IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 50/2024
[2024] NZSC 114

BETWEEN	CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES (AUSTRALASIA) LIMITED Applicant
AND	ROYAL COMMISSION OF INQUIRY INTO HISTORICAL ABUSE IN STATE CARE AND IN THE CARE OF FAITH-BASED INSTITUTIONS First Respondent
	ATTORNEY-GENERAL Second Respondent

Court:	Ellen France, Kós and Miller JJ
Counsel:	E J Engwirda for Applicant S J M Mount KC and T M F Powell for First Respondent P J Gunn, J N E Varuhas and R E R Gavey for Second Respondent
Judgment:	13 September 2024

JUDGMENT OF THE COURT

A **The application for leave to exceed the ten-page limit is dismissed.**

B **The application for leave to appeal is dismissed.**

C **The applicant must pay the second respondent costs of $2,500.**

REASONS

Introduction

[1] The applicant, the Christian Congregation of Jehovah's Witnesses (Australasia) Ltd (the Jehovah's Witnesses), seeks leave to appeal from a decision of the Court of Appeal.[1] The Court of Appeal upheld the decision of the High Court dismissing a challenge by way of judicial review brought by the Jehovah's Witnesses to activities of the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions (the Commission).[2]

Background

[2] To put the application in context, it is sufficient to note the following.

[3] Early on in its investigative phase, the Commission advised the Jehovah's Witnesses it intended to include the Jehovah's Witnesses in its inquiry. The Jehovah's Witnesses similarly made clear its position was that its activities were outside the scope of the Commission's inquiry. That was on the basis that the Jehovah's Witnesses never assumed responsibility for the care of children, young persons or vulnerable adults as it did not have any residential facilities and was otherwise not involved in the systematic care of such persons.

[4] The Commission continued with its investigation. The Jehovah's Witnesses, while still protesting jurisdiction, provided documents sought by the Commission. The Commission produced two minutes (Minute 16 and Minute 29) explaining why it

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1 *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions* [2024] NZCA 128 (Cooper P, Goddard and Cooke JJ) [CA judgment].

2 *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions* [2023] NZHC 2985 (Ellis J) [HC results judgment]; and *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions* [2023] NZHC 3031 (Ellis J) [HC reasons judgment].

considered the activities of the Jehovah's Witnesses came within the Commission's terms of reference.[3]

[5] The Jehovah's Witnesses filed judicial review proceedings. Subsequently, the Commission chair sought an amendment to the terms of reference. This was agreed to and, on 8 September 2023, the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Amendment Order (No 2) 2023 (the Amendment Order) came into effect. The amendment to the relevant clause of the terms of reference added this to the definition of "in the care of faith-based institutions":[4]

> (ba) for the avoidance of doubt, a faith-based institution may assume responsibility for the care of an individual through an informal or pastoral care relationship. An informal or pastoral care relationship includes a trust-based relationship between an individual and a person with power or authority conferred by the faith-based institution, where such a relationship is related to the institution's work or is enabled by the institution's conferral of authority or power on the person …

The Court of Appeal decision

[6] The Court of Appeal judgment addressed two arguments. First, that the Commission exceeded the terms of reference (as they were before the Amendment Order) in Minutes 16 and 29, and the Jehovah's Witnesses should get declaratory relief. Second, that the Amendment Order was targeted at the Jehovah's Witnesses breaching s 27 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) and also involved an improper purpose, so was ultra vires.

[7] On the first point, the Court of Appeal disagreed with the High Court's narrower assessment of the role of the court in assessing this issue. The Court nonetheless rejected the argument the High Court erred in deciding the Commission did not exceed its terms of reference. In doing so, the Court of Appeal accepted the type of activities undertaken by the Jehovah's Witnesses were "likely at the margin of

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3 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions *Minute 16: Faith-based Care* (31 January 2022); and see discussion of Minute 29 in HC reasons judgment, above n 2, at [76]–[78] and [136]. Minute 29 is no longer available on the Commission's website. See also Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Order 2018 [2018 Order], cl 8 and sch.

4 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Amendment Order (No 2) 2023, cl 6. See also 2018 Order, cl 17.4(ba).

what was contemplated" by the terms of reference.[5] But, the Court said, the activities of the Jehovah's Witnesses identified by the Commission, such as the witnessing activities, were not by definition excluded.

[8] On the second question relating to the Amendment Order, the Court said that the applicant's argument mischaracterised s 27(2) of the Bill of Rights. The Court said this:[6]

> The right in s 27(2) does not limit any subsequent decision or exercise of power unless the subsequent step seeks to validate, or otherwise immunise from challenge, the matters already under review. If it does affect the challenged matters, s 27(2) may need to be confronted. But when a power to amend the terms of reference is otherwise lawfully exercised, to so exercise it does not infringe the s 27(2) right simply because judicial review proceedings are on foot. To find that it did would involve a determination that the applicant for judicial review is entitled to have the law substantively frozen in its favour, at least temporarily, by the simple technique of bringing such proceedings. This argument is wrong as a matter of principle.

[9] The Court considered its conclusions were supported by the High Court decision in *New Health New Zealand Inc v Attorney-General*,[7] and by this Court's judgment in that case upholding the decision of the High Court.[8] In rejecting the challenge to the Medicines Amendment Regulations 2015, in issue in that case, this Court noted:[9]

> [29] Here, where the purpose was to clarify the law prospectively, albeit with a consequential effect on the utility of the appellant's appeal, the same concern does not arise. Indeed, Lang J in *Reilly* considered that the "usual course" would be to prospectively amend the regulations to correct the earlier error.

[10] The Court of Appeal in this case went on to say that the applicant's rights to bring judicial review proceedings had not been removed. The Court said this:[10]

> The Jehovah's Witnesses can exercise, and have exercised, their right to challenge the Commission's interpretation of the terms of reference before they were amended with these arguments fully advanced in both the High Court and this Court. They have sought only declaratory relief because

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5 CA judgment, above n 1, at [36].
6 At [59].
7 *New Health New Zealand Inc v Attorney-General* [2015] NZHC 2138, [2015] NZAR 1513.
8 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 60, [2018] 1 NZLR 1041.
9 Footnote omitted.
10 CA judgment, above n 1, at [65].

> there has been an amendment to the terms of reference, and their arguments cannot succeed in relation to the amended terms. But that has not removed their right to seek judicial review of the Commission for any reviewable decisions made prior to the amendment. As we have already indicated, we have doubts about the utility of granting any declaratory relief in such circumstances. But in any event we have considered the arguments and rejected them on their merits. The very fact that the Jehovah's Witnesses have appeared, and advanced these arguments, demonstrates that their right to do so has not been infringed.

[11] The Court took the view the same conclusions applied to s 27(3). For the same reasons the improper purpose argument was rejected.

The proposed appeal

[12] In the application for leave to appeal, the Jehovah's Witnesses advance a number of grounds.

[13] Grounds 1–5 are a challenge to the Court of Appeal's finding on the scope of the terms of reference prior to the Amendment Order. As we read the submissions on these grounds, the Jehovah's Witnesses attach importance to the fact that Minute 29 was a jurisdictional ruling, so that the issue before the Court of Appeal was not simply an interpretative exercise but rather a decision linked to the exercise of the Commission's powers.

[14] In relation to Ground 2 the focus is on whether, in deciding if there was evidence capable of establishing the primary facts, an irrelevant consideration, of vicarious liability, was taken into account.[11] Under Ground 3 the Jehovah's Witnesses submit that the evidence relied upon in Minute 29 was not capable of establishing the primary facts. Ground 4 essentially repeats Ground 1 but relies on ss 13 and 15 of the Bill of Rights (the rights to freedom of religion and the manifestation of religion and belief, respectively) and says the Commission breached those rights.

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[11] The High Court in this respect set out the relevant part of Minute 29 as follows: "… the law's general approach to care relationships, and the assumption of responsibility is contextual, flexible, and recognises that an assumption of responsibility can be implied or imputed from a party's actions. Similarly, the law of institutional responsibility in tort (vicarious liability) looks to the nature of the underlying relationship and the degree of connection to the activities of the institution.": see HC reasons judgment, above n 2, at [136].

[15] Under Ground 5 the contention is that the Court of Appeal was wrong not to appreciate the applicant wanted "out" because there was no jurisdiction for it to be "in", rather than to avoid any adverse finding. Ground 6 challenges the Court's approach to s 27 of the Bill of Rights.

Our assessment

[16] We accept the submission for the second respondent that the resolution of Grounds 1–5 would turn on the specific facts of the case and, in particular, the interpretation of the terms of reference for this particular inquiry.[12] The broader question, namely, the approach of the court to judicial review of a Royal Commission's interpretation of its terms of reference, was resolved in favour of the Jehovah's Witnesses. The Court of Appeal also did not find the analogy with tort law (the vicarious liability point in Ground 2) helpful in its reasoning. No question of general or public importance accordingly arises in relation to these grounds.[13]

[17] Nor do we see the appearance of a miscarriage of justice, as that term is used in the civil context, in the Court of Appeal's orthodox approach to the interpretation of the terms of reference.[14]

[18] That leaves the ground based on s 27, Ground 6. In support of this ground the Jehovah's Witnesses say this case is distinguishable from *New Health New Zealand Inc v South Taranaki District Council* because it "obliterates the process right to an effective remedy".[15] It is also said that this ground raises a question about the effect of s 27(2) and its inter-relationship with s 5 which, in turn, would require consideration of the correctness of the approaches to this issue in *Mangawhai Residents and Ratepayers Association Inc v Kaipara District Council*.[16]

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12 The first respondent abides the decision of the Court on the basis the second respondent has "adopted the role of contradictor in the public interest".

13 Senior Courts Act 2016, s 74(2)(a).

14 Section 74(2)(b); and see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

15 *New Health*, above n 8.

16 *Mangawhai Residents and Ratepayers Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437.

[19] We accept the second respondent's submission that *New Health* is applicable. The Court in that case acknowledged the Regulations had "a consequential effect on the utility of the appellant's appeal", as here, but clarified the law prospectively.[17] That too distinguishes this case from *Mangawhai*. No question of general or public importance accordingly arises. Nor does anything raised by the Jehovah's Witnesses give rise to an appearance of a miscarriage of justice in the approach adopted by the Court of Appeal, particularly where the proposed appeal would be academic. The Commission has now released its report. The Jehovah's Witnesses can challenge the report of the Commission, as we understand it has done.

[20] We add that we agree with the second respondent's submission that there was no good reason for the applicant to exceed the ten-page limit for submissions. The points raised in support of leave were capable of explanation within that limit and leave should have been sought in advance. In the circumstances, leave to the applicant to exceed the ten-page limit is declined.

Result

[21] The application for leave to exceed the ten-page limit is dismissed.

[22] The application for leave to appeal is dismissed.

[23] The applicant must pay the second respondent costs of $2,500.

Solicitors:
R J Roil, Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions, Wellington for First Respondent
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Second Respondent

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17 At [26].