IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2020-409-574
[2020] NZHC 3109

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review of decisions made by Immigration New Zealand
BETWEEN	ARGOS FROYANES LIMITED Applicant
AND	CHIEF EXECUTIVE OF IMMIGRATION NEW ZEALAND Respondent

Hearing: 20 November 2020

Appearances: S W B Foote QC and B M Russell for Applicant
S P Jerebine and H T N Fong for Respondent

Judgment: 24 November 2020

JUDGMENT OF OSBORNE J
[Reasons]

This judgment was delivered by me on 24 November 2020
at 4.00 pm pursuant to Rule 11.5
of the High Court Rules

Registrar/Deputy Registrar

Date:

[1] The plaintiff, Argos Froyanes Ltd (AFL), operates two vessels which are docked at the Port of Lyttelton. The vessels are used for toothfish fishing. The Antarctic season is to commence on 1 December 2020.

[2] AFL had sought from INZ an invitation for identified overseas workers to apply for critical purpose visas for the balance of personnel to crew the two vessels. The workers would have landed at Christchurch Airport and been transferred (pursuant to permission granted by the health authorities) directly to the Port, in order to enable the two vessels to then depart. Following consideration and reconsideration (13 October 2020, 3 November 2020 and 17 November 2020), INZ declined to invite the workers to apply for visas.

[3] In this proceeding AFL seeks judicial review of INZ's decisions by which INZ declined to issue an invitation to identified overseas workers to apply for critical purpose visas. AFL by its statement of claim seeks declarations as to AFL's entitlement to have visas issued. At the same time as filing its substantive proceeding, AFL filed an interlocutory application asking that the relief be ordered now on an interlocutory basis.

[4] On 20 November 2020, I urgently heard the interlocutory application and dismissed it.[1]

[5] These are my reasons for that decision.

Does s 186 Immigration Act 2009 bar AFL's review proceeding?

[6] The visas which AFL was pursuing for its workers, namely critical purpose visas, are, in terms of the Immigration Act 2009 (the Act), temporary entry class visas. The respondent, the Chief Executive of INZ, invokes s 186(3)(a) of the Act as a bar to AFL's bringing this review proceeding.

[7] Section 186 provides:

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1 *Argos Froyanes Ltd v Chief Executive of Immigration NZ* [2020] NZHC 3089.

> **186 Limited right of review in respect of temporary entry class visa decisions**
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> (1) No appeal lies against a decision of the Minister or an immigration officer on any matter in relation to a temporary entry class visa, whether to any court, the Tribunal, the Minister, or otherwise.
>
> (2) Subsection (1) applies except to the extent that section 185 provides a right of reconsideration for an onshore holder of a temporary visa in the circumstances set out in that section.
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> (3) A person may bring review proceedings in a court in respect of a decision in relation to a temporary entry class visa except if the decision is in relation to the—
>
> (a) refusal or failure to grant a temporary entry class visa to a person outside New Zealand:
>
> (b) cancellation of a temporary entry class visa before the holder of the visa arrives in New Zealand.

Chief Executive's position

[8] For the Chief Executive, Ms Jerebine referred to a line of authority relating specifically to s 186(3) of the Act. She referred to three decisions of this Court in particular, being *Liu v Minister of Immigration, Kaur v Ministry of Business, Innovation and Employment* (*Kaur* (2016)) and *AD v Chief Executive of the Ministry of Business, Innovation and Employment*.[2]

[9] In *Liu*, Fogarty J had been minded to consider granting relief by way of judicial review on the grounds of *Associated Provincial Picture Houses v Wednesbury Corporation* irrationality.[3] Having received submissions in relation to s 186(3)(a) of the Act, his Honour concluded that the plaintiffs in that case were precluded from bringing review proceedings because they were persons from outside New Zealand. His Honour explained:

> [6] I examined s 186(3)(a) as a privative clause to see whether or not there was any ambiguity that could be read to the advantage of the plaintiffs. I decided that there was not. I also thought that, in terms of the general common law hostility to statutory clauses limiting judicial review, it is a relevant factor here that the common law recognises the Crown's prerogative to control its

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2 *Liu v Minister of Immigration* [2015] NZHC 2048; *Kaur v Ministry of Business, Innovation and Employment* [2016] NZHC 2595 [*Kaur* (2016)]; and *AD v Chief Executive of the Ministry of Business, Innovation and Employment* [2020] NZHC 1010.

3 At [4], citing *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA).

> borders. In the end, I am satisfied that s 186 does not have to be read restrictively or liberally, but can be read simply, and that it directly applies.

[10] In *Kaur* (2016), Hinton J took the same view of s 186(3) (and the related section 187(8), which applies in relation to residence class visas). Her Honour recorded:

> [38] While on the face of it, ss 186(3) and 187(8) are the end of the matter, nothing is ever quite what it seems. There is a general presumption that Parliament does not intend to exclude judicial review for error of law. In this case, there is an error of law, in terms of the failure to give reasons in respect of the temporary entry class visa refusal.
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> [39] Despite the presumption, Parliament may exclude review for error of law, with sufficiently clear legislative wording. Legislative purpose and context are relevant and, in particular, where Parliament has provided for statutory appeal rights, courts are more likely to apply a privative clause on its terms.
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> [40] Turning to consider these points, in this case, the wording of the clauses is clear. There is no ambiguity that may be read to Ms Kaur's advantage. On the face of it, ss 186(3) and 187(8) exclude judicial review for persons outside New Zealand. There is nothing in these provisions, or the legislation, that suggests they need to be read restrictively or liberally, rather than simply applied.
>
> [41] Second, ss 186(3) and 187(8) relate to the Crown's prerogative to control its borders, which is fundamentally a matter for the executive. As such, the provisions ought not to be read down by the courts, but instead applied on their terms. …
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> (footnotes omitted)

[11] In *AD*, the applicant was an Australian citizen who had been refused a temporary entry class visa. Clark J dismissed AD's application for further time to commence the proceeding. Her Honour went on to consider the alternative issue as to whether AD was in any event barred from bringing review proceedings by reason of s 186(3) of the Act. Clark J summarised in five points the submissions made on behalf of the applicant in support of the proposition that s 186(3) did not bar AD from bringing the proceeding. The five points are recorded as:[4]

> (a) INZ made an error of law in suspending his visa waiver status and requiring him "as a citizen of the commonwealth of Australia" to make an application for a visa. The correct statutory procedure in relation to Australian citizens about whom there are character concerns, is to seek a special direction under s 17 of the Act.

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4 At [47].

(b) The arbitrary use of the power under s 69(2)(d) is inconsistent with the principles of fairness and natural justice.

(c) Citing *Bulk Gas Users Group v Attorney-General*, where it was alleged that a decision-maker made an error of law, there is a presumption against a privative clause being interpreted to exclude the supervisory jurisdiction of the Court.[5]

(d) The absence of statutory appeal rights as an alternative remedy fails to displace the presumption against the exclusion of appeal rights in this instance.

(e) The circumstances of AD's case can be distinguished from the cases relied upon by the respondent in asserting s 186(3)(a) applies to bar him from bringing review proceedings.

[12] Her Honour then turned to discuss the reach of s 186(3), concluding that the law as stated in both *Liu* and *Kaur* (2016) applied to *AD*. The relevant portion of the judgment reads:

> *Discussion*
>
> [49] In previous cases where the respondent has relied on s 186 as precluding a person from applying for judicial review, the courts have described the provision as lacking ambiguity, and that s 186 does not "need to be read restrictively or liberally but can be simply applied".[6]
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> [50] The concern with legislation that restricts the availability of judicial review is that it can interfere with the supervisory role of the courts to hold public officers to account in the discharge of their powers. Senior courts have been reluctant to read legislation in a way that diminishes their "constitutional responsibility for upholding values which constitute the rule of law".[7] Therefore, privative clauses will be carefully scrutinised. As the exclusion of judicial review will be a product of the particular statutory setting the privative clause is to be construed in its statutory context.
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> [51] Section 186 appears in pt 7 of the Act dealing with appeals, reviews, and other proceedings. The purpose of pt 7 (amongst other purposes) is "to provide comprehensively for the system of appeal and review in respect of decision-making under [the] Act".[8] The Act provides for limited rights of reconsideration concerning temporary entry class visas if the holder is onshore.[9] Section 186 itself provides limited rights of review in respect of temporary entry class visa decisions.
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> [52] While no appeal lies against a decision on any matter relating to a temporary entry class visa, there remains a right of reconsideration "for an

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5 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).
6 *Liu*, above n 2, at [6]; and *Kaur* (2016), above n 2, at [40].
7 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [3]–[4].
8 Immigration Act 2009, s 184.
9 Section 185(1).

> onshore holder of a temporary visa in the circumstances set out in [s 185]".[10] As well, a person may bring review proceedings in respect of a decision in relation to a temporary entry class visa except if the person is "outside New Zealand".
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> [53] Thus, the legislative policy evident in s 186(3) is not at odds with the right of New Zealand citizens to invoke the supervisory jurisdiction of the High Court. As Fogarty J observed when examining s 186(3) in *Liu v Minister of Immigration*, "it is a relevant factor here that the common law recognises the Crown's prerogative to control its borders".[11]

AFL's position

[13] For AFL, Mr Foote QC submitted that the line of authority relied upon by the Chief Executive should not be followed. He submitted that the decisions of INZ in the present case fall to be categorised as "capricious and arbitrary" such as to meet the requirements of unreasonableness or irrationality under administrative law. He submitted that where a decision-maker has acted unreasonably in that sense, then the Court should properly treat the situation as one in which no decision has been made.

[14] For this approach, Mr Foote referred to the 2012 decision of this Court in *Kaur v Ministry of Business, Innovation and Employment* (*Kaur* (2012)).[12] In *Kaur* (2012), the impugned decision had been made under the advance passenger processing provisions in pt 4 of the Act, ss 96–97 (and following).

[15] The plaintiffs filed proceedings for judicial review and sought, by way of interim relief, declarations as to their entitlement to travel to New Zealand.

[16] The Ministry invoked the privative or ouster clause in s 97(4) of the Act.[13]

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10 Section 186(2).

11 *Liu*, above n 2, at [6]; *Kaur* (2016), above 2, at [41] per Hinton J; *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 at [116]–[117] and authorities cited therein; and *Chief Executive of Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 495 at [5].

12 *Kaur v Ministry of Business, Innovation and Employment* [2012] NZHC 3563 [*Kaur* (2012)].

13 Section 97(4) provides:

> (4) A person in relation to whom a decision is made under subsection (1) —
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> (a) may not appeal the decision to any court, the Tribunal, the Minister, or otherwise:
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> (b) may bring review proceedings in relation to the decision only on the grounds that he or she is a person in relation to whom that decision should not have been made because he or she is a person to whom subsection (3)(b) applies.

[17] Duffy J was ultimately not satisfied that it was appropriate to grant interim relief that would require the plaintiffs to be permitted to travel to New Zealand.[14] But her Honour first considered a submission for the Ministry that the plaintiffs were precluded from bringing review proceedings in relation to the s 97 decisions. Her Honour expressed the conclusion that the ouster clause (s 97(4)) "is not as final as the defendant contends", basing this conclusion upon the Court's reluctance to accept the ouster of its supervisory jurisdiction and upon the concept that decisions that are irrational in the administrative law sense cannot properly be understood to be "decisions" caught by ouster provisions such as s 97.[15] Duffy J's discussion of the issue reflects an adoption of nullity-based reasoning, sometimes described as a theory of absolute invalidity, flowing from the House of Lord's 1969 decision in *Anisminic v Foreign Compensation Commission*.[16] Her Honour's full discussion reads:

> [71] The defendant argues that the ouster clause in s 97(4) precludes the Court from judicially reviewing the current s 97 decisions. On first reading, that appears so. However, it is well established that Courts with a supervisory jurisdiction will not lightly accept the ouster of their jurisdiction. The general approach is that a Court will be slow to conclude that its jurisdiction has been excluded: see *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA). Where there has been fraud, corruption, bad faith or misconduct in the exercise of a statutory power, the Court is likely to view what has occurred as being ultra vires conduct that falls outside the scope of the statutory power to which the ouster clause applies. This is because as was recognised in *Bulk Gas* at 135, what has occurred is not a true exercise of the statutory power but is instead an act that lacks jurisdiction in the sense recognised in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. The same reasoning may be applied to decisions that are flawed for other administrative law reasons. For example, a decision to refuse to allow someone to board an aircraft bound for New Zealand that is shown to be capricious and arbitrary will meet the requirements of administrative law unreasonableness/ irrationality. A decision that is irrational in this way cannot in law be understood to be a decision that is made under s 97 and, therefore, it will be capable of review by this Court. This is not to say that the impugned decisions in this case were made in circumstances involving corruption, bad faith, fraud, misconduct, or irrationality. But it goes to show that the ouster clause is not as final as the defendant contends.

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14 At [72].
15 At [71].
16 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

Discussion

[18] I find the scope of the privative clause contained in s 186(3) of the Act to have been coherently settled by this Court's decisions in *Liu*, *Kaur* (2016) and *AD*.[17]

[19] In relation to *Kaur* (2012), I note first that the observations as to the reach of the s 97(4) ouster clause are obiter and less than definitive.

[20] Also, I do not find *Kaur* (2012), dealing as it does with the ouster clause in s 97(4) of the Act, to be of assistance in relation to the application of s 186(3) of the Act. If the twin limbs on which the Court's restricted view in 2012 of s 97(4) were valid at that time (and I refrain from expressing any view on that) — restrictive interpretation of privative clauses and irrational decisions not being "decisions" — I am not persuaded that those two limbs are any longer so.

[21] In its recent judgment in *Ortmann v United States of America*, the Supreme Court discussed much-quoted observations of Lord Pearce made in *Anisminic*.[18] The Court observed: "The passage in *Anisminic* quoted above rests on a theory of absolute invalidity. That approach has been eschewed in New Zealand."[19]

[22] The Court then observed in a footnote to that passage:[20]

> The exceptions have been some High Court cases relating to the interpretation of ouster clauses: see *Kaur v Ministry of Business, Innovation and Employment* [2012] NZHC 3563 at [71]; and *Malhi v Auckland Co-Operative Taxi Society Ltd* [2014] NZHC 2814, [2015] 2 NZLR 552 at [36]–[39]. The present case does not concern an ouster clause and we make no comment on the appropriateness of the approach taken in those cases in the ouster clause context. See also Josh Pemberton "The Judicial Approach to Privative Provisions in New Zealand" [2015] NZ L Rev 617.

[23] The Supreme Court's reference to *Anisminic* was made in relation to an ouster clause and with a focus on the nullity-based reasoning and theory of absolute invalidity for which *Anisminic* has been the most cited source of support. The Supreme Court's acknowledgement that the *Anisminic* approach has been eschewed in New Zealand

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17 *Liu,* above n 2; *Kaur* (2016), above 2; and *AD*, above n 2.
18 *Ortmann v United States of America* [2020] NZSC 120.
19 At [535].
20 At n 609.

tacitly recognises the contrary lines of New Zealand authority — such as *Liu*, *Kaur* (2016) and *AD* — as now exist.[21] Similarly, the Court's invitation to the reader to consider Josh Pemberton's article on privative provisions suggests at the least that it contains an informed assessment. What that article recognises (in parallel with the Supreme Court's own "eschewed" reference) is that the New Zealand courts can be seen as having moved away from reliance on the concept of jurisdiction and nullity-based reasoning.

Conclusion

[24] The "decision" referred to in s 186(3) of the Act encompasses (as established in *Liu*, *Kaur* (2016) and *AD*) a decision which is legally or procedurally flawed even to the extent that (under the *Anisminic* approach) it may once have been termed a "nullity". That includes where the decision might be found to have been made capriciously or irrationally in the administrative law sense.

[25] Accordingly, AFL's proceeding is barred by s 186(3) of the Act.

[26] As the substantive proceeding itself is barred, so too is any interlocutory application based upon it.

The substance of AFL's complaints

[27] By reason of s 186(3) of the Act, it becomes unnecessary that I make a determination as to whether AFL has established to any particular standard any grounds of invalidity.

[28] Having heard detailed submissions, I will limit myself to the following observations.

[29] What AFL sought through this interlocutory application was, albeit necessarily addressed in terms of declaratory relief, relief in the nature of a requirement that visas be issued. While Mr Foote addressed the Court in terms of the conventional approach

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[21] The Court found at [535] that the reference to "determination" includes a determination which is legally or procedurally flawed.

to interlocutory relief — a reasonably arguable case — I doubt that such would have been the appropriate standard to apply where what is sought is in substance in the nature of mandatory relief. Mr Foote acknowledged the threshold requirement under s 15 Judicial Review Procedure Act 2016 whereby interim orders must be necessary to "preserve the position of the applicant". By reference to *Greer v Department of Corrections*, Mr Foote nevertheless submitted that the Court must avoid an overly formalistic approach to the threshold question, recognising that in appropriate cases interim relief may encompass orders placing an applicant in the position it would have been but for the alleged illegality.[22] Generally, however, the cases referred to truly involved a preservation of something which had previously been enjoyed or available. In *Greer*, the applicant's access to computers which he had previously had was restored for the interim. In *Whiskey Jacks Rotorua Ltd v Minister of Internal Affairs*, the relief enabled the applicant to continue to operate gaming machines at a venue pending determination of the substantive proceeding.[23]

[30] The present case is substantially different. It does not involve the preservation (or restoration for the interim) of something previously enjoyed. It involves the one-off grant of fresh visas which would be utilised before any substantive hearing, the substantive proceeding itself thereby being rendered otiose.

[31] The other decision significantly relied upon by Mr Foote, *Christiansen v Director-General of Health*, might be viewed as representing a high watermark in relation to interim relief in an administrative law context.[24] Walker J considered it appropriate in the most unusual circumstances of that case to view it as falling within the category identified by Francis Cooke J in *Greer*, namely relief which places the applicant in the position they would have been in but for the alleged illegality.[25] Her Honour concluded that the fact that interim relief would effectively or practically determine the proceeding did not present "an insurmountable hurdle".[26]

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22 *Greer v Department of Corrections* [2018] NZHC 1240, [2018] 3 NZLR 571 at [21]–[22].
23 *Whiskey Jacks Rotorua Ltd v Minister of Internal Affairs* HC Wellington CIV-2003-485-1901, 11 September 2003.
24 *Christiansen v Director-General of Health* [2020] NZHC 887, [2020] 2 NZLR 556.
25 At [58].
26 At [62].

[32] On the other hand, as noted by Ms Jerebine in her submissions, there was a concession on the part of the relevant Ministry in *Christiansen* that one of the grounds of review was made out.[27] Walker J found, in addition to that concession, that there was a strong case that at least one other ground of review was also made out.[28]

[33] Here, had I been required to determine the interim application on the basis that s 186(3) of the Act did not preclude review, I would not have found AFL's case to be so clearly strong as the applicant's case was found to be in *Christiansen*. Given the finding I have already reached, I refrain from the detailed consideration of this case which may now be for a substantive hearing. I also observe that this is a case where the application for interim relief was heard within 24 hours of the proceeding being filed and upon the basis of the brief affidavit able to be filed within that period for the Chief Executive by one of the three decision-makers. The fully-informed assessment of the strength of the applicant's case is likely to be possible only at the point both parties have had an opportunity to file comprehensive evidence.

Osborne J

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27 At [11].
28 At [49]–[51].