IN THE SUPREME COURT OF NEW ZEALAND

SC 33/2007
[2007] NZSC 54

BETWEEN	JOSEPH RONALD BELCHER Applicant
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Court: Blanchard, Tipping and McGrath JJ

Counsel: T Ellis for Applicant
C R Gwyn, A Markham and M G Coleman for Respondent

Judgment: 16 July 2007

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] This application relates to a decision of the Court of Appeal dismissing an appeal against the making in the High Court of an extended supervision order (ESO) in respect of Mr Belcher under s 107I of the Parole Act 2002.

[2] The Court of Appeal determined that the order was in the nature of a criminal penalty which had been applied retrospectively to the applicant. It found, however, that the ESO legislation had made it perfectly clear that the legislation was to have retrospective effect. The Crown did not seek to show that this was a justified limitation under s 5 of the New Zealand Bill of Rights Act 1990. Having made it plain that the ESO legislation was in this respect inconsistent with the Bill of Rights, and having implicitly found the matter governed by s 4 of the Bill of Rights, the Court of Appeal proceeded to consider whether it should make a declaration of

inconsistency. But it came to the conclusion that in the circumstances it had no jurisdiction to do so.

[3] The applicant seeks to raise in this Court several new Bill of Rights arguments which the lower courts were not asked to consider. We decline to permit that course since we would not have the benefit of the views of the lower courts and, in any event, the arguments sought to be made do not appear to have merit.

[4] The other grounds challenging the basis for the making of the ESO and the admissibility of the Crown's expert evidence are not sufficiently arguable to justify the granting of leave.

[5] Nor are we persuaded that the Court of Appeal was wrong to conclude that the evidence before the High Court, supplemented by the additional evidence received by the Court of Appeal, did warrant the making of the ESO in respect of the applicant. No question of law of public or general importance arises nor is there any appearance of a miscarriage of justice.

[6] As to the decision to decline a formal declaration of inconsistency: assuming, without deciding, that a declaration may be available in a criminal proceeding, we consider that it was entirely appropriate for the Court of Appeal to leave the matter in essentially the same way as it was subsequently left by the majority of this Court in *R v Hansen*[1] where the inconsistency was described in the reasons for judgment but no declaration was made. It is also of some moment in the present case that no issue concerning s 5 was required to be determined in the necessary course of interpreting the legislation and resolving questions between the parties. A response in the form of a declaration was quite unnecessary.

[7] We should, however, before leaving this matter correct the Court of Appeal's erroneous view that, if a declaration of inconsistency had been otherwise available and appropriate, there would nevertheless have been in this case the same jurisdictional difficulty as existed in *Taunoa v Attorney-General*.[2] The difficulty in

---

1 [2007] NZSC 7.
2 [2006] NZSC 95 at para [6].

that case arose from an unusual situation in which the asserted cause of action in respect of which relief was being sought in this Court could not have existed when the proceeding was before the High Court since the Act of Parliament in respect of which relief was sought had not been enacted until the *Taunoa* proceeding was already before the Court of Appeal.

This Court said:

> No relief in the form now sought could have been granted in the Court of Appeal for the obvious reason that no issue relating to the Act was before it. This Court also has under s 25(1) all the powers of the Court of Appeal even if the proceeding has not been heard in that Court. But, again, as the issue was never before the High Court, the Court of Appeal would have lacked any power to hear it, for it too has no originating jurisdiction.

[8] In the present proceeding the issue, namely the application of the relevant aspect of the Parole Act to Mr Belcher's circumstances, was before the High Court. Relief in the form of a declaration could, if otherwise available, have been granted by that Court and accordingly the Court of Appeal was not precluded from considering that question. It would not thereby have been exercising an originating jurisdiction. In this respect the Court of Appeal fell into error but, for the reasons given above, that does not require the granting of leave to appeal to this Court.

Solicitors:
Crown Law Office, Wellington