IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-404-273

	UNDER	Part 1A of the Human Rights Act 1993
	BETWEEN	CHILD POVERTY ACTION GROUP INCORPORATED (CPAG) Appellant
	AND	THE ATTORNEY-GENERAL Respondent

Hearing: 5 June 2009

Appearances: F Joychild and D Peirse for the appellant
C Gwyn and J Foster for the respondent

Judgment: 3 July 2009 at 3 pm

JUDGMENT OF MALLON J

Introduction

[1] The appellant claims that certain provisions of the Income Tax Act 2007 discriminate against the children of beneficiaries when compared with the children of working parents. Before the Human Rights Review Tribunal it sought a declaration under the Human Rights Act 1993 that these provisions were inconsistent with s 19 of the New Zealand Bill of Rights Act 1990 (which affirms the right to freedom from discrimination). The Tribunal agreed that the provisions were discriminatory but held that that this was justified (s 5 of the New Zealand Bill of Rights Act 1990). The Tribunal therefore declined to make a declaration in the appellant's favour. The appellant wishes to appeal the Tribunal's decision but, through no fault of its own, it lodged its appeal outside the time prescribed in the Human Rights Act.

[2] There are two issues before me. They are first, whether the Court has power to extend the time for lodging the appeal; and secondly, whether the Court has jurisdiction to hear the appeal if the respondent waives the time limits for bringing the appeal. The respondent says that the Court has no power to extend the time but that it consents to an out of time appeal and this gives the Court jurisdiction. The appellant says that the Court has power to extend the time limit and that, despite the respondent's consent to the late appeal, this is the preferable course because otherwise the respondent has the power to decide in any particular case which late appeals can be pursued and which can not.

Legislation

[3] Section 123 of the Humans Rights Act provides for appeals to the High Court from decisions of the Tribunal. The appellant's right of appeal is under s 123(2) which provides for an appeal where the Tribunal has dismissed a proceeding or declined to grant the remedy sought. Section 123(4) provides that "[e]very appeal under this section shall be made by giving notice of appeal within 30 days after the date of the giving by the Tribunal in writing of the decision to which the appeal relates". Section 123(8) provides that "[s]ubject to the provisions of this Act, the procedure in respect of any such appeal shall be in accordance with the rules of Court".

[4] Section 124 of the Human Rights Act provides for appeals to the Court of Appeal on a question of law. Section 124(1) provides that any party to a proceeding before the High Court may appeal "against any determination of the High Court on a question of law arising in those proceedings" if the High Court grants leave, or if the High Court refuses to grant leave but the Court of Appeal grants special leave. If a party wishes to seek leave or special leave the following provisions apply (s 124(2) and (3)):

> (2) A party desiring to appeal to the Court of Appeal under this section shall, within 21 days after the determination of the High Court, or within such further time as that Court may allow, give notice of his or her application for leave to appeal in such manner as may be directed by the rules of that Court, and the High Court may grant leave accordingly if in the opinion of that Court the question of law

involved in the appeal is one which, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

(3) Where the High Court refuses leave to any party to appeal to the Court of Appeal under this section, that party may, within 21 days after the refusal of the High Court or within such further time as the Court of Appeal may allow, apply to the Court of Appeal, in such manner as may be directed by the rules of that Court, for special leave to appeal to that Court, and the Court of Appeal may grant leave accordingly if, in the opinion of that Court, the question of law involved in the appeal is one which, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

[5] Because of s 123(8) of the Human Rights Act, the High Court Rules are also relevant. It is agreed that the predecessor rules are relevant because the appeal was filed before the new High Court Rules came into force, although there is no material difference in the wording between the old r 704 and its replacement in the new r 20.4. Rule 704 provides:

704 Time for appeal where there is right of appeal

(1) This rule applies when a party has a right of appeal to the Court.

(2) An appeal must be brought,—

(a) if the enactment that confers the right of appeal specifies a period within which the appeal must be brought, within that period; or

(b) in every other case, within 20 working days after the decision appealed against is given.

(3) By special leave, the Court may extend the time prescribed for appealing if the enactment that confers the right of appeal—

(a) permits the extension; or

(b) does not limit the time prescribed for bringing the appeal.

(4) An application for an extension—

(a) must be made by an interlocutory application on notice to every other party affected by the appeal; and

(b) may be made before or after the expiry of the time for appealing.

What happened here

[6] An affidavit from the Director of the Office of Human Rights Proceedings has been filed. The Director advises that the office represented the appellant before the Tribunal. The Tribunal's decision was given on 16 December 2008. The Director met with the appellant on 18 December 2008 and advised that the Office would advise the appellant of the date by which any appeal would need to be filed. The Director was aware that the Human Rights Act provided for 30 days to bring an appeal but needed to check whether there were days over the Christmas/New Year period that were not included in the calculation of the 30 days.

[7] On the afternoon of 23 December 2008 the Director was able to consider the issue. He was unable to read the High Court Rules online because the system was down, and that remained the position for some time. The Director then telephoned a civil case manager in the Wellington registry of the High Court. He was told that for the purposes of calculating the time for filing an appeal the period from 24 December to 5 January was excluded. On this basis the Director advised that the appellant had until 27 January to file its appeal. The Director said that to be on the safe side (for example to allow for delays in postage) the appellant should make sure that any appeal was filed on 23 January 2009.

[8] In accordance with that advice, on 23 January 2009 the appellant filed its appeal. Subsequently the Director realised his mistake when, after a discussion with Crown Law, he checked the High Court Rules and saw that the rule concerning the computation of time did not apply to statutory rights of appeal. This meant that the 30 day period expired on 15 January 2009.

Issue 1: Power to extend time?

[9] The parties agree that r 704(2)(a) applies because the Human Rights Act, which confers the right of appeal, specifies the period within which the appeal must be brought. That time period is within 30 days after the Tribunal gave its decision in writing. The parties agree that the 30 days expired on 15 January 2009 and the

appellant's appeal was filed out of time. This means that the appellant needs special leave to bring the appeal out of time, which the Court can grant if the Human Rights Act either "permits the extension" (r 704(3)(a)) or "does not limit the time prescribed for bringing the appeal" (r 704(3)(b)).

[10] The appellant relies on the first of these two bases on which an extension can be granted. That is, it submits that the Human Rights Act permits the extension. It acknowledges that the Human Rights Act does not do so expressly. It submits that the Act should be construed as permitting the extension because it does not expressly prohibit it either. It submits that this construction is open and should be adopted because it best advances the rights that the Human Rights legislation seeks to protect.

[11] The appellant acknowledges that there is a line of High Court authority which is against it. That line begins with *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404. In that case the High Court was considering an identical provision to s 123 of the Human Rights Act. The Judge considered that the language of the statutory provision indicated an intent that appeals were to be brought within the specified time and did not indicate, in any ordinary and grammatical sense, an intent to permit or authorise an extension of time. The Judge acknowledged that this ran counter to a Judge's natural inclination to try to support rights of appeal, but considered that any alternative interpretation was not open. He considered that the broad nature of the jurisdiction conferred by the legislation on the Tribunal (where decisions were not determined according to conventional legal principles and procedures) did not encourage him to adopt some especially liberal construction of the appeal provisions, it being not surprising in the Judge's view that a restricted right of appeal was intended.

[12] *Inglis* was followed by the High Court in *Ta'ase v Victoria University of Wellington* (1999) 14 PRNZ 406; *Cullen v Police* (1995) 14 PRNZ 315; and *Stoves v Commissioner of Police* HC CHCH CIV-2009-409-000011 20 April 2009, all in respect of s 123(4) of the Human Rights Act. The Court of Appeal took the same view in respect of s 123(4) in *Dawson v Chief Executive Officer of the Ministry of Social Development* [2007] NZCA 94 at [12]. Further, in *Attorney-General v Howard* HC WN CIV-2008-485-1291 7 April 2009 the High Court Judge considered

procedural certainty was desirable in Human Right Act appeals (especially because lay litigants were common) and relied on *Inglis* in support of this view.

[13] A similar approach has been taken under other legislation: *Steinborn v Minister of Immigration* [2002] 1 NZLR 639 and *Kaur v Chief Executive of the Department of Labour* HC WN CIV-2005-485-585 23 February 2006 (both appeals under the Immigration Act 1987); and *Saipe v Accident Compensation Corporation* HC AK CIV-2008-404-1053 10 April 2008, *Bruce v Accident Compensation Corporation* HC WN CIV-2008-485-411 28 July 2008 and *Thomas v Accident Compensation Corporation* HC AK CIV-2008-404-00675 3 November 2008 (all in respect of accident compensation legislation).

[14] The position advanced by the appellant does, however, have some support. In *Simpson v Accident Compensation Corporation* HC WN AP 130/01 21 October 2002 the High Court Judge referred to *Inglis, Ta'ase* and *Cullen* and said (at [9]) that "I should think it remains open to argument that a statute may permit an extension of time if it does not expressly or implicitly prohibit it". However the Judge also said that he did not have to consider this argument because no application to extend the time had been made, and the appellant had not complied with the Court's directions, had not appeared and had chances of success on the appeal that were described as "forlorn".

[15] The appellant submits that the approach raised in *Simpson* should be followed. She submits that the cases have largely applied *Inglis* without much apparent independent analysis and that the rationale in *Inglis* is not persuasive. The appellant submits that in cases taken under Part 1A of the Human Rights Act (as is the case here) there is much less use of 'non-conventional legal principles and procedures' which was the rationale relied on in *Inglis* for why Parliament intended restricted rights of appeal. The appellant further submits that the *Inglis* approach runs contrary to authority that recognises the special nature of human rights domestic legislation and that this characteristic must guide construction of its provisions. The appellant acknowledges that these authorities have been in the context of decisions on substantive human rights but says the same principles should apply when considering the interpretation of procedural human rights. The appellant says that in

the context of Human Rights legislation a strict construction of the appeal provisions "reduces access to justice and disables rights", particularly in Part 1A cases.

[16] I share the inclination referred to in *Inglis* to support rights of appeal, particularly where the appeal has been filed only a few days late and in the circumstances where the appellant has acted responsibly by taking advice and relying on it (including the advice to file the appeal a few days before the expiry of the time period in order "to be safe"). I also acknowledge the appellant's point that strict construction of procedural provisions may prevent important issues (here whether legislation unlawfully discriminated against the many children of beneficiaries in this country) from being considered by the Court. However, there are three reasons why I am unable to accept the construction for which the appellant contends.

[17] First, the weight of authority, which includes the Court of Appeal by which this Court is bound, has determined otherwise. The Court of Appeal in *Dawson* specifically stated that "there is nothing in the Human Rights Act that authorises an extension of time beyond that fixed by s 123(4)" (at [12]). The Court of Appeal went on to refer to *Inglis* and *Ta'ase* and said that it was not invited to overrule those authorities. I do not read this as indicating any view one way or the other as to whether there is a prospect that it would overrule those authorities if it were invited to do so. As matters stand, however, the Court of Appeal has applied the *Inglis* (and *Ta'ase* and the others) approach.

[18] Secondly, I agree with the view in *Inglis* (and the decisions that have taken the same approach) that s 123(4) does not permit an extension of the time prescribed for bringing the appeal, applying the ordinary meaning of the words in r 704(3). Section 123(4) of the Human Rights Act provides that "every" appeal "shall" be made by giving notice within 30 days. It therefore specifies what must be done. In the absence of any provision expressly permitting an extension despite the mandatory terms of s 123(4), it cannot be said that the Human Rights Act permits (ie. allows, gives consent to or provides for) an extension in time.

[19] That conclusion is reinforced by the terms of s 124. That section expressly provides for the High Court to allow further time beyond the stipulated 21 day time period for the bringing of an application for leave to appeal and, similarly, for the Court of Appeal to allow further time beyond the stipulated 21 day time period for the bringing of an application for special leave. It is not obvious why Parliament has permitted extensions of time for leave applications to appeal from the High Court on a question of law but not when the appeal is from the Tribunal (which appeal may be on fact and/or law). The respondent suggests that it may be because at this stage of a proceeding on appeal a question of law will be of sufficient importance as to warrant a more generous approach to time limits. Whatever the rationale, the words make plain Parliament's intent.

[20] Thirdly, when construing statutory provisions, there is a difference between taking a generous rather than niggardly approach on the one hand and overriding Parliament's intent on the other. The Court's task is to interpret, and not legislate: *R v Hansen* [2007] 3 NZLR 1 (SC) at [156]. That is the case whether the statutory provisions are in Human Rights legislation or not. Here there is the further difficulty that the approach contended for would have application beyond the Human Rights area. Rule 704 (and its replacement) applies generally to appeals to the High Court. If r 704(3)(a) (and its replacement) is to be interpreted as meaning that an enactment in the area of human rights permits an extension unless the enactment expressly prohibits an extension, then that approach ought equally to be taken in respect of other enactments which confer rights of appeal. Appellants under those other enactments ought to be equally entitled to pursue rights of appeals on matters of importance to them.

[21] I therefore consider that I am not able to grant an extension in the time for the bringing of this appeal. (I note that counsel did not seek to contend that an out of time appeal could be regularised under r 5, now r 1.5, the authorities being to the effect that this regularises non-compliance with the requirements of the High Court Rules and not non-compliance with other statutory provisions.)

Issue 2: jurisdiction if waiver?

[22] The appellant says that a party can waive a statutory time requirement for the bringing of an appeal and if it does so the Court has jurisdiction to hear the appeal. The respondent agrees and has advised that it does waive the requirement.

[23] There is authority which has taken the view that if non-compliance with statutory requirements is waived the Court has jurisdiction: *Gaynor v Lacy* [1920] NZLR 235 at 237; *Meeks v Hull* (1999) 12 PRNZ 606; *Shaw v Commissioner of Inland Revenue* (2002) 20 NZTC 17,788 at [18]; *Williamson v Williamson* (1998) 12 PRNZ 455 at 460; *Donnelly v Orr* (1999) 13 PRNZ 190; *Cullen v Police* (1999) 14 PRNZ 315; and *Siola'a v Wellington District Court* [2009] NZAR 23 (CA). There has also been authority which indicates otherwise: *Zhang v Accident Compensation Corporation* HC AK CIV-2005-404-007101 27 October 2006 at [8]; *The Attorney-General v Howard* at [17] and [24] (discussing the conflicting line of authority and suggesting the distinction may be between proceedings in which the Court could never have had jurisdiction and those where there would have been jurisdiction but for the failure to comply with the time limits) and *Benchmark Building Supplies Ltd v Wright* (1998) 12 PRNZ 200 at 203 (that an appeal brought outside a mandatory time limit may be a nullity).

[24] The most recent of these authorities is the Court of Appeal's decision in *Siola'a.* The case was concerned with an application for leave to appeal under accident compensation legislation which was out of time. The issue of waiver turned on the meaning of s 3 of the Inferior Courts Procedure Act 1909. That section provided that where there was waiver of an error, irregularity, omission, or defect, whether it related to the jurisdiction of the Court or to the procedure, the proceedings were valid – unless it would give to the Court jurisdiction which it could never have had under any circumstances. The appellant had filed his application for leave to appeal outside the statutory time frame. The Court of Appeal concluded that under s 3 the jurisdictional irregularity caused by the late filing could be cured by waiver. This was because the granting of leave was not something the Court could never have had jurisdiction to do. In reaching this view the Court of Appeal added that classifying a leave application made outside the time limit set by the statute as a

"nullity" was not strictly accurate. Waiver of non-compliance would mean that there was an application before the Court requiring a determination and over which the Court would have jurisdiction.

[25] There is an issue as to whether *Siola'a* turns on the existence of s 3 or whether it has wider application (because that section does not apply here). Counsel for the parties submitted that it should be applied in the present context. I agree.

[26] I note that there is a suggestion in *Siola'a* that it may have wider application in that the Court of Appeal went on to refer to its analysis as being consistent with the analysis of *Crown Health Financing Agency v P* [2008] NZCA 362 at [72] and [252] (the Court of Appeal in *Siola'a* refers to [253] of that decision but that reference appears to be wrong). In those passages the Court of Appeal is considering whether a proceeding is a "nullity" if it first required an application for leave and no such application had been made (the issue arising because a fresh proceeding had limitation issues) and concludes that it is not.

[27] I consider it is open to take the same approach as that taken in *Siola'a* under s 3 of the Inferior Courts Procedure Act. A number of decisions of the High Court have taken this approach. These decisions include *Cullen* which concerned an appeal under the Human Rights Act. Although the Judge in *Cullen* did not discuss why waiver might give the Court jurisdiction, it was prepared to consider whether the respondent had waived the statutory time period for filing an appeal, finding on the facts that it had not. I am reinforced in my view that the *Siola'a* approach can be taken here by the discussion in Wade & Forsyth *Administrative Law* (9ed 2004) at pp 239 to 242.

[28] This is not a case where the Court could never have had jurisdiction – it does have jurisdiction in respect of appeals from the Human Rights Tribunal. The time limit in the Human Rights Act is a mandatory one and so, although procedural, can deprive a Court of jurisdiction. But jurisdiction is only lost if objection is taken at the proper time. In this case the respondent to the appeal, who would otherwise have the benefit of the mandatory time limit, is prepared to waive it. There is therefore an

appeal (for which no application to strike out has been made or considered) before the Court requiring a determination over which the Court has jurisdiction.

[29] For completeness I note that I raised with counsel whether there was an analogy to be drawn with the ability of a defendant to elect not to rely on a limitation defence. Counsel for both parties responded by submitting that this analogy could be drawn and that the well established position is that a limitation defence only bars a claim if it is raised by the defence: see, for example, *AMP Finance New Zealand Limited v Heaven* (1997) 8 TCLR 144 (CA) at 154; *Official Assignee v Fuller* [1982] 1 NZLR 671 (CA) at 672; *Ronex Properties Ltd v John Laing Construction Ltd* [1982] 3 All ER 961 at 965; and *Seal v Chief Constable of South Wales Police* [2007] 4 All ER 177 [2007] UKHL 31 (HL) at [44].

[30] Having reviewed the authorities the parties have referred to me and the discussion in *Wade & Forsyth* I am satisfied that the respondent's waiver of the statutory time period for bringing this appeal (and correspondingly the absence of any application to strike out the appeal) means that the Court has jurisdiction to consider and decide the appellant's appeal.

Result

[31] The application for leave to extend the time to appeal is dismissed. However the respondent has waived the time prescribed for bringing the appeal which means that the appeal is able to proceed and can be determined by the Court.

Mallon J

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