IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2022-404-86
[2022] NZHC 159

UNDER	The Habeas Corpus Act 2001
IN THE MATTER OF	An application for writ of habeas corpus
BETWEEN	STEPHEN GEORGE BROADBENT and KERRY JOY STEVENSON Applicants
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF HEALTH and THE CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT Respondents

Hearing: 10 February 2022 (by telephone)

Counsel: Applicants in person
V McCall and A P Lawson for the respondents

Judgment: 11 February 2022

JUDGMENT OF CAMPBELL J

This judgment was delivered by me on 11 February 2022 at 11:00am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

[1] Mr Broadbent and Ms Stevenson were planning to arrive in New Zealand by air from Australia on 2 February 2022. They knew that on arrival they would be subject to a general requirement, pursuant to orders made under the COVID-19 Public Health Response Act 2020 (**the COVID Act**), that they be isolated or quarantined at a managed isolation or quarantine facility (**MIQF**).

[2] On 28 January 2022, in advance of their arrival, Mr Broadbent and Ms Stevenson applied for an exemption from the general requirement to be isolated or quarantined at an MIQF. They asked for home isolation instead. They say they received no response to their application. Instead, on their arrival in New Zealand on 2 February 2022 they were detained at an MIQF, where they currently remain.

[3] They say their application was processed arbitrarily and in breach of principles of natural justice. They also say the decision to refuse an exemption (which they say was communicated to them only by the fact of their being detained at the MIQF) was not a reasoned and proportionate response to the outbreak or spread of COVID-19.

[4] For those reasons they say the refusal of an exemption was invalid and that their detention is accordingly unlawful. They apply for a writ of habeas corpus ordering their release from detention at the MIQF.

[5] The Chief Executive of the Ministry of Business Innovation and Employment (**MBIE**), under whose authority Mr Broadbent and Ms Stevenson are being detained, says the detention is lawful. Alternatively, the Chief Executive says an application for a writ of habeas corpus is not the appropriate procedure for considering the allegations made by Mr Broadbent and Ms Stevenson — they should have applied for a judicial review. For either reason, the Chief Executive says I should refuse the application.

[6] I have to decide (i) whether the Chief Executive has established that the detention of Mr Broadbent and Ms Stevenson is lawful and (ii) whether I should in any event refuse the application for a writ of habeas corpus on the ground that the application is not the appropriate procedure for considering the allegations raised by Mr Broadbent and Ms Stevenson.

The background in more detail

[7] Mr Broadbent and Ms Stevenson live in Greenhithe, Auckland. They had originally planned to arrive in New Zealand, from Queensland, on 16 January 2022. They had obtained an MIQ voucher enabling them to do so.

[8] Well in advance of that planned arrival they applied, on 22 November 2021, for an exemption allowing them to isolate at home rather than in an MIQF. They made their application under cl 12 of the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 (**the IQ Order**). I set out relevant parts of the IQ Order later in this judgment.

[9] In asking for an exemption, Mr Broadbent and Ms Stevenson said (among other things) that they had been in Queensland for over six months and they would be double vaccinated. The Chief Executive declined that application on about 24 December 2021, in part because of the threat of the Omicron variant of COVID-19.

[10] Mr Broadbent told me that he and Ms Stevenson accepted that decision. He nonetheless explained to me concerns that he had with the application process, as he said that these remained relevant to their complaints about the way their later (January 2022) exemption application was processed. He said MBIE's website did not allow applications to be made for home isolation. The only way he could progress an application for home isolation was by an email to various persons at both MBIE and the Ministry of Health. He said he was directed by MBIE back to the website, but eventually the "Isolation Exemptions Team" at MBIE dealt with his application by email.

[11] As it turned out, Mr Broadbent and Ms Stevenson were in any event unable to travel to New Zealand on 16 January 2022. This was because they both tested positive for COVID-19 on 15 January 2022.

[12] Mr Broadbent and Ms Stevenson managed to obtain another MIQ voucher, this time for 2 February 2022. On 28 January 2022, Mr Broadbent sent an email to the Isolation Exemptions Team asking them to reconsider Mr Broadbent and Ms Stevenson's application for home quarantine "on the grounds of changed

circumstances". He then set out what he said were the changed circumstances. These included that there were likely to be more community cases of Omicron than border cases, that there were many community cases of Omicron isolating at home, and that he and Ms Stevenson were both double vaccinated and had had COVID-19 and so "there is hardly anyone in the world less likely to get covid than us".

[13] Mr Broadbent received an email reply from the Isolation Exemptions Team the next day, 29 January 2022. It began: "Thank you for your email. We understand that this is not the outcome you were looking for." The email then explained the process for making complaints. It noted that "if you would like for your request to be reconsidered, you will need to submit a new application with new relevant evidence".

[14] Mr Broadbent replied by email saying he was not making a complaint, that he was making a request to reconsider the application in light of changed circumstances. He asked that the application be properly considered. The Isolation Exemptions Team responded that "we are unable to reconsider your application based on the same information". Mr Broadbent replied that "This is not the same information. If you read it you will clearly see that it relates to new information and changed circumstances". The Team's further response was "if you would like us to consider the new information, you will need to submit a new application".

[15] These email exchanges all occurred on 29 January 2022. On 31 January 2022, Mr Broadbent sent a further email saying "If you insist, Please treat this as a new application under s12 (3) considering all of the information attached and already held by you." His email attached a document that essentially repeated what was set out in his email of 28 January 2022. It also attached his and Ms Stevenson's earlier COVID-19 positive test results.

[16] Mr Broadbent told me that he received no reply to his January 2022 application for exemption. He said the only "communication" of any decision by MBIE to refuse the application was their treatment on arrival in New Zealand, when officials directed them to, and then detained them in, the MIQF.

[17] Mr Broadbent also told me that they have been told by the manager of the MIQF that they have to remain there until 6.45 pm on 12 February 2022. This is slightly earlier than the full ten days of isolation.[1]

[18] Mr Broadbent and Ms Stevenson had initially considered challenging their detention by way of judicial review. They had drafted a judicial review application. They filed that draft with their habeas corpus application. They said they decided not to pursue the judicial review application because they knew it could not be determined before their period of isolation and quarantine in the MIQF was completed.

Mr Broadbent's and Ms Stevenson's submissions

[19] Mr Broadbent made clear and articulate submissions. Ms Stevenson relied on Mr Broadbent's submissions.

[20] Mr Broadbent submitted that the distinction between arbitrary detention and lawful detention depended first on whether the process had been arbitrary. In order to be lawfully detained, he said there had to be a proper process in accordance with the principles of natural justice. He said MBIE had not followed natural justice principles. Its process was arbitrary. Here, he referred me to the way in which MBIE had dealt (or failed to deal) with his application in late January 2022. He said no decision on the application had been communicated to him and Ms Stevenson. If there had been a decision, no reasons for the decision were given. It followed, he said, that the decision on their exemption application was arbitrary and unlawful.

[21] As well as criticising the process, Mr Broadbent submitted that any decision to refuse their application was not a reasoned and proportionate response to the outbreak or spread of COVID-19, and therefore was unreasonable and invalid. Here Mr Broadbent referred to the changed circumstances that he had put forward in making the application in January 2022. He said there was no data suggesting that anyone who had been double vaccinated and had recently recovered from COVID-19 had then tested positive. He said he and Ms Stevenson were at present the least likely people

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[1] The manager of an MIQF has a discretion to allow a slightly earlier departure time: COVID-19 Public Health Response (Isolation and Quarantine) Order 2020, cl 11.

in New Zealand to catch COVID-19. He said it made no sense for them to have to isolate in an MIQF rather than at home when thousands of people in the community who actually had COVID-19 were allowed to isolate at home. He said this was especially so, given that any decision-maker had to have regard to his and Ms Stevenson's rights under the New Zealand Bill of Rights Act 1990. In this respect, Mr Broadbent relied on Venning J's judgment in *Bolton v Chief Executive of the Ministry of Business, Innovation and Employment*.[2]

The Habeas Corpus Act 2001

[22] An application for a writ of habeas corpus is an application to challenge the legality of a person's detention.[3] Detention includes every form of restraint of liberty of the person.[4] Mr Broadbent and Ms Stevenson's liberty is being restrained while in the MIQF and so they are subject to detention in terms of the Habeas Corpus Act.

[23] On an application for a writ of habeas corpus, it is for the defendant to establish that the detention is lawful. If the defendant fails to establish the lawfulness of the detention, the Court must, subject to limited exceptions, grant the writ ordering the release of the detained person from detention.[5] One exception is that the Court may refuse to grant the writ, without requiring the defendant to establish the lawfulness of the detention, "if the court is satisfied that … an application for the issue of a writ of habeas corpus is not the appropriate procedure for considering the allegations made by the applicant".[6]

The Chief Executive's position

[24] The Chief Executive says that the detention of Mr Broadbent and Ms Stevenson is lawful under the COVID Act and under orders that have been made under that Act. In particular, applying for an exemption from isolation at an MIQF under cl 12 of the IQ Order does not render isolation at an MIQF unlawful unless and until an exemption is granted. So, even assuming that the decision on the exemption

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2 *Bolton v Chief Executive of the Ministry of Business, Innovation and Employment* [2021] NZHC 2897.
3 Habeas Corpus Act 2001, s 6.
4 Section 3.
5 Section 14(1).
6 Section 14(1A)(b).

application was invalid (which the Chief Executive does not accept), that simply meant that the default position under cl 12 prevailed, namely that Mr Broadbent and Ms Stevenson were required to isolate or quarantine in an MIQF. Their detention was therefore lawful.

[25] Alternatively, the Chief Executive relies on s 14(1A)(b) of the Habeas Corpus Act, saying that the allegations made by Mr Broadbent and Ms Stevenson should be ventilated in an application for judicial review, not an application for a writ of habeas corpus.

[26] Ms McCall, for the Chief Executive, told me that Mr Broadbent and Ms Stevenson's application for an exemption was being reconsidered. That process had, however, not been completed at the time of the hearing before me.

Issues

[27] As indicated earlier, there are two issues for me to decide.

[28] First, has the Chief Executive established that the detention of Mr Broadbent and Ms Stevenson is lawful? In answering that issue, I will address Mr Broadbent's arguments that the detention is unlawful because MBIE acted arbitrarily, in breach of natural justice and unreasonably in responding to the exemption application.

[29] The second issue arises only if the Chief Executive has not established that the detention of Mr Broadbent and Ms Stevenson is lawful. I then have to consider whether I should in any event refuse the application for a writ of habeas corpus on the ground that the application is not the appropriate procedure for considering the allegations raised by Mr Broadbent and Ms Stevenson.

Has the Chief Executive established that the detention of Mr Broadbent and Ms Stevenson is lawful?

[30] The starting point is cl 8 of the COVID-19 Public Health Response (Air Border) Order (No 2) 2020. Clause 8(3) provides that a person who arrives in New Zealand by air "must be isolated or quarantined … in accordance with the [IQ Order]".

[31] Clause 8(3) applied to Mr Broadbent and Ms Stevenson. They were therefore required to be isolated or quarantined in accordance with the IQ Order.

[32] Clause 12(1) of the IQ Order provides that a person's place of isolation or quarantine is "the high-risk MIQF or low-risk MIQF that is allocated to that person" by the Chief Executive after a suitably qualified health practitioner determines whether the person should be allocated a high-risk MIQF or low-risk MIQF. Clause 12(1) is the provision that imposes the general requirement that a person arriving in New Zealand by air undertake isolation or quarantine in an MIQF.

[33] I understood from Mr Broadbent that he and Ms Stevenson were allocated a low-risk rather than a high-risk MIQF. They do not challenge that particular decision. They challenge the Chief Executive's response to their application for an exemption from the requirement to isolate or quarantine in *any* MIQF.

[34] The possibility of such an exemption is provided by cl 12(2), which provides:[7]

> However, a medical officer of health may instead determine for any reason (for example, for medical evacuation) that a person's place of isolation or quarantine is any other facility or place.

[35] Under cl 12(2) a medical officer of health can determine, for example, that a person's place of isolation or quarantine is their home. That was the determination for which Mr Broadbent and Ms Stevenson applied.

[36] Mr Broadbent and Ms Stevenson say that the Chief Executive's decision on their exemption application was arbitrary, in breach of natural justice and unreasonable. They say the decision was therefore unlawful. I will assume for the moment that their arguments are correct and that the Chief Executive's decision was unlawful. The problem for Mr Broadbent and Ms Stevenson (on this habeas corpus application, I emphasise) is that, even if the Chief Executive's decision was unlawful,

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[7] I note that, in addition, cl 12(2A) sets out mandatory considerations for a determination under cl 12(2) and cl 12(3) places a filter on cl 12(2). Neither subclause is relevant on this application.

the only relevant[8] consequence is that there has been no valid decision under cl 12(2).[9] In the absence of any valid decision under cl 12(2), the general rule in cl 12(1) applies, and Mr Broadbent and Ms Stevenson's place of isolation or quarantine is the MIQF that has been allocated to them. Their detention in that MIQF is therefore lawful.

[37] In short, and as Ms McCall put it, the default position under cl 12(1) is that a person arriving in New Zealand by air is required to isolate or quarantine in an MIQF. That default position prevails unless and until an exemption is granted under cl 12(2). Because no exemption has been granted, the default position prevails, even if the decision refusing an exemption was unlawful.

[38] The position would be different if the requirement to isolate or quarantine in an MIQF arose only on the Chief Executive deciding that a person should be subject to such a requirement. A valid decision by the Chief Executive would then be a prerequisite to the lawfulness of detention in an MIQF. But that is not how the IQ Order operates. Under the IQ Order, that requirement is imposed directly by cl 12(1).

[39] For these reasons, the Chief Executive has satisfied me that the detention of Mr Broadbent and Ms Stevenson is lawful. I therefore decline the application for a writ of habeas corpus.

Should I refuse the application on the ground that the application is not the appropriate procedure for considering the allegations raised by Mr Broadbent and Ms Stevenson?

[40] On the view that I have reached on the first issue, I do not have to reach a conclusion on this second issue. I nonetheless record that I accept Ms McCall's submission that the challenges that Mr Broadbent and Ms Stevenson made to the decision-making process, and to the substance of the decision itself, are not ones that can be appropriately considered on an application for a writ of habeas corpus.

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8 That is, relevant to the lawfulness of their detention, which is what is at issue on this application.

9 At times in his submissions I understood Mr Broadbent to contend that the Chief Executive had not made any decision at all. Even assuming that to be so, the same consequence (that there was no valid decision under cl 12(2), so that the general rule in cl 12(1) applies) would follow.

[41] This is not to say anything about the merits of Mr Broadbent and Ms Stevenson's challenges. It is merely to say that the summary procedure that is adopted for a habeas corpus application is not appropriate for those challenges. Here, there was no affidavit evidence filed in support of the application, the Chief Executive prepared and filed a notice opposition within 24 hours of receiving the application, and I heard the application a few hours later. Unsurprisingly, the Chief Executive was not able to prepare and file affidavit evidence before the hearing.

[42] This urgent procedure is appropriate (and required[10]) where the lawfulness of a person's detention is being challenged. But it will not often lend itself to fair determination of administrative law challenges to decision making.[11] The challenges made by Mr Broadbent and Ms Stevenson, both as to process and substance, could be fairly determined only after the Chief Executive had the opportunity to respond with affidavit evidence. That opportunity would arise in a judicial review proceeding, but it could not arise on this habeas corpus application.

[43] In saying this, I make no criticism of Mr Broadbent and Ms Stevenson. They candidly said that their first inclination had been to file a judicial review proceeding.

[44] For completeness, my refusal of this application does not prevent Mr Broadbent and Ms Stevenson from pursuing a judicial review proceeding challenging the Chief Executive's response to their exemption application. I appreciate, of course, that they may regard the time and expense of such a proceeding as pointless given that it would be determined after their detention in the MIQF is complete.

Costs

[45] The parties did not address costs. I consider there should be no order as to costs. Mr Broadbent and Ms Stevenson pursued their challenges to the Chief Executive's decision in a responsible and balanced way. Their challenges to the decision are, at least on administrative law grounds, not wholly without merit.

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10 Habeas Corpus Act, s 9.

11 See *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA), which is now reflected in s 14(1A)(b) of the Habeas Corpus Act.

Result

[46] I decline the application for a writ of habeas corpus. I make no order as to costs.

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Campbell J