

COVID-19 timeline
19 August 2020

Borrowdale v Director General of Health, 2020

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2020-485-194
[2020] NZHC 2090

UNDER the Judicial Review Procedure Act 2016

IN THE MATTER of an application for judicial review

BETWEEN ANDREW BORROWDALE
Applicant

AND DIRECTOR-GENERAL OF HEALTH
First Respondent

ATTORNEY-GENERAL
Second Respondent

NEW ZEALAND LAW SOCIETY
Intervener

Hearing: 27–29 July 2020

Court: Thomas, Venning and Ellis JJ

Counsel: T Mijatov for Applicant
V E Casey QC, V McCall and E M Jamieson for Respondents
T C Stephens, J B Orpin-Dowell and M R G van Alphen Fyfe for
Intervener

Judgment: 19 August 2020

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[1] At the time of finalising this judgment, COVID-19 had infected over 21,500,000 people world-wide and killed over 760,000.¹ Responding to the pandemic has tested the powers, resources and resolve of governments across the globe. Public health measures of varying degrees of restrictiveness have been officially imposed by different states; their relative appropriateness and effectiveness have been hotly debated. But even as this country returns to a state of semi-lockdown, there is one thing on which most commentators are agreed. The decisions taken by the New Zealand government in March this year to “go hard and go early” were the right ones.

[2] Even in times of emergency, however, and even when the merits of the Government response are not widely contested, the rule of law matters. So in these proceedings, Mr Andrew Borrowdale has challenged the lawfulness of the restrictions imposed by the New Zealand Government on all people present in this country from 11.59 pm on Wednesday 25 March 2020 until 11.59 pm on Wednesday 13 May 2020, in response to COVID-19.² Those restrictions — by which the New Zealand people were, effectively, confined to their homes for the better part of two months — were

¹ World Health Organisation *Coronavirus disease (COVID-19) Situation report – 250* (17 August 2020).

² The proceedings are not concerned with the very recent return to Alert Levels 2 and 3; the legal lockdown landscape is now materially different from what it was in March and April.

referred to more colloquially as the “Alert Level 3” and “Alert Level 4” restrictions and, in respect of Level 4, the “Lockdown”.

[3] There is no dispute that restrictions of the kind inherent in the Alert Levels limited rights and freedoms which are affirmed by the New Zealand Bill of Rights Act 1990 (NZBORA) including, most relevantly, the rights to freedom of assembly, association, and movement.³ The essential question raised by Mr Borrowdale is whether the limits on those rights were authorised by law at the time of the Lockdown.

[4] Mr Borrowdale’s challenge takes form in three separate causes of action.

[5] The first relates only to the first nine days of the first Lockdown, beginning on 26 March. Although on that day a restrictive order was made by the Director-General of Health under s 70 of the Health Act 1956 (the 1956 Act), Mr Borrowdale says that the public announcements made by the Prime Minister and others unlawfully directed more extensive restrictions.

[6] The second cause of action challenges the lawfulness of the three s 70 health orders made by the Director-General of Health on 25 March, 3 April, and 27 April (the Orders). Essentially, the lawfulness of the Orders is challenged as exceeding the reach of the emergency powers conferred by the 1956 Act, particularly when they are interpreted consistently – or as consistently as possible – with the NZBORA.

[7] The third cause of action is, in effect, a subset of the second. It relates to a specific aspect of Order 1. Mr Borrowdale says that Order 1 involved an unlawful delegation of the Director-General’s s 70(1)(m) power to determine what premises needed to be closed. This is because, he says, decisions about what businesses (and therefore premises) were “essential” were left to be determined and published by unnamed members of the public service, and these decisions were regularly altered.

³ New Zealand Bill of Rights Act 1990 [NZBORA], ss 16–18.