IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 131/2024
[2025] NZSC 50

BETWEEN	ASHOR CHRISTIAN GORGUS Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS First Respondent
	ATTORNEY-GENERAL Second Respondent

Court:	Ellen France, Williams and Kós JJ
Counsel:	D J Dufty for Applicant S M Kinsler and H T Reid for Respondents
Judgment:	9 May 2025

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B There is no order as to costs.

REASONS

Introduction

[1] The applicant, Mr Gorgus, spent approximately two weeks on directed segregation while on remand in July 2019. He challenged aspects of the segregation in the High Court.[1] He was unsuccessful in a number of respects in the High Court.[2]

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1 *Gorgus v The Chief Executive of the Department of Corrections* [2023] NZHC 450 (Woolford J) [HC judgment].

2 In the High Court, Ara Poutama Aotearoa | Department of Corrections consented to the Court making a declaration that it had breached the right of Mr Gorgus to natural justice—affirmed by s 27(1) of the New Zealand Bill of Rights Act 1990—in relation to procedural omissions.

He now seeks leave to appeal from the decision of the Court of Appeal.[3] The Court of Appeal dismissed his appeal from the High Court, finding that the period of segregation did not comprise a breach of his right to be treated with humanity and with respect for his inherent dignity in terms of s 23(5) of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). The Court allowed his appeal against the subsequent decision of the High Court to award costs against him.[4]

[2] In seeking leave to appeal to this Court, the applicant's focus is on the minimum entitlements of prisoners in relation to physical exercise whilst in prison and on whether what Mr Gorgus says were deficiencies in the facilities made available to him were such as to comprise a breach of s 23(5).

Background

[3] While in segregation, Mr Gorgus was able to undertake physical exercise in either the general exercise yard or in a small area adjacent to his cell. His management plan allowed him to take "one hour of physical exercise in the yards" but it also specified that he was to be placed in handcuffs for all movements outside of his cell. The latter specification meant that when in the general yard he was handcuffed. This restriction did not apply when he was in the cell-adjacent area.

[4] Mr Gorgus said that he was only allowed to exercise in the general yard three times a week for 30 minutes and that he was handcuffed during this period.[5] The High Court suggested that other prisoners, not subject to directed segregation like Mr Gorgus, were present. The Court of Appeal stated that it appeared that he had only been to the general yard on one occasion[6] but that Mr Gorgus was regularly offered time in the space adjacent to his cell which he declined to take up. He said that the cell-adjacent space was too small for him to run around in and had no exercise equipment.

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3 *Gorgus v Chief Executive of the Department of Corrections* [2024] NZCA 610 (Courtney, Cooke and Collins JJ) [CA judgment].

4 *Gorgus v The Chief Executive of the Department of Corrections* [2023] NZHC 2097 (Woolford J).

5 In his submissions to this Court, the applicant referred to three occasions. The Court of Appeal and the High Court refer to three occasions per week.

6 The records of prisoner movement logs over the relevant period were apparently incomplete.

[5] In addressing this part of the claim, the High Court noted the difficulties arising from the absence of evidence both as to the size or nature of the cell-adjacent area or about "the need for or utility of unspecified exercise equipment".[7] (Mr Gorgus represented himself in person in the High Court and it does not appear that the focus of the statement of claim was on the sufficiency of the cell-adjacent space but rather on being handcuffed while in the general yard and given limited access to that yard.) The only evidence in the High Court of the size of the cell-adjacent yard was that of a prison officer who said it was maybe 12 by eight metres. The High Court considered that the cell-adjacent area was sufficient to meet the minimum requirements in the Corrections Act 2004.

[6] Counsel was assigned to Mr Gorgus on the appeal to the Court of Appeal. The Court of Appeal granted leave to Mr Gorgus to adduce new evidence as to the size of the cell-adjacent yard. That evidence showed that the space was approximately 3.1 by 3.25 metres. In considering this aspect of the appeal, the Court of Appeal's conclusion was as follows:[8]

> [46] We accept that Mr Gorgus would not have been able to perform the types of exercises that he may have wished to have performed when in the general exercise yard and in the small area adjacent to his cell. As was noted by Woolford J, it was however quite possible for Mr Gorgus to have performed exercise programmes as such as the 5BX developed for the Canadian Airforce and other calisthenics work out plans that can be performed in small spaces without exercise equipment. He was also offered the opportunity to exercise in the larger exercise yard on occasions. We do not accept that because he was handcuffed when in the larger yard that Mr Gorgus was denied the minimum requirements for exercise under s 70 of the [Corrections Act].

[7] The Court went on to note that without "more compelling evidence" it agreed with the High Court that the right of Mr Gorgus to physical exercise was not breached when he was placed in segregation.[9]

The proposed appeal

[8] On the proposed appeal, Mr Gorgus focuses on the Court of Appeal's finding that the conditions of his segregation—particularly, his access to physical exercise and

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7 HC judgment, above n 1, at [55].
8 Footnote omitted.
9 CA judgment, above n 3, at [47].

the conditions available for that exercise—did not comprise a breach of s 23(5) of the Bill of Rights.

[9] He wishes to argue first that the provision of minimum entitlements to prisoners under the Corrections Act should be interpreted in line with the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), noting that one of the purposes of the Corrections Act is to provide facilities operated in accordance with the Mandela Rules.[10] Second, his case is that the failure to provide him with a means to exercise (without being handcuffed), in the open air, and with space, exercise equipment and/or instalments—as anticipated by the Mandela Rules—is a breach of s 23(5) of the Bill of Rights. Mr Gorgus says these matters raise questions of general or public importance.[11] He seeks a declaration and/or damages as a result of the breach of s 23(5).

[10] To put the proposed appeal in context, we note first that s 70 of the Corrections Act provides:[12]

> **70 Exercise**
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> (1) Every prisoner (other than a prisoner who is engaged in outdoor work) may, on a daily basis, take at least 1 hour of physical exercise.
>
> (2) The physical exercise referred to in subsection (1) may be taken by the prisoner in the open air if the weather permits.

[11] Second, we record that the relevant provision of the Mandela Rules is as follows:

> *Rule 23*
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> 1. Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.
>
> 2. Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end, space, installations and equipment should be provided.

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10 Corrections Act 2004, s 5(1)(b); and *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* GA Res 70/175 (2016), annex.

11 Senior Courts Act 2016, s 74(2)(a).

12 See also Corrections Act, s 69(1)(a).

[12] We accept that the approach to compliance with the Mandela Rules and their interrelationship with s 23(5) does raise a question of general and public importance.[13] The detail that the Mandela Rules add to the provision in s 70 of the Corrections Act in this case is of importance to the argument for Mr Gorgus. However, for the reasons which follow, we accept the submission for the respondents that the present case is not an appropriate vehicle for this Court to consider these issues.

[13] First, as is indicated in our discussion of the background, there are evidential deficiencies in the case so that—whatever the causes of these deficiencies—we would be considering the case in something of an evidential vacuum. The respondents make the submission that the material exchanged in discovery and the evidence adduced at trial did not provide a basis for a thorough ventilation of the issue of the features of the cell-adjacent space. We would be in no better position.

[14] Second, the present focus of the case has changed from that considered by the High Court (now with emphasis placed on the cell-adjacent yard). Third, the respondents submit that the issue of the status of the Mandela Rules was not pressed by the applicant in the Court of Appeal. That may explain why, although there was reference to the Mandela Rules in the submissions of both parties in the Court of Appeal, those Rules were not discussed by the Court of Appeal. However this omission has arisen, the result is that we would be considering the matter without the benefit of the views of that Court on this aspect.

[15] Nor in all the circumstances do we see the assessment of the Court of Appeal on s 23(5) as giving rise to the appearance of a miscarriage of justice.[14]

[16] We also note that there are other avenues for complaint about the provision of exercise facilities in the situation in which Mr Gorgus found himself. These include investigation by the Office of the Inspectorate,[15] inquiry by a Visiting Justice,[16] and a

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13 See *Stevens v Chief Executive of the Department of Corrections* [2024] NZSC 127.

14 Senior Courts Act, s 74(2)(b).

15 Corrections Act, s 29. There is also provision for a prisoner (while in prison) to make an internal prisoner complaint: Ara Poutama Aotearoa | Department of Corrections "Prisoner complaints" <www.corrections.govt.nz>.

16 Corrections Act, s 19.

complaint to the Ombudsman.[17] We appreciate that Mr Gorgus has, as his counsel said in the Court of Appeal, attempted to utilise these avenues.[18] Material that was before the Court of Appeal suggests the Inspectorate did not investigate the complaint because there was still an internal complaint that was live. The High Court made a declaration that related, in part, to the omission to provide a revocation request from Mr Gorgus to the Visiting Justice in a timely manner so, although that avenue was actively pursued by Mr Gorgus, we understand that it did not lead anywhere.[19] We have no information about the engagement Mr Gorgus had with the Ombudsman.[20]

[17] Given the circumstances, it appears to us that investigation through the above avenues is more suited to the type of investigation required in this case. The investigation of prisoners' rights to exercise at Auckland Prison was undertaken by an Ombudsman in 2016[21] and, despite the lapse of time, may still provide a suitable avenue for Mr Gorgus should he wish to pursue that option.[22]

Result

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

[19] In the circumstances, there is no order as to costs.

Solicitors:
Meredith Connell, Wellington for Respondents

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17 Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata *Making complaints about prisons and Community Corrections* (2024).

18 It does not appear, on the admittedly limited information we have, that there was any particular focus on issues relating to the cell-adjacent yard.

19 See above at n 2. We understand that Mr Gorgus eventually met with a Visiting Justice but we have little information about what occurred.

20 Generally, the Ombudsman is unlikely to investigate a complaint unless the complainant has first tried the internal complaints process and engaged with the Inspectorate: Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata, above n 17.

21 Ron Paterson *Investigation into prisoner's right to exercise at Auckland Prison* (Office of the Ombudsman, May 2016).

22 An Ombudsman may refuse to investigate a complaint if it relates to an act that the complainant has known about for more than 12 months: Ombudsmen Act 1975, s 17(1)(b).