IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA552/2020
[2023] NZCA 653

BETWEEN	STEPHEN THOMAS HUDSON Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing: 2 June 2022

Court: Cooper P, French and Katz JJ

Counsel: V E Casey KC and D A Ewen for Appellant
M J McKillop and J B Watson for Respondent

Judgment: 18 December 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B For the reasons set out at [74]–[76], there is no order for relief.

C The respondent must pay costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Cooper P)

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Introduction

[1] The Corrections Act 2004 (the Act) empowers prison managers to impose restrictions on prisoners' access to property.[1] Two such restrictions are contained in s 43(2)(e) and (g) of the Act, which, respectively, enable a prison manager to refuse to issue or allow a prisoner to keep an item of property if he or she has reasonable grounds to believe that the item is objectionable, or may interfere with the effective management of the prison.

[2] This appeal concerns the proposed exercise of those powers to prevent Mr Stephen Hudson—a prisoner at Rimutaka Prison—from accessing two magazines: one FHM magazine and one Ralph magazine. Mr Hudson's request for these magazines was initially unlawfully censored by an unidentified officer of

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1 Corrections Act 2004, ss 43–45A.

Ara Poutama Aotearoa | the Department of Corrections (Corrections). However, Corrections seeks to maintain its entitlement to restrict prisoners' access to magazines like the ones Mr Hudson requested—magazines which fall into the genre known as "lad mags" or men's magazines, and which are, it was common ground, generally available on an unrestricted basis to the wider public. It says, among other things, that these magazines might interfere with the rehabilitation of prisoners, and could become a form of currency in prison, with associated risks.

[3] Mr Hudson commenced a proceeding in the High Court seeking to challenge Corrections' ability to restrict prisoners' access to these magazines. He claimed, among other things, that the restriction breached his right to freedom of expression, protected under s 14 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights), and was ultra vires s 43 of the Act.[2]

[4] The High Court dismissed his claim, finding that the restriction amounted to a justified limit on Mr Hudson's s 14 right.[3]

[5] Mr Hudson appeals.

Background

[6] Mr Hudson is serving a life sentence for murder. In early January 2018, Mr Hudson submitted a property request form to a Corrections officer for vetting, a step needed before the request could be relayed to a friend of his in the community to procure the items he sought. The request was for an electric fan as well as for two magazines: one FHM magazine and one Ralph magazine.[4]

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2 Section 14 of the New Zealand Bill of Rights Act 1990 affirms, amongst other things, the right to seek and receive information.

3 *Hudson v Attorney-General* [2020] NZHC 1608 [High Court judgment] at [49].

4 It appears that Mr Hudson did not request specific editions of the magazines. In his first affidavit filed in the High Court, he simply recorded that he had requested "1 x FHM magazine … [and] 1 x Ralph magazine". In the High Court, Dobson J requested complete copies of "a small sample of both magazines" which had originally been provided by Corrections in a redacted form. These were the issues of Ralph for November 2009 and March 2010, and for FHM for August 2011 and January 2012: see High Court judgment, above n 3, at [25] and [29]. It is this sample of the magazines which was before us for the purposes of this appeal.

[7] When Mr Hudson's friend received the request form, she found that his references to the two magazines had been crossed out by an unidentified Corrections officer who had vetted the request. The Attorney-General concedes, as in the High Court, that there was no lawful basis for the Corrections officer to do so.

[8] Mr Hudson's friend informed him of what had happened and he lodged a complaint, using the appropriate form, asking for an explanation. Anticipating that there might be some sort of prohibition in place which applied to the magazines, he asked that the authorities "please provide the statute or rule such a prohibition relies upon and any other direction or justification for such a prohibition".

[9] In response, Mr Hudson was advised that the magazines were designated as banned items under section C.01 of the Prison Operations Manual (the POM).[5] He was also provided with a partially redacted email dated 31 December 2012 which set out a non-exhaustive updated list of magazines and newspapers that constituted "prohibited titles", and which listed FHM and Ralph magazines among other titles, including Loaded, Playboy and Playgirl. There is no dispute that no such list was in use by staff at Rimutaka Prison at the time Mr Hudson's request was processed.

[10] Dissatisfied with the response, Mr Hudson raised his complaint with the Office of the Inspectorate | Te Tari Tirohia. Mr Hudson received a response from the Office on 3 May 2018. The response noted that while Mr Hudson had been provided with a copy of "Rimutaka Prison's Prohibited Magazine list" and directed to section C.01 of the POM, he should have been referred to s 43(1) and (2)(e) of the Act and the property section of the POM. Section 43(1) and (2)(e) and extracts from the property section were then set out. The Office considered that the matter required further attention, and noted it would ask Corrections Services "to advise what guidance is given to the prison directors in making decisions to prohibit a publication to clarify the decision making on restricting magazines". Finally, the Office observed that it appeared that neither magazine requested by Mr Hudson is still published.

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5 Section C.01 of the POM, which was not referred to in the course of argument, deals with the processing of prisoners' mail. Section C.01.01(4)(f) requires authorised officers dealing with prisoners' mail to take into account "the need to prevent the entry of unauthorised items into the prison", but the term "unauthorised items" is not defined or otherwise elaborated on.

[11] With no remedy immediately forthcoming, Mr Hudson commenced an application for judicial review in November 2018. He sought declaratory relief only, advancing a range of claims, the underlying thrust of which was that the decision banning the magazines amounted to an unjustified breach of his right to freedom of expression, protected by s 14 of the Bill of Rights.

The evidence

[12] The Attorney-General's response to the proceeding was based significantly on affidavits sworn by Ms Vivien Whelan, the prison director of Rimutaka Prison, and Dr Juanita Ryan, the chief psychologist for Corrections. As will become apparent, these affidavits have taken on a central importance for the purposes of this appeal. Accordingly, we turn to them now.

[13] Ms Whelan's affidavit set out a history of Mr Hudson's property request. She candidly acknowledged some of the issues that arose in the handling of Mr Hudson's request, but maintained that:

> … applying the current statutory provisions, regulations and policies which are relevant to decisions in this area, prisoners at Rimutaka Prison would not be permitted to possess magazines like FHM and Ralph magazine.

[14] Having referred to s 43(2) of the Act, Ms Whelan provided four main reasons in support of her view that prisoners would not be able to possess the magazines. First, based on her experience, the magazines would have the real potential to interfere with the effective management of the prison. She pointed to the risk that the magazines would become a form of currency, leading to possible violence, stand-over tactics, intimidation and bullying. She noted that, as with other items that are viewed as a kind of currency in the prison environment, the magazines could become associated with other anti-social behaviour, such as bartering for contraband.

[15] Secondly, Ms Whelan expressed the concern that the magazines in question, which "include numerous pictures of half-naked women in provocative poses", objectify, degrade and sexualise women. She took the view that the magazines would be unlikely to assist and could well harm the rehabilitation of the many prisoners who have committed sexual offences or offences of violence against women. Ms Whelan

was also concerned that magazines which might sexually prime and excite men could well compromise the safety of female staff working in the prison, and staff might be offended if confronted by the material contained within the magazines.

[16] Thirdly, Ms Whelan took issue with articles and advertising in the magazines focussing respectively on violence and alcohol. While violence is prohibited in the prison environment, it remains a persistent problem and Ms Whelan considered it inappropriate for prisoners to have access to any material that encourages violence of any kind. Ms Whelan was also concerned that the magazines contain items that promote the consumption of alcohol: content promoting alcohol consumption might inhibit the rehabilitation of prisoners for whom alcohol played a role in their offending.

[17] Fourthly, Ms Whelan noted some practical concerns about the allocation of scarce resources in a prison context and the difficulty in restricting the flow of information. She took the view that, even if the potential harms set out above might not arise in respect of all of the content contained within the magazines, nor in respect of all prisoners, it would be administratively unworkable to try to redact the problematic aspects of the magazines or restrict access to the magazines to certain conditions or prisoners.

[18] Finally, Ms Whelan noted that, in any event, as the magazines sought by Mr Hudson were no longer in print at the time of his request, he would have been unlikely to have received them.

[19] Dr Ryan shared Ms Whelan's concerns about the potential for the magazines to interfere with the rehabilitation of prisoners. She observed that some of the material in the magazines is known to be consistent with a range of unhealthy attitudes relating to women, including attitudes which legitimise violence against women. The same attitudes were associated with exposure to mainstream objectification of women in media. Such attitudes have been linked to an increased risk of reoffending.

[20] Dr Ryan also saw access to materials containing sexualised content as being inconsistent with reducing sexual pre-occupation and compulsivity. She also cited findings from before FHM ceased to be published that it was one of the least compliant

magazines in relation to Australian alcohol advertising standards. This was a cause for concern since such standards are designed to discourage the promotion of unhealthy attitudes relating to alcohol.

[21] Dr Ryan acknowledged that it was impossible for Corrections to completely restrict prisoners' access to the kind of material contained in the magazines. For example, most prisoners have access to television, which might expose prisoners to sexualised content. However, she noted:

> … men's magazines such as Ralph and FHM have as their specific aim the promotion of negative [content] such as the sexualisation of women and the glorification of alcohol use. [Corrections] does what is reasonably practicable to restrict prisoner access to this type of content. For the same reason, books and DVDs are also vetted to minimise prisoner access to the type of material that could risk undermining … rehabilitation efforts.

Judgment appealed

[22] Dobson J delivered his judgment on 7 July 2020. The Judge began by noting that Mr Hudson had acknowledged at the hearing that a declaration that the unidentified Corrections officer's actions (which had effectively prevented Mr Hudson from accessing the magazines) were unlawful would not be helpful. That was because, although Corrections had conceded that the officer's actions were unlawful, it sought to maintain its entitlement to make decisions to deny prisoners access to publications such as the ones at issue. Accordingly, the Judge assessed matters on the following basis:[6]

> [32] Given the grounds advanced for justifying prohibition, it is appropriate to assess the lawfulness of decisions to do so on the basis that they reflect an unwritten or informal policy that any issues of these magazines will be deemed to be objectionable. That is, the Department considers itself entitled to make such a finding without requiring assessment on an individual basis of any particular issues of the magazines that might arrive in the mail for Mr Hudson.

[23] The Judge then turned to assess this "unwritten or informal policy" by reference to the Bill of Rights.[7] He noted that the proportionality assessment required

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6 High Court judgment, above n 3.

7 As we go on to discuss below at [32]–[35] we do not consider the Judge was right to assess matters on this basis, there being no actual policy which could be the subject of considered analysis. Rather, the appropriate decision was the intended future decision indicated by Corrections to prevent prisoners from accessing FHM and Ralph magazines, as well as other like magazines.

by s 5 of the Bill of Rights had to be undertaken against the "back cloth of the prison environment", where infringements on protected rights were inevitable, and where deference should be accorded the expertise and experience of prison managers.[8]

[24] The Judge concluded that while the magazine policy engaged Mr Hudson's s 14 right, the policy was, in terms of s 5 of the Bill of Rights, a justified limit on that right. He found that the overall purpose of the restriction, being to enable the effective management of prisons, and the safe custody and welfare of prisoners while detained there, was clearly of sufficient importance to justify curtailing s 14.[9] He also accepted that there is a rational connection "between the measures that limit the s 14 right and the overall purpose of the Act and delegated instruments", given Mr Hudson's acknowledgement that "there was justification for forbidding prisoners from having access to genuinely objectionable materials, such as materials inciting violence or promoting hard drug use".[10]

[25] The Judge also found that the extent of the impairment of Mr Hudson's s 14 right was reasonably necessary to achieve the policy's purpose. In this context, the Judge relied on the affidavits sworn by Ms Whelan and Dr Ryan. They said that it would be difficult to prevent the magazines from being circulated throughout the prison community, potentially prejudicing some prisoners' rehabilitation and encouraging disobedience.[11] Finally, the Judge concluded that the limit on Mr Hudson's right was in due proportion to the importance of the policy's objective. That followed from the evidence referred to above, and also the fact that the expression Mr Hudson sought to invoke—a substantial portion of which involved "scantily clad young women in sexually provocative poses"—was of a lower value than other instances where the courts had intervened to protect a prisoner's right to freedom of expression.[12]

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8 High Court judgment, above n 3, at [35]–[36], citing *Regina (Hirst) v Secretary of State for the Home Department* [2002] EWHC 602, [2002] 1 WLR 2929 at [31]; and *Taylor v Chief Executive of the Department of Corrections*, [2015] NZCA 477, [2015] NZAR 1648 at [83].

9 At [39].

10 At [40].

11 At [41]–[44].

12 At [45]–[49], citing *S v Attorney-General* [2017] NZHC 2629 at [455].

[26] Having concluded that Mr Hudson's claim under the Bill of Rights could not be sustained, the Judge turned to address Mr Hudson's other claims. In doing so, he rejected Mr Hudson's arguments that:

(a) the term "objectionable", used in s 43(2)(e) of the Act, should be given the same interpretation as it has been given in the context of the Films, Videos and Publications Classification Act 1993 (the Classification Act);[13]

(b) various subordinate instruments said to be relevant to the policy were ultra vires their empowering legislation;[14]

(c) a blanket prohibition on the men's magazines at issue impermissibly fettered the discretion of decision-makers;[15] and

(d) the decision to categorise the magazines as objectionable was unreasonable.[16]

The scope of this appeal

[27] Before we discuss the more substantive grounds of appeal, we address a preliminary question about the scope of the appeal. Before us, counsel for both sides pointed to a potential difficulty in identifying a relevant decision made by Corrections to which judicial review might attach.

Submissions

[28] Ms Casey KC, for Mr Hudson, submitted that the scope of the appeal should be limited to the specific decision by the Corrections officer to prevent Mr Hudson from accessing the relevant magazines, by censoring his request.

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13 At [53]–[56].
14 At [57]–[62].
15 At [63]–[66].
16 At [67]–[76].

[29] In Ms Casey's submission, the Judge erred by seeking to review a policy which she characterised as "presumptive, unwritten, informal and essentially fictional" and which was of uncertain scope and unclear rationale. The Judge had effectively reviewed Ms Whelan's affidavit, which had set out her view of the policy's lawfulness. But there was actually no such policy to be reviewed: the evidence before the High Court was that policy work in this area was ongoing. In the result, the proposed policy put forward by Ms Whelan failed to meet the "prescribed by law" requirement in s 5 of the Bill of Rights.

[30] Ms Casey submitted that, properly understood, the Crown's arguments as to the lawfulness of the policy, and Ms Whelan's affidavit on which they had relied, were addressed to the futility of granting relief in circumstances where Corrections maintained its entitlement to ban magazines of the kind that Mr Hudson sought to obtain. They should not have been construed by the Judge as having been predicated on a policy, the result of which was that the Judge dealt with matters on an improperly abstract and hypothetical basis.

[31] Mr McKillop, for the Attorney-General, accepted that the Judge had dealt with matters on a hypothetical basis, but submitted it was not improper for him to have done so. It was open for the Judge to in effect give a declaratory judgment about proposed action by Corrections. While the High Court's approach was unusual, it was in accord with the inherently flexible nature of judicial review and Mr Hudson's concern that Corrections should not be able to make such decisions in the future. Mr Hudson's interests would not have been served by granting a declaration that crossing out the references to the magazines was unlawful, because Corrections wished to maintain its entitlement to make such decisions.

Discussion

[32] We do not consider it would be appropriate to confine the appeal in the way contended for by Ms Casey. In our view, concerns about the artificiality of reviewing a non-existent policy of uncertain scope and nature can be met if it is the *intended future decision* indicated in Ms Whelan's affidavit, rather than a policy, which is the subject of analysis. A proposed exercise of a statutory power may be the subject of

judicial review under s 3(1)(c) of the Judicial Review Procedure Act 2016. We think that proceeding in this way is both a pragmatic and principled response.

[33] Pragmatically, it is clear from Ms Whelan's affidavit that, regardless of the existence of a magazine policy, Mr Hudson's request for the magazines would have been declined had a person with requisite authority handled it. The existence or non-existence of such a magazines policy is therefore a red herring: the important point is that had Dobson J remitted the decision back to Corrections, the same position would likely have been reached later down the line. Reviewing the proposed decision by Corrections in this context enables practical justice to be achieved: it avoids the cost and delay caused by the matter going back to the prison, only for the same decision to be made, requiring the matter to progress through the courts once again.

[34] In principle, remitting the matter back to Corrections to make an actual decision would allow what was in effect an accident of procedure to be determinative of this appeal. The Court will be slow to require such an approach, not least in the context of a judicial review proceeding commenced by a self-represented litigant. Further, as we discuss below at [55]–19[57] when we come to the Bill of Rights, we consider there is a proposed exercise of a statutory power involved here: namely, the proposed exercise of power under s 43(2) of the Act by Corrections to restrict Mr Hudson's access to the impugned magazines.

[35] In coming to this conclusion we have borne in mind the observations, referred to by Ms Casey, of the Privy Council in *Phipps v Royal Australasian College of Surgeons*.[17] In that case, the Board commented that courts will generally be slow to conclude that evidence given by decision-makers that, notwithstanding any procedural defects the same outcome would have been arrived at, ought to preclude the grant of relief. Rather, when a decision is tainted by significant procedural irregularity, the person prejudiced is normally entitled to have the matter considered afresh. However, as was emphasised in that case, the overriding general principle is the need to achieve a fair result in the particular circumstances.[18] Here, for reasons we have explained,

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17 *Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513 (PC).
18 At [27], citing *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA).

we consider that is best achieved by reviewing the proposed exercise of power under s 43(2) of the Act to restrict Mr Hudson's access to the impugned magazines.

Substantive issues

[36] Once this point is reached there are two issues that remain to be determined:

(a) First, should relief have been granted in respect of the initial decision by the Corrections officer to censor Mr Hudson's property request?

(b) Secondly, when interpreted in accordance with the Bill of Rights, do s 43(2)(e) and (g) of the Act empower the prison manager to restrict Mr Hudson's access to the magazines he requested?

Issue one: should relief have been granted in respect of the initial decision by the Corrections officer to censor Mr Hudson's property request?

Submissions

[37] Ms Casey contended that the Judge was wrong to treat Mr Hudson as having abandoned his pleading for a declaration that the decision to ban the FHM and Ralph magazines was ultra vires. Some leniency should be accorded to him as a lay litigant who was not aware that, when the Judge initiated a discussion with him about the utility of relief, he was effectively being asked to abandon the relief he sought in his statement of claim. The Court should have granted a declaration that what had occurred was unlawful and referred the decision to censor the request—and the putative or pending decision to ban the magazines—back to the prison authorities with appropriate guidance on the law.

[38] Ms Casey further submitted that the argument that the prohibition would have been justified in any event is "in effect a submission that relief by way of a referral back for a fresh decision should be declined on the grounds that the same outcome was inevitable". To decline relief on such grounds was unusual, and lacked proper justification.

[39] Mr McKillop's answer on this point was brief: there was no failure to grant relief in relation to the acknowledged procedural errors in the case. Mr Hudson had expressly disavowed such relief and the principle of litigation finality weighs strongly against permitting him to now change his mind for the purposes of this appeal.

Discussion

[40] The general approach in the context of judicial review proceedings ought to be that a claimant who succeeds in establishing the unlawfulness of administrative action is entitled to be granted a remedial order.[19] However, it is common for pleadings to be clarified and refined as proceedings progress, and it is open to a litigant to disclaim relief which had initially been sought. In such circumstances, it will accord with the flexible remedial approach in judicial review proceedings for a court to give effect to the litigant's wishes.

[41] We accept that Mr Hudson may not have fully appreciated the consequences of speaking to the Judge about the relief he was seeking. There is no evidence before us detailing the nature of the discussion he had with the Judge. However, the Judge said:[20]

> [31] For his part, Mr Hudson acknowledged that a declaration that the particular instance of prohibition was not lawful had no utility for him. Given the Department's resolve to maintain its entitlement to prohibit his access to such magazines, the essence of his complaint was to challenge the lawfulness of the Department's entitlement to make such decisions currently and in the future.

[42] In these circumstances, the Judge declined to grant relief in respect of what he characterised as the "admitted historical errors" because that would not respond to the "essence" of Mr Hudson's complaint.[21] It was legitimate for the Judge to clarify the key basis of Mr Hudson's proceeding in this manner. The statement of claim did not make the position clear. For example, the first head of relief sought was "[a] declaration that in banning FHM and Ralph magazines the Department of Corrections has acted ultra vires s 14 of the [Bill of Rights]". It was not clear from

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19 See Ivan Hare, Catherine Donnelly and Joanna Bell (eds) *De Smith's Judicial Review* (9th ed, Thomson Reuters, London, 2023) at [18-047].

20 High Court judgment, above n 3.

21 At [31] and [82].

this whether the declaration sought related to the actions of the Corrections officer who had initially censored Mr Hudson's request, or the intended future decision indicated by Ms Whelan's affidavit.

[43] Though it was not made explicit, we think the Judge was also likely influenced by the evidence before him that, were the decision to be made again—this time by a person with the requisite authority—the same outcome would be arrived at. While that is certainly an unusual basis for declining to grant relief, here it was not seemingly the sole basis for doing so, as just discussed.

[44] For these reasons we do not consider it would be appropriate to revisit the Judge's decision not to grant relief in respect of the initial decision by the Corrections officer to censor Mr Hudson's property request.

Issue two: when interpreted in accordance with the Bill of Rights, do s 43(2)(e) and (g) of the Act empower the prison manager to restrict Mr Hudson's access to the magazines he requested?

[45] The parties agreed that the Judge was right to conclude that Mr Hudson's right to freedom of expression was engaged by a decision to restrict his access to the magazines in question. The focus of argument was instead on the Judge's proportionality assessment: that is, how he balanced the rights-infringement against the objectives it was said to have served. In this section, we first address a preliminary question about the meaning of the term "objectionable" as used in the Act. Then, we consider the Judge's Bill of Rights analysis.

[46] First, however, it is appropriate to mention the concept of "authorised property", which is the tool the Act uses to regulate what property prisoners are allowed to keep. The term is defined in s 3(1) as "property that is declared by rules made under section 45A as property that prisoners may be issued with or allowed to keep".[22] The Rules on authorised property under s 45A provide that prisoners may be issued with up to 10 magazines, but that "[n]o … magazines will be permitted that are considered to be objectionable e.g. pornographic". Section 43(2) of the Act then empowers the prison manager to refuse to issue or allow a prisoner to keep an item of

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22 Corrections Act, s 3(1) definition of "authorised property".

property notwithstanding its classification as authorised property if he or she has reasonable grounds to believe that certain thresholds are met. As we have noted, it is the thresholds set out in paras (e) and (g) which are invoked by Corrections in this proceeding. Section 43 relevantly provides:

> **43 Authorised property**
>
> (1) A prisoner may be issued with, or allowed to keep, authorised property subject to—
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> (a) any condition set out in rules made under section 45A; and
>
> (b) any special conditions imposed by the prison manager relating to the use of the property; and
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> (c) the condition described in section 44(1).
>
> (2) Despite subsection (1), the prison manager may refuse to issue or allow a prisoner to keep an item of property if he or she has reasonable grounds to believe that—
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> (a) the item may be used to injure the prisoner or any other person, or to damage property; or
>
> (b) the item is a camera, tape recorder, or electronic device that may be used to record security features or actions in the prison; or
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> (c) the item may be used to circumvent practices or procedures in the prison; or
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> (d) the item has been obtained through coercion of a prisoner or as a result of other improper behaviour; or
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> (e) the item is objectionable; or
>
> (f) the item may assist a prisoner to—
>
> (i) discover new methods of committing offences; or
>
> (ii) continue offending; or
>
> (g) the item may interfere with the effective management of the prison.
>
> …

What does this issue require us to address?

[47] Ms Casey contended that the term "objectionable" in s 43(2)(e) should be given a meaning consistent with its meaning in the context of the Classification Act.

She said this was an argument that was independent of, and logically prior to, any consideration of the Bill of Rights.

[48] We do not consider it necessary to address this issue in the manner contended. First, we accept the submissions for the Attorney-General that the relevant decision is not solely predicated on whether the magazines in question are objectionable. Ms Whelan's affidavit did not confine itself to such an analysis: it also engaged with whether, in terms of s 43(2)(g) of the Act, the availability of the magazines would have the potential to interfere with the effective management of the prison. As we have already discussed, her first reason for why magazines like FHM and Ralph were prohibited was that they "would have the real potential to interfere with the effective management of the prison". She went on to point to the likelihood that the magazines would be commodified, leading to the possibility of "violence, stand-over tactics, intimidation and bullying" and jeopardising "good order and discipline". We reject Ms Casey's submission that adverse implications for the effective management of the prison were not material to Ms Whelan's approach and should be excluded from our analysis.

[49] Secondly, it is common ground that s 43(2) of the Act does not empower unjustified interferences with rights protected by the Bill of Rights. Indeed, it would be somewhat artificial to begin by assessing in the abstract—that is, divorced from the interpretative direction in s 6 of the Bill of Rights—whether the Act authorises prohibition of the magazines at issue. Rather, our task is to interpret s 43(2) in accordance with the direction in s 6 of the Bill of Rights.[23] On this approach s 43(2), as an empowering provision which enables prison authorities to create rules to censor certain material, will only permit restrictions on the relevant magazines where that is demonstrably justified in terms of s 5 of the Bill of Rights.[24]

[50] For these reasons, we prefer to leave the question of whether the term "objectionable" in s 43(2) of the Act shares the same meaning as it has under the Classification Act to a future case.

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[23] Section 6 of the Bill of Rights provides that wherever an enactment can be given a rights-consistent meaning that meaning is to be preferred to any other meaning.

[24] See *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [101]–[102] per Winkelmann CJ and O'Regan J and [259], n 361 per Glazebrook J.

Appropriate methodology

[51] In *D (SC 31/2019) v New Zealand Police*, a majority of the Supreme Court held that Tipping J's six-step methodology in *Hansen v R* is inappropriate when reviewing the exercise of statutory powers.[25] The Court referred to decisions of the Canadian Supreme Court which held that aspects of the methodology set out in *R v Oakes* (on which Tipping J's six-step methodology was based)[26] are poorly suited to situations in which a discretionary administrative decision engages the protections of the Canadian Charter of Rights and Freedoms.[27] In accordance with these decisions, Winkelmann CJ and O'Regan J instead preferred an approach of balancing the objectives of the legislation against the level of intrusion into rights involved.[28]

[52] In *Moncrief-Spittle v Regional Facilities Auckland Ltd* a unanimous Supreme Court affirmed that a less structured inquiry may be appropriate in the context of a review of a discretionary power.[29] The Court endorsed a statement by the Supreme Court of Canada in *Doré v Barreau du Québec* that a "more flexible administrative approach" to assessing the compatibility of an individual decision with rights, is "more consistent with the nature of discretionary decision-making".[30] Though the Court emphasised that there was no immutable rule, the Court in *Moncrief-Spittle* considered the *Doré* approach was appropriate given there were no intermediate options for the decision-maker to take in respect of the relevant decision, namely, whether to cancel a contract for hire of an events centre.[31]

[53] To a certain extent, a comparable situation arises here, where the relevant (proposed) decision is whether to permit Mr Hudson to access the relevant magazines.

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25 At [101]–[102] per Winkelmann CJ and O'Regan J and [259], n 361 per Glazebrook J. See also *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [46], n 66 per Winkelmann CJ.

26 *R v Oakes* [1986] 1 SCR 103.

27 Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK). See *D (SC 31/2019) v New Zealand Police*, above n 24, at [100], citing *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395 at [37]–[38]; *Loyola High School v Attorney General of Quebec* 2015 SCC 12, [2015] 1 SCR 613 at [3]–[4] per LeBel, Abella, Cromwell and Karakatsanis JJ; and *Law Society of British Columbia v Trinity Western University* 2018 SCC 32, [2018] 2 SCR 293 at [57] per Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.

28 *D (SC 31/2019) v New Zealand Police*, above n 24, at [100]–[101] and [108].

29 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [87].

30 At [89], citing *Doré v Barreau du Québec*, above n 27, at [37].

31 At [90]–[91].

At a basic level, there are only two possible outcomes: either permission is granted or it is not—although, of course, Corrections may be able to impose conditions on Mr Hudson's access to the magazines in question.

[54] It follows that we accept the Attorney-General's submission that the approach taken in *D (SC 31/2019) v New Zealand Police* is the appropriate one for the purposes of this appeal.[32] We emphasise, however, that this modified approach entails no "weak or watered down" version of proportionality.[33] The intrusion into protected rights must still be proportionate in light of the statutory objectives. The overall question to be answered is whether the limit on the right affected by the proposed decision to restrict Mr Hudson's access to the magazines is a reasonable limit that can be justified in a free and democratic society.

Is the limit prescribed by law?

[55] Section 5 of the Bill of Rights provides, among other things, that the rights and freedoms in the Bill of Rights may be subject to "reasonable limits prescribed by law". An initial question therefore arises: what is the "limit" in this case that must be prescribed by law? The parties disagreed: the appellant contended that the limit was the (non-existent) men's magazine policy, whereas the Attorney-General argued that it was the power reposed in the prison manager by dint of s 43(2) of the Act.

[56] The Supreme Court discussed the prescribed by law requirement in *New Health New Zealand Inc v South Taranaki District Council*.[34] In that case, a question arose as to whether the decision of the Council to fluoridate the water supply was prescribed by law. In answering that question, O'Regan and Ellen France JJ referred to the decision of the Canadian Supreme Court in *Slaight Communications Inc v Davidson*, where that Court considered how to approach an order made by an administrative tribunal when determining whether the "prescribed by law" requirement in s 1 of the Canadian Charter (the equivalent of s 5 of the Bill of Rights

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32 In adopting this methodology for the purposes of this appeal, we mean no criticism of the Judge, whose decision preceded that of the Supreme Court in *D (SC 31/2019) v New Zealand Police*, above n 24.

33 *Law Society of British Columbia v Trinity Western University*, above n 27, at [80].

34 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948.

Act) applied. In *Slaight*, Lamer J explained that where the "disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right", then it was:[35]

> … necessary to subject the legislation [as opposed to the order] to the test set out in s 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

[57] We consider this to be an appropriate approach for the present case. By explicitly empowering prison managers to restrict prisoners' access to items of property, s 43(2) of the Act necessarily implies the power to restrict prisoners' rights, including the right to freedom of expression. It follows, on this approach, that it is the purported power under s 43(2) to restrict prisoners' access to magazines such as the ones in issue that is the limiting measure that must be shown capable of demonstrable justification. That limiting measure is clearly prescribed by law, being enacted by Parliament.

Proportionality assessment

Submissions

[58] For Mr Hudson, Ms Casey submitted that the Judge's proportionality assessment was in error. The Judge had erred when, having decided at only an "abstract level" that banning objectionable material in prison may be demonstrably justified, he proceeded to consider whether the particular decision was unreasonable in a *Wednesbury* sense. This had the effect of removing the burden on the Crown to positively establish that the rights infringement was demonstrably justified.

[59] Further, Ms Casey contended that, by characterising the magazines as a low value form of expression, the Judge had relied on a subjective value judgement, which was not appropriate territory for him to enter. Likewise, she claimed he did not properly engage with the context of the restriction, namely, one of a prison environment where rights are already significantly curtailed, and where further restrictions therefore need to be carefully justified.

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35 *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1079–1080.

[60] In terms of the specific rationales said to justify the decision, Ms Casey submitted:

(a) A concern that the magazines might become tradable does not justify the ban: the argument is based on an "unexplained assumption" that only some prisoners would be permitted to obtain them. Further, any commodity in prison is capable of being traded.

(b) Evidence that access to the magazines might undermine rehabilitation was tentative, lacked nuance, and did not account for the fact that similar material to that contained in the magazines was already widely available to prisoners through other publications.

(c) Evidence that the magazines contained ads promoting drug use and violence equally did not account for the fact that such material is already widely available.

(d) Evidence that the magazines could compromise the safety of female prison staff was unsubstantiated.

(e) That the magazines might offend staff is not credible given their content is unrestricted outside the prison environment and already available within it.

[61] Mr McKillop, for the Attorney-General, submitted that the Judge was correct to conduct the proportionality assessment against the "backcloth of the prison environment".[36] He supported the Judge's reasoning that the limit is justified by the need to facilitate prisoners' rehabilitation and a safe prison environment. The causes of concern identified in the affidavits of Ms Whelan and Dr Juanita Ryan, in his submission, provided ample justification for the limit.

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[36] High Court judgment, above n 3, at [36], citing *Regina (Hirst) v Secretary of State for the Home Department*, above n 8, at [31].

[62] Mr McKillop was critical of the appellant's contention that there was a lack of evidence underpinning the views expressed in Ms Whelan's affidavit. He noted that magazines such as those at issue have long been prohibited in Rimutaka Prison, arguing that the prison manager should not be required to allow the prisoners access to the magazines simply to demonstrate that her views are justified.

Discussion

[63] We readily accept the submission for the Attorney-General that a proportionality assessment of the proposed decision to restrict prisoners' access to the magazines must be context-sensitive, giving due weight to the institutional competence of experts such as Ms Whelan and Dr Ryan. As this Court accepted in *Taylor v Chief Executive of Department of Corrections*, the court should be cautious in reaching a different view from the decision-maker on matters relating to the security and good order of the prison.[37] However, as this Court also observed, where human rights are engaged in a penal context, prison authorities tend to be supervised intensively because they do not have special expertise or authority on rights and there are important individual interests at stake.[38]

[64] Although we would not characterise the right to access men's magazines of this nature as an important one, it nevertheless clearly falls within the ambit of freedom of expression, limitations on which must be demonstrably justified in a free and democratic society. In this context, we cannot accept Ms Casey's submission that the Judge erred by characterising the magazines as low value speech. The prediction in the White Paper that it would be the courts' concern to weigh the value of the particular speech against the degree and type of intrusion, the precision of the restraint, and the particular interest the restraint is designed to protect,[39] has been borne out by

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37 *Taylor v Chief Executive of Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [89].

38 At [89].

39 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [10.57]. The White Paper announced that it was the policy of the Government to introduce a Bill of Rights and it was intended to begin a process of developing public understanding and consensus building prior to the intoduction of a Bill in Parliament.

subsequent jurisprudence.[40] As this Court pointed out in *Attorney-General v Smith*,[41] an eminent example of applying a hierarchical analysis to protected expression can be found in the speech of Baroness Hale in *Campbell v MGN Ltd*:[42]

> There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.

That kind of hierarchical analysis will be important when addressing the proportionality of the infringement of s 14 under s 5, as opposed to identifying whether s 14 is infringed at the outset.[43] It was at that former stage that the Judge considered the value of the expression and we consider that was clearly the correct approach.

[65] We have set out the evidence of Ms Whelan and Dr Ryan that is relied on by way of justification of the limit on Mr Hudson's s 14 right above.[44] We have noted already that their views are entitled to some deference. We accept, however, Ms Casey's submission that the prison environment is one where human rights are already significantly curtailed. Especially where a rights infringement is not a necessary corollary of the conditions of imprisonment—as, for example, restrictions on freedom of movement are—it must be scrutinised carefully.

[66] With the foregoing in mind, and having looked at two issues of each magazine adduced in evidence, we cannot help but take the view that the evidence adduced by

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40 See for example *Attorney-General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899 at [38]; and *S v Attorney-General* [2017] NZHC 2629 at [455], citing *Miss Behavin' Ltd v Belfast City Council* [2007] UKHL 19, [2007] NI 89 at [38] per Baroness Hale. See also *Chief Executive of the Department of Corrections v Smith* [2020] NZCA 675 at [46].

41 *Attorney-General v Smith*, above n 40, at [38].

42 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [148] per Baroness Hale.

43 *Attorney-General v Smith*, above n 40, at [38].

44 See above at [12]–[21].

the Attorney-General does not rise to the level of providing demonstrable justification for the restriction on Mr Hudson's s 14 right.

[67] First, we make the general observation that the magazines include sexualised depictions of women, but there is no nudity and the content cannot be properly described as pornographic. It is of a kind that is freely available without restriction to the wider public.

[68] Secondly, we are inclined to doubt Ms Whelan's evidence that permitting Mr Hudson to access the magazines would be likely to lead to violence, stand-over tactics, intimidation and bullying. Ms Whelan did not point to any instances of those harms occurring—whether in New Zealand or abroad—where prisoners have accessed similar content (whether by permission or subterfuge). As counsel for both sides accepted, the popularity of men's magazines has plummeted over the past decade or so such that FHM and Ralph—the titles requested by Mr Hudson—are no longer published in any form. That must bear on the likelihood of such harms occurring. Moreover, as Ms Casey submitted, any item has the potential to become a tradable commodity given the supply restrictions inherent in a prison environment. This concern does not rationally justify banning some items sought by prisoners but not others, unless it can be shown that the item to be banned has clearly harmful effects or potential harms associated with it. Further, there is no reason to think that permitting access to these magazines, a substitutable asset insofar as similar content is already available in the prison environment—a fact accepted by both Ms Whelan and Dr Ryan—would *increase* the harms said to justify the rights-infringement. Indeed, if anything a decision to restrict access to the magazines would on its face contribute to scarcity, increasing desirability and the possibility of a division between the "haves and have nots", as Ms Whelan put it.

[69] Concerns that the availability of the magazines requested by Mr Hudson would interfere with the rehabilitation of prisoners also give us pause. The evidence that might occur was expressed in very tentative terms—Dr Ryan said that "[a]ccess to men's magazines such as *Ralph* and *FHM* may not be conducive" to rehabilitation efforts and acknowledged this was not an issue for all prisoners. Dr Ryan referred us to a range of studies but none of them identified a causal relationship for example,

between consumption of men's magazines and violence, and nor did any address rehabilitation specifically, let alone rehabilitation in a prison context. This degree of evidence can be contrasted with, for example, the "substantial body of research … to support the proposition that the fluoridation of community drinking water has a beneficial effect in reducing the incidence of tooth decay" which was before the Court as to the demonstrable justification of water fluoridation in *New Health New Zealand Inc v South Taranaki District Council*.[45]

[70] Critically, none of the evidence adduced by the Attorney-General in our view properly addresses the fact—accepted by both sides—that material equivalent to that contained in the magazines requested by Mr Hudson already exists in the prison environment. Dr Ryan acknowledged that most prisoners have access to television, through which they may be exposed to sexualised content. The exhibits to affidavits filed by Mr Hudson in the High Court also demonstrate that there are other mediums through which such content, together with the other impugned content, is available. Dr Ryan's answer to this is that Corrections "does what is reasonably practicable to restrict prisoner access to this type of content". But that answer is difficult to reconcile with the availability to prisoners of free-to-air television. As Ms Casey submits, allowing the content through some channels while excluding it through others gives rise to questions as to the rational connection between the proposed decision and the objectives it is said to serve. These have not, in our view, been adequately answered.

[71] In response to the appellant's criticism of the evidence tendered in support of the limit, the Attorney-General submits that Corrections should not be required to allow the magazines in issue into the prison just to demonstrate the harms claimed. We agree. However, it is also clear that s 5 of the Bill of Rights places the burden of proof on the party seeking to uphold a limit upon a right.[46] As this Court observed in *Child Poverty Action Group Inc v Attorney-General*:[47]

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45 *New Health New Zealand Inc v South Taranaki District Council* [2016] NZCA 462, [2017] 2 NZLR 13 at [153].

46 See *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402; [2013] 3 NZLR 729 at [91]; *Make It 16 Inc v Attorney-General* [2021] NZCA 681, [2022] 2 NZLR 440 at [53]–[59], reasoning which was upheld on appeal in *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [45]–[57]; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [6.4.1].

47 *Child Poverty Action Group Inc v Attorney-General*, above n 46, at [91] (footnote omitted).

> That latitude or leeway to the legislature does not however alter the fact that the onus is on the Crown to justify the limit on the right. The justification has to be "demonstrable".

Corrections is not required to allow the particular magazines into the prison to demonstrate the harms claimed. However, in our view it should point to evidence demonstrating a causal nexus between access to those magazines and the claimed harms, whether by reference to comparator prisons, jurisdictions, empirical studies or informed academic opinion. It has not done so.

[72] Accordingly, we are of the view that the proposed exercise of power under s 43(2) of the Act by Corrections to restrict Mr Hudson's access to the impugned magazines does not represent a demonstrably justified limit on Mr Hudson's s 14 right. We should say now, as the Supreme Court did in *Make It 16 Inc v Attorney-General*, that we leave open the possibility that the limit could later be held to be justified.[48] However, evidence meeting the threshold of demonstrable justification has not been put before the Court.

[73] We emphasise too that the above analysis is specific to the magazines which were put before us in evidence and which, we were given to understand, are available on an unrestricted basis to the wider community. It will remain open for Corrections to establish in a future case that restricting access to different magazines, with different and more objectionable content, amounts to a demonstrably justified limit on a prisoner's s 14 right to freedom of expression.

Relief

[74] In the event the appeal were to be allowed, Ms Casey sought, as relief:

(a) a declaration that the censorship of Mr Hudson's request for the magazines in 2017 was unlawful;

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48 *Make It 16 Inc v Attorney-General*, above n 46, at [57].

(b) an order "quashing the putative directive that he may not receive or keep copies of the requested magazines", with a direction for reconsideration with guidance on the law; and

(c) costs.

[75] We are not prepared to grant relief in the terms sought. We have upheld the Judge's decision to decline relief in respect of the initial decision by the Corrections officer to censor Mr Hudson's property request. That makes a declaration in respect of that decision inappropriate.

[76] Although we have reached the view that, on the evidence, a future decision to refuse access to the requested magazines would not be a justified limit on Mr Hudson's right under s 14 of the Bill of Rights, an order quashing a "putative directive" would be inappropriate. There is nothing to quash.

[77] If Mr Hudson wishes to take further steps to obtain the requested magazines he is entitled to do so. Any future request can be dealt with in accordance with the discussion in this judgment, and any policy lawfully adopted by Corrections that may be in place at the time.

Result

[78] The appeal is allowed.

[79] For the reasons set out at [74]–[76], there is no order for relief.

[80] The respondent must pay costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

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