CHiLD POVERTY ACTION GROUP

Child Poverty Action Group v Attorney General – what did we gain? Frances Joychild (QC)

In June 2013 Child Poverty Action Group (CPAG) decided not to appeal the decision of the Court of Appeal declining CPAG's appeal under s5 NZBORA (though upholding it under s 19). This ended nine years of litigation by CPAG challenging the In Work Tax Credit ($60 per week to primary caregiver for first 3 children and $15 per week for each child after that) which was a child poverty alleviation measure that excluded parents on income tested benefits from receiving it. Frances Joychild QC who was counsel for CPAG for the last 4 years (along with Jenny Ryan from the Office of Human Rights Proceedings) spoke at a CPAG 2013 end of year gathering about what CPAG had gained from the litigation - here is what she said.

The arguments

The government defended the In Work Tax Credit ($60 pw for first three children and $15 for each after that) and as a work incentive and necessary to ensure a gap between those in work and those on benefits. CPAG argued there already was a mechanism to create a gap (Minimum Family Tax Credit) which supplemented a working family's income and ensured it was significantly higher than those on benefits. The gap problem, such as it was, related to a tiny proportion of beneficiaries who were on benefit and working 20 hours a week.

At the time of its development, and today, children in beneficiary families had significantly higher levels of poverty when compared to children in working families (though there were many children living in poverty in working families). CPAG argued it was wrong and unlawfully discriminatory to tie a child poverty alleviation measure to a work incentive. New Zealand has signed up to international human rights treaties not to discriminate against children on the grounds of their parentage in relation to social security schemes aimed at child assistance.

The proceedings

There were ten separate hearings in the case and in the processes the proceedings have made an indelible mark on New Zealand Human Rights Law. There were two hearings in the Human Rights Review Tribunal, six in the High Court and two in the Court of Appeal. Today I briefly set out three of the most important precedents set by the CPAG litigation.

1. Right of a public interest group to bring Human Rights Act proceedings on behalf of others affected by government action.

CPAG , a non-profit group formed to advocate for more informed social policy to support children in New Zealand, particularly those living in poverty, said it was acting on behalf of 250,000 children whose parents were excluded from the tax credit. The Crown tried to strike out CPAG's case on the grounds that the plaintiff was not an aggrieved person (someone personally affected by the exclusion), nor someone acting on behalf of an aggrieved person.

The Tribunal supported CPAG's right to bring proceedings in the interests of unnamed beneficiaries and their children. The Crown appealed to the High Court and when it didn't succeed there (no right to appeal the decision) it then took judicial review proceedings in the High Court. The Court upheld CPAG's right to bring proceedings in its own name. Ultimately the case was heard and determined without an individual beneficiary having to come forward and prove they were the subject of discrimination.

This is a very important precedent. Human rights cases typically involve vulnerable persons-sometimes highly vulnerable. To require that a claim of discrimination proceed only when affected individuals came forward as plaintiffs would have a deeply chilling effect on human rights litigation. Affected persons (in this case beneficiaries whose financial security and entitlements depend upon a good relationship with Work and Income) would have to expose themselves to the intense scrutiny of Work and Income staff of their family's dealings with the department over many years in the context of a public adversarial court setting.

Also, while personal information can be suppressed by court order, it is far from clear whether adequate protections exist at pre-hearing stages. The Social Development Minister's public disclosure to all media outlets, of personal information gained from the files of two beneficiaries who complained about a change in government welfare policy several years ago is deeply sobering. The Minister said later that she has not ruled out doing the same thing again.

Further, beneficiaries are now perceived as the most discriminated against group in New Zealand society, more so than any racial group. A strong argument can be made that the culture of disdain and blame towards beneficiaries that currently exists throughout New Zealand society has been fostered by the executive itself, the branch of government created to determine entitlements and rights.

In summary then, the CPAG decision has been of critical importance to the future ability of public interest groups to challenge a government policy, omission or law under Part 1A Human Rights Act which discriminates against vulnerable groups of persons, on their behalf.

2. Right to take claims of discrimination in relation to government economic and social policy upheld

Throughout the substantive hearings the Crown's major argument was that courts should stay well clear of getting involved in claims involving social and economic policies. They said this was the domain of the government, not the courts. The courts should 'defer' to government policies.

These arguments are based upon traditional legal thinking. Justice Miller pointed out in his High Court judicial review decision that in 2001, Parliament itself had changed that thinking by enacting Part 1A of the Human Rights Act. Claims could be taken to the courts, publicised there and vindicated to some degree. However later, the High Court that heard the substantive claim placed a great deal of reliance on the doctrine of deference and very lightly skipped over the government reasons for the discrimination before concluding it was justified. That court then refused CPAG's application to appeal its decision to the Court of Appeal. The court said that care had to be taken 'not to provide oxygen to flames that should be lit in other fora'. This was a very clear and direct indication that this particular court did not consider there was much of a place for a claim of discrimination relating to economic and social issues to be considered by the courts. It was indicating it was Parliament's domain, not the courts, despite Part 1A Human Rights Act. The Court of Appeal overturned that decision and granted CPAG leave to appeal to it against the High Court decision. Ultimately the Court of Appeal found that the government had demonstrably justified the discrimination in this case as it had shown it had considered other non discriminatory options and the discrimination was proportionate to the purposes of incentivising people into work.

However in its decision it sent the government a very clear message. The use of the word 'deference' was not helpful and the courts could not shy away from or shirk their task of scrutinising a claim of discrimination under Part 1A. It said it would give ' some latitude or leeway to government' particularly where a case involved a range of social, economic, fiscal and taxation measures (as CPAG case did) but that did not alter the fact that the burden is on the Crown to justify the limit it is putting on a right to be free from discrimination.

Hence, though CPAG didn't succeed, the door is left open for future economic and social claims to be made. The government is on notice. The courts will scrutinise the government's reasoning to make sure discrimination in social and economic policies is demonstrably justified. If the "flame lighting" comment had been left unchallenged the future ability to bring cases would be doubtful. In 2013, inequality is the number one human rights issue, and one everyone should be concerned about as it undermines our free and democratic society. The Court of Appeal approach is positive and hopeful.

Finally on this point it must be said that the In Work Tax Credit claim was always a very ambitious claim from a legal point of view given the doctrine of deference and the particularly wide and complex range of social and economic factors at issue for the government with the tax credit. If ever a court was going to defer it would be in a case like this. A loss in this case should not deter interest groups from bringing other economic and social claims challenging discrimination in government policy or legislation.

3. Clear and simple and rights friendly legal test set for determining discrimination under s 19

The Court of Appeal in its first Part 1A decision (Atkinson v Ministry of Health) confirmed the test for discrimination first set out by the Human Rights Review Tribunal in the Child Poverty Action Group hearing. Then, when it heard CPAG's appeal in May this year, its second Part 1A decision, it both affirmed and refined it.

New Zealand now has a clear and coherent legal test. First, is there differential treatment or effects of persons in comparable or analogous circumstances on a prohibited ground of discrimination? Second, if so, does that differential treatment result in material disadvantage when viewed in context?

This is also an excellent outcome. The question of what the test should be was hotly debated academically and in the hearings. The Crown's proposed tests would have created a serious barrier to claims –they would have resulted in many claims being struck out at the first hurdle without the government having to justify the discrimination. Fortunately CPAG could point to strong academic criticisms of the Crown's proposed tests in overseas jurisdictions. These tests will require the government to justify discrimination in most cases. Hopefully that will happen early on in the policy development process and unjustified discrimination will be ironed out before it ever becomes government policy or law.

A new issue arose in the Court of Appeal in the CPAG case which was how you determined material disadvantage. The Crown had argued beneficiaries were not disadvantaged by the off benefit rule as even if that rule was not there they would also have been excluded by the fact they were not working full time hours (another requirement for the IWTC). CPAG argued that regardless of that they were still discriminated against by the off benefit rule – it was an operative characteristic. The Court of Appeal agreed. This means that claimants do not have to prove that they meet every other eligibility criteria for a benefit before they can claim discrimination. If one factor excludes them and is operative, that is enough.

There are numerous decisions relating to aspects of the CPAG litigation ranging from 2009 to 2013. CPAG has made its legal mark for the good of human rights – despite ultimately losing. It must be grateful to OHRP for providing representation to High Court level and to its donors for funding it to the Court of Appeal. The proceedings also played a big part in keeping the full range of issues of child poverty on the public and political agenda. Notably, in the 2011 elections four opposition parties had a policy to remove the discrimination against income tested beneficiary parents under the In Work Tax Credit.