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IN THE SUPREME COURT OF NEW ZEALAND SC 70/2022

I TE KŌTI MANA NUI O AOTEAROA [2023] NZSC Trans 2

BETWEEN **A**

Applicant

AND **MINISTER OF INTERNAL AFFAIRS**

Respondent

Hearing:	16 March 2023
Court:	Glazebrook J Williams J Kós J
Counsel:	W L Aldred for the Applicant A L Martin and K Laurenson for the Respondent B J R Keith as Special Advocate

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CIVIL ORAL LEAVE HEARING

MS ALDRED:

E nga Kaiwhakawā, tēnā koutou. Ko Ms Aldred ahau. I appear for the applicant for leave.

GLAZEBROOK J:

Thank you.

MR KEITH:

E nga Kaiwhakawā. Keith tōku ingoa. I appear as special advocate.

GLAZEBROOK J:

Tēnā koutou.

MR MARTIN:

E nga Kaiwhakawā, tēnā koutou. Ko Martin ahau, kei kōnei māua Mr Laurenson, mō te kaiwhakahē.

GLAZEBROOK J:

Tēnā korua. So you will have had our minute, and you will understand from the minute that we consider that there are important points of law and therefore that the case has general and public importance. These are points that haven't been looked at before, so what we've asked is that the Crown start with telling us why leave shouldn't be granted. Also another point, that given the point the Crown didn't file submissions for the closed hearing, and just proposed to take us through the facts, as I understand it, which means that, well which have not particularly related to the issue of whether there's a general or public important point of law, do we actually need the closed hearing this afternoon, and that's a question not a conclusion. So perhaps if you, Mr Martin, can start your submissions and you can consider whether – perhaps discuss it and consider whether we do need the closed hearing.

MR MARTIN:

Thank you Ma'am. I'd like to do that, consider the point and come back to it. As your Honour has just noted the Court has indicated a preliminary view and invited me to address it on good reasons why leave should not be granted. I propose to do the law, or to focus more on the law and open, and there's the question of the facts, and closed, subject to what your Honour has just raised. Apart from anything else it reduces the risk of me –

GLAZEBROOK J:

Well perhaps if you, and I think it's a very good idea. Also it stops us inadvertently saying anything that might not able to be said in open court. But perhaps if you can just explain why you say the facts are important in respect of, without going into what the facts are, but why you say they're important in respect of the leave question, which I assume you were going to do?

MR MARTIN:

Yes, and I can do that without going into the detail and I'll come to three points around why leave should not be granted, the first of which is really that this case turns on facts relating to this applicant's particular circumstances and I'll develop that a bit more. But you're quite right when you say your Honour that not going to the facts in open does reduce the risk of me accidentally disclosing something in answering a question and so on. But it also allows I think the focus on what the Court has asked me and I'll approach it in two parts if I may; why leave should be granted which it will be submitted really turns on three things, that the case turns on the facts specific to Ms A's circumstances and I'll develop these points if I may. That the facts and the law have both been thoroughly gone into in the Courts below and that –

GLAZEBROOK J:

They've what been sorry?

MR MARTIN:

The facts and the law have both been gone into thoroughly in the courts below and that the international context has changed. So broadly those were the three

points in the first part which is why leave should not be granted and then I was going to, time permitting, develop three other points in relation to why it is submitted the arguments advanced on behalf of Ms A do not reach threshold for leave. Really I was going to touch on the duty of candour argument that has been raised, this question of what an intention to facilitate a terrorist act might mean and, in particular, that it's not limited to criminal offending and then the failure to address exceptions, specifically address exceptions for dissent, advocacy, armed conflict and BORA rights.

KÓS J:

Doesn't that last point just suggest leave should be granted? Isn't the question of whether facilitation of a terrorist act does or does not relate to a criminal act, the very sort of question this Court should give it's view on? Mr Martin, I cannot see how any of the three arguments you've run so far have the remotest prospect of persuading this Court that leave should not be granted.

MR MARTIN:

So the first arguments around leave in terms of the personal circumstances and so?

GLAZEBROOK J:

Well no any of them.

KÓS J:

Yes, all of those three arguments. I mean every case that comes to us is one where there are specific facts but nonetheless the legal questions here are so important that one would think leave might be granted. Every case that comes to us has been thoroughly examined by the Courts below. That's not a reason not to grant leave and you just raised a very important legal question in relation to a criminal act which suggests that leave again ought to be granted.

WILLIAMS J:

Certainly the argument that the law has been thoroughly addressed in the Courts below is never going to work in this Court, Mr Martin.

GLAZEBROOK J:

It might do on the facts which I think is what you were primarily using that argument for because it might be if we had concurrent findings of fact and the case turns on or the appeal point turns on facts, then that might be a reason that we would say well no you don't need a third go at the facts.

MR MARTIN:

I think that's it in essence and it is complicated by the fact that the facts need to be talked about separately which –

GLAZEBROOK J:

Can I tell you the only thing that would likely convince me is to say that these facts are so peculiar and so related to this particular circumstances that, and there is nothing, it would be a hopeless appeal in respect of that, and I'm not making any comment on whether that's the case or not, but I'm telling you what the argument I think might run, and that therefore it wasn't a good case because of that to look at the points of law that clearly arise but I think you've got a bit of an uphill battle if that's what the argument is personally and it wasn't the argument that you are putting to us on your three propositions. So that was an argument that if I had been making an argument that's the argument I would make but it wasn't the argument that you are making.

MR MARTIN:

So out of the matters I've scoped I think I can take you to what has changed in terms of the context around this case –

GLAZEBROOK J:

But again, as I understand it, it's just that you're saying that this particular circumstances are not going to arise again but that's not really the point is it?
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MR MARTIN:

The particular – yes, so let me develop it. I won't go into –

GLAZEBROOK J:

We'll let you go now.

MR MARTIN:

I won't go into her personal circumstances because I'm apprehending –

GLAZEBROOK J:

No, no, I think you're on the international context changes now.

MR MARTIN:

I am and that does link to the definition of intention to facilitate a terrorist act, and I won't labour this point but I'll come to that, and so that is around the international context. So in this case the essential context giving rise to the danger that is in issue no longer exists. This is the ISIS caliphate.

KÓS J:

But the public issue this Court will be seized of is not concerned only with ISIL.

MR MARTIN:

And I do acknowledge and accept that the statutory definition is not limited in that way. I accept that.

KÓS J:

Of course.

MR MARTIN:

There is context around its enactment but in this case the intention to facilitate a terrorist act is focused on particular facts that were very unique in an international context, which I'm calling the ISIS caliphate in Syria and Iraq at that time, submitted that's an historically unusual set of circumstances. I won't labour this at all but occupied a vast amount of territory, a population of about six million people at that time and extreme crimes and human rights violations.

WILLIAMS J:

That's rare?

MR MARTIN:

Well yes it is for the purposes of this provision –

GLAZEBROOK J:

Have you read about Afghanistan recently?

MR MARTIN:

It is for the purposes of this provision because, and I'm about to start coming into why we may or may not want the closed hearing, there's a limit to how far I can start developing –

WILLIAMS J:

I understand that.

MR MARTIN:

– the particular analysis here in relation to this person and this travel but it is not as simple as saying that –

GLAZEBROOK J:

Well maybe we can leave that particular bit. It sounds as though you are saying we do need a closed hearing and I would be happy to hear from you in a closed hearing in respect of the argument that I suggested could possibly be made, that this isn't an appropriate case to look at the more general points of law that we see arising out of this, which I think is what this seems to be arguing, or at least moving towards arguing but, as you say, it's not one that you can develop in an open hearing.

MR MARTIN:

If I collect my thoughts and am careful because what I don’t want to do is put you to the trouble of reconvening in order for me to say not a great deal more.

GLAZEBROOK J:

It's absolutely no trouble to reconvene if you feel that there are things that you need to discuss about the facts that relate to whether leave should be granted.

MR MARTIN:

Thank you, your Honour, I appreciate that indication and we can reflect further. Just to develop the point just a little bit and carefully, it is the situation on the ground in Syria and Iraq at this point in time, including the existence of a terrorist organisation in control of a specific bounded area, albeit in a situation where there is much instability, the particular international awareness of the atrocities that were occurring, and then the individual circumstances around intention to travel to that place. So those things in combination, it is submitted, are unusual and, just to come back to Justice Williams' point, I mean even in the context of the troubling world we live in, the chapter of events here was particularly troubling, and so I'm not suggesting that there are not outrages in all kinds of parts of the world but here you have that in the context of a terrorist organisation controlling a population in what is sometimes called a proto-state.

KÓS J:

So this case concerns A who is enamoured of the caliphate. A future case might involve B who has been recruited by the Wagner group, which occupies part of the Ukrainian national territory. This doesn't –

GLAZEBROOK J:

Or indeed the Taliban and control of Afghanistan.

KÓS J:

Yes, so that's case C. Your circumstances don't sound desperately unique to me. Not such that would exclude the need for this Court to reconsider the legal conclusions reached in the courts below.

MR MARTIN:

And it's that that I'm really testing. I wont develop it much further because then we are disappearing into areas where I go at my peril in terms of open court. But what I am sort of testing is I guess the preliminary view your Honours have expressed to see whether it really is worth convening, and we might take some time to reflect on that. So there is that point, it links to her individual circumstances, and there may not be a lot more that I should say, or can

usefully say in open at this point on that. I think the point is understood. Can I, at the risk of trying the Court's patience, I understand –

GLAZEBROOK J:

We're infinitely patient, we mightn't sound it but…

MR MARTIN:

I understood, I do take the point that Justice Kós made about by the time a case gets to here, it's been gone over by courts below. In this case Justice Dobson in the High Court was involved over four years, nine interlocutory rulings I think, and they're in the footnote 4 to the Court of Appeal's judgment. So you had by the time he delivered his judgments, his open and closed ones, a judge with a high level of familiarity with the facts and the issues, you've had the extensive and expert assistance of my friend the special advocate, and, as you may hear more about, you've got the scrutiny of the evidence on effectively a correctness or a merits basis by both courts below. It has submitted adopting a cautious and questioning approach, and so they've quite intentionally scrutinised the material before the Court to a degree that's exceptional for judicial review. Now I don't say that's wrong, I say in this situation that's cautious. So I leave that point there, but it has had a great deal of scrutiny for –

KÓS J:

Is this an argument that everything Mr Keith has said is so patently nonsensical that there is nothing for us to consider? Because if it's not, I'm not sure what your point is.

MR MARTIN:

Well I don't put it as high as that, your Honour, but I do say that there is, while there is much that can be considered and argued about, at the end of the day the courts below have considered that carefully and robustly, and it is submitted, reached points that are correct in law.

WILLIAMS J:

The Court of Appeal undertakes merits review in most of its appeals. Not judicial review of course, but in most of its appeals it's a substantive review. That doesn't stop us granting leave in appropriate cases.

MR MARTIN:

And here this matter commenced as an administrative appeal.

WILLIAMS J:

I understand that, but that's a procedural point.

MR MARTIN:

No, I understand, I'm not taking the point. My point, though, is that on the courts below point of view she was entitled to bring an appeal. For reasons that are not entirely clear she switched to a judicial review. They applied judicial review but looked in a way that, is essentially the same as an appeal. I'm not standing here to complain about that.

WILLIAMS J:

No, but my point is that the merits review isn't a good reason for this Court not to have a look at it, given that we have a look at merits reviews relatively regularly in our work, albeit as a final appellate court.

MR MARTIN:

And ultimately there's a limit to how far I can develop the submission beyond the point, it still needs to be a matter of general and public importance and if the questions you are seeing are such that you consider that's the case, then that is obviously what you will do, you'll grant leave. It is the submission for the Crown that following the process that has been gone through the findings on both fact, but on law as well, the application of the law, are such that the result of any appeal should be that it is dismissed.

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KÓS J:

That's then an argument that the case is factually and legally hopeless and I think that's a tricky one to make. I mean the reality, my observation after six years as President of the Court of Appeal, is the more thorough we were in the Court of Appeal the more likely it was leave would be granted and the reason for that is the obvious one, that the big and important cases gain the greatest attention by each Court at each level. And this might just be one of those.

GLAZEBROOK J:

And it might be that it's a good argument to say that it's been gone into in such detail in both Courts with concurrent findings that we would be unlikely to overturn it on the facts. That might say it's unlikely to be a miscarriage of justice would be the argument, but you're still stuck with whether it's a case of general or public importance because of these matters never having come before this Court in terms of the law, which is a major restriction in terms of the right to travel. So it's not something that one would say is not of importance in terms of its more general context as well as the importance to the person.

MR MARTIN:

I take the point you're making. It's still in the scope of things compared to other powers that are exercised not something that is exercised often and, as I touched on, there was particular context here. But I take your Honour's points that a context in which the power was used could arise in a different way. So I'm conscious there are the legal points that we could start to get into but that is essentially starting the substantive argument in a way that's unhelpful I suspect.

GLAZEBROOK J:

Well did you want to mention anything about the duty of candour because that is also a point of law that interests me in terms of it being a matter that I think leave might well be justified on. So there's two things really. It's the definition of facilitation, probably the links with the various human rights involved in the Bill of Rights, and the duty of candour. I suppose there are those exceptions but I'm not sure they're even pressed that hard at the moment by the – I'm not sure in terms of the applicant herself but…

MR MARTIN:

Perhaps not by the applicant herself, but without cutting across him, my friend may say the point that's being raised there is the one that your Honour has left open in *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138 and a matter for this Court whether this will be the case in which you would wish to return to that.

GLAZEBROOK J:

Absolutely.

MR MARTIN:

I won't go further on that but coming back to your Honour's question, sorry I mean the submission for the Crown will be that the duty of candour doesn't add anything to the contextual approach to judicial review that you see here, and I suppose as I frame it the approach that's been taken here was that the facts need to, and do here, support a decision that is reasonably open to the decision-maker on the basis of sufficient evidence including a report that is fair, accurate and adequate, this is the *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 test of course, in this context. So the report has to be those things in this context and taking into account the Minister's expertise where appropriate. So the Minister needed to be appraised of obviously material matters before he made his decision. So, in short, the key point it is submitted, is that a review is informed by questions of context and materiality and therefore the duty of candour, if you like, is in that mix already and we, at that point, move into what is essentially a granular factual analysis.

GLAZEBROOK J:

So report fair, accurate and, sorry, I –

MR MARTIN:

Sorry, your Honour, fair, accurate and adequate so that's the *Air Nelson* test which my friend, the special advocate, has I think sort of invited this Court to have a look at as being a Court of Appeal authority that this Court could consider. However, it's submitted for the respondent that it covers the ground,

it's difficult to see what a different test would look like that would be radically different. But my point for these purposes is that judicial review really has at its centre context and materiality and whether you start to take this heightened sort of scrutiny or duty of candour type arguments. The point is the Courts here have looked at the context and have made their own assessment about materiality and so the approach isn't wrong because of the words that are used, if I can put it that way.

I realise there is, I mean just an example perhaps to respond to Justice Kós, it's an example where there is much that could be said in many authorities so there is certainly much argument that could be had but that, in essence, is what the Crown's position would be. I think we've covered off attempting to facilitate it to the extent that we can and I take your Honour's indication around the exceptions. Those were the three –

GLAZEBROOK J:

Well I mean I just don't know how much they are pressed at the moment, that's all.

MR MARTIN:

Understood and the answer to at least some parts of that in relation to religious observance and so forth, the Crown says there's not evidence in relation to that from Ms A but I don't think I need to develop that further here. Those would be the three points I was going to touch on briefly in the time available from a legal perspective.

I would, if I may, like to give more consideration to this question of whether for your Honours it is going to be a useful exercise to convene. One reason it might be is if you simply do want to have an understanding of the factual context at this point, and that's why I adopted the – well it's two reasons I adopted the point, the suggestion of simply in a neutral way taking you through it. One, to do as much in open as possible at this stage but then, secondly, I suppose to help you orient yourself, allowing for the fact that this is an unusual situation. I mean, obviously, you'd usually read material yourselves but here you have limits of time perhaps to do that and I could help with that. That said, in the sort

of 45 minutes I'm certainly not going to be taking you through all of the material. It would be pretty much telling you this is what's in here, this is where you'll find it.

KÓS J:

We've each of us spent more time than we'd ever want to in something called a SCIF so I think we're reasonably conversant with the facts.

GLAZEBROOK J:

The use to me would be the argument that I was asking you whether you wanted to make, that these facts are so unusual, and the proposed appeal so hopeless, that it's just not the right case to look at these important points of law, and I think it probably would be worth giving you that opportunity to do that but just to go through the facts it would not be…

KÓS J:

If that is Mr Martin's argument.

GLAZEBROOK J:

No, no, if you want to make that argument, yes.

KÓS J:

But if you don't then not.

GLAZEBROOK J:

Because we don't really need to be taken through that and if the application for leave to appeal is going to be granted then it's wasted having us up to speed because by the time the appeal is heard we are likely to have forgotten and there will be two more judges on the Bench who would need to go through that process again.

WILLIAMS J:

That's the point I was going to raise. Having all of us spend quite a bit of time in the SCIF having gone through the reports and your closed submissions in

the Court of Appeal, we're pretty aware of what you pointed to in support of your arguments and those points were all well made but you can hear from us that we're not convinced that they're enough to stop us, and so I wonder whether, wouldn't it be better if we did a closed hearing with five judges in a full appeal and heard you fully? It would be a much more efficient use of resources, don't you think, giving what you're hearing our perspective is on arguments we know you're going to put because we've read you putting them.

MR MARTIN:

And I'm inclined to that view. I'm conscious of what Justice Glazebrook said that we could have it –

GLAZEBROOK J:

No, if you want to make that argument we're happy to hear.

MR MARTIN:

Understood.

GLAZEBROOK J:

If you don't want to make that argument then there's no point in hearing.

MR MARTIN:

And I'm inclined to adopt what Justice Williams has said is that we could have it with the bench of three and at some length potentially but I'm not sure it will at this point get me across the line in which case I'm, given the indication you've given me which I appreciate, thank you, that you've already oriented yourselves in the way that I had in mind.

WILLIAMS J:

You wanted to do?

MR MARTIN:

Exactly.

WILLIAMS J:

And normally in a leave application we wouldn't be so oriented.

MR MARTIN:

Understand.

WILLIAMS J:

So I can understand why you'd make that submission, but if you conceded leave then we can get on with the job.

1030

GLAZEBROOK J:

You don’t have to concede leave.

WILLIAMS J:

Well it was a question albeit a rhetorical one.

GLAZEBROOK J:

We’re not going to require you to do that.

MR MARTIN:

I've indicated what my thinking is. What I might do is confer but –

WILLIAMS J:

Shall we stand down for it and give you an opportunity?

MR MARTIN:

There’s two questions there, isn't there? From the Crown’s point of view there's a question of whether there is any benefit now in advancing the argument into a closed format, then there's the question of whether leave would be conceded and I have to say, with respect, Sir, that wouldn't be the Crown’s position.

WILLIAMS J:

Okay.

KÓS J:

I'd be very reluctant to put you to that.

GLAZEBROOK J:

Yes.

KÓS J:

I'm sure we all would be but I think the first question is certainly a live one.

MR MARTIN:

Understood, Sir. No, thank you. If it's helpful, it may not take very long, I'll just briefly confer and we may be able to resolve things that way.

GLAZEBROOK J:

Well I think there's –

WILLIAMS J:

We'll just take a few minutes out and give them a chance to talk?

GLAZEBROOK J:

Yes, I mean at this stage I think, depending on the answer, it may be that we don't need to call on you, but we'll wait and find out. So we'll just adjourn and you'll let us know through the registrar when you're ready.

MR MARTIN:

Thank you, your Honours.

COURT ADJOURNS: 10.31 AM

COURT RESUMES: 10.45 AM

GLAZEBROOK J:

(missing audio) … and an indication as well that we therefore will be granting leave and so we don't need to hear from the applicant or the special advocate. So we'll formalise that grant of leave this afternoon.

MR MARTIN:

Thank you Ma'am, thank you your Honours.

GLAZEBROOK J:

Thank you. We'll now adjourn.

COURT ADJOURNS: 10.45 AM