IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 17/2018
[2018] NZSC 40

BETWEEN		PHILLIP JOHN SMITH Applicant
AND		ATTORNEY-GENERAL Respondent

Court: William Young, O'Regan and Ellen France JJ

Counsel: Applicant in person
U R Jagose QC and V McCall for Respondent

Judgment: 7 May 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant is serving a life sentence for murder. While serving this sentence he lost his hair. In 2012 he was granted permission from the manager at Auckland prison to wear a hairpiece. In early November 2014, he escaped custody and flew to South America. He was arrested in Brazil and eventually returned to New Zealand (and to Auckland prison) on 29 November 2014. On 1 December 2014 the prison manager revoked the applicant's permission to retain and wear his hairpiece.

[2] The applicant sought judicial review of that decision.[1] He alleged: (a) a breach of natural justice; (b) failure to take into account s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA) (which affirms freedom of expression); and (c) a breach of his

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[1] *Smith v Attorney-General on behalf of Department of Corrections* [2017] NZHC 463, [2017] 2 NZLR 704 (Wylie J).

rights under s 23(5) of the NZBORA, to be treated with humanity and respect for inherent dignity. On these grounds, the applicant sought declarations, an order quashing the decision to revoke permission for his hairpiece, and damages for the breach of s 23(5).

[3] In the High Court, Wylie J addressed only the argument based on s 14. This section provides:

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

Wylie J said that when the applicant was wearing a hairpiece, he was "trying to say – this is who I am and this is how I want to look".[2] He therefore concluded that by wearing a hairpiece the applicant was exercising his right to freedom of expression. Wylie J found that: (a) freedom of expression was a mandatory consideration which the prison manager failed to take into account when deciding whether to revoke the hairpiece; and (b) the prison manager failed to consider whether revoking the hairpiece would be a justified limitation on that freedom.[3] Wylie J made a declaration to that effect and also quashed the prison manager's decision.[4]

[4] After the High Court judgment, the prison manager gave the applicant permission to have and wear the hairpiece. The Attorney-General nonetheless appealed to the Court of Appeal which heard and determined the appeal despite there no longer being a live issue between the parties.[5] We note that at the hearing of the appeal, the Attorney-General did not seek to justify the withdrawal of permission to wear the hairpiece and it was accepted the decision "may well have been vulnerable on other administrative law grounds".[6] We also note that the Court limited the issues it was prepared to consider to the single ground of whether the applicant's wish to wear a hairpiece engaged s 14 of the NZBORA.[7]

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2 At [70].
3 At [88].
4 At [98]–[99].
5 *The Attorney-General v Smith* [2018] NZCA 24 (Kós P, Cooper and Asher JJ).
6 At [18].
7 At [28]–[29].

[5] The Court of Appeal concluded that the right to freedom of expression applies only to conduct which conveys, or attempts to convey, a meaning to others and that the wearing of the hairpiece was not of that character.[8] It accordingly allowed the appeal. In doing so it referred to European Convention on Human Rights cases and judgments from Canada and the United States in which a similar approach was taken.

[6] The applicant now seeks leave to appeal to this Court. He claims that the Court of Appeal wrongly "diluted" the s 14 right to freedom of expression by treating the examples given in the section ("the freedom to seek, receive, and impart information and opinions of any kind in any form") as limiting the scope of the primary right (freedom of expression). He maintains that the reliance on non-domestic authority was inappropriate and asserts that his wearing of a hairpiece was an act of expression.

[7] That s 14 protects only expression, and thus expressive conduct, cannot be in dispute. Whether expressive conduct encompasses how a person presents to others (for instance the wearing of particular attire, the use of make-up, hair length, or, as in this case, the wearing of a hairpiece) may be open to debate and indeed, as the Court of Appeal recognised, may depend on the circumstances. At the very least, the question whether the disputed conduct conveyed a meaning is relevant to such debate, although not necessarily decisive. As to this, we think that Wylie J would have considered that the applicant, by wearing a hairpiece, was conveying a meaning (along the lines of "this is who I am and this is how I want to look").

[8] We accept that the question whether expressive conduct is confined to conduct which conveys meaning raises a question of law of public importance. We are, however, nonetheless of the view that leave should be refused. This is because:

(a) We do not see the answer to this question as likely to be decisive of outcome. This is because it does not seem to us that the conclusion as to whether s 14 is engaged in this case is much affected by whether the test is framed in terms of (i) expressive conduct or (ii) conduct which conveys, or attempts to convey, meaning. We rather think that if Wylie J had applied the Court of Appeal's conveying meaning approach

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8 At [49]–[51].

he would have probably reached the same result again on the basis that by wearing the hairpiece the applicant was seeking to convey something of meaning. On this basis, the decision of the Court of Appeal might be thought to turn, in the end, on application rather than principle.

(b) Possibly relevant to the appropriate approach to s 14 is the question whether interference with the way a detained person presents to others is consistent with s 23(5) of the NZBORA. Refusing to permit a person to cover up some aspect of their appearance which they consider to be unsightly could be construed as an infringement of dignity (for the purposes of s 23(5)). If so, this may be relevant to whether what the Court of Appeal thought to be a stretched construction/application of s 14 would be appropriate. This, however, has not been the subject of inquiry and, importantly, findings of fact in the lower Courts and it would not be practicable for us to address it on appeal.

(c) The case is moot as there is now no dispute that the applicant may wear a hairpiece. While this consideration did not prevent the Court of Appeal hearing the case, that Court's judgment reveals some discomfort over the relevance of s 23(5). The combination of the absence of a live issue and the impracticality of dealing appropriately with the s 23(5) issue leaves us with the view that the proposed appeal would have to be addressed on an artificial basis.

[9] Accordingly, the application for leave to appeal is dismissed. Given the history of the litigation and the applicant's circumstances, we propose to give no order as to costs.

Solicitors:
Crown Law Office, Wellington for Respondent