IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 21/2022
[2022] NZSC 98

BETWEEN	ALAN RUSSELL HALL Appellant
AND	THE QUEEN Respondent

Hearing:	8 June 2022
Court:	Winkelmann CJ, O'Regan, Ellen France, Williams and Kós JJ
Counsel:	N P Chisnall and L A Elborough for Appellant M F Laracy and E J Hoskin for Respondent
Oral judgment:	8 June 2022
Reasons: (Jurisdiction)	12 August 2022

REASONS (JURISDICTION)

REASONS
(Given by Ellen France J)

Introduction

[1] In our judgment delivered orally on 8 June 2022, we said we would issue a separate judgment explaining the basis on which the Court had jurisdiction to hear the appeal.[1] The question of jurisdiction arises because Mr Hall's appeal was brought in reliance on the transitional provisions governing appeals to this Court following the abolition of appeals to the Judicial Committee of the Privy Council. The parties agreed to proceed in this Court. As we shall explain, our jurisdiction accordingly essentially depended on establishing Mr Hall met the criteria for the application of the

1 *Hall v R* [2022] NZSC 71 [SC judgment] at [1], n 1.

transitional provisions and that his appeal was compatible with the statutory framework for appeals to this Court.

[2] At the hearing of the appeal, the parties were agreed that the Court had jurisdiction but were permitted to file further submissions on the point. Having had the benefit of those further submissions in the form of a joint memorandum, we now explain the jurisdictional pathway.

The issue

[3] The issue of jurisdiction arises in this way. After his trial in 1986, Mr Hall applied unsuccessfully to the Court of Appeal for leave to appeal against conviction.[2] At that time, if Mr Hall wanted to challenge the Court of Appeal's decision, his only avenue to do so was to seek special leave from Her Majesty in Council (the Privy Council). Mr Hall did not pursue that option.

[4] The right to appeal to the Privy Council from any decision of a New Zealand court made after 31 December 2003 was abolished with the enactment of the Supreme Court Act 2003.[3] Rights of appeal to this Court were created to replace the jurisdiction of the Privy Council for post-2003 decisions. The transitional provisions in the Supreme Court Act preserve the option of an appeal to the Privy Council for someone in Mr Hall's position,[4] but they also allow some historical appeals to be redirected to this Court at the appellant's election, with the consent of the Crown.[5] Accordingly, when in 2022 Mr Hall wished to pursue an appeal from the 1987 decision of the Court of Appeal, he potentially had two options. He could either seek special leave to bring an appeal to the Privy Council, or, he could seek leave to appeal to this Court. Mr Hall pursued the latter course.[6] Obviously, for Mr Hall to have the benefit of the transitional provisions the criteria governing their application must be met.

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2 *R v Hall* [1987] 1 NZLR 616 (CA) (Cooke P, Somers and Bisson JJ) [CA judgment].
3 Section 42.
4 Sections 50(1)(c) and 52. These transitional provisions are preserved in the Senior Courts Act 2016, sch 5 cls 3(1)(c) and 5.
5 Sections 50–51. These transitional provisions are preserved in the Senior Courts Act, sch 5 cls 3–4.
6 Leave to appeal was granted: *Hall v R* [2022] NZSC 51.

[5] Engagement of the transitional provisions is a necessary condition for Mr Hall to access appeal rights to this Court, but it is not sufficient on its own. Importantly, the transitional provisions do not of themselves confer substantive jurisdiction to entertain an appeal.[7] It is still necessary, in the usual way, for Mr Hall's appeal to fit into the relevant statutory appellate pathway which, in this case, is provided by the Crimes Act 1961.[8]

[6] To summarise then, the Court's jurisdiction turns on two questions:

(a) Are the criteria provided for in the transitional provisions of the Supreme Court Act (now preserved in sch 5 cl 4 of the Senior Courts Act 2016) satisfied in this case?

(b) If so, is Mr Hall's appeal compatible with the Crimes Act?

[7] As we shall see, in relation to both questions, it is necessary to consider Mr Hall's appeal rights to the Privy Council. We address each question in turn.

Are the requirements in the transitional provisions met?

[8] We interpolate here, as indicated above, that the transitional provisions in the Supreme Court Act are preserved in the Senior Courts Act. For convenience, we will refer to the latter Act. The Senior Courts Act provides that the ability to appeal to this Court for a pre-1 January 2004 matter is subject to two sets of qualifications.

[9] First, sch 5 cl 4 of the Senior Courts Act sets out the limits on the ability to seek leave to appeal to this Court against decisions predating 2004. We agree with the parties that none of these limits adversely affect Mr Hall's ability to seek to pursue an appeal in this Court. In particular, the Privy Council had not already heard or begun

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7 *Norske Skog Tasman Ltd v Clarke* [2005] ERNZ 206 (CA) at 209; and *Creser v Creser* [2014] NZCA 359, (2014) 22 PRNZ 167 at [6]. Both judgments arise in the context of applications to the Court of Appeal for leave to appeal to the Privy Council but their interpretation of the transitional provisions applies equally here.

8 As noted in SC judgment, above n 1, at [3], n 5 these proceedings were commenced before the commencement date of the Criminal Procedure Act 2011 so the appeal is determined under Part 13 of the Crimes Act 1961: Criminal Procedure Act, s 397.

hearing his appeal;[9] a New Zealand Court had not declined Mr Hall leave to appeal to the Privy Council and the Privy Council had not later given special leave to appeal;[10] the Privy Council had not declined special leave to appeal;[11] and, all the parties to the proceedings had agreed in writing that an application for leave to appeal should be made to this Court.[12]

[10] Second, sch 5 cl 6 makes it clear that no new rights of appeal are created in relation to decisions made before 1 January 2004. A person in Mr Hall's position needs to have had "a right to appeal" at the time. As we have foreshadowed, this aspect of the transitional provisions requires consideration of Mr Hall's rights, as they were in 1987, to appeal to the Privy Council.

[11] The statute law of New Zealand at the time did not confer any right of appeal from the Court of Appeal in criminal proceedings.[13] But Her Majesty could, by the exercise of the royal prerogative, grant special leave to appeal.[14] Special leave to appeal would not be granted absent "some clear departure from the requirements of justice".[15] A potentially complicating factor in this case is that, as we have noted, the Court of Appeal in Mr Hall's case declined leave to appeal.

[12] The case of *Campbell v The Queen* is however Privy Council authority confirming that a refusal by the local court to grant leave is not a jurisdictional barrier, albeit that would be a relevant consideration for the Board in deciding whether to grant

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9 Schedule 5 cl 4(2)(a).
10 Schedule 5 cl 4(2)(b).
11 Schedule 5 cl 4(2)(c).
12 Schedule 5 cl 4(2)(d).
13 Under both the Judicial Committee Act 1833 (UK) 3 & 4 Will IV c 41 and Judicial Committee Act 1844 (UK) 7 & 8 Vict c 69, rules could be made governing the admission of any appeal to the Privy Council. Collectively, the relevant rules provided for appeals to be brought as of right for claims of a certain value and type, pursuant to leave obtained from the Court appealed from, or in the absence of such leave, by special leave granted by Her Majesty in Council upon a petition. The rules did not convey a right of appeal in criminal proceedings.
14 See, for example, *R v Kaitamaki* [1984] 1 NZLR 385 (PC) at 387. See also *Fryer v Superintendent of Her Majesty's Prison at Paparua* [1979] 1 NZLR 693 (CA) at 696; *Woolworths (New Zealand) Ltd v Wynne* [1952] NZLR 496 (CA); and J J McGrath *Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of Termination and Court Structure* (Crown Law Office, 5 May 1995) at [26].
15 *Ibrahim v The King* [1914] AC 599 (PC) at 615, citing *Riel v The Queen* (1885) 10 App Cas 675 (PC). *Ibrahim* was cited in Lord Mance and Jacob Turner *Privy Council Practice* (Oxford University Press, Oxford, 2017) at 51. See also Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens & Sons, London, 1966) at 437–439.

special leave.[16] The issue in *Campbell* arose in the context of an argument about the jurisdiction for an appeal by way of special leave from the Court of Appeal of Jamaica. Lord Mance referred to the Judicial Committee Acts of 1833 and 1844, which governed appeals to the Privy Council, noting the comprehensive nature of the language used. The point was made that s 3 of the 1833 Act enabled the Board to consider "all appeals … from or in respect of the determination, sentence, rule, or order of any court, …".[17] Section 1 of the 1844 Act provided for the admission of "any appeal … from any judgments, sentences, decrees, or orders of any court of justice …". Lord Mance said that this language was "as comprehensive as possible, and the contrast between any 'determination' or 'judgment' and any 'rule', 'decree' or 'order' is to be noted".[18] Further, the "background of the royal prerogative, which these statutory provisions were intended to regulate, also suggests an expansive interpretation".[19]

[13] There is nothing to suggest that the same approach to jurisdiction would not have applied in Mr Hall's case. It has to be acknowledged that the language used in sch 5 cl 6 of the Senior Courts Act, namely, that there was a "right" to appeal at the time does not at first blush fit neatly with the nature of Mr Hall's rights. However, the word "right" was used in other parts of the Supreme Court Act to encompass appeals by way of leave.[20] There is nothing to suggest that there was any intention, via the transitional provisions, to reduce the parties' rights.

[14] It follows that we agree with the parties that in 1987 Mr Hall could have sought special leave to appeal to the Privy Council from the decision of the Court of Appeal. He therefore met the requirements for the application of the transitional pathway.

Compatibility with the Crimes Act pathway?

[15] Sections 383 and 383A of the Crimes Act (amended by the Supreme Court Act) provide the two pathways for conviction appeals to be brought to this Court. Mr Hall's

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16 *Campbell v The Queen* [2010] UKPC 26, [2011] 2 AC 79 at [25].
17 At [17].
18 At [17]. See also [21].
19 At [17].
20 See s 51. See also the heading to s 383 of the Crimes Act which refers to a "Right of appeal against conviction or sentence" where s 383(1) encompasses appeals with leave to this Court.

appeal, redirected to this Court via the transitional provisions, must fit compatibly with one of those pathways for this Court to have jurisdiction.

[16] Unlike the Privy Council, this Court lacks jurisdiction to hear an appeal from a refusal to grant leave.[21] That is material given the procedural history of this case. In 1987 when Mr Hall sought to appeal against conviction to the Court of Appeal, he had to obtain leave to appeal from that Court because his proposed appeal raised questions of mixed fact and law.[22] By contrast, appeals brought solely on the basis of error of law could at that time proceed as of right.[23] Although the Court of Appeal in its 1987 decision undertook a comprehensive consideration of the proposed appeal grounds, it ultimately declined to grant leave to appeal.[24] For that reason, Mr Hall's appeal against the 1987 decision is not obviously compatible with s 383A of the Crimes Act.[25]

[17] Previously, however, this Court has taken the view that the statutory provisions for appeals may in some cases permit the Court to treat an application for leave as an application for a first (leapfrog) appeal from the court of first instance.[26] Adopting that approach is appropriate in this context given that Mr Hall had (as noted above) a right to petition the Privy Council for special leave, and the transitional provisions were not intended to reduce parties' existing rights.[27] In this case, the rights Mr Hall seeks to re-direct to this Court are those he had in 1987. If he had been able to proceed by way of a leapfrog appeal in the Privy Council, it follows that, consistently with the statutory pathway here, Mr Hall's appeal can be treated as a first (leapfrog) appeal to this Court under s 383 of the Crimes Act.

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21 *Simpson v Kawerau District Court* (2004) 17 PRNZ 358 (SC).

22 Crimes Act, s 383(1)(b).

23 Crimes Act, s 383(1)(a). The position in this respect changed in 1991: Crimes Amendment Act 1991, s 2. That section amended s 383 to provide, relevantly, for a right of appeal to the Court of Appeal against conviction.

24 CA judgment, above n 2.

25 Section 383A of the Crimes Act only provided for appeals (by way of leave) to the Supreme Court against a "decision of the Court of Appeal on appeal under s 383". The Court of Appeal's refusal to grant leave to appeal was not a decision "on appeal" under s 383. In *Simpson*, above n 21, at [5], this Court made a similar point in the context of the Summary Proceedings Act 1957.

26 See, for example, *Sena v New Zealand Police* [2018] NZSC 92.

27 We do not need to resolve the question of whether the relevant provision of the Crimes Act is that at the time of transition or at a later point in time. For our purposes, there is no relevant difference.

[18] It is clear from *Campbell* that the Privy Council has jurisdiction to entertain a leapfrog appeal.[28] That jurisdiction derives largely from the broad wording of s 1 of the Judicial Committee Act 1844, referred to above. Further, Lord Mance cited several authorities that illustrate the ability to grant special leave "even though all available means of domestic appeal had not been exhausted".[29] In reliance on one of those decisions, Sir Kenneth Roberts-Wray said the Privy Council can hear a direct appeal ("short-circuiting a Court of Appeal"), but only in exceptional circumstances.[30] The text by Lord Mance and Jacob Turner, *Privy Council Practice*, is to similar effect.[31]

[19] We can also point to leapfrog appeals from New Zealand to the Privy Council albeit not in the criminal law context. An example is *Te Teira Te Paea v Te Roera Tareha* which concerned a dispute about Māori land.[32] By consent, the (then) Supreme Court removed two legal questions into the Court of Appeal for resolution before trial. After the Court of Appeal delivered its judgment on those questions, the matter came on for hearing in the Supreme Court. From that, first instance, judgment, Te Teira Te Paea sought (and obtained) special leave to appeal directly to the Privy Council.

[20] We can accordingly treat Mr Hall's appeal as a leapfrog appeal under s 383 of the Crimes Act.[33] As the parties submit, given what we now know, we can assume that there was a basis on which leave to appeal could have been granted. Mr Hall's appeal to this Court is therefore compatible with the Crimes Act pathway. We do not have to consider the parties' alternative argument that, in any event, the Court of Appeal's "leave" decision is not truly comparable to contemporary appeal arrangements.

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28 *Campbell*, above n 16, at [22].

29 At [22]. These are *Re Barnett* (1844) 4 Moo PC 453, 13 ER 378 (PC); *Harrison v Scott* (1846) 5 Moo PC 357, 13 ER 528 (PC); *Attorney-General for the Island of Jamaica v Manderson* (1848) 6 Moo PC 239, 13 ER 675 (PC); *Hitchins v Hollingsworth* (1852) 7 Moo PC 228, 13 ER 868 (PC); and *Re The Initiative and Referendum Act* [1919] AC 935 (PC).

30 Roberts-Wray, above n 15, at 436.

31 Mance and Turner, above n 15, at 47.

32 *Te Teira Te Paea v Te Roera Tareha* [1902] AC 56 (PC).

33 We note that leave to appeal was not granted on this basis. Rather, the appeal was treated as an appeal from the Court of Appeal. We have considered whether we should recall and re-issue the leave judgment but have determined it is sufficient to correct the record in this judgment.

Conclusion

[21] For these reasons, as indicated in our substantive judgment, we are satisfied that the Court had jurisdiction to consider Mr Hall's appeal.

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