IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-006168
[2012] NZHC 3591

UNDER	the Declaratory Judgments Act 1908, the Judicature Amendment Act 1972 and Part 30 of the High Court Rules
BETWEEN	ARTHUR WILLIAM TAYLOR Applicant
AND	THE MANAGER OF AUCKLAND PRISON Respondent

Hearing: 7 August 2012

Appearances: Applicant in Person
A M Powell and M Reddy for the Respondent
G M Coumbe Counsel assisting the Court

Judgment: 20 December 2012

JUDGMENT OF GILBERT J

This judgment was delivered by me on 20 December 2012 at 4.30 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date:

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Introduction

[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.

[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.

[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

Date: 01 June 2011

Review Date: N/A

Prisoner Instruction – Auckland Prison Smoking Policy

Pursant 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.

[6] The ban removes the rights that would otherwise be enjoyed by a significant percentage of the prison population. It therefore affects a large number of people. A 2005 prison health survey conducted by the Ministry of Health found that approximately three out of every four prisoners in New Zealand smoked.[1] The Department of Corrections' annual report for the year ending 30 June 2011 records that the total prison population was 8,712.[2] Auckland Prison houses approximately 622 prisoners, more than half of whom are smokers.

[7] Arthur Taylor, a non-smoker, is a prisoner at Auckland Prison. He has brought this proceeding challenging by way of judicial review the validity of the rule promulgated under the CA on two grounds. The first is that the prison manager had no power under the CA to impose a total ban on smoking in all areas of the prison, including the cells. The second is that even if he did have the power under the CA to make such a rule, the manager did not properly exercise his discretion in doing so; instead he simply acted under direction from the Chief Executive in implementing

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[1] Ministry of Health *Results from the Prisoner Health Survey 2005* (December 2008) at xii.
[2] Department of Corrections *Annual Report 1 July 2010 – 30 June 2011* at 33.

the smoke-free policy. Mr Taylor seeks an order declaring that the rule is invalid and of no effect.

[8] This case is not about the dangers of smoking or whether a complete ban on smoking in prisons is good policy. That is a matter for Parliament to determine. This case is solely concerned with whether the implementation of the smoke-free policy at Auckland Prison was lawful. The issues I have to consider are as follows:

(a) Was the manager empowered by s 33 of the CA to make the rule?

(b) If so, did the manager act reasonably in making the rule?

(c) If the rule is unlawful, what is the appropriate remedy?

Was the manager empowered by s 33 of the CA to make the rule?

[9] Section 33 of the CA relevantly provides:

> (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.

[10] Determining the proper scope of s 33 is a matter of statutory interpretation. Section 5 of the Interpretation Act 1999 provides that the meaning of an enactment is to be ascertained from its text in the light of its purpose. Tipping J elaborated on the correct approach in *Commerce Commission v Fonterra Co-operative Group Ltd*:[3]

> The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and general legislative context. Of relevance also must be the social, commercial or other objective of the enactment.

[11] Section 33 is an empowering provision. Parliament is presumed not to have authorised rules, which are tertiary delegated legislation, that are repugnant to the laws of New Zealand. The scope of the prison manager's power to make rules under s 33 must therefore be considered in the light of the purpose of s 33 interpreted in the context of the CA as a whole and any other relevant legislation.

[12] Section 6A of the SEA is clearly relevant as part of the legislative context because it specifically regulates smoking in prison cells. Section 33 must also be interpreted, if possible, consistently with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990. Any regulations made under the CA should also be considered in determining whether the rule is valid. The rule must not be inconsistent with any such regulations.

[13] In assessing whether the blanket rule made under s 33 banning smoking in prisons was valid, it is helpful to begin by reviewing the common law position and the relevant legislative context. I will then examine whether the rule was within the proper scope of that section.

The common law position

[14] It is well-established at common law that prisoners retain all civil rights and freedoms of ordinary citizens unless these are removed by law expressly or by

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[3] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC) at [22].

necessary implication.[4] The presumptive starting point is therefore that prisoners have the same rights as other citizens to possess tobacco and to smoke in their own home, if they wish. The prison cell is the institutional equivalent of a prisoner's home.[5]

[15] Historically, smoking has been an integral part of prison life and deeply embedded in prison culture. Prisoners could purchase tobacco and smoking related items, including matches and lighters, through a prison order system. Tobacco was also commonly used by prisoners as a form of currency.

The Smoke-free Environments Act 1990

[16] Since August 1990, smoking in prisons has been regulated by the SEA. The SEA was enacted in response to growing evidence about the health hazards of smoking and passive smoking. It has four main purposes: to reduce non-smokers' exposure to detrimental health effects caused by others smoking; to regulate the promotion of tobacco products; to regulate the presence of harmful constituents in tobacco products; and to establish a Health Sponsorship Council.

[17] In furtherance of the first of these purposes, the SEA imposes different requirements in respect of distinct prison areas.

Workplaces

[18] Section 5 deals with smoking in workplaces. When originally introduced, s 5 simply required employers to have a written policy on smoking for every workplace. While all policies were required to ban smoking in certain defined areas, employers could designate permitted smoking areas occupied exclusively by employees if all employees agreed. The policy was to be reviewed annually.

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[4] *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC).

[5] The Department of Corrections recognised this in its submissions to the Law and Order Select Committee relating to a proposed amendment to the SEA stating that "during their imprisonment, prison cells become the inmate's residence": Department of Corrections *Report to Law and Order Select Committee* (28 July 2003).

[19] The Smoke-free Environments Amendment Act 2003 introduced a total ban on smoking in workplaces. "Workplace" has a lengthy definition in s 2. Relevantly for present purposes, it includes: an internal area within a building; a cafeteria, corridor, lift, lobby, stairwell, toilet, washroom, or other common internal area; and an internal area within a vehicle provided by an employer and used by employees. Following the amendment, s 5(1) has required employers to take "all reasonably practicable steps" to ensure that no person smokes at any time in a workplace (other than in a vehicle in which smoking is permitted under s 5A).[6]

Prison cells

[20] While "prison cell" is not defined in the SEA, it clearly means the room within a prison where a prisoner is confined. Parliament specifically addressed the issue of smoking in prison cells in s 6A, which was introduced with the 2003 amendment. Section 6A of the SEA provides:

> **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] This applies to a vehicle provided by an employer to which the public does not normally have access and where the employees who regularly use the vehicle have consented to smoking occurring.

Prison yards and other open areas

[21] The SEA does not restrict smoking in an "open area" which is defined in s 2 as "a part of the premises that is not an internal area". The prison yard at Auckland Prison is open overhead and therefore an open area. It does not fall within the definition of "workplace".

Does the SEA authorise a policy banning smoking in all areas of prisons including prison cells and open areas?

[22] It is clear from s 6A that Parliament intended that prisoners would retain the right to smoke in their cells. Parliament would not have enacted s 6A requiring all prison managers to ensure that there is a written policy dealing with the effects of smoke from prisoners smoking in their cells if they did not anticipate that this would occur. Further, Parliament would not have excluded prison cells from the definition of "workplace", where smoking is banned, if they had intended to remove prisoners' rights to smoke in their cells.

[23] There is nothing in the SEA to suggest that Parliament intended to remove prisoners' rights to smoke in their cells or in open areas such as prison yards; quite the contrary.

In view of this legislative context, did Parliament intend that a rule could be made banning smoking in all areas of all prisons under s 33 of the Corrections Act 2004?

[24] The answer to this question requires consideration of the purpose of the CA and the intended scope of the rule-making power under s 33.

[25] The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by the means set out in s 5(1) of the CA. These include:

(a) ensuring that custodial sentences are administered in a safe, secure, humane and effective manner; and

(b) providing for corrections facilities to be operated in accordance with rules set out in the Act and regulations made under the Act that are based, amongst other matters, on the United Nations Standard Minimum Rules for the Treatment of Prisoners.

[26] The principles that guide the operation of the corrections system are set out in s 6 of the CA. Subsection 6(1)(g) provides that 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 persons under control or supervision.

[27] As noted, s 33 of the CA empowers the Chief Executive to authorise the manager of a 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. The rule-making power under s 33 must be interpreted in the light of the legislative purposes set out in ss 5 and 6 of the CA.

[28] Section 6A of the SEA specifically covers smoking in prison cells. It contains a statutory directive: a prison manager *must* ensure that there is a written policy on smoking in prison cells and that policy *must* be based on the principles contained in s 6A(2). By contrast, a prison manager can only make rules under s 33 when authorised by the Chief Executive. Without such authorisation, the prison manager has no rule-making power under s 33. This indicates that Parliament intended that smoking in prison cells would be regulated by the policy required by s 6A of the SEA, not by rules made under s 33 of the CA.

[29] This is consistent with what occurred prior to the ban. There was no prison rule under s 33 to enforce the smoking policy. The written policy on smoking in cells required by s 6A is enforced using the complaints procedure and offence provisions found in the SEA. Breach of the policy can also be enforced under s 128(1)(a) of the CA which relates to a failure to comply with a lawful order.

[30] A blanket ban on smoking in prison cells was inconsistent with reg 158(1)(h) of the Corrections Regulations 2005. Regulation 158(1) sets out the privileges that

may be forfeited or postponed as a penalty imposed on a prisoner under ss 133(3)(a) or 133(7)(a) of the CA. At the time the rule was made, reg 158(1)(h) exempted essential toiletries, tobacco, writing materials and stamps from the list of such privileges.[7] Prisoners penalised under the CA were therefore not vulnerable to the loss or postponement of the right to possess or use tobacco. The rule purporting to remove this right from all prisoners was inconsistent with this regulation and therefore outside what Parliament must have intended as an appropriate rule under s 33. This is clear from s 33(5) of the CA which provides:

> Any rules made under subsection (1) or subsection (2) must not be inconsistent with this Act, the Sentencing Act 2002, the Parole Act 2002 or any regulation made under any of those Acts.

[31] A rule imposing a blanket ban on smoking by prisoners in all areas of the prison does not serve the purpose of ensuring that custodial sentences are administered in a safe, secure, humane and effective manner. Nor is the ban reasonably necessary to ensure the maintenance of the law or the safety of the public, corrections staff and other prisoners. In my view, the ban falls outside the scope of the rule-making power under s 33 of the CA. It is inconsistent with s 6A of the SEA and, at the time the rule was made, it was also inconsistent with reg 158(1)(h) of the Corrections Regulations 2005.

If so, did the manager act reasonably in making the rule?

[32] In view of the conclusion I have reached above, it is not necessary for me to decide this alternative ground of challenge. However, I consider that it is also made out.

[33] It is clear that the manager acted under direction from the Chief Executive and made the rule to give effect to the nationwide policy to ban smoking by prisoners from 1 July 2011. The manager did not exercise his discretion or

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[7] Since the hearing of this case, the Corrections Amendment Regulations 2012 were made by Order in Council. These came into force on 2 November 2012. Two of these regulations are relevant. The first, a new reg 32A declares tobacco and any equipment used for smoking tobacco to be unauthorised items. The second is that reg 158(1)(h) has been amended by deleting the word "tobacco". These changes do not affect the validity of the rule which must be judged at the time it was made. It is also beyond the scope of this judgment to consider the validity of these amendments to the regulations.

undertake any genuine assessment of the particular requirements at Auckland Prison, as was required under s 33 of the CA. Nor did he take into account the mandatory criteria in s 33(5), which required him to have regard to s 6A of the SEA and reg 158 of the Corrections Regulations. He simply made the rule in line with the sample rule he received from the Chief Executive that same day. For this reason also, I consider that the rule is invalid and of no effect.

What is the appropriate remedy?

[34] Mr Powell, for the respondent, argues that any relief should be limited to a declaration that the smoke-free policy is unlawful but that the effect of the declaration be delayed for six months from the date of the judgment. He relies on the Court of Appeal's decision in *Air Nelson Ltd v Minister of Transport*:[8]

> 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.

[35] Mr Powell submits that the following factors favour suspending the effect of the declaration for this period:

(a) Mr Taylor does not smoke. Transferring property between prisoners is unlawful. Accordingly, Mr Taylor does not have any legitimate reason for wishing to smoke or possess tobacco or lighters and is not affected by the rule.

(b) The Court's decision has the potential to affect the entire prison population and all personnel who work in prisons, to their detriment. He refers to evidence indicating that indoor air quality has improved and that fire incidents have decreased since the ban was imposed.

(c) This proceeding was not commenced until two months after the policy was implemented, notwithstanding that it had been announced

[8] *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 (CA) at [59].

12 months before implementation. Mr Powell drew attention to two decisions of this Court where delay was seen as a factor disqualifying relief.[9]

(d) Reintroducing tobacco to the prison environment is likely to be disruptive.

[36] In *Martin v Ryan*[10] Fisher J considered that partial invalidation would have to be justified by powerful reasons. I do not consider that such reasons exist in this case.

[37] There was no suggestion that Mr Taylor lacked standing to bring this claim. The fact that he may be less affected by the rule than other prisoners because he does not smoke is not a good reason for denying the normal relief that would follow a successful application for judicial review challenging a decision on the grounds that it was made without jurisdiction or was otherwise unlawful.

[38] The ban on smoking anywhere at Auckland Prison, including in prison cells, unlawfully restricts the rights of over 600 prisoners. I can see no reason why a declaration to that effect should be postponed for six months as requested by the respondent.

[39] I do not consider that Mr Taylor unreasonably delayed bringing this proceeding or that this should disqualify the relief he seeks. The proceeding was commenced on 21 September 2011, within three months of the rule coming into effect. Although the policy had been announced 12 months earlier, Mr Taylor did not know how it would be implemented. In my view, he should not be criticised for delaying until the rule was brought into force before challenging it. Taking into account the difficulties he faces as a prisoner, I consider that he moved promptly in filing this proceeding after the rule came into force. I do not consider that delay is a disqualifying factor in this case. It is clearly distinguishable from the *Greenpeace* and *Anderson* decisions relied on by Mr Powell.

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[9] *Greenpeace of New Zealand Inc v Minister of Energy and Resources* [2012] NZHC 1422; *Anderson v Valuer General* [1974] 1 NZLR 603 (HC).
[10] *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 241.

Result

[40] I make an order declaring that the rule made by the manager of Auckland Prison, which came into force on 1 July 2011, banning smoking in all areas of Auckland Prison including prison cells and open areas was unlawful, invalid and of no effect.

M.A. Gilbert J

M A Gilbert J