IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-439
[2013] NZHC 743

BETWEEN	DAVID CULLEN BAIN Applicant
AND	MINISTER OF JUSTICE Respondent

Hearing: 11 April 2013

Counsel: M P Reed QC & M A Karam for Applicant
K P McDonald QC & E Child for Respondent

Judgment: 16 April 2013

JUDGMENT OF KEANE J
[re application for transfer]

This judgment was delivered by on 16 April 2013 at 4pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:
Crown Law Office, Wellington

Counsel:
M P Reed QC & M A Karam, Auckland

[1] In 1995 David Bain was convicted of the murders in 1994 of five members of his family. In 2007 the Privy Council quashed his convictions and ordered that he undergo a new trial.[1] In June 2009, at his second trial, he was acquitted on all counts. He had then spent 13 years in prison. On 25 March 2010 he applied to the then Minister of Justice, Hon Simon Power, seeking compensation.

[2] Mr Bain was not then eligible to be considered under the Cabinet Guidelines governing compensation for wrongful conviction and imprisonment. The Privy Council had granted his appeal but it had ordered a retrial. The retrial order made him ineligible under the Guidelines.

[3] Mr Bain relied rather on the Cabinet decision approving the Guidelines, dated 2 December 1998, under which Cabinet agreed that 'the Crown reserve the right, in extraordinary circumstances, to consider claims falling outside the criteria specified ... on their individual merits, where this is in the interests of justice.'

[4] On 10 November 2011 the Minister appointed Hon Ian Binnie QC, CC, formerly a Judge of the Supreme Court of Canada, to report to him on Mr Bain's claim. On 30 August 2012 Mr Binnie QC reported to the present Minister, Hon Judith Collins, recommending that Mr Bain be compensated in an amount to be fixed by Cabinet in the exercise of its discretion.

[5] The Minister, after taking advice from the Crown Law Office and from the police, on 26 September 2012 appointed Hon Dr R L Fisher QC, a former Judge of this Court, to 'peer-review' the Binnie report. On 13 December 2012, in an interim report, Dr Fisher put in issue Mr Binnie QC's method of analysis, and thus his conclusions and recommendation. He recommended a fresh review.

[6] Mr Bain and his advisers did not receive a copy of either report until the Minister released them publicly on 13 December 2012. The Minister considered that she was not obliged to release the Binnie report to Mr Bain and his counsel any earlier, or to release to them the Fisher report at all, or to consult with them about either report.

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1 *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 (PC).

[7] To report responsibly to Cabinet, the Minister considered, she was entitled, indeed obliged, to assess Mr Binnie QC's report for herself assisted by confidential advice. Mr Bain's claim was outside the Cabinet Guidelines and she considered the evaluative process it prescribes did not apply. Cabinet's decision whether to grant Mr Bain compensation was entirely discretionary.

[8] On 30 January 2013 Mr Bain brought this application for judicial review, and on 4 February 2013 Cabinet decided that Mr Bain's compensation claim should be put on hold. Mr Bain's case is to be heard on a date in late July 2013 and there is an immediate issue as to where that hearing should take place.

[9] Mr Bain contends that he is entitled to have his case heard in Auckland, where he filed it and where his counsel are. The Minister contends that it must be heard in Wellington where, she says, it ought to have been filed in the first place. She says that everything material to Mr Bain's application happened there, not in Auckland. On 6 March 2013, the Minister applied to have the case transferred to Wellington, and that gives rise to two issues.

[10] The first issue, whether Mr Bain was entitled to file his case in Auckland, turns on whether one or more of his three grounds for review, his 'causes of action', arose wholly, or in a 'material part', in Auckland.[2] The second arises only if I decide that, as the Minister says, Mr Bain should have filed his application in Wellington.[3] I must then decide whether to transfer the case to Wellington.

[11] Neither issue requires me to consider whether Mr Bain's three grounds for review have merit, or whether his claim for compensation does. Whether he should receive compensation is for Cabinet to decide in its complete discretion. Whether his review grounds have merit will be the subject of the July hearing, on the complete record and the affidavits still to be filed.

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2 HCR 30.3(1); 5.25; 5.1(1)(c).
3 HCR 5.1(4).

Proper Registry

[12] The issue whether Mr Bain was entitled to file his application in Auckland turns on whether any of his grounds for review, as he has set them out in his statement of claim, arose in Auckland as opposed to Wellington, if not wholly then in any 'material part'.

[13] In his statement of claim, Mr Bain rests all three of his grounds for review, his 'causes of action', on a narrative beginning on 25 March 2010, when he applied for compensation. This narrative extends past the date of the Binnie report, 30 August 2012, to the date on which Mr Bain's counsel gave notice to the Minister that he intended to make this application for review, 21 January 2013.

[14] Mr Bain's three grounds for review culminate in the three principal declarations he seeks, which express their essence:

(a) A declaration that the Minister, in withholding the two reports, and in not consulting with him and his advisers about them, acted in breach of his right to natural justice.

(b) A declaration that the Minister frustrated his legitimate expectation that he and his advisers would be given the reports and consulted.

(c) A declaration that the Minister's conduct was unreasonable and invalid.

Mr Bain seeks also related declarations that the Minister is culpable of predetermination, bias, and an abuse of power.

[15] Mr Bain accepts that his first and third grounds for review, or 'causes of action', have as their focus the Minister's conduct in Wellington, after she received the Binnie report. He was entitled to file his application in Auckland, as of right, he contends, relying only on his second cause of action in which he claims that the Minister has breached his legitimate expectation that once the Binnie report was

received he would continue to be informed and consulted; an expectation he derives from the terms on which the Minister authorised the Binnie inquiry and how it was conducted. It had, he contends, an Auckland as well as Wellington dimension.

[16] On this application he points to 14 particulars in his statement of claim, which he says illustrate that Auckland dimension, all of which, he contends, are critical cumulatively to his claim to a legitimate expectation. He cannot establish his expectation without them.

Cause of action - material part

[17] A ground for review, a 'cause of action', is 'an assembly of facts, which entitles a plaintiff to relief (including discretionary relief)'. A 'part' of a ground for review, or a 'cause of action', is some fact or facts within that assembly of facts entitling relief, and to be 'material' it must be significant to a component of that ground or cause of action.[4]

[18] To be 'material' a fact does not have to be contested.[5] It must be more than a 'minor background aspect of the cause of action'. Whether it is merely that or 'sufficiently germane' to be material calls for assessment. There is no fixed and exact yard stick. The line between a material and an immaterial fact is 'ultimately imprecise'. Everything depends finally on the Court's 'perception of relevance'.[6]

[19] Where, as here, an application for judicial review concerns a claim for compensation for wrongful conviction and imprisonment the fact that it is made in the first instance to the Minister of Justice in Wellington, and is ultimately resolved by Cabinet there, at the seat of Government, does not preclude a 'material part' of a related cause of action arising elsewhere.

[20] In *Akatere v Attorney-General*,[7] an application for judicial review challenging the adequacy of compensation offered by Cabinet to wrongfully convicted and

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4 *National Bank of New Zealand Ltd v Glennie* (1992) 6 PRNZ 292 (HC) at 294.
5 *Krone (NZ) Technique Ltd v Connector Systems Ltd* (1988) 2 PRNZ 627 (HC) at 629; *K v Chief Executive of the Department of Labour* (2009) 19 PRNZ 222 (HC) at [19].
6 *K v Chief Executive of the Department of Labour*, above n 5, at [19].
7 *Akatere v Attorney-General* [2006] 3 NZLR 705 (HC).

imprisoned claimants, who were eligible to be considered under the Guidelines, was filed and heard in Auckland seemingly without any issue about the proper Registry arising. Presumably the fact that the claimants came from Auckland and had been tried and confined in Auckland, before their convictions were quashed completely on appeal, was deemed a 'material part' of their causes of action.

[21] So too, in *K v Chief Executive of the Department of Labour*,[8] on an application for judicial review relying on three causes of action of a decision by the Minister of Immigration to issue a deportation order, Asher J held that a material part of the third of them arose in Auckland.

[22] The first two causes of action alleged that the Minister had made an error of law and been unfair and unreasonable. These, Asher J held, had no Auckland component. As he said:[9]

> In judicial review the focus is on the procedures of the decision-maker and the lawfulness of the decision itself. Here the causes of action do not focus on the lead-up procedures, but rather on the lawfulness of the Minister's decision. Indeed the procedures leading up to that decision are not criticised, and there is no criticism of any step taken in Auckland. Therefore, no step or circumstance in Auckland will be of key importance in considering the first two causes of action.

[23] The third cause of action, he held, stood differently. It challenged as unfair and unreasonable the Minister's decision 'to issue a deportation notice but to keep the plaintiff in 'limbo' ... until circumstances in Sri Lanka permitted' deportation. To resolve that cause of action, he held, the Court was obliged to consider the plaintiff's continuing indeterminate confinement in Auckland. That, he said, was:[10]

> An important fact which it will be necessary for the plaintiff to prove to establish the cause of action. The fact it may not be controversial is irrelevant. That matter of residence in Auckland for an indeterminate time is an essential element of the cause of action, and not just a background fact.

[24] A case still closer to this is *New Zealand Association for Migration and Investment v Attorney General*.[11] There the Association, on an application for judicial

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8 *K v Chief Executive of the Department of Labour*, above n 5.
9 At [22].
10 At [23].

review, sought a declaration that applicants for New Zealand residence, whose applications had been filed but not resolved before 20 November 2002, were entitled to have them resolved under the policy applying before that date.

[25] The Association advanced three grounds for review. First that the Minister and the New Zealand Immigration Service, in deciding that the new policy should apply to existing applicants, erred as to the nature of their statutory duty. Second, that both failed to comply with a duty to consult the Association, its members and the affected applicants for whom its members acted. Third, that the applicants enjoyed a legitimate expectation that their applications would be determined under the old policy.

[26] Despite the fact that the applicants for residence, directly affected, were not parties to the proceeding and that the Association's registered office was in Tauranga, Randerson J held that a 'material part' of the second 'cause of action', concerning the failure to consult, arose in Auckland. The Association's chairman had his office there, as did many of its members. The Association had filed in Auckland as a matter of right.

[27] Finally, standing in contrast, is a case on which the Minister relies, *Criminal Bar Association of New Zealand Incorporated v Attorney-General & Legal Services Commissioner*.[12]

[28] There the Criminal Bar Association filed in Auckland an application for review challenging changes in the criminal legal aid scheme. McKenzie J held that Wellington was the proper Registry, because no 'material part' of any cause of action came into being beyond Wellington. As he said[13]:

> The challenge is to decisions made by the Ministry of Justice. Those decisions were taken in Wellington. The decisions apply generally to all legal aid grants, and to all legal aid providers. They are not geographically confined in any way. There is no basis for finding that a material part of the

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11 *New Zealand Association for Migration and Investment v Attorney General* HC Auckland M1700-02, 3 March 2003 at [22], [24].

12 *Criminal Bar Association of New Zealand Incorporated v Attorney-General & Legal Services Commissioner* [2012] NZHC 400.

13 At [49].

> cause of action arose at every place where any of the decisions challenged may have practical effect or application.

[29] It is against that spectrum of possibilities that I must now review Mr Bain's cause of action, relying on legitimate expectation and when, and more especially where, it is alleged to have originated.

Breach of legitimate expectation

[30] In his statement of claim, Mr Bain, speaking of himself as the applicant and the Minister as respondent, first states the legitimate expectation on which he claims to be entitled to rely:

> The applicant had been intimately involved in all aspects of his application for compensation, including the inquiry undertaken by Justice Binnie, and had legitimate expectations that:
>
> > The applicant would be timeously provided with a copy of the Binnie report;
> >
> > The respondent would involve the applicant with all steps taken following receipt of the Binnie report, and that the applicant's input and/or submissions would be genuinely weighed by the respondent;
> >
> > The respondent would implement processes for the continuation and resolution of the applicant's claim in a manner which accorded with the principles of natural justice.

[31] Then, Mr Bain sets out three sources for the legitimate expectation he claims:

> The applicant's legitimate expectation arose from:
>
> > The inclusive and consultative manner in which the Minister, Ministry Officials and Justice Binnie consulted the applicant from the date of lodgment of the application in March 2010 to when Justice Binnie's report was delivered in August 2012;
> >
> > Statements made by the respondent and officials announcing adherence to the Cabinet Guidelines and processing the applicant's application for compensation in a fair and reasonable manner; and, specifically, in appointing Justice Binnie to investigate and report on the application (further particulars to be provided prior to hearing).
> >
> > Past practice in accordance with claims made under the Cabinet Guidelines of consultation, and the 'current practice [under] the Cabinet Guidelines' to act 'in a consistent manner in such claims' (*Compensation for Wrongful Conviction and Imprisonment Ministry of Justice, February 2012*).

[32] Mr Bain concludes by asserting, in a summary way, the breach on which he relies to obtain declaratory relief:

> The respondent has breached the applicant's legitimate expectations in the circumstances set out in this statement of claim.

[33] The Minister, in her statement of defence, denies Mr Bain's claim to a legitimate expectation in the terms he describes. She denies that the three grounds on which Mr Bain relies could justify the expectation he claims to have. She denies any breach of any such expectation. On this present application the Minister contends that no 'material part' of this, Mr Bain's second cause of action, arose in Auckland.

[34] The fact, the Minister says, that she or her predecessor, or officials, wrote to Mr Bain in Auckland cannot mean that the expectation he asserts originated in Auckland. The letters and texts came from Wellington. The fact that during the inquiry a meeting and a hearing took place in Auckland is no more than a background fact. Neither is material to his cause of action.

Related conclusions

[35] To establish his second cause of action, alleging a breach of a legitimate expectation, Mr Bain must do more than he must under his first two causes of action. He must not only demonstrate that after the Minister received the Binnie report she acted in breach of his rights. He must establish the legitimate expectation he alleges she has transgressed.

[36] To establish that expectation and why it is legitimate Mr Bain sets out three grounds in his statement of claim, the first two of which are crucial. The first is that from the point of his application until the date of the Binnie report the two Ministers concerned were 'inclusive and consultative', as were officials. His second and related reason is that they and their officials accepted from the outset that the Cabinet Guidelines should apply as if he were an eligible applicant; consistently, he then alleges in his third reason, with the then existing practice.

[37] In setting out his second reason Mr Bain relies especially on the way in which Mr Binnie QC was authorised to and did conduct his inquiry and he says that

he will elaborate why that is so with further particulars before the hearing. It is that aspect of his reasons especially that is relevant to this present application. In resisting the Minister's application for transfer, Mr Bain contends that a notable feature of the inquiry authorised and conducted was that the fact he was then living in Auckland, where his then counsel still are, was accepted and fully accommodated.

[38] It is not merely incidental, Mr Bain says, that letters between his counsel and ministers and officials were between Auckland and Wellington. Nor is it merely incidental that he was not required to go to Wellington and that in January 2012 Mr Binnie QC met him and his counsel in Auckland to confirm how the inquiry was to be conducted, and then in July 2012 interviewed him there. Nor is it merely incidental that the Minister's officials and counsel participated on each of those occasions.

[39] Whether these particulars of the inquiry, as it was authorised and conducted, do give rise to the legitimate expectation Mr Bain asserts to receive the Binnie report and to be consulted about it, is the very issue to be resolved at the hearing. The cogency of his grounds cannot begin to be assessed now and they do not need to be.

[40] What is plain is that, to evaluate these expressed grounds for the legitimate expectation Mr Bain claims, this Court will have to evaluate them in detail and decide what weight, if any, the Auckland dimension deserves. In that sense, that dimension is a material part of Mr Bain's second cause of action and it entitled him to file his application for review in Auckland as of right.

Application for transfer

[41] The result is that I have no need to consider whether to accede to the Minister's application under r 5.1(4) to transfer the case to the Wellington Registry. Her application assumes that Mr Bain filed his statement of claim in the wrong Registry and I have found that he did not. Even if Mr Bain did file in the wrong Registry, however, I do not find the grounds for transfer compelling.

[42] I do not accept the Minister's submission that once it is established under r 5.1(c) that a statement of claim has been filed in the wrong Registry, then presumptively an order for transfer ought to be made to the proper Registry. That is not what r 5.1(4) says. It confers a general discretion.

[43] I adopt, furthermore, Fogarty J's analysis of r 5.1(4) in *Insurance Brokers Association of New Zealand Inc v New Zealand Fire Service Commission.*[14] As he said:[15] 'The discretion in subcl (4) has to be read to give effect to r 5 but also to give effect to r 1.2, which is the cornerstone of the whole of the High Court Rules.' Rule 1.2 states: 'The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or any interlocutory application'.

[44] In that case, even though Fogarty J found that the application for declaratory relief there in question ought not to have been filed in Auckland, and that the proper Registry was in Wellington, he declined transfer.

[45] He did so because, as he then said, the rule requiring that a case be filed in the registry nearest to where the cause of action or some material part arose makes most sense in ordinary civil cases in which there are to be witnesses. The rule ensures that a defendant should not have to appear, and call witnesses, at a Court of the plaintiff's choosing remote from where the dispute arose and the witnesses are.

[46] In that case, he said, an application for declaratory relief turning on the meaning of a statute, there was no cause of action in the ordinary sense or any need for witnesses. It was immaterial where the statute took effect. It took effect everywhere. The argument could be heard as well in Auckland as in Wellington. A trial in Wellington was unlikely to take place more speedily or be less expensive.

[47] Where, as here, the Crown is the defendant r 5.1(1)(c), on essentially the same rationale, makes the proper Registry that nearest the place where the cause of action or a material part arose. In every case against the Crown some material part of a cause of action is likely to have arisen in Wellington. To spare plaintiffs remote

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[14] *Insurance Brokers Association of New Zealand Inc v New Zealand Fire Service Commission* (2011) 20 PRNZ 841 (HC) at [16] - [20].

[15] At [18].

from Wellington having to bring their cases there, they are entitled to bring their case in another registry also near to where a material part of their cause of action arose.

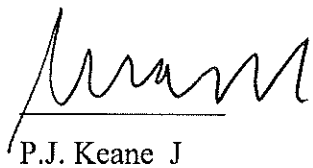
[48] In this case, in contrast to the *Insurance Brokers* case, Mr Bain must establish as a matter of fact the breaches of his rights he alleges, and there will be affidavit evidence. But, as is agreed, none is likely to be contested, and those giving affidavits are unlikely to be cross examined. The case will turn on what can be inferred from the undisputed record, set against the grounds for review and the civil burden and standard of proof.

[49] Here too, therefore, I consider, as the *Akatere* case illustrates, nothing turns on where the case is argued. It could be argued equally well in Auckland or Wellington. In either city it can proceed on the same day and in either case counsel will have to travel. There is no compelling reason for transfer.

[50] In this I take no account of Mr Bain's submission that he has suffered an injustice calling for redress, that he is without means, and that the Minister is seeking to deny him equality of arms. Whether he has suffered an injustice warranting compensation is the very issue Cabinet must decide and he has not disclosed his means, or explained why he has not applied for legal aid.

Orders

[51] I find that Mr Bain was entitled to bring his application for review in the Auckland Registry of this Court and I decline the Minister's application for transfer of the case to the Wellington Registry. Mr Bain is entitled to costs, according to scale 2B and any related disbursements. I need only hear counsel by memorandum if some issue of principle arises which the Registrar cannot resolve.



P.J. Keane J