IN THE SUPREME COURT OF NEW ZEALAND

SC 135/2013
[2014] NZSC 5

BETWEEN	JOHN ALFRED VOGEL Applicant
AND	ATTORNEY-GENERAL First Respondent
	DOCTOR MARK GROEN AND DOCTOR MATTHEW GENTRY Second Respondents

Court: Elias CJ, Glazebrook and Arnold JJ

Counsel: T Ellis for Applicant
A M Powell and S M Kinsler for Respondents

Judgment: 19 February 2014

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] In April 2000 a Visiting Judge sentenced the applicant, then a prison inmate, to 21 days cell confinement for drug offending. The applicant had pleaded guilty and asked the Visiting Judge to impose that sentence so that he had the opportunity to address his drug problems, apparently in preparation for an upcoming parole hearing. Unfortunately, the 21 day sentence exceeded the 15 day maximum permitted under s 33(3)(g) of the Penal Institutions Act 1954.

[2] Some years later, the applicant brought a claim for damages against the Crown alleging breaches of the New Zealand Bill of Rights Act 1990 (NZBORA) in relation to his period in cell confinement, specifically ss 9 (prohibition on torture) and 23(5) (obligation to treat those detained with humanity and respect for inherent

dignity). The applicant argued that the unlawful sentence, and the fact that he did not receive the managerial and medical oversight required by the relevant prison regulations,[1] breached his NZBORA rights.

[3] In relation to managerial and medical oversight, both the High Court[2] and the Court of Appeal[3] accepted that the regulations had been breached but found that the failures did not have any adverse effect on the applicant sufficient to justify findings of breach of ss 9 or 23(5).[4]

[4] In relation to the excessive sentence, both Courts considered that neither the sentence nor the circumstances in which it was served could amount to torture, so there was no breach of s 9.[5] But they did not agree in relation to s 23(5). Lang J considered that s 23(5) had not been breached because, although the sentence exceeded the Visiting Judge's statutory authority, it had been imposed at the request of the applicant.[6] The Court of Appeal differed on this point, holding that s 23(5) had been breached. The applicant's known mental health and addiction issues reduced the weight that could be given to the fact that he had requested a 21 day sentence.[7]

[5] In relation to remedy for the s 23(5) breach, the Court of Appeal considered this Court's judgment in *Taunoa v Attorney-General*[8] and concluded that, but for the provisions of the Prisoners' and Victims' Claims Act 2005 (the PVC Act), a small award of damages would have been appropriate.[9] In terms of the PVC Act, the Court said that there was no evidence that the applicant had attempted to use any of the specified internal and external complaint mechanisms.[10] Accordingly, the Court held

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1 Penal Institutions Regulations 1999, regs 49(2)(b)(i), 52(2), 56(b) and 105(4)–(5).
2 *Vogel v Attorney-General* [2012] NZHC 269 [*Vogel* (HC)].
3 *Vogel v Attorney-General* [2013] NZCA 545 [*Vogel* (CA)].
4 *Vogel* (HC), above n 2, at [49] and [55]; *Vogel* (CA), above n 3, at [62].
5 *Vogel* (HC), above n 2, at [81]–[83] and [97]; *Vogel* (CA), above n 3, at [67].
6 *Vogel* (HC), above n 2, at [103]-[105].
7 *Vogel* (CA), above n 3, at [72]-[75].
8 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.
9 *Vogel* (CA), above n 3, at [78].
10 Prisoners' and Victims' Claims Act 2005, ss 7(1)(c) and 13(1). See *Vogel* (CA), above n 3, at [82].

that s 13 precluded any award of damages. The Court did, however, make a declaration that the applicant's rights had been breached.[11]

[6] The applicant says that the Court of Appeal was wrong when it refused to make an award of damages to him. He appears to advance three grounds:

(a) The Court observed that it would be difficult, given that the breach occurred in 2000, to calculate an appropriate award.[12] The applicant says that this is allowing pragmatism to prevail over principle and is wrong.

(b) The Court noted that there were no records of any observations made by nurses who checked the applicant during his sentence of cell-confinement.[13] The applicant says that relying on the Government's failure to keep records to excuse the payment of compensation encourages a failure to keep records and to investigate, which is contrary to the Convention Against Torture (CAT).[14]

(c) The applicant says: "The scheme of the PVC Act, and the interpretation placed upon it by the Court of Appeal, are directly in conflict with the purposes and intent of CAT, in trying to or actually limiting compensation".

[7] The applicant says that leave should be granted because New Zealand's compliance with its obligations under CAT is a matter of general or public importance, as is the effect of the PVC Act on damages awards for NZBORA breaches. The applicant seeks an award of damages in the amount of $5,000.

[8] We are not satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal. The issues identified in the application for leave are not in fact raised in the case:

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11 *Vogel* (CA), above n 3, at [86].
12 At [80].
13 At [70].
14 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

(a) The Court of Appeal declined to make an award of damages because of the PVC Act, not because damages would be difficult to calculate given the passage of time or because of a lack of records. The applicant gives the Court's observations more significance than they had.

(b) Both Courts found that what occurred did not amount to torture in terms of s 9 of NZBORA, although the Court of Appeal found a breach of s 23(5). Even taking an expansive view of the obligations CAT imposes, it is difficult to see that it is engaged in this case. Accordingly, the question whether the PVC Act is consistent with CAT does not arise. Moreover, the applicant does not suggest that the Court of Appeal misinterpreted or misapplied the PVC Act's provisions.

[9] The application for leave to appeal is dismissed. There is no order for costs.

Solicitors:
Marshall, Bird & Curtis, Auckland for Applicant
Crown Law Office, Wellington for Respondents