IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2005-485-999

IN THE MATTER OF	Part 1 of the Judicature Amendment Act 1972 and Rule 623 of the High Court Rules
AND	
IN THE MATTER OF	The Contraception, Sterilisation and Abortion Act 1977
BETWEEN	RIGHT TO LIFE NEW ZEALAND INC Applicant
AND	THE ABORTION SUPERVISORY COMMITTEE Respondent

Hearing: 20 July 2009

Counsel: P D McKenzie QC and I C Bassett for the Applicant
C Gwyn and W Aldred for the Respondent

Judgment: 3 August 2009

JUDGMENT (NO 2) OF MILLER J

Introduction

[1] In my first judgment, delivered on 9 June 2008, I refused orders in the nature of mandamus but reserved declaratory relief for further argument, counsel having agreed at the hearing that the form of any declarations ought be settled after the parties had considered the judgment *Right to Life New Zealand Inc v The Abortion Supervisory Committee* [2008] 2 NZLR 825. The parties now return to argue whether relief is appropriate.

Background

[2] In the first judgment, which should be read with this one, I held that declaratory relief might complement Parliamentary oversight of the Abortion Supervisory Committee by clarifying its functions under the abortion law, and rejected a submission that relief should be refused because the applicant does not reflect the views of the community at large (at [155]):

> Relief is discretionary, but in this socially divisive area the Court should not assume a policy role. Contrary to the Committee's submission, it does not matter that for all the Court knows the applicant may be opposed to abortion on any ground, or that the litigation will prove a poor strategic choice for the applicant if it results in the law being amended to decriminalise abortion. It will be apparent from what I have said that I also reject the Committee's submission that declaratory relief should be refused on the grounds that the claim is moot and the degree of non-compliance allegedly trivial.

[3] Relief was deferred pending an appeal and cross-appeal, but the Court of Appeal held that it lacked jurisdiction because relief had not been addressed. The Committee contends that no relief ought to be granted, while the applicant seeks declarations. I understand it to be common ground, however, that should I refuse any relief the final judgment will found jurisdiction for the parties' appeals.

[4] Both parties filed further evidence for this hearing. The Committee provided a copy of its 2008 report to the House of Representatives and an affidavit of Mr Newall deposing to steps taken in recent times to educate providers and improve the quality of information that the Committee receives from general practitioners referring women to certifying consultants.

[5] Mr Orr responded with an affidavit incorporating certain statistics that the Committee had omitted from its 2008 report – in contrast to earlier reports - and a letter of 21 May 2009 reporting what had happened in the Court of Appeal. In that letter the Committee told certifying consultants:

> You may be aware that in the context of the Court of Appeal's decision, interest groups on both sides of the abortion debate have made statements to the effect that abortions are available in New Zealand "on demand", or that "if a woman wishes to have an abortion she will be able to get one."

> The Committee believes those comments to be incorrect and unfounded. It is confident that certifying consultants have been and are continuing to act in good faith and to apply the law as it is contained in the Crimes Act and the Contraception, Sterilisation, and Abortion Act.
>
> The Committee wishes to ensure that certifying consultants continue to perform their work as they have done and do at present, and to remind you that the litigation brought by Right to Life is directed towards the role and actions of the Committee. The litigation does not in any way alter your obligations as certifying consultants under the legislation, or your obligations to your patients as a medical practitioner.

Submissions

[6] Mr McKenzie accepted that declaratory relief is discretionary but argued that the starting point is that relief is not generally denied if grounds for intervention have been established: *Air Nelson Limited v Minister of Transport* [2008] NZCA 26. Since I found the Committee had misunderstood its statutory functions, the applicant is entitled to relief. There is clear utility in the Court making declarations that clarify the Committee's functions under the abortion law. Further, the case concerns a very significant social issue on which the community has been divided and in respect of which the Court ought not deny relief on policy grounds. The abortion law asserts a state interest in protecting the unborn child through the statutory processes and procedures and relief is in the interests of the unborn child. He responded to a submission by Ms Gwyn to the effect that the Court risks interference in Parliamentary proceedings by basing relief on the Committee's previous reports to the House of Representatives, arguing that the Court is doing no more than interpreting legislation, and may have recourse to the Committee's reports since the underlying purpose of the Parliamentary privilege is that of ensuring that witnesses may speak freely and the declarations sought have no adverse consequences for members of the Committee. Further, the evidence on which the applicant relies comprises reports which the Committee has published outside Parliamentary proceedings.

[7] Ms Gwyn responded that relief is unnecessary and inappropriate. There is no finding of unlawful conduct on the Committee's part, and the judgment speaks for itself. As a responsible public body the Committee will be guided by the judgment, subject of course to appellate review, without need of formal orders. The Committee

has already provided clarification for medical practitioners and others. The declarations sought would substantially rewrite some provisions of the legislation, and far from providing clarification would be likely to lead to confusion and ongoing judicial supervision. The applicant has suffered no substantial prejudice and declarations are not necessary to vindicate any of its rights. Further, declarations based on findings against the Committee in respect of material included in its reports to Parliament may offend against article 9 of the Bill of Rights 1688. She acknowledged that the Committee did not take this point in the earlier hearing before me, but argued that it is entitled to do so in relation to relief.

Discussion

[8] Relief in judicial review is discretionary. However, the starting point is that, having established a ground for review, the applicant is entitled to a remedy unless there are very good reasons for refusing it. In *Air Nelson Limited v Minister of Transport* [2008] NZAR 139, the Court of Appeal held:

> [59] Public law remedies are discretionary. In considering whether to exercise its discretion not to quash an unlawful decision or grant another remedy, the court can take into account the needs of good administration, any delay or other disentitling conduct of the claimant, the effect on third parties, the commercial community or industry, and the utility of granting a remedy.
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> [60] Nevertheless, there must be extremely strong reasons to decline to grant relief. For example, in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 (HL), Lord Bingham described the discretion as being "very narrow" (at p 608), whereas Lord Hoffmann said cases in which relief would be declined were "exceptional" (at p 616).
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> [61] 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. The usual assumption is that where there is "substantial prejudice" to the claimant, a remedy should issue (see *Murdoch v New Zealand Milk Board* [1982] 2 NZLR 108 at p 122. This is evident from *Unison Networks Ltd v Commerce Commission* [2007] NZCA 49, where this Court refused to grant relief, notwithstanding a finding that the Commerce Commission had acted unlawfully, on the basis that overturning the Commission's decision would occasion considerable disruption to the electricity industry and its consumers. The majority nevertheless took note of "strong cautions against exercising the discretion not to set aside an unlawful decision" (at para [81]).

[9] I also accept that the applicant can point to prejudice, albeit not to the applicant itself. Contrary to Mr McKenzie's oral submissions, unborn children as a class are not party to this proceeding, for reasons given at some length in my judgment. Nor can the applicant represent them in any formal sense, although I readily accept that it acts in their interests. However, I held that Parliament recognised the interests of the unborn child in the substantive criteria and the procedures of the abortion law. Although Parliament must have deliberately decided not to spell out any legal rights in an unborn child, as the Court of Appeal held in *Wall v Livingston* [1982] 1 NZLR 734, 737, the legislation does assert a state interest in protecting it; see my judgment at [79]. As the Court of Appeal held in *Wall v Livingston*, the matter is handled indirectly by surrounding the lawful termination of a pregnancy with the precautionary process of authorisation by two certifying consultants which must be obtained if the abortion is not to breach the criminal law. I accept accordingly that there would be prejudice to unborn children, to the extent that the Committee's misunderstanding of its statutory functions contributed to abortions being authorised unlawfully. I held, without reaching a final conclusion on the point, that there is reason to believe the law is being applied more liberally than Parliament intended.

[10] Further, non-compliance has been material. I found that the Committee has failed over many years to exercise some of its statutory powers at all, with the result that its supervision of certifying consultants has been substantially less rigorous than the legislature intended. I recognised that the Committee provides consultants with guidance about grounds for abortion and supports continuing medical education. It is not possible to say how many unlawful abortions have been performed as a result of the Committee's misunderstanding of its functions.

[11] However, other factors militate strongly against relief. To begin with, the Committee's failure to appreciate its statutory functions stems less from its interpretation of the legislation than its understanding of *Wall v Livingston*. As to that, I accept Mr McKenzie's submission that the Court has an important role in clarifying the law, but the judgment speaks for itself.

[12] Second, the Committee is a public body which accepts that it must give effect to the judgment, subject of course to an appeal which is still pending. It has begun to better inform itself about the grounds on which general practitioners refer women to certifying consultants, and takes steps to inform the consultants of their obligations. Ms Gwyn accepted that it has not reviewed the performance of certifying consultants against the statutory criteria in s 187A of the Crimes Act, calling for reports from them to the extent necessary for that purpose. In my judgment I refused mandatory relief on a number of grounds, one of which was that there was no reason to suppose that the Committee will refuse to act now that its functions have been clarified. It remains the case that the Committee can be expected to administer the law as Parliament intended, without need of formal orders.

[13] Third, and perhaps most importantly, the Committee is supervised by Parliament, which can hold it to account if it does not administer the law honestly and is the proper body to assess where the public interest lies in this field. Construction of legislation is the province of the Court, and the Court's analysis of the legislation may complement Parliamentary oversight, but to go further by making declarations is to risk assuming a function that Parliament has reserved for itself. In particular, the question whether consultants are complying with the abortion law falls to be answered by the Committee, in the first instance, and by Parliament as the body to which the Committee reports. It is for Parliament to assess Mr McKenzie's submission in this hearing to the effect that the letter of 21 May 2009 ([5] above) and its 2008 report to Parliament together show that the Committee wants the status quo to continue and is prepared to manipulate the evidence to that end; in short, that truth is the first casualty of battle. So too is Ms Gwyn's submission that the current Committee has addressed past deficiencies.

[14] Fourth, declarations risk reshaping the Committee's administrative priorities, in respect of which it has a discretion under the Contraception, Sterilisation, and Abortion Act 1977. I accept Ms Gwyn's submission that more litigation might well result. The declarations promoted by the applicant highlight this risk, focusing almost exclusively on critical scrutiny of the performance of certifying consultants and the sanctions available to the Committee if consultants cannot justify their decisions under the criteria in s 187A of the Crimes Act 1961. If granted, the

declarations would place pressure on the Committee to focus on those aspects of its work, presumably at the expense of others. That may be appropriate, but for reasons just given it is not for the Court to say so.

[15] Fifth, declarations that go beyond the language of the legislation, as these do, risk becoming a substitute for it, and may lead to confusion and requests for further clarification.

[16] Article 9 of the Bill of Rights 1688 declares that the freedom of speech and debates for proceedings in Parliament ought not to be impeached or questioned in any Court or place outside Parliament. The legislature has delegated its review of the Committee's reports to a Select Committee, and Ms Gwyn cited David McGee *Parliamentary Practice in New Zealand* (3ed 2005) at 621 for the proposition that Select Committee proceedings are as parliamentary as those on the floor of the House. Evidence before a Select Committee is protected, as is advice and draft reports generated during its work and published as part of its proceedings.

[17] Three questions arise: whether the reports are within the scope of the privilege (I understand they are not read in evidence, and that Abortion Supervisory Committee members are sometimes not invited to speak to the Select Committee at all when the reports are presented); whether they were also published outside the Select Committee's proceedings with the consequence that the privilege does not apply to the copies in evidence; and whether that Committee can and did waive the privilege, by putting the reports in evidence itself at an earlier stage of the proceeding (and relying on its 2008 report for purposes of this hearing). These are questions of practice and comity, affecting the quality of judicial as well as Select Committee proceedings: see *Boscawen v A-G* [2009] NZCA 12 at [23]-[26] and *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at [20]. But on the view I take of the case, I need not answer them.

[18] In any event, the submission that relief would offend article 9 can be disposed of shortly in the immediate circumstances. The proposed declarations are directed to interpretation of the legislation and, indirectly, the Committee's misunderstanding of *Wall v Livingston*. The Committee's reports were not relied

upon in any material way for that purpose; it made its stance perfectly clear in pleadings, other evidence and argument. The reports did form a substantial part of the evidence tending to show that the abortion law is being applied more liberally than Parliament intended, but that part of the judgment is not the subject of the proposed declarations.

Decision

[19] I decline to make declarations.

[20] In my judgment of 9 June 2008, I held that the applicant was entitled to costs, which I was inclined to set on a 2B basis with provision for two counsel. While it remains the position that the applicant has been successful overall, it has failed on this part of the case and some allowance ought to be made for that. Counsel may file memoranda if costs cannot be agreed.

Miller J

Solicitors:
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Crown Law, Wellington for the Respondent