

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

JUDGMENT OF THE COURT

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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.

That is, Mr Borrowdale says the Order is defective because it alters the ordinary meaning of "congregate" by excepting congregation with "physical distancing", which was defined as remaining two metres away from other people or, if closer than two metres, being together for less than 15 minutes.

[138] The word "congregate" is not defined in the 1956 Act and does not appear in it, apart from in s 70(1)(m). But we acknowledge that its ordinary meaning is to gather together. Although a more restricted meaning was adopted in Order 1, in a context where congregation was being *prohibited*, a narrower meaning of the word is in fact more rights consistent. In other words, permitting people to gather together when following the rules of physical distancing impinges less on freedom of movement, assembly and association than an unqualified ban on congregation. There is therefore little merit in this point.

Conclusion: second cause of action

[139] In our view Orders 1, 2, and 3 were each authorised by either s 70(1)(f), (m), or both when those provisions are interpreted in light of their purpose and context. The second cause of action fails, accordingly.

THE FIRST CAUSE OF ACTION

[140] The focus of the first cause of action is on the first nine days of Lockdown beginning on 26 March⁷⁰ and concluding on 3 April, when Order 2 came into effect. It centres on public announcements made by the Prime Minister and others, and the allegation that they had the effect of unlawfully limiting New Zealanders' rights. We note that while some of the announcements began from 23 March, they did not purport to limit New Zealanders' rights until the move to Alert Level 4 – that is, from 26 March.

[141] The context for those public announcements is explained by Dr Bloomfield in his affidavit:

The timeline of what happened was almost like a wave coming in: we could see it emerging in the distance during January and started watching carefully.

⁷⁰ Technically at 11.59 pm on 25 March, but effectively from 26 March.

In February the wave grew bigger and came closer: we started putting in border protections and preparing the health system to deal with outbreaks. By March we were realising that this threat was unprecedented, and if the virus got established in New Zealand it would be catastrophic ...

Then came a tipping point around the weekend of 21–22 March: modelling coming in from experts, both in New Zealand and around the world, was showing that once community transmission took hold, we would lose our window to stamp out the virus, that there would only be one shot at this. At the same time, we were getting our first confirmed community transmission cases. We realised that "go early" had changed to "go right now", and there was no time left. What we thought could be done in two weeks or two days had to happen now: it was quite literally now or never. Hard decisions were required, and we made them, as it was now clear that this was the best – in fact the only – way to protect the health and well-being of New Zealanders, prevent our health system being overwhelmed, and avoid prolonged damage to our economy.

The absolute priority was to get the lockdown in place and that drove every aspect of what we did over that period: we needed to move, and had no time to sort out the exact details. Some things would have to get sorted out later.

The Statements

[142] By way of background, on Saturday 21 March 2020, the Prime Minister addressed the nation from her office in the Beehive, flanked by the New Zealand flag. She said she was speaking directly "to all New Zealanders today to give you as much certainty and clarity as we can as we fight COVID-19". She outlined the rapidly escalating global health crisis and explained "how we will know what to do and when". And she announced an alert system for COVID-19 that could apply either to the whole country or to specific areas.

[143] That alert system had four levels of alert (the Alert Levels):

- (a) Alert Level 1 – *Prepare*. This recognises a situation where the disease is contained in New Zealand: the risk assessment is that COVID-19 is uncontrolled overseas and that isolated household transmission could be occurring in New Zealand.
- (b) Alert Level 2 – *Reduce*. This recognises a situation where the disease is contained but the risk of community transmission remains: the risk assessment is that household transmission and single or isolated cluster outbreaks could be occurring.

This case: unlawful execution?

[238] As we understood this aspect of Mr Borrowdale's argument, it is predicated on the contention that "execution of laws" in s 1 means "promulgation of laws". From that, he says that the Statements here therefore offend s 1 because they purported to "promulgate" a law without legislative authority.

[239] In our view, however, that is not what this part of s 1 is about. The words "pretended power of suspending" qualify both "laws" and "the execution of laws". And suspending the "execution" of laws involves suspending the *operation* of laws – by leaving them intact but rendering them impotent. This seems to us quite clear when the "no dispensing" provision is read together with the "late dispensing" provision (as set out at [228] above), where the "pretended power of dispensing" plainly refers both to "laws" and "the execution of laws".¹⁰² Accordingly, the Statements cannot be said to have involved a pretended "execution" of law in terms of s 1.

Conclusion: first cause of action

[240] In our view, the Restrictive Measures imposed on New Zealanders by way of the Statements for the nine days between 26 March and 3 April went beyond the terms of Order 1. The Restrictive Measures were therefore limitations on NZBORA rights that were not prescribed by law. They did not, however, constitute a suspension of either laws or their execution in terms of the BOR 1688.

[241] We consider the question of relief at the end of this judgment.

THIRD CAUSE OF ACTION: UNLAWFUL DELEGATION

[242] The focus of the third cause of action is on a particular aspect of Order 1. Order 1 required to be closed, until further notice, "all premises within all districts of

¹⁰² That is also the meaning which appears to have been adopted by this Court in *Alan Johnston Sawmilling Ltd v Governor-General* [2002] NZAR 129 (HC); and in *Aviation Industry Association of New Zealand (Inc) v Civil Aviation Authority of New Zealand* HC Wellington CP289/00, 24 August 2001 (HC). Jeffries J in *Professional Promotions & Services Ltd v Attorney-General* [1990] 1 NZLR 501 (HC) appears to have taken a different approach. We prefer the former.

New Zealand except those listed in the Appendix". The Appendix then listed a number of specific exemptions, including:¹⁰³

- (e) any premises necessary for the performance or delivery of essential businesses as defined further below;

For the purposes of this order:

- "essential businesses" means businesses that are essential to the provision of the necessities of life and those businesses that support them, as described on the Essential Services list on the covid19.govt.nz internet site maintained by the New Zealand government.

[243] Mr Borrowdale alleges that this aspect of Order 1 involved an unlawful delegation of the Director-General's power to determine what was an "essential business" to the Ministry of Business, Innovation, and Employment (MBIE).¹⁰⁴ He seeks a declaration that Order 1 was therefore unlawful for lack of compliance with s 41 of the State Sector Act 1988.¹⁰⁵

The competing contentions

[244] It is important to be clear as to the source and nature of the power that is in issue here. Section 70(1)(m) relevantly empowers the Director-General, acting as a Medical Officer of Health, to "require to be closed, until further order or for a fixed period, all premises within the district (or a stated area of the district) of any stated kind or description". It is that power – the power to specify what premises are to be closed – that is said to have been delegated.

[245] On Mr Borrowdale's interpretation, the effect of Order 1 was to leave it to others to specify which businesses were essential and, so, which premises were to be closed. In other words, the Director-General effectively delegated his s 70(1)(m) power to close premises of a stated kind or description to MBIE, which administered

¹⁰³ Items (a) to (d) were specific statutory exemptions under s 70(1A).

¹⁰⁴ The focus of argument was on the wording of Order 1, but because the list of "essential businesses" was fluid, the issue continues throughout the currency of Order 1, during Levels 4 and 3.

¹⁰⁵ Section 41(1) provides that a Public Service chief executive (such as the Director-General) may either generally or particularly, delegate in writing to a person described in subsection (1A) or (2A) any of the functions or powers of the chief executive under this Act or any other Act ...