IN THE WAITANGI TRIBUNAL

Wai 2540

CONCERNING

the Treaty of Waitangi Act 1975

AND

an application for urgent by Tom Hemopo on behalf of himself, Ngāti Maniapoto, Rongomaiwahine and Ngāti Kahungunu

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DECISION
ON APPLICATION FOR AN URGENT HEARING

11 November 2015

Introduction

1. This decision concerns an application for an urgent hearing filed by Tom Hemopo on behalf of himself, Ngāti Maniapoto, Rongomaiwahine and Ngāti Kahungunu concerning the Crown's failure to reduce the number of Māori who reoffend thus reducing the disproportionate number of Māori serving sentences.

The claim

2. The claimant alleges that the Crown has breached the principles of the Treaty of Waitangi by, failing to make a long term commitment to bring the number of Māori serving sentences in line with the general Māori population; failing to set a specific target to reduce reoffending by Māori; failing to have an overall strategy to reduce reoffending by Māori; and failing to engage with Māori at an overall strategic level.

3. It is also alleged that the existing rehabilitative programmes implemented by the Crown are not appropriately assessed to ascertain whether they are contributing or could contribute to an overall reduction in reoffending by Māori.

4. It is submitted that the statistics for Māori convictions and reoffending are dire and the number of Māori serving sentences is totally disproportionate to population and reoffending rates for Māori are significantly worse than other ethnicities.

5. Māori make up only 15.8% of the national population, the percentage of those in prison who are Māori is 50.8%, and the percentage of Māori women in prison is 63%. The percentage of men who are Māori and serving sentences in prison and in the community is 37% and Māori women is 45.3%. 64.4% of Māori released from prison will be reconvicted within 2 years, compared to 53.4% of Europeans and 41.2% of Māori released from prison will be re-imprisoned within 2 years, compared to 31.8% of Europeans.

Procedural History

6. On 31 August 2015, the Tribunal received a statement of claim and an application for an urgent hearing from Tom Hemopo (Wai 2540, #1.1.1 and #3.1.1). The claim was registered on 1 September 2015 as Wai 2540, the Department of Corrections and Reoffending Prisoners claim (Wai 2540, #2.1.1).

7. I issued a memorandum-directions on 1 September 2015 directing the Crown and interested parties to file a response to the application by 15 September 2015 (Wai 2540, #2.5.1). The Crown received an extension to file their response and as directed on 29 September 2015 they filed submissions in response along with the affidavits of Jean-Pierre De Raad, Wallace Haumaha, Peter Johnston, Vincent Arbuckle, Anthony Fisher, Benjamin Clark, Richard Schmidt and John Campbell.

8. On 29 September 2015 counsel for the applicant filed the affidavit of Desma Kemp Ratima (Wai 2540, #A6), I directed the Crown to file any supplementary submissions and evidence in response to the affidavit by 8 October 2015 and the applicant to file any submissions and evidence in reply by 15 October 2015 (Wai 2540, #2.5.3).

9. As directed the applicant filed submissions in reply to those of the Crown on 15 October 2015 (Wai 2450, #3.1.7).

Parties Submissions

Applicant Submissions

10. The applicant submits that his claim relates to the failure of the Crown to address the alarmingly high rates of reoffending by Māori prisoners. Specifically that the Crown has no strategy, target or commitment to lower Māori reoffending in general or re-offending by Māori serving terms of imprisonment.

11. In 2013 the Department of Corrections (Corrections) abandoned its Māori Strategic Plan without consideration as to whether it had been successful in reducing reoffending by Māori. It has not been replaced and the applicant submits that the focus of his claim is that fact that the Crown now has no strategy, target or policy to address the high rate of Māori reoffending.

12. Further the applicant submits that the Crown has made no high level commitment to reduce the number of Māori in prison and serving sentences while Corrections has set no target to lower reoffending by Māori to be in line with other ethnicities and has since 2013 had no strategy in relation to Māori.

13. The applicant submits that Māori are already suffering significant and irreversible prejudice as follows:

    a. the Crown and the Corretions have created a stereotype that Māori are inherently criminal because the Māori statistics are not being perceived as a failure of the Crown and Corrections;
    b. too many Māori are in prison or otherwise serving sentences, where they are removed from society and from their rights as citizens, and they are not contributing fully to their whānau, hapū, iwi and communities;
    c. whānau of Māori serving sentences are being deprived of that support person, they risk break-up of their whānau, which puts children at risk of becoming offenders themselves.

14. It is further submitted that so long as the Crown fails to act; Māori reoffending and the disproportionate number of Māori serving sentences will not improve. Further, the Crown has no accountability for Māori reoffending or the Māori statistics, reoffending data will not be available until the end of 2016 and in 2017 when it reports on its crime and reoffending targets, it will not be reporting on Māori statistics.

15. The applicant submits that there is no alternative remedy available, there is no recourse to the Courts, the main alternative being consultation with the Crown and the applicant submits that neither the Crown nor Corrections engages with Māori at the overall strategic level.

16. Further the applicant submits that the Crown has been on notice about the importance of issues regarding the Corrections since the filing of the Wai 1024 claim in 2004 which concerned two sentencing assessment tools which were weighted against Māori. In its Report, the Tribunal was confident that urgent action was required to ensure that prejudice did not ensue. This claim is different in that it relates to the Crown's failure to discharge its obligations to Māori in relation to reducing reoffending, however the Crown failed to take action in 2004, which leave the applicant no choice but to pursue this claim.

17. The applicant submits that this claim is of importance to all Māori and that the universal affect of the actions and omissions of the Crown and the Corrections supports a claim for urgency.

Crown Response

18. The Crown opposes the application for an urgent hearing.

19. It is submitted by the Crown that the issue of Māori reoffending is highly complex and acknowledges that the disproportionate rates of Māori reoffending is an extremely serious issue that causes significant prejudice to Māori but that there are inherent limits to what correctional and other state interventions can reasonably achieve.

20. Further, the Crown submits that they are undertaking a range of measures that are in substance directed at matters which are raised by the applicant and an inquiry which makes recommendations as sought would not substantially assist the Crown to reduce Māori over-representation and re-offending. It is submitted that there are both ongoing and nascent initiatives which will address the issues raised, the Crown does submit that not all of these initiatives have an explicit Māori focus but they are acutely aware that success in reducing reoffending means success in reducing Māori over-representation and reoffending.

21. The Crown submits that the work of Corrections cannot be usefully inquired into in isolation from the work of the wider justice sector. The work of Corrections represents just one part of the Crown's efforts to address the issue of Māori over-representation in the justice sector and disproportionate reoffending. Corrections are part of the wider justice sector which includes the Ministry of Justice, Police, Crown Law and the Serious Fraud Office, the joint approach taken reflects the nature of the issues involved in addressing crime and reoffending.

22. It is submitted by the Crown that the suggestion of a four to five day hearing by the applicant is a significant underestimate of the complexity of the issues involved and that the kaupapa inquiry programme provides the most appropriate forum for such issues to be effectively inquired into.

23. Further to this, the Crown submits that now is not the time to hear the claim under urgency or as part of the kaupapa inquiry programme. There are a number of strategic and operational initiatives underway and time is required for these initiatives to be developed, implemented, monitored and assessed. Participation in an inquiry would divert organisational focus and resources away from the progressing of substantive initiatives to address Māori overrepresentation and reoffending.

24. Finally the Crown submits that there is no imminent event that will irrevocably affect the ability of the Crown to continue to address the prejudice Māori are suffering.

Applicant Reply

25. The applicant accepts that the issue of Māori overrepresentation in the criminal justice system is complex but submit that the focus of this claim is the narrow issue of the lack of strategy from Corrections in relation to Māori reoffending. It is further submitted that the current approach being taken to address the reoffending problem is flawed.

26. In reply to the Crowns statement that "there are inherent limits to what correctional and other state interventions can reasonably achieve" the applicant submits that this statement is concerning and if the Crown's attitude to Māori statistics is simply to accept defeat then urgent intervention is required.

27. It is submitted in reply to the argument of the Crown that Corrections is just one part of the Crown's effort to address the statistics, this does not detract from Corrections

responsibilities to the more than four thousand Māori currently in prison. The recommendations sought in this claim do not require Corrections to be the sole contributor to reducing the overall Māori reoffending rate but it must actually contribute.

28. It is not disputed by the applicant that Corrections is undertaking a range of measures but without a coherent strategy supported by a clear budget and targets that actually hold Corrections accountable for Māori reoffending, these measures are essentially unconnected silos.

29. In response to the argument from the Crown that there is no imminent event that will irrevocably affect the ability of the Crown to continue to address the prejudice Māori are suffering, the applicant submits that whether or not the Crown has the ability to try and remove prejudice is not a criteria for urgency. The applicant does not challenge the Crown's ability to address prejudice but their lack of commitment and an overall strategy, which means that the Crown cannot succeed in removing the prejudice if it continues on its current path.

30. Finally the applicant submits that this is surely an exceptional case, as the statistics are so appalling, particularly in relation to Māori youth, that an external audit/review is essential, it is imperative that this Tribunal hear this claim as a matter of urgency.

Urgency Criteria

29. The Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

> In deciding an urgency application, the Tribunal has a regard to a number of factors. Of particular importance is whether:
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> - The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
> - There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
> - The claimants can demonstrate that they are ready to proceed urgently to a hearing.
>
> Other factors that the Tribunal may consider include whether:
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> - The claim or claims challenge an important current or pending Crown action or policy;
> - An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
> - Any other grounds justifying urgency have been made out.
>
> Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

Discussion

32. The decision to grant or refuse an urgent hearing before the Tribunal is a discretion to be exercised having regard to the relevant principles and the appropriate facts.

The guideline referred to in paragraph 29 above, is for the benefit of parties as an attempt to help them focus on the matters that are likely to move the decision one way or another. There are cases where a number of the listed factors may be barely present but the overall shape of the case could still mean urgency is appropriate. The decision of necessity has to be somewhat subjective with a weighing of the various factors and for that very reason there is no mathematical application of the principles available. The presiding judicial officer will inevitably recognise an urgent matter when he or she sees it.

33. It is not for me to stray too far into the merits of the claim. The offending and reoffending figures in the evidence are undisputed, stark and cause for considerable concern. It is not as though those figures are new. Māori offending and reoffending rates have been well known for a very long time. The applicant's case focuses on reoffending and the proposition that the Crown is simply not doing enough, not doing it in a strategic and focused way and not doing it now.

34. The Crown says that there is no imminent event as would justify an urgent hearing. In a general sense that is true. I prefer to view the matter in this way. If the applicant is right, and I express no view on that, then many young Māori men and women are in the Correction system or will enter it tomorrow, next month or next year. If the applicant is correct then for those people and their family's there is imminent and perhaps irreversible prejudice.

35. I return to paragraph 5. The figures and percentages indicated and the human and social consequences, if the applicant is correct, are overpowering. There appears to be nowhere else than the Tribunal where the applicant can go to address the issue. I have before me approximately 2000 pages of submissions, affidavits and appendices. It is clear that the Crown is making a major effort to address crime in a general sense and has a focus on Māori crime. Parts of these documents are merely informative and deal with crime and the penal system in a general sense. But it is not as if the claim relates to the causes of crime or the appropriateness of the Crown's response to crime, in general. The applicant focuses on reoffending. He points out that offenders, predominantly young offenders, are or have been in the custody and control of the Corrections department for long periods of time 24 hours a day. The application asserts that the opportunity for change or reformation implicit in this is being squandered.

36. The Crown accepts that the figures speak for themselves in the sense that Māori are prejudiced. The Crown does not accept that it is in breach of the Treaty or is the cause of the prejudice. It rightly points out the complexity of the causes of offending. It suggests however that the matter would be much better dealt with in a kaupapa inquiry relating to justice generally. I do not agree. If the applicant is right; the imminence of the prejudice to large numbers of Māori people means that it is better dealt with now and not delayed to a broader inquiry years hence. I am of that view notwithstanding that a grant of urgency will postpone a hearing for others who have waited many years to have their claim heard.

Decision

37. Having regard to all the factors and material before me I am of the view this is a proper matter for an urgent hearing and the application is granted.

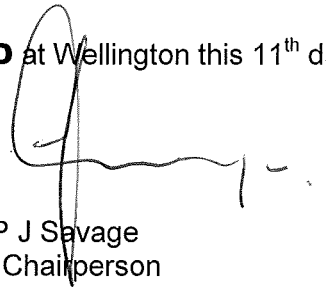
38. The applicant is represented by senior Counsel with considerable experience before this Tribunal. Counsel has submitted that the matter could be dealt with in just 5 days of hearing time. Whether those are 5 consecutive days will have to be decided. He must have had regard to the time needed for the Crown to respond at the hearing.

39. The matter is to be set down for hearing in the middle of the next calendar year at the Tribunal hearing rooms in Wellington. 5 days is to be allotted to the hearing.

40. A Tribunal when appointed will inevitably wish to confer with Counsel to manage the matters arising before hearing. Counsel should however begin immediately to attempt to narrow the issues and agree the relevant facts where appropriate. Counsel are expected to produce concise and highly focused cases before the Tribunal.

The Registrar is to send a copy of this direction to the applicant, Crown counsel and all those on the notification list for Wai 2540, the Department of Corrections and Reoffending Prisoners Claim.

DATED at Wellington this 11th day of November 2015



Judge P J Savage
Deputy Chairperson
WAITANGI TRIBUNAL