Lawson v. Housing New Zealand

M.538/94

Country: New Zealand
Region: Oceania
Year: 1996
Court: High Court
Health Topics: Aging
Human Rights: Right to health, Right to housing, Right to social security

Facts

From 1990 onwards, the government implemented a policy whereby houses formerly owned by the state were transferred to Housing New Zealand (HNZ) (the first defendant), a corporate body with strong parallels to a state-owned enterprise, and their rents were progressively increased from their former subsidised level towards market rents.

The plaintiff, a tenant of HNZ, issued proceedings for judicial review challenging the formulation and implementation of this policy. She asserted that HNZ failed to have proper regard to the Crownâ€™s social objectives and the interests of the community, as required by s 4 of the Housing Restructuring Act 1992, and that charging market rents without regard to affordability and the impact on tenantsâ€™ living standards was in breach of her right to life under s 8 of the New Zealand Bill of Rights Act 1990. The plaintiff also alleged that, in determining the Crownâ€™s social objectives for incorporation into HNZâ€™s Statement of Corporate Intent for 1993/1994 or failing to alter that statement so as to ensure that rents charged by HNZ are affordable, the Ministers of Housing and Finance (the second and third defendants respectively) failed to have proper regard to New Zealandâ€™s international obligations. In particularÂ Art 25(1) of the Universal Declaration of Human Rights (UDHR),Â which provides that everyone has a right to a standard of living adequate for health and well-being including housing, Arts 2(1) and 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Art 27 of the Convention on the Rights of the Child (CRC), which obliges states to recognise and take steps to assist persons responsible for children to implement the right to an adequate standard of living for every child. None of these international instruments have been specifically incorporated into New Zealand domestic law. The plaintiff also contended that the Ministers had failed to have proper regard to her rights under s 8 because the charging of market rents had allegedly resulted in her having inadequate housing. Finally, the plaintiff claimed against all defendants that they had acted in breach of her legitimate expectation that she and other former state house tenants would not be forced out of their homes if they were unable to afford market rents.

The High Court held that the decisions of HNZ were not amenable to judicial review since its decision to increase rents had not been dictated by the government and the plaintiffâ€™s challenge to the increase of her rent was concerned not with the decision-making process but rather with the merits of the actual decision itself. The court also found that the plaintiff had failed to adduce evidence indicating that she had a legitimate expectation that she would not be forced out of her home by HNZ if unable to afford a market rent.

[Adapted from INTERIGHTS summary, with permission]

Decision and Reasoning

In dismissing the application, it was held that:

HNZâ€™s contention that, since the Housing Restructuring Act contains no reference to market rents, the implementation of a market rent policy is a private function was unpersuasive. The wording of s 3(b) of the Bill of Rights Act did not require that a function must be explicitly mentioned in legislation for it to be â€˜publicâ€™. The fact that a particular body was essentially private in nature does not of itself obviate compliance with the Bill of Rights Act (Television New Zealand Ltd v Newsmonitor Services Ltd [1994] 2 NZLR 91 (NZ HC) considered, dicta of Cooke P in TV3 Network Ltd v Eveready New Zealand Ltd [1993] 3 NZLR 435, 441 (NZ CA) applied). Pursuant to s 3, the increasing of rent did not need to be a public function provided it is done in

the performance of a public function, power or duty. On balance therefore, it appears that HNZ's acts fall within s 3 (dicta of McGechan J in Federated Farmers of New Zealand Inc v New Zealand Post Ltd [1990-92] 3 NZBORR 339, 394-395 (NZ CA) applied).

The plaintiffâ€™s argument that s 8 included not only the right not to be deprived of physical existence but also the right not to be deprived of things necessary to support and ensure that existence, such as adequate, affordable housing, relied on the Canadian courtsâ€™ interpretation of s 7 of the Canadian Charter of Rights and Freedoms 1982. Section 7Â provided that â€˜everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.â€™ However, s 7 is framed somewhat more broadly than s 8 of the Bill of Rights Act since it also includes rights to liberty and security of the person and is partly expressed in positive terms (Singh et al v Minister of Employment and Immigration [1985] 1 SCR 177 (Can SC) distinguished).

Although caution was required in using legislative â€˜omissionsâ€™ as an interpretative aid (Simpson & Anor v Attorney-General (Baigentâ€™s case) [1994] 3 NZLR 667 (NZ CA) considered), it was nevertheless relevant that the debate in Canada about whether s 7 embraces social and economic factors centered around the rights to liberty and security of the person and Canadian courts had generally been reluctant to import social and economic considerations into s 7 (Clark v Peterborough Utilities Commission (1995) 24 OR (3d) 7 considered).

It was also important to note that the only New Zealand Court of Appeal decision to date which dealt with s 8 concerns a situation far removed from the instant case, namely the withholding of lifesaving medical treatment of a child (Re J (An Infant): B and B v Director-General of Social Welfare [1996] 2 NZLR 134 (NZ CA); [1996] 3 CHRLD 419 considered).

It was not necessary in the present case to decide whether social and economic factors were entirely excluded from the ambit of s 8; all that was at issue was whether the defendantsâ€™ acts deprived the plaintiff of her â€˜lifeâ€™. Whilst regard should be had to international human rights norms in interpreting and applying the Bill of Rights Act, and whilst a liberal interpretative approach was warranted, the court was ultimately constrained by the wording of s 8 itself (Ministry of Transport v Noort [1992] 3 NZLR 260, 292 (NZ CA) and dicta of Gault J in Eketone v Alliance Textiles (NZ) Ltd [1993] 2 ERNZ 783, 795 (NZ CA) applied).

It would have required an unduly strained interpretation of s 8 to conclude that the right not to be deprived of life encompasses a right not to be charged market rent for accommodation without regard to affordability and impact on the tenantâ€™s living standards. There were strong policy arguments in favour of excluding such an interpretation, in particular the fact that it would accord an inappropriate economic role to s 8 and involve a massive expansion of judicial review to include all of the modern elements of the welfare state.

Even if the increase of rent complained of was prima facie within the scope of s 8, it constitutes a reasonable limit on the right to life which is demonstrably justified in a free and democratic society (dicta of Richardson J in Ministry of Transport v Noort (above) and McGechan J in Federated Farmers of New Zealand Inc v New Zealand Post Ltd (above) applied).

While housing was essential, and was regarded as such by government, the continued provision by the state of subsidised rental housing is not regarded as a continuing state function and s 5 â€˜reasonablenessâ€™ needs to be seen in that context. This court was not to become a tribunal determining living costs. All economic, administrative and social consequences needed to be weighed against the rights in the Bill of Rights Act but the provision of subsidized rental housing was no longer regarded as being as important in the public interest as was formerly the case.

Efforts had been made by HNZ and systems implemented to minimize hardship arising out of the housing reforms and it cannot reasonably have been expected to have tailored its policies to the personal circumstances of individual tenants. Moreover, the policy was implemented to address perceived anomalies and injustices in the previous regime, and was consistent both with the Crownâ€™s social objectives and with the Statement of Corporate Intent and the statutory criteria in the Housing Restructuring Act.

A pragmatic approach to determining whether market rents were â€˜prescribed by lawâ€™ in terms of s 5 was required. HNZâ€™s statutory obligation to be a successful business â€˜prescribesâ€™ a commercial course of conc and inherent within that was the imposition of commercially necessary charges (dicta of McGechan J in Federated Farmers of New Zealand Inc v New Zealand Post Ltd (above) 397 applied).

The Governmentâ€™s policy on housing since 1990 did not appear to run counter to the obligations in the UDHR and ICESCR given the continuation of the state housing rental stock and the other measures undertaken, such as facilitating transfers to more appropriate accommodation and the payment of an accommodation benefit to those on low incomes. The plaintiff principally relied on General Comment No 4 of the ICESCR and Fact Sheet No 21 but their status in New Zealand was uncertain. In addition, her circumstances precluded her from invoking the CRC.

It was for international fora, rather than this court, to judge whether the Government had fully complied with the international obligations in question. It was sufficient for this court to reach the view that the Government had plainly made efforts, such as the lengthy and detailed consideration of affordability and impact on living standards of tenants and the changes to the accommodation benefit, to balance the competing factors.

Moreover, the law did not appear to require ministers to give specific consideration to international

instruments in reaching their decisions as long as such obligations informed the decision-making process (Ashby v Minister of Immigration [1981] 1 NZLR 222, 225 (NZ CA) and Tavita v Minister of Immigration [1994] 2 NZLR 257 (NZ CA); [1996] 1 CHRLD 71 applied). There was no evidence that this was not the case so far as the housing reforms were concerned.
Compliance may also have been measured by New Zealandâ€™s report to the United Nations Economic and Social Council in February 1991 and the later draft report which gave detailed accounts of New Zealandâ€™s efforts to comply with its international obligations across a wide range of issues, including housing.
No case had, therefore, been made out by the plaintiff that the second and third defendants failed in a way amenable to the judgment of this court to take New Zealandâ€™s international obligations into account or to honor them sufficiently.

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Decision Excerpts