IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 54/2024
[2024] NZSC 127

BETWEEN	MICHAEL (MAXIEN) STEVENS Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS First Respondent
	PRISON DIRECTOR AT AUCKLAND SOUTH CORRECTIONS FACILITY Second Respondent

Court:	Ellen France, Kós and Miller JJ
Counsel:	G E Minchin and S J Fraser for Applicant S M Kinsler and S J Harrison for First Respondent J K Scragg and E A Boshier for Second Respondent
Judgment:	1 October 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B There is no order as to costs.

REASONS

Introduction

[1] Maxien Stevens, who is transgender, is serving a sentence of preventive detention. She issued judicial review proceedings challenging decisions relating to her segregation while in custody at Auckland South Corrections Facility. As the first respondent says, the grounds of review were essentially directed to what she said was an improper use of directed segregation by prison management and inadequate

oversight of directed segregation by the chief executive of the Department of Corrections | Ara Poutama Aotearoa (the Department of Corrections). The application for review was dismissed by Andrew J in the High Court.[1] The Court of Appeal upheld the High Court judgment.[2] She now seeks leave to appeal to this Court.

Background

[2] The High Court judgment has a useful summary of Ms Stevens' time in the Auckland South Corrections Facility, the arrangements in terms of the accommodation there and the segregation orders.[3] It is sufficient to set out the Court's description of the various segregation orders made by the prison director,[4] namely:[5]

> (a) Order of 12 May 2021. This was made under s 58(1)(a) of the [Corrections Act 2004] which permits a segregation order in circumstances where the prison [director] considers the "security or good order of the prison would otherwise be endangered or prejudiced". This order was revoked on 18 May 2021;
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> (b) Order of 18 May 2021. This was made under s 59(1)(b) of the Act which permits a segregation order when the safety of the prisoner has been put at risk by another person and there is no reasonable way to otherwise ensure the prisoner's safety. This order was, in turn, revoked on 27 May 2021;
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> (c) Order of 8 June 2021. This was made under s 60(1)(a) of the Act which permits a segregation order if the health centre manager of the prison recommends it in order to assess or ensure a prisoner's physical health (except against the risk of self-harm). This order was revoked on 9 June 2021 when Ms Stevens was considered to be medically stable;
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> (d) Order of 9 June 2021. This was made under s 59(1)(b) of the Act and was extended on each of 21 June 2021, 8 July 2021, 6 August 2021 and 8 September 2021.

The proposed appeal

[3] The grounds Ms Stevens wishes to raise on appeal can be grouped under three headings.

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1 *Stevens v Chief Executive of the Department of Corrections* [2023] NZHC 1051 [HC judgment].
2 *Stevens v Chief Executive of the Department of Corrections* [2024] NZCA 153 (Gilbert, Whata and Churchman JJ) [CA judgment].
3 HC judgment, above n 1, at [7]–[19].
4 The second respondent, the "prison director", is a "prison manager" for the purposes of ss 58 and 59 of the Corrections Act 2004.
5 At [19].

Status of United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)

[4] The first ground relates to the effect of s 5(1)(b) of the Corrections Act. Section 5(1) provides that the purpose of the corrections system is "to improve public safety and contribute to the maintenance of a just society by", relevantly:

> (b) providing for corrections facilities to be operated in accordance with rules set out in this Act and regulations made under this Act that are based, amongst other matters, on the [Mandela Rules]; …

[5] Ms Stevens argued in the Court of Appeal that the High Court erred in finding that the Mandela Rules were not incorporated into New Zealand law by s 5(1)(b).[6] In relation to this argument, the Court of Appeal said that "[a]lthough the lawfulness of the temporary direction made on 12 May 2021 does not turn on it" there was no error in the High Court in observing that the Mandela Rules were not incorporated into New Zealand law by s 5(1)(b) of the Act.[7] The Court referred in this context to an observation to this effect in *Attorney-General v Taunoa*.[8]

[6] The Court of Appeal in this case accepted that the power to restrict a prisoner's opportunity to associate with other prisoners could only be exercised in the circumstances set out under ss 58, 59 and 60 of the Corrections Act and in accordance with the purposes and principles in ss 5 and 6. But there was nothing to support the suggestion that the power to direct segregation on 12 May 2021 and limit Ms Stevens' opportunity for association with other prisoners was exercised other than in a bona fide manner and for a proper purpose. It was not imposed as a punishment but as a tool to maintain the security and good order of the prison.[9]

[7] In the application for leave, Ms Stevens' submissions shift from the argument the Mandela Rules are incorporated into New Zealand law to a submission that this

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6 *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* GA Res 70/175 (2016), annex.

7 CA judgment, above n 2, at [68].

8 *Attorney-General v Taunoa* [2006] 2 NZLR 457 (CA) at [260]–[261]. This Court, in refusing leave on issues raised about the Mandela Rules in *Taunoa,* said: "These issues may be relevant to the establishment of the Bill of Rights breaches but do not give rise to separate claims.": *Taunoa v Attorney-General* [2006] NZSC 30 at [1].

9 Reflecting the findings of the High Court: HC judgment, above n 1.

Court should clarify that they are part of the focus for a decision-maker when dealing with any relevant matters, not just the Corrections Act and relevant regulations.

Sections 58 and 59 of the Corrections Act

[8] These two sections provide for the prison director to direct segregation for the purpose of the security or good order of the prison, or safety; or for the purpose of protective custody.[10] Both sections also provide various protections including the requirement to give the prisoner written reasons for a direction; provision for revocation if segregation is no longer justified; various time limits; and provision for regular review.[11] The focus of the challenge under this head is that the segregation orders and their extensions reflected a failure to exercise the relevant statutory discretion. There are a number of aspects to this.

[9] First, Ms Stevens says where (as here) a senior adviser from the Department of Corrections is acting under delegation from the chief executive under s 58(3)(b)–(c) (revocation or extension) or s 59(4)(b)–(d) (revocation, extension, and periodic review), in reviewing segregation decisions made by the prison director, the adviser is required to carry out an independent factual inquiry. She cannot simply rely on the information provided by the prison director and if she does, it is said, she (and therefore the chief executive) has no function under ss 58 or 59. Second, it is submitted that the Court of Appeal was wrong in not finding that, once the chief executive was seized of the matter, the power of the chief executive to revoke the direction in s 58(3)(b) superseded the prison director's power under s 58(1)(b) to make a direction. Finally, the applicant raises an argument about the adequacy of the reasons given for the decision of 8 September 2021 to extend the segregation order for three months.

[10] In relation to these matters, the Court of Appeal accepted the submission for the applicant that the senior adviser had to "independently evaluate whether it was appropriate to extend the segregation order".[12] However, the Court rejected the submission that the chief executive abdicated his responsibilities under the

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10 Corrections Act, ss 58(1) and 59(1).
11 See ss 58(2)(a) and (3), and 59(3)(a) and (4).
12 CA judgment, above n 2, at [110].

Corrections Act. In this context, the Court said that when acting as a delegate, the senior adviser is entitled to rely on material provided to her by the prison director. The Court noted that these types of decisions are reviewed and made on a daily basis across the prison system. The segregation directions are "all of comparatively short duration".[13] Further, the Court said, "[i]t would not be practicable for her to carry out her own fact-finding exercise in respect of each of these recommendations before making any decision."[14] That process would not be consistent with the scheme and purpose of the Corrections Act.

[11] On the second point, Ms Stevens relied on s 10(f) of the Corrections Act. That section prevents the chief executive from delegating certain functions to any staff member of a prison. Those functions include "the powers conferred by section 58 or section 59(1)(b)". The Court of Appeal said reliance on this section was misplaced. There had been no delegation to a staff member of a prison. The senior advisor was the chief executive's delegate and she did not work at the prison. Further, the segregation direction on 12 May 2021 had in fact been made by the prison director under the power directly conferred on him under s 58(1)(a). The chief executive was not involved in the exercise of that power.

[12] Finally, the Court considered that the reasons given for the decision to extend the order were satisfactory.[15]

Terms of s 58 order

[13] The argument made under this heading is that the implementation of the s 58 order of 12 May 2021 was illegal because the terms of that order only allowed for Ms Stevens' association with other prisoners to be restricted, not denied.[16] It is argued that the prison director acted unlawfully by placing Ms Stevens in the Separation and Reintegration Unit in implementing this order as this had the effect of denying her association with other prisoners.

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13 At [120].
14 At [120]; and see at [59] and [98].
15 At [115]–[116].
16 It seems on the material before us that the order referred to restricting and not to denying association.

[14] The Court of Appeal upheld the High Court's finding on this ground. Essentially Andrew J found that s 58 of the Corrections Act plainly conferred powers on the prison director to either restrict or deny access. Whether a prisoner on directed segregation under s 58 would be restricted or denied from associating with other prisoners would depend on what was possible within the particular prison and also the reasons for the segregation. The Court of Appeal agreed with the High Court that the evidence filed for the prison director established the practical difficulties of placing Ms Stevens elsewhere in the context of the 12 May 2021 order.

Our assessment

[15] The impact of the Mandela Rules on segregation decisions may raise a question of general or public importance which the Court may wish to consider at some point.[17] In the present case, however, the applicant's argument has undertaken a fairly fundamental shift. The effect of that change means that we would be considering that point without the benefit of analysis of it in the courts below. In these circumstances, this proposed appeal is not an appropriate case to consider the issue. Further, it is not suggested how the approach now advanced would have altered the outcome.

[16] In terms of the processes undertaken (the challenges relating to ss 58 and 59), it may be that in some cases a delegate undertaking the review function will be put on a factual inquiry. But whether that is so will turn on the specific facts, and in this case the Courts below both proceeded on the basis that independent inquiry was required in the review of the decision to extend. No question of general or public importance arises. Apart from a reference to an error about the number of cell movements, there is nothing raised by the applicant to suggest the inquiry she contemplates would have made a difference. The adequacy of the reasons given for the decision of 8 September 2021 to extend the segregation order have been the subject of concurrent factual findings and nothing advanced by the applicant provides a basis for a different view. Finally, for the reasons given by the Court of Appeal, we consider the argument based on s 10(f) of the Corrections Act has insufficient prospects of success to warrant a grant of leave.

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[17] Senior Courts Act 2016, s 74(2)(a).

[17] The final ground relating to the terms of the s 58 order is also, on analysis, a challenge to the concurrent findings below about the practical difficulties of effecting any other placement. No more general question arises. Nor is there anything in the submissions for the applicant that gives rise to the appearance of a miscarriage of justice.[18] It is not therefore necessary in the interests of justice for this Court to hear and determine the proposed appeal.[19]

Result

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

[19] There is no order as to costs.

Solicitors:
Exeo Legal, Wellington for Applicant
Meredith Connell, Wellington for First Respondent
Duncan Cotterill, Wellington for Second Respondent

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18 Section 74(2)(b).
19 Section 74(1).