IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2024-485-000626
[2024] NZHC 3016

UNDER	the Judicial Review Procedure Act 2016
BETWEEN	CAMERON SHAW, JANE MAXINE SHAW, RIKIHANA JAMES PORTER, TE ARA HOU RIKIHANA MIHIKOTUKUTUKU, DALE SHAW, PIKIHUIA HAENGA, MARTIN SHAW Applicants
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing:	Sunday, 13 October 2024
Counsel:	F E Geiringer for Applicants A M Powell for Defendant
Judgment:	16 October 2024

REASONS JUDGMENT OF RADICH J

---

[1] Mr Shaw has been on a hunger strike in Rimutaka Prison for three months. He is striking for political reasons – to protest constitutional injustices and to demand a just constitution for Aotearoa New Zealand. He wants better recognition of and respect for the obligation to Māori under Te Tiriti. In September and October 2024, the Chief Executive of the Department of Corrections (Corrections) and Health New Zealand (Te Whatu Ora) sought declarations to validate Mr Shaw's clearly expressed

wishes to refuse medical care during his hunger strike and to clarify their respective obligations.[1]

[2] I granted declarations to that effect on 10 October 2024 in an oral decision following the hearing,[2] with reasons on 11 October 2024.[3]

[3] In this Reasons judgment, I explain why I declined a writ of habeas corpus and interim declarations in a decision given orally on Sunday afternoon, 13 October 2024.[4] These applications are brought through a proceeding that is separate from, but closely related to, the advance directive proceedings.

Background to this proceeding

[4] Mr Shaw stopped taking all fluids on 7 October 2024, in response to a shift in his accommodation at the prison. At the beginning of the hearing on 10 October, I was told he had consumed some cranberry juice. He did not accept any further fluids until the afternoon of 13 October, when once again he had some cranberry juice and water so he could speak to the Court. The situation was, and remains, dire.

[5] During the advance directive hearing, Mr Geiringer, counsel for Mr Shaw's whānau (who were interested parties to the advance directive application), made an application for a writ of habeas corpus. In the afternoon of that hearing, I heard argument on the habeas corpus application, but did not finally determine the issue in the hope that Corrections, Mr Francis Shaw and the Shaw whānau could reach a resolution.

[6] Over the weekend, Mr Geiringer, concerned about Mr Francis Shaw's continued deterioration and refusal of fluids, requested an urgent hearing on the habeas corpus application. The Court and counsel for Corrections accommodated the request, and the hearing was held on Sunday afternoon at 4pm. At 3.15, prior to the hearing,

---

1 See *Chief Executive of the Department of Corrections v Shaw* HC Wellington CIV-2024-485-588, 26 September 2024 (Minute of La Hood J) for an explanation of the first hearing in this matter, which was adjourned *sine die*.

2 *Chief Executive of the Department of Corrections v Shaw* [2024] NZHC 2959 (Results).

3 *Chief Executive of the Department of Corrections v Shaw* [2024] NZHC 2976 (Reasons).

4 *Shaw v Chief Executive of the Department of Corrections* [2024] NZHC 2980 (Results).

Mr Geiringer made an application (in the alternative) for interim orders under the Judicial Review Procedure Act 2016 (Act).

[7] On Sunday, I heard from Mr Powell and Mr Geiringer on both applications. In addition, I heard directly from Cameron Shaw, a spokesperson for the whānau, and Francis Shaw, both of whom appeared over an audio-visual link.[5] In addition, I was able to review the affidavits of Jane Shaw and Cameron Shaw and of Mr Viljoen, the Acting Deputy General Manager at Rimutaka Prison, all filed on 10 October.

[8] An oral results decision was given on Sunday evening.[6] This judgment provides full reasons for that decision.

Mr Shaw's location in Rimutaka prison

[9] Mr Shaw is a low-medium security prisoner. He wished to move into a 'health' cell at the commencement of his strike. The health cells are the closest equivalent to hospital beds within the custodial environment. This transfer occurred at some point in the last two months. Unfortunately, in an unexplainable course of action at some point over 6 and 7 September, Mr Shaw damaged that cell significantly. Corrections says it is unusable and unsafe. Mr Shaw disagrees vehemently with this assessment, providing reasons for his views. He wishes to return to the health cell. I cannot resolve this evidential conflict at this stage, nor do I attempt to.

[10] As a result of the damage to the health cell, Corrections moved Mr Shaw to a cell in the Intervention and Support Unit (ISU). Mr Shaw objects to this. He would prefer to be in another location, either the health cell or the Management Unit. Mr Shaw railed against the transfer by recommencing a fluid strike. Given the tenuous state of his health due to the ongoing hunger strike, his decision to not consume fluids until he is moved is concerning, for his whānau, for his counsel, for Corrections, and for the Court.

---

5 Although Francis Shaw was neither a witness nor a party to the application, I decided it was appropriate to hear from him directly.

6 *Shaw*, above n 4.

The conflicting, untested evidence

[11] Corrections maintain that the ISU is the only place for Mr Shaw. Mr Viljoen has provided evidence to explain why in Corrections' view there is no other suitable location for him within Rimutaka. Corrections staff have considered, and dismissed, for various reasons, the other potential locations for him.[7] A significant factor is the importance of Mr Shaw remaining in close proximity to the health care facilities if he decides to seek nourishment or medical treatment at any point. Some of Corrections' reasons are more compelling than others, and I acknowledge Mr Geiringer's contentions in those respects.

[12] Nonetheless, Mr Shaw has been monitored closely by Corrections, in accordance with its hunger strike policy since July 17. As part of both proceedings, the Court has reviewed numerous notes of interactions, meetings and medical records (over 600 pages worth). As Mr Viljoen has said, Corrections' efforts "are focussed entirely on ensuring that he serves his sentence under humane conditions and that we do what we can to maintain his health". It is clear to me that Corrections staff have gone to considerable lengths to accommodate Mr Shaw and to provide as best they can for his health and wellbeing, despite a recent breakdown in the relationship. I hope that the clarity provided by the declarations made last week can facilitate alterations in the intensity of the monitoring required, especially overnight.

[13] The Shaw whānau tells a different story of the past week, and I have weighed this in my decision also. I thank the whānau for their genuine commitment to resolution, and for their conduct in the proceedings to date. This is a difficult time. Cameron Shaw shared his view, both in his affidavit and orally, that Corrections is "harassing" and "goading" Francis Shaw into "restarting, continuing, or escalating his hunger strike". He says Corrections have broken agreements to avoid waking Francis up in the night and are "exacerbating the situation by taking it to the next level [by refusing to move Francis out of the ISU]". Jane Shaw's affidavit shares Francis' opinion that the ISU is being used as a "punishment" and her perspective that Corrections have "provoked" Mr Shaw by their "unreasonable" decision to not move

---

7 Including the High Security Unit, the Low Security Unit, the Management Unit and the High Dependency Unit.

Francis out of the ISU. Jane shares a story of Francis' which she says explains "very well what is going on":

> The Wind and the Sun had a competition to see who could get a person to take off their coat. The Wind went first. It blew, and blew, and blew as hard as it could. The harder it blew, the tighter the person held onto their coat. The Sun said, "let me try". The Sun just shone, and the person relaxed and took off their coat.

[14] At the hearing, Francis Shaw repeated his concerns to me, describing the ISU placement as punishment, suggesting the damage to the health cell is not material, or should not prevent him from being there, and expressing upset with his general treatment in custody of late.

The habeas corpus application

[15] As Mander J said in *Greer v Smith*:[8]

> In New Zealand the Habeas Corpus Act 2001 governs all applications for habeas corpus. It is a writ that will issue to ensure that no subject of New Zealand is unlawfully detained. It is a narrow, but vitally important constitutional mechanism that the High Court, as the sole Court responsible for such applications, will strive to uphold. Every application is accorded the respect the writ commands.

[16] The Court has endeavoured to demonstrate this respect by hearing the application on 10 October and again on 13 October at very short notice. However, it is clear that habeas corpus is not the appropriate vehicle to remedy or question conditions of imprisonment.

[17] In *Bennett v Superintendent, Rimutaka Prison (No. 2),* the Court of Appeal held that the writ cannot be used to render detention unlawful even if an inmate is treated unlawfully while detained.[9] In *Ericson v Chief Executive of the Department of Corrections,* the Court of Appeal emphasised the point that the writ is not appropriate for challenging the lawfulness of a conviction or the conditions under which an inmate sentenced to imprisonment is detained.[10] In *Craig v Chief Executive of the Department*

---

8 *Greer v Smith* [2015] NZHC 326, [2017] NZAR 141 at [6].
9 *Bennett v Superintendent, Rimutaka Prison (No 2)* [2002] 1 NZLR 616 (CA) at [61] and [62].
10 *Ericson v Chief Executive of the Department of Corrections* [2014] NZCA 118 at [4].

of Corrections, I reiterated that it is not for the Court to examine conditions of detention in considering an application for habeas corpus.[11] The Court of Appeal dismisses applications for the writ that claim mistreatment or grievances with the conditions within prison,[12] or with conditions of detention.[13] Additionally, the Law Commission has observed that "conditions in prison" are not appropriate for habeas corpus.[14]

[18] Usually, if an applicant wishes to challenge the lawfulness of the conditions of his incarceration, he may do so by applying for judicial review.[15] Of course in this situation, it is the Shaw whānau, rather than Mr Shaw himself, bringing the application. Mr Shaw does not acknowledge the jurisdiction of the Court, nor did he want to be joined as a party to this application.[16]

[19] Judicial review is raised consistently as the best method for resolution of issues of this type.[17] Mr Powell emphasised this in his submissions to the Court, and I suggested that was appropriate. Mr Geiringer took this feedback on board by bringing the application for interim orders in a judicial review proceeding, yet to be commenced.[18]

[20] The habeas corpus application was still alive, but not argued on 13 October. I have determined, in line with the authorities I have mentioned, that no writ of habeas corpus is available for Mr Shaw.

Interim declarations to preserve the position

[21] I made it clear to counsel that, in these unusual circumstances, I had no issue with the jurisdictional basis for making interim orders, where a substantive proceeding

---

11 *Craig v Chief Executive of the Department of Corrections* [2024] NZHC 202 at [18].
12 *Parker v Chief Executive of Department of Corrections* [2022] NZCA 316.
13 *Coleman v Chief Executive of Department of Corrections* [2020] NZCA 210.
14 Law Commission *Habeas Corpus: Refining the Procedure* (NZLC R100, 2007) at 6.
15 *Bennett*, above n 9, at [65]. See also *Whichman v Department of Corrections* [2018] NZHC 1296.
16 I put this question directly to Mr Shaw on 13 October in the course of the hearing, but he responded he was capable of representing himself.
17 *Greer v Smith*, above n 8, at [27] and [28] citing *Greer v Rimutaka Prison Manager* [2014] NZHC 1957.
18 Citing *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA) at [49].

was anticipated. Nor was I against making orders at this preliminary stage if I considered it appropriate.

[22] Interim orders are available under the Act if "it is necessary to preserve the position of the applicant".[19] Where the Crown is a respondent, the Court could either declare that Corrections ought not to take to any further action that is, or would be, consequential on the exercise of the statutory power,[20] or that it ought not to institute or continue any proceedings.[21]

[23] Equally, jurisdiction is available at common law through pt 30 of the High Court Rules 2016.[22]

Counsel for the applicants

[24] Mr Geiringer contended that the custodial environment is designed for those who may take unreasonable or stubborn positions and Corrections must be able to approach these situations with care and consideration, rather than inflexibly. He said that no one is praising Mr Shaw's choice to damage his cell, but it must be understood in the context of the advanced stages of a hunger strike. He said that, while it would usually be an intolerable position for Corrections to capitulate to a prisoner in this way, we are facing extraordinary circumstances. In light of the devastating anticipated consequences, the Court *must* be satisfied that Corrections had done *everything* possible to canvass all possible alternatives (to the ISU). His submission is that, given that it is not possible to resolve matters at an interim stage, the position must be preserved until the contested evidential issues can be resolved at a substantive hearing.

[25] Mr Geiringer seemed to be saying the position to be preserved is Mr Shaw's life; that Rimutaka prison staff ought not to take the action of returning him to the ISU (after he left the AVL booth on Sunday) and should instead place him elsewhere. The particular language used in the application was that I should declare that the Chief

---

19 Judicial Review Procedure Act 2016, s 15(1).
20 Section 15(3)(b)(i).
21 Section 15(3)(b)(ii).
22 *Christensen v Director-General of Health* [2020] NZHC 887, [2020] 2 NZLR 566 at [59].

Executive of the Department of Corrections (and all staff etc.) should "refrain from returning Francis Shaw to an ISU cell".

[26] As I understand Mr Geiringer's argument, it can be distilled to what he describes as a "common sense position". Corrections says the ISU is the only place that can keep Mr Shaw safe given his health needs in the advanced stages of a hunger strike. But ISU is the only place guaranteed to kill Mr Shaw, given his protest to being located there. Therefore, it *cannot* be the only place to keep him safe. In that situation, Corrections must find another solution. On a practical level, this argument has some force. But the legal question for me remains, what is the position that is necessary to be preserved?

Counsel for the respondents

[27] Mr Powell rebutted firmly both the procedural and substantive elements of the proceeding. He considered the hearing on Sunday to be "not just an abridgment but an abandonment of due process". He said that unlike, for example, a need to stop someone from felling a native tree on a Sunday, the situation that was presented was not capable of sustaining interim orders. There is no position to preserve, and the threshold is "simply not met". He pointed to various parts of the evidence given in Mr Viljoen's affidavit, including the adherence to the hunger strike policy, the requirement for Mr Shaw's segregation due to health reasons,[23] and the operational considerations that are in play at Rimutaka prison.

Analysis

[28] Section 15 of the Act creates a statutory threshold which must be satisfied.[24] I acknowledge that:[25]

> Like all legislation, s 15 should be interpreted in light of its purpose. There are two evident purposes of the interim relief power — to relieve the applicant from the adverse effects of a challenged decision until the challenge is heard and determined, and to preserve the ability of the Court to grant effective relief

---

23 See Corrections Act 2004, s 60.

24 *Auckland Pride v Minister of Immigration* [2023] NZHC 758, [2023] 2 NZLR 651 at [31].

25 *Greer v Chief Executive of Department of Corrections* [2018] NZHC 1240, [2018] 3 NZLR 571 at [24].

> if the challenge is successful. The threshold question should be interpreted and applied in light of these purposes.

The policy considerations

[29] I see this as being a similar situation to that in *Taylor v Chief Executive of the Department of Corrections* where, even if the order sought is expressed in negative language, it would in substance require Corrections to take positive steps.[26] The requirement for positive steps is not itself a bar on making the orders sought,[27] but the Court should be cognisant of the "strong policy considerations" at play where positive orders may involve "inappropriate intervention by the court in decisions about the best use of scare resources or the balancing of delicate priorities which are best left to the discretion of the responsible authorities."[28]

[30] I am guided by the following observation of the Court of Appeal in *Taylor*:[29]

> That need to maintain discipline within prisons militates against any restriction being placed against the discretionary ability of the Department of Corrections to control prison visits. A court will hesitate before making any order affecting the discretion of a prison manager to control visits, and that hesitation will be even greater when the proposed orders have a mandatory quality in the sense of directing positive action. A court imposition of such positive duties on the prison manager might require the prison manager to use prison resources in a manner which may compromise that public safety (which is the "paramount consideration" ...

[31] I acknowledge that, given the vulnerability of prisoners, where intervention is warranted, it is the duty of the Court to intervene.[30]

[32] At this interim stage, it is evident Corrections is attempting to find a solution that works for Mr Shaw and custodial staff, while, as Mr Powell put it, fitting the muster within brick and mortar. There are multiple considerations at play. The process is ongoing, and I do not consider it warranted or appropriate to intervene. I do not accept that Corrections is acting in bad faith.

---

26 *Taylor v Chief Executive of the Department of Corrections* [2010] NZCA 371, [2011] 1 NZLR 112.
27 At [27].
28 At [26].
29 At [29].
30 See *Taylor v Attorney-General (No 3)* [2022] NZHC 3170 at [70].

The lack of a position to preserve

[33] In my opinion, the operative position of Corrections, as the Crown entity against which declarations could be made, remains that "Corrections will do all that it can to help Mr Shaw. It will do all that it can to provide nourishment to him whenever he chooses to have it."[31]

[34] I do not accept that maintaining the current state of affairs would certainly lead to Mr Shaw's death, such that orders are "necessary". As I said on Sunday night, the "current position is a position that Mr Shaw has chosen and can change".[32] I do not consider my conclusion to be an "overly formalistic" approach to the s 15 threshold. It goes to the heart of the provision.[33] Here, we must distinguish between other interim or urgent judicial review applications where, for example, rainbow interest groups could not control immigration decisions (*Auckland Pride*) or where an individual in managed isolation could not leave (*Christensen*).

[35] It is of direct relevance that the Court has taken determinative steps to uphold Mr Shaw's wishes in the advance directive proceeding.[34] He is an author of his own circumstances to the end. In the same way that Gendall J considered that it was likely the 'Posie Parker' rallies would go ahead regardless of their figurehead's presence (in weighing whether Auckland Pride had a "position"),[35] it has been made clear to the Court in the advance directive proceeding that Mr Shaw may continue his strike, even if placed back in the health cell, because of his political objectives.

[36] I have been unable to find a position that is necessary to preserve, and therefore, I do not make the orders sought, in their express terms, or in any other iteration of them.

---

31 *Shaw (Results)*, above n 4, at [5].
32 At [6].
33 *Insley v Minister of Climate Change* [2023] NZHC 1388.
34 *Chief Executive of the Department of Corrections v Shaw (Reasons)*, above n 3.
35 *Auckland Pride*, above n 24, at [52].

Concluding comments

[37] If the signalled judicial review application is brought, the Court will deal with it proactively. Regardless of that, I trust Corrections will continue working with Francis Shaw, and the Shaw whānau, to address the concerns as best they can.

[38] I make a direction that the court file may not be accessed without the permission of a Judge.[36]

Radich J

Solicitors:
Woodward Law, Lower Hutt for Applicants
Crown Law Office, Wellington for Defendant

[36] As provided for in the Senior Courts (Access to Court Documents) Rules 2017, r 5(2).