IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-002269
[2017] NZHC 1647

BETWEEN	PHILLIP JOHN SMITH Applicant
AND	THE ATTORNEY-GENERAL ON BEHALF OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing:	3 March 2017, last submissions on 15 June 2017
Appearances:	Applicant in person A F Todd for Respondent
Judgment:	18 July 2017

JUDGMENT OF PALMER J

This judgment was delivered by me on 18 July 2017 at 11 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……..

Solicitors:
Crown Law, Wellington

And to:
The Applicant

Summary

[1] In November 2014 Mr Phillip Smith escaped from custody in New Zealand and was recaptured in Brazil. In the wake of his escape the Department of Corrections put in place a new temporary release regime which has now, itself, been replaced. There were no reintegrative releases under the temporary regime. The need for the temporary regime was attributed to Mr Smith's escape. Mr Smith challenges the temporary regime as unlawful. The Crown seeks to strike out the challenge on the ground he lacks the standing to do so.

[2] The requirement of standing in judicial review proceedings has been significantly relaxed in New Zealand. But it is not so relaxed that it is horizontal. It still exists. Personal standing is concerned with whether a litigant's personal rights and interests are affected by the decision under challenge. Public interest standing is more concerned with whether the decision under challenge is or may be unlawful. For a judicial review to be struck out on the basis of standing, claims to both personal standing and public interest standing must be so untenable that the court must be certain they cannot possibly succeed. That requires assessment of the litigant's personal rights and interests, and the merits of the challenge, on the basis the facts pleaded in the statement of claim are true. For that reason, standing will usually be considered in the course of a substantive judicial review proceeding. That allows standing to be assessed in light of the merits of the case which may illuminate the public interest at issue. And it avoids delay. Only rarely is standing likely to be a ground for striking out judicial review proceedings before a substantive hearing.

[3] Here, I consider Mr Smith is sufficiently affected by, and connected to, the decision at issue to have personal standing to bring his claim. Even if he did not, I consider there is sufficient public interest in whether the temporary release scheme was lawful that there would be public interest standing too. I decline the application.

What happened?

Mr Smith's custody and escape

[4] Mr Smith was sentenced to life imprisonment for murder in 1996. He was also sentenced for a number of child sex offences, aggravated burglary and kidnapping. He was classified as a maximum security prisoner from 1996 to 2004. From 2005 his security classification was periodically lowered. His non-parole period ended in 2009. In March 2013 Mr Smith had a minimum security classification. In 2013 and 2014 Mr Smith met the eligibility criteria for the Department of Corrections' (Corrections) temporary release system and was authorised to be temporarily released.

[5] On 6 November 2014, while on a 74-hour temporary release under supervision by an approved sponsor, Mr Smith did not return to custody. He fled to South America. He was arrested in Brazil and returned to New Zealand on 29 November 2014.

Corrections' temporary release system

[6] Sections 62 and 63 of the Corrections Act 2004 (the Act) provide for the temporary release of certain prisoners with the objective of rehabilitating prisoners, reintegrating prisoners into the community and facilitating the compassionate or humane treatment of a prisoner or otherwise furthering the interests of justice. Regulations 26 and 27 of the Corrections Regulations 2005 (the Regulations) provide for the eligibility of prisoners for temporary release and the purposes for which they may be released. Those eligible include prisoners with minimum, low or low-medium security classifications in specified circumstances.

[7] On 11 November 2014, after Mr Smith's escape, the Chief Executive of Corrections directed all temporary release of prisoners would cease, with certain exceptions, pending a comprehensive review of temporary release processes and policies. On 12 November 2014 the National Commissioner of Corrections Services issued a circular addressing temporary procedures, with guidance and guidelines for how temporary releases were to be managed pending the review. Further circulars

were issued on 14 November 2014 and 3 February 2015. These had the effect of restricting who was eligible for temporary release compared with the temporary release scheme in force before Mr Smith's escape. The interim system remained in force until 19 October 2015 when a new temporary release system came into effect.

[8] In August 2015 the Government Inquiry into Matters Concerning the Escape of Phillip John Smith/Traynor reported. An affidavit by the Chief Custodial Officer of Corrections supporting this strike out application notes that the report stated of the temporary release system:[1]

> 28.1 The number of prisoners released to outside work programmes was reduced from 443 to 264;
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> 28.2 This had a significantly adverse effect on prisoner morale;
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> 28.3 The number of reintegrative releases decreased from 214 in the six months before the escape to none between 14 November 2014 and the date of the report. As such progress of a considerable number of prisoners on reintegrative pathways who were benefitting from temporary releases, was delayed;
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> 28.4 The interim measures were restrictive and had impacts for prisoners, families, employers and community groups;
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> 28.5 Escorted temporary removals remained available for reintegrative activities but the number decreased.

Mr Smith's position since his return

[9] Mr Smith returned to custody in New Zealand on 29 November 2014. On 3 December 2014 Mr Smith was reclassified as a maximum security prisoner and placed on voluntary segregation. He had been the subject of a number of death threats from other prisoners. In July 2016 Mr Smith was convicted for escaping from lawful custody and breach of the Passports Act 1992 and sentenced to 33 months' imprisonment. Mr Smith's security classification has subsequently been changed. In February 2017 he succeeded in a judicial review of Corrections' decisions about his security classification decisions in 2014 and 2015.[2] I am advised his current classification is low-medium.

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1 Affidavit of Neil Stuart David Beales (8 December 2016) at [28].

2 *Smith & Anor v Attorney-General* [2017] NZHC 136, [2017] NZAR 331.

This proceeding

[10] Mr Smith seeks judicial review of Corrections' decisions to issue interim guidelines for temporary release. He says various aspects of the interim guidelines:

(a) were unlawful for inconsistency with the Act and the Regulations;

(b) unlawfully fettered the Chief Executive's and others' discretion; and

(c) were unlawful acts of dictation to prison directors.

[11] Mr Smith seeks declarations of the illegality of those aspects of the interim guidelines and orders quashing the decisions challenged. The Crown defends the proceeding and pleads, as an affirmative defence, that Mr Smith lacks standing to apply for judicial review, which is moot because the circulars are no longer in force.

[12] The Crown also filed an application to strike out the statement of claim, and for costs, on the grounds it discloses no reasonably arguable cause of action and is an abuse of process because the applicant has no standing to bring the proceedings. Mr Smith opposes the Crown's application. This judgment decides the application.

[13] Since the hearing of this application I have been advised by the Crown that four prisoners have filed proceedings against Corrections in negligence, for loss of wages incurred as a result of the suspension of the release to work programme.

The law of strike out and standing

Strike out

[14] There is no dispute about the principles that govern the strike out of proceedings. Rule 15 of the High Court Rules 2016 provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
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> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

(2) If the court strikes out a statement of claim or a counterclaim under subclause (1) it may by the same or a subsequent order dismiss the proceeding or the counterclaim.

(3) Instead of striking out all or part of a pleading under subclause (1) the court may stay all or part of the proceeding on such conditions as are considered just.

(4) This rule does not affect the court's inherent jurisdiction.

[15] The approach to strike out is well-established. As summarised by the Court of Appeal in *Attorney-General v Prince and Gardner* and a minority of the Supreme Court in *Couch v Attorney-General*:[3]

(a) the facts pleaded are assumed to be true;

(b) the causes of action must be so untenable the court is certain they cannot possibly succeed;

(c) the jurisdiction is to be exercised sparingly and only in a clear case;

(d) the jurisdiction is not excluded by the need to decide difficult questions of law; and

(e) particular care is required in areas where the law is confused or developing.

[16] The Court of Appeal has also stated that the grounds for strike-out in r 15.1(1)(b)–(d) concern the misuse of the court's processes.[4]

[17] Here the Crown's application to strike out the statement of claim is based only on the proposition that Mr Smith lacks standing to bring the proceeding.

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3 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

4 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89].

Standing

[18] The requirement of standing in judicial review proceedings has been significantly relaxed in New Zealand. But it is not so relaxed that it is horizontal. It still exists. The requirement of standing reflects the general attitude of the New Zealand legal system that a judicial decision on the application of law is made in a context of particular facts. In general, New Zealand courts do not give advisory opinions.[5]

[19] The requirements of standing were significantly relaxed in both the United Kingdom and New Zealand in the 1980s. In *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd (Fleet Street Casuals)*, the House of Lords considered the question of standing as a preliminary point. Lord Wilberforce, supported by Lord Fraser, observed:[6]

> There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties and to the breach of those said to have been committed. In other words, the question of sufficient interest can not, in such cases, be considered in the abstract , or as an isolated point: it must be taken together with the legal and factual context. The rule [of court] requires sufficient interest *in the matter to which the application relates.*

[20] Lord Wilberforce considered, irrespective of standing, judicial review could not succeed so the federation had not shown sufficient interest in the matter.[7] His speech reflected the views of the majority of the House.

[21] Lord Diplock also regretted the form in which the case came to the House, deflecting the courts below from the substantive issues.[8] He considered it was not "helpful" to say the federation did not have a sufficient interest because judicial

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5 *Gordon-Smith v R* [2008] NZSC 56, [2009] 1 NZLR 721 at [18].

6 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 630 (emphasis in the original).

7 At 635–636.

8 At 636.

review is available only for unlawful conduct.[9] He preferred to allow the appeal upon the more general ground that it had not been shown the respondent did anything unlawful. He quoted Lord Denning:[10]

> I agree in substance with what Lord Denning MR said at p 559, though in language more eloquent than it would be my normal style to use:
>
> > I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts *in their discretion,* can grant whatever remedy is appropriate.
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> The reference here is to flagrant and serious breaches of the law by persons and authorities exercising governmental functions which are continuing unchecked. To revert to technical restrictions on locus standi to prevent this that were current 30 years or more would be to reverse that progress towards having a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my lifetime.

[22] Lord Diplock explained the English judicial review procedure by which leave to apply for judicial review was considered first, including the question of sufficient interest, and then the application itself.[11] He considered "[i]f, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief".[12] Lord Diplock would have held the applicant did have a sufficient interest. He said:[13]

> It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

[23] Lord Diplock's view showed the way for the subsequent development of the law in both the United Kingdom and New Zealand. In 1981 Cooke J, for the Court

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9 At 637.
10 At 641, citing *R v Greater London Council, ex parte Blackburn* [1976] 1 WLR 550, 559. Italics added by Lord Diplock.
11 At 642.
12 At 644.
13 At 644.

of Appeal in *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)*, quoted with approval the statements by Lord Diplock quoted above. Since then the New Zealand courts have taken a "generous approach" or "more relaxed attitude" to questions of standing in judicial review cases which is "very liberally available".[14]

[24] Here, the Crown relied on recent United Kingdom cases which emphasise the context-dependent nature of an inquiry into standing. In the United Kingdom Supreme Court in respect of Scotland in 2011, in *AXA General Insurance Ltd v HM Advocate & Ors*, Lord Reed distinguished between rules of standing in private and in public law on the basis there is a public interest involved in judicial review proceedings whether or not private rights may also be affected.[15] He suggested a requirement to demonstrate an interest will not "operate satisfactorily" if applied in the same way in all contexts, stating "the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court".[16] He considered sufficient interest depended on context "and in particular upon what will best serve the purposes of judicial review in that context".[17] Standing to oppose the judicial review was upheld and the judicial review was dismissed on its merits.[18]

[25] The Crown also relied upon the New Zealand Court of Appeal judgment in *Attorney-General v Taylor*, which recently considered standing in the context of a claim for a declaration of inconsistency with the Bill of Rights.[19] The Court considered standing matters because courts will not embark upon general inquiries into conflicts between legislation and protected rights.[20] The Court referred to United Kingdom Human Rights Act jurisprudence to the effect that, in some circumstances, a representative plaintiff can initiate proceedings but only when no

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14 *Ye v Minister of Immigration* [2009] 2 NZLR 596 (CA) at [322]; *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [91](a); *Kim v Prison Manager, Mount Eden Correctional Facility* [2012] NZSC 121, [2013] 2 NZLR 589 at [76].

15 *AXA General Insurance Ltd v HM Advocate & Ors* [2011] UKSC 46, [2012] 1 AC 868 at [169].

16 At [170].

17 At [170].

18 The Crown also relied on *Hussein v Secretary of State for Defence* [2014] EWCA 1087. The English Court of Appeal there considered an appellant in Iraq did not have standing to challenge the legality of interrogation techniques to which he had not been subjected. But that does not add much to *AXA General Insurance Ltd.*

19 *Attorney-General v Taylor* [2017] NZCA 215. This judgment is currently under appeal, including in relation to standing.

20 At [166].

other plaintiff will step forward. It did not refer to, and I do not consider it affects, the general law of standing in judicial review proceedings.

[26] There is also an academic debate about the purpose of standing which derives from distinct views about whether the principal function of judicial review is to protect individual rights or to protect the public interest.[21] But, of course, the law of judicial review can serve both or either of those functions. Which dominates depends on both the facts and the relevant law in the individual case. So context is relevant. But it is not everything. The substantive law also matters. Which may be why it is difficult to divorce questions of standing from the merits of the application of the law of judicial review to a particular factual context.

[27] I agree with the Crown's summary of the current law of standing in New Zealand.[22] A party who has a personal interest at stake, or whose personal rights and interests are affected, has standing to bring a proceeding. If not, he or she may be permitted to pursue a claim if that is warranted by the public interest in the administration of justice and the vindication of the rule of law. The apparent merits of the case are relevant to that assessment, as is whether a wider issue of general importance is raised. Standing is not automatic and decisions are made on the totality of facts, with a generous approach prevailing.

[28] Personal standing is concerned with whether a litigant's personal rights and interests are affected by the decision under challenge. If they are, sufficient standing will exist to apply for judicial review of the decision. Public interest standing is more concerned with whether the decision under challenge is or may be unlawful. If so, standing is also likely to exist.

[29] The point this emphasises, which is also encapsulated in the Crown's summary and the context-dependency of *AXA General Insurance Ltd*, is the relevance of the merits of the case to the assessment of public interest standing. This

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21 Mark Elliott and Jason N E Varuhas *Administrative Law: Text and Materials* (5th ed, Oxford University Press, Oxford, 2017 at ch 14.7; Jason N E Varuhas "The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications" in John Bell, Mark Elliott, Jason N E Varuhas and Philip Murray (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, Oxford, 2016) 45 at 57–60.

22 Crown's Submissions of 10 February 2017 at [44], summarised in the rest of the paragraph.

point was emphasised by both Lord Wilberforce and Lord Diplock in *Fleet Street Casuals* in relation to the English two-step process of seeking leave for, and then hearing the substantive argument of, a judicial review. There may be "simple cases" where a person has insufficient interest to support grant of leave but "in other cases" it will be necessary to consider the substantive case. And if, "on a quick perusal", the court thinks there is an arguable case in favour of granting the relief claimed, leave should be granted. It is the substantive merit of the challenge that is relevant to public interest standing, not the likelihood of relief, which is discretionary in judicial review proceedings.

[30] I consider a similar approach applies to applications to strike out judicial review proceedings for lack of standing. For a judicial review to be struck out on the basis of standing, claims to both personal standing and public interest standing must be so untenable that the court must be certain they cannot possibly succeed. That requires assessment of the litigant's personal rights and interests, and the merits of the challenge, on the basis the facts pleaded in the statement of claim are true. If the personal interest of a litigant may be impacted by the decision under challenge, or the decision under challenge may be unlawful, an application to strike out a judicial review proceeding on the ground of standing cannot succeed. Rather, the substantive judicial review proceeding, which is supposed to be simple, un-technical and prompt, would need to be heard.

[31] For that reason, objections to standing in judicial review proceedings will usually be considered in the course of the substantive proceeding. That allows standing to be assessed in light of the merits of the case which may illuminate the public interest at issue. And it avoids delay. It is no coincidence that the Crown was not able to point to a New Zealand judgment striking out a judicial review proceeding on the basis only of standing. Only rarely is standing likely to found striking out judicial review proceedings before a substantive hearing.

Submissions

[32] Ms Todd, for the Crown, submitted Mr Smith is not personally affected by the guidelines he seeks to challenge because:

(a) the guidelines under challenge no longer exist;

(b) although Mr Smith was technically subject to the guidelines for a few days he was not affected by them because as a maximum security prisoner he did not, and it would have been very difficult for him to, apply under them for temporary release;

(c) the class of people affected by the guidelines, who were eligible for release and refused release, have not brought proceedings;

(d) the issues have been ventilated in a public inquiry; and

(e) Mr Smith would not be vindicated if the guidelines were unlawful.

[33] Ms Todd submitted public interest standing is not appropriate here. She distinguished cases where standing had been upheld, especially cases taken by public interest community groups in relation to environmental issues. She submitted the relief sought would have no practical utility.

[34] Mr Smith responded that what really matters is the merits of his case and, on that, the Chief Executive of Corrections must act within the law. He submitted:

(a) the guidelines directly conflicted with the Act and the Regulations;

(b) he was directly subject to the guidelines and even if he wanted to apply under them he could not because of the (unlawful) substance of the guidelines;

(c) his security classifications were found to have been unlawful by the High Court so the Crown could not second guess what they should have been;

(d) the Inquiry found the interim guidelines had a significant effect on prisoner morale which may have affected others not bringing proceedings;

(e) the Inquiry was not a judicial authority and was not able to rule on unlawfulness but it did allude to an unlawful fettering of discretion and the Government and the public are entitled to know if they can rely on its contents, as they were in *Peters v Davison*;[23]

(f) the relief he seeks would be useful because: it is not in the public interest that prisoners should be subjected to unlawful regulations; a declaration may assist to open up other legal options; and accountability is important to ensure the Department of Corrections understands the limits of its power and to vindicate the rule of law; and

(g) he would be personally vindicated because his escape would no longer be regarded by his fellow prisoners as leading to the imposition of the guidelines for which he would not be seen as responsible.

Does Mr Smith have standing?

[35] Mr Smith was subject to the guidelines from 29 November 2014 to 3 December 2014. If he is correct they were unlawful, he may have been able to apply for temporary release. Given the circumstances of his escape while on temporary release it seems highly unlikely he would have been granted temporary release. But that does not mean he was not subject to their legal effect. Mr Smith is also connected to the guidelines by virtue of their imposition being caused by his escape. I consider Mr Smith's rights and interests are somewhat affected by the guidelines.

[36] Irrespective of Mr Smith's personal standing, I consider the merits of the judicial review are arguable. Sections 62 and 63 of the Act appear to envisage a regime under which at least some prisoners are temporarily released for the objectives of rehabilitation, reintegration or otherwise furthering the interests of justice. At first glance, legislative provision for such a regime is not susceptible to being overridden on a blanket basis by executive decision by Corrections. Assessing

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[23] *Peters v Davison* [1999] 2 NZLR 164 (CA).

that will require assessment of the reasons for the suspension on 11 November 2014 to be given in evidence in a substantive hearing. And, according to the Inquiry, Corrections' decision had a significantly adverse effect on morale, delayed reintegration of a considerable number of prisoners and had impacts on prisoners, families, employers and community groups. On the basis of the facts as pleaded, the decision under challenge may be unlawful with significant consequences. If so, there is a public interest in vindication of the rule of law by way of judicial review.

[37] Accordingly I do not consider Mr Smith's claim to either personal or public interest standing is so untenable the proceeding should be struck out.

Result

[38] I decline the application to strike out the proceeding. I order the Crown to pay the reasonable disbursements of Mr Smith.

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Palmer J