IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 1/2021
[2021] NZSC 34

BETWEEN		PHILLIP JOHN SMITH Applicant
AND		CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: Applicant in person
A M Powell and C P C Wrightson for Respondent

Judgment: 21 April 2021

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B There is no order as to costs.

REASONS

[1] This application for leave to appeal concerns a proposed interview of Phillip Smith, a prison inmate, by a journalist. In issue is the application of regs 108 and 109 of the Corrections Regulations 2005 to the journalist's request for permission. These regulations:

(a) prohibit the interviewing (defined broadly) of prisoners without the written approval of both the chief executive and the prisoner concerned (reg 108); and

(b) provide criteria for determining whether the chief executive should give approval (reg 109).

[2] The application of these regulations (and similar earlier regulations) has been the subject of previous litigation involving Ahmed Zaoui,[1] Scott Watson[2] and Arthur Taylor.[3] The leading case in New Zealand is the Court of Appeal decision in *Taylor*. There is also a House of Lords decision.[4]

[3] Approval for the proposed interview was first sought in 2017. A decision in May 2018 to withhold approval resulted, in July 2018, in judicial review proceedings. These were settled in October 2018 on the basis that the application would be reconsidered. The outcome of this reconsideration was a further decision, in February 2019, to withhold approval. This was for reasons which came down to likely distress for the applicant's victims and prison management concerns (particularly in terms of preserving the applicant's personal safety if the interview were published).

[4] In the High Court, Doogue J set aside the withholding of approval on a basis which made it clear that she expected that, on reconsideration (or more likely perhaps, a further application), approval would be granted.[5]

[5] The Court of Appeal allowed the appeal and upheld the withholding of approval.[6]

[6] In his submissions in support of the application, the applicant contends that:

(a) the Court of Appeal allowed what he called "an inference" of harm to victims to trump his right to freedom of expression and incidentally,

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1 *Television New Zealand Ltd v Attorney-General* (2004) 8 HRNZ 45 (CA). The relevant regulations in this case were regs 87 and 88 of the Penal Institutions Regulations 2000.

2 *Watson v Chief Executive of the Department of Corrections* [2015] NZHC 1227, (2015) 10 HRNZ 505.

3 *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648.

4 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL).

5 *Smith v The Chief Executive of the Department of Corrections* [2019] NZHC 2472.

6 *Chief Executive of the Department of Corrections v Smith* [2020] NZCA 675 (Clifford, Gilbert and Courtney JJ).

that it is wrong to allow victim distress to be, in this context, a basis for withholding consent;

(b) regs 108 and 109 were ultra vires unless able to be construed in a way which respects the right to freedom of expression (and that the Court of Appeal did not so construe them because it held that outright refusal is an option); and

(c) the Court of Appeal's proportionality approach was wrong.

[7] We are not persuaded that the proposed appeal raises an issue of general or public importance which warrants leave to appeal,[7] and we see no appearance of a miscarriage of justice.[8]

[8] As to the first point, there was evidence that a published interview would cause distress. In any event, it is open to a court to act on inferences as well as direct evidence.

[9] As to the second, the Court of Appeal approached the case on the basis that the regulations had to be applied consistently with the right to freedom of expression. We do not accept that this precludes a withholding of approval (as opposed to the imposition of conditions). We add that because the applicant had said that he would not accept control over the content of the interview, there is limited substance in his suggestion that approval should have been granted subject to conditions.

[10] In respect of the third point, the Court of Appeal balanced the impact on the guaranteed right against the countervailing considerations (victim concerns and prison management). On that basis it concluded that withholding approval was not a disproportionate limit on the applicant's right to freedom of expression. This, as opposed to a full *Hansen* analysis,[9] is consistent with the reasons of Winkelmann CJ and O'Regan J in *D (SC 31/2019) v New Zealand Police*.[10] Against that background,

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7 Senior Courts Act 2016, s 74(2)(a).
8 Section 74(2)(b).
9 See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.
10 *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2 at [101]. Glazebrook J agreed that the *Hansen* methodology was not appropriate: n 361.

the various complaints identified by the applicant in relation to this aspect of the case are primarily about application rather than principle.

[11] The application for leave to appeal is dismissed. The respondent not having sought costs, and given the applicant's circumstances, no order as to costs is made.

Solicitors:
Crown Law Office, Wellington for Respondent