IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-404-273
[2012] NZHC 675

UNDER	Part 1A Human Rights Act 1993
BETWEEN	CHILD POVERTY ACTION GROUP INCORPORATED Applicant
AND	THE ATTORNEY-GENERAL Respondent

Hearing: 26 March 2012

Counsel: F M Joychild and J M Ryan for applicant
J Foster and C I J Fleming for respondent

Judgment: 4 April 2012

RESERVED JUDGMENT OF DOBSON J

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[1] This is an application for leave to appeal to the Court of Appeal.

[2] On 25 October 2011, a Court in which I sat with Ms Grant and Ms Ineson as lay members, dismissed an appeal brought by the present applicant (CPAG) from the Human Rights Review Tribunal (the Tribunal). CPAG had sought a declaration that legislation delivering the Working for Families in-work tax credit (IWTC) was inconsistent with the right to be free from discrimination, in relation to the alleged discrimination against children of those on State benefits.[1] This was because the eligibility criteria for the IWTC, administered under the Income Tax Act 2007, excludes families where the caregivers are on State benefits.

[3] CPAG had argued that s MD8 in Part M of the Income Tax Act 2007, which requires that a person qualifying for the IWTC has to be a person, inter alia, who is

[1] Provided for by s 92J of the Human Rights Act 1993.

not receiving an income-tested benefit, constituted discrimination on the grounds of employment status. The extended definition of that phrase in s 21 of the Human Rights Act 1993 (HR Act) includes whether a person is a recipient of a benefit under the Social Security Act 1964 or an entitlement under the Injury Prevention, Rehabilitation and Compensation Act 2001.

[4] The first aspect of CPAG's appeal to this Court was that the exclusionary provision in s MD8 breached s 19 of the New Zealand Bill of Rights Act 1990 (BORA), which recognises all individuals' rights to freedom from discrimination on the grounds of discrimination provided in the HR Act, ie including employment status.

[5] The High Court judgment accepted the approach contended for on behalf of CPAG as to what will constitute discrimination. However, it found that discrimination did not exist in the present circumstances because the class defined as the complainants, who were excluded from entitlement to the IWTC on account of their status as recipients of State benefits, were also excluded because of a ground not challenged, namely that recipients have to be "full-time earners".[2] Accordingly, their status as beneficiaries was not applied against them to their disadvantage, and the only ones discriminated against in any real (rather than theoretical) way were the very small number of "full time earners" who also elected to remain on a benefit.

[6] The second aspect of the appeal was, if discrimination was made out, then the Crown as the alleged discriminator could not establish, for the purposes of s 5 of BORA, that the discrimination was occurring only to an extent that is demonstrably justified. The judgment considered that and determined that if it was wrong on the s 19 issue and discrimination was made out, then it would, in any event, only be to an extent that was demonstrably justified in terms of s 5.

[7] Leave is required for a further appeal to the Court of Appeal under s 124 of the HR Act. That provides for leave to be granted to pursue appeals on a question of law and it is accepted that an applicant is required to raise a question of law capable

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2 Income Tax Act 2007, s MD9(1).

of bona fide and serious argument in a case which involves some interest, public or private, of sufficient importance to outweigh the delay and costs of a further appeal.[3]

[8] Initially, leave was sought in relation to a sequence of three relatively specific questions on the application of s 19 of BORA, and five questions on the issue of demonstrable justification under s 5 of BORA. Those questions were in the following terms:

> 2. …
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> In relation to discrimination under section 19 of the New Zealand Bill of Rights Act 1990:
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> (a) Whether, as the Applicant maintains, the Court failed to ask itself the correct question when considering whether the differential treatment of the vast majority of beneficiary parents who did not also meet the full time earner eligibility requirements of the In-Work Tax Credit (IWTC) constituted discrimination. The Applicant maintains that the correct question was whether employment status was a material factor in the exclusion of parents on income tested benefits from the IWTC, notwithstanding that they were also unable to meet the full time earner requirement.
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> (b) Whether, as the Applicant maintains, the Court failed to recognise the fact and significance of the inherent connection and close entwinement of the full time earner eligibility requirement and the 'off-benefit' eligibility requirement for the IWTC when determining whether there was discrimination. Specifically, whether the Court erred in holding that there was no real disadvantage because only a very small number of beneficiary parents would qualify for the IWTC absent the off-benefit rule when the other reason for their disqualification is inherently connected with their status of being in receipt of an income tested benefit.
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> (c) Whether, as the Applicant maintains, the full time earner requirement which is neutral on its face nevertheless discriminates indirectly on the grounds of being in receipt of an income tested benefit.
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> In relation to demonstrable justification under section 5 New Zealand Bill of Rights Act 1990:
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> (d) Whether, as the Applicant maintains, the Court erred in finding that the IWTC, as part of the WFF package, was exclusively a work incentive measure rather than a measure with dual purposes and/or effects of incentivising beneficiaries into work and ensuring income adequacy in

[3] *Waller v Hider* [1998] 1 NZLR 412 (CA), *Snee v Snee* (1993) 13 PRNZ 609 (CA).

low to middle income families so as to alleviate child poverty.

(e) Whether, as the Applicant maintains, the Court erred in finding the objective was sufficiently important to justify the extent of the discrimination at the first step of the s 5 inquiry rather than simply asking whether the objective was sufficiently important to justify some discrimination. In doing so, whether the Court prejudged the proportionality analysis it was required to undertake in the second limb of the s 5 analysis.

(f) Whether, as the Applicant maintains, the Court erred in its approach and conclusion to the question whether the exclusion of beneficiaries from the IWTC was more than reasonably necessary for sufficient achievement of purpose(s) of the limitation, by:

(i) Failing to ask itself the proper question, namely, whether on the evidence there was another or other sufficiently effective means, besides the IWTC with its off-benefit rule, in which to achieve Parliament's objective of incentivising beneficiary parents into work, such other means being less intrusive on the right to be free from employment status discrimination (i.e. to the right of parents and their children living in poverty, not to be excluded from additional income).

(g) Whether, as the Applicant maintains, the Court failed to give proper weight to, and take appropriate account of, relevant contextual factors when undertaking the proportionality exercise, namely:

(i) The failure of the Government, when developing the IWTC as part of the Working for Families (WFF) package, to comply with its international human rights commitments, particularly in the field of economic and social obligations in relation to children and families living in poverty.

(ii) The lack of attention in the policy development process to the effect upon those children and parents who would miss out on the IWTC.

(iii) The gravity of the impact upon the fundamental rights of those parents and their children who were excluded from the IWTC.

(iv) The lack of consultation with affected groups through the Parliamentary process prior to enactment.

(h) Whether, as the Applicant maintains, the Court erred in its approach and conclusion to the question whether the social

advantage to be gained from the work incentive objective of the IWTC was proportionate to the harm to the right by:

(i) Not asking itself the proper question namely, whether the benefit to be gained from the important social objective (of incentivizing beneficiaries into work by creating a gap) justified excluding the very large majority of beneficiary parents and their children from additional income, when a high number of those parents and children were living in poverty.

(ii) Not taking into account the fact that there were other more efficient ways to design a work incentive and create a gap between the incomes of beneficiary families and working families which would not have excluded the vast majority of beneficiary parents (and their children) from the additional income support which the IWTC provided.

(iii) Not taking proper account of the impact of the exclusion of beneficiary parents (and their children) from the IWTC upon their right to be free from employment status discrimination, specifically to entitlement to additional income where a disproportionate number of them were living in poverty.

[9] The respondent filed a notice of opposition, which opposed all of these detailed questions on the basis that they were not capable of bona fide and serious argument that would result in a different outcome on appeal, and in respect of some of them that they raised matters that were not pleaded. In response CPAG filed an amended application which sought leave for two questions at a more abstracted level, in the following terms:

2. The questions for which leave is sought are now:

(a) Did the Court correctly state and apply the test for a breach of s 19 of the New Zealand Bill of Rights Act 1990?

(b) Did the Court correctly state and apply the test for s 5 of the New Zealand Bill of Rights Act 1990?

[10] Ms Joychild submitted, in support of the application for leave, that it was unnecessary to consider the precise terms of appropriate questions of law, and that in this area there ought to be a degree of latitude to accommodate the developing jurisprudence. She referred in general terms to the thorough extent to which the House of Lords and the United Kingdom Supreme Court has re-evaluated, on final

appeals, all elements going to decisions on unlawful discrimination.[4] Ms Joychild also referred to the relatively general form of questions as posed in final appeals to the Canadian Supreme Court in support of her proposition that, once an issue or issues in respect of which a question of law that was appropriate for further appellate consideration was identified, there ought not to be constraints imposed.[5]

[11] Ms Joychild invited analogy with the approach of Asher J in *Ministry of Health v Atkinson*:[6]

> However, the more detailed the questions, the greater the danger of artificial constraints on argument that do not respond to the natural development of submissions, particularly in an appeal involving novel questions of some complexity and importance. I consider it preferable to state those questions of law in broad terms, and to leave the development of argument under the control of the Court of Appeal.

[12] In *Atkinson*, the respondent consented to leave being granted in respect of a number of detailed questions, and the argument was over the terms and extent of questions of law appropriately posed for the Court of Appeal.

[13] In opposing leave in the present case, Ms Foster disputed that leave could be granted other than on specific questions of law which arose out of the matters previously argued in CPAG's appeal. I accept that the context of this challenge to the IWTC, and the scope of the extensive arguments before the Tribunal and the High Court, would render it inappropriate to grant leave other than on defined questions of law.

[14] In the course of her oral submissions, Ms Joychild resorted to a number of the more detailed questions in the original form of application for leave to appeal to illustrate the tenability and importance claimed for those questions. I took her final position to be that, given the terms of opposition to the application, it would be appropriate to consider granting leave by reference to both forms of questions posed.

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4 See for example *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 and *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173.

5 See for example *Withler v Canada (Attorney-General)* 2011 SCC 12, [2011] SCR 396 and *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.

6 *Ministry of Health v Atkinson* HC Auckland CIV-2010-404-000287, 11 March 2011 at [7].

[15] Ms Joychild submitted that because generally posed questions about the tests and application of ss 19 and 5 of BORA were treated by Asher J as "no doubt" being questions of law for which leave was appropriately granted, the same conclusion ought to be reached on the present application. That proposition does not follow. The issues recognised in *Atkinson* as qualifying are not necessarily the same in every case involving ss 19 and 5. The fact that the same legislative provisions are at issue is not enough to qualify this case as similarly important to the issues raised in *Atkinson*. The existence of the prior appeal before the Court of Appeal in *Atkinson* might indeed count against the same questions having the requisite status in this subsequent case.

Section 19

[16] To have any utility, an appeal would have to overturn the High Court finding that the provision complained of, which caused beneficiary families to be excluded from the IWTC, was not discriminatory. Ms Joychild foreshadowed an argument that prohibited discrimination may occur where the different treatment can be partly attributed to a prohibited ground or where that was a "material factor" in the difference in treatment.

[17] That approach is inconsistent with any requirement for different treatment to be caused by the prohibited ground of discrimination, so as to exclude innocuous or purely theoretical differences in treatment from the scope of what might attract intervention under the legislation.

[18] In opposing leave, Ms Foster argued that CPAG's approach is untenable. However, where a claimant group is disqualified from a benefit because of a set of circumstances, and part of those circumstances involves a prohibited ground under s 21 of the HR Act, whether that amounts to discrimination is a question worthy of appellate review. Accordingly, the prospect of such a different approach to the scope of conduct caught by s 19 cannot be dismissed as untenable.

[19] Ms Joychild claims a high level of importance for the issue because of the scale of child poverty in New Zealand society and the concentration of it within

families on State benefits. However, the significance of issues in an economic or political setting does not automatically establish their general or public importance in the context of questions of law. The High Court judgment expressed reservations that the essence of CPAG's complaint is not justiciable, but rather a platform for an attempt to attribute legal consequences to political choice. CPAG's further pursuit of its claim of prohibited discrimination is unapologetically one component in its broader campaign of lobbying for greater resources to be allocated to alleviating child poverty. The Court needs to be wary, in assessing relative importance in the context of questions of law, not to provide oxygen for flames that should be lit in other fora.

[20] At its core, CPAG's argument for a much broader application of s 19 undoubtedly has some importance for the developing jurisprudence of the application of Part 1A of the HR Act. I am therefore satisfied that questions of law on the application of s 19 are appropriate for further appellate consideration, subject to them having some utility.

Section 5

[21] The Attorney-General opposed any questions on the s 5 issue of justification for discrimination, on the ground that none of the questions posed were seriously arguable. Ms Foster submitted that the test under s 5 of BORA is well settled so that the approach adopted by the Tribunal and the High Court to the application of s 5 did not give rise to an arguable question of law. The argument for the Attorney-General relied on the relatively emphatic terms in which the High Court judgment found that any discrimination would be justified.

[22] Ms Foster argued that leave should not be granted if there were no realistic prospects for a different outcome. In this regard she cited *Trevethick v Ministry of Health*.[7] That litigation involved a campaign challenging the government's policy choice on the scope of cover provided under the accident compensation regime. In declining special leave, the Court of Appeal reasoned that even if discrimination could be made out under the s 19 test, it was plain that it would be held to be

[7] *Trevethick v Ministry of Health* [2008] NZCA 397, [2009] NZAR 18.

justified discrimination in terms of s 5 of BORA. In that context, the prospect of a partial or pyrrhic victory in having the Court recognise a relevant form of discrimination was not enough to give the issues sought to be argued on further appeal sufficient status.

[23] On the s 5 analysis, Ms Joychild could not persuade me that there was any seriously arguable question which would lead to a different outcome.

[24] Here, Ms Joychild argued that there was utility in CPAG achieving judicial recognition of the broader basis on which prohibited discrimination for the purposes of s 19 ought to be assessed. I am not satisfied that such a prospect is sufficient to warrant a grant of leave, given that any discrimination, if found, could be demonstrably justified in terms of s 5. Substantial resources have already been committed to defending CPAG's challenge. Unless there is some seriously arguable basis for suggesting that some form of relief might be ordered against the respondent, CPAG cannot make out the grounds necessary for a grant of leave.

[25] Accordingly, the application for leave to further appeal is dismissed.

Dobson J

Solicitors:
Davenport City Law, Auckland for applicant
Crown Law, Wellington for respondent