



CHiLD POVERTY ACTION GROUP

CPAG's Human Rights Case: Wider Implications for a Democratic Society

Michael Timmins

Michael Timmins is a lawyer and long time supporter of CPAG. He has been involved with and has a deep interest in Comparative Human Rights Legislation. Born and raised in New Zealand, Michael is currently based in Thailand, specializing in international law.

This case directly concerns the In Work Tax Credit, but it also raises fundamental questions around the kind of democracy New Zealanders want. What kind of scrutiny should there be of policy and legislation that has human rights implications? How do we, as citizens, ensure the accountability of our elected officials?

In my view, a key aspect of the case is the outcome around the level of deference that courts will give to parliament in reviewing policy impacting on human rights. The High Court held that wide deference is due, but I feel that the Court should be empowered to scrutinise policy where the democratic process is flawed.

Unlike countries such as the United States, we do not have a written constitution protecting fundamental rights enforceable in the courts. Parliament is thus clearly supreme. But, supremacy is not without its obligations. For a democracy to work, there should be real

transparency and accountability of decision-making, particularly where this impacts on our human rights obligations.

In theory, that should be achieved through select committees, public consultation, judicial review, and, ultimately, at the ballot box. Without a written constitution, it is particularly important that these democratic processes be robust. Where these procedures fail, there should be a higher level of scrutiny, not more deference, to the Crown in policy challenges.

In this case, it is clear that the democratic process failed poor children in the policy development of Working for Families. There was no green paper, no white paper, no select committee, a flawed Bill of Rights report by the Attorney-General, and the legislation for Working for Families was passed very quickly into law.

Despite this failure of procedure, the High Court decided to defer to parliament. I wonder, then, how we can actually keep parliament to account with such a high level of deference? Will there ever be a case where the Court will scrutinize the policy? Surely, where the procedure is flawed, where parliament has not done its job, and where this impacts on our international human rights obligations, the court should not overly defer to Parliament and should actually look at the policy as to whether it breaches human rights?

The Court of Appeal should better define the boundaries of deference. This is not only important in the current case, but will also guide accountability in future policy-making. Further, it will guide whether there is any utility to human rights litigation in New Zealand.

Another interesting question is the correct ground of discrimination. The High Court assessed the case on the basis that “employment status” was the relevant ground listed in the Human Rights Act 1993. Instinctively, this feels correct. However, I feel that this ground almost subconsciously draws the attention away from children. Instead, the focus shifts to the parents – the “beneficiaries”, and the work incentives that are behind the policy.

In my view, a better ground is “family status” which is also found in the Human Rights Act 1993. This ground maintains the focus on the children and whether they are discriminated against. It also links in very well with the Convention on the Rights of the Child, which makes clear that the best interests of the child should be a primary consideration.

If we take this approach of family status then the “comparator” group is much easier to define. The group discriminated against, with harmful effect, is the 230,000 children living in benefit dependent families. They are denied a child based poverty alleviation measure in the name of creating a work incentive. I feel that, on appeal, this ground should be seriously considered.

In sum, we have a Bill of Rights that is at the core of our human rights commitments. We need to take these obligations seriously and have a process of calling the government to account when measures that are discriminatory have not been through the normal checks and balances of the democratic process. Taking this case onwards will therefore be very important as it will hopefully establish that there is a utility to human rights litigation and the citizenry has the means to ensure accountability.