

**NOTE: SUPREME COURT ORDER PROHIBITING PUBLICATION OF THE
NAME OR IDENTIFYING PARTICULARS OF P REMAINS IN FORCE.**

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 91/2022
[2022] NZSC 136**

BETWEEN	P (SC 91/2022) Applicant
AND	HIGH COURT AT AUCKLAND First Respondent
	COURT OF APPEAL Second Respondent
	COMMISSIONER OF INLAND REVENUE Third Respondent
	ATTORNEY-GENERAL Fourth Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: Applicant in person
B M McKenna for First and Second Respondents
D L Harris and M J McKillop for Third and Fourth Respondents

Judgment: 22 November 2022

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay one set of costs of \$2,500 to the third and fourth respondents.**
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REASONS

Introduction

[1] Ms P has filed an application for leave to appeal to this Court from a decision of the Court of Appeal.¹ The proposed appeal arises in the context of an ongoing complaint about the assessment of child support by the Commissioner of Inland Revenue (the Commissioner).

Background

[2] From late December 2017 to late July 2018, Ms P's child was not in her custody but was with the child's father. The Commissioner assessed her as ineligible to receive child support for this period. She disputed that assessment and challenged it in the courts. Shortly after this Court dismissed an application for leave to appeal as an abuse of process,² Ms P filed a claim in the Human Rights Review Tribunal. This claim alleged Ms P had been discriminated against in relation to the assessment of child support by the current respondents on the grounds of her family status and victimised contrary to s 66 of the Human Rights Act 1993.

[3] The Human Rights Review Tribunal struck out the decision on various grounds including that it was a collateral attack on previous Court decisions;³ could have been raised in the earlier proceedings;⁴ and that there was, in any event, no factual foundation for the claim.⁵ Ms P filed an appeal from that decision to the High Court. Before releasing it for service, the High Court Registrar referred the notice of appeal to Ellis J under r 5.35A of the High Court Rules 2016. Under r 5.35B the High Court can strike out a proceeding if it is an abuse of process. Ellis J struck out the appeal, largely agreeing with the analysis of the Human Rights Review Tribunal.⁶

¹ *P (CA334/2022) v High Court at Auckland* [2022] NZCA 396 (Cooper P and Brown J) [CA judgment]. The notice of application refers also to the minute of Miller J which is the subject of review in the CA judgment.

² *P (SC 120/2019) v Commissioner of Inland Revenue* [2021] NZSC 51.

³ *P v High Court of Auckland* [2021] NZHRRT 56. The Human Rights Review Tribunal said a collateral challenge on earlier court proceedings was prohibited by ss 79 and 92B of the Human Rights Act 1993: at [31.1]; see also [20]–[21] and [27].

⁴ At [29].

⁵ At [31.2]–[31.3]; see also [23]–[25].

⁶ *P v High Court of Auckland* [2022] NZHC 1382.

[4] Ms P then filed an appeal from the High Court decision in the Court of Appeal. Miller J ruled in a minute dated 15 July 2022 that there was no jurisdiction to entertain the appeal unless and until Ms P obtained leave to appeal under s 124 of the Human Rights Act. Section 124 deals with appeal rights in relation to proceedings under that Act. It provides that an appeal is available from a decision of the High Court on a question of law where the High Court grants leave to appeal or, if the High Court refuses to do so, with the special leave of the Court of Appeal. Miller J's decision was upheld on review.⁷

[5] In dismissing the application for review, the Court of Appeal agreed with Miller J that the Court's jurisdiction in this case was governed by s 124 and not, as Ms P had argued, by s 56(4) of the Senior Courts Act 2016. Section 56(4) provides for an appeal without leave to the Court of Appeal from a decision of the High Court striking out a proceeding.

[6] The Court of Appeal explained its reasoning in this way:⁸

[3] This Court's jurisdiction is prescribed in s 56(1) of the [Senior Courts Act]. The power to hear appeals specified in s 56(1)(a) is subject to specific provisions in other statutes precluding or limiting a right of appeal to this Court. It is also subject to the requirement that leave be obtained for appeals from orders or decisions of the High Court made on an interlocutory application: see s 56(2), (3) and (5).

[4] The role of s 56(4) is to provide a qualification to the restriction contained in s 56(3), whereby leave is not required under s 56(3) in order to appeal certain interlocutory decisions which are final in effect. Section 56(4) does not have the effect of extending the s 56(1)(a) jurisdiction so as to override limitations in other statutes which confer or confine rights of appeal to this Court.

[5] Section 124 of the Human Rights Act contains such a limitation. It provides that an appeal to this Court against a determination of the High Court on a question of law may only be brought with the leave of the High Court or, if the High Court refuses leave, with special leave granted by [the Court of Appeal].

⁷ CA judgment, above n 1.

⁸ Footnote omitted.

The proposed appeal

[7] In challenging the decision of the Court of Appeal declining review, Ms P wishes to reprise the argument about s 124 rejected by that Court. Essentially, she says her appeal rights are controlled by s 56(4) of the Senior Courts Act, not by s 124. In this respect, Ms P argues her appeal relies on a question of fact, so is not governed by s 124 which deals with appeals on a question of law.

[8] The first and second respondents abide the decision of the Court on leave. We interpolate here that it was not appropriate to include the two Courts, which had made the decisions under challenge, as parties. In opposing leave to appeal, the third and fourth respondents submit that s 124 applies although they also say that the High Court was likely incorrect to strike out the appeal under r 5.35B.⁹ The third and fourth respondents also submit there is no prospect of a miscarriage of justice if leave to appeal is declined because the proceeding is an abuse of process.

Result

[9] The way in which events have transpired potentially has created an issue about the inter-relationship between s 56 of the Senior Courts Act and s 124 of the Human Rights Act. However, we do not consider this is an appropriate case to consider that issue because we accept the submission for the third and fourth respondents that the current proceeding is an abuse of process. Leave to appeal is not in the interests of justice in these circumstances.¹⁰

[10] The third and fourth respondents seek costs. As they have been put to the cost of providing submissions, a costs award is appropriate. The applicant must pay one set of costs of \$2,500 to the third and fourth respondents.

Solicitors:
Crown Law Office, Wellington for First, Second, Third and Fourth Respondents

⁹ This is on the basis they submit that the Rule appears intended to apply to proposed proceedings at first instance, not appeals.

¹⁰ Senior Courts Act 2016, s 74(2).