IN THE SUPREME COURT OF NEW ZEALAND SC CIV 5/2004

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **BENJAMIN EUGENE MANUEL**

Appellant

AND **THE SUPERINTENDENT, HAWKES BAY REGIONAL PRISON**

Respondent

Hearing 3 August 2004

Coram Gault J
Blanchard J

Counsel T Ellis and G Edgeler for Appellant
S P France for Respondent

APPLICATION FOR LEAVE TO APPEAL

10.01 am

Ellis Your Honours, I think when I was reviewing what I could say in the limited time available, I recalled the Law Society Seminar document under the name of Justice Blanchard some years ago which said something to the effect of 90 percent of the persuasion is in the writing.

Blanchard J No, no the percentages were vastly different from that.

Ellis J But the impression that one certainly got was that if you hadn't persuaded Your Honours on the written material, you weren't going to necessarily –

Blanchard J No, I actually said by morning tea.

Ellis By morning tea, oh well, I'll take that as an extension of time. So anyway, I have assumed that you have read my submissions and that I needn't address them in any detail and that I'm really just going to respond with some comments on my learned friend's response.

Gault J Can I perhaps give you some help Mr Ellis. I think we can take it as accepted by the Crown that there may well be a matter of sufficient importance and difficulty to warrant appeal at some stage on the issue of the relationship between habeas corpus under the Act and judicial review. So you can take that as a given. The issue would seem to be here whether, even if you are wholly successful in persuading us that judicial review issues are appropriately dealt with wholly on an application for habeas corpus, whether this applicant really has anything that justifies appeal.

Ellis Yes, well I think I'm on hopefully the same wavelength as what Your Honour indicated there. So I was going to address essentially my friend's submissions paragraph 20, 21 and 22 and 11 and my paragraph 25 and paragraph (f) of the –

Blanchard J Well the Court issued a minute in the hope that you might address the issues there. Plus any other issues which we might have overlooked but we've had no advice in advance of the hearing of a point being overlooked.

Ellis No.

Blanchard J So I assume that we've captured the issues there.

Ellis Well, we certainly discussed that between ourselves and said, well we may not have formulated it like that but we had no adverse comment to make so it didn't require a response because you said if there was any point that had been overlooked to notify you and we didn't feel there was so we didn't come back to you. So really, well I was only going to take my 15 minutes approximately and I hope I am addressing both what Justice Gault has just said and the issues as set out in the Minute or some or them because I haven't got time to do them all. Let me simply say this. In paragraph 21 my learned friend says it's clear that the Habeas Corpus Act presents some difficulties. The procedure it introduces is simply incompatible with the possible breadth of the Act. The reality of a different domestic legal canvas where ready alternatives exist and where the role of habeas corpus is accordingly diminished. So it's my proposition that in this case the diminishing of the right of habeas corpus is of such sufficient importance that Your Honours should consider it and Parliament didn't enact the Habeas Corpus Act in 2000 for the Court of Appeal to diminish it. And that is a matter that has been addressed by final courts of appeal around the world. And in simple terms, why this

applicant should be entitled to his habeas corpus and for you to hear it appears to be something that the respondents have missed and I'm not quite sure whether Your Honours have quite got the grasp of it either. You may have but your Minute may disguise it. So very simply, one says at paragraph 8, page 8 sorry, of our submissions in paragraph (f)(i) the Parole Board never met either physically or by phone to lawfully adjourn the 29 February 1996 scheduled hearing and the hearing was without jurisdiction. It didn't meet. In the argument in the Court of Appeal was formulated in the process really of (f)(iii) but this is a new nuance on that, the Board never met. It didn't adjourn. It's very simple. You only need, well you hardly need three days' notice to raise such a simple point. Either it did meet or it didn't meet and Mr Manuel was locked up eight years ago without jurisdiction. It couldn't be any simpler.

Blanchard J When was this point first taken?

Ellis The 25th of June when I filed this. The point in the sense, the issue of whether the Parole Board could lawfully meet because of consent –

Blanchard J This is a new point?

Ellis Well, it's not a new point. It's a new formulation on an old point.

Gault J What was the old point?

Ellis The old point was that the Parole Board was meeting, in the terms of (f)(iii) there, that it was meeting without the consent to adjourn to a final date.

Blanchard J It's a totally different point from that Mr Ellis.

Ellis No, the issue is, was it lawfully convened under s.107(l).

Blanchard J How do we know it never met?

Ellis Well, we've had no documentation presented to that effect.

Blanchard J Well, they wouldn't, would they, if this point's never been taken before.

Ellis Well, there's been no response to it.

Gault J This is extraordinary, this attempt to raise a point after eight years for the first time and then saying, oh but there's no justification. That seems to me an attempt to take advantage of lapse of time.

Ellis No, it's an attempt to obtain justice, Sir.

Gault J Oh well you can put it that way Mr Ellis.

Ellis Yes, well one can, I mean it's very simply answered isn't it, if there was a meeting of the Parole Board then that point disappears like the Titanic. But there's no, the point whether the Board was meeting lawfully on that date was a major proposition.

Gault J We understand the point.

Ellis Right. And it is not an opportunity to take advantage of time. The proposition in the Court of Appeal that, in the Judgment of the Court of Appeal, the indication that this was some form of ambush was simply not true. There wasn't three days' notice, there was at least ten and my learned friend knew about the challenge significantly before that and we exchanged at least 41 emails in the interim. The scope of the challenge was well known. And it seems somewhat strange that one can be snatched from the street on an ex parte basis without any notice at all but then it is said, oh dear, dear, we've only got three days' notice to respond if somebody wants to be released. Is that justice?

Blanchard J That's a debating point but it's not a good legal point.

Ellis Well, with respect Lord Bingham, in **Stafford** in the Court of Appeal when it was there, made the point that the process appeared to be contrary to the rule of law and he called upon the Secretary of State to reconsider and with respect Sir I think it is a good legal point. Nevertheless, that is the essential proposition that Mr Manuel is entitled to not a diminished form of habeas corpus but a full right of habeas corpus. There has been ample opportunity to respond. The submissions are there in detail and the attack is simply not restricted to domestic material. It's also directed to the international right of habeas corpus and if Your Honours were to refuse leave, then of course, as you're well aware, Mr Manuel might exercise his right even to seek interim relief from the United Nations Human Rights Committee because this is such an injustice that it requires that step being taken. But I'm sure that won't be necessary because this case has all the ingredients, given the **Stafford** challenge which my learned friend says this is where, in paragraph 16, the real focus was a challenge based on **Stafford** and that's what it was. It was only as the documents became apparent that the absence of an interim recall order was there. I had notified Mr France that it was a simple straightforward **Stafford** challenge to whether one could be recalled for an offence that wasn't causally linked. It turned into something else because of the documentation, not because of any attempt to ambush anybody. And that case, the **Stafford** case where the, in my learned friend's submissions in his final paragraph there, where the European Court reversed itself Grand Chamber, was an issue of some importance as was and as is, if I may say so, habeas corpus and if one reflects Your Honours on your previous incarnation, habeas corpus in New Zealand is something that rarely if ever the Court of Appeal has

granted. I think the last one was **Flickinger** some 10 years odd ago. The right of habeas corpus has been diminished such that in appellate Courts it's non-existent and it is well and truly time that the issue of habeas corpus was aired in the final appellate Court of the nation. And unless there are any questions, those are my submissions.

10.15 am

Gault J Thank you Mr Ellis.
Mr France, what do you say about this issue of jurisdiction, that the Board never met?

France I hadn't picked it up in my learned friend's submissions to be honest. And my response is that it cannot be open to raise it at this stage of the proceedings. Not only was it not raised in the High Court and, just checking the Judgment, the heading over that relevant part of the Judgment which is paragraph 46 of His Honour Justice Miller's Judgment, is "Final Recall Order Lack of Consent to Adjournment" which always has been the point, not that the Board never met. It wasn't taken before the Court of Appeal and going back in time it wasn't taken before the Parole Board when the applicant was legally represented. And my submission would be that it cannot, with respect, be open to raise a new point such as that at this stage of proceedings. And there is no evidence on it. It's just, it would need evidence presumably on the practice of the Board in relation to those. It is of course the finding of both lower Courts that there was no merit in the claim that the applicant's apparent consent conveyed in writing to an adjournment was invalid. So any consideration of how then the Board dealt with that adjournment would have to take that into account as well, and that's why there was no objection at the Parole Board hearing. He consented to the adjournment. Never complained about it at the time. Never complained about it in his affidavits filed in relation to these proceedings. And both lower Courts, in my submission correctly, have dismissed that and now the never met point is being raised seemingly in a context that there's some procedural flaw in how the Parole Board confirmed an adjournment that the applicant consented to. In my submission that clearly not only can't be raised, but can't be a point of any merit ultimately. Do Your Honours wish me –

Gault J Any other points you want to make?

France No, I'm actually content to rest on my written unless the Court has specific inquiries. I split the written into the general which was the scope of the Act and in effect accepted the Judgment of the Court of Appeal. The Crown would have preferred the brighter line that was referred to and rejected in paragraph 49 of the Judgment because there's obviously a practical convenience in being able to say in advance whether the case can be brought under the Habeas Corpus

Act or not, whatever the particular matter. But accepts that it will have to be a process of evolution.

Gault J — But from a practical point of view, why would not an applicant apply for both? If there's an anxiety about the lawfulness of an underlying decision, why would not an applicant normally apply for judicial review of the decision and habeas corpus to be activated on the decision being found to be unlawful?

France — I think the only concern over that practice is the effect of when Your Honour says to be activated upon the judicial review –

Gault J — Well you normally apply for relief in any proceeding in an hierarchical form so that one seeks further relief consequent upon the prior relief.

France — As long as the indication of the relief in the nature of a writ of habeas corpus isn't seen to dictate the procedure to be followed on the judicial review then I would accept that's entirely correct but the concern has always been –

Gault J — Is it not possible to adjourn an application for habeas corpus in order that the matter can be properly considered? Must it be decided on the third day?

France — It's not, my answer on that is that it's, and my learned friend could comment on that, my answer is that it's not clear, on the Statute it says it has to have a hearing. Practically that has happened is the answer in other proceedings I've done in the habeas corpus –

Blanchard J — The Statute really only mirrors in that respect the practice of the Courts previously of dropping everything to accord priority to habeas corpus applications. The Statute makes it look rather further but I'm not sure it actually is.

France — Yes.

Blanchard J — Because the Courts, the High Court anyway, did drop everything.

France — Indeed. I had no concern over the propositions Your Honours point takes as long as that procedure is available exactly for the reasons identified in both the underlying Judgments, that it's the idea, I suppose Sir, and Your Honours may recall **Bennett**, Counsel don't have to file judicial review and in **Bennett** my learned friend who was Counsel there refused to, Your Honour may recall, and the Court indicated that had judicial review been brought it would have been minded to give relief but it wasn't there. And as happens in any event, the Department act upon the Court's indication. But Your Honour's question also presupposes in a way that Counsel will do it that way. This one hasn't either.

Gault J I understand that. That's why I was bouncing it from you.

France Well, I think it works perfectly well. I mean the other way I've always, it's not my job to bring the proceedings, but the other way it's always seemed to me is one brings the judicial review, indicating it involves liberty etc, sees the outcome and then immediately, if not dealt with then, immediately files habeas corpus on the basis of the Judgment and says, given the findings on review which is really just another variant on what Your Honours raised, it's properly, I have no disagreement that it is a matter that properly might be considered at the end of a judicial review consideration if I can put it that way of the underlying decision. The impact of the decision on the judicial review may well be that given the particular circumstances of a case a writ is an appropriate remedy to seek. It's the procedural context including the appeal rights etc that have given rise to the concern.

Gault J Well, I can understand that. And the stronger the argument for the matter having to be actually resolved on the third day, the weaker the argument that it should extend to examination of underlying decisions.

France Yes, yes.

Blanchard J Speaking of decisions, has there been a result from the most recent application Mr Manuel has made to the Parole Board.

France It was adjourned Sir. I'm not, my learned friend may know whether there's another date but it was adjourned, the 19th, the date that I indicated. At the request I understand of the applicant but that's without any comment as to the reasons which may, undoubtedly did, make that an appropriate request. So it hasn't come up but it's in train and hopefully will do so.

Gault J Yes, thank you Mr France. Anything from that Mr Ellis?

Ellis Yes Sir, I found that a helpful exchange because it does get to some of the problems that are inherent in this judicial review-habeas corpus dilemma and in, I can best explain it in the **Miller** case which has just been recently before the Court of Appeal on a habeas. He filed for both a statutory appeal from a Parole Board decision which is, as you'd be aware, a wider legal remedy than a judicial review because you're not confined to merits, plus a habeas corpus three days before that was set down because the Courts take the view that once you've filed it it's got to be heard within three days. But in our instance case here, whilst it was filed, I didn't want it heard in three days and I didn't think it was fair on the Crown to have to respond so we had it adjourned until 10 days.

Blanchard J Well, why didn't you use judicial review then if you didn't want it heard in the three days?

Ellis Well, because the same reason that in **Miller**, whilst you won the appeal, you didn't get the man released because the remedy of judicial review or a statutory appeal is inadequate to obtain what you want. So it's the remedy one's after, the release. You might win a review but just get a new hearing. Well, that's not what one's after. One's after the liberty of the subject. And the Court of Appeal, when having won the appeal but lost the habeas corpus, appealed the habeas which I then wanted heard with his criminal appeal, the Tito one from ten years ago plus a judicial review of the Dr Chaplow, wanted it adjourned so they could all be heard together and the Court of Appeal said no, we can't do this, we must hear it. Well, I'd always understood you could have a judicial review under habeas corpus at once and if as a result of that it then took the judicial review slower but swift route, I'd have no problems with that at all but the Court insists, no, no, we've got to go the fast route on your habeas so it produces some very practical problems of trying to file them together and I had to abandon my appeal in the Court of Appeal to file another habeas on another day. And my learned friend mentioned **Bennett** and you will recall that yes I quite freely admit I wasn't prepared to file a judicial review in that case because of the timing involved and not being confident of getting an urgent hearing before the particular Judge that was involved in that case. And one was certainly trapped in that but as we've seen here with this habeas, when the Courts feel they can, one isn't rushed into making urgent decisions on habeas where there are major issues of constitutional importance and I think that is right because, I mean, you've certainly not heard this the next day after it was filed and nobody's asking you to. And the proposition that seems to have developed that habeas now is determined in undue haste if you're not ready, doesn't do justice to the writ. There's not every habeas that wants to be heard absolutely immediately when there's matters of constitutional importance at stake.

As for the matter of no material before the Board on the, before the Court on the absence of an adjournment point, habeas is not a matter that is governed by strict technicalities. This is the most important constitutional writ there is. And it would be an astonishing disgrace to justice and an astonishing disgrace if I may say so to the law, if one wasn't able to argue such an important point before the final appellate Court of the land and that one was forced to go offshore. So I seek leave to appeal.

Gault J Thank you Mr Ellis.

Ellis I'm sorry, I forgot about Justice Blanchard's question about had the Parole Board met.

Blanchard J I didn't want any detail. It was simply a matter of whether he was still inside or not.

Ellis Yes he is.

Blanchard J I'm not interested in why.

Ellis Well, I didn't know until I read Mr France's submissions that the Board was meeting as I hadn't received any papers so it was adjourned.

Gault J We'll retire and confer.

Court adjourns 10.30 am