IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-330
[2024] NZHC 196

UNDER	the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules
IN THE MATTER	of an application for judicial review of directions made by the Director-General of Health under section 116E(1) of the Health Act 1956
BETWEEN	NEW HEALTH NEW ZEALAND INCORPORATED Plaintiff
AND	DIRECTOR-GENERAL OF HEALTH First Defendant
	ATTORNEY-GENERAL Second Defendant

Hearing:	2 February 2024
Counsel:	C F J Reid and L M Hansen for Plaintiff A M Powell and K M Eckersley for First and Second Defendants
Judgment:	16 February 2024

JUDGMENT OF RADICH J
(Relief)

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[1] In my decision of 10 November 2023, I found that, when a discretionary decision has the potential to restrict a fundamental right in the New Zealand Bill of Rights Act 1990, the decision maker must, as a part of its decision-making process, address the restriction and consider whether it is demonstrably justified under s 5 of

the Act, quite apart from a substantive assessment by the Court of whether any restriction is so justified.[1]

[2] I found that, in giving directions to 14 local authorities under s 116E of the Health Act 1956 to add fluoride to their drinking water supplies, the Director-General of Health had failed to address the restriction that it entailed to the right in s 11 of the Bill of Rights Act to refuse medical treatment.[2]

[3] While the substantive proceeding alleges, among other causes of action, that the Director-General's decision is a breach of the Bill of Rights Act in a substantive sense, that issue is not before the Court at this stage. The parties had agreed that the issues addressed in the findings I have summarised in [1] and [2] would be isolated and determined as a separate question of law.

[4] The issue that now falls to be determined is whether, and if so what, relief should, in the Court's discretion, be given as a result of those findings.

[5] This decision should be read alongside my first decision. I will not recount the relevant facts and circumstances here.

The Court's discretion in giving relief

[6] Relief in judicial review, including a breach of the Bill of Rights of Act, is discretionary.[3] However, it will generally be considered appropriate to grant some form of relief where a reviewable error has been found.[4]

[7] In principle, the starting point is that, where a claimant demonstrates that a public decision maker has erred in the exercise of its power, the claimant is entitled to relief. There must be extremely strong reasons to decline to grant relief.[5] More

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1 *New Health New Zealand Incorporated v Director-General of Health* [2023] NZHC 3183.

2 At [92], [103] and [108]; the Supreme Court having found that fluoridation is a limit on the right to refuse medical treatment in *New Health v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [99]–[100] per O'Regan and Ellen France JJ, at [172] per Glazebrook J and at [243] per Elias CJ.

3 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [63] per Elias J.

4 *Ririnui v Landcorp Farming Limited* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112] per Elias CJ and Arnold J.

5 *Air Nelson v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60]–[61] per O'Regan J.

recently, the Court of Appeal has said that, in expressing itself in that way, the Court seemed to have had in mind situations where it could be shown that there was substantial prejudice to a claimant and that it may be that a more nuanced approach is necessary in the generality of cases.[6] Those comments were made in the context of the particular purpose and scheme of the Construction Contracts Act 2002 which would, as the Court said, be undermined if there was a requirement to show "extremely strong reasons" to deny relief.[7]

[8] Nevertheless, it may still be said that "[when] a decision is flawed by serious procedural irregularity … [justice] requires that the decision should be set aside and reconsidered unless, in the particular case, there is a good reason why that should not be so".[8]

[9] However, as I said in the first decision, one of the factors for a Court in exercising its discretion is that relief must be of a possible, practical value. A Court will not be likely to exercise its coercive powers for no purpose.[9] And so, if, despite a procedural error, the substantive Bill of Rights Act outcome is sufficiently clear – one way or another – the Court may simply say so. There may be no point in circumstances such as those in sending it back to be reconsidered.[10] In addition, a number of further factors may need to be balanced. They include an assessment of the gravity of the error, the degree of prejudice for an applicant, the potential for significant prejudice to public administration, prejudice to third parties and events subsequent.[11]

The issue in context

[10] The circumstances in which the exercise of the Court's discretion falls to be determined in this case are a little unusual. As I observed in the first decision, there are two aspects to discretionary decisions on the part of those to whom s 3 of the Bill

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6 *Rees v Frith* [2011] NZCA 668, [2012] 1 NZLR 408 at [48] per Arnold J.
7 At [48].
8 *Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513 (PC) at [27] per Lord Nicholls.
9 *Turner v Pickering* [1976] 1 NZLR 129 at 141 and 142.
10 *New Health New Zealand Incorporated v Director-General of Health*, above n 1 at [89].
11 At [113].

of Rights Act applies in circumstances in which a right protected under the Act might be restricted:

(a) The decision maker must address that restriction and consider whether it is demonstrably justified under s 5; and

(b) The Court must be satisfied that any such restriction is so justified.[12]

[11] In most cases, these requirements will be addressed alongside each other. In the event of a decision-making flaw on the first of the two requirements, the question of relief will be informed by the Court's finding on the second.

[12] What then should the Court's approach be where there has been a fundamental flaw in the first of the two considerations but in circumstances in which the second is yet to be considered?

Positions of the parties

[13] New Health says that the error is material and serious and that it has rendered the decision-making fundamentally flawed. The omission is not, it is said, simply a process error and Bill of Rights Act considerations cannot be minimised. Orders are sought setting aside each of the 14 directions given to local authorities under s 116E of the Health Act.

[14] For the Director-General, it is said that the ultimate question is whether the s 11 limitation is justified. That, it is said, the fact-laden inquiry that the Court is yet to make. The process error, it is said, is not in those circumstances material.

[15] It is said that it is artificial to separate the two questions referred to in [10] above. They should be considered hand-in-hand. It is said that this is not a case where the Court needs the decision maker to consider substantive rights consistency, and to engage in a balancing assessment, before it determines the issue.

[12] At [84], citing *Wallace v Chief Executive of the Department of Corrections* [2023] NZHC 2248 at [65].

[16] I add for completeness that the plaintiff advanced additional points which took issue with the Director-General's media release following my first judgment and with the Director-General not agreeing to an interim stay of the fluoridation directions in question, pending this decision. As I indicated during the hearing, I do not see merit in those points. The words in the media release were, it might be said, crafted carefully. But they were sufficiently accurate. They were not misleading. Similarly, there was no sufficient basis upon which the Director-General ought to have felt compelled to accept interim orders.

Discussion

[17] The Director-General must, in my view, address the s 11 restriction and consider whether it is demonstrably justified before the Court comes on to consider the issue substantively. I say that for four primary reasons.

[18] First, compliance with the Bill of Rights Act is an essential element of a lawful decision. A lawful decision required the Director-General to be satisfied that the directions were a justified limit on the right to refuse medical treatment and to explain why. There was no evidence to demonstrate that the Director-General was satisfied. No explanation was given. Appropriate relief needs to follow in order for the failure to be addressed.

[19] Secondly, relief for the very kind of flaw in question here has been a relatively orthodox outcome in previous cases. I referred to several relevant cases in my first decision:

(a) In *Moonen v Film and Literature Board of Review*, a full bench of the Court of Appeal, in finding that the Board of Review had failed to have proper regard to ss 5 and 6 of the Bill of Rights Act, decided that the Board should reconsider its Bill of Rights Act assessment in accordance with directions given.[13]

(b) In *Schubert v Wanganui District Council*, it was found that the Council had failed to consider the right to freedom of expression in its decision-

[13] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at [28] and [40].

making.[14] The Council was required to consider the right and to express its conclusions in the first instance.[15]

(c) In *Television New Zealand v West*, it was found that the application of the provisions of the Bill of Rights Act is a mandatory relevant consideration and must be taken into account by the Authority.[16] Its failure to do so resulted in an order that its decision be reconsidered. The Court was not prepared to carry out its own s 5 balancing exercise until the Authority had done so.[17]

[20] It is the difference between the fence at the top of the cliff and the ambulance at the bottom. As the authors of Butler and Butler have said, requiring the decision maker to undertake a rights assessment in the first instance leads to a position, when rights are implicated, where interferences are deliberate, measured and closely scrutinised before the interference occurs.[18] If the assessment must await determination by a Court, if challenged, then it may well be that a fundamental right is breached without any form of protection being in place at the decision-making level.

[21] Helpfully, counsel for the Crown have referred to the Victoria Charter of Human Rights and Responsibilities Act 2006 which, expressly, imposes a two-limbed obligation on decision makers to: [19]

(a) "give proper consideration to a relevant human right" when making decisions; and

(b) ensure decisions are compatible with human rights.

[22] Victorian cases on relief for a breach of the procedural limb of the Charter are of limited assistance because, as is usually the case here, procedural and substantive Bill of Rights Act issues are considered together. Victorian cases have made the point that there are a number of remedies available – besides a finding of invalidity – for a

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14 *Schubert v Wanganui District Council* [2011] NZAR 233 at [160], [162] and [171].
15 At [173].
16 *Television New Zealand v West* [2011] 3 NZLR 825 at [86].
17 At [110].
18 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 181.
19 Charter of Human Rights and Responsibilities Act 2006 (Vic), s 38(1).

breach of the procedural limb, such as a declaration, an injunction or certiorari for error on the face of the record.[20] And it has been said in Victoria that unlawfulness as a result of the breach of the procedural limb does not necessarily invalidate the decision.[21]

[23] Nonetheless, there have been cases in which, despite findings on a substantive rights assessment, a failure to give proper consideration to relevant human rights of complainants has led to the underlying decisions being quashed.[22]

[24] Thirdly, even on the view that is taken in the United Kingdom – where there will not be an actionable flaw in the event that a decision maker does not address a potential restriction on a fundamental right[23] – it has been said quite plainly by the England and Wales Court of Appeal in *R (SB) v Governors of Denbigh High School* that the Court will be assisted by, and will attribute due weight to, the decision maker's views in the course of its own assessment.[24]

[25] The point here is that, in the exercise of its relief, the Court should strive to find an outcome that will be of practical value. As the Supreme Court said in *Moncrief-Spittle v Regional Facilities Auckland Ltd*, while the Court must satisfy itself of the reasonableness of the limitation of a right, regard may be had and respect given to where the decision maker saw the balance as lying.[25] Without wishing to overplay the metaphor, it is, as I said in my first decision with reference to the shooting target described by Tipping J in *Hansen v R*, an essential component of the Bill of Rights Act scheme that a shot be taken at the target of potential rights outcomes by the decision

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20 *Bare v Independent Broad-based Anti-Corruption Commission* [2015] VSCA 197, (2015) 48 VR 129 at [152] per Warren CJ.

21 At [151] per Warren CJ and [389] per Tate JA; and *Certain Children v Minister for Families and Children (No. 2)* [2017] VSC 251, (2017) 52 VR 441 at [178].

22 *Bare v Independent Broad-based Anti-Corruption Commission*, above n 20, at [236] and [328] per Tate JA, and [560]–[569] per Santamaria JA; *Certain Children v Minister for Families and Children*, above n 21, at [588]; *Haigh v Ryan* [2018] VSC 474 at [58], [74] at [100].

23 As discussed in *New Health New Zealand Incorporated v Director-General of Health*, above n 1, at [55]–[74].

24 *R (SB) v Governors of Denbigh High School* [2005] EWCA Civ 199, [2005] 1 WLR 3372 at [31] and [68], cited with approval in *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420 at [26].

25 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [86].

maker in the first instance before the Court comes to see where it lands.[26] The Court should not be asked in this case to start the assessment by looking at a blank target.

[26] Fourthly, this is not a case where the substantive Bill of Rights Act outcome is sufficiently clear, one way or another. In *New Health v South Taranaki District Council*, only O'Regan and Ellen France JJ went so far as to consider the application of s 5 to the limitation on the right to refuse medical treatment that fluoridation causes.[27]

[27] Elias CJ and William Young and Glazebrook JJ did not consider that issue. Elias CJ said that the Court did not have available to it materials that would enable it to make that assessment.[28] And Glazebrook J said that the application of s 5 would depend upon local conditions.[29]

[28] Accordingly, the substantive issue remains at large and in a case such as this it would not be appropriate for the decision maker to ignore the issue and to leave it to the Court – in the event that someone was to bring a challenge. Accordingly, in this case, reasons do need to be given in the first instance.

[29] However, I am not satisfied that the appropriate remedy is to quash the decisions. As I said in the first decision, regard needs to be had to such factors as the potential for significant prejudice to public administration, prejudice to third parties and events subsequent. It is apparent from evidence filed that funding is being provided to local authorities for the capital works to which the directions relate. Practical relief needs to be given to require the substantive rights assessment to be undertaken by the Director-General, but without at this stage in the process setting the decision aside.

[30] It may be that in other cases where, for example, the decision in question had just been made or where the decision was administrative in nature, there would be a basis for the decision to be set aside while the reconsideration takes place.

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26 *Hansen v R* [2007] NZSC 7, [2007] NZLR 1 at [119] and *New Health New Zealand Incorporated v Director-General of Health*, above n 1, at [91]–[92].

27 *New Health v South Taranaki District Council*, above n 2, [126], [131], [134] and [143].

28 At [223].

29 At [176].

[31] However, in this case, as I see it, the appropriate remedy is to make an order under s 17(3) of the Judicial Review Procedure Act 2016 directing the Director-General to reconsider and determine the decision described in [1] of my first decision.

[32] The reconsideration, insofar as this decision is concerned, is to be limited to an assessment of whether the directions given to the 14 local authorities under s 116E of the Health Act were in each case in terms of s 5 of the Bill of Rights Act reasonable limits on the right to refuse medical treatment prescribed by law as can be demonstrably justified in a free and democratic society. The plaintiff's views on the issue are to be taken into account.

[33] In accordance with s 17(6) of the Judicial Review Procedure Act, if a matter is referred back under subs (3), as is the case here, the decision that is to be reconsidered continues to have effect unless and until it is revoked or amended by the Director-General. It is not in my view an appropriate case for an interim order to be made and, for the reasons given, I do not see additional relief under s 16 of the Judicial Review Procedure Act as being warranted.

[34] Costs were discussed at the hearing on relief. Costs on a 2B basis are sought by the applicant and counsel for the respondents accepted, responsibly, that in the event that relief was granted, costs on that basis would be appropriate.

Relief

[35] I make the orders referred to in [31] and [32] above.

[36] The applicant is entitled to costs on a 2B basis, with certification for second counsel, together with reasonable disbursements.

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Radich J

Solicitors:
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