IN THE HIGH COURT OF NEW ZEALAND
WHANGANUI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGANUI ROHE

CRI-2022-483-26
[2023] NZHC 1617

BETWEEN	TINA AROHA STEEDMAN Appellant
AND	THE NEW ZEALAND POLICE Respondent

Hearing: 9 March 2023

Appearances: S K Green for Appellant
J C H Liu and J J Harvey for Respondent

Judgment: 27 June 2023

JUDGMENT OF McQUEEN J

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[1] On 18 July 2022, Ms Tina Steedman (the appellant) was convicted by Judge Krebs in the Taihape District Court of an offence under s 26(1) of the COVID-19 Public Health Response Act 2020 (the Act).[1] On 21 October 2022, she was sentenced by Judge Krebs, who concluded that the matter could be dealt with by way of conviction and discharge.[2]

[2] Ms Steedman now appeals both her conviction and sentence. She says that the District Court made errors of law in determining whether her exercise of certain fundamental rights could be taken into account when considering the offending. She says that the rights to freedom of expression and peaceful assembly are capable of being read into orders made under the Act so as to excuse any criminal liability. She contends that the Judge should have discharged her without conviction pursuant to ss 106 and 107 of the Sentencing Act 2002.

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1 *Police v Ngarimu* [2022] NZDC 13518. [Results Judgment].
2 *Police v Steedman* [2022] NZDC 21075. [Sentencing Judgment].

[3] Ms Steedman's appeal is opposed. The Police (the respondent) submit that the text of the relevant order made under the Act cannot properly be interpreted to exempt criminal liability, and the limits imposed on Ms Steedman's rights were justified in a free and democratic society. The Police say that the general consequences of the conviction were not outweighed by the gravity of the offence.

[4] For the reasons set out below, I dismiss the appeal.

Background

The COVID-19 pandemic and related legislation

[5] The circumstances and effect of the COVID-19 pandemic are well known, and no purpose is served by repeating them here. I will confine the background relevant to this appeal to the relevant circumstances and legislation that led to the filing of charges against Ms Steedman and her co-defendants.

[6] The Act was passed on 13 May 2020. The purpose of the Act is to support a public health response to COVID-19 that:[3]

> (a) prevents, and limits the risk of, the outbreak or spread of COVID-19 (taking into account the infectious nature and potential for asymptomatic transmission of COVID-19); and
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> (b) avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and
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> (c) is co-ordinated, orderly, and proportionate; and
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> (d) allows social, economic, and other factors to be taken into account where it is relevant to do so; and
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> (e) is economically sustainable; and

[3] COVID-19 Public Health Response Act 2020, s 4.

(f) has enforceable measures, in addition to the relevant voluntary measures and public health and other guidance that also support that response.

[7] Part 2 of the Act concerns the making of COVID-19 orders by the Minister for COVID-19 Response (the Minister). Such orders made under s 11 are secondary legislation.[4]

[8] Section 8 provides that COVID-19 orders under the Act can only be made in certain circumstances. Section 9 addresses the requirements for making orders under s 11 of the Act. It states:

> (1) The Minister may make a COVID-19 order under section 11 in accordance with the following provisions:
>
> (a) the Minister must have had regard to advice from the Director-General about—
>
> (i) the risks of the outbreak or spread of COVID-19; and
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> (ii) the nature and extent of measures (whether voluntary or enforceable) that are appropriate to address those risks; and
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> (b) the Minister may have had regard to any decision by the Government on the level of public health measures appropriate to respond to those risks and avoid, mitigate, or remedy the effects of the outbreak or spread of COVID-19 (which decision may have taken into account any social, economic, or other factors); and
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> (ba) the Minister must be satisfied that the order does not limit or is a justified limit on the rights and freedoms in the New Zealand Bill of Rights Act 1990; and
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> (c) the Minister—
>
> (i) must have consulted the Prime Minister, the Minister of Justice, and the Minister of Health; and
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> (ii) may have consulted any other Minister that the Minister (as defined in this Act) thinks fit; and
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> (d) before making the order, the Minister must be satisfied that the order is appropriate to achieve the purpose of this Act.

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4 COVID-19 Public Health Response Act 2020, s 11(8).

(2) Nothing in this section requires the Minister to receive specific advice from the Director-General about the content of a proposed order or proposal to amend, extend, or revoke an order.

[9] Section 12 of the Act sets out generally what COVID-19 orders may provide for. It states:

(1) A COVID-19 order may—

(a) impose different measures, including requirements, restrictions, directions, and conditions, for different circumstances and different classes of persons, places, premises, craft, vehicles, or other things:

(aa) specify the evidence (including any particular form of evidence) that may be required to be produced to demonstrate compliance with a requirement, restriction, direction, or condition:

(b) apply,—

(i) in relation to persons, generally to all persons in New Zealand or to any person or specified class of persons in New Zealand:

(ii) in relation to places, premises, craft, vehicles, or other things, to any class or to all of them:

(iii) in relation to anything else,—

(A) generally throughout New Zealand:

(B) in any area, however described:

(c) provide that any provision of a COVID-19 order (even if the provision is beneficial) does not apply in any specified circumstances, in any specified way, or to any specified persons, places, premises, craft, vehicles, or other things, or to any specified class of persons, places, premises, craft, vehicles, or other things:

(d) authorise the Director-General, subject to any criteria or conditions specified in the order, to do any of the following things by written notice:

(i) specify, determine, designate, define, or approve any matters, impose conditions, or give directions, required for the operation of a provision of this Act or a COVID-19 order, including matters that affect or determine the application, operation, or scope of a provision:

(ii) determine that any provision of this Act or a COVID-19 order (even if the provision is beneficial) does not apply in any specified circumstances, in any specified

way, or to any specified persons, places, premises, craft, vehicles, or other things, or to any specified class of persons, places, premises, craft, vehicles, or other things:

(e) if any thing can be prohibited under section 11, permit that thing but only subject to specified conditions.

…

[10] Section 13 addresses the effect of COVID-19 orders. It states:

(1) A COVID-19 order may not be held invalid just because—

(a) it is, or authorises any act or omission that is, inconsistent with the Health Act 1956 or any other enactment relevant to the subject matter of the order; or

(b) it confers a discretion on any person, or allows any matter or thing to be granted, specified, determined, designated, defined, approved, or disapplied by any person, or allows a person to impose conditions or give directions, whether or not there are prescribed criteria.

(2) However, subsection (1)(a) does not limit or affect the application of the New Zealand Bill of Rights Act 1990.

(3) To avoid doubt, nothing in this Act prevents the filing, hearing, or determination of any legal proceedings in respect of the making or terms of any COVID-19 order.

[11] Section 26(1) provides that a person commits an offence if they intentionally fail to comply with a COVID-19 order. An individual who commits an offence against s 26(1) is liable on conviction to imprisonment for a term not exceeding six months, or a fine not exceeding $5,000.[5] Section 26(3) provides that a person commits an infringement offence if they do anything specified as an infringement offence in the Act or a COVID-19 order. Section 26(4) provides that a person who commits an infringement offence is liable to an infringement fee or a fine, as provided in the subsection.

[12] The relevant order in the present case is the COVID-19 Public Health Response (Alert Level Requirements) Order (No 12) 2021 (the Order), which came into force at 11:59 pm on 21 September 2021.[6] It has since been revoked, at 11.59 pm on

5 COVID-19 Public Health Response Act 2020, s 26(2).
6 COVID-19 Public Health Response (Alert Level Requirements) Order (No 12) 2021, cl 2(1).

2 December 2021, by cl 107 of the COVID-19 Public Health Response (Protection Framework) Order 2021.

[13] The purpose of the Order was to "prevent, and limit the risk of, the outbreak or spread of COVID-19 and to otherwise support the purposes of the Act".[7] It established areas to which specific 'Alert Levels' were to apply. Of note in the present case is that the wider Auckland Region, as specified in schs 3 and 4 of the Order, was designated as an 'Alert Level 3' area.[8] Part 3 of the Order addressed Alert Level 3 restrictions, including on essential personal movement, controlled gatherings and limited outdoor gatherings. Generally, persons residing within those areas were required to stay home and avoid all non-essential travel.

[14] Relevant to the present appeal, cl 17 of the Order stated:

> **17 Restrictions on travel into, out of, or through alert level areas**
>
> (1) A person in one alert level area may go into, out of, or through another alert level area only if—
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> (a) the travel is for 1 or more of the purposes permitted under clause 18; and
>
> (b) the person, so far as is reasonably practicable, travels directly without stopping while in the other alert level area (except for the permitted purpose of the travel under clause 18 or a permitted airport transfer).

[15] Clause 18 and sch 5 specified in detail the reasons for which persons were permitted to travel into, out of, or through alert level areas. Broadly, permitted purposes were: essential work, shared caregiving arrangements, care of children and others, students attending registered schools, accessing health services, leaving or relocating from hospitals, accessing judicial institutions, leaving or relocating home on court order, leaving New Zealand, emergencies, returning home after isolation or quarantine, caring for pets or animals, going home, or relocating home or places of residence. Travelling to attend a political protest was not a purpose that was permitted by cl 18 and sch 5.

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7 Clause 3.
8 Clause 6.

The offending

[16] On 16 October 2021, Ms Steedman and her two co-offenders travelled from Taihape to Auckland. At the time, Taihape (being in the Rangitikei District) was in Alert Level 2, and Auckland was in Alert Level 3. Ms Steedman and her co-offenders travelled to Auckland for the purpose of attending public protests against government imposed COVID-19 measures held in the Auckland Domain and organised by Brian Tamaki. They then returned to Taihape.

[17] The police became aware of the travel following Ms Steedman posting a photograph on social media of herself at the Auckland Doman, with the Auckland Museum clearly visible in the background. She was later charged for intentionally failing to comply with cl 17 of the Order, pursuant to s 26(1) of the Act.

[18] Ms Steedman gave a statement to the police in which she described:[9]

> … leaving Taihape about 6.30 am on 16 October, travelling through Taumarunui, and reaching the border with the Auckland area where they were stopped at checkpoints. Ms Steedman was not the driver. The woman who was driving spoke to the police officer. Despite being encouraged not to do so, the trio proceeded through the checkpoint and went to the Auckland Domain near the museum. Ms Steedman was at pains to stress that it was just the three of them in their "bubble".
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> They arrived late to the Domain and missed most of the rally. However, she said that they caught the last speaker, Brian Tamaki, who spoke for a [sic] about 15 minutes.
>
> Ms Steedman explained that the three had lunch together under the trees before locating a toilet at a service station at St Luke's. They stayed at the service station for about 10 to 15 minutes paying for fuel and something to drink before carrying on back to Taihape via Otorohanga.

[19] Ms Steedman showed regret and remorse for her actions when giving her statement to the police, and confirmed the accuracy of the statement she had given.[10]

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9 Results Judgment, above n 1, at [6]–[8].
10 At [10]–[11].

The Results Judgment

[20] Following a judge-alone trial on 14 June 2022, the Judge delivered his results judgment on 18 July 2022.[11] His Honour discussed the statement Ms Steedman gave to the police, and recorded:

> [35] Ms Steedman made full and frank admissions to Sergeant Demchy. I am in no doubt whatsoever that Ms Steedman travelled to Auckland in breach of the COVID-19 order.
>
> [36] The defence advanced on her behalf, however, is that she was entitled to do so because she was exercising her rights to freedom of association and freedom of speech guaranteed by the New Zealand Bill of Rights Act.

[21] The Judge concluded that the defence advanced on behalf of Ms Steedman was not available, stating:

> [41] Although ss 13(2) and (3) of the COVID Response Act state that COVID orders made under that Act do not limit or affect the application of the New Zealand Bill of Rights Act 1990 ("NZBORA"), and clarify that challenges may be made to such orders, those provisions do not change that fact that reading the No 12 Order in a way which would permit the charges to be defended on the basis that the defendants were exercising their NZBORA rights would require "considerable interpolation and judicial amendment" of the Order.[12] To allow such a defence would effectively require an additional paragraph in clause 18 specifying that the purposes for which New Zealanders were permitted to travel to an Alert Level 3 area included protesting.
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> [42] In reality, the New Zealand Government specifically chose not to provide that purpose as one for which New Zealanders were permitted to travel.
>
> [43] Even if that decision, and therefore the No 12 Order, is inconsistent with the NZBORA rights to freedom of movement and peaceful assembly, the courts are still required to apply the Order.[13] Section 4 of the NZBORA requires as much ….
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> [44] In other words, I must apply the law as it stands/stood, and cannot choose to decline to convict the defendants, should I find that the elements of the charge are proved beyond reasonable doubt, by reason only that the No 12 Order is *possibly* inconsistent with the NZBORA.

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11 Results Judgment, above n 1.

12 This footnote recorded: I use that quote as Ellis J used it in *Taylor v Attorney-General* [2014] NZHC 2225 in determining that the plain wording of s 80(1)(d) of the Electoral Act 1993 could not be read in a way that was consistent with the s 12 NZBORA right to vote, and that the provision was therefore inconsistent with that right.

13 This footnote recorded: I note here that a criminal prosecution is not the appropriate forum for determining whether the Order is inconsistent with the New Zealand Bill of Rights Act 1990.

[22] The Judge considered that s 4 of the NZBORA meant that he was bound to apply the Order and the Act notwithstanding that it may possibly be inconsistent with ss 14 and 16 of the NZBORA. He commented:[14]

> In any event, the High Court has already, in *Borrowdale v Director-General of Health*, commented to the effect that limits created by previous, much more restrictive and rights-infringing Government orders made in response to the COVID-19 pandemic were limits that were demonstrably justified in a free and democratic society in accordance with s 5 of the NZBORA.[15]

[23] His Honour concluded:

> [53] In summary, even if cls 17 and 18 of the No 12 Order are both inconsistent with the rights affirmed in ss 14 and 16 of the NZBORA and are not a justified limit on those rights – and I have my doubts given the senior court comments in *Borrowdale* about the earlier, more restrictive orders being justified limitations – I must still give the No 12 Order its natural meaning and, in accordance with s 4 of the NZBORA, cannot decline to apply it by reason only that it is possibly inconsistent with the NZBORA.
>
> [54] Undoubtedly the rights to freedom of expression and freedom of movement and peaceful assembly are important rights, but in the circumstances those rights were/are to be subordinated to the public policy indicated by the COVID Response Act 2020 and any orders lawfully made under it. By virtue of s 4 of the NZBORA, the legislation and orders must prevail over those rights unless and until Parliament overturns them as being unlawful.

The Sentencing Judgment

[24] The Judge issued his sentencing judgment on 21 October 2022. At the sentencing hearing, Ms Steedman sought a discharge without conviction, arguing that the offending was very minor offending and a low-level offence, that the purpose of the travel could be taken into account, that there had been no deception involved, that only a small time was spent in Auckland, that Ms Steedman had confessed, and that she had expressed remorse.

[25] The Judge considered that the offending did not involve a low level of culpability but was rather a premeditated and deliberate act undertaken in the face of significant publicity as a protest against the very rules that were being flouted, and

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14 Results Judgment, above n 1, at [48].

15 This footnote recorded: *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864; and *Borrowdale v Director-General of Health* [2021] NZCA 520, [2022] 2 NZLR 356.

therefore Ms Steedman's culpability was moderately serious.[16] His Honour noted that no evidence was filed as to the consequences of a conviction.

[26] The Judge concluded:

> [11] It is true that this is a relatively minor offence but I have indicated my view that it is a moderately serious example of it. In my view, the consequences are not out of all proportion to the gravity of the offending. I have said earlier that this was a deliberate and flagrant breach of the regulations for the purpose of protesting against their very existence but publicity was widely made that prosecutions would be commenced and pursued by police for such breaches and many were.
>
> [12] Any justifying reasons for this other than a desire to protest are absent. Similarly, there are no specific consequences of a conviction as acknowledged by Ms Green and it is only the general consequences arising from a conviction in any case which are present here.
>
> [13] In my view, Ms Steedman must have known the likely consequences should she breach the rules in the way that she did and might have expected at the time to have weighed that risk into the decision to go and protest.
>
> [14] In the circumstances, I decline the application to discharge without conviction.
>
> [15] Having made those general remarks about the seriousness of the offence and so forth and having regard to the factors relating to both defendants generally, it is my view that this matter can be dealt with by way of the entering of a conviction only and there will be no other penalty. That then is the end of the matter.

The grounds of appeal

[27] The grounds of appeal as recorded in Ms Green's written submissions on behalf of Ms Steedman are:

(a) the Judge erred in not considering whether Ms Steedman's rights under the New Zealand Bill of Rights Act 1990 (the NZBORA) could be reconciled with the Order;

(b) the Judge misconstrued Ms Steedman's case, which was that she had breached the Order, but that rights protected under the NZBORA were capable of being read into the Order;

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16 Sentencing Judgment at [6]–[7].

(c) the Judge incorrectly applied *Taylor v Attorney-General*, and therefore did not consider:[17]

(i) the rights in question;

(ii) the purposes of the relevant legislative instruments which were in conflict of the relevant protected rights;

(iii) the factual circumstances, which showed Ms Steedman exercising her rights, in breach of the Order, as against those who were permitted to pass through Alert Level borders under cls 17 and 18, and sch 5;

(iv) what consequences (in her words "legislative mischief") would be created by reading in rights protected by the NZBORA into the Order; and

(v) the scheme of the Act, particularly s 26 which provides two kinds of penalties for a breach of an Order;

(d) the Judge erred in determining that *Borrowdale* cases applied to Ms Steedman's case;[18]

(e) the Judge erred in appearing to be applying ss 3, 4, and 6 analyses under the NZBORA, where he referred to absolute rights, as Ms Steedman did not argue that the relevant rights were absolute or limitless.

[28] Ms Green seeks that Ms Steedman's conviction be quashed, set aside, or a conviction of the "lesser offence under s 26" be entered.

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17 See *Taylor v Attorney-General* [2014] NZHC 2225.
18 See above n 14.

Approach to appeal

[29] An appeal against a refusal to discharge without conviction is viewed as a composite appeal against conviction and sentence.[19] The appeal must be allowed only where a miscarriage of justice has occurred by virtue of a material error in entering the conviction or in applying s 107 of the Sentencing Act 2002.[20] A miscarriage of justice means any error, irregularity, or occurrence in or in relation to or affecting the trial that has created a real risk that the outcome of the trial was affected, or has resulted in an unfair trial or a trial that was a nullity. As noted recently by the Court of Appeal, the question is, in essence, simply whether the District Court's decision is wrong.[21]

[30] Section 107 of the Sentencing Act governs discharges without conviction generally and states:

> **107 Guidance for discharge without conviction**
>
> The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[31] This involves three elements:[22]

(a) the gravity of the offending;

(b) the consequences of the conviction; and

(c) whether the latter is out of all proportion to the former.

[32] If the threshold in s 107 is satisfied, then the Court has discretion under s 106 of the Sentencing Act as to whether to grant discharge without conviction.

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19 *Jackson v R* [2016] NZCA 627, (2016) 28 CRNZ 14 at [6]–[16].
20 Criminal Procedure Act 2011, s 232(2); *Jackson v R,* above n 25, at [12].
21 *Singh v R* [2022] NZCA 23 at [8].
22 *Singh v R,* above n 21, at [9], citing *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [16]–[17].

Analysis

Preliminary remarks

[33] The appeal was advanced solely on the basis that the Judge made errors of law. Ms Steedman's case does not challenge the lawfulness of the Order as such and Ms Green was explicit that no application for judicial review was made. Rather the argument is that, properly interpreted in light of the NZBORA ("read up", as Ms Green describes it), the Order should permit travel for the purpose of political protest. The parties did not deal with the case as a collateral challenge to the Order.[23]

[34] I accept that an error of law made by the Judge could potentially constitute a miscarriage of justice, where it creates a real risk that the outcome of the trial was affected. Accordingly, I address Ms Steedman's appeal by considering whether the Judge made any error of law. If I conclude that an error of law has occurred, it will then be necessary to consider what effect, if any, that has had on Ms Steedman's conviction.

Sections 14, 16, and 28 of the NZBORA

[35] The rights relied upon by Ms Steedman are:

(a) Section 14: 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.

(b) Section 16: Everyone has the right to freedom of peaceful assembly.

(c) Section 28: An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in the NZBORA or is included only in part.[24]

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23 Compare *Chapman v Police* [2023] NZHC 1435.

24 Ms Green, counsel for Ms Steedman, accepted in oral submissions that s 28 "was probably not needed" and did not identify any other right or freedom on which she relied. I therefore make no further comment on that section.

[36] Ms Green submits that those rights combine as a "political protest right" of a higher rank, as they are constitutional in nature. She says that the interpretation of the Order should affirm those rights where the terms of the Order conflict with them. She also refers to s 13 of the Act and relies on the reasoning and approach of the Supreme Court in *Fitzgerald v R*.[25] She presumes that the rights relied upon are in fact engaged in the present case.

[37] Mr Liu, on behalf of the Police in response, submits that:

(a) The right to freedom of thought is not engaged, citing the Court of Appeal in *Moncrief-Spittle v Regional Facilities Auckland Ltd*.[26]

(b) The right to freedom of expression is not engaged as Ms Steedman was not prohibited from criticising the government or prevented from expressing her opinions as to how the government managed the COVID-19 pandemic. Ms Steedman was free to express her views online and have them imparted and received. Mr Liu relies on the view of this Court in *Borrowdale* that the right to freedom of expression was not engaged by the original lockdown orders under the Health Act 1956.[27]

(c) The Court of Appeal in *Borrowdale* held that the International Covenant on Civil and Political Rights (ICCPR) contained provisions that said the rights contained in ss 16, 17 and 18 could be restricted by law in circumstances where it was necessary to do so in the interests of protecting public health or the rights or freedoms of others. The Court of Appeal also considered that the ICCPR recognised that the right to movement, assembly, and association could be derogated, in that those rights were not sacrosanct.[28]

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25 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.

26 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142 at [112]; affirmed in *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138 [2022] 1 NZLR 459 at [65].

27 See *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864 at [88].

28 See *Borrowdale v Director-General of Health* [2021] NZCA 520, [2022] 2 NZLR 356 at [109].

(d) Therefore, neither freedom of thought or expression are engaged, and the right to freedom of movement and assembly can be limited if it is reasonable and demonstrably justified in a free and democratic society. There is no higher 'political protest right'.

[38] The High Court in *Borrowdale* (comprising Thomas, Venning and Ellis JJ) did conclude that freedom of expression was not engaged by orders made by the Director-General of Health under s 70 of the Health Act 1956.[29] The Court, however, concluded that freedom of association was engaged, stating:[30]

> ….Rather, we favour the assessment of the learned authors Butler and Butler that s 17 encompasses an individual's right to associate with any other individual:[31]
>
> > … it is consistent with the broad ambit of the closely related rights of free expression (s 14 of BORA) and free assembly (s 16 of BORA). Secondly, in other human rights systems a narrow view of the ambit of free association is acceptable since the right to associate with other individuals in an informal, disorganised way would likely be protected by a right to privacy or autonomy. The absence of such rights from BORA means it is legitimate for the right of free association to occupy the field that its ordinary meaning suggests.

[39] The Court of Appeal in *Borrowdale* agreed with the High Court that freedom of expression was not a right engaged by the three orders, stating:[32]

> The High Court held that the rights affirmed by ss 14 and 22 of the NZBORA were not engaged in this case and preferred to focus on ss 16, 17 and 18. We do not understand Dr Borrowdale to be challenging that aspect of the High Court's judgment. In any event, we agree with the approach taken by the High Court and will proceed on the basis that it is the rights affirmed by ss 16, 17 and 18 of the NZBORA that are engaged in this case.
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> (footnotes omitted).

[40] I accept that view, and the submissions made by Mr Liu in reliance upon it. I consider that s 14 of the NZBORA was not engaged by the Order and nor was Ms Steedman prevented by the Order from exercising her right under s 14. Ms Steedman was not prevented from protesting or expressing her views, only from

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29 *Borrowdale v Attorney-General* [2020] NZHC 2090, [2020] 2 NZLR 864 at [88].
30 At [88].
31 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd edition, LexisNexis, Wellington, 2015) at 778.
32 *Borrowdale v Director-General of Health* [2021] NZCA 520, [2022] 2 NZLR 356 at [105].

travelling across Alert Level borders for the purpose of doing so. Ms Green ultimately accepted that this was the position.

[41] Accordingly, from this point onwards, I consider Ms Steedman's appeal on the basis of s 16 only, which I accept is engaged by the Order, being that it was directed to reducing the movement of persons throughout Aotearoa New Zealand for the purpose of stopping the spread of COVID-19.

The effect of Borrowdale

[42] The three orders in issue in *Borrowdale* related to the initial Alert Level 4 and Alert Level 3 periods that were applied in March 2020, at the beginning of the COVID-19 pandemic and its entry into Aotearoa New Zealand. They set out:

(a) Order 1: the requirement that all premises to be closed, except (among other things) private dwelling houses, and forbade people from congregating in outdoor places of amusement or recreation.[33]

(b) Order 2: the requirement that all persons to be isolated or quarantined by remaining at their current place of residence, except as permitted for essential personal movement, and to maintain physical distancing.[34]

(c) Order 3: the requirements of Alert Level 3.[35]

[43] Both the High Court and Court of Appeal in *Borrowdale* concluded that the three orders, while engaging and limiting rights protected by the NZBORA, were justified in a free and democratic society.[36] The illegality that arose was because certain limitations imposed early in the COVID-19 response were not prescribed by law.

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33 *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864 at [26]. This order was issued on 25 March 2020, under s 70(1)(m) of the Health Act 1956, and was effective from 11:59 pm on that day until further notice.

34 At [29]. This order was issued on 3 April 2020, under s 70(1)(f) of the Health Act 1965, and was effective from 6:00 pm that day until 22 April 2020, unless otherwise revoked or extended.

35 At [32]. This order was issued on 24 April 2020, again under the Health Act 1956, and was effective from 11:59 pm the same day, until 13 May 2020.

36 *Borrowdale*, above n 31, at [292]; and *Borrowdale v Director-General of Health* [2021] NZCA 520, [2022] 2 NZLR 356 at [162].

[44] The District Court Judge in the present case described the three orders as "much more restrictive and rights-infringing Government orders" than the Order concerned in the present case. I agree that is an apt description. The orders with which the courts in *Borrowdale* were concerned were the part of the government's very initial response to the pandemic, and represented the imposition of the "Go hard, go early" suppression policy agreed by Cabinet.

[45] By the time 21 September 2021 arrived, and the Order in this case came into effect, the position, while still fraught with risk, was undoubtedly different. The passage of the Act created a reasoned and bespoke framework for the government to implement a response to the variable levels of risk posed by COVID-19 and its notable variants. The Order allowed permissible travel for a large number of defined purposes, between and within areas subject to particular Alert Levels—providing the basis for a conclusion that it is much less restrictive than the orders in *Borrowdale*.

[46] The District Court Judge's conclusion was essentially that, as both the High Court and Court of Appeal considered that the more restrictive three orders in *Borrowdale* did not unjustifiably limit the right contained in s 16 of the NZBORA, it was very unlikely that a less restrictive order did unjustifiably limit that right. Further, he considered that even if there was an unjustified limitation on the s 16 right, he was required to apply the Act and the Order on their terms, in accordance with s 4 of the NZBORA.

[47] Ms Green says:

> It is submitted the conflict between the 2 instruments (the No 12 Order and the rights) can be resolved in favour of the Appellant by engaging in the interpretative function as prescribed by Part I (ss 2,3,4, and 6 of BORA). Utilising s 13 of the parent Act to aid in this interpretation also assists and that [which] was not undertaken at all by the Court below. This is said to be an error of law. Finally, common law assists, particularly the case of *Fitzgerald v R* [2021] NZSC 131 in the interpretative function.

[48] Ms Green submits that the analysis proposed by the NZBORA where a legislative instrument conflicts with protected rights was not undertaken by the District Court Judge, and that this was an error of law. She says that a rights-infringing interpretation should be avoided, and that therefore the three rights relied on by

Ms Steedman should be read into the Order, so as to provide a defence to the conviction.

[49] Ms Green is correct that the Judge did not engage in a kind of analysis as envisaged by *Hansen v R*.[37] Instead, his analysis hinged upon the view that it was unlikely that the Order could be considered an unjustifiable limitation on rights affirmed by the NZBORA. I consider that was a logical conclusion, and not in error of law. It follows that I do not accept that the Judge erred in referring to and/or applying the conclusions of the High Court and Court of Appeal in *Borrowdale*, and thereby technically refusing to engage in a full rights-analysis as sought by Ms Green.

[50] The judgments in *Borrowdale* were clearly relevant, being as they were, an assessment of the rights implications of rights-limiting orders made in the context of the COVID-19 pandemic. I accept that they were made under different legislation and in the context of judicial review, but I do not think this makes the judgments inapplicable as contended by Ms Green. The issue remains the same—whether the relevant order unduly limited rights protected by the NZBORA.

[51] It is also clear to me that in coming to that conclusion the District Court Judge did not 'misconstrue' Ms Steedman's case. His Honour clearly understood that Ms Steedman contended that the proposed inconsistency of the Order with the NZBORA, and the principle that a rights-consistent interpretation is to be preferred, means that the Order should be read or interpreted in a manner consistent with NZBORA rights, and thereby provide a complete defence to Ms Steedman's conviction.

[52] However, for completeness, I will go on to consider the other matters raised by Ms Green in argument.

Can s 16 of the NZBORA be "read up" into the Order?

[53] Ms Green submits that the Order and the rights relied upon by Ms Steedman could be reconciled by:

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[37] *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

i. Acknowledging the political rights, exercised by the Appellant, were "higher" rights; not akin to the absolute right in s9 nor the fair trial right (again, limitless). The basis for these rights, as higher rights, is that it strikes at the heart of any democracy that it must be an "open society" – open to critique, to protest and to examination by its citizens.

ii. Next, there is no right to work nor to a certain standard of living in New Zealand. The permissive nature of cl 17 and cl 18 as a reason, only, for travel needs consideration, it is submitted,

iii. The purposes of the Order and indeed the Act, were arguably not being upheld by permitting the wide range of movement by workers and school students and those relocating back to or to new homes. These permitted exceptions meeting the purposes of the Order and the Act means it can not do violence to the scheme of the Act, by reading up the rights, rather than reading them down.

iv. The provision of other measures, in place at this time, along with the prohibition of movement into Auckland, means that the purposes of the Order and the Act could be met should the Appellant have exercised her political rights in a certain factual way (distancing, not lingering, no contact with multiple places etc). That she did do so must count in balancing equation. The consideration of the rights, and the contest as against the legislative instruments must not be considered in a vacuum. They ought to be considered in a factual context. This is basic statutory interpretation.

(footnotes omitted)

[54] Ms Green submits that s 13 of the Act and the principle of legality generally strengthens the principle that clear wording is required for legislation to be construed as overriding fundamental freedoms. As noted, s 13 of the Act provides that COVID-19 orders do not limit or affect the application of the NZBORA. Ms Green says the rights-consistent interpretation need only be possible.

[55] I also understood Ms Green to submit that to require Ms Steedman to exercise those rights from her home in Taihape, without having crossed Alert Level borders, would also have unfairly limited her rights, as political protest "shall by its nature be destructive". She says: "The rights (to gather, to speech, political thought as a freedom of expression) would have no meaning, where it was exercised from a person's home, or to no audience, for instance", and refers to the work of Albert Camus.[38] The

[38] Albert Camus was a French philosopher and author who lived between 1913–1960.

submission appeared to be that in order for Ms Steedman to have the full and effective exercise of her rights, she would have had to have been allowed to breach the Order for the purpose of political protest.

[56] Ms Green submits that the purposes of the Act and the Order were not frustrated by Ms Steedman exercising her rights to travel to Auckland for the purpose of political protest, and that they would not be frustrated by reading those rights into the Order. Ms Green points to the spread of COVID-19 and says that the lockdowns were ineffective in stopping that spread, submitting that rights limitations were therefore unjustified. She says also that given the wide range of permitted purposes for which to travel across Alert Level borders, the lockdown was not "entirely a blanket ban or lockdown of Auckland", meaning "that the purpose of the No 12 Order being upheld (to prevent the spread) was quite possibly not being achieved". Ms Green submitted that the risk of spread through breach of the Order would have been low, but she also accepted she had no evidence of this.

[57] It is helpful to set out the terms of ss 4, 5 and 6 of the NZBORA at this point.

[58] Section 4 of the NZBORA provides that no court shall hold any provisions of any enactments implied repealed or revoked; or decline to apply any provisions of an enactment, by reason only that the provision is inconsistent with the NZBORA.

[59] Section 5 provides that, subject to s 4, the rights and freedom contained in the NZBORA may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[60] Section 6 states that where an enactment can be given a meaning that is consistent with the NZBORA, that meaning shall be preferred to any other meaning.

[61] The interrelation between ss 4, 5, and 6 is typically addressed by reference to *Hansen v R.* However, Ms Green doubts the utility of the *Hansen* analysis in the present case. Rather, she submits the approach taken in *Fitzgerald* is more appropriate.[39] She submits that the importance of the rights in question (combined as

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[39] *Fitzgerald*, above n 25.

a right to political protest) require the application of s 6 by the Court with the effect of what she describes as "a generous reading up of rights".[40] Ms Green says that the District Court Judge failed to fulfil the judicial function required by s 6.

[62] I do not accept that this is the position. The *Fitzgerald* approach arises in respect of an absolute right – one that is unable to be justifiably limited, and in respect of which, s 5 of the NZBORA is not relevant. The approach in *Hansen* remains appropriate in circumstances where non-absolute rights are in issue, such as the present case, in respect of s 16 of the NZBORA—where s 5 of the NZBORA remains relevant. That was the Court of Appeal's conclusion in *Borrowdale*.[41] This is also consistent with the view of the Tipping J in *Hansen* that his approach would not always be appropriate in the circumstances.[42]

[63] The point is that because *Fitzgerald* concerned an absolute right, which cannot be justifiably limited, an interpretation of that right giving the right-holder the full and effective exercise of their right was required to be one that was largely inconsistent with the statutory wording. Any other interpretation would have prolonged and deepened the limitation on Mr Fitzgerald's absolute right. In the present case, the full and effective exercise of a right means something different, because it is accepted that s 16 is a right that can be justifiably limited. It is not a matter of saying that because the Order is possibly inconsistent with s 16, that it is an unjustified limit and therefore s 16 provides an absolute defence to the offending.

[64] I accept the arguments made by Mr Liu for the Police that there is no 'higher political protest right' as advocated by Ms Green—rather the position is that in respect of the Order, s 16 is the engaged right, and that to ascertain whether there is an unjustified limitation on that right, the approach in *Hansen* is the correct methodology. The primary issue is therefore not whether s 16 can be read into the Order, but rather whether the Order represents a justified limitation on s 16.

[65] The test set out by Tipping J in *Hansen* is as follows:[43]

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40 *Fitzgerald*, above n 25, at [38]–[40] and [48] per Winkelmann CJ.
41 *Borrowdale v Director-General of Health* [2021] NZCA 520, [2022] 2 NZLR 356 at [139]–[141].
42 *Hansen*, above n 37, at [93]–[94].
43 At [92].

Step 1. Ascertain Parliament's intended meaning.

Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.

Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.

Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.

Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.

Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

[66] The parties were agreed that Parliament's intended meaning was to prevent travel between Alert Level areas except for specific purposes, for the purpose of limiting the spread of COVID-19. It is also apparent that this meaning is somewhat inconsistent with s 16, which is the right to freedom of peaceful assembly. An order that cuts across a person's right to travel to a public location and gather with other persons for any purpose is an order that is inconsistent with that right.

[67] Section 5, as noted, requires that rights and freedoms contained in the NZBORA may only be subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The Order itself is secondary legislation, and therefore the apparent inconsistency was prescribed by law. The question is then whether the apparent limitation or inconsistency was demonstrably justified in a free and democratic society. For the following reasons, I consider that it was.

[68] First, the purpose of the Order was for the protection of public health. The object was to prevent, and limit the risk of, the outbreak or spread of COVID-19, thereby protecting the health and wellbeing of all people in New Zealand and preserving the capacity of the public health system. Secondly, Ms Steedman's ability to gather with persons was not entirely limited—in her home area, which was at Alert Level 2, she was permitted to gather and interact with a range of people. It was only

crossing over into other areas that was prohibited, and only prohibited for purposes not allowed in the Order. That appears to me to have been a proportionate response. The restrictions applied were for the purpose of ensuring that areas with higher risks of community transmission like Auckland, due to its population density, did not unduly contaminate other regions, thereby necessitating intensified restrictions in those regions.

[69] Thirdly, whether the Order was achieving its purposes in this instance is irrelevant. It is not for the courts to effectively invalidate secondary legislation purely on the basis of Ms Steedman's view that it was not effective. On the contrary, the question remains whether the limitations placed on Ms Steedman's right under s 16 are justified.

[70] Finally, I observe that the courts have been largely consistent in their findings (with the exception of vaccination mandates) that the limitations placed on rights of persons in New Zealand as a result of lockdown or other COVID-19 requirements have been justified.[44] The parties did not draw to my attention any judgments in the criminal context in which arguments like those advanced by Ms Steedman have been successful.

[71] On the basis that the Order was a proportionate and balanced response to the nature of the pandemic at the time of Ms Steedman's offending, I consider that the limitations on her s 16 right were justified, and that therefore, it is not possible or necessary to read into the Order a proviso that criminal liability under s 26(1) of the Act is excluded if a person who has breached an order does so for the purpose of political protest.

Taylor v Attorney-General

[72] I do not consider the Judge erred in his reference to *Taylor v Attorney-General*.[45] His Honour cited that case only in passing reference for the purpose of establishing that he did not consider that the rights that Ms Green said could be read

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44 See *Borrowdale v Director-General of Health* [2021] NZCA 520; and *Orewa Community Church v Minister for COVID-19 Response* [2022] NZHC 2026.

45 Above n 17.

into the Order, could in fact be read into the Order. That was not an abdication of the District Court's 'executive function' as contended by Ms Green, but rather, part of his Honour's reasoning for the conclusion that it was unlikely that the Order would be considered an unjustified limitation of Ms Steedman's rights.

[73] The Judge was of the view that the interpretation promoted by Ms Green was not available on the bare terms of the Order, and that therefore s 4 of the NZBORA required him to apply the Order as written, in line with Parliament's intended meaning. This analysis reflects Steps 5 and 6 of the *Hansen* approach. Again, this was not the Judge refusing to enter a rights-analysis, but rather, taking the analysis to what he considered was its logical conclusion. That was not an error of law.

[74] In any case, because I consider the limitation in this case is justified, it is not necessary to go on to the latter steps in the *Hansen* approach.

Conclusion –no error of law

[75] In sum, I do not consider that the Judge made any error of law.

[76] I conclude that:

(a) section 16 is the relevant NZBORA right engaged in this case;

(b) to the extent that there is an inconsistency, I am satisfied that the Order represented a justified limitation on Ms Steedman's s 16 right; and

(c) therefore, it is not possible or necessary to read into the Order a proviso that criminal liability under s 26(1) of the Act is excluded if a person who has breached an order does so for the purpose of political protest.

[77] Accordingly, I do not need to go on to consider whether there was a real risk that the outcome of the trial was affected, or the trial was otherwise unfair.

Refusal of discharge without conviction

[78] As in the District Court, Ms Steedman provided no evidence upon which this Court could conclude that the consequences of a conviction are out of proportion with the gravity of the offending. No application was made to adduce further evidence on appeal. This was noted by the Police.

[79] Ms Green submitted that the Judge should have discharged Ms Steedman without conviction as:

(a) the purpose for which the travel to Auckland occurred was only political protest conducted in an "exemplary" fashion, involving no violence, and she was open as to the purposes for the travel;

(b) other persons who have breached COVID-19 orders have been discharged without conviction where their breaches involved no exercise of protected rights;

(c) the travel to Auckland was brief, and did not involve Ms Steedman and her co-offenders mingling with other persons;

(d) the Judge did not take into account the impact of a conviction on Ms Steedman;

(e) the Judge did not consider that Ms Steedman was charged with a criminal offence "as opposed to the fine only offence"; and

(f) a conviction and discharge was not the least restrictive outcome appropriate in the circumstances.

[80] As submitted by the Police, Ms Green's submission regarding the way in which Ms Steedman was charged misunderstands the statutory regime. Section 26(3) of the Act states that "a person commits an infringement offence if the person does anything specified as an infringement offence in this Act or a COVID-19 order". Where a breach is an infringement offence, it is expressly specified in the Act or Order. The Order does

not specify that a breach of cl 17 is an infringement offence. It is therefore an offence under s 26(1).

[81] In such circumstances, I am unable to conclude that the consequences of conviction are out of all proportion to the gravity of offending, and that Ms Steedman should have been discharged without conviction. While I do consider the offending to be of a more minor nature than was described by the Judge, on the information before this Court, I cannot see a basis for considering that his Honour erred.

[82] No evidence was provided as to the effect of the conviction upon Ms Steedman. Ms Green submitted that Ms Steedman lives in a small community and may travel for representative sport. When questioned further about the effects of a conviction, Ms Green submitted that Ms Steedman's employment was not presently affected but could be affected if she wanted to change jobs, and that at as an older person, "there is nothing to point to like a younger person", rather, Ms Steedman just wants to be able to rely on her good character.

[83] Ms Green referred to this Court's decision in *Nash* as well as the District Court decision in *Police v Rawnsley & Willis*.[46] Both those cases involved very different circumstances from those presented by Ms Steedman and I do not consider they assist her. Without more, I consider that the effect of conviction has been negligible. Accordingly, I conclude that the conviction was appropriately entered.

Result

[84] The appeal is dismissed.

McQueen J

Solicitors:
McKenna & King Solicitors, Hamilton for Appellant
Crown Solicitor, Whanganui for Respondent

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[46] *Nash v Police* HC Wellington CRI-2009-485-007, 22 May 2009; *Police v Rawnsley* [2021] NZDC 25342.