MEDIUM PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP188 and 189/96

UNDER the Judicature Amendment Act 1972 or alternatively under the Common Law and Part VII of the High Court Rules, and the NZ Bill of Rights Act 1990 and the Legal Services Act 1991

IN THE MATTER of an Application for the Judicial Review of a Decision of the Registrar of the Court of Appeal, and of a Decision of a Statutory Review of that decision by a Judge of the Court of Appeal

BETWEEN JEFFREY GEORGE NICHOLLS
and RANGI TEKOPA TIKITIKI

Applicants

A N D THE REGISTRAR OF THE COURT OF APPEAL

First Respondent

A N D HER MAJESTY'S ATTORNEY-GENERAL FOR NEW ZEALAND

Second Respondent

Hearing: 15-16 September 1997

Counsel: T. Ellis with A. Shaw and F.M. Cooke for Applicants
J.J. McGrath QC with M. Hodgen and J. Foster for First and Second Respondents
P. Bartlett with P.A. Ryder-Lewis for Legal Services Board

Judgment: 24 OCT 1997

JUDGMENT OF ELLIS J.

Solicitors:
T. Ellis, P.O. Box 12-538, Wellington for Applicants
Crown Law Office, Wellington for First and Second Respondents
Bartlett & Partners, Wellington for Legal Services Board

These are applications for review of two decisions refusing to grant legal aid to appeal to the Court of Appeal. On 21 March 1996 the applicant Nicholls was convicted in the High Court on a charge of murder and was sentenced to life imprisonment. He appealed to the Court of Appeal against his conviction and applied for legal aid. This was refused by the Deputy Registrar of the Court of Appeal on 24 June 1996. Nicholls applied for a review of this decision. The review was undertaken by Blanchard J, who confirmed the refusal of legal aid.

On 15 May 1996 the applicant Tikitiki was convicted in the District Court of rape and subsequently sentenced to eight years imprisonment. He appealed against his sentence and applied for legal aid, which was refused by the Deputy Registrar on 24 June 1996. He did not apply for review.

In each case it is submitted the refusal of aid was unlawful. A variety of reasons were put forward. In effect this case is a challenge to the procedures adopted in the Court of Appeal when legal aid applications are considered, and a fundamental challenge to the basis upon which that Court determines what is or is not "in the interests of justice".

The Statutory Scheme

The Legal Services Act 1991 is stated in its long title to be an Act to make legal services more readily available to persons of insufficient means. Criminal legal aid may be granted for proceedings in the District Court, High Court and Court of Appeal, but in the Privy Council only where the Attorney-General certifies that a question of law of exceptional public importance is involved and the grant of aid is desirable in the public interest: s4. Only natural persons charged or convicted are eligible: s5. Every application shall be made in the appropriate Court: s6; and the Registrar (which includes a Deputy Registrar: s2) may grant it. Section 7 provides:

> **"SECT. 7. REGISTRAR MAY GRANT CRIMINAL LEGAL AID-**
> (1) Where any Court receives an application for criminal legal aid, a Registrar of that Court may, after assessing the application in accordance with the prescribed procedure, direct that criminal legal aid be granted to the applicant if, -
>
> (a) Subject to section 15(1) of this Act, in that Registrar's opinion it is desirable in the interests of justice that the applicant be granted criminal legal aid; and
>
> (b) It appears to that Registrar that the applicant does not have sufficient means to enable him or her to obtain legal assistance.
>
> (2) In considering whether or not to direct the grant of criminal legal aid, the Registrar shall have regard to-
>
> (a) The gravity of the offence [or, in any case to which section 4(c) of this Act applies, the offence for which the sentence to which the proceedings relate was imposed]:

[(aa) In any case to which section 4(c) of this Act applies, the consequences for the applicant if criminal legal aid is not granted:]

(b) In respect of any appeal, the grounds of the appeal:

(c) Any other circumstances that in the opinion of the Registrar are relevant.

(3) Subject to section 11 of this Act, any direction given under this section may be in respect of -

(a) The whole of the proceedings or appeal or such part of the proceedings or appeal as the Registrar thinks fit:

(b) The whole of the expenses of the person charged or convicted or such part of those expenses as the Registrar thinks fit.

(4) Before directing the grant of criminal legal aid to any person, the Registrar shall, in each case, consider the various powers conferred on the Registrar by subsection (3) of this section and the appropriateness of exercising each of them in that case.

(5) Nothing in subsection (3) of this section prevents the applicant from making a further application for criminal legal aid in respect of the proceedings or appeal."

Where the application is in the Court of Appeal, s15 applies. This provides:

"**SECT. 15. REGISTRAR TO REFER CERTAIN MATTERS TO JUDGE OF COURT OF APPEAL -**

(1) Where an application for criminal legal aid is made to the Court of Appeal, the Registrar who deals with that application shall, for the purposes of determining whether or not it is desirable in the interests of justice that the applicant be granted criminal legal aid, consult with a Judge of that Court, and shall take the views of that Judge on that matter into account in making that determination.

(2) Where, pursuant to section 14(1) of this Act, any Registrar proposes to modify or cancel any grant of criminal legal aid to any person in respect of any proceedings in the Court of Appeal on the grounds that it is no longer desirable in the interests of justice that criminal legal aid by afforded to that person, that Registrar shall consult with a Judge of that Court on that matter, and shall take the views of that Judge on that matter into account in deciding whether or not to cancel or modify that grant of aid on those grounds."

A decision of the Registrar can be reviewed. Section 16 provides:

"SECT. 16. REVIEW OF DECISIONS OF REGISTRAR -

(1) Any person who is aggrieved by any decision of a Registrar under section 7 or section 8 or section 14 of this Act may apply for a review of that decision to, -

(a) Where the decision was made by a Registrar of the Court of Appeal, a Judge of that Court or a Judge of the High Court:

(b) Where the decision was made by a Registrar of the High Court, a Judge of that Court:

(c) In any other case, a District Court Judge.

(2) Every application under subsection (1) of this section shall be made within 20 working days after the date on which notification of the decision of the Registrar is forwarded to the applicant, or within such further time as a Judge or District Court Judge may allow on application made for that purpose either before or after the expiration of those 20 working days.

(3) Every review shall be by way of rehearing of the matter in respect of which the Registrar made the decision.

(4) On hearing an application under subsection (1) of this section for a review of a decision of a Registrar, the Judge or District Court Judge may confirm, modify, or reverse the Registrar's decision.

> (5) Where, as a result of the modification or reversal, under this section, of a decision of a Registrar, any amount fixed by a District Subcommittee under section 11 of this Act is required to be re-assessed, that Registrar shall refer that amount to that Subcommittee.
> (6) The District Subcommittee may make such variation (if any) to that amount as it considers appropriate, and the amount as so varied shall be deemed to be the amount fixed under section 11 of this Act in respect of the grant of aid to which it relates."

There are two distinct steps involved in the grant of aid. The first is a determination whether or not it is desirable in the interests of justice: s7(1)(a), and if so, the second is whether or not the applicant has sufficient means of his or her own: s7(1)(b). In the present cases it is only the first consideration that the Court is asked to consider, so in effect I am to assume each applicant would qualify as being without sufficient means.

The Procedure in the Court of Appeal

In the Court of Appeal the procedure follows the guidelines contained in a document called, unsurprisingly, "Criminal Legal Aid Procedures".

When the Registrar, or in these cases the Deputy Registrar, received each application for legal aid, he referred the whole file to a Judge of the Court of Appeal for his opinion as to whether or not it was desirable in the

interests of justice to grant aid. It was a different Judge in each case. Each Judge considered whether further written material was required (in Nicholls' case the summing-up and eight trial rulings were already on file). He then passed the file to a Judges' Clerk to prepare a Criminal Appeal Sheet (CAS). This was done and in Nicholls' case it comprised a lengthy summary of facts and the grounds of appeal which were:

> "1. The trial Judge erred in law by failing to put the defence of insanity to the jury.
> 2. The defence was prejudiced by the trial Judge's refusal to delay the trial for further medical evidence to be obtained.
> 3. The defence was prejudiced by the trial Judge's refusal to hear counsel in chambers during the trial in relation to a matter of evidence.
> 4. The trial Judge was incorrect in law in an answer given to a question from the jury."

However, the Notice of Appeal contained the additional statement "the full grounds of appeal are currently being prepared by my lawyer". Then followed a lengthy comment about the grounds of appeal.

In Tikitiki's case there was a short summary of facts. The sole ground of appeal was that the sentence was manifestly excessive. The comment was that the sentence was not manifestly excessive.

Each CAS was returned to the Judge, who considered the papers and in each case recommended that aid be declined. He then passed the file to a second Judge for independent consideration. In Nicholls' case the second Judge noted his concern that the "full grounds of appeal" had not been filed, however after discussion with the first Judge this reservation was not pursued. In Tikitiki's case the second Judge agreed with the first. Then the papers were sent to a third Judge for independent assessment and each agreed that aid should be declined. Each file, but not the CAS, was returned to the Deputy Registrar, who has deposed that on being aware of the views of three Judges in each case he made up his own mind that it was not desirable in the interests of justice to grant aid.

The Deputy Registrar then wrote a standard letter to each applicant. In the letter to Tikitiki he said:

> "Your application for Criminal Legal Aid has been refused.
>
> Section 7 of the Legal Services Act 1991 provides that aid may be granted if it appears desirable in the interests of justice that it be granted. Section 15 requires the Registrar of this Court to consult with a Judge for the purpose of determining whether that condition has been met. After consideration by three Judges of the Court of Appeal it has been decided that in your case it has not been. This is because the grounds you wish to put forward are not substantial enough to justify the expense of a grant of legal aid and the costs of an appeal.

> Your appeal against sentence will be determined by the Court on 8 August 1996.
>
> You have 28 days in which to make written submissions in support of your appeal against sentence."

In Nicholls' case the applicant applied under s16 for review. The file and CAS were put before Blanchard J, who had no prior dealings with it. Included was a letter from Mr Billington QC, retained by the applicant. He conducted a rehearing on the papers and confirmed the Deputy Registrar's decision. I record the Judge also had before him the Statement of Claim in CP188/96, one of the claims I am now considering. Nicholls was advised simply that the Deputy Registrar's decision had been confirmed. No reasons were given, although the Statement of Claim raised the issues under the International Covenant on Civil and Political Rights.

In Tikitiki's case no application for review was made.

The Challenges to the Decisions

The claims are that the decision of the Deputy Registrar was illegal for these reasons:

1. The appellant was not given an opportunity to file full grounds of

appeal (Nicholls).

2. The Deputy Registrar did not consult a Judge, but merely followed the Judge's direction. He did not exercise his own discretion.

3. The Deputy Registrar did not receive the CAS.

4. The system of having three Judges consider the application is ultra vires.

5. The Deputy Registrar wrongfully took into account economic considerations when deciding whether or not it was in the interests of justice to grant aid.

6. The applicant was not afforded a hearing before the Deputy Registrar or the Judge on review.

7. The Judges relied on the CAS rather than their own reading of the file.

8. No proper reasons were given for the decisions.

9. The decision was in breach of the New Zealand Bill of Rights Act 1990 (BOR) and our international obligations under the International Convention on Civil and Political Rights (ICCPR).

Nicholls claims the decision of Blanchard J on review was the exercise of a statutory power as a statutory tribunal, not as a Judge of the Court of Appeal. He claims that the Judge's decision did not cure the defects in the Deputy Registrar's decision, but compounded them. In his Third Amended Statement of Claim he criticises the Judge for failing to give reasons for his decision, and before me this was extended to a criticism of the failure to afford the applicant a hearing.

In his Second Amended Statement of Claim Tikitiki raises the same issues against the decision of the Deputy Registrar.

I have condensed the variously worded allegations into what I consider to be the essence of the applicants' claims, which I propose to deal with in two parts.

The Procedural Criticisms

1. Nicholls claims he was not given the opportunity to file full grounds of appeal. A period of some 11 weeks elapsed from the filing of the

appeal to the Deputy Registrar's decision. While I think it would have been preferable to write asking for them, rather than proceed on a presumption drawn from delay (a period during which the applicant was without legal aid), the defect if it be such was cured at review when Mr Billington's letter was before Blanchard J. Certainly by then the applicant had every opportunity to state his case.

2. Each claims the Deputy Registrar did not consult with a Judge as required by s15. It is well settled that where a statute requires consultation, the obligation and nature of the consultation will depend on the nature of the transaction and the parties to it.

In my view the relative status and expertise of the Deputy Registrar and a Judge or Judges of the Court of Appeal on the question what is desirable in the interests of justice is obvious. While it is possible for the Deputy Registrar to take a different view from a Judge, it is extremely unlikely in practice. The statute expressly requires consultation because of the Judge's pre-eminent expertise in this area. In my view the Deputy Registrar is required to make all information available to him, available to the Judge (and so Judges), but he is not required to discuss the Judge's reasons with

him or prosecute the matter further after learning the Judge's views unless he, the Deputy Registrar, has some particular cause for concern, which he should then discuss with the Judge. The evidence of the Deputy Registrar was that he obtained the Judge's views (which he knew were endorsed by two others) and then made his own decision. In my view this is what the statute required.

3. It is true that the Deputy Registrar did not receive or consider the CAS, which is a working document which the Judges have prepared for their own use. In my view the nature of the consultation does not require the Judge to explain his reasons to the Deputy Registrar in any detail unless the Deputy Registrar raises a question or problem. That was not the case here. The use of the CAS may however create other problems, namely if Judges rely on it and it contains errors of fact or assessment which are not available to the applicant for scrutiny.

4. The system of using three Judges has been in place for many years. The practice is that if any one Judge thinks aid should be granted in the interests of justice, then that is the recommendation. The statute requires only one Judge to be consulted. The consultation in fact provides a greater measure of consideration which can only work in

the applicant's favour. In my view, it is a strange suggestion that consulting three is a breach of the obligation to consult one.

5. The letter advising refusal of legal aid contains the unfortunate statement "the grounds you wish to put forward are not substantial enough to justify the expense of legal aid and the costs of an appeal". While it is true if a broad look at the Act is taken, the factors the Deputy Registrar or a Judge on review can take into account are plainly limited by s7 to what is desirable in the interests of justice and the means of the applicant. I am satisfied that each application was declined because neither a Judge nor the Deputy Registrar considered the grant was desirable in the interests of justice. The letter plainly sends the wrong message to an applicant and should be changed. There is, however, no substance in the criticism.

6, 7 & 8. The applicants were not afforded a hearing and no detailed reasons were given for the decisions, apart from the standard letter. As far as the CAS is concerned, Blanchard J deposes that he reviewed the file himself. What is perhaps of most significance is that the applicants had no way of knowing what influence the CAS had or what was in it.

The Bill of Rights and International Obligations

In terms of the Legal Services Act 1991 it is submitted that where an applicant for legal aid is appealing against a conviction for murder, or a sentence for rape, because of the gravity of the offences and the consequences for the applicant, it must be in the interests of justice to grant aid, subject of course to the question of means. Indeed the submission covered virtually all appeals where imprisonment was imposed, and others as well, all on the same basis, namely the proper consideration of the statutory criteria in s7(2)(a) and (aa).

In my view the decision whether or nor to grant legal aid to an appellant is discretionary depending on whether or not the Registrar considers it to be "in the interests of justice". The applicants' contention would limit that discretion. It is submitted that such limitation is imposed upon the Registrar by our international obligations. These obligations and their history have been succinctly traced by Keith J delivering the leading judgment of the Court of Appeal in *Wellington District Legal Services Committee v Tangiora* (CA33/97, unreported, 10 September 1997). Article 14 of the ICCPR provides:

"14 .(1) ...
(2) ...
(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) ...
(b) ...
(c) ...
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) ...
(f) ...
(g) ...
(4) ...
(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

Article 14 (3)(f) requires legal aid for those without means only when "the interests of justice so require". There is no equivalent provision on appeal, but it is easy to infer that no higher obligation could be imposed. That obligation equates precisely with what is provided for in our s7 set out above.

Mr Shaw and Mr Ellis gave ample references to texts and to the leading cases before the European Court of Human Rights and the

Committee on Human Rights. All support the submission that legal aid should also be available on appeal when the interests of justice require it. That is what our legislation provides. However, the question of when legal aid is necessary in the interests of justice is a matter of fact to be determined according to the statutory criteria set out in s7(2).

In the European Convention on Human Rights, Article 6 provides that everyone charged with a criminal offence must, if he has insufficient means, be given free legal assistance "when the interests of justice so require". The European Court of Human Rights has determined that this includes the appeal process, indeed all stages of the process until guilt has been finally determined.. The jurisprudence before that Court is summarised in the text Harris, O'Boyle & Warbrick "Law of the European Convention on Human Rights", Butterworths, 1995, p262:

> "A number of criteria have been identified by the Court as being relevant when determining whether the 'interests of justice' call for legal assistance. Firstly, the more complicated the case, the more likely that legal assistance is required. Secondly, regard must be had to the contribution that the accused would be able to make if he defended himself. In this connection, the test is the capacity of the particular accused to present his case. A third consideration is the importance of what is 'at stake' for the applicant in terms of the seriousness of the offence with which he is charged and the possible sentence that could result. This is a consideration that may by itself require legal aid to be granted. In *Quaranta v Switzerland* the 'mere fact' that the possible sentence that could be imposed upon the accused

> for drugs offences was three years' imprisonment automatically meant that legal aid should have been provided.
>
> In appeal cases, it does not matter that the accused's chances of success are negligible. To the extent that the accused is granted a right of appeal by national law, he must be provided with legal aid if this is required for him to exercise it. In *Boner v U.K.* the applicant was refused legal aid on the statutory ground that he did not have 'substantial grounds for making the appeal'. In holding that there had been a breach of Article 6(3)(c), the European Court focused on the fact that the accused would need the services of a lawyer in order to argue the point he wished to raise, as well as the importance of what was at stake for the applicant (an eight-year sentence). For these reasons, the 'interests of justice' required legal representation for the accused to exercise effectively the (admittedly wide) right of appeal that Scots law allowed him; it did not matter that his chances of success were slight."

Although we do not have capital offences in New Zealand, the general position is well stated by Professor Novak in ".U.N. Covenant on Civil and Political Rights. CCPR Commentary" at pages 259-260:

> "A systematic interpretation, including the travaux preparatoires, tends to lead to the following result: Everyone charged with a criminal offence has a primary, unrestricted right to be present at the trial and to defend himself. However, he can forego this right and instead make use of defence counsel, with the court being required to inform him of the right to counsel. In principle, he may select an attorney of his own choosing so long as he can afford to do so. Should he lack the financial means, he has a right to appointment of defence counsel by the court at no cost, insofar as this is necessary in the interest of

> administration of justice. Whether the interests of justice require the State to provide for effective representation by counsel depends primarily on the seriousness of the offence and the potential maximum punishment. The Committee found, e.g. that fines of 1,000 Norwegian krones for two traffic violations did not require the assignment of a lawyer at the expense of the State, whereas in a capital case it was 'axiomatic' that legal assistance be available."

In the present cases, whether or not it is in the interests of parties to grant legal aid has been determined on the papers, without a hearing, and relying on the CAS. This raises important questions, as does the fact that no reasons are given for the Registrar's decision, or that of the Judge on review. Further, as is plain from s7 itself, aid can be for a full hearing or limited to say formulating the grounds of appeal. It should not be the Registrar's or the Judge's function to investigate or formulate possible grounds of appeal, and the appellant will often be untrained and unable to analyse the case for him or herself. Perhaps the most telling quotation in the applicant's submissions is from the judgment of the Supreme Court of the United States in *Douglas v California* (1963) 9L ed 2d US 811. There Douglas J said at page 814:

> "In spite of California's forward treatment of indigents, under its present practice the type of an appeal a person is afforded in the District Court of Appeal hinges *upon whether or not he can pay for the assistance of counsel. If he can the appellate court passes on the merits of his case

> only after having the full benefit of written briefs and oral argument by counsel. If he cannot the appellate court is forced to pre-judge the merits before it can even determine whether counsel should be provided. At this stage in the proceedings only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an ex parte examination of the record that the assistance of counsel is not required."

I do not need to refer to the counterbalance supplied by the dissenting judgment of Clark J. It too is important in the present context. Nor must it be overlooked that this is a case decided on the "equal protection" and "due process" provisions of the United States Constitution. However, it encapsulates the applicants' submissions. I recollect many years ago urging the Court of Appeal that the decision of the United States Supreme Court in *Gideon v Wainwright* (9L ed 2d 799) should be applied in New Zealand, only to be told firmly by the President that Gideon's trumpet had not been heard in New Zealand.

Here the Court is dealing with cases of murder and rape. They are at or near the top end of the criminal calendar in terms of seriousness. Neither appellant presents as competent in the law or legal process. Neither has been able to suggest a ground of appeal that any one of three

Judges thinks has any chance of success, however, Mr Billington has suggested there may be a ground based on the conduct of the defence.

The Proper Disposition of the Case

Since the hearing, which was originally scheduled before a Full Court, I have given anxious consideration to the matters of principle and fact involved in each of the two cases. I have just referred to the matters that I think are of particular concern. Added to these is the question of jurisdiction to review the decision of a Judge of the Court of Appeal. I do not propose to decide that, because not only do I anticipate that this case will be taken to the Court of Appeal in any event, but I consider that the concerns I have expressed are properly for consideration by the Court of Appeal itself, which can take this opportunity to review its procedure in light of the challenges now made. Under s64 of the Judicature Act 1908 this Court can remove applications for review into the Court of Appeal: *Black v N.Z. Law Practitioners Disciplinary Tribunal* (1996) 10 PRNZ 181. I therefore order that they be so removed.

A. D. Tompkins J