IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-404-155
[2022] NZHC 3559

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review
BETWEEN	NEW ZEALAND DEFENCE FORCE Applicant
AND	DISTRICT COURT OF NEW ZEALAND First Respondent
	WORKSAFE NEW ZEALAND Second Respondent

Hearing: 12 September 2022

Counsel: S V McKechnie and T J Bremner for Applicant
D G Johnstone and S T A Forrest for Second Respondent

Judgment: 20 December 2022

JUDGMENT OF BREWER J

This judgment was delivered by me on 20 December 2022 at 12 noon pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Simpson Grierson (Wellington) for Applicant
Crown Law (Wellington) for First Respondent
WorkSafe New Zealand (Auckland) for Second Respondent

Introduction

[1] On 8 May 2019, Lance Corporal Nicholas Kahotea, an experienced and well-regarded member of 1 New Zealand Special Air Service Regiment (NZSAS) died during a training exercise at Ardmore Military Training Area. Lance Corporal Kahotea fell to his death from a helicopter while participating in a 'bump landing' exercise in which he and others were to be inserted onto the roof of a building as part of a counter-terrorism response.

[2] WorkSafe New Zealand (WNZ) charged the New Zealand Defence Force (NZDF) under s 48 of the Health and Safety at Work Act 2015 (HSWA) with failing to ensure, so far as reasonably practicable, Lance Corporal Kahotea's health and safety.

[3] NZDF applied to the District Court for the charge to be dismissed. It argued that the HSWA does not apply to the activity in which Lance Corporal Kahotea was engaged at the time of his death. Judge J H Lovell-Smith did not accept the NZDF's argument. On 19 October 2021 she declined the application.[1]

[4] NZDF then brought the current proceeding. It is an application for judicial review of Judge Lovell-Smith's key conclusions on the ground they are founded on errors of law. NZDF seeks declarations overturning the District Court's decision and effectively ending WNZ's prosecution.[2]

The issue

[5] During the pre-trial case management process counsel, with very commendable professionalism, narrowed the dispute between the parties to one issue. It is necessary to give some context before I state it.

[6] The HSWA came into force on 4 April 2016. Its main purpose is to "provide for a balanced framework to secure the health and safety of workers and workplaces" by, among other things, "eliminating or minimising risks arising from work".[3]

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1 *WorkSafe New Zealand v New Zealand Defence Force* [2021] NZDC 17908.

2 On 27 April 2022, I ordered that the WNZ prosecution be transferred from the District Court to this Court. That does not affect the current proceeding.

3 Health and Safety at Work Act 2015, s 3(1)(a).

[7] As should be obvious, a safety-focused statute such as the HSWA cannot apply entirely to the Armed Forces. They exist to do dangerous things in dangerous environments, in New Zealand and overseas. They need to train to do those dangerous things. So, the HSWA has exemptions for the Armed Forces. One is s 7, reproduced below as it was in 2019:

> **7 Application of Act to Armed Forces**
>
> (1) Nothing in this Act requires or permits a person to take any action, or to refrain from taking any action, that would be, or could reasonably be expected to be, prejudicial to the defence of New Zealand.
>
> (2) Subject to this section, section 13, and any regulations made under section 213, this Act applies to the Armed Forces and any military aircraft or naval ship.
>
> (3) This Act does not apply to—
>
> (a) a worker who—
>
> (i) is a member of the Armed Forces while the worker is carrying out any operational activity; or
>
> (ii) is carrying out work for the Armed Forces at a place outside New Zealand at which the Armed Forces are carrying out any operational activity:
>
> (b) any military aircraft or naval ship operating in an area in which the deployment of the aircraft or ship is an operational activity.
>
> (4) In this section, operational activity—
>
> (a) means—
>
> (i) any service in time of war or other like emergency or in the event of any actual or imminent emergency involving the deployment of the Armed Forces overseas:
>
> (ii) any other service carried out by the Armed Forces overseas that is authorised by the Government of New Zealand and that involves peacekeeping, the maintenance or restoration of law and order or the functioning of government institutions, or any other activity in respect of which the Government of New Zealand wishes to provide assistance (whether or not in conjunction with personnel from 1 or more other countries):
>
> (iii) any service or activity or class of service or activity (whether carried out in New Zealand or overseas) that is declared under subsection (5) to be an operational activity for the purposes of this section; and

(b) includes any training carried out (whether in New Zealand or overseas) directly in preparation for any specific operational activity within the meaning of paragraph (a)(i) to (iii).

(5) The Chief of Defence Force may, by notice in writing, declare any service or activity or class of service or activity to be an operational activity for the purposes of this section.

(6) As soon as practicable after making a declaration under subsection (5), the Chief of Defence Force must—

(a) give written notice of the declaration to the Minister of Defence; and

(b) provide a copy of the notice to the regulator.

(7) A declaration made under subsection (5) must be published on an Internet site maintained by or on behalf of the New Zealand Defence Force.

(8) A declaration made under subsection (5) is neither a legislative instrument nor a disallowable instrument for the purposes of the Legislation Act 2012 and does not have to be presented to the House of Representatives under section 41 of that Act.

(9) In commanding the New Zealand Defence Force, the Chief of Defence Force must take into account the need to promote the purpose of this Act to the greatest extent consistent with maintaining the defence of New Zealand.

[8] The Chief of Defence Force made a declaration under s 7(5) which NZDF says applies to the activity Lance Corporal Kahotea was involved in at the time of his death. If that is so, then the HSWA does not apply and the prosecution must cease.

[9] The declaration is:[4]

> I, Timothy James Keating, Lieutenant General, Chief of Defence Force, declare the following to be operational activity under section 7(5) of the Health and Safety at Work Act, with the consequence that the Health and Safety at Work Act 2015 does not apply to the members of the Armed Forces carrying out the following activity in New Zealand:
>
> **Class of Service or Activity**: Counter Terrorism Response
>
> This declaration extends to any collective training to achieve operational level of capability for Counter Terrorism Response undertaken by members of the Armed Forces.

[4] The declaration was made on 14 June 2018.

[10] WNZ's case is that the wording of the declaration is "hopelessly vague and inappropriately broad, disconnected to legitimate purpose, and accordingly ultra vires".

[11] NZDF's case is that the wording of the declaration, when construed properly, is within the s 7(5) power granted to the Chief of Defence Force.

[12] The parties agree, therefore, that the issue for me to decide is whether the declaration is a valid exercise of the Chief of Defence Force's power to make a declaration under s 7(5) of the HSWA. If not, it is ultra vires and invalid.[5]

Discussion

[13] Deciding the issue is, in essence, an exercise in statutory interpretation. There is a three step test for assessing the lawfulness of a regulation (including secondary legislation such as the declaration).[6] I adopt Ms McKechnie's formulation:

> (a) Analyse the provision under which the regulation purports to be made, including the scope of the authority conferred by Parliament in light of the purposes for which those powers were conferred. Where Parliament has given a broad power, "it is a power to carry out the purposes of the empowering legislation and the … discretion is constrained by those purposes".[7]
>
> (b) Determine the meaning of the regulation.
>
> (c) Decide whether the regulation complies with the empowering provision.

[14] The meaning of the declaration is to be ascertained from its text and in the light of its purpose.[8]

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5 The parties pleaded their cases in the usual way, and there are more issues raised in the pleadings than this one. But, this is the vital issue and the parties agree that in the circumstances of this case no technical issue of pleadings will be taken and I do not have to engage with the pleadings. I agree entirely with this approach.

6 *Commercial Fishers Whanau Inc v Attorney-General* [2019] NZHC 1204 at [15]–[16].

7 At [15].

8 Legislation Act 2019, s 10(1).

Analysis of section 7

[15] The first part of the analysis is straightforward. Parliament intended the HSWA to apply to members of the Armed Forces so long as that does not prejudice the defence of New Zealand.[9]

[16] Section 7, in accordance with this parliamentary intent, exempts from HSWA coverage members of the Armed Forces who are carrying out an operational activity.[10]

[17] The definition of operational activity includes (as, of course, it must) any service in time of war or emergency involving deployment overseas and peacekeeping service (or its like) overseas.[11]

[18] The definition also extends to "any training carried out (whether in New Zealand or overseas) directly in preparation for any specific operational activity" as that term is defined.[12]

[19] Section 7 does not exempt all military training from HSWA oversight. If the training does not come within the other meanings in s 7(4) then to be exempt it must come within a declaration by the Chief of Defence Force made pursuant to s 7(5).

[20] Again, this is in accordance with Parliament's intention that the HSWA shall apply to the Armed Forces, but not to the prejudice of the defence of New Zealand. It accords with the intention because to train effectively to do dangerous (sometimes, very dangerous) things, or to operate in dangerous (sometimes, very dangerous) environments, the training itself will have inherent dangers.

[21] This does not mean that in training for an operational activity safety can be ignored. Putting aside the requirements of military law regarding training safety, Parliament requires:[13]

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9 Health and Safety at Work Act, s 7(1).
10 Section 7(3)(a)(i).
11 Section 7(4).
12 Section 7(4)(b).
13 Section 7(9).

> (9) In commanding the New Zealand Defence Force, the Chief of Defence Force must take into account the need to promote the purpose of this Act to the greatest extent consistent with maintaining the defence of New Zealand.

[22] The power given to the Chief of Defence Force by s 7(5) is nevertheless a broad one. The consent of the Minister of Defence is not a prerequisite. Oversight of this power to create secondary legislation is provided by the requirement to give written notice of a declaration to the Minister of Defence and to the regulator.[14]

The meaning of the declaration

[23] The declaration declares "Counter Terrorism Response" to be an operational activity.

[24] Mr Johnstone, for WNZ, submits:

> An exemption for all forms of Armed Forces service or activity simply in response to terrorism (rather than by way of actually taking part in counter terrorism operations, or training to do so) is unjustified. But "Counter Terrorism Response" is unacceptably imprecise language for legislation. It can only refer to conduct generically in response to terrorism. It cannot sensibly be read down to mean "Counter-terrorism operations" only.

[25] I accept that a s 7(5) declaration could be expressed so broadly as to be ultra vires the power. That is to say, if it covered such a wide range of service or activity as to offend against s 7(9). An example discussed by counsel was a hypothetical declaration that "anti-terrorism" is a class of service or activity exempt from the HSWA as an operational activity. The meaning of "anti-terrorism" is so broad that it covers matters such as public education and open source intelligence gathering which could not possibly be within the scope of the s 7(5) power.

[26] However, I do not agree that "Counter Terrorism Response" has a disqualifying broadness of meaning.[15]

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[14] The regulator is WorkSafe New Zealand. See Health and Safety at Work Act, s 189.

[15] Mr Johnstone supported his submission that "Counter Terrorism Response" is invalidly broad by referring to the expired 2016 declaration which exempted "Counter-terrorism operations". He submitted this was a more narrowly focused term. However, my focus is on the meaning of the term used in the 2018 declaration.

[27] The term has a well understood military meaning. Counter Terrorism means all offensive measures taken to neutralise terrorism before and after hostile acts are carried out.[16] The addition of the word "Response" simply means that the offensive measures to be taken are in response to the existence of terrorism. And, "offensive measures" refers to the deployment of military force.

[28] Exempting offensive measures in response to the existence of terrorism fits comfortably within the intention of Parliament that the HSWA not prejudice the defence of New Zealand.

[29] And, in my view, the extension of the declaration to the stated form of training is also expressed in a suitably constraining way. I repeat the wording:

> The declaration extends to any collective training to achieve operational level of capability for Counter Terrorism Response undertaken by members of the Armed Forces.

[30] "Collective training" essentially means team training as opposed to individual training. The aim is for the team to achieve a collective proficiency.

[31] "Operational level of capability" is another well understood military term. There are three levels of capability within the Armed Forces which are used for training purposes. They are the basic level of capability (BLOC), the directed level of capability (DLOC) and the operational level of capability (OLOC).

[32] As can readily be understood, not every member of the Armed Forces, and not every grouping within the Armed Forces, can be trained and held ready to deploy on combat operations at a moment's notice.

[33] So, the three levels of capability relate to how much further training an individual or a group of individuals (a force element) requires in order to deploy on operations. It can be considered within the concept of "response time"; the time within which the Government requires a force element to deploy in a particular capability.

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16 A NATO definition adopted by the New Zealand Defence Force.

[34] A force element is at OLOC when it is ready to deploy on operations.

[35] WNZ's criticism of this part of the declaration is that training to achieve OLOC for counter-terrorism response necessarily includes all forms of training designed to develop capability to respond to terrorism. Accordingly, it is unacceptably broad and outside the scope of the s 7(5) power.

[36] I do not accept this criticism. The evidence before me (and in particular from Colonel Roy) is to the effect that collective training to achieve operational level of capability is distinct from training to achieve BLOC or DLOC. I also accept Ms McKechnie's submission that there is no particular difference, in this context, between training to achieve OLOC and training to maintain OLOC.[17]

[37] In my view, the natural meaning of the declaration is that Counter Terrorism Response is excluded from the HSWA, and so is collective training (group training) to achieve the level of capability (OLOC) required for deployment on Counter Terrorism Response operations. That is the highest level of collective training for that purpose.

Is the declaration ultra vires?

[38] As I have said, the intention of Parliament is to exempt the Armed Forces from the HSWA where not to do so would be prejudicial to the defence of New Zealand. Section 7 sets out the exemptions by referring to, and defining, operational activity. Section 7(5) gives the Chief of Defence Force a broad power to declare service or activity to be an operational activity. That power is not unconstrained. If it were exercised without due regard to s 7(9) then it might well be outside the intention of Parliament and ultra vires the power conferred. It is clear, though, that in conferring the power Parliament expected the Chief of Defence Force to use professional military judgement in deciding what service or activity constitutes operational activity and when it should be the subject of a s 7(5) declaration. The purpose being to avoid prejudice to the defence of New Zealand.

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[17] OLOC is not a static state. Force elements required to be at OLOC constantly train to achieve it and maintain it.

[39] In making a declaration the Chief of Defence Force is permitted to use terms that have a particular meaning for members of the Armed Forces. After all, a declaration must be understood, and applied, by members of the Armed Forces.

[40] In this case, the terms used in the declaration are not obscure. To understand them fully, and in context, requires some background knowledge but that does not make the declaration unacceptably broad or vague.[18] I have set out at [37] my view of the natural meaning of the declaration.

[41] It follows that the natural meaning of the declaration is within the purpose of the delegated power. It is a readily understood meaning. It is not an over-broad meaning. It does not extend to, and could not reasonably be thought to include, training to achieve lower levels of capability such that due regard by the Chief of Defence Force to s 7(9) should have limited the declaration.

[42] In formal terms, and acknowledging that the case before me is very different to the case before Judge Lovell-Smith:

(a) I declare that the Judge's decision was unlawful.

(b) I quash the decision.

[43] The charge brought by WNZ against NZDF remains extant. I cannot discharge NZDF pursuant to s 147 of the Criminal Procedure Act 2011 because a decision to dismiss a charge must be given in open court. I direct the registry to arrange a telephone conference with counsel as soon as may be convenient in February 2023 to discuss the options for bringing the prosecution to an end.

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Brewer J

[18] Mr Johnstone submitted that the audience for the declaration goes beyond members of the Armed Forces. It includes the Minister of Defence, the regulator and any person who might consult the Internet site mentioned at s 7(7). That is, of course, correct. But the declaration conveys its broad meaning on its face.