IN THE SUPREME COURT OF NEW ZEALAND

SC 6/2006
[2006] NZSC 94

BETWEEN	CHRISTOPHER HAPIMANA BEN MARK TAUNOA AND ORS Appellants and Cross-Respondent
AND	THE ATTORNEY GENERAL AND ANOR Respondents

Hearing: 2 November 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Henry JJ

Counsel: T Ellis, D La Hood and A C Wills for Appellants and Cross-Respondent
C Gwyn, D J Boldt and B Keith for Respondents

Judgment: 13 November 2006

JUDGMENT OF THE COURT – RECUSAL APPLICATIONS

The applications are dismissed.

REASONS

[1] At the beginning of the hearing on 2 November, the fourth day of the substantive case in this Court, Mr Ellis, for the appellants, made two oral applications that the Court and three of its members, respectively, recuse themselves. Those applications were dismissed and the hearing continued. We now give our reasons.

[2] Both of the applications were on the ground of an appearance of bias through pre-determination. The first, involving all members of the Bench, was brought because Mr Ellis believed that the Court was declining to hear an application which

he had made in writing on 5 October seeking a stay or striking out of the respondents' cross-appeal or, instead, a declaration of inconsistency relating to the Prisoners' and Victims' Claims Act 2005. Counsel said he had formed that view because his application was not heard before the Court began hearing from Crown counsel on the cross-appeal on 1 November. Counsel's view was incorrect. The members of the Court had, mistakenly it appears, concluded from the fact that Mr Ellis did not ask for the opportunity of advancing submissions on the stay etc application at that time, that he would present his argument on the application when Crown counsel had concluded and the Court had more fully comprehended the ambit of the cross-appeal. That impression was confirmed when Mr Ellis opened his argument for the respondents on 1 November, following the argument by the Crown. He indicated then that he would be developing his written submissions in support of the strike out application, as indeed he went on to do after the Court had heard the recusal applications. There is no basis for the assertion that a reasonable apprehension of bias arises from the order in which the Court heard oral argument on the various issues live before it. The strike out application had been covered in written submissions by both parties. The Court had made no ruling on it. It was not clear whether any party wished to make further oral submissions on the application. In the event, the Crown did not, but Mr Ellis did and was heard by the Court. Mr Ellis agreed that there would have been no impediment to the Court proceeding to hear the substantive appeal after hearing argument on the application and reserving its decision. In substance, there is no difference. Mr Ellis's complaint is as to sequence only. At the time he did not ask to have the application heard first. No presumption of bias by pre-determination can reasonably be thought to arise from the sequence adopted.

[3] The second application concerned the participation in the hearing of the Chief Justice and Blanchard and Tipping JJ. Mr Ellis told the Court that overnight he had seen for the first time a report of the Court's leave decision, given by those Judges, in *Udompun v Minister of Immigration.*[1] Counsel drew attention to the fact that Mrs Udompun had been unsuccessful in seeking leave for an appeal on the ground that a sum awarded to her was inadequate to vindicate a breach of her rights under

[1] (2006) 8 HRNZ 6.

s 23(5) of the New Zealand Bill of Rights Act 1990. The present cross-appeal by the Crown argues that no damages should be awarded at all, on the basis that declaratory relief is sufficient vindication of the public law right. If that submission is not accepted, the Crown contends that, as a matter of principle, any awards should be no more than are sufficient vindication as a matter of public law and should not attempt compensation by analogy with damages in tort. The Crown therefore puts in issue on the present appeal the principles upon which awards of damages are available for breach of the Bill of Rights Act, a matter of general or public importance which it is appropriate for this Court to hear.

[4] No presumption of bias arises where a judge has earlier considered a legal point in issue in other proceedings[2] let alone where the earlier determination was not directed to the substantive points in issue in the instant case but, rather, to the preliminary question of suitability for leave. But, in any event, the determination that *Udompun* was not a suitable case for this Court to hear under the statutory criteria in the Supreme Court Act has no bearing on the apparent impartiality of the members of the Court to determine the present appeal, where leave has been granted. The leave decision in *Udompun* was plainly made on the particular facts of that case, which bore no resemblance to the present case. The judgment merely records that the Court was not persuaded that it could arguably be said that the award in question was outside the range properly open.[3] The appropriate level of such awards generally was not put in issue in *Udompun*.

[5] Whichever test of appearance of bias is appropriate in New Zealand,[4] the argument which counsel was attempting to make had no credibility in relation to either application. Indeed, Mr Ellis quite frankly admitted that in making his application he was aware that additional Judges sufficient to hear the appeal could not be appointed without legislative change. He said that if the cross-appeal could not proceed his clients were quite happy with the remedy already given to them. It is apparent that although counsel spoke of the need to exhaust domestic remedies

---

2 See *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 QB 451 at [25].

3 At [7].

4 See *Man O'War Station Ltd v Auckland City Council (Judgment No 1)* [2002] 3 NZLR 577 at [10] (PC) and *Erris Promotions Ltd v Commissioner of Inland Revenue* (2003) 21 NZTC 18,214.

before “raising the matters elsewhere”, the application largely had a domestic tactical purpose. It is regrettable that counsel saw fit to question the impartiality of the Court for such a purpose, the more so when the grounds were so very weak.

Solicitors:
N B Dunning, Wellington for Appellants
Crown Law Office, Wellington