NOTE: THE CONFIDENTIALITY OF THE NAME AND IDENTIFYING PARTICULARS OF THE APPLICANT AND OF HIS CLAIM OR STATUS MUST BE MAINTAINED PURSUANT TO S 151 OF THE IMMIGRATION ACT 2009. SEE http://www.legislation.govt.nz/act/public/2009/0051/latest/DLM1440836.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 15/2022
[2022] NZSC 55

BETWEEN	AR (INDIA) Applicant
AND	ATTORNEY-GENERAL Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	R S Pidgeon for Applicant C P Paterson and A-R C Davies for Respondent
Judgment:	6 May 2022

JUDGMENT OF THE COURT

A **The application for an extension of time to apply for leave to appeal is granted.**

B **Leave to permit Mr Pidgeon to act for the applicant is granted.**

C **The application for leave to appeal is dismissed.**

D **There is no order as to costs.**

REASONS

[1] The applicant applies for leave to appeal against a decision of the Court of Appeal.[1] In that decision, the Court of Appeal upheld a decision of the High Court striking out the applicant's claim against the respondent.[2]

[2] The applicant has applied three times for refugee status in New Zealand. He has also unsuccessfully sought refugee status in both the United Kingdom and Australia.

[3] The applicant was granted a visa to remain in New Zealand while proceedings relating to his first application for refugee status were conducted. An immigration officer entered a notation on the visa in the applicant's Indian passport which referred to the fact that the applicant was awaiting a High Court decision on refugee appeal status. This was, on its face, a breach of s 151 of the Immigration Act 2009, which requires the fact that a person is a refugee or is claiming refugee status to be kept confidential. When the error was realised, immigration officers attempted to remedy the error by blocking out the notation in stamping "cancelled without prejudice" over the visa.

[4] After this occurred, the applicant made a third application for refugee status. He claimed that the notation in his passport would alert Indian authorities to the fact that he had sought refugee status in New Zealand. In the alternative, he claimed the conspicuous stamps in his passport would prompt Indian authorities to investigate his circumstances and conclude he had sought refugee status. That application was unsuccessful.

[5] Prior to the determination of the third application for refugee status the applicant commenced proceedings in the High Court pleading misfeasance in public office and breaches of ss 8 and 23(5) of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). Both of these causes of action were based on the notation made by immigration officers to the visa in the applicant's Indian passport. The respondent

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1 *AR (India) v Attorney-General* [2021] NZCA 291 (French, Brown and Collins JJ) [CA judgment].
2 *AR (India) v Attorney-General* [2020] NZHC 421 (Associate Judge Bell) [HC judgment].

applied to strike out both causes of action. The applicant abandoned the misfeasance cause of action, and the Associate Judge struck out the cause of action based on alleged breaches of the Bill of Rights.

[6] In the Court of Appeal, the applicant did not pursue the cause of action alleging a breach of s 23(5) of the Bill of Rights, accepting that the Associate Judge had been correct to point out that that provision applied only to people deprived of liberty, and, as the applicant had not been deprived of liberty, the provision was not engaged.[3]

[7] Section 8 of the Bill of Rights provides: "No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice". The applicant pleaded that this provision had been breached because his life was placed at risk in the event he was required to return to India (because it may become apparent to the Indian authorities that he had sought refugee status) and because the quality of his life in New Zealand was decreased. The Court of Appeal referred to the latter claim as a claim for diminution of dignity, and we will use the same terminology.

[8] The Court of Appeal rejected the applicant's claim as to the risk to his life on return to India, given that he would become entitled to a new passport within a short period of time and also because the Immigration and Protection Tribunal and the High Court had both found there would be no such risk.[4] Raising the same issue again was, it said, an abuse of process. The Court of Appeal also found that the diminution of dignity claim was untenable and therefore properly struck out.[5]

[9] The Court of Appeal also refused to allow the applicant to amend his pleadings to allege that the failure by the immigration officers to comply with s 151 of the Immigration Act amounted to a tort of breach of statutory duty. However, the Court said this did not prevent new proceedings alleging such a breach being commenced.[6]

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3 HC judgment, above n 2, at [37]; and CA judgment, above n 1, at [24].
4 CA judgment, above n 1, at [63]–[65].
5 At [57].
6 At [66]–[70].

[10] The applicant wishes to challenge all three aspects of the Court of Appeal decision if leave to appeal is granted. He also wishes to raise a new argument based on Tikanga Māori and Te Ao Māori and to expand his argument in relation to s 8 of the Bill of Rights in light of a recent authority of the England and Wales High Court.[7]

[11] The applicant argues that the Court of Appeal took an unduly narrow interpretation of s 8 of the Bill of Rights and that this is a matter of public importance justifying the grant of leave.[8] We accept that the scope of s 8 is a matter of public importance. However, we do not consider that this is an appropriate case to address the issue because, on any definition of s 8, the applicant's case could not succeed on the facts. We prefer to leave open the question of the correct interpretation of s 8 of the Bill of Rights for a future case in which the outcome could be affected.

[12] We do not consider that the applicant's argument that the Court of Appeal's finding that it would be an abuse of process to allow the applicant to argue that his life was endangered in the face of clear findings to the contrary by the Immigration and Protection Tribunal is a matter of public importance. Rather, it is a matter particular to the facts of the case. We do not see any appearance of miscarriage in the way the Court of Appeal addressed this issue.[9]

[13] In relation to the argument as to the amending of the pleadings to include a pleading of breach of statutory duty, we see that as specific to the present case and as raising no point of public importance. Given the clear indication by the Court of Appeal that there was no impediment to the commencement of a new action for breach of statutory duty, we do not see any appearance of miscarriage in the way the Court of Appeal addressed this issue. In particular, we reject the applicant's claim that the Court of Appeal dismissed the proposed breach of statutory duty claim. Rather, the Court did not permit the claim to be made in the appeal when it had not been raised in the High Court.

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7 *R (Morahan) v West London Assistant Coroner* [2021] EWHC 1603 (Admin), [2021] QB 1205.
8 Senior Courts Act 2016, s 74(2)(a).
9 Senior Courts Act, s 74(2)(b).

[14] The argument relating to Tikanga Māori and Te Ao Māori is not particularised. We do not consider it would be appropriate for this Court to deal with any such argument as a first and last Court in circumstances where it is far from apparent as to how it could be applied to the facts of the particular case.

[15] The applicant's counsel requires leave to act because he filed an affidavit in the High Court. He was given leave to appear in the Court of Appeal and, in light of that, we see no impediment to his acting in this Court as well.[10] We therefore give the necessary leave.

[16] The applicant also requires an extension of time to apply for leave to appeal. The respondent's objection to the applicant's application for an extension of time is based only on the merits of the application itself. We have addressed the merits and in those circumstances we grant the extension of time.

[17] The application for leave to appeal is dismissed.

[18] As the applicant is legally aided, there is no order as to costs.

Solicitors:
Integritas Law Firm, Auckland for Applicant
Meredith Connell, Auckland for Respondent

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10 *AR (India) v Attorney-General* [2020] NZCA 467 (Clifford J).