IN THE COURT OF APPEAL OF NEW ZEALAND

CA187/2017
[2018] NZCA 24

BETWEEN	THE ATTORNEY-GENERAL Appellant
AND	PHILLIP JOHN SMITH Respondent

Hearing:	26 September 2017
Court:	Kós P, Cooper and Asher JJ
Counsel:	U Jagose QC, Solicitor-General and V McCall for Appellant T Ellis and G Edgeler for Respondent
Judgment:	1 March 2018 at 10 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B There is no order for costs.

REASONS OF THE COURT

(Given by Kós P)

[1] Does a prisoner's wish to wear a wig engage the right to freedom of expression affirmed by s 14 of the New Zealand Bill of Rights Act 1990?[1]

[2] A prison manager revoked the prisoner's permission to wear his wig when he was returned to custody after absconding while on temporary release. In the

[1] Herein "the Act".

High Court Wylie J concluded that the prisoner's wish to wear his wig while in prison engaged s 14 of the Act:[2]

> **14 Freedom of expression**
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> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

The Judge also concluded that the process adopted by the prison manager was erroneous. He should have acknowledged the prisoner's right to freedom of expression and set out, "albeit briefly", why he had reached the conclusion the limitation on that freedom – removal of the wig was justified under s 5.

[3] The Crown appeals those findings. But there is a preliminary question: is the appeal moot? Following Wylie J's decision permission to wear the wig was reinstated. The prison does not intend to revoke the permission again if the appeal is allowed. There is no longer a dispute of right between the parties.

Background

[4] The prisoner-respondent, Phillip John Smith, was sentenced to life imprisonment for murder, paedophile offending, aggravated burglary and kidnapping in 1996. He was given a minimum non-parole period of 13 years. He has sought, but been denied, parole.

[5] In 2001 Mr Smith began to lose his hair. Medical treatments were unavailing. In 2012 he sought approval from the prison manager at Auckland Prison to be permitted to possess and wear a wig. He said it would improve his self-esteem and confidence. A psychological assessment supported that claim. It would aid his rehabilitation. It would also protect his scalp from sun exposure in summer. And it would prevent heat loss in winter.

[6] The application was granted by Mr Sherlock, the Prison Director at Auckland Prison. A wig was made. Mr Smith received it in April 2013. It attaches to his scalp

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[2] *Smith v Attorney-General on behalf of Department of Corrections* [2017] NZHC 463, [2017] 2 NZLR 704 [*Smith v Attorney-General*].

with glue and tape. In July 2014 Mr Smith was moved to Spring Hill Corrections Facility. Permission was again granted for possession and use of his wig.

[7] On 6 November 2014 he was released for three days. Temporary release arrangements anticipate an eventual reintegration into society. The approved sponsor, his sister, collected him from the prison. But Mr Smith then fled. He boarded a flight to Santiago. Then another to Rio de Janeiro. Six days later he was arrested there. He was deported and returned to Auckland Prison on 29 November 2014. On arrival it appeared to the authorities that he had consumed drugs of some sort.[3] He was placed in the At Risk Unit to recover from their effects.

[8] The prison manager, Mr Sherlock, was informed of these events. On 1 December 2014 he revoked permission for Mr Smith to retain his wig. Mr Smith sought reasons. The response was perfunctory:

> Have spoken with Prison Manager. Prison Manager has withdrawn his approval of the hairpiece due to the actions conducted by the prisoner.

[9] Mr Smith appeared before the District Court at Auckland on charges arising from his escape.[4] He was by then entirely bald. Media reporting was pervasive. Comparator photographs were used to show the difference in Mr Smith's appearance with and without the wig.

[10] Mr Smith complained to the Office of the Ombudsman about the decision to revoke permission. In April 2016 the Ombudsman concluded the decision was not unreasonable.

[11] Mr Smith then filed his present judicial review proceedings. Three causes of action were advanced:

(a) breach of natural justice (ss 27(1) of the Act and s 6(1)(f)(ii) of the Corrections Act 2004) – in relation to the prison manager's refusal to

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3 Mr Smith claims it was a sleeping pill provided by the Brazilian authorities; the Crown says he obtained unspecified drugs from another prisoner and ingested them before or on the flight.

4 Mr Smith was sentenced to two years and nine months' imprisonment in relation to those charges: *R v Smith* [2016] NZDC 13828.

give reasons or consult with the plaintiff about the decision to remove his wig;

(b) failure to consider that Mr Smith's wig was "an act of expression" protected by s 14 of the Act.[5] A declaration that the decision to remove the wig was in breach of s 14 was sought, together with an order quashing the decision; and

(c) breach of s 23(5) of the Act (the right of a detained prisoner be treated with humanity and respect for his inherent dignity). Again a declaration and order quashing were sought.

Damages of $5,000 were sought on the second and third causes of action only.

Judgment appealed

[12] Wylie J delivered his judgment on 16 March 2017. The judgment addresses, directly, only the second cause of action. It concluded that Mr Smith's practice of wearing a wig was an act in exercise of his right to freedom of expression under s 14 of the Act. While Wylie J gave a number of reasons, the essential rationale was that wearing the wig was, for Mr Smith, an act with "expressive content". He had obtained the wig to improve his self-confidence and self-esteem:[6]

> In my judgment, in wearing a hairpiece, Mr Smith was endeavouring to present himself to others in a way with which he was comfortable. The wearing of a hairpiece was a physical act by which Mr Smith sought to promote his self-confidence and self-esteem. Mr Smith was trying to say – this is who I am and this is how I want to look. He was trying to affect the perception that others would have of him. His action in wearing a hairpiece had expressive content.

[13] The Judge considered that s 14 was a mandatory relevant consideration in the decision whether to remove Mr Smith's wig. The prison manager should have considered whether such a decision would have been a reasonable limit prescribed

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5 Together with the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) and the *Universal Declaration of Human Rights* GA Res 217A, A/Res/217 (1948), art 19.

6 *Smith v Attorney-General*, above n [6], at [70].

by law. "In other words, he should have acknowledged the right affirmed by s 14 and considered s 5 of [the Act]."[7]

[14] Wylie J then went on to reject the Crown's argument that while makers of discretionary ministerial decisions were obliged to exercise their powers in a manner consistent with the Act in a prison management context that applied only to the *outcome* of the administrative decision-making and *not* the *process* of arriving at the particular decision. The Judge considered the decision of the House of Lords in *R (SB) v Governors of Denbigh High School*.[8] While he accepted that the decision-making in the present case was a relatively low-level managerial decision, the particular context involving coercive powers made it distinguishable from *R (SB) v Governors of Denbigh High School*.[9] A mandatory process therefore applied for the making of an administrative decision affecting a prisoner's rights under the Act. The Judge continued:

> [87] I do not consider that a full step by step analysis as discussed in *Hansen* was necessarily required. Rather, Mr Sherlock could, and should, have acknowledged Mr Smith's right to freedom of expression under s 14, and set out, albeit briefly but in a transparent way, why he had reached the conclusion that the limitation he proposed was justified under s 5. A succinct summary of his reasons would have sufficed.
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> [88] In the absence of any evidence to the contrary, I conclude that Mr Sherlock failed to take into account a relevant, and indeed a mandatory, consideration, namely Mr Smith's right to freedom of expression under [the Act], and whether or not the limitation he was proposing on that right, through a decision to revoke permission earlier given for the issuance of a hairpiece, was a justified limitation on the right.

[15] The Judge said he did not need to decide the other causes of action. He made no comment at all on the third cause of action concerning s 23(5). As it happens, that approach has caused us some unintended difficulty in disposing of the present appeal. On the second cause of action (breach of natural justice/s 27) the Judge indicated, per obiter, that the original reasons given for the decision to revoke permission to wear the wig were inadequate.[10] He continued:[11]

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7 At [74].
8 *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100.
9 *Smith v Attorney-General*, above n 2, at [86].
10 At [90]–[91].
11 At [91].

> A decision-maker should not be able to avoid challenge by giving perfunctory reasons, and in my view the more or less contemporaneous reasons given by Mr Sherlock — the decision was made because of Mr Smith's actions — were perfunctory.

[16] In the result the Judge made a declaration that Mr Sherlock's revocation of permission failed to take into account as a relevant consideration Mr Smith's right to freedom of expression under s 14. And, further, that he failed to conduct any assessment under s 5 of the limitations on that right. An order in the nature of certiorari quashing the decision was made. Noting that damages were not expressly sought in relation to the cause of action on which he had decided the matter,[12] the Judge considered that the declaration and order quashing the decision were sufficient to vindicate the rights breached. Damages were declined.

Issues

[17] This appeal raises three issues:

(a) Is the appeal moot? If so, should either of the remaining issues be addressed?

(b) Does the respondent's wish to wear a wig engage the right to freedom of expression affirmed by s 14 of the Act?

(c) Did the prison manager have to identify the s 14 right, potential limits and undertake a proportionality analysis? Or is it sufficient that the decision limited a protected right in a manner ultimately justified under s 5?

Issue 1: Is the appeal moot? If so, should either of the remaining issues be addressed?

[18] Following the delivery of Wylie J's judgment, permission to wear the wig was reinstated. The Crown submissions record:

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[12] Which was not in fact correct: damages were sought on that cause of action, as well as the s 23(5) cause of action. They were not sought on the natural justice cause of action. Mr Smith, however, mounts no cross-appeal.

> The appellant has remade the challenged decision and the respondent is, again, authorised to wear his hairpiece. The appellant does not seek to justify the decision to revoke the hairpiece. The appellant accepts the decision may well have been vulnerable on other administrative law grounds.

The submissions go on to observe that the appeal was brought to determine what are primarily now legal issues, being those set out in Issues 2 and 3.

[19] The prospect of the appeal being moot in the circumstances was not addressed in written submissions. The Court issued a minute on the subject prior to the hearing. The issue was addressed orally at the outset of the hearing.

[20] The Solicitor-General confirmed the stance taken in her written submissions. She went further. She advised that the prison has no intention to revoke the permission again if the appeal is allowed. She accepted that there was now no current dispute between the parties.

[21] This is not, then, the typical administrative law case where an order is made quashing a decision, which order is then honoured by the government, but with the government appealing in order to reinstate lawfully the challenged administrative action.

[22] We are in no doubt that the Crown's appeal is moot. There is no current dispute of right between the parties. The outcome of the appeal will make no difference to Mr Smith, and he has brought no cross-appeal. If Wylie J's decision is reversed, it will assist the Crown only in an abstract sense in future cases.

[23] A similar situation arose before this Court in *Hutchinson v A*.[13] In that case an order had been made quashing the decision of a Board of Trustees suspending and excluding A from a secondary school. A was a special needs student. The High Court decision was based on the single ground (among several pleaded) that the Board had not sufficiently examined the facts of A's case before making its decision. The appeal sought to raise wider grounds. And A gave notice that he intended to support the judgment on the basis the Board's actions also involved

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13 *Hutchinson v A* [2015] NZCA 214, [2015] NZAR 1273.

unlawful discrimination under the Human Rights Act 1993. After the appeal was filed A left the school and the district. He had no intention to return. In those circumstances this Court declined to hear the appeal on the basis that it was moot. We noted that it is a well-established general principle that appellate courts will not determine appeals where there is no longer a live issue between the parties. The Courts are reluctant to consider academic or abstract questions where there is no longer a dispute between the parties to be resolved.[14]

[24] There is, however, an exception. As a matter of discretion a court may hear an appeal, despite the absence of a dispute affecting the rights and obligations of the parties inter se, where there is an important question of law concerning a public authority.[15] An important consideration is the responsibility of a court to show due sensitivity to the role in New Zealand's tripartite system of government: "[i]n general advisory opinions are not appropriate."[16]

[25] A difficulty standing in the way of discretionary determination of such an issue in *Hutchinso*n, however, was the fact that the Judge had made no first instance findings in relation to discrimination and breach of the Human Rights Act 1993. As a consequence the Court of Appeal would have been required to consider fresh affidavit evidence and cross-examination. So in *Hutchinson* the discretion was declined and no further hearing occurred.

[26] In the present appeal all counsel urged us to address Issue 2. That is whether Mr Smith's wish to wear his wig engaged the right to freedom of expression affirmed by s 14. We are satisfied that this issue can be addressed in the present appeal. It raises an important question with potential application in other cases. It has been the subject of a reasoned determination in the High Court. No further evidence is required.

[27] The parties' positions diverged however, on whether the Court should consider Issue 3. That is whether the prison manager had (on the one hand) to identify the right and undertake a proportionality analysis or (on the other) it would

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14 At [11]. See also *Gordon-Smith v R* [2008] NZSC 56, [2009] 1 NZLR 721 at [14].
15 At [13] citing *Gordon-Smith v R*, above n 14, at [15].
16 At [14].

be sufficient simply that the outcome of his determination limited a protected right in a manner justified under s 5. The Solicitor-General urged that we determine that issue. Mr Ellis on behalf of Mr Smith, however, submitted that we should not.

[28] In this respect we agree with Mr Ellis. The High Court Judge did not resolve liability under the first and third causes of action. It is particularly significant that the Judge did not determine the third cause of action which concerns the rights of detained persons to be treated with humanity and with respect for their inherent dignity enshrined in s 23(5) of the Act. Issue 3 essentially asks the Court to give guidance on the process to be adopted by a prison manager in making a decision removing prisoner property which (assuming Issue 2 is answered in the affirmative) engages a right to freedom of expression. We do not consider that issue can be answered without broader consideration of s 23(5) and the wider statutory context as it relates to corrections and, particularly, the Corrections Act 2004 and the Corrections Regulations 2005. On those matters we have neither findings nor submissions. In those circumstances, and in agreement with Mr Ellis, we will not as a matter of discretion determine Issue 3.

Conclusion

[29] The present appeal is moot. The Court will, in its discretion, address Issue 2. But it will not address Issue 3.

Issue 2: Does the respondent's wish to wear a wig engage the right to freedom of expression affirmed by s 14 of the Act?

[30] We summarised earlier the Judge's reasoning on this issue.[17] As we noted, the essential rationale was that wearing the wig was, for Mr Smith, an act with "expressive content". It was a physical action contrived to affect the perception others had of him.

[17] See above at [12] of this judgment.

Submissions

[31] The Solicitor-General submitted that while the freedom of expression protected by s 14 should be given a broad meaning to cover a range of expressive conduct — including non-verbal symbolic expression — it must be communicative of something in order to benefit from s 14's protection. The wearing of the wig is not expression; it does not communicate any content, ideas or meaning to third persons. Rather its purpose (and sole effect) is to make Mr Smith feel better. Its effects are all in the mind of Mr Smith, including his perceptions of what he thinks are in the minds of other people. She accepted that some hairstyles might amount to expressive conduct for s 14 purposes. For instance, where conveying a cultural, religious or political message. But in this case the wig was worn only to address Mr Smith's subjective feelings of low self-esteem and self-confidence. There is no external audience for such feelings, and the wearing of this wig does not involve "expression" protected by s 14.

[32] For Mr Smith, Mr Ellis submitted that the Crown's proposition that self-esteem and self-confidence do not engage freedom of expression was entirely wrong. Want of self-esteem does not arise in a vacuum. Rather, it likely arises from perceived adverse expressions of worth by others in a social setting. The response to those expressions — modified behaviour or appearance — is as much protected expression as would be a verbal entreaty for greater respect. In Mr Ellis's submission that appreciation lay beneath the decision of the Judge. The wearing of the wig was an expression of both physical form and personality. Inasmuch as it was capable of altering the perceptions of others, it amounted to expression protected by s 14.

Discussion

[33] As its title records, a core purpose of the Act is to affirm, protect and promote human rights and fundamental freedoms in New Zealand. A broad (or "generous"), purposive construction must be given to the Act's provisions to "give individuals the

full measure of the fundamental rights and freedoms referred to".[18] That approach has usually been adopted by New Zealand's courts in considering s 14. In *Moonen v Film & Literature Board of Review* this Court described expression protected to be "as wide as human thought and imagination".[19] The Supreme Court endorsed that approach in *Morse v Police*.[20] It is now orthodox that s 14 protects symbolic conduct as well as speech. In *Hopkinson v Police* Ellen France J noted that "it is well established that [freedom of expression] includes non-verbal conduct such as flag burning".[21] In a well-known example, *Pointon v Police*, Heath J held that a naturist running naked through woods (so far as we know, largely silently) engaged s 14, because he wished to draw attention to his alternative lifestyle choice and to make the point that, as he saw it, clothing was "an artificial construct that covers the human form".[22] The justification for any limitations imposed by the state on that right — for example, under the criminal law — then falls to be determined under the balancing exercise in s 5.

[34] Professor Petra and Dr Andrew Butler in *The New Zealand Bill of Rights Act: A Commentary* identify four theoretical rationales for the protection of freedom of expression.[23] The first and most influential justification is the "marketplace of ideas" articulated by Oliver Wendell Holmes J in his famous dissenting judgment in *Abrams v United States*.[24] The marketplace is the best test of truth and offensive, bad and false ideas should all be permitted to be expressed and then criticised without the predetermination inherent in censorship or like constraints. It might be noted that Holmes J lived in a pre-"post-truth" world, whereas nowadays unregulated social media permits just about anything to be published. But earlier centuries had pamphleteers operating in much the same way; it was only their reach that was really different.

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18 *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328; and *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439 (CA) at 440.

19 *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15].

20 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

21 *Hopkinson v Police* [2004] 3 NZLR 704 (HC) at [41].

22 *Pointon v Police* [2012] NZHC 3208 at [7]. See similarly *Gough v United Kingdom* (2015) 61 EHRR 8 (Section IV, ECHR).

23 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington 2015) at [13.6]. These basic rationales were most famously delineated in Thomas Emmerson "Toward a General Theory of the First Amendment" (1963) 72 Yale Law Journal 877 at 878–879.

24 *Abrams v United States* 250 US 616 (1919) at 630. As to the background to that decision, see Thomas Healy *The Great Dissent* (Henry Holt & Co, New York, 2013).

[35] The second rationale is that free speech is the engine room of a democratic state. Effective democratic government works best through vigorous debate that only a broad conception of free speech can maintain.[25] These articulations, it may be noted, apply with greater ease to freedom of speech, rather than the broader conception of freedom of expression.

[36] Thirdly, freedom of expression is valuable in its own right as a matter of human self-fulfilment. In *R v Sharpe* L'Heureux-Dubé, Gonthier and Bastarache JJ held self-fulfilment is one of the rationales for free expression and therefore "all content regardless of its popularity, aesthetic or moral tastefulness or mainstream acceptance" is protected.[26] Professor Claudia Geiringer and Steven Price add to this that speech is part of who we are.[27] Emotional and intellectual development is facilitated by self-expression. That covers "all *communicative* expression". The European Court of Human Rights has observed that the right to create, perform, distribute or exhibit works of art contributes to an exchange of ideas and personal fulfilment of individuals and that that is essential for a democratic society.[28]

[37] Finally, freedom of speech is a "societal safety valve".[29] That is, repression by the government of free speech encourages conspiracy; "in the battle for public order, free speech is the ally, not the enemy".[30]

[38] Western political thought readily applies hierarchical analysis to protected expression. That philosophical strain is evident also in freedom of expression jurisprudence. An eminent example is found in the speech of Baroness Hale in *Campbell v MGN Limited*:[31]

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25 See for example *New York Times v Sullivan* 376 US 254 (1964) at 270 per Brennan J.

26 *R v Share* (2001) 194 DLR (4th) 1 (SCC) at [141].

27 Claudia Geiringer and Steven Price "Moving from Self-Justification to Demonstrable Justification — the Bill of Rights and the Broadcasting Standards Authority" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation: Essays in honour of John Burrows QC* (LexisNexis, Wellington, 2008) 295 at 320 (emphasis added).

28 *Müller v Switzerland* (1991) 13 EHRR 212 (ECHR) at [33].

29 See *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 126.

30 Butler and Butler, above n 23, at [13.6.15].

31 *Campbell v MGN Ltd* UKHL 22, [2004] 2 AC 457 at [148]. See also Geiringer and Price, above n 27, at 321–323; *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [239] per Tipping J; and Helen Fenwick and Gavin Philipson *Media Freedom under the Human Rights Act* (Oxford University Press, Oxford, 2006) at 15.

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

We doubt however that a hierarchical approach is appropriate at the s 14, rather than s 5, stage of analysis. "Low value" expression — whether mundane and innocuous (such as private discourse or commercial radio) or hateful and dangerous (such as hate speech, an incitement to violence or even violent action itself) — is expression regardless. Constraint of the former will seldom be justifiable under s 5. Constraint of the latter will seldom be difficult to justify under s 5.[32] It follows that the mundane nature of the activity at issue in this case — the wearing of a wig – does not necessarily exclude it from s 14 protection.

[39] The important question for present purposes is instead whether Mr Smith's action in wearing a wig is "expression" at all for the purposes of s 14. The wording of that provision — set out above at [2] of this judgment — is articulated differently to the other protected freedoms. Although the definition is non-exclusive, it is impossible not to read the added words "including the freedom to seek, receive, and impart information and opinions of any kind in any form" as indicative of the scope of "expression". The fact and nature of that articulation is both expansive and limiting in effect. It is expansive inasmuch as the definition is non-exclusive. It is limiting in that the focus of the extended definition is upon the protection of communication of "information and opinions".

[40] In this the New Zealand legislation has much in common with the Canadian Charter of Rights and Freedoms, which at s 2(b) expresses as a fundamental freedom

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[32] Our analysis here accords with that expressed in Butler and Butler, above n 23, at [13.7.23].

"freedom of thought, belief, opinion and expression", and s 16(1) of the South African Constitution. The International Covenant on Civil and Political Rights, which the Act affirms, states at art 19(2):

> Everyone has the right to freedom of expression; the right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other media of his or her choice.

Likewise, the European Convention for the Protection of Human Rights and Fundamental Freedoms describes a right of freedom of expression as *including* "freedom to hold opinions and to receive and impart information and ideas".[33]

[41] These jurisdictions have not acceded to the proposition that conduct of all kinds amounts to expression. The distinction drawn is not based on valuing the conduct — a distinction we have already rejected — but based instead on the content and purpose of the conduct. The Supreme Court of Canada has held the essential character of protected expression is that it is an *activity that conveys a meaning*. Dickson CJ put it in those terms in *Attorney-General (Quebec) v Irwin Toy Ltd* (*Irwin Toy*):[34]

> We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterise certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s 2(b) challenge would proceed.

The Supreme Court of Canada has reiterated that test in later decisions. In *Rocket v Royal College of Dental Surgeons of Ontario*, the appellants were dentists who had

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[33] Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), art 10(1).

[34] *Attorney-General (Quebec) v Irwin-Toy Ltd* [1989] 1 SCR 927 at 969.

advertised their services contrary to regulations restricting such advertising.[35] They challenged the constitutionality of restriction on the basis of the right to freedom of expression guaranteed under the Charter. The Court noted the test under *Irwin Toy* was whether the relevant conduct aims to convey a meaning and was plainly satisfied that professional advertising met that test.[36] In *Montréal (City) v 2952-1399 Québec Inc*, a club that featured female dancers was prosecuted for nuisance owing to their playing music and "commentary accompanying the show" through a loudspeaker so that passers-by might be enticed to enter.[37] The Court there, too, was satisfied that the emitting by loudspeakers from the building onto the street did have expressive content and therefore was prima facie protected in terms of *Irwin Toy*.[38] *Irwin Toy* was reviewed and applied again in *R v Keegstra* in which Dickson CJ emphasised it was not the content of the expression that was relevant to interpreting s 2(b) of the Charter.[39] Any activity that conveys or attempts to convey a meaning has expressive content, and whether that meaning is "invidious and obnoxious is beside the point".[40] The s 14 inquiry thus focuses upon whether the conduct was intended to deliver a message.[41]

[42] European Convention jurisprudence is to similar effect. A number of cases under that Convention – art 10(1) of which is quoted at [40] above - have concerned attire or appearance. In *Stevens v United Kingdom* the applicant's child had refused to wear a tie as part of his school uniform.[42] The Commission found that although the right to freedom of expression might include the right to express ideas via the way a person dresses, the application of the rule here had not prevented the expressing a particular opinion or idea.[43] A similar conclusion was reached by the Commission in *Tig v Turkey* where a bearded student was denied access to a university campus.[44] The applicant was not in wearing the beard expressing or

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35 *Rocket v Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232.
36 At 244.
37 *Montréal (City) v 2952-1399 Québec Inc* 2005 SCC 62, [2005] 3 SCR 141.
38 At 167.
39 *R v Keegstra* [1990] 3 SCR 697.
40 At 730. See also *RWSDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573 at 588 per McIntyre J.
41 Butler and Butler, above n 23, at [13.7.15].
42 *Stevens v United Kingdom* (1986) 46 DR 245.
43 At [2]. See also *Kara v United Kingdom* [1998] ECHR 36528/97 in which a transvestite's complaint about an employer refusing him the right to wear a dress failed for the same reason.
44 *Tiğ v Turkey* [2005] ECHR 8165/03.

observing any particular cultural or religious belief; he had not been prevented from expressing a particular opinion by the ban.

[43] Appearance cases have commonly failed in United States First Amendment litigation. In *Karr v Schmidt* the Fifth Circuit Court of Appeals expressed doubt "that the wearing of long hair has sufficient communicative content to entitle it to the protection of the First Amendment".[45] It acknowledged that in some circumstances hair length might convey a "discrete message", but here Mr Karr (a 16-year old high school student) did not assert any such purpose but simply "[liked] his hair long".[46] Likewise in *Blau v Fort Thomas Public School District* a challenge to a prescriptive school uniform code failed in the Sixth Circuit Court of Appeals where the plaintiff's objection was merely that she wished to wear clothes she felt good in and wished to be able to express her individuality.[47] The Court stated that "the First Amendment does not protect such vague and attenuated notions of expression". Rather the plaintiff would need to demonstrate that the desired conduct could fairly be described as imbued with elements of communication which convey a particularised message that would be understood by those who viewed it.[48] In contrast, however, in *Church v Board of Education of Saline Area School District* a 12th grade student in 1970 succeeded in challenging a school dress code where his purpose in wearing his hair long was to dissent in a tangible manner to the continuation of the Vietnam War and to symbolise the importance of dissent generally in opposition to intolerance for such action.[49]

[44] Some support for a similar approach under s 14 can be found in the New Zealand jurisprudence. In *Brooker v Police* Blanchard J observed that "in a typical incident leading to a charge of disorderly behaviour, for example where the defendant behaves in a drunken and noisy manner in a public place, there will be no

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45 *Karr v Schmidt* 460 F 2d 609 (5th Cir 1972) at 613. See also *Mercer v Lothamer* 321 F Supp 335 (ED Ohio 1971); *Miller v Gillis* 315 F Supp 94 (ED Illinois 1969); *Brownlee v Bradley County, Tennessee Board of Education* 311 F Supp 1360 (SD Tenn 1970); and *Neinast v Board of Trustees of the Columbus Metropolitan Library* 190 F Supp 2d 1040 (ED Ohio 2002) — a case concerning footwear (or its absence): certiorari was denied by the Supreme Court.

46 At 614.

47 *Blau v Fort Thomas Public School District* 401 F 3d 381 (6th Circ 2005).

48 At 390

49 *Church v Board of Education of Saline Area School District of Washtenaw County, Michigan* 339 F Supp 538 (ED Michigan 1972).

Bill of Rights dimension".[50] These observations, and those of Dickson CJ in *Irwin-Toy* (cited at [41] above) were relied upon by Priestley J in *Thompson v Police* in concluding that loud nocturnal screeching by the appellant (apparently to attract stray cats, which she would then feed) did not engage s 14 protection. The Judge observed:[51]

> Whether calling for cats is expressive conduct for s 14 purposes, is not easily answered in the absence of any native test. Policy considerations tug strongly both ways. While it is dangerous, as the Chief Justice noted, to exclude from "expression" certain types of conduct lest the right itself be diluted, equally it is farcical to suggest that every human activity is an exercise of the right to free expression. Care must be exercised to ensure that "expression" which has a protected status is not confused with mindless human utterances or sounds. As Holmes J famously commented, freedom of expression does not extend to falsely calling out "Fire" in a crowded theatre.

For reasons we give shortly, we agree with the penultimate sentence. We doubt however that it is correct that a false claim of "Fire" does not attract a prima facie s 14 protection, because it plainly does communicate an idea or opinion. But its falsity immediately robs it of that prima facie protection under s 5.[52] It may be observed in passing that Professor and Dr Butler doubt the correctness of the conclusion reached on the facts in *Thompson.*[53] It is unnecessary for us to enter that debate to resolve the present appeal.

[45] In our view the prevailing overseas jurisprudence is correct to impose a purposive limit on protected "expression". The purpose neither of the conventions nor of the Act is to clothe all human conduct with prima facie protection, despite the arguable benefits thereof for human self-fulfilment. That is so for three reasons.

[46] The first is that we consider that to justify and engage the protection, "expression" must involve, as Dickson CJ put it in *Irwin-Toy*, an attempt to convey meaning to another. Acts whose rewards are confined to the actor's own ego may well enhance self-fulfilment, but they are not expression, or the expression protected by s 14. Reading Shakespeare and Austen enhances self-fulfilment, but (absent

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50 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [58].

51 *Thompson v Police* [2012] NZHC 2234, [2013] 1 NZLR 848 at [75] (footnote excluded).

52 Prosecution of the miscreant under s 145 of the Crimes Act 1961, for criminal nuisance, would predictably succeed and s 14 would offer no shield against it.

53 Butler and Butler, above n 23, at [13.7.5].

public performance) it is not expression (other than on the part of Shakespeare and Austen respectively). As we note later, wearing long hair or growing a moustache communicate nothing of meaning requiring protection. Without more they neither provoke ideas nor inform. Behaviour communicating nothing of meaning should not, in our view, engage s 14 rights analysis and s 5 balancing process that would follow. No fundamental freedom contained in the Bill of Rights is engaged and it is inappropriate to invoke a Bill of Rights analysis in assessing purported constraints on such activity.

[47] Secondly, it is unnecessary to engage s 14 to protect behaviour devoid of meaningful content. The Act is not a complete statement of the rights of citizens that the law recognises in New Zealand: there are rights that lie outside the Act which are nevertheless rights.[54] Section 28 of the Act recognises that reality. It states that an existing right or freedom is not restricted or abrogated simply because it is not included or fully included in the Act. Rights recognised by the common law remain. It is a basic proposition at common law that individuals are able to do anything that is not prohibited by statute or common law.[55] Organs of state cannot constrain the liberties of citizens (even of serving prisoners) except upon lawful and reasonable grounds (including regulations – such as the Corrections Regulations 2005 – which must be intra vires) and after considering any contrary arguments by those persons.[56] It is the genius of the common law of judicial review that it is engaged even if the Act's formal protections are not. Even though s 14 is not engaged in this case, any rights analysis must begin with the presumption that Mr Smith has the common law right to wear a wig if he wishes, simply because it is not illegal to do so. There would need to be a lawful basis, grounded in statute or regulation, to prevent him doing so. Without that, if the wig were removed by an official purporting to exercise a statutory power Mr Smith may seek judicial review. In addition, civil remedies may lie against anyone wrongly removing it. The absence of a Bill of Rights remedy does not leave Mr Smith without other possible means of redress.[57]

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54 Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 348–349; and Butler and Butler, above n 23, at [3.3.28].

55 See Butler and Butler, above n 23, at [3.2.2].

56 As to the common-law rights of prisoners see *McCann v State Hospitals Board for Scotland* [2017] UKSC 31 at [51] per Lord Hodge citing *Raymond v Honey* [1983] 1 AC 1 (HL).

57 As noted at [18] above, the Crown acknowledged the "vulnerability" of the prison manager's decision at common law and no longer sought to justify it.

[48] Thirdly, imposing a s 14 rights overlay in such cases provides little meaningful protection. Where the conduct is devoid of content, legitimate constraints may more readily be justified under s 5 than where meaning is sought to be conveyed. And where the conduct is otherwise unlawful – such as the "Fire" example postulated by Holmes J, or involves violence or a breach of copyright – again the s 5 analysis is unlikely to mean the prima facie protection amounts to much more than a momentary fig leaf.[58]

[49] For these three reasons we do not consider Parliament would have intended s 14 to apply other than in the case of conduct conveying, or attempting to convey, a meaning to others.

[50] Assessed against that test, we do not consider Mr Smith's desire to possess and wear a wig involves conduct conveying or attempting to convey meaning. It is not enough that people may view him differently hirsute as opposed to bald. All activity in the presence of others may provoke a reaction. A man drives his car on the road; other motorists see him and steer clear. His act of driving is not protected expression, because no identifiable idea or meaningful information is conveyed to anyone else. A man grows his hair and a moustache over the summer holidays. His workmates notice this on their return to work. No meaningful idea or information is conveyed by these acts alone; no protected expression is involved. Mr Pointon, the ardent naturist jogger, runs naked through the forest.[59] Protected expression is involved, for the reasons noted above at [33] of this judgment. But if Mr Pointon then puts his clothes on for the run home from the forest, the situation is quite different. In now adopting orthodox attire, he conveys no particular meaning to anyone seeing him.

[51] Therein, we suggest, lies the paradox of Mr Smith's case. He does not like being bald, being seen bald or the reaction he perceives other people have to his being bald. It is the baldness that is distinctive, and which he dislikes. His assumption of a wig is calculated to make him less distinctive and more ordinary in appearance. This makes him feel better, but it is the antithesis of protected

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58 As to the copyright example, see *Television New Zealand v Newsmonitor Services Ltd* [1994] 2 NZLR 91 (HC) at 95.

59 See *Pointon v Police*, above n 22.

expression. His actions are the equivalent of Mr Pointon, the naturist jogger, putting his clothes back on. Wearing a wig for that purpose does not convey meaning, does not attempt to convey meaning, and does not engage s 14.

Conclusion

[52] We conclude that Mr Smith's wish to wear a wig did not engage the right to freedom of expression affirmed by s 14 of the Act.

Issue 3: Did the prison manager have to identify the s 14 right, potential limits and undertake a proportionality analysis? Or is it sufficient that the decision limited a protected right in manner ultimately justified under s 5?

[53] For reasons given at [28], we decline to answer this issue.

Result

[54] The appeal is allowed. The respondent's wish to wear a wig did not engage s 14 of the New Zealand Bill of Rights Act 1990.

[55] Given the underlying mootness of the appeal, we make no order for costs.

Solicitors:
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