

In the matter The Declaratory Judgments Act 1908

Between **Kiwi Party of New Zealand**
Applicant

And **ATTORNEY-GENERAL**
Respondent

Memorandum in regard to Registrar's decision to refuse waiver of
fees

Dated 10 October 2019

Presented for filing by:

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May it Please the Court

Background

- 1 By a decision dated 18 September 2019 a registrar of the Court of Appeal, 'the registrar' refused an application to waive Court fees on the basis of public interest. The basis for the decision was that the applicant had indicated that it would proceed with the appeal whether or not the waiver was granted.

Submissions

Registrar's decision plainly wrong

- 2 It is submitted that for the following reasons the decision was plainly wrong and that this application should be considered de novo.
- 3 It is submitted that the fee waiver form is a regulatory instrument which embodies a balance between access to justice and the cost thereof.
- 4 It is submitted that as the waiver form does not stipulate that fees cannot be waived where a party indicates it would proceed in any event, a fee waiver application cannot be refused purely on this basis. It is submitted that it is simply one factor to be considered and that the primary factor for consideration is the scope of the public interest at issue. It is submitted that rather than considering public interest the registrar defaulted to hardship grounds.
- 5 Subsequent to the decision, by email dated 19/9/19, counsel asked the registrar if the matter could proceed while a review of her decision was filed. The registrar replied in the negative. However, the review application provides that application can be made for the matter to so proceed. On the basis of the incorrect information provided by the registrar the applicant has since paid the fee.
- 6 As it appears that the registrar who made the decision to refuse the waiver application is unfamiliar with the fee waiver process, it is submitted that the application should be considered ne novo.

Substantive reasons for fee waiver

- 7 The causes of action at issue in this appeal were struck out on the basis that the Act at issue and the conduct of Parliament was not justiciable.
- 8 In the recent prorogation case, <https://www.supremecourt.uk/cases/uksc-2019-0192.html>, the UK Supreme court based its jurisdiction on being the interpreter of the English Constitution, as follows:

39. Although the United Kingdom does not have a single document entitled “The Constitution”, it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. **It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits.** The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context. (emphasis added)
- 9 As the Laws of England Act 1858 adopted the “laws of England as existing on the 14th day of January 1840”, the English Constitution is part of NZ law, as high law.
- 10 Importantly the UK Supreme Court noted, at paragraph [66], that while there was an arena within which there was “exclusive cognisance” by Parliament, “extensive inroads had been made into areas previously within exclusive cognisance.”
- 11 It is submitted that as what is within “exclusive cognisance” is not an area of settled law, the striking out of the relevant parts of the Kiwi Party case was wrong at law, as strike out is only permissible where the law is settled.
- 12 It is submitted that while the NZ Constitution has been eclipsed, by those whose powers it limits, it continues to subsist and that the scope and operation of the Constitution is a core public interest, which runs parallel with the core function of the Court, which is to maintain the rule of law.

Conclusion

- 13 It is submitted that the significance of the public interest issues at large in this proceeding are not overborne by the fact that the applicant will proceed with or without a waiver,

Dated 10 October 2019



G E Minchin
Counsel for applicant