Court of Appeal notes:[2]

> When he landed in Wellington, G was served with a determination notice under the Act attaching standard release conditions to which he was automatically subject, together with an application to impose three interim special conditions, which had been filed in the District Court two days prior to his arrival.

[2] G sought judicial review. The conditions, it may be noted, expired in October 2021, prior to the High Court hearing.

High Court

[3] G's claim succeeded before Gwyn J.[3] She held that the determination amounted to the retrospective imposition of a penalty and double jeopardy, contrary to G's rights under the New Zealand Bill of Rights Act 1990.[4] These consequences, she held, were the result of the Commissioner impermissibly applying the provisions of the ROMI Act. In addition to declaring the determination unlawful, the Judge quashed the Commissioner's decision to make it.

Court of Appeal

[4] The Court of Appeal allowed the appeal. It held that release conditions under the ROMI Act were penalties and that s 25(g) of NZBoRA and s 6 of the Sentencing Act 2002 were not engaged (the penalty did not change between G's offending and his sentencing, the determination notice was not a sentence, nor analogous and G's penalty

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1 The "ROMI Act".
2 *Commissioner of Police v G* [2023] NZCA 93 (Cooper P, Miller and Courtney JJ) [CA judgment] at [2].
3 *G v Commissioner of Police* [2022] NZHC 3514, [2023] 2 NZLR 107.
4 The "NZBoRA".

had not increased under the ROMI Act). The determination notice did breach s 26(2) of NZBoRA and the presumption against retrospectivity was engaged. However, Parliament clearly intended the ROMI Act to apply with effect from its commencement to offenders returned to New Zealand. The absence of express reference to NZBoRA was not determinative. There was no unfairness in applying the statute to persons whose convictions overseas predated its enactment.[5] Given that clear intention, the Commissioner had a statutory obligation to determine G to be a returning prisoner if the s 17 criteria were met. His s 17 analysis could not be impeached.[6] The breaches of rights of which G complained, including of natural justice in not first being given a hearing, were "inevitable consequences of the statute, properly construed" and the argument about the consequential rights breaches fell away.[7]

Returning Offenders (Management and Information) Amendment Act 2023

[5] Prior to delivery of the Court of Appeal decision, Parliament passed the ROMI Amendment Act 2023, "said to be intended to ensure the continued application of the Act to those whose offending predated the Act's commencement".[8] The Amendment Act:[9]

> … expressly provides for the retrospective application of the ROMI Act to persons in G's position, even where that would be inconsistent with other law including the High Court's decision, s 12 of the Legislation Act 2019, ss 6(1) and (2) of the Sentencing Act 2002 and ss 25(g) and 26(2) of [NZBoRA].

As the Act expressly did not affect the rights of parties in the present appeal (sch 1, cl 9), the Court of Appeal put it to one side.

Application for leave

[6] G wishes to advance 10 grounds of appeal. The primary grounds revolve around the Court of Appeal's construction of the legislation and, in particular, the Court of Appeal's conclusion that the ROMI Act had intended retrospective effect and

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5 CA judgment, above n 2, at [168].
6 At [157].
7 At [185].
8 At [6] (footnote omitted).
9 At [6] (footnote omitted).

excluded the right to a hearing prior to exercise. G asserts that meant criminalising conduct retrospectively or "creating retroactive offences extraterritorially". It is said that "the extent of reliance upon parliamentary materials may have breached the Parliamentary Privileges [sic] Act in construing that the s 17 criteria was clearly intended to apply retrospectively with the intent of imposing a penalty". It is also submitted that a *Hansen* indication or a formal declaration of inconsistency should have been given, and a further finding should be made that the Court of Appeal's conclusion is inconsistent with the Treaty of Waitangi. The 10 grounds are all said to involve matters of general or public importance.[10] G also asserts a substantial miscarriage of justice may occur unless the appeal is heard.[11]

[7] G purported to file very detailed reply submissions. There is no provision therefor in the Supreme Court Rules 2004. Objection is taken to their filing, and we need not refer to them.

Our assessment

[8] The effect of the Amendment Act is that the only person now affected by this decision is G. The release conditions have long since expired and so the appeal is now largely moot. We do not consider therefore that the proposed appeal involves a matter of general or public importance. While the matters raised by G might be arguable, we do not consider in these circumstances that a substantial miscarriage of justice will occur unless the proposed appeal is heard. It is not therefore necessary in the interests of justice for the Court to hear and determine G's proposed appeal.

[9] The focus of the High Court and Court of Appeal decisions was the legitimacy of executive action. The claim that the ROMI Act is inconsistent with NZBoRA (and that relief accordingly should be given) was not advanced in the statement of claim. Nor was the Treaty of Waitangi either pleaded or made the subject of any material argument in any Court below. We decline to contemplate these matters now, fresh

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10 Senior Courts Act 2016, s 74(2)(a).
11 Section 74(2)(b).

upon a second appeal, when the proposed appeal otherwise fails to meet the statutory criteria for leave.[12]

Result

[10] The application for leave to appeal is dismissed.

[11] The applicant must pay the first and second respondents costs of $2,500.

Solicitors:
Crown Law Office, Wellington for Respondents

[12] *Naera v Fenwick* [2014] NZSC 58 at [12]; *Tarr v Sutcliffe* [2018] NZSC 66 at [11]; *Pavitt v R* [2005] NZSC 24 at [4]; *LM v R* [2014] NZSC 9, (2014) 26 CRNZ 643 at [2]; and *Wilson v R* [2019] NZSC 57 at [7].