IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA239/2020
[2020] NZCA 156

BETWEEN	ANDREW BORROWDALE Applicant
AND	DIRECTOR-GENERAL OF HEALTH Respondent

Court: Kós P

Counsel: Applicant in person
V E Casey QC and A M Powell for Respondent

Judgment: 8 May 2020 at 2.45 pm
(On the papers)

JUDGMENT OF KÓS P

The application for transfer of the proceeding to the Court of Appeal, under s 59 of the Senior Courts Act 2016, is declined.

REASONS

[1] Mr Borrowdale has issued a proceeding for judicial review against the Director-General of Health in the High Court at Wellington. He alleges three lockdown orders made by the Director-General are *ultra vires*. That is, he says they exceed the powers vested in medical officers of health to make quarantine, isolation, non-association and closure orders under s 70 of the Health Act 1956. He alleges the orders are unlawful, ineffective and should be quashed by the High Court.

[2] The three orders challenged (and the basis of challenge in each case) are as follows. First, there is the initial "Level 4" non-association and closure order of 25 March 2020, made purportedly pursuant to s 70(1)(m) of the Health Act. This required premises in all districts of New Zealand to be closed, other than certain essential businesses defined in an appendix. Mr Borrowdale alleges the order exceeded the power within s 70(1)(m)(i) of the Health Act enabling closure of "all premises within the district … of any stated kind or description" by failing to refer to premises of a stated kind or description, and in purporting to define premises negatively by reference to all premises (other than those essential). Mr Borrowdale makes a related argument in relation to the prohibition on congregation in outdoor places of amusement or recreation. He further alleges that the order's definition of "essential businesses" amounted to an unlawful delegation to unnamed officials to decide which premises should be closed, and that the definition of "congregate" purports to vary the primary legislation.

[3] Secondly, Mr Borrowdale challenges the further "Level 4" isolation and quarantine order of 3 April 2020, made purportedly pursuant to s 70(1)(f) of the Health Act. This required all persons in all districts of New Zealand to be isolated or quarantined by remaining at their current place of residence, other than for certain "essential personal movement". Mr Borrowdale alleges the order is ultra vires s 70(1)(f) because that provision does not empower orders of a general nature. Rather, he says it only empowers a medical officer of health to require particular individuals to be isolated, quarantined or disinfected. Mr Borrowdale further alleges that the Director-General exceeded his powers by purporting to act nationally in exercising the functions of medical officers of health in their health districts, without considering the needs of each health district separately.

[4] Thirdly, Mr Borrowdale challenges the "Level 3" order of 24 April 2020, made purportedly pursuant to s 70(1)(f) and (m) of the Health Act.[1] He says the third order is ultra vires for the same reasons as the second order.

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1 Health Act (COVID-19 Alert Level 3) Order 2020.

[5] It should be noted that the first and second orders were revoked by the third order and are no longer in force.[2] Any urgency therefore relates to the operative effect of the third ("Level 3") order only.

Application for transfer of proceedings to the Court of Appeal

[6] Yesterday Mr Borrowdale applied for removal of the proceeding from the High Court and its transfer to this Court, under s 59 of the Senior Courts Act 2016. That section provides:

> **59 Transfer of civil proceeding from High Court to Court of Appeal**
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> (1) A party to a civil proceeding in the High Court may apply for an order transferring the proceeding to the Court of Appeal.
>
> (2) In determining whether to make an order transferring the proceeding, the Court of Appeal must be satisfied that the circumstances of the proceeding are exceptional.
>
> (3) Without limiting subsection (2), the circumstances may be exceptional if—
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> (a) the party to the proceeding intends to submit that a relevant decision of the Court of Appeal should be overruled:
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> (b) the proceeding raises an issue of considerable public importance that—
>
> (i) needs to be determined urgently; and
>
> (ii) is unlikely to be determined urgently if the proceeding is heard and determined by both the High Court and the Court of Appeal:
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> (c) the proceeding does not raise a question of fact or a significant question of fact, but raises a question of law that is the subject of conflicting decisions of the Court of Appeal.
>
> (4) In deciding whether to make an order transferring the proceeding, the Court of Appeal must have regard to the following matters:
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> (a) the primary purpose of the Court of Appeal as an appellate court:
>
> (b) the desirability of obtaining a determination of the proceeding in the High Court and a review of that determination on appeal:

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2 Cl 13.

(c) whether a full court of the High Court could effectively determine the question in issue:

(d) whether the proceeding raises a question of fact or a significant question of fact:

(e) whether the parties have agreed to the transfer of the proceeding:

(f) any other matter to which regard should be had in the public interest.

(5) It is not a sufficient ground that the parties agree to the transfer.

(6) The Court of Appeal has the jurisdiction of the High Court to hear and determine a proceeding transferred under this section.

(7) The Court of Appeal may transfer back to the High Court a proceeding that has been transferred to the Court of Appeal.

[7] Mr Borrowdale relies on s 59(3)(b). He submits that this proceeding raises issues of considerable public importance. The orders affect the whole population in a variety of ways, "by confining virtually the whole of the population of New Zealand to their homes and requiring businesses to close". Mr Borrowdale submits the orders continue in force and are likely to be replaced by similar orders using the same powers under scrutiny in the proceeding. Potentially these the orders may be spent by the time his application has run its full course through both the High Court and Court of Appeal. He submits that he is unlikely to have resources sufficient to take a protracted proceeding through potentially three levels of court, with cumulative exposure to costs. He submits, "[t]here is a real possibility that, if the matter proceeds in the High Court without removal, it may not reach the Court of Appeal at all."

[8] For the Director-General, Ms Casey QC and Mr Powell oppose removal and transfer to this Court. They submit that it is of critical importance that the resolution of this proceeding be progressed in a manner that allows for a fully informed and considered determination of the issues before the Court. They submit that urgency should not displace the respondent's right to properly prepare his defence and to be heard fairly, nor the public interest in achieving an appropriate outcome, both in terms of the legality of the orders and the remedies sought by the applicant. They note that the proceeding is being case managed under urgency in the High Court. They submit that transferring the proceeding would deprive this Court of the benefit of a reasoned

judgment of the High Court, regarding both legality of the orders and any appropriate remedies.

Discussion

[9] Even if the circumstances attending a proceeding are exceptional, it does not of course follow that it should be removed from the High Court and transferred to the Court of Appeal. This Court must still be persuaded that that is, in all the circumstances, the better course to follow.

[10] I accept that Mr Borrowdale's proceeding raises issues of considerable public importance. I accept also that those issues need to be determined with urgency. I am not however persuaded that the proceeding is unlikely to be determined urgently if it is heard at first instance in the High Court. And nor am I persuaded that the better course is that the proceeding be heard at first instance in this Court.

[11] As this Court observed last week during the hearing of the habeas corpus applications in *A v Ardern,* questions raised concerning legality of the Director-General's various lockdown orders are complex.[3] They are not merely questions of statutory interpretation, or law, but mixed questions of law and fact. It may be assumed the Crown may need to call evidence of process, context and history. It is not inconceivable there will need to be cross-examination. These are forensic processes far more amenable to resolution in a trial court. It would not be right for this Court to make orders now which limit the parties' reasonable freedom of action in both proving and defending this proceeding. The burden of the mandatory considerations in s 59(4) lies firmly against removal and transfer.

[12] History is instructive. The constitutional proceeding most analogous to the present one is *Fitzgerald v Muldoon* in 1976.[4] It concerned the prime ministerial suspension of the New Zealand superannuation scheme. It was determined entirely in the High Court. The proceeding was filed on 22 March 1976. It was given a priority fixture on 19 May 1976. Trial began on 31 May 1976. Six witnesses were called and

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3 *A v Ardern* [2020] NZCA 144.

4 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC) . See "Constitutional Collision: Fitzgerald v Muldoon v Wild" (2014) 13 Otago L Rev 243.

cross-examined. Wild CJ delivered judgment, against the government, on 11 June 1976. There was no appeal. The government instead went to Parliament and obtained retrospective legislation. I accept the issues in the present proceeding reach further into the liberties and pockets of the New Zealand public than was the case in 1976. But that is an argument for according even greater urgency to the timetabling of trial, rather than trying the case instead in a court whose primary constitutional responsibility is the correction of error on appeal.

[13] I am not persuaded, in these circumstances, that the proceeding is unlikely to be determined urgently if heard first in the High Court. Mr Borrowdale's submission as to his finite resources at least anticipates there may need to be one appeal (presumably from this Court to the Supreme Court). Any appeal inevitably raises the prospect of protraction and added cost. But, as in *Fitzgerald v Muldoon*, what matters most is that a court of competent jurisdiction makes a fully considered decision on the evidence and the law. That decision will either invalidate or uphold the Director-General's orders. If the former, the government then has two choices: appeal or seek assistance from the House. If the latter, Mr Borrowdale also has two, but rather different, choices.

[14] The question this application begs is whether this Court should now limit the available judicial steps to two (Court of Appeal, and perhaps Supreme Court) rather than three (High Court, Court of Appeal and perhaps Supreme Court). And behind that lies another question, which is whether we should thereby deny parties' ordinary constitutional entitlement to a first appeal as of right (any appeal to the Supreme Court being by leave only). While leave might be anticipated, that is still a step this Court should be reluctant to take, especially where the issues are ones of such fundamental importance as these.

Result

[15] The application for transfer of the proceeding to the Court of Appeal, under s 59 of the Senior Courts Act 2016, is declined.

Solicitors:
Crown Law Office, Wellington for Respondent