IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-002101
[2014] NZHC 2225

UNDER	The Judicature Amendment Act 1972, Part 30 of the High Court Rules, the New Zealand Bill of Rights Act 1990, Declaratory Judgments Act 1908 and the common law
IN THE MATTER	of an action for judicial review and declarations
BETWEEN	ARTHUR WILLIAM TAYLOR, JOES TWAIN MCVAY, RHYS WARREN First, Second and Third Applicants
	HINEMANU NGARONOA, SANDRA WILDE, MARITTA MATTHEWS Fourth, Fifth and Sixth Applicants
AND	THE ATTORNEY-GENERAL OF NEW ZEALAND First Respondent
	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Second Respondent
	THE ELECTORAL COMMISSION Third Respondent

Hearing:	10 September 2014
Appearances:	First Applicant in person (via AVL) R Francois for Second - Sixth Applicants J Pike QC and P Gunn for the Respondents
Judgment:	12 September 2014

JUDGMENT OF ELLIS J

This judgment was delivered by me on Friday 12 September 2014 at 4.45 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar Date:……..

[1] The applicants are all serving prisoners. They seek interim orders "preserving" their right to vote in the upcoming (20 September 2014) general election. Parliament has ostensibly taken away that right by its 2010 amendment to the Electoral Act 1993 (the Act).

Background: the right to vote, the Electoral Act and the 2010 amendment

[2] Section 12 of the New Zealand Bill of Rights Act 1990 (NZBORA) provides that every New Zealand citizen who is 18 years or over has the right to vote. That section reflects and affirms art 25 of the International Covenant on Civil and Political Rights (ICCPR),[1] which recognises the right of all citizens to vote in genuine, periodic, elections without unreasonable restrictions. The commentary to art 25 acknowledges that laws suspending the right to vote held by those who are convicted of criminal offences on objective and reasonable grounds that are proportionate to the particular offence and sentence do not breach the Convention. And in broader terms, s 5 of NZBORA contemplates that all the rights affirmed by that Act are subject to such reasonable limits as may be prescribed by law and demonstrably justified in a free and democratic society.

[3] Prior to 2010, s 80(1)(d) of the Act disqualified from registration as electors persons who were "detained in prison" under –

(a) A sentence of imprisonment for life; or

(b) A sentence of preventive detention; or

(c) A sentence of imprisonment for a term of 3 years or more.[2]

[4] That subsection was amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (the Amendment Act).[3] On its face the amendment

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1 International Covenant on Economic, Social and Cultural rights 1993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

2 The law between 1993 and 2010 was derived from the 1986 *Report of the Royal Commission on the Electoral System* which noted (inter alia) that contemporary penal theory is generally opposed to the view that imprisonment entails a general suspension of the rights of citizenship such as the right to vote. The Report recommended (at 9.21) that any disqualification be limited to prisoners serving a sentence of imprisonment "equal to or greater than the maximum period of continuous absence overseas consistent with retaining the right to vote, namely 3 years".

disenfranchises all persons who happen to be serving a sentence of imprisonment and are incarcerated on election day.[4]

[5] Before the amendment became law, the Attorney-General advised the House that it appeared to be inconsistent with NZBORA. In other words, the restrictions it placed on universal suffrage were not demonstrably justified in a free and democratic society. Parliament nonetheless enacted the amendment, albeit by a small majority.

[6] There are many criticisms which have been levelled at the Amendment Act. Many of them were expressly noted by the Attorney-General in his s 7 report.

[7] First, the explanatory note to the Bill indicated that its object was that a person convicted for "serious crimes against the community" should forfeit the right to vote as part of their punishment. But many people who are serving a sentence of imprisonment of less than three years would not be regarded as serious offenders. For example, a fine defaulter may be sentenced to a short term of imprisonment as an alternative sentence. It is difficult to contend that such a person should be characterised as having offended so seriously that he or she should forfeit their right to vote.

[8] Similarly, short-term custodial sentences are sometimes imposed because other sentences, such as home or community detention, are not an option for a particular offender due to limited facilities and resources, mental health issues, the absence of family support, the absence of a suitable home detention address, or homelessness. It is argued that the mere existence of such adverse external circumstances ought not mean that the individual is to be treated as a serious offender who warrants disenfranchisement.

[9] It is for reasons such as these that the Attorney said that the objective of the Act cannot be said to be rationally linked to its effect, namely the blanket ban on

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3 It is, perhaps, notable that the Amendment Act did not originate as a Government measure but had its genesis in a Private Member's Bill. Also notable is that the Bill was not referred to the Justice and Electoral Select Committee but, rather, to the Law and Order Select Committee which received official advice in relation to the Bill from the Department of Corrections.

4 Section 80(1)(d) of that Act now provides that no sentenced prisoner serving a full time custodial sentence is eligible to vote in a general election and that the person's name is either to be removed from, or not added to, the register of electors.

prisoner voting. Such a rational link is necessary if the restriction placed on the s 12 right is to be justified.

[10] The absence of a rational link between object and effect is further underscored by the following:

(a) a person sentenced to a month in prison just before election day is unable to vote while a person sentenced to one year's home detention (which is regarded as equivalent to a two year prison sentence) may vote unimpeded;

(b) a prisoner convicted of a serious violent offence who serves a two and a half year sentence in prison between general elections will be able to vote and will receive no additional punishment at all. Someone serving a one-week sentence that coincided with a general election would still be unable to vote.

(c) the disenfranchising provisions depend entirely on the date of sentencing, which bears no relationship either to the objective of the Amendment or to the conduct of the prisoners whose voting rights are taken away. It operates without regard to the nature of the offence committed, the length of the term imposed or the personal circumstances of the offender. It ignores differentiating culpability of offenders or whether the sentence was for a token number of days, a mandatory sentence or one of strict liability.

[11] A separate criticism is that, unlike restrictions on freedom of movement and freedom from unreasonable search and seizure, which are necessary incidents of imprisonment, the right to vote is unrelated to the fact of incarceration. Deprivation of voting rights is thus said to be more analogous to removing the right of prisoners to freely manifest their religion while in prison.[5]

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[5] See Andrew Geddis "The ghosts of the civil dead" (15 February 2010) Pundit <www.pundit.co.nz>.

[12] Furthermore, the Act appears to introduce wider, irrational, inconsistencies in the law. For example mentally impaired prisoners who are detained in a hospital or a secure facility for less than three years are able to vote while all prisoners serving sentences of less than three years in prisons are disenfranchised.

[13] The applicants in the present case also allege that the Amendment Act disproportionately disenfranchises Maori, who make up 51 per cent of the prison population. That was a consequence referred to on the occasion of the first reading of the Bill by the Hon. Hone Harawira, who said:[6]

> Kim Workman, director of Rethinking Crime and Punishment, said the provisions of the bill would affect the 90 percent of prisoners who would be out of jail in 2 years, and it would also actively disenfranchise the families and the communities that those inmates come from. Communities like Ōtara, Flaxmere, and Cannons Creek would stand to lose a significant number of their voters. It does not take very much consideration to realise that with Māori and Pasifika constituting the great majority of prison inmates, the Polynesian voice would be the voice that was silenced by this legislation.

[14] It is also worthy of note that although comparable legislative measures have been enacted in other, cognate, jurisdictions, they have subsequently been held unconstitutional and struck down by the Courts. Thus the Supreme Court of Canada, the European Court of Human Rights, the Constitutional Court of South Africa, and the High Court of Australia have all held that disenfranchising *all* prisoners is an unjustifiable breach of individual rights.[7] For example, the Supreme Court of Canada did not consider such a limitation is justified by the social contract theory:[8]

> The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen's continued membership in the self-governing polity. Indeed, the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order. Certain rights are justifiably limited for penal reasons, including aspects of the rights to liberty, security of the person, mobility, and security against search and seizure. But whether a right is justifiably limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact.

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6 (17 March 2010) 662 NZPD 10339.

7 *Sauvé v Canada (Attorney General)* [1993] 2 SCR 438; *Hirst v the United Kingdom (No2)* (6 October 2004) ECHR 74025/01; *Roach v Electoral Commissioner* [2007] HCA 43, 233 CLR 162; *Minister of Home Affairs v National Institute for Crime Prevention* (NICRO) 2004 (5) BCLR 445 (CC) (SA). The UK Supreme Court has recently dismissed an application by Scottish prisoners to be able to vote in the 18 September referendum with reasons to follow: *Moohan and another (Appellant) v The Lord Advocate (Respondent)* UKSC 2014/0183.

8 *Sauvé v Canada (No2)* [2002] 3 SCR 519 at [45]-[52].

> Indeed, the right of the state to punish and the obligation of the criminal to accept punishment are tied to society's acceptance of the criminal as a person with rights and responsibilities.

[15] And the High Court of Australia has said:[9]

> 92 Moreover, s 93(8AA) is not yoked to sentencing laws or practices of any particular description….
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> 93 The 2006 Act treats indifferently imprisonment for a token period of days, mandatory sentences, and sentences for offences of strict liability. It does not reflect any assessment of any degree of culpability other than that which can be attributed to prisoners in general as a section of society…
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> 95 The legislative pursuit of an end which stigmatises offenders by imposing a civil disability during any term of imprisonment takes s 93(8AA) beyond what is reasonably appropriate and adapted (or "proportionate") to the maintenance of representative government. The net of disqualification is case too wide by s 93(8AA).

[16] I have set out the various criticisms made of the Amendment Act at some length in order to make it clear that Mr Taylor's is not some vexatious voice in the wilderness on this issue. In light of the conclusions I have reached in relation to the present applications, I think it is important to record that there is considerable and considered support for the position he is advancing. But the existence of such support does not, of course, necessarily mean that there is a remedy that this court can give.

The other proceedings and the present interim orders application

[17] In 2013, (most of) the present applicants brought judicial review proceedings seeking a declaration that the 2010 amendment is inconsistent with s 12 of NZBORA. An application by the Crown to strike out those proceedings on jurisdictional grounds was unsuccessful.[10] Although, in light of the looming general election, the applicants then sought urgency in relation to the substantive application for review, that was declined.[11] That decision prompted the filing of these present review proceedings, and the application for interim orders.

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9 *Roach v Electoral Commissioner*, above n7 at [92]-[95].

10 *Taylor v Attorney-General* [2014] NZHC 1630.

11 *Taylor v Attorney-General* [2014] NZHC 1795. I observe that a similar challenge to the legislative denial of prisoners' right to vote in the upcoming Scottish Referendum was heard and determined as a matter of urgency by the Scottish Courts and the UK Supreme Court.

[18] A further, closely related, application has been filed by the 2nd to 6th applicants in the Waitangi Tribunal. Urgency was sought, but declined on the basis that the Tribunal considered that the applicants were effectively seeking legislative change prior to the election on 20 September 2014 and that this was unrealistic.[12] The Tribunal nonetheless said:[13]

> … the claim raises very important issues that should be inquired into by the Tribunal as a matter of some urgency. I am aware that the same issue for prisoners in general is a live one in a number of western democracies. Maori form a large proportion of the New Zealand prison population. It is important that consideration be given to the Treaty implications of the present legislation.

[19] On that basis the Tribunal has accorded the Wai 2472 claim "priority", although that means that it will not be heard until next year.

[20] In terms of the specific interim relief sought by the plaintiffs in these proceedings, the orders sought are that:

(a) The Crown enter into negotiations with the Maori applicants' representative(s) to change or review the law prohibiting prisoners from voting under s 80(1)(d) of the Electoral Act 1993; and/or

(b) The respondents ought not to take any action consequential to the implementation of s 80(1)(d) of the Electoral Act 1993, which purported to come into effect on 15 December 2010, until the application for review if finally determined or until further order of the Court; and/or

(c) The respondents ought not to take any steps to enforce or continue to implement s 80(1)(d) of the Electoral Act 1993 until the application for review if finally determined or until further order of the Court; and/or

(d) Such further or other order(s) as the court thinks just.

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12 Wai 2472 #2.5.3 (7 August 2014).
13 At [11].

A position to preserve?

[21] Applications for interim orders are governed by s 8 of the Judicature Amendment Act 1972, which provides:

> (1) Subject to subsection (2) of this section, at any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes:
>
> (a) Prohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the statutory power:
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> (b) Prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates:
>
> (c) Declaring any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by effluxion of time before the final determination of the application for review, to continue and, where necessary, to be deemed to have continued in force.
>
> (2) Where the Crown is the respondent (or one of the respondents) to the application for review the Court shall not have power to make any order against the Crown under paragraph (a) or paragraph (b) of this section; but, instead, in any such case the Court may, by interim order, -
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> (a) Declare that the Crown ought not to take any further action that is or would be consequential on the exercise of the statutory power:
>
> (b) Declare that the Crown ought not to institute or continue with any proceedings, civil or criminal, in connection with any matter to which the application for review relates.
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> (3) Any order under subsection (1) or subsection (2) of this section may be made subject to such terms and conditions as the Court thinks fit, and may be expressed to continue in force until the application for review is finally determined or until such other date, or the happening of such other event, as the Court may specify.

[22] As subs (1) makes clear, the threshold question for the Court is whether the interim relief sought by the applicants is necessary to preserve their respective positions. And the difficulty faced by the applicants in the present case is that, on its face, the Amendment Act deprived them of the right to vote. Thus the starting point is that s 80(1)(d) has already disenfranchised them. That is, of course, the opposite of the position they wish to preserve.

[23] Mr Taylor and Mr Francois have nonetheless sought to get around this seemingly significant hurdle by contending that:

(a) s 80(1)(d) can, and should, be read consistently with s 12 of NZBORA;

(b) s 80(1)(d) can, and should, be read consistently with the Treaty of Waitangi;

(c) s 80(1)(d) can, and should, be read consistently with New Zealand's international obligations, including the United Nations Declaration on the Rights of Indigenous Peoples;[14]

(d) s 80(1)(d) can be read down and for other reasons does not, in fact, mean what it says and is legally ineffectual; and

(e) the 2010 amendment is invalid because it was passed contrary to mandatory manner and form requirements contained in the Act.

[24] On those bases (they say) the applicants need the interim orders sought to preserve a legal reality that has, until now, not been properly understood by the relevant authorities. And because the correct position has not been understood, the Executive is seeking now unlawfully to deny them the ability to vote on 20 September.

[25] Strictly speaking, if this Court were able to endorse any of the five contentions set out in [23] above, the reality would be that no interim orders would be required. That is because the Executive is bound to apply the law that is enacted by Parliament as it is interpreted by the Courts. For that reason, it is apparent that the application for interim relief has morphed into a more substantive application for judicial review. The matter was certainly argued in that way before me, and I propose to deal with it on that basis. I therefore attempt to address each of the plaintiffs' five arguments in turn, below.

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[14] United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, LXI A/RES/61/295 (2007).

Can s 80(1)(d) be read consistently with NZBORA s 12?

[26] The argument under this heading (which was advanced only by Mr Francois) was based on a passage from the judgment of Simon France J in *A v New Zealand Parole Board*, where he said:[15]

> [3] A sentence can be viewed as having two components:
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> (a) the penal or punishment part, which represents the amount of time that *must* be served as "just desserts" for the offending. Once an offender has served this part of a sentence he or she becomes "parole eligible"; whether they are released is up to the Parole Board;
>
> (b) the balance of the sentence, which represents the period from parole eligibility date to the last day of the sentence. This portion might be served if it is assessed by the Parole Board to be inappropriate, or unsafe, to release the prisoner following completion of the punishment component.
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> [4] It has always been the case that Parliament says how much the punishment part of a sentence will be. It does that by setting a basic rule applicable to all sentences. Over the years that rule has changed but the amounts have been either 1/3, 1/2 or 2/3 of a sentence.

[27] Mr Francois submitted that because the only conceivable purpose served by disenfranchising prisoners was to punish them, such disenfranchisement could only be justified in the NZBORA sense for so long as a particular prisoner was serving the "penal or punishment" part of his sentence. He said that it would be a relatively easy matter for the relevant authorities to determine the duration of the "penal or punishment" period in any given case. That is probably correct.

[28] Mr Francois then submitted that s 80(1)(d) could, and needed to, be read consistently with this NZBORA-friendly analysis. In other words, s 80(1)(d) needs to be read as applying only to those prisoners still serving the "punishment" portion of their sentence.

[29] Mr Pike submitted that Simon France J's dicta in *A* did not reflect any underlying legal principle of general application. I accept that submission in the sense that it is not a position that is expressly stated anywhere in the statute book. That said, however, I also accept that if one were able to take a "blue sky" approach

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[15] *A v New Zealand Parole Board* [2008] NZAR 703 (HC)

to drafting an NZBORA-consistent restriction on prisoners' rights to vote, the Judge's analysis might be instructive.

[30] The real difficulty faced by Mr Francois, however, is that it is not possible to read s 80(1)(d) in the way for which he contends without considerable interpolation and judicial amendment. To read the provision in that way would not involve an exercise in statutory interpretation, it would involve an exercise in curial redrafting.[16] Significantly, Mr Francois was not able to suggest that there was any word or words presently contained in s 80(1)(d) that could admit the meaning he advocated.

[31] Accordingly it is not, in my view, possible to read s 80(1)(d) consistently with s 12 of NZBORA.

Can s 80(1)(d) be read consistently with the Treaty of Waitangi?

[32] Mr Francois correctly submitted that legislation will be interpreted in accordance with the principles of the Treaty of Waitangi if they are incorporated into that legislation. The principles of the Treaty are not, however, incorporated into the Act.

[33] Mr Francois also relied, however, on the decision in *Barton-Prescott v Director General of Social Welfare*, where the court held that the Treaty is relevant to the interpretation of any statute that refers to the subject matter of the Treaty even if it does not expressly refer to the Treaty itself.[17] He said that the Treaty was engaged here because (inter alia) it guaranteed to Maori the rights of citizenship, which includes the right to vote. He submitted that s 80(1)(d) should therefore be interpreted as excluding all Maori inmates from its ambit.

[34] It is possible to recognise that there may well be arguments to be made about the consistency of s 80(1)(d) with the principles of Treaty. The filing in the Tribunal of the Wai 2472 claim is indicative of that. But whether or not inconsistencies exist, and the nature and extent of those inconsistencies is, in my view, a matter for the

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16 See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [61]: "Section 6 can only dictate the displacement of what appears to be the natural meaning of a provision in favour of another meaning **that is genuinely open in light of both its text and purpose**." (emphasis added).

17 *Barton-Prescott v Director General of Social Welfare* [1997] 3 NZLR 179 (HC).

Waitangi Tribunal, not this Court. Moreover the Tribunal is presently seized of precisely that issue. It seems wrong in principle for this Court to pre-empt proper consideration of that issue by that highly specialist body.[18]

[35] For the same reason it is not possible to accept Mr Francois' submission about what a Treaty-consistent version of s 80(1)(d) might look like. The suggestion that it simply should not be applied to Maori at all is, with respect, facile. By way of example only, the Human Rights Act implications of simply excluding Maori prisoners from its reach appear to me to be troubling.

[36] Perhaps even more fundamentally, however, the *Barton-Prescott* approach can only be applied where there is an interpretive exercise that the court is able to undertake. As I have already said, s 80(1)(d) cannot reasonably bear another meaning, there is no room for Treaty principles to be read into it. To interpret the word "prisoner" as excluding Maori prisoners is simply not open to me. Section 80(1)(d) is clear on its face and (if otherwise valid) universal in its application.

Can s 80(1)(d) be read consistently with international law?

[37] Mr Francois's submission that s 80(1)(d) should be interpreted consistently with international law faces almost identical obstacles. As Clifford J said in *Bin Zhang v Police*:[19]

> [20] … international treaties are not directly enforceable domestically. The relevant provisions must be incorporated into domestic law: see *Ashby v Minister of Immigration* [1981] 1 NZLR 222 at 224. That may occur in a number of ways. The most obvious is by means of direct legislative incorporation, which is not applicable here. There are two further means by which treaty obligations may be given the force of law domestically which I consider relevant in the present case. First, where the treaty obligation represents a rule of customary international law it is incorporated as part of the law of the land. Second, the courts may have regard to international treaty obligations when interpreting domestic legislation, and will attempt to achieve an interpretation consonant with international obligations.

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18 The Court has noted, albeit in different contexts, that it does not lightly interfere with matters before the Waitangi Tribunal before it has completed an inquiry see *Baker v Waitangi Tribunal and Attorney-General* [2014] NZHC 1219 at [53] and *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 at [89].

19 *Bin Zhang v Police* [2009] NZAR 217 (HC) at [20].

[38] He continued:[20]

> However, notwithstanding the courts' willingness to have regard to New Zealand's international obligations in interpreting legislation**, if the terms of the domestic legislation are clear and unambiguous they must be given effect in our Courts whether or not they carry out New Zealand's international obligations: Ashby at 229.**

[39] Neither the ICCPR nor any of the other instruments referred to by Mr Francois have been incorporated into the Act. As I have said, the meaning of s 80(1)(d) is clear. Domestic law can only be read consistently with international law where Parliament has not deliberately eschewed the relevant international obligation. It has done so here.

Can s 80(1)(d) otherwise be read down and/or is it legally ineffective?

[40] In reliance on the decision in *R v Pora* Mr Taylor submitted that where there are conflicting statutory provisions that cannot be reconciled, the court must determine which is the "leading" provision and then apply it.[21] Here, he says that s 80(1)(d) is inconsistent with:

(a) s 12 of NZBORA;

(b) ss 4C and 268 of the Electoral Act;

(c) the prohibited grounds of discrimination contained in Part 2 (s 21) of the Human Rights Act 1993;

(d) the purposes and principles of the corrections system contained in ss 5(1)(b) and 6(1)(g) of the Corrections Act 2004; and

(e) the purposes and principles of sentencing contained in ss 7 and 8 of the Sentencing Act 2002;

and that any or all of those sections "lead" and must therefore prevail.

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[20] At [34] (emphasis added).
[21] *R v Pora* [2001] 2 NZLR 37 (CA).

[41] *Pora* was concerned with two conflicting provisions contained in the Criminal Justice Act 1985. Section 4(2) of that Act prohibited the Courts from making any order "in the nature of a penalty" that it could not have made against an offender at the time the offence was committed. But s 2(4) of the Criminal Justice Amendment Act (No 2) 1999, amended the principal Act by inserting a new and discrete provision (s 80(2A)) which stipulated that if the commission of an offence of murder involved home invasion the Court was required to impose upon the offender a minimum period of imprisonment (MPI) of not less than 13 years, even if the offence was committed before the date on which the amendment came into effect.

[42] Following a re-trial in 2000, Mr Pora was convicted of a murder involving home invasion that had taken place in 1992. He was sentenced to an MPI of 13 years, in accordance with s 80(2A). It was accepted that an order that he serve a 13-year MPI was an order in the nature of a penalty which could not have been imposed upon him at the time of the commission of the offence (or, indeed, following his first trial in 1994) and was thus both seemingly prohibited by s 4(2), and apparently authorised by the later, more specific provision, s 80(2A). There was no dispute that the two subsections could not be reconciled.

[43] The interpretive issue raised by this clear inconsistency was considered by a bench of seven in the Court of Appeal. The outcome has been summarised by Messrs Carter and McHerron as follows:[22]

> Three Judges held that the later more recent provision partly displaced or impliedly repealed the earlier more general provision. Three Judges, including the Chief Justice, thought however that the later provision should be treated as being of no effect because it was inconsistent with fundamental rights, international obligations, and presumptions against retrospectivity. Thus, the canon of construction that a later more specific Act displaces an earlier more general one was displaced by the purposive approach and presumption against retrospectivity embodied in ss 5 and 7 of the Interpretation Act 1999.
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> …
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> Notably the seventh Judge, Richardson P, preferred on this matter to express no final view.

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[22] Ross Carter and Jason McHerron "Statutory Interpretation – A 2012 Guide (Presented to the New Zealand Law Society October 2012) at 74.

[44] Because of this split between the seven Judges there are necessarily debates to be had about what the ratio of the decision might be and whether it can fairly be said that the analysis relied on by Mr Taylor was the majority view. I do not propose to resolve that debate here. Rather, I prefer simply to deal with Mr Taylor's submission on its merits.

[45] The specific principle relied on by Mr Taylor was expressed in the following way in Thomas J's judgment:[23]

> There is ample authority for the proposition that where conflicting sections appear in the same statute, a purposive approach is to be adopted in determining which is the leading and which is the subordinate provision. The rule adopted by the Courts where two provisions in the same statute are in conflict was established as long ago as 1894. Lord Herschell LC in *Institute of Patent Agents v Lockwood* [1894] AC 347, affirmed the rule of construction which is to apply when two sections in the same Act are irreconcilable. He said (at 360):
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> > ... there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other.
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> *Halsbury's Laws* (4th ed) vol 44, para 872, expresses the law in these terms:
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> > It is sometimes said that where there is an irreconcilable inconsistency between two provisions in the same statute, the later prevails, but this is doubtful and the better view appears to be that the courts must determine which is the leading provision and which the subordinate provision, and which must give way to the other.

[46] Thomas J then went on to determine which of the two subsections at issue in that case was the leading provision by adopting a purposive interpretive exercise.

[47] Elias CJ and Tipping J took a slightly different approach, which was also endorsed by Mr Taylor. They concluded that Parliament had failed to appreciate that s 2(4) was in conflict with both s 80(2A) and s 25(g) of NZBORA. The basis for that view was that there had been no mention in the parliamentary debates of the conflict, and no s 7 report by the Attorney had been prepared. Their Honours then

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[23] *R v Pora* above n 21 at [149].

held that where Parliament legislates inconsistently with the Bill of Rights it must contemplate that and do so expressly, not by a side wind. Elias CJ said:[24]

> It is improbable where human rights are affected that Parliament would do by a side wind what it has not done explicitly. The legislation, properly construed, establishes that s 4 prevails.

She continued:[25]

> This result does not affect the orthodoxy that Parliament cannot bind its successors. Nor does it attempt to tie Parliament to a "manner and form" restriction which establishes the conditions for valid law-making. It implements Parliament's own requirement in s 6 of the New Zealand Bill of Rights Act that Parliament must speak clearly if it wishes to trench upon fundamental rights.

[48] Thus their Honours effectively held that s 80(2A) had no effect.

Discussion

[49] In my view there are a number of difficulties faced by Mr Taylor even if the approaches of Elias CJ, Tipping J and Thomas J were to be adopted here. I address these difficulties in no particular order.

[50] First, and by contrast with *Pora*, there is clear evidence that Parliament did turn its mind to the NZBORA implications of the enactment of s 80(1)(d). The Attorney's report was before the House and a number of those MPs who spoke for and against the Bill referred to it. Thus any interpretive approach that is predicated on legislative inadvertence is not available here, and the applicants' position therefore runs head-on into s 4 of NZBORA.

[51] But Mr Taylor submitted that the s 4 prohibition on the Courts holding that an NZBORA-inconsistent statutory provision is invalid or ineffective was limited to

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[24] *R v Pora*, above n 21, at [51].
[25] At [52].

cases in which the relevant provision was *only* inconsistent with a provision in NZBORA.[26] In this case he said that s 80(1)(d) was inconsistent *not only* with NZBORA s 12 but also with the provisions to which I have referred at [40] above and a raft of international instruments.

[52] I accept that s 4 does recognise that there may be other non-NZBORA grounds on which the Courts could hold a particular statutory provision or enactment to be impliedly repealed or revoked or otherwise invalid or ineffective. But that begs the fundamental question of whether such grounds exist here. And that, of course, is the question with which this judgment is principally concerned. Accordingly it seems to me that Mr Taylor's submission about the reach of s 4 really adds nothing to his wider argument.

[53] Secondly, and as Thomas J's judgment makes clear, the rule of interpretation sourced from *Lockwood* and relied on by Mr Taylor is concerned with inconsistent provisions contained within the *same* statute. It is only because the conflicting provisions reside under a single statutory umbrella that the inconsistency can be resolved by a purposive approach. Where conflicting provisions are contained in *different* statutes, then adopting a purposive approach to each will, in all likelihood, achieve nothing; indeed, it is more likely merely to confirm that the provisions conflict.[27]

[54] Once that point is reached, then any conflict falls to be resolved by reference to other canons of construction which favour giving meaning and force to s 80(1)(d).

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[26] Section 4 provides:
No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), -
(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
(b) Decline to apply any provision of the enactment –
by reason **only** that the provision is inconsistent with any provision of this Bill of Rights. (emphasis added)

[27] A purposive interpretation is, of course, mandated by s 5 of the Interpretation Act 1999.

These include the rules that the specific (s 80(1)(d)) overrides the general (the provisions referred to at [40] above) and that the provision enacted later in time prevails.[28]

[55] Thirdly, to the extent Mr Taylor relied on the alleged *internal* conflict between ss 80(1)(d) and 4C of the Electoral Act, the difficulty is that the inconsistency is far from obvious or direct.[29] Section 4C merely provides that:

> The objective of the Electoral Commission … is to administer the electoral system impartially, efficiently, effectively, and in a way that -
>
> (a) facilitates participation in parliamentary democracy; and
>
> (b) promotes understanding of the electoral system and associated matters; and
>
> (c) maintains confidence in the administration of the electoral system.

[56] While I acknowledge that denying certain classes of person the right to vote does not appear to "facilitate participation in parliamentary democracy", it is not the Electoral Commission that has enacted s 80(1)(d). Rather, s 80(1)(d) merely forms part of the body of statutory law that the Commission is undoubtedly required to administer and apply. In simple terms, the Electoral Commission's ability to achieve its statutory objectives is constrained by the terms of the Act, which include s 80(1)(d). In my view there is therefore no relevant internal conflict of the kind with which *Pora* was concerned.

[57] A similar but additional point can be made in relation to the alleged inconsistency between s 80(1)(d) and ss 7 and 8 of the Sentencing Act and ss 5 and 6 of the Corrections Act. Although it can reasonably be contended that disenfranchising prisoners does not facilitate their rehabilitation and reintegration

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[28] Generally if Parliament wishes to repeal an enactment it will do so expressly. However, the doctrine of implied repeal guarantees that where two provisions are inconsistent the later enactment will prevail. A L Smith J set out the doctrine of implied repeal in *Kutner v Philips* [1891] 2 QB 267 (QB). He noted that "[i]f … the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later".

[29] To the extent Mr Taylor also submitted that there was an inconsistency between s 80(1)(d) and s 268 of the Act, but I deal with that section separately at [62] onwards below.

into society,[30] the extent to which such "purposes and principles" can be achieved by those charged with pursuing them is necessarily limited by many things, including other laws. Purposes and principles provisions are, in a sense, aspirational. Moreover, as any sentencing Judge knows, such purposes and principles themselves often conflict with each other; none of them can therefore constitute an absolute, immoveable, obligation. A balancing exercise is always required.

[58] By contrast, s 80(1)(d) is both specific and absolute in its terms. It does not admit any room for rehabilitative and reintegrating purposes and principles. That does not mean that the purposes and principles have no effect or have been impliedly repealed; they continue to be relevant and to apply in myriad other circumstances. In my view such provisions cannot therefore be seen as conflicting with s 80(1)(d) in any sense that requires judicial or administrative reconciliation.

[59] Lastly, as far as the alleged inconsistency with s 21 of the Human Rights Act is concerned, the fundamental problem is that s 21B of that Act provides that:

> (1) To avoid doubt, an act or omission of any person or body is not unlawful under this Part if that act or omission is authorised or required by an enactment or otherwise by law.

[60] Although Mr Taylor sought to argue that, because of their constitutional deficiencies, the restrictions contained in s 80(1)(d) cannot be said to be "prescribed by law" in terms of NZBORA s 5 or (presumably) "authorised … by law" in terms of s 21B, I do not accept that argument. On the basis that s 80(1)(d) means what it says and is otherwise valid (as to which see the remainder of this judgment) it is clearly "law" which prescribes or authorises those restrictions.

[61] Accordingly, even were I to take from the judgments in *Pora* the interpretive approaches that are most favourable to Mr Taylor, they do not get him home here.

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[30] The aims of rehabilitation and reintegration form part of these purposes and principles.

Was s 80(1)(d) invalidly enacted, contrary to the manner and form requirements of s 268?

[62] Section 268 of the Electoral Act 1993 is a "manner and form" provision. It entrenches a number of other provisions in the Act by stipulating that they may not be repealed or amended unless the amendment or repeal:

> (a) is passed by a majority of 75 percent of all the members of the House of Representatives; or
>
> (b) has been carried by a majority of the valid votes cast at a poll of the electors of the General and Maori electoral districts.

[63] Included amongst the "reserved provisions" created by s 268 are:[31]

> (e) Section 74 of this Act, and the definition of the term "adult" in section 3(1) of this Act, and section 60(f) of this Act, so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:

[64] Section 74 relevantly provides:

> (1) Subject to the provisions of this Act, every adult person is qualified to be registered as an elector of an electoral district if—
>
> (a) That person is—
>
> (i) A New Zealand citizen; or
>
> (ii) A permanent resident of New Zealand; and
>
> (b) That person has at some time resided continuously in New Zealand for a period of not less than one year; and
>
> (c) That electoral district—
>
> (i) Is the last in which that person has continuously resided for a period equalling or exceeding one month; or
>
> (ii) Where that person has never resided continuously in any one electoral district for a period equalling or exceeding one month, is the electoral district in which that person resides or has last resided.

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[31] Section 268(1)(d).

[65] In broad terms, the word "adult" is defined in s 3(1) as meaning a person of or over the age of 18.

[66] Section 60(f) provides:

> **60 Who may vote**
>
> Subject to the provisions of this Act, the following persons, and no others, shall be qualified to vote at any election in any district, namely,—
>
> …
>
> (f) any member of the Defence Force who is outside New Zealand, if he or she is or will be of or over the age of 18 years on polling day, and his or her place of residence immediately before he or she last left New Zealand is within the district.

[67] Mr Taylor submits that because the Amendment Act took away the right to vote from several thousand adult New Zealanders it had the effect of amending s 74. And because the Amendment Act was not passed by a 75 per cent majority, he says it is invalid for want of compliance with the manner and form requirements contained in s 268(2). His argument is necessarily predicated on the entirety of s 74 being a reserved provision.

[68] It is not disputed that such non-compliance with ss 268(1)(e) and 268(2) would invalidate the amendment.[32]

[69] Mr Pike's principal submission was that the Amendment Act did not specifically amend s 74 and thus there was no need for a 75 per cent majority. No change was made to s 74 itself as a result of the Bill; indeed, it contained no reference to s 74 at all. Mr Pike relied as well on the opening words of s 74, which renders its effect "subject to the provisions of this Act" which, he said, included any subsequent amendment that detracted from, or was inconsistent with, it. He also said that it was "strongly arguable" that s 268(1) only entrenches s 74 of the Act insofar as it provides that 18 years of age is the minimum voting age.

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[32] It is trite that compliance with manner and form requirements is a condition of valid law-making. See for example *Westco Lagan v Attorney-General* [2001] 1 NZLR 40 (HC) at [93].

Discussion

[70] At the outset, I confess to having some reservations about the correctness of the proposition that an entrenched provision is only protected from direct, rather than implied, amendment or repeal. In *Bribery Commissioner v Ranasinghe* s 55 of the Ceylon (Constitution) Order in Council 1946 required that the appointment of judicial officers was vested in the Judicial Service Commission. Section 29 of the Ceylon (Constitution) Order in Council 1946 provided that no Bill for the amendment or repeal of any of the provisions of the Order could be presented for royal assent unless the number of votes in favour was more than two-thirds. Section 41 of the Bribery Amendment Act 1958 provided for the appointment of the members of the Bribery Tribunal to be on advice by the Minster of Justice. The Act was passed by an ordinary majority.

[71] Although the 1958 Act did not purport on its face to amend or to refer to s 55 the Privy Council held that there was a plain conflict and the Act was therefore invalid. The Judicial Committee said:[33]

> In the present case… the legislature has purported to pass a law which, being in conflict with section 55 of the Order in Council must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative provision laid down in section 29(4) the Ceylon legislature has not got the general power to amend its constitution by ordinary majority resolutions.

[72] Accordingly, in the present case, if s 268(1)(e) reserves s 74 in its entirety, and if the effect of the Amendment Act is in conflict with s 74 (which it appears to be), then in my view there is a problem. The critical question therefore is whether s 268(1)(e) entrenches all of s 74, or only that part of s 74 which prescribes 18 years as the minimum voting age.

[73] Professor Joseph, for example, appears to consider that all of s 74 is entrenched. He notes:[34]

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33 *Bribery Commissioner v Ranasinghe* [1965] AC 172 (PC) at 198.

34 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Wellington, 2014) at 588.

> Section 268 entrenches six key machinery sections….s 74, which establishes the qualification of electors (including the voting age and definition of adult in ss 3(1) and 60(f)).

[74] However in my respectful view the words "so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote" qualify s 74 as well as the definition of adult in s 3(1) and s 60(f). Thus it is only the minimum voting age that is constitutionally protected. This interpretation is necessary for paragraph (e) to make sense. "[T]hose provisions" cannot only refer to s 60(f) and the definition of adult in s 3(1) because neither of those provisions "prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote". The definition of an "adult" merely provides that an adult is aged 18 or over. Section 60(f) provides that certain members of the Defence Force who are over 18 can vote. These two provisions only "prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote" when read in conjunction with s 74.

[75] This interpretation is supported by the words in paragraph (e). The words "those provisions" most obviously refer to all of the previously mentioned provisions, including s 74. To read the words "so far as those provisions…" as referring only to ss 3(1) and 60(f) would arbitrarily sever the first mentioned provision from the latter two.

[76] The punctuation of the paragraph supports this interpretation. Each reference to a statutory provision is separated by a comma and an "and". That reinforces the view that there is no special and separate coupling of 3(1) and 60(f). Had such special and separate coupling been intended, the paragraph would logically read something more like this:

> (e) section 74, and the definition of the term adult in section 3(1) and section 60(f) so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:

[77] Lastly, interpreting s 268(1)(e) so that it is only the minimum voting age that is reserved, enables content to be given to the opening words of s 74 ("Subject to the provisions of this Act"). In particular, it is difficult to see how s 74 could be

impliedly (or effectively) amended or overridden by other provisions in the Act if s 268(1)(e) entrenches it in its entirety. Conversely s 268(1)(e) would be rendered meaningless (insofar as it relates to s 74) if the opening words in s 74 meant that its entrenchment could be circumvented by a statutory side wind, namely by enacting a separate provision in the Act that is inconsistent with it.

[78] Accordingly the only way in which the two sections can in my view be reconciled is by adopting an interpretation that s 74 is subject to other provisions in the Act *except* insofar as it is entrenched, namely in relation to the minimum voting age. Once that point is reached, it must be concluded that as the Amendment Act had no effect on the minimum voting age, it did not require the support of a 75 per cent majority in the House.[35]

Conclusions

[79] For the reasons I have given above, and notwithstanding the numerous and weighty constitutional criticisms that have been made of s 80(1)(d), I am unable to conclude that it can be read down or otherwise invalidated. More particularly:

(a) the section is clear on its face and cannot bear an alternate meaning and so does not permit a reading that is consistent with NZBORA or relevant international obligations;

(b) similarly, and even if I were in a position to determine that the section is not consistent with the Treaty of Waitangi, its lack of ambiguity means that a Treaty-consistent interpretation is not possible;

(c) nor, in advance of proper consideration of the issues by the Waitangi Tribunal, is it clear what such a Treaty-consistent interpretation would be;

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[35] Whether the differing viewpoints I have articulated above mean that there is sufficient ambiguity in the scope of s 268(1)(e) to warrant invoking s 6 NZBORA (which would presumably favour the conclusion that all of s 74 is entrenched) was not something either Mr Taylor, Mr Francois or Mr Pike raised or addressed and I cannot take it further here.

(d) although s 80(1)(d) does not, perhaps, sit easily with certain other statutory provisions, this is not a case such as *R v Pora*, involving two clearly and directly conflicting provisions contained in the same statute;

(e) to the extent it can be said that there is any genuine inconsistency between s 80(1)(d) and other statutory provisions (apart from NZBORA s 12), an application of the ordinary canons of statutory construction means that s 80(1)(d) prevails; and

(f) although, on balance, s 80(1)(d) can reasonably be said to have the effect of amending s 74 of the Electoral Act, s 74 is only entrenched insofar as it protects the minimum voting age. A 75 per cent parliamentary majority was therefore not required to enact s 80(1)(d) and it is not invalid for a failure to comply with the manner and form requirements of s 268.

[80] However constitutionally objectionable s 80(1)(d) might be, Parliament has (for now) spoken. And what Parliament has said is that no prisoner who is serving a sentence of imprisonment and who happens to be incarcerated on 20 September 2014 may vote in this year's general election. The applicants therefore have no position to preserve and the Court is unable to intervene. The application is dismissed accordingly.

Post script: housekeeping matters

[81] Notwithstanding my conclusions above, two substantive judicial review applications remain on foot. In light of what appears to be a significant overlap, Mr Taylor and the other applicants will need to consider whether they wish to pursue both of them. In any event, the Registry is to convene a telephone conference with Mr Taylor and counsel to discuss what future directions are required. That conference should be before me, as the current judicial review list judge.

[82] Lastly I place on record that I did not find Mr Taylor's AVL participation in the hearing before me particularly satisfactory. The sound quality was poor and

there was frequent interference, to the extent that Mr Taylor had to turn off his own microphone while others were speaking. It may be that, unless and until the Court's AVL system can be upgraded, careful consideration will need to be given to permitting serving prisoners who are self-represented parties to civil proceedings of this nature to be present in Court for the hearing.

Rebecca Ellis J