IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-112
[2020] NZHC 3111

UNDER	the Judicial Review Procedure Act 2016 and New Zealand Bill of Rights Act 1990
IN THE MATTER	of an application for judicial review
BETWEEN	WILLIAM DWANE BELL Applicant
AND	CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIONS Respondent

Teleconference: 20 November 2020

Appearances: Applicant in person assisted by T Cheng as McKenzie friend
H M Carrad and C P C Wrightson for the respondent
H M Z Lanham, counsel assisting the Court

Date of judgment: 24 November 2020

JUDGMENT OF PALMER J

This judgment was delivered by me on Tuesday 24 November 2020 at 3.30 pm.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Counsel/Solicitors/Party:
Applicant in person
T Cheng
Crown Law, Wellington
H M Z Lanham, Barrister, Auckland

Summary

[1] Mr William Bell applies for judicial review of Department of Corrections' decisions regarding his security classification in 2019. Corrections proposes that Mr Bell appear at the hearing by audio-visual link (AVL). Mr Bell asks to appear in person. He also wishes to have a fellow prisoner, Mr Thomas Cheng from another prison, to support him as his McKenzie friend in court. I direct that Mr Bell appear in person. I do not allow Mr Cheng to accompany him but I direct that Mr Bell may have two more telephone conversations with him in preparation for the hearing.

The proceedings

[2] Mr William Bell is serving a long sentence of imprisonment. In 2019 and 2020, Corrections changed his security classification several times. Mr Bell applies for judicial review to challenge some of those decisions. Corrections opposes the application.

[3] Mr Bell applied for Mr Cheng, another prisoner at the same prison, to be appointed as his McKenzie friend to support him during the proceeding. He said, by way of affidavit, that he has difficulty understanding the intricacies of court proceedings, which causes him frustration and distress.[1] He wanted Mr Cheng to be his McKenzie friend, as someone to whom he can relate and communicate well and who also has a better command of English. In May 2020, Corrections agreed that Mr Cheng be allowed to assist Mr Bell during the case management of the proceeding, as did I because I considered that would facilitate the efficient progress of the proceeding.[2]

[4] Mr Cheng was later transferred to a different prison. In August 2020, Mr Bell said he tried to get legal representation but Mr Cheng was the only person who would help him and is the one person Mr Bell could trust.[3] Corrections did not oppose Mr Cheng providing assistance to Mr Bell by telephone or by way of written assistance, subject to operational security requirements, but submitted Mr Bell should

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1 Affidavit of William Bell, 19 March 2020, at [2].
2 Minute No 2, 27 May 2020, at [3].
3 Minute No 3, 3 August 2020, at [5].

have legal representation or, alternatively, the Court should appoint a counsel to assist the Court.[4]

[5] In a Minute of 3 August 2020, I said:[5]

> [7] I consider it is likely to be helpful to the Court for Mr Cheng to continue to provide assistance to Mr Bell by telephone or by way of written assistance, subject to operational security requirements. But Mr Cheng is not Mr Bell's legal representative and may not advocate for him in Court.
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> [8] Given the implications of the issues raised by the judicial review, I consider it is desirable to appoint a counsel to assist the Court by providing an independent view of the legal and evidential issues that arise. The role of the counsel will be to assist the Court, not to be Mr Bell's counsel. But I would expect counsel assisting to meet with Mr Bell and Mr Cheng, as well as counsel for the Crown, in doing so.

[6] The judicial review has been set down for hearing on Wednesday, 2 December 2020, in the Auckland High Court for up to two days. At a case management teleconference on 20 November 2020, I heard submissions on two substantive issues:

(a) Corrections requests that Mr Bell appear at the hearing by AVL. Mr Bell wishes to appear in person.

(b) Corrections questions whether Mr Cheng needs to attend the hearing. Mr Bell wishes him to attend.

Relevant law

Remote and in-person appearances

[7] The Courts (Remote Participation) Act 2010 (the Act) provides the criteria against which judges and Registrars assess and decide the use of AVL by participants in a proceeding. Section 5 provides that the general criteria for "whether or not" to allow the use of AVL are:

(a) the nature of the proceeding:

(b) the availability and quality of the technology that is to be used:

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4 At [6].
5 At [7].

(c) the potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding, including—

(i) the ability to assess the credibility of witnesses and the reliability of evidence presented to the court; and

(ii) the level of contact with other participants:

(d) any other relevant matters.

[8] Section 6 mandates additional criteria be considered in a criminal proceeding. Section 7 provides:

7 Use of audio-visual links in civil proceedings

(1) AVL may be used in a civil proceeding for the appearance of a participant in the proceeding if a judicial officer or Registrar determines to allow its use for the appearance of that participant.

(2) A judicial officer or Registrar may make a determination under subsection (1)—

(a) on his or her own motion; or

(b) on the application of any participant in the proceeding.

(3) A determination under subsection (1) must—

(a) be made in accordance with the criteria in section 5; and

(b) take into account whether or not the parties consent to the use of AVL for the appearance of the participant.

[9] In the early days of AVL, in *Taylor v Manager of Auckland Prison*, Duffy J reviewed the provisions of the Act in considering an application by Corrections for a prisoner litigant in person, Mr Arthur Taylor, to attend his civil hearing by AVL.[6] Duffy J held that, in some circumstances, the use of AVL could enhance access to justice.[7] But she had "reservations about whether a party or counsel who is compelled to participate in a court hearing by AVL can nonetheless be said to have received an adequate opportunity to be heard, to have had access to the court in a real sense and to have been treated on like terms as the opposing party".[8] She read s 7 of the Act "to go no further" than to allow any participant who wants to appear by AVL to apply to the

6 *Taylor v Manager of Auckland Prison* [2012] NZHC 1241.
7 At [51].
8 At [52].

court for that outcome.[9] She considered, in the context of a public law claim alleging conduct of the defendant was ultra vires, the Court should ensure the party bringing the claim has the fullest opportunity to be heard and to have access to the Court.[10] She considered in that case, even though there would be no oral evidence, she could not be satisfied Mr Taylor would have that opportunity; requiring him to appear by AVL would place him at a significant disadvantage.[11]

[10] In 2017, Wylie J followed Duffy J's reasoning in *Smith v Attorney-General* in a two-day judicial review involving oral evidence.[12] Simon France J did not follow the same approach in *Harriman v Attorney-General* where consent by a prisoner to appear by AVL was withdrawn shortly beforehand and the prisoner argued the Court had no jurisdiction to direct appearance by AVL.[13] Simon France J made his decision without access to *Taylor v Manager of Auckland Prison*.

[11] In 2017, in *Taylor v Attorney-General*, Mr Arthur Taylor and Mr Phillip Smith were representing themselves in a three-day hearing, and each had previously escaped from custody.[14] Fitzgerald J accepted that their transportation to and accommodation at the hearing involved security risks.[15] But, given that the case was set down for three days and would involve examination and cross-examination, she considered it was in the interests of justice that the plaintiffs were able to present their case in person.[16]

McKenzie friends

[12] A court may allow a "McKenzie friend" to sit in court as a support person for a party to legal proceedings; to take notes and make quiet suggestions but, only in rare circumstances, with leave, to address the Court.[17]

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9 At [63].
10 At [67].
11 At [67], [65].
12 *Smith v Attorney-General* HC Auckland CIV-2016-404-1599, 28 February 2017 (Minute) quoted in *Taylor v Attorney-General* [2017] NZHC 223 at [18].
13 *Harriman v Attorney-General* [2015] NZHC 3197.
14 *Taylor v Attorney-General*, above n 12.
15 At [26].
16 At [29].
17 *Craig v Slater (McKenzie friend)* [2017] NZHC 874, [2017] NZAR 649 at [5]. The label derives from *McKenzie v McKenzie* [1970] 3 WLR 472 (CA)

1 Should Mr Bell appear in person or remotely?

Submissions on mode of appearance

[13] Ms Carrad, for Corrections, submits there will be no live witnesses or cross-examination, Mr Bell has filed his written submissions and Ms Lanham, as counsel assisting, will ensure arguments that support Mr Bell's position are fairly put. She submits Corrections has had an active alert for Mr Bell's risk of escape since 2007 and there is evidence before the Court about that risk. She submits the cases relied upon by Mr Bell can be distinguished from the situation here and the case is likely to last for one or one-and-a-half days. She submits it is not necessary for Mr Bell to appear at the hearing in person.

[14] Mr Bell submits that natural justice requires that he appears on equal terms with the respondent. He submits it would be unfair and contrary to the interests of justice to compel him to appear by AVL. He submits Corrections' alert rests only on his escape from a boys' home in 1994. He has not escaped since, having been in prison for almost two decades. He submits there have only been allegations about his risk of escape, which have never been proven even though he has been punished for them. He refers to cases in which prisoners have been allowed to appear despite Corrections' concerns about the risk of escape.[18] Mr Cheng notes that those accused of serious crimes appear in the High Court, which should be a secure place, and it is much better to attend a hearing in person.

[15] Ms Lanham notes that she had a recent experience of hearing in which a prisoner appeared by AVL and was able to make submissions effectively.

Decision on mode of appearance

[16] In 2020, after the COVID-19 lockdowns, we are all more used to attending events electronically. Attending a one-hour AVL meeting can be an attractive alternative to travel by plane (or through Auckland traffic). But that does not mean AVL is necessarily suitable for events with something significant at stake or for long

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[18] *Taylor v Attorney-General*, above n 12, *Smith v Attorney-General* [2017] NZHC 463, [2017] 2 NZLR 704.

events. Fatigue can set in after a few hours. It can be more difficult to focus or to hear what is said than when attending in person. And technical difficulties can occur, even with court AVL arrangements.

[17] I agree with Duffy J that the Act allows a participant who wants to appear by AVL to apply to the Court for that outcome. The Act does not contain any particular presumption as to mode of appearance. Judges will be guided by fairness and the interests of justice given the circumstances of the particular case and the relevant considerations, including those identified in the Act.

[18] So, where there is a short judicial hearing about an issue that is not particularly significant such as an interlocutory issue, it may well be appropriate to allow appearance by AVL or by telephone. All of the case management conferences in this proceeding have been conducted by teleconference and that has not caused particular difficulties or been objected to. But there may be a greater risk that conducting a hearing by AVL is, or is perceived to be, unfair where:

(a) a significant substantive interest of a litigant is at stake;

(b) there is oral evidence to be led or cross-examination to be undertaken; and/or

(c) the hearing is longer than one day.

[19] Corrections' concerns about the risk of escape are relevant. But Corrections and court security staff deal with the transfer of prisoners between custodial facilities and the Auckland High Court every day. I can understand why they raise the issue. But the evidence they point to regarding the risk of escape is not particularly recent and is not compelling. I have confidence in their ability to prevent Mr Bell escaping during his transfer from a custodial facility to Court and back.

[20] I accept the issues at stake for Mr Bell are significant. He challenges decisions by those who are holding him in custody that affect important conditions of his custody. There is to be no oral evidence. But the hearing is set down to last for up to

two days. I consider that requiring Mr Bell to attend his own legal proceedings by AVL, when the judge and counsel are there in person, would put him at an unjustified disadvantage. It is in the interests of justice that he attends in person if he wishes to do so. I order accordingly, unless COVID-19 alert levels change and the hearing is conducted by AVL for all parties.

2 Should Mr Cheng attend the hearing?

Submissions on Mr Cheng's role

[21] Mr Bell says that Corrections has put on hold his telephone calls with Mr Cheng. He pleads for his calls with Mr Cheng to resume. He says the mail system put in place instead has limitations in enabling him to reply to Mr Cheng which hampers his ability to prepare for the hearing. Mr Cheng proposes that they be allowed two more phone calls between now and the hearing, to help Mr Bell prepare for the hearing; rather than using mail which has a tendency to go astray or be delayed. Mr Cheng says that would be particularly important if I decide Mr Cheng is not to attend the hearing.

[22] Ms Carrad, for Corrections, explains that Corrections considers there is no reason to treat Mr Bell and Mr Cheng differently from other prisoners bringing litigation and it decided telephone calls between Mr Bell and Mr Cheng are no longer permitted. Ms Carrad says that their communication will need to be in writing. She says the two prisons agreed, in the "unique circumstances of this case" to prioritise three pieces of mail between Mr Bell and Mr Cheng to facilitate Mr Bell filing his evidence in reply, written submissions and any memorandum.[19] Ms Carrad submits that, if Mr Bell or Mr Cheng wish to pursue the issue of phone calls, they should raise it with the prison manager at each prison, in accordance with the regulations. Ms Carrad queries whether Mr Cheng's presence at the hearing in any form is necessary or in the interests of justice when he is not able to advocate at the hearing, Mr Bell has already had Mr Cheng's assistance, and it is difficult to see what need there is for him to attend.

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[19] Counsel for the Respondent's Memorandum Updating the Court, 30 October 2020, at [5].

[23] Ms Lanham submits that Mr Cheng's proposal for two phone calls is reasonable. She advises that Mr Bell has expressed to her his stress and anxiety about appearing in a courtroom environment.

Decision on Mr Cheng's role

[24] I do not consider I should order that Mr Cheng attend Mr Bell's court hearing. I have appointed a counsel to assist the Court by providing an independent view of the legal and evidential issues. I have already said that Mr Cheng is not Mr Bell's legal representative and may not advocate for him in Court. If Mr Cheng were freely able to attend court, I would have no problem in him acting as Mr Bell's McKenzie friend. But, as a serving prisoner, he is not. And I do not consider there is good reason for me to order that Corrections go to the effort of transporting Mr Cheng to the Court, as well as Mr Bell, for the purpose of supporting Mr Bell.

[25] However, Mr Cheng has been providing support to Mr Bell, with Corrections' consent, until recently. I have not seen any evidence that identifies an operational security risk in them having further phone conversations about the proceedings. I consider it is reasonable for Mr Bell to have two more phone conversations with Mr Cheng in preparation for the judicial review proceeding, as requested. As Ms Lanham says, the prospect of appearing in court is stressful enough for many lawyers, let alone a lay litigant who is challenging decisions of those who are holding him in custody.

Result

[26] Under ss 65(3) and 65(2)(b) of the Corrections Act 2004, I direct the Manager of the prison at which Mr Bell is in custody to arrange for his attendance in the Auckland High Court for the hearing on 2 and 3 December 2020, unless COVID-19 alert levels change and the hearing is conducted by AVL for all parties. I do not order that Mr Cheng also appear at the hearing. But I direct that Mr Bell may have two more phone conversations with Mr Cheng, in preparation for the hearing.

Palmer J