IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2021-409-4
[2021] NZHC 1935

UNDER	the New Zealand Bill of Rights Act 1990
BETWEEN	PHILLIP JOHN SMITH Plaintiff
AND	THE ATTORNEY-GENERAL Defendant

Hearing: 16 July 2021

Counsel: P J Smith (self-represented Plaintiff)
K Laurenson and R M McMenamin for Defendant

Judgment: 29 July 2021

JUDGMENT OF ASSOCIATE JUDGE LESTER

This judgment was delivered by me on 29 July 2021 at 3.00 pm
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

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[1] The defendant applies to strike out the plaintiff's claim. Unusually there is little, if any, dispute as to the factual allegations raised in the statement of claim. The application to strike out is brought on the grounds the plaintiff lacks standing as he has no connection to the events set out in the statement of claim and, in addition, that the plaintiff cannot advance a claim on behalf of others as he is not a solicitor.

Context and background

[2] What follows is from the submissions for the defendant and is not in dispute.

[3] On 7 January 2021 at Rolleston Prison, a group of ten prisoners from the Kia Marama unit were engaged in work in the prison garden. At the conclusion of the work, a harvest knife described as being large, could not be located. The staff involved from the Department of Corrections (the Department) decided to conduct a strip-search of the ten prisoners who were in the work party in order to find the knife. The knife was not found and it later transpired it was with a third party provider who had been assisting with the work in the garden.

[4] The plaintiff, Mr Smith, was not in the work party and was not one of those prisoners searched, although he was placed in the Kia Marama unit at that time and remains placed in it at present.

[5] The Department accepts that a metal detector or scanner should have been used at least as the first step to try and locate the knife and, as a result, the Department has made settlement offers to all 10 prisoners. Eight prisoners have executed a Deed of Settlement and Release. A further prisoner has accepted the offer by letter but has not yet signed a Deed of Settlement. The Department intends to continue attempts to settle with the remaining prisoner. That prisoner has not sought to be joined to these proceedings.

The statement of claim

[6] The statement of claim pleads the Corrections staff involved did not have reasonable grounds for the search, which renders the strip-searches of the 10 prisoners

on 7 January 2021 illegal and unreasonable, in breach of s 21 of the New Zealand Bill of Rights Act 1990 (NZBORA).

[7] The plaintiff seeks a declaration that the search was illegal and in breach of s 98(3)(a)(i) of the Corrections Act 2004 (the Act), together with a declaration that the search was unreasonable and in breach of s 21 of the NZBORA.

[8] The statement of claim also sought public law compensation of $1,500 for each of the 10 prisoners strip-searched on 7 January 2021. That claim was abandoned by the plaintiff in his written submissions.

[9] In a practical sense, the plaintiff's withdrawal of the application for compensation highlights the issues in this case. In seeking compensation on behalf of non-parties, the plaintiff was effectively seeking to represent those non-parties. The proceeding sought a remedy on their behalf when they were not named as parties to the proceeding. The plaintiff was correct to withdraw this part of his claim. As a result, the defendant did not advance its challenge to this proceeding on the basis Mr Smith could not represent the 10 individuals as if he were counsel.

Submissions on standing

[10] Ms Laurenson, for the defendant, noted the present proceeding is not an application for judicial review. However, with the plaintiff abandoning the claim for damages on behalf of the non-parties, Ms Laurenson submitted there was no distinction between the standing the plaintiff would require to bring judicial review proceedings and the standing required for this proceeding. I agree. With a technical approach to standing no longer existing, whether Mr Smith has standing should not depend on the form of the proceeding – that is whether it is a judicial review proceeding or an ordinary proceeding seeking a declaration of breach of the NZBORA.

Personal standing

[11] The plaintiff submits he has personal standing by virtue of his being subject to a practice that allowed blanket strip-searching during the period prior to the 2021 decision challenged in this proceeding and the Department's subsequent reminder to

staff to comply with the prescribed requirements for such searches. While the plaintiff acknowledges he was not strip-searched, he says he was nevertheless subject to the effect of the practice that allowed it. The plaintiff submits that on a generous approach this sufficiently connects him to the case to give him personal standing.

[12] In an earlier memorandum dated 8 March 2021, the plaintiff put standing slightly differently. He said:

> The plaintiff in the current proceeding is connected to the strip-searching because he resides in the same unit as the 10 prisoners that were searched and is at risk of being a victim of the same alleged practice if it is not subjected to the supervisory jurisdiction of the Court.

[13] I do not accept the idea the plaintiff was at risk of an unlawful practice that did not eventuate is enough to give him personal interest standing.

[14] In support of the plaintiff's submission that he had personal standing, the plaintiff refers to *Smith v Attorney-General*, where the Department of Corrections put in place a temporary release regime that had the effect of prohibiting all temporary release of prisoners pending a review.[1] The Department then issued interim guidelines that restricted the prisoners eligible for temporary release. The Department's decisions to issue these guidelines were challenged by the plaintiff. The defendant argued the plaintiff was not directly impacted by the Guidelines because, as a maximum security prisoner, it would have been difficult for him to be granted temporary release in any event. Palmer J disagreed and noted the fact it was highly unlikely the plaintiff would be granted temporary release did not mean he was not subject to the legal effect of the guidelines.

[15] In my view, the situation before Palmer J was quite different from the present case.

[16] In *Smith v Attorney-General*, the plaintiff was subject to a policy that had a direct if unlikely effect on him.[2] His right to seek temporary release, however

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1 *Smith v Attorney-General* [2017] NZHC 1647, [2017] NZAR 1094.
2 *Smith v Attorney-General,* above n 2.

unlikely to succeed, was curtailed. Accordingly, a right or interest which would otherwise have been held by the plaintiff was in that case affected by the guidelines.

[17] Here, it is unconvincing for the plaintiff to say he was subject to the effect of the practice that allowed the strip-search to occur. This seems to be an argument that because the plaintiff *might* have been subject to such an unlawful search, he has personal interest standing. That is to erroneously equate a breach of rights that *might* have but did not occur in the past with an *actual* (if theoretical) curtailment of rights.

[18] In a similar proceeding, *Taylor v Attorney-General*, where the plaintiffs (including the present plaintiff) were strip-searched, it was claimed the searches were unlawful and in breach of NZBORA and compensation was sought.[3] Messrs Taylor and Smith were two of a large number of prisoners strip-searched.

[19] Accordingly, the proceeding was similar to the present one in that declarations and damages were sought. Peters J said:[4]

> …. Mr Taylor and Mr Smith emphasised that 209 prisoners were searched. I do not consider this affects the outcome. It was open to those prisoners to join this proceeding if they wished. Given they did not, the plaintiffs' case stands or falls on the strip-searches of them.

[20] In terms of personal standing, I see the present case as being the same as that before Peters J. The plaintiff's personal standing stands or falls on what actually happened to him not what might have happened. In fairness, Mr Smith, while not conceding the personal interest point, submitted his claim to public interest standing was the stronger of the two.

Public interest standing

[21] The plaintiff says he is representing the protection of his own rights and the public interest in upholding the rule of law.

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3 *Taylor v Attorney-General* [2018] NZHC 2557.
4 *Taylor v Attorney-General*, above n 4, at [95].

[22] In the judicial review context, Palmer J in *Smith v Attorney-General* said:[5]

> [27] I agree with the Crown's summary of the current law of standing in New Zealand. 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.
>
> (footnote omitted)

[23] The defendant acknowledged at the hearing of its application that the searches were unlawful. It has paid compensation to eight of those affected prisoners on a full and final basis, with a settlement pending in respect of one more prisoner and negotiations continuing with the tenth prisoner.

[24] While personal standing turns on whether a plaintiff's personal rights and interests are affected by the challenged decision "[p]ublic interest standing is more concerned with whether the decision under challenge is or may be unlawful".[6] If the decision is unlawful, standing is likely to exist.[7]

[25] Of significance to the present application is the following statement from Palmer J's decision in *Smith*:[8]

> 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.

[26] Relying on the above passage, Mr Smith submitted that once the defendant conceded the search was unlawful, it was not possible to say this was one of those "rare cases" when a strike out on the basis of a lack of standing was appropriate.[9] I agree.

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5 *Smith v Attorney-General*, above n 2.
6 *Smith v Attorney-General*, above n 2, at [2] and [28].
7 *Smith v Attorney-General*, above n 2, at [28].
8 *Smith v Attorney-General*, above n 2, at [29].
9 *Smith v Attorney-General*, above n 2, at [2].

[27] Ms Laurenson's submissions focused on the proposition that it was highly unlikely in the circumstances of this case that the Court would make the declaration sought by the plaintiff. Ms Laurenson submitted there was no utility in recognising the plaintiff as having public interest standing as the defendant's actions to date rendered any declaration redundant.

[28] Ms Laurenson said the settlements reached directly with the prisoners by the defendant meant:

(i) the prisoners' interests have been vindicated;

(ii) the remaining prisoner can bring proceedings if he chooses not to accept the settlement offer; and

(iii) the actions put in issue in this proceeding have been traversed with the affected parties through their settlement process.

[29] Ms Laurenson relied on *Mitchell v Attorney-General*.[10] In *Mitchell*, a former prisoner sought judicial review of the decision to strip search 15 other prisoners. The search took place while the plaintiff was a serving prisoner but she was not searched herself. The Department challenged the plaintiff's standing. In that case, if the plaintiff's standing was not recognised, Thomas J concluded the matters in issue would not be adequately traversed by other parties. The Judge held that warranted a "relatively flexible approach" to standing given the importance of the protected values at play.[11] Ms Laurenson submitted that in this case, there was no risk of the events not being traversed because such had already occurred through the settlement process. There was accordingly no need to find the plaintiff had public interest standing.

[30] That said, Ms Laurenson accepted the fact that there might be a person with private interest standing did not of itself exclude the possibility that a plaintiff could demonstrate they had public interest standing.

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10 *Mitchell v Attorney-General* [2017] NZHC 2089, [2017] NZAR 1538.
11 At [51].

[31] In my view, the approach advanced by Ms Laurenson is not consistent with the approach laid down by Palmer J noted above at [25]. Ms Laurenson, when addressing this passage from Palmer J's decision in *Smith*, noted that in the preceding sentence his Honour says: "if, 'on a quick perusal', the court thinks there is an arguable case in favour of granting the relief claimed, leave should be granted".[12] Ms Laurenson said this meant that the availability of relief could be assessed when considering standing. However, this statement (as noted by Palmer J) was made in the context of the English practice where all applications for judicial review require the granting of leave as a threshold step. I do not read para [29] of *Smith* as a whole as meaning that standing should depend on an examination of whether relief will in fact be granted.

[32] Ms Laurenson also argued that the proceeding was rendered moot by the settlements that had been reached.

[33] Mr Smith relied on Brewer J's decision in *Taylor v Attorney-General*, in which a prisoner challenged a regulation banning tobacco in prisons.[13] By the time of the hearing the Government had passed retrospective legislation to address the issues raised by Mr Taylor. Accordingly, the defendant said the declarations sought by Mr Taylor were moot. Brewer J did not accept that submission. He said:[14]

> In my view, there is a public interest in the Court addressing allegations that prisoners have been subjected to unlawful regulation, even if the only remedy might be a declaration that this happened."

[34] This principle is not restricted to situations where prisoners have been subjected to unlawful regulation. As Thomas J in *Mitchell* said:[15]

> I consider there is a clear public interest in judicial intervention to prevent or remedy the unlawful actions which affected a number of women. The broader public interest is served by holding Corrections to account for the unlawful treatment of sentenced prisoners. There is a public interest in the administration of justice and vindication of the rule of law.

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12 *Smith v Attorney-General*, above n 2, at [29].
13 *Taylor v Attorney-General* [2013] NZHC 1659.
14 *Taylor v Attorney-General*, above n 11 at [13].
15 *Mitchell*, above n 10 at [52], citing *Smith v Attorney-General*, above n 1, at [27].

[35] *Taylor* also concerned whether Mr Taylor had standing, given Mr Taylor was not a smoker. Brewer J said:[16]

> However, New Zealand has a liberal approach to standing. I consider that as a prisoner the applicant has a legitimate interest in decisions which affect prisoners' rights. I recognise his standing to bring this case.

[36] Mr Smith said that, as a long-serving prisoner, he also has a legitimate interest in decisions which affect prisoners' rights.

[37] A similar comment was made by Elias CJ in *Attorney-General v Taylor*, the prisoners' voting rights case, where her Honour addressed Mr Taylor's standing to apply for a declaration and said: "Mr Taylor cannot be treated as a busy-body with no sufficient interest in vindication of the rights of prisoners."[17]

[38] I note Ms Laurenson's submission that the present situation is different from the tobacco case and the voting rights case as they concerned issues of policy or guidelines, rather than a one-off search. However, this is not a point of distinction on which a strike out application should turn as it is ultimately an argument as to the utility or availability of relief. Mr Smith submitted that the search may have been a result of a failure to properly train or educate the staff as to the Department's policies. On that, I cannot comment but such is a matter relevant to relief, not standing.

[39] The only ground relied on for the mootness argument was the settlements with up to nine of the ten prisoners subject to the search. I am satisfied this ground is not sufficient to strike out the claim.

[40] It follows from the above that I am satisfied that the defendant has not met the high threshold for a strike out on the grounds of standing. In order for the case to be struck out on the basis of standing, the claim to public interest standing must be so untenable that the Court must be certain it cannot possibly succeed.[18]

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16 *Taylor v Attorney-General*, above n 11, at [15].
17 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [120].
18 *Smith v Attorney-General*, above n 2, at [30].

[41] With the defendant's concession that the search was unlawful and the acceptance the same approach to standing in judicial review applies in this context, it follows the strike out application must be ***dismissed***.

Costs

[42] Mr Smith asks to be heard on a claim for disbursements, having accepted that he cannot claim costs as a self-represented litigant. If disbursements cannot be agreed, Mr Smith is to file a memorandum setting out his claim within 10 working days of the date of this judgment.

Associate Judge Lester

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