IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-35
[2013] NZHC 1659

BETWEEN	ARTHUR WILLIAM TAYLOR Applicant
AND	THE ATTORNEY-GENERAL First Respondent
	THE MANAGER OF AUCKLAND PRISON Second Respondent
	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Third Respondent

Hearing:	7 and 8 March 2013
Counsel	Applicant in person AM Powell and MJ Cameron for Respondents GM Coumbe, counsel assisting the Court
Judgment:	3 July 2013

JUDGMENT OF BREWER J

This judgment was delivered by me on 3 July 2013 at 10:00 am pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

SOLICITORS/COUNSEL
Crown Law (Wellington) for Respondents
Gillian Coumbe (Auckland) – counsel assisting the Court
(Copy to Applicant in person)

Introduction

[1] The applicant is a sentenced prisoner. He brings this case in protest at prohibitions on prison inmates possessing or smoking tobacco. These prohibitions, he submits, were, for a relevant period, unlawful. He seeks declarations to that effect.

Background

The 2012 case

[2] This is the second case brought by the applicant on this topic. On 20 December 2012, he obtained a declaration that a rule made by the manager of Auckland Prison, which came into force on 1 July 2011, banning smoking in all areas of Auckland Prison was unlawful, invalid and of no effect.[1]

[3] To understand the issues in this case, it is necessary to understand the 2012 case:[2]

> [1] In June 2010, the Chief Executive of the Department of Corrections announced a policy to make New Zealand prisons smoke-free from 1 July 2011. A 12 month nationwide campaign to prepare for the ban on smoking in prisons commenced. Its aim was to discourage smoking by prisoners and Corrections staff and to prepare them for the ban by providing aids such as nicotine patches.
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> [2] On 1 June 2011 the Chief Executive directed prison managers to introduce a rule prohibiting smoking in all areas of all prisons in accordance with a sample rule provided. The stated objective of the rule was "to implement the Department's policy decision that except for designated smoking areas outside the secure prison perimeter, the prison estate would be smoke-free from 1 July 2011". The rule was to be made under s 33 of the Corrections Act 2004 (the CA) which empowers the Chief Executive to authorise a prison manager to make rules that the manager considers appropriate for the management of the prison and the conduct and safe custody of the prisoners.
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> [3] The manager of Auckland Prison immediately made a rule for Auckland Prison, in line with the sample rule provided, as follows:
>
> **AUCKLAND PRISON**
>
> **PRISONER INSTRUCTION - PRISON RULE**

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1 *Taylor v Auckland Prison* [2012] NZHC 3591.
2 Ibid.

Date: 01 June 2011

Review Date: N/A

Prisoner Instruction – Auckland Prison Smoking Policy

Pursuant to Section 33 of the Corrections Act 2004, I am instituting a rule that forbids any prisoner smoking tobacco or any other substance, or have in possession any tobacco or tobacco related item on Auckland Prison property. This instruction covers all areas within the secure perimeter of the prison site. It also includes all Department of Corrections buildings, car parks, roadways and grounds, including the Regional Office, Training Department, CIE buildings, Spotless buildings and Living Earth compound.

Furthermore prisoners are also forbidden from smoking while on temporary removal from Auckland Prison.

This rule is effective from 01 July 2011.

[4] Two days later, tobacco and smoking-related items were reclassified as unauthorised items in terms of the Prohibited Items Schedule to the Prison Services Operational Manual. Then, on 1 July 2011, the Department removed tobacco and smoking-related products from the list of authorised items prisoners could purchase. The ban took effect that day.

[5] Similar rules were made by all other prison managers so that there is now a blanket ban on smoking by prisoners at all times and in all areas of prisons throughout New Zealand. The ban extends to possession of tobacco and tobacco-related products. The result is that prisoners are now denied access to an activity that is lawful outside prison subject only to the restrictions in the Smoke-free Environments Act 1990 (the SEA). Even remand prisoners, who have not been found guilty of any crime and are presumed by law to be innocent, are subject to these restrictions. They may be arrested, detained in custody and forced to undergo immediate nicotine withdrawal, all in the same day.

[4] Section 33 of the Corrections Act 2004 ("the CA") provided, relevantly:

33 Manager may make rules for prison

(1) The chief executive may authorise the manager of a corrections prison to make rules that the manager considers appropriate for the management of the prison and for the conduct and safe custody of the prisoners.

(2) ...

(3) An authorisation given by the chief executive … under subsection (1) … may be subject to –

(a) any conditions imposed by the chief executive… :

(b) any limitations placed on the scope or subject matter of the rules by the chief executive…

(4) Any rules made under subsection (1) … may be revoked at any time by the prison manager and, –

(a) in the case of rules made by the manager of a corrections prison, by the chief executive:

(b) ...

(5) Any rules made under subsection (1) … must not be inconsistent with this Act, the Sentencing Act 2002, the Parole Act 2002, or any regulations made under any of those Acts.

[5] However, s 6A of the Smoke-free Environments Act 1990 ("the SEA") provided specifically for regulating smoking in prisons:

6A Smoking in prison cells

(1) The superintendent of a prison must ensure that there is a written policy on smoking in the prison's cells, prepared for the protection of the health of employees and inmates.

(2) The policy—

(a) must be based on the principles that—

(i) as far as is reasonably practicable, an employee or inmate who does not smoke, or does not wish to smoke in the prison, must be protected from smoke arising from smoking in the prison's cells:

(ii) unless it is not reasonably practicable to do otherwise, an inmate who does not wish to smoke in his or her cell must not be required to share it with an inmate who does wish to smoke in it; and

(b) must state the procedure for making complaints under this Part.

(3) The superintendent—

(a) must ensure that the policy complies with subsection (2); and

(b) must take all reasonably practicable steps to ensure that the policy is complied with.

[6] Gilbert J concluded that Parliament intended smoking in prison cells to be regulated by the policy required by s 6A of the SEA, not by rules made under s 33 of

the CA.[3] His Honour also found that at the time the rule was made it was inconsistent with reg 158(1)(h) of the Corrections Regulations 2005. This provision included tobacco in a list of things which could not be forfeited as a penalty for misbehaviour. The rule was therefore declared unlawful, invalid and of no effect.

The Government's response

[7] Unfortunately for those in prison who wanted access to tobacco, the Government was determined to keep prisons smoke-free. It took two steps which are at the centre of the issues I have to decide.

[8] The first step occurred during the period in which Gilbert J was reaching his decision in the 2012 case. On 2 November 2012, the Corrections Amendment Regulations 2012 came into force. A new reg 32A declared tobacco and any equipment used for smoking it to be unauthorised items (and hence forbidden to inmates). Regulation 158(1)(h) was amended by deleting the word "tobacco" (and thus it no longer conflicted with the rule which was the subject of the 2012 proceeding).

[9] The applicant saw this step as being unlawful. He filed this proceeding on 7 January 2013 challenging the new anti-smoking regulations. He also sought to compel the second respondent to comply with s 6A of the SEA by putting in place a written policy on smoking in the prison's cells.

[10] The second step occurred after the applicant filed this proceeding. On 26 February 2013, Parliament passed the Corrections Amendment Act 2013, the relevant sections of which came into force on 5 March 2013. The Amendment Act included a number of anti-smoking measures which were introduced to the House by the Minister of Corrections on 12 February 2013 via a Supplementary Order Paper.

[11] Counsel assisting the Court, Ms Coumbe, describes the relevant amendments:[4]

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3 Ibid, at [28].

4 Submissions of counsel assisting the Court, dated 27 February 2013, at 1.3(c).

- imposing, as from the date of assent, a statutory ban on smoking and possession of tobacco in prisons, achieved by (i) amending the definition of an "unauthorised item" in s 3(1) of the CA to include tobacco and smoking equipment, (ii) amending s 129 of the CA to make smoking a disciplinary offence, and (iii) repealing s 6A of the SEA and removing the "prison cell" exemption from the ban on smoking in the workplace;

- purporting to validate the Rule (and the identical rules made in other prisons) and the regulations, as from 12 February 2013, and no earlier (s 179AA(1)). Subs (1) seeks to do this by providing that as from 12 February those rules and regulations must be treated as if made after Part 3 of the Bill came into force. Part 3 repeals s 6A of the SEA ...;

- preventing, as from 12 February 2013 the bringing of further proceedings against the Crown "questioning the validity" of the rules and regulations (s 179AA(2)) ...;

- restricting this proceeding by limiting any relief (insofar as it relates to the regulations) to the period before 12 February 2013 (s 179AA(3)).

Is there now anything to be determined?

[12] There is an old aphorism: "*vox populi vox Dei*" ("the voice of the people is the voice of God"). In New Zealand, that voice is made law by Parliament. The law now is that prisoners are banned from possessing tobacco and it is a disciplinary offence for them to smoke it. Mr Powell for the respondents submits that there is no point in me giving judgment on the issues pleaded by the applicant. Nothing that I can order could have any utility.

[13] I have decided that I should give judgment on the substantive issues raised by this case. The applicant's principal pleading is that the anti-smoking regulations were unlawful. He argues that they were not authorised by the statute under which they were made and they contradict other statutes. It is part of our democracy that Parliament delegates to the Government the right to make laws by way of regulations. It is important that the Government keeps within the terms of these delegations. It is particularly important where a delegation relates to the use of coercive power. 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. Equally, there is a public-interest utility in a decision that this did not happen.

[14] I think there might be a practical utility also. The anti-smoking regulations were in force from 2 November 2012 until 5 March 2013. The Amendment Act retrospectively validated them from 12 February 2013. If the anti-smoking regulations are declared invalid, prisoners who had disciplinary action taken against them could apply for relief. The relief could include correction of their disciplinary record (an adverse record can affect consideration of parole) and compensation.[5]

[15] It was suggested that the applicant should not be given standing in this case. He is not himself a smoker, and although it was said at one point that he had suffered a disciplinary consequence because he was found to possess tobacco, that is not pleaded. 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.

Should the respondents be allowed to defend the case?

[16] The applicant also raised a potential "knockout point". It is that the respondents are precluded from arguing against the invalidity of the anti-smoking regulations because that issue has been decided between the parties in the applicant's favour by the 2012 judgment. In other words, there is issue estoppel.

[17] The argument is that the 2012 judgment established as between the parties that the CA did not confer a power to remove a prisoner's right to smoke as that would be contrary to primary legislation, particularly s 6A of the SEA.

[18] I do not accept that issue estoppel applies to this case. I would have to find it "... possible to say positively and without room for doubt that the issues are identical".[6] I cannot do that. Gilbert J's decision was centred on the interpretation of s 33 of the CA and the power it gave to make rules. The anti-smoking regulations were made pursuant to ss 200 and 201. These give powers to the Governor-General,

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5 I use "apply for relief" expansively to include application for administrative relief as well as application for judicial relief. The ouster provision in s 179AA as inserted by s 39 of the Amendment Act might preclude the latter.

6 *Shiels v Blakeley* [1986] 2 NZLR 262 at 267.

which he exercised. These sections, and the powers they confer, were not examined by Gilbert J.[7]

The substantive issues

Validity of the anti-smoking regulations

[19] The Corrections Amendment Regulations 2012 are expressed to be pursuant to ss 3, 200 and 201 of the CA.

[20] Section 3 is the interpretation section. It does not confer power to make regulations.

[21] Section 200 provides, relevantly:

> (1) The Governor-General may, by Order in Council, make regulations—
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> (a) ensuring the good management of—
>
> (i) prisons:
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> ...
>
> (b) prescribing the powers and functions of—
>
> (i) staff members of prisons:
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> ...
>
> (c) ...
>
> (d) providing for the management, care, treatment, well-being, and reintegration into the community of the following persons:
>
> (i) prisoners:

[22] Section 201 elaborates on what may be done under s 200(1)(a) but without limiting it:

> Regulations made under section 200(1)(a) may include (without limitation) provisions—

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[7] See *Rowling v Takaro Properties Ltd* [1988] AC 473 on whether the construction of legislation is, in any event, capable of giving rise to issue estoppel.

...

(d) ensuring the discipline of prisoners, including (without limitation) regulating the granting and loss of privileges ...

[23] It is pursuant to this authority, then, that the anti-smoking regulations were made:

> **4 New regulation 32A inserted (Tobacco and equipment used for smoking tobacco declared to be unauthorised items)**
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> After regulation 32, insert:
>
> "**32A Tobacco and equipment used for smoking tobacco declared to be unauthorised items**
>
> "Tobacco and any equipment used for smoking tobacco are declared to be unauthorised items."
>
> ...
>
> **6 Regulation 158 amended (Privileges)**
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> In regulation 158(1)(h), delete "tobacco,".

[24] The explanatory note to the 2012 regulations says that this last regulation was necessary as otherwise it would be inconsistent with tobacco being an unauthorised item.

[25] The issue is whether ss 200 and 201 authorise the making of regulations to ban tobacco from prisons. This has two aspects. The first is whether the wider (i.e. outside the CA) law permits such a construction of the sections. The second is whether the anti-smoking regulations come within the scope of the regulation making powers.

[26] As to the first aspect, the main argument for the applicant is the one made to Gilbert J. The CA cannot authorise regulations which are contrary to other statutes. It is the SEA which governs smoking in prisons, not the CA. Section 6A of the SEA, in particular, is relevant. It requires prison managers to ensure there is a written policy on smoking in cells based on the principles identified.

[27] Mr Powell for the respondents argues that Gilbert J is wrong in his interpretation of s 6A. Since I have held that issue estoppel does not apply, this is a

matter I must decide for myself in the sense that for this case I have to consider all arguments afresh.

[28] Mr Powell's key argument is summarised:[8]

> 33. The text of s 6A is sufficiently clear: the key driver of any policy on smoking in prisons must be the protection of staff and inmates, and 'as far as reasonably practicable', prisoners are to be protected from second-hand smoke. Other than those broad objectives, the section neither prescribes nor prohibits any considerations upon which regulations, decisions and policies implemented in pursuit of the Corrections Act's objectives must be based. In particular, s 6A does not require that prisoners be permitted to smoke. In fact, regulations, decisions regarding approval of items for purchase and policies which reduce the likelihood of tobacco and equipment used for smoking tobacco from entering the prison estate must, as a matter of logic, be the best means of achieving the requirements of s 6A.

[29] The point is that the purposes of the SEA are about recognising and discouraging the harmful effects of smoking. The submission is that the broader (i.e. unstated) purpose of the SEA is to reduce smoking. Accordingly, s 6A should not be interpreted as evidencing a right to acquire and possess tobacco. It does not expressly give such a right and the banning of tobacco must be consistent with s 6A and the policies of the SEA.

[30] On this point I respectfully agree with Gilbert J. The SEA focuses on reducing harm to those who do not smoke or who do not wish to smoke in prison. It makes it mandatory for prison managers to have a written policy that complies with its principles. The SEA certainly does not confer a right to smoke, but it recognises that there is one. Indeed, it excludes prison cells from the ban on smoking in workplaces.

[31] On the second aspect, I also agree with Gilbert J's view that banning tobacco from prisons is not consistent with the requirements of ss 5(1)(a) and 6(1)(g) of the CA. The former requires sentences to be administered (inter alia) in a humane manner. Forcing prisoners into nicotine withdrawal is not humane. The latter sets out principles to guide the operation of the corrections system which include that

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[8] Respondents' submissions in opposition to application for declaratory judgment and judicial review, dated 18 February 2013.

sentences must not be administered more restrictively than is reasonably necessary to ensure the maintenance of the law and the safety of the public, corrections staff, and prisoners. Depriving prisoners of tobacco, an otherwise lawful substance, is too restrictive.

[32] This does not mean that prison inmates had an absolute right to acquire, possess and smoke tobacco. The purpose of the SEA in this area was to require policies to be put in place which would balance the rights of smokers and non-smokers. I also have no doubt that the s 201 power to make regulations to ensure the discipline of prisoners would extend to withdrawing access to tobacco. The amendment to reg 158(1)(h) would thus be within the scope of ss 200 and 201 of the CA if it had been made for the purpose of discipline.

Decision

[33] I find that nothing in ss 3, 200 or 201 of the Corrections Act 2004 authorised the making of reg 32A by the Corrections Amendment Regulations 2012. It is accordingly ultra vires.

[34] The amendment to reg 158(1)(h) by deleting "tobacco" is also ultra vires the Corrections Act 2004 because of its purpose. That purpose was to remove an inconsistency with the reg 32A ban.

[35] I make a Declaration that reg 4 (which created reg 32A) and reg 6 (which amended reg 158(1)(h)) of the Corrections Amendment Regulations 2012 were unlawful, invalid and of no effect.

[36] The effect, or utility, of this Declaration is subject to the Corrections Amendment Act 2013. I do not in this judgment decide the competing submissions of the parties on how the ouster provisions of the Amendment Act should be interpreted.[9] There is no actual claim for relief before me and I do not think it useful to hypothesise.

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[9] See [14].

[37] The applicant seeks declarations also that the anti-smoking regulations:[10]

- "constitute unlawful and prohibited discrimination against smokers of tobacco and breach section 19 of [New Zealand Bill of Rights Act 1990] and section 21(1)(h)(iii) of the [Human Rights Act 1993]"; and

- "undermine respect for the inherent dignity of the person and are thereby an unjustified infringement of section 23(5) of [New Zealand Bill of Rights Act 1990]".

[38] In view of my finding that the Corrections Act 2004 did not authorise the making of the anti-smoking regulations, it is not necessary for me to rule on whether they breached the rights legislation as pleaded. I decline to do so.

[39] The applicant is entitled to costs. As a self-represented litigant these would be restricted to out-of-pocket expenses. If costs are to be claimed, the applicant must file a memorandum setting them out within three weeks of the date of delivery of this judgment. In such event, the respondents may have two weeks in which to reply.

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Brewer J

[10] Prayers for relief E and F of the amended statement of claim.