

**NOTE: HIGH COURT ORDER SUPPRESSING PUBLICATION OF THE
NAMES OF THE APPLICANTS REMAINS IN FORCE**

IN THE SUPREME COURT OF NEW ZEALAND

**SC 36/2008
[2008] NZSC 64**

BETWEEN EGW and PW
 Applicants

AND THE ATTORNEY-GENERAL
 Respondent

Court: Elias CJ, McGrath and Wilson JJ

Counsel: S M Cooper for Applicants
 K P McDonald QC and U R Jagose for Respondent

Judgment: 15 August 2008

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] This is an application for leave to appeal against a judgment of the High Court dismissing a proceeding brought by the applicants for damages for breaches of duty by Social Welfare agencies. We were informed by counsel that there are some 450 cases presently before the High Court dealing with similar claims arising from alleged historic abuse of children in state institutions or foster homes.

[2] The High Court's judgment was delivered on 28 November 2007. The applicants have appealed to the Court of Appeal but that appeal has not yet been heard.

[3] The applicants have encountered problems with obtaining legal aid for the appeal to the Court of Appeal. Counsel has informed us in submissions that an unfavourable decision by the Legal Services Agency has been upheld by the Legal Aid Review Panel in a decision released on 10 June 2008. Shortly afterwards the applicants filed their application for leave to appeal against the High Court judgment directly to this Court. It specifies 12 proposed grounds of appeal covering issues of fact as well as law.

[4] Counsel has advised the Court that she has been proceeding with the appeal to the Court of Appeal “pro bono”. Counsel is concerned at the prospect that, depending on the outcome in the Court of Appeal, the applicants may also have to face a further appeal without legal aid. Counsel cannot afford to fund two levels of appeal pro bono, and for that reason, and because of the need for prompt final clarification of the relevant law, it has been decided to apply directly to this Court in order to bypass the Court of Appeal stage.

[5] Section 14 of the Supreme Court Act 2003 directs the Court not to give leave to bring an appeal direct to it from a Court other than the Court of Appeal, unless satisfied that there are exceptional circumstances justifying taking the proposed appeal directly to the Supreme Court. This requirement is in addition to the Court being satisfied that it is necessary in the interests of justice to hear the proposed appeal. The policy of s 14 recognises that in the ordinary course the Supreme Court is a second appellate Court which will have the advantage of a considered judgment from the Court of Appeal on the issues to be addressed. The first level of appeal will, usually, also refine the issues that need determination and resolve disputed questions of fact.

[6] The impression given by the applicants’ submissions is that it is principally the applicants’ difficulties in getting legal aid that have led to the present application. If the legal aid process has not operated properly, that can be challenged by the appellants through the mechanism of appeal or judicial review. If, however, the legal aid process is not flawed, there is no principled basis for this Court to intervene. Whatever the position, the applicants’ difficulties in relation to the appeal do not justify the Court granting leave to bring a direct appeal. The circumstances

do not warrant this Court ignoring the underlying policy of the legislation, that an appeal to this Court is, other than in exceptional circumstances, a second appeal.

[7] The application is dismissed. There will be no order for costs.

Solicitors:

S M Cooper, Wellington for Applicants

Crown Law Office, Wellington for Respondent