IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE PAPAIOEA ROHE

CIV-2021-454-000037
[2021] NZHC 1551

BETWEEN	DAPHNA KAYE WHITMORE Applicant
AND	PALMERSTON NORTH CITY COUNCIL Respondent

Hearing: 24 June 2021

Appearances: N Levy QC for the Applicant
J Shackleton and O L Rego for the Respondent

Judgment: 25 June 2021

REASONS JUDGMENT OF NATION J

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[1] On 29 May 2021, a member of the group Speak Up For Women (SUFW) made an online booking for the group to hold a meeting at the Pioneer Women's Hall at the Ellen Melville Centre, Auckland on 27 June 2021.

[2] On 21 January 2021, through the applicant, SUFW applied under the Judicial Review Procedure Act 2016 for an interim order that the licence to occupy created by the agreement to hire the Ellen Melville Centre in central Auckland on 27 June 2021 from 5.30 pm to 8.00 pm continues in force.

[3] On about 1 June 2021, an SUFW supporter arranged with the Palmerston North City Library to book a venue at the Library on Friday 25 June 2021. On 17 June 2021, a person from the Council emailed the SUFW supporter to advise the Library was cancelling the scheduled SUFW talk on 25 June 2021.

[4] On 21 June 2021, the SUFW representative filed in the High Court at Palmerston North an application under the Judicial Review Procedure Act for an interim order that the licence to occupy created by the agreement to hire the mezzanine meeting space at the Palmerston North City Library between 6.30 pm and 8.00 pm on 25 June 2021 continues in force.

[5] The applications were filed as without notice applications but on a Pickwick basis, meaning they were brought to the attention of the two Councils who were named as respondents to the applications.

[6] Without objection, the Court arranged an urgent hearing of the applications at 2.15 pm on 24 June 2021. The Court heard submissions from both counsel for SUFW and the respective councils.

[7] At the hearing, the Court had affidavit evidence from the executive member of SUFW, who was the applicant for the Palmerston North proceedings. The Court also had affidavit evidence from the applicant in the Auckland proceedings. Some of the evidence in their affidavits was relevant to both proceedings.

[8] The Auckland proceedings have now been discontinued. There is no need for a judgment in those proceedings. This judgment relates just to the Palmerston North proceedings. It follows a results judgment I issued on 25 June 2021 making the order sought by SUFW.

Background to the decision

[9] It does not appear there is or could be any real dispute as to background facts relevant to the Council's decision and to the Court's consideration of SUFW's application for relief.

[10] As described by SUFW:

> In their own words: "Speak Up For Women formed in 2018 in opposition to the government's sex self-ID proposals in the Births, Deaths, Marriages and Relationships Registration Bill. Speak Up For Women's campaign platform – that there was inadequate public consultation, and the Bill risked unintended consequences for women's sex-based rights – was ultimately accepted by

> Minister Martin after taking legal advice, and the proposal was withdrawn. Speak Up For Women is a diverse group of ordinary New Zealanders including teachers, academics, health professionals, care workers, activists, lawyers and students with a shared interest in the rights of women and girls."

[11] The applicant for interim relief in the Palmerston North proceedings explained that the group has been arranging meetings for SUFW members and members of the public to discuss the Government's proposal to pass into law this year the bill. SUFW believes sex self-ID will have significant implications for women and girls, particularly in relation to their rights to single sex spaces, e.g. changing rooms, hostels, prisons, services and sports. She said:

> Broadly speaking, SUFW takes what has become known as a "gender critical" feminist position: that a person's sex is a material reality that does not change. Sex is distinct from gender and has a social and physical significance that cannot be ignored. If the word "woman" is taken to include any man identifying as a woman, the definitions of "woman" and "man" lose meaning, and women lose the ability to organise as a distinct group, and to describe and record their experiences of being female and of sexism and sex discrimination.

[12] She said, an opposing view is that sex is a matter of subjective identification. On that basis, males who identify as women are "women" because they say they are, irrespective of any social, physical or medical transition.

[13] This applicant said:

> Amongst those with the opposing view, there are at least some who consider that those with:
>
> "gender critical" feminist views are hateful and transphobic.

[14] With this applicant's affidavit, there was evidence that a person described as a well-known transgender activist had described SUFW as a "hate" group.

[15] The applicant provided evidence to indicate that SUFW includes people of differing sexual orientations.

[16] On about 22 May 2021, an SUFW supporter spoke to an appropriate person at the Palmerston North City Library about booking the venue. The two people met to view the premises. The Library proposed two dates. SUFW chose Friday 25 June 2021.

[17] On 1 June 2021, the SUFW supporter confirmed SUFW wanted the venue to discuss the proposed Births, Deaths, Marriages, and Relationships Registration Bill. The following day, the SUFW supporter emailed the Library with some proposed promotional material for the website and posters. There was some discussion as to what had happened in a similar Christchurch event the previous week.

[18] On 10 June 2021, the Librarian advised she was in the process of putting the event on the Library's online events page.

[19] On 14 June 2021, another person from the Council said she was in the process of getting the event on the website but wanted to change the start time to 6.30 pm to accommodate the Library closing time of 6.00 pm.

[20] On Thursday 17 June 2021, the same person from the Council emailed the SUFW supporter stating:

> After research and after seeking community feedback, we are now planning to replace it with a facilitated debate that enables all of the various viewpoints surrounding the BDMRR Bill to have a voice. This is our preferred approach, and one which we have used in the past where diverse views have been held on controversial topics. Of paramount importance to us is providing a platform for informed and balanced dialogue. An invitation has been set to the MP in charge of the Bill, Minister Jan Tinetti, to come and speak. The date for such a debate is yet to be confirmed and an invitation to attend will be sent to Speak Up for Women.

The approach required of the Council in making its decision and of the Court in reviewing that decision

[21] In a judgment of 30 April 2021, the Court of Appeal set out certain principles which govern how I must deal with the current application.[1]

[22] Their judgment was on an appeal against a decision of a council to deny the use of a council venue for a meeting where key speakers would be people from overseas with a profile as supporters of what is often referred to as alt-right views.

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1 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142.

[23] The Court of Appeal concluded the decision whether to make a Council venue available for public meetings and debates was a reviewable decision under the Judicial Review Procedure Act because, in substance, it was a decision for public and New Zealand Bill of Rights Act 1990 (BORA) purposes, pursuant to a public function or power in circumstances that engaged BORA rights.

[24] The Council's function of providing venues for live performances protected at common law and under BORA engaged rights of freedom of expression and peaceful assembly. The Court said:

> [65] Under s 14 of BORA, the right to freedom of expression includes the right to seek, receive and impart information and opinions of any kind in any form. This right is recognised as one of the essential foundations of a democratic society. The breadth of the right has been described as being "as wide as human thought and imagination". It includes non-verbal and symbolic conduct as well as expression through speech and writing, provided that the conduct conveys, or attempts to convey, something to others. By its nature, live performance — whether theatre, music, dance, debate or lecture — involves forms of expression protected by BORA. The present case concerns the type of expression readily understood as protected by BORA; the speakers wished to express their political views and those interested in their views had the right to hear them being expressed. We consider it incontrovertible that the right to freedom of expression was engaged when RFAL decided to cancel the event.
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> [66] We also accept that the right to peaceful assembly was engaged. This right tends to be considered in relation to those who wish to protest, rather than those who are the object of protest. However, those wishing to assemble for a purpose likely to attract protest are equally entitled to do so as those protesting. The right to peaceful assembly may be viewed as a corollary to the right to freedom of speech. In the circumstances of this case, which are akin to those in *Verrall v Great Yarmouth Borough Council*, we think that is the proper approach. We add, however, that we do not see this right as making any practical difference to the obligations on RFAL; in the circumstances of this case the right to peaceful assembly involves the same considerations as the right to freedom of expression.
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> [67] Society places a high value on freedom of expression and RFAL has the power to control public assets that are used for many forms of expression. The decision to cancel was made pursuant to a core statutory function and would directly affect the BORA rights of members of the public who wished to attend the event. That is the proper context in which to view RFAL's decision to cancel the VHA. It ought not to be treated as merely a commercial decision subject to the same limitations for review as apply to ordinary commercial decisions that have only commercial consequences.

[25] BORA rights which the Court of Appeal said were engaged in that case:[2]

> … are not absolute; they may be subject to such reasonable limits as can be demonstrably justified in a free and democratic society. In *R v Hansen* the Supreme Court held that where a BORA right is limited by legislation, a proportionality analysis is required to determine whether the limitation is justified under s 5. Under that approach, the limitation must be rationally connected to its objective and impair the right or freedom in question as little as possible.
>
> (footnotes omitted)

[26] The Court of Appeal referred to how that question was to be considered by the Court and what significance had to be attached to the decisionmaker's role. The Court noted that, in *Taylor v Chief Executive of the Department of Corrections*, it had eschewed any determination as to whether review of an administrative decision-making under BORA generally required a form of proportionality analysis of the type adopted in Hanson.[3] The Court of Appeal cited a dicta from Judges of the Supreme Court of the United Kingdom in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department*.[4]

[27] As to the Court's competence to adjudicate on an alleged infringement of human rights, Lord Sumption said:[5]

> It does not follow from the court's constitutional competence to adjudicate on an alleged infringement of human rights that it must be regarded as factually competent to disagree with the decision-maker in every case or that it should decline to recognise its own institutional limitations. … The executive's assessment of the implications of the facts is not conclusive, but may be entitled to great weight, depending on the nature of the decision and the expertise and sources of information of the decision-maker or those who advise her. Secondly, rationality is a minimum condition of proportionality, but is not the whole test. None the less, there are cases where the rationality of a decision is the only criterion which is capable of judicial assessment. This is particularly likely to be true of predictive and other judgmental assessments, especially those of a political nature. Such cases often involve a judgment or prediction of a kind whose rationality can be assessed but whose correctness cannot in the nature of things be tested empirically. Thirdly, where the justification for a decision depends on a judgment about the future impact of alternative courses of action, there is not necessarily a single "right" answer. There may be a range of judgments which could be made with equal propriety,

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2 At [116].

3 *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648.

4 *Moncrief-Spittle*, above n 1, at [65] citing *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 at [13] per Lord Sumption.

5 *R (Lord Carlile of Berriew)*, at [32].

> in which case the law is satisfied if the judgment under review lies within that range.

[28] And, from Lord Neuberger:[6]

> … where human rights are adversely affected by an executive decision, the court must form its own view on the proportionality of the decision, or what is sometimes referred to as the balancing exercise involved in the decision. …
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> … [W]here, as here, the relevant decision maker has carried out the balancing exercise, and has not made any errors of primary fact or principle and has not reached an irrational conclusion, so that the only issue is the proportionality of the decision, the court cannot simply frank the decision, but it must give the decision appropriate weight, and that weight may be decisive. The weight to be given to the decision must depend on the type of decision involved, and the reasons for it. There is a spectrum of types of decision, ranging from those based on factors on which judges have the evidence, the experience, the knowledge, and the institutional legitimacy to be able to form their own view with confidence, to those based on factors in respect of which judges cannot claim any such competence, and where only exceptional circumstances would justify judicial interference, in the absence of errors of fact, is understandings, failure to take into account relevant material, taking into account irrelevant material or irrationality.

[29] The Court of Appeal then referred to factual matters that had been relevant to the Council in making its decision. The Court had particular regard to the fact there had been no indication to the Council with the booking that security was likely to be an issue. It referred to there being a high security risk for staff, patrons and protesters alike, and said that most of the likely problems with the event arose from the organisers decision not to share what it knew about the security risk associated with the event when it made the booking. The Court said:[7]

> Had it done so, the suitability of the venue and the real nature of the security risk could have been assessed and managed. The decision to cancel was not inevitable and another decision-maker in like circumstances may have made a different decision. But in the circumstances outlined it cannot be said that the decision was not a rational and reasonable response. We therefore consider that RFAL's decision to cancel the event was a justified limitation on the appellants' BORA-affirmed rights to freedom of expression and freedom of peaceful assembly.

Legal principles applicable to review

[30] These were not in dispute.

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6 *Moncrief-Spittle v Regional Facilities Auckland Ltd*, above n 1, at [120], citing *R (Lord Carlile of Berriew) v Secretary of State for the Home Department*, above n 4, at [67]-[68].

7 *Moncrief-Spittle v Regional Facilities Auckland Ltd*, above n 1, at [127].

[31] The proceedings are brought under the Judicial Review Procedure Act. Section 15 allows for interim relief:

> **15 Interim orders**
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> (1) At any time before the final determination of an application, the court may, on the application of a party, make an interim order of the kind specified in subsection (2) if, in its opinion, it is necessary to do so to preserve the position of the applicant.
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> (2) The interim orders referred to in subsection (1) are interim orders-…
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> …
>
> (c) declaring that any licence that has been revoked or suspended in the exercise of the statutory power, …, continues …

[32] Section 15 requires the Court to consider all the circumstances, including the strength or weakness of the claim, the statutory framework, the public interest, and the private and public repercussions of granting relief.

[33] Relevant principles, as outlined in the commentary in s 15 in *McGechan on Procedure*, included:[8]

> (a) The purpose of the test is to give a right of protection on an interim basis to an applicant who may otherwise be unfairly prejudiced by reason of a delay in obtaining a final hearing …
>
> (b) … If there is no arguable or justiciable issue raised, there is no position to preserve …
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> (c) There must be a "necessity" as contrasted with a "simple desire to preserve a position if possible" …
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> …
>
> (f) The purpose of s 15 is to preserve the position of the applicant, not to improve it. … However, interim relief can encompass orders placing the applicant in the position it would have been but for the illegality alleged – it is not limited to preserving the status quo.

Submissions

[34] SUFW submit that the Council's decision engaged with SUFW's rights of freedom of expression and peaceful assembly. They submitted there would be no need

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8 Andrew Beck and others (eds) *McGechan on Procedure* (online ed, Thompson Reuters) at [JR15.04].

for Council staff to engage with the meeting but, if they did, there was no indication there would be any risk to their physical safety. SUFW submitted that the Council's wish to host a debate at which both "sides" could be heard was an irrelevant consideration as to the decision which had to be made as to whether SUFW should have available to it for its proposed public meeting the venue which the Library staff had agreed they could use. The potential for a meeting along the lines proposed by the Council could not be used to reasonably justify the booking that had been made for use of the Library.

[35] The Council contends:

(a) The order sought was not necessary to preserve SUFW's position.

(b) The decision was rational and reasonable in terms of the BORA.

(c) The Council did not take into account irrelevant considerations. It was empowered by the Local Government Act 2002 to exercise control over the city Library in a manner which it considered promoted social and cultural wellbeing in Palmerston North, even when this might impose some limits on BORA-protected rights. It was open to the Council to change the arrangement for use of the Library upon learning more about the risks involved.

(d) In the exercise of discretion, there would be little prejudice to SUFW if the order is not granted. With the brief time available until the event, there would be prejudice to the Council if it has to make the Library available as originally arranged, because of the need to have a staff member present at the venue.

Discussion

[36] I recognise the short time that the parties have had to put evidence before the Court to support their respective positions. Nevertheless, the evidence which has been made available as to SUFW's actions in arranging to use the Library, the Library's response to their request, and the Council's ultimate decision has allowed me to form a firm view as to the merits of SUFW's application.

[37] The Council's decision did engage with the fundamental rights of freedom of expression and peaceful assembly. Through her discussion with Library staff, there was an agreement between the applicant and the Council that SUFW would be able to use the Library venue for the planned meeting. SUFW's entitlement was in the nature of a licence.

[38] Section 5, BORA states:

> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[39] It is for the party seeking reliance on s 5 to advance the argument that limits on rights are reasonable.[9]

[40] There is no suggestion that in SUFW's dealings with the Library they, in any way, misled the Library as to the nature of the event they were going to hold or as to the particular stance they had with regard to the legislation they wished to discuss.

[41] Communications were consistent with Library staff having no safety concerns for themselves or anyone else with the proposed event. They actively assisted in preparing for the meeting and in ensuring that appropriate facilities would be available.

[42] In considering the booking, the Council or relevant staff must have been sensitive to strongly held views within the community that were in opposition to the views of SUFW. In submissions, Mr Shackleton for the Council said the Council was aware that there were some opposed to SUFW who regarded SUFW as a hate group.

[43] There is sufficient evidence before me at this stage to be clear that SUFW cannot rationally be described as a "hate group" in the sense that term can be relevant in making decisions about the extent to which a particular group should be allowed to exercise its rights of free speech and freedom of assembly.

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9 *B v Waitemata District Health Board* [2016] NZCA 184, [2016] 3 NZLR 569, at [109]-[110]; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

[44] The Council's justification for the decision it made is apparent from the email conveying its decision to SUFW.

[45] The Council was cancelling the arrangement with SUFW for the use of the Library space on the basis the Council would arrange a meeting at which representatives with the SUFW perspective on the proposed Bill and those with the opposing perspective would be speaking. The Council must thus have considered there would be no safety issues in having both groups at the same venue and there would be no risk to one group or the other through their being involved in such a meeting.

[46] There was nothing in the Council's response to indicate it had concerns as to the safety of any person if SUFW went ahead with the meeting as originally planned. There was no suggestion there would be a protest of the sort that could cause disruption within the community in a way the Council had a duty to avoid.

[47] SUFW had arranged to hold a meeting where it would be able to run the meeting in the way it wanted. It could reasonably be anticipated that, at such a meeting, it would be presenting its perspective on the proposed legislation in a manner consistent with the position the group holds over that legislation. There was no suggestion that, in holding the meeting, it wished to promote an alternative point of view although it was indicated there would be opportunity for discussion with anyone who was at the meeting.

[48] I consider the Council's ultimate decision involved a significant failure to recognise SUFW's right to freedom of speech and freedom of peaceful assembly. Through insisting a meeting could proceed only with an involvement of those with an opposing point of view, the Council was saying that those who might want to attend an event promoted by SUFW could attend only if:

(a) people with the opposing point of view were also there; and

(b) the meeting which SUFW supporters could attend would only be allowed if persons invited or selected by the Council were also in attendance.

[49] With its decision, the Council also indicated it would not allow SUFW to express its views about the proposed legislation at the arranged meeting in the manner SUFW wanted. The Council was insisting that SUFW could speak about their position on the legislation only if what they had to say was countered by speakers with an opposing point of view.

[50] I consider the Council's decision involved a serious failure to recognise the BORA rights of SUFW and its members. I consider the cancellation of the agreement reached with the Library, for the reasons and on the terms put forward by the Council, could not be considered a rational and reasonable limitation on those rights.

[51] The Council's decision could not be justified as being required by the duty on the Council under the Local Government Act to promote the social and cultural wellbeing of people in Palmerston North. Those ends could also be promoted through the Council properly recognising the BORA rights engaged in this case and allowing SUFW to hold a meeting in the way its members wanted to and in ways which, by law, they were entitled to do.

[52] I do not consider there is any reason in the exercise of my discretion to refuse SUFW the relief they seek. The availability of the venue was agreed to after discussion with Library staff. It involves the use of Library space for a relatively brief period not long after the Library would close to the public.

[53] Were relief to be declined, with the stance the Council has taken, there would be no assurance that, at any time in the future, SUFW would be able to hold a meeting in the manner they are entitled to with the BORA rights that are engaged.

[54] The applicant in these proceedings was accordingly entitled to the order sought.

[55] As the successful party, the applicant is also entitled to costs. If there is no agreement reach over those, a memorandum from the applicant is to be filed within four weeks. A memorandum for the Council in response is to be filed within two

weeks of receiving the applicant's memorandum. The memoranda are to be no longer than four pages. Costs will be determined on the papers.

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