THE HIGH COURT OF NEW ZEALAND
TE KŌTI MATUA O AOTEAROA

19 August 2020

MEDIA RELEASE – EMBARGOED UNTIL 4.00 PM TODAY

ANDREW BORROWDALE V DIRECTOR-GENERAL OF HEALTH AND ATTORNEY-GENERAL

[2020] NZHC 2090

PRESS SUMMARY

This summary is provided to assist in the understanding of the court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and the reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz**.**

Summary

A Full Bench (three Judges) of the High Court has made a declaration that, for the 9 day period between 26 March and 3 April 2020, the Government's requirement that New Zealanders stay at home and in their bubbles was justified, but unlawful. All other challenges to the Lockdown and the Government's early COVID-19 response have failed.

Mr Borrowdale's challenge

Mr Borrowdale's challenge to the legality of the early lockdown took the form of judicial review proceedings brought against the Director-General of Health and the Attorney-General. He sought declarations of illegality in relation to three matters relating to the Government's initial COVID-19 response. The first focused on the public announcements made by the Prime Minister and other officials during the first 9 days of the lockdown. The second challenge related to three orders made under the Health Act 1956 by the Director-General on 26 March (Order 1), 3 April (Order 2), and 27 April (Order 3). And the third challenge related to the definition of "essential services" contained in Order 1.

Because the issues raised by the challenges were of general public importance and concerned the operation of the rule of law and the administration of justice, the New Zealand Law Society was granted leave to intervene in the proceedings.

The public announcements

Order 1 was made at the beginning of the Level 4 Lockdown. It forbade congregating (except when social distancing was observed) and required the closure of non-essential businesses. But it did not require people to stay home and in their "bubble". Those obligations were, instead, conveyed to the public through various public announcements made by the Prime Minister and other officials from 23 March onwards. Mr Borrowdale contended that these further restrictions were not "prescribed by law" and so unlawfully limited certain of New Zealanders' rights and freedoms under the New Zealand Bill of Rights Act (NZBORA), including the rights to freedom of movement, assembly and association. He also contended that the announcements unlawfully suspended the law in breach of the Bill of Rights 1688 (BOR 1688).

The Court concluded that, reasonably interpreted, the statements conveyed that New Zealanders were required—backed by the threat of enforcement—to stay at home and in their "bubbles" when that was not, in fact, the legal position. So until Order 2 came into effect (on 3 April) those restrictions were not prescribed by law and, accordingly, an unlawful limit on the relevant NZBORA rights and freedoms. But the Court rejected the contention that the requirements involved a "suspension" of laws contrary to s 1 BOR 1688 or that the statements were of the kind found to be unlawful in *Fitzgerald v Muldoon*. Although rights were limited by the requirements, the statements did not purport to "suspend" or stop the operation of any law. And by contrast with *Fitzgerald*, the Executive did in fact have the power to impose the restrictions, it merely omitted to exercise that power, until 3 April. After Order 2 came into effect on that day, the omission was corrected.

In deciding to make a formal declaration of illegality, the Court took into account the wider public health emergency context and the fact that the power to impose the restrictions existed. It concluded that although the state of emergency went some way to explain what had happened, it also made the Court's oversight role particularly important. The precise terms of the declaration made are set out at the end of this Media Release. As well as declaring that the requirement to stay at home was not, for those first nine days, prescribed by law and so in breach of the NZBORA it also declares that the requirement was, otherwise, a necessary, reasonable, and proportionate response to the COVID-19 crisis at the time.

There was no specific evidence before the Court as to the potential impact of a finding of illegality on charges laid against individuals in the first nine days of Lockdown. The general evidence suggested, however, that there would be few, if any, prosecutions affected.

The legality of Orders 1—3

Orders 1—3 were made by the Director-General of Health under s 70(1) of the Health Act 1956. As noted, Order 1, made under s 70(1)(m), forbade congregations (except those with social distancing) and required the closure of non-essential businesses. Order 2, made under s 70(1)(f), required all persons to be isolated or quarantined by remaining at home, with limited exceptions.

And Order 3, made under both s 70(1)(f) and (m), replaced Orders 1and 2, and imposed largely the same restrictions but with further clarifications and exceptions.

Mr Borrowdale challenged the legality of Orders 1–3 on the grounds that they went beyond the "special" authorising powers in s 70 and that they, too, unlawfully limited NZBORA rights.

Central to his challenge was the proper interpretation of s 70 itself. The Court began by considering context: the timeline of COVID-19's spread, New Zealand's international obligations to protect public health, and the nature and history of the s 70 emergency powers. The Court concluded that all those matters reinforced the need for a purposive and liberal interpretative approach and the principle that the section is to be read as applying to circumstances as they arise. The Court also confirmed that the s 70 powers clearly contemplate the restriction of fundamental rights in a public health emergency and rejected Mr Borrowdale's contention that their scope should be limited by reference to the NZBORA. Rather, the NZBORA is relevant to the exercise of the powers in the particular case and here, Mr Borrowdale had properly conceded that the limits on rights imposed by the three orders were justified in the circumstances.

The Court rejected Mr Borrowdale's specific challenges to the Orders. It held that the Director-General was able to exercise the s 70 powers, including the power to require isolation and quarantine, on a nationwide basis. He was also able to negatively define the premises to be closed, and to add a permissible exception to the ban on "congregation" in the form of social distancing. Orders 1–3 were therefore lawful, and authorised by either s 70(1)(f) or (m).

Essential Services

Finally, Mr Borrowdale challenged the Director-General's definition of "essential services" in Order 1 as being an unlawful delegation of his s 70 powers. That delegation was alleged to have occurred because—Mr Borrowdale said—Order 1 left the definition of "essential services" to the Ministry of Business, Innovation and Employment (MBIE), to be updated from time to time on the COVID-19 government website.

The Court reviewed the wording of Order 1 and the evidence about how MBIE determined what was and was not an essential service. The Court held that in Order 1 the Director-General broadly, but lawfully, defined essential services as: "businesses that are essential to the provision of the necessities of life and those businesses that support them". That definition was at all times clear and fixed. The Court concluded that the function of MBIE and the website list was interpretive and advisory only. Only the Director-General could change the definition; MBIE's job was to apply it. There was therefore no delegation and no breach of the rule of law.

Result

The Court made a declaration in the following terms:

> By various public and widely publicised announcements made between 26 March and 3 April 2020 in response to the COVID-19 public health crisis, members of the executive branch of the New Zealand Government stated or implied that, for that nine-day period, subject to limited exceptions, all New Zealanders were required by law to stay at home and in their "bubbles" when

> there was no such requirement. Those announcements had the effect of limiting certain rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990 including, in particular, the rights to freedom of movement, peaceful assembly and association. While there is no question that the requirement was a necessary, reasonable and proportionate response to the COVID-19 crisis at that time, the requirement was not prescribed by law and was therefore contrary to s 5 of the New Zealand Bill of Rights Act.

After Order 2 came into effect on 3 April 2020, the problem was corrected; the declaration has no bearing on subsequent or current restrictions.

The remainder of the challenges failed and the relevant claims were dismissed.

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