

IN THE COURT OF APPEAL OF NEW ZEALAND

CA169/04

BETWEEN TELEVISION NEW ZEALAND
LIMITED
Appellant

AND ATTORNEY-GENERAL OF NEW
ZEALAND
Respondent

Hearing: 9 September 2004

Coram: McGrath J
Hammond J
William Young J

Appearances: W Akel for the Appellant
Solicitor-General T Arnold QC and B J R Keith for Crown

Judgment: 17 September 2004

JUDGMENT OF THE COURT DELIVERED BY McGRATH J

Introduction

[1] This appeal concerns the refusal of the Chief Executive of the Department of Corrections to approve a request by Television New Zealand to interview an inmate of a penal institution, Mr Ahmed Zaoui.

Background facts

[2] Ahmed Zaoui arrived at Auckland International Airport on 4 December 2002, having flown from Vietnam on a false passport. Since his arrival the Refugee Status Appeals Authority has granted him refugee status. However, he remains in detention

in Auckland Central Remand Prison, pursuant to a warrant of commitment issued under Part 4 of the Immigration Act 1987. That warrant was issued because the Director of Security has made a security risk certificate in relation to him, which the Minister of Immigration has made a preliminary decision to rely upon. The basis of the certificate is that:

(a) Mr Zaoui's continued presence in New Zealand constitutes a threat to national security in terms of s 72 of the 1987 Act; and

(b) There are reasonable grounds for regarding him as a danger to the security of New Zealand in terms of art 33.2 of the United Nations Convention Relating to the Status of Refugees 1951.

[3] Mr Zaoui has exercised his right to have the Inspector-General of Intelligence and Security, a retired High Court Judge, review the certificate to determine whether it was properly made. That process is presently suspended pending determination of appeals to this Court from directions made by Williams J in *Zaoui v Attorney-General* [2004] 2 NZLR 339. If the Inspector-General determines that the certificate was not properly made Zaoui will be freed. If he upholds the certificate, Mr Zaoui has a right of appeal to this Court on a point of law. The Act provides that, the Minister of Immigration will have three days to determine whether finally to rely on the certificate, with the consequence that Mr Zaoui would be deported.

[4] Mr Zaoui's case has received substantial media coverage, in part because of the wide-ranging litigation undertaken by his counsel and the Crown.

[5] On 20 April 2004, a journalist employed by the appellant, Television New Zealand, wrote to the Department of Corrections seeking permission to interview Mr Zaoui. That was required under reg 87 of the Penal Institutions Regulations 2000. Mr Zaoui consented to the proposed interview, but the Chief Executive declined to authorise it.

[6] The appellant brought an action in the High Court challenging the vires of regs 87 and 88 of the Penal Institutions Regulations 2000, and seeking review of the

Chief Executive's decision on the basis of mistake of fact, unreasonableness, procedural impropriety and inconsistency with the right to freedom of expression contained in s 14 of the New Zealand Bill of Rights Act 1990.

Judgment under appeal

[7] The matter was heard by Ronald Young J. He held the regulations *intra vires*. They were not inconsistent with the Bill of Rights Act and were clearly authorised by s 45 of the Penal Institutions Act. The limits placed on prisoners' rights to freedom of expression by the regulations were reasonable under s 5 of the Bill of Rights Act. Those limits protected, among other things, the interests of victims and the integrity of the trial process.

[8] The focus of the other challenges was on the decision to refuse consent. The Judge accepted that protecting the integrity of legal processes was a legitimate consideration. The real question was whether there was any basis for the Chief Executive's concern. While acknowledging that Judges and the Inspector-General were unlikely to be influenced by the publicity, Ronald Young J emphasised that the integrity of the Court system could be undermined by a parallel system of trial by media. He noted that the interview was directed at issues currently before the courts and Inspector-General. The latter process was particularly vulnerable to one-sided publicity. There was also a close analogy between the present case and that of a remand prisoner, who would not normally be allowed to give an interview of this kind. Mr Zaoui had also already taken a number of opportunities to publicise his case. Given those factors the conclusion reached by the Chief Executive was reasonably open to him, even taking into account the right to freedom of speech. Nor was there any failure to consider relevant factors or error of law.

[9] Finally, the Judge concluded that there was no requirement that the Chief Executive consult the applicant before making a final decision to decline the application. He decided that consultation was required where statute, an established practice, or fairness required it. The first two categories did not apply. Nor was it unfair to consult, in the absence of any indication of prejudice.

[10] The applications were accordingly dismissed.

Discussion

[11] We are satisfied that the regulations fall within the power to make regulations given by s 45(1),(4),(7),(15) and (17) of the Penal Institutions Act 1954.

[12] Mr Akel, counsel for Television New Zealand, summarised its application for approval as follows:

TVNZ wish to interview Mr Zaoui about his time in Algeria, Europe and Asia; the reasons why he came to New Zealand; his understanding of the decision of the Refugee Status Appeals Authority (which granted him refugee status); his understanding of the reasons why he is detained and his hopes for release in the future. TVNZ wish to broadcast this interview to the New Zealand public.

[13] There are a number of sound policy reasons justifying limitation on news media interviews with prison inmates. The Penal Institutions Regulations 2000 prohibit interviewing of a prison inmate for certain purposes, without first obtaining the written approval of the Chief Executive of the Department of Corrections. The purposes concerned include obtaining information with a view to publishing or broadcasting it, or to making a film, photograph, videotape or other visual recording of an inmate for the purposes of broadcasting it (reg 87(1)). Prior written approval is also required from the inmate concerned, and the Secretary must be satisfied that the inmate understands the nature, purpose and possible consequences of the interview concerned and its possible broadcast (reg 88(2)). No question arises concerning these requirements in the present case. In deciding whether to give approval, the Chief Executive must have regard to the need to protect the interests of people other than the inmate concerned, maintaining the security and order of the penal institution, and may impose conditions to protect these interests (regs 88(1) and (3)).

[14] Subject to these requirements, the discretion (to approve the interviewing by media of an inmate) that is given to the Chief Executive is a wide one. It may however be qualified by the requirements of the New Zealand Bill of Rights

Act 1990 which is applicable to all executive action other than to the extent that it is excluded by statute.

[15] In the present case, the relevance of the Bill of Rights is in relation to the freedom of speech. Section 14 of the Act provides as follows:

14 Freedom of expression

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[16] In a case in which an inmate who is fully informed of the implications of doing so desires to be interviewed, the inmate's right to freedom of speech would support the application. In those situations the decision of the Chief Executive on an application for approval requires a balancing of that right against conflicting values. In the case of inmates who have been convicted of criminal offending the Chief Executive would have to take account of the interests of victims which is specifically addressed in reg 88(1)(a). It is also relevant that part of the effect of imprisonment as a punishment is curtailment of some freedoms including that of free speech.

[17] Mr Zaoui, has not been detained because of criminal offending. He is detained for administrative reasons under the statutory requirements of Part 4A of the Immigration Act 1987 rather than because he has been convicted of any crime. The circumstances are spelt out in another judgment delivered today in this Court (*Zaoui v Attorney-General* CA166/04, 16 September 2004). In brief, Mr Zaoui's detention results from the making of a security risk certificate in respect of him by the Director of Security under Part 4A of the Immigration Act 1987. He may well be detained until the processes for the review of that certificate by the Inspector-General of Intelligence and Security are completed and his possible deportation thereafter effected, on the ground that he constitutes a risk to national security. There is no element of punishment in his detention.

[18] The importance of being able to exercise rights of free speech, for a person in Mr Zaoui's position, is substantial. Mr Zaoui has a legitimate interest in putting forward his account.

[19] In helpfully giving the Court the reasons for his decision to refuse approval to Television New Zealand to interview Mr Zaoui, the Chief Executive, Mr Byers, has by affidavit informed the Court that none of the New Zealand Immigration Service, New Zealand Security Intelligence Service, police, or officials in the Department of the Prime Minister and Cabinet wish to oppose approval of the application, although the Security Intelligence Service expressed concern that such an interview would be likely to be a further element of an active media campaign by the appellant. Concern was also expressed that any interview should not impact on the conduct of the legal processes presently involving Mr Zaoui.

[20] The Chief Executive also referred to a number of issues that we accept can arise in respect of proposed media contact with a detained person. Some are immediate practical concerns, such as the need to ensure that information released through media contact does not put at risk the security of the relevant penal institution. Media interviews, and associated contact relating to the decision to detain a person, could in some circumstances tend to disrupt and complicate the management of the person as an inmate because compliance with warrants of commitment might be made more difficult by such activity. We do not however understand from Mr Byers' affidavit that such considerations were significant in the reasons for his decision in this case. He specifically accepted that any security issues arising from the interview or Mr Zaoui's increased public profile could be managed.

[21] The Chief Executive's essential reason for refusing the application is set out in his affidavit as follows:

I concluded that an interview of the kind sought was not desirable in the public interest. Such an interview would involve Mr Zaoui directly in the media coverage of the various proceedings and would add to the controversy that had arisen in respect of those proceedings. As with a remand inmate awaiting trial, I considered that an interview of Mr Zaoui could interfere with the integrity of and public confidence in the various processes that Mr Zaoui had put in train. I also considered it relevant that, as I had noted, Mr Zaoui had been able to express his position through submissions made on his behalf in the proceedings and through media comments by his lawyers. I therefore decided to decline Mr van Wel's request.

[22] The Solicitor-General in his submissions in support of the High Court Judgment has said that given the statutory requirements of secrecy in the process, a

balanced public discussion of Mr Zaoui's position is not possible at this stage. He expressed concern that the risk of trial by media was particularly acute.

[23] We are satisfied that these considerations provide the only basis on which the rights of Mr Zaoui to free speech in the present highly unusual circumstances are counter-balanced in any significant way. As we have said, the purpose of his detention is not to impede his free speech in relation to the issues concerning the certificate and his possible deportation.

[24] The Inspector-General is a statutory officer who has held office as a High Court Judge and who is required to conduct an assessment of whether the security certificate in question was properly made by the Director of Security under Part 4A of the Immigration Act. The function is of a quasi-judicial kind but with certain limits reflected in the nature of the official information being considered. Much of the information that must be considered by the Inspector-General will be secret, being classified security information. Protection of its secrecy is one of the objects of the special process of review of the security risk certificate under Part 4A of the 1987 Act. The standing and reputation of the persons appointed to hold office of Inspector-General is the principal effective protection for the integrity of the process which must operate largely in secret.

[25] It cannot reasonably be suggested the determination of the Inspector-General would be influenced by the publicity that is associated with Mr Zaoui exercising his rights of free speech as a result of a television interview of the kind that Television New Zealand seek to undertake. Nor is the conclusion open that permitting an interview such as that described by Mr Akel could harm the process by diminishing public confidence in it. In any event on any reasonable balancing of his free speech rights as against the possible risk of damage to public confidence in the Inspector-General's process, little weight can attach to the latter in relative terms. In those circumstances we do not consider that the reasons given by the Director for his decision to refuse approval can be sustained against the duty to take account of Mr Zaoui's right to free speech. It is unnecessary to consider whether the extent to which those rights apply to Television New Zealand or the television watching public. The decision relates only to the circumstances to his case.

[26] For these reasons the appeal by Television New Zealand is allowed, and the decision of the Chief Executive set aside. The Chief Executive is directed to reconsider the decision, in accordance with this judgment.

[27] The appellant is entitled to costs in the sum of \$6000 together with reasonable disbursements, (including the travelling and accommodation costs of counsel where appropriate) to be agreed by counsel or failing agreement to be fixed by the Registrar.

Solicitors:
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