IN THE SUPREME COURT OF NEW ZEALAND SC CIV 13/2004

BETWEEN **AHMED ZAOUI**

Appellant

AND **THE ATTORNEY-GENERAL**

First Respondent

AND **THE SUPERINTENDENT, AUCKLAND CENTRAL REMAND PRISON**

Second Respondent

AND **THE HUMAN RIGHTS COMMISSION**

Intervener

Hearing 10 and11 November 2004

Coram Elias CJ
Gault J
Keith J
Blanchard J
Sir Thomas Eichelbaum

Counsel R E Harrison QC, D Manning for Appellant
T Arnold QC, C R Gwyn, T M A Luey for Respondent
R M Hesketh, S A Bell for Intervener

CIVIL APPEAL

Recording from 10.06 am

Harrison … including the substantive tests for conducting and determining the security risk certificate review by the Inspector General of Intelligence and Security. The second of these with which we are directly concerned today is the ability of the Courts of law to intervene in relation to Mr Zaoui's open ended ongoing detention in prison potentially for up to three years pending completion of his protracted security risk review certificate, review process. Now Your Honours the Crown would have the Court accept there is only one set of issues here, not two. It says that there is no separate issue as to Court intervention in Mr Zaoui's detention. There is only the security risk certificate review process the Crown says. This, the Crown says, is the only legal means through which Mr Zaoui may ultimately on completion of the review be entitled to a release from prison. But I submit that is a most curious proposition at the outset given that no power is conferred on the Inspector General who conducts the review to address the matter of Mr Zaoui's ongoing detention in any way whatsoever. He is simply not concerned with it. But by taking the position that there is only one set of legal issues and not two, the Crown can then contend that Mr Zaoui's assertion that his ongoing detention is not warranted in the circumstances of this particular case amounts to a collateral attack on the Inspector General's review process and indeed they say an attempt to go behind the security risk certificate itself. And of course if you view it as one set of issues and only the one for which the Crown contends, then you can push that argument. But I submit to treat the security risk certificate review process as the only avenue through which Mr Zaoui's ongoing detention can be addressed, and most tangentially addressed, is to beg the very question at issue in these proceedings as to the extent and existence of the Court's power to intervene in the detention.

Now I submit that when it is all boiled down, what the Crown is saying in its submissions is this. No matter how undeserved, how unnecessary, how unfair, how unreasonable, how damaging and how prolonged Mr Zaoui's detention has been and will continue to be, for as long as he continues to be held for the purposes of Part IVA of the Act, the Courts, the Crown says, are powerless to intervene. And furthermore don't expect the executive to do so. Now to reach that outcome, the appellant says, there needs first to be trampled under foot a great deal of our constitutional history, fundamental legal principle and human rights law both domestic and international. And this, the burden of my submissions is, is something that the Court is respectfully invited not to do.

Now turning to my written synopsis of argument, I will take that as read of course. I would like to if I may, if it would assist, to walk the Court through Part IVA of the Immigration Act and set it in the broader context of the Act as a whole. That is not something that space has allowed me to do in the written Submissions but if it is of assistance I will do that now.

Now the Crown in its bundle of authorities has I think the provisions of Part IVA in its entirety but assuming that Your Honours have access to the entire statute in electronic form or otherwise, that might also assist. But starting first with Part IVA. Part IVA was introduced into the Act by amendment in 1999 and it was part of a package of amendments which included the changes introducing the refugee status determination procedures. Section 114A is of some importance. It sets out the object of the Act and particularly, as regards the subject of a certificate, I would lay stress on 114A(c), "recognise that the public interest requires nevertheless that such information, classified security information, be used for the purposes of this Act" but equally that fairness requires some protection for the rights of any individual affected by it. And (f) ensure that persons covered by this Act who pose a security risk can, where necessary, be effectively and quickly detained and removed or deported from New Zealand. And I would stress the words "where necessary" in that provision as relevant to the interpretation task the Court has. And of course (f) also shows that the underlying assumption of all these procedures was that it would be a speedy process which it has not been.

I'll touch upon the definition of classified security information in 114D. One notes that that is a category of information which in the opinion of the Director cannot be divulged to the individual in question or to other persons and it goes on to say, and this is important, because both (a) and (b) – the (a) relates to identification of the source or the conditions on which the information was received from another agency and then (b) is the added dimension disclosure of the information would be likely to prejudice (1) to (4). So that you not only need information from a particular kind of source that may be inappropriate to disclose, but you also need to qualify with the further conditions of (b).

Now s.114C deals with relevant security criteria and subs (1) briefly lists the different categories of criteria and states the context in which they operate. We are dealing here with what is known as a relevant refugee deportation security criterion or criteria and that is in 1(e) and that is a criterion which operates, and I quote, "where a decision is to be taken as to whether a person in New Zealand who is a refugee status claimant or refugee" and then there's two alternatives which don't apply to Mr Zaoui, (3) who is in New Zealand unlawfully should be deported. So that's the context in which these criteria are to operate. And then as a gradation, the different types of criteria are set out. And I argue that these are carefully progressive if you like, starting with in subs (2) of 114C relevant entry security criteria and those are set out, and going right to the end at subs (6), the relevant refugee deportation security criteria which we are concerned with here. And that makes perfect good sense because if you are looking at relevant entry security criteria you're talking about someone who's overseas who has applied to come here and he's on the suspected

terrorist list, the answer is the criteria are much less serious and intense than at the other end of the scale subs (6), the relevant refugee deportation security criteria. Under subs (6) you've got a combination of any one or more of the criteria listed in subs (4) plus (a) and (b) of subs (6). The subs (4) criteria are the deportation security criteria which apply to non-refugee, non-refugee claimants and they're set out there and we're either under s.72 or s.73 of Part II of the Act which is the, shall we say, the ordinary non-criminal deportation part of the Act which I'll mention later.

So that you then have, what the scheme of this is that you've got to not only qualify as an ordinary deportee, if you like, under Part II but because you're a refugee you also must satisfy (6)(a) or (b) and it's (6)(a) which is the subject of the certificate issued in respect of Mr Zaoui that there are reasonable grounds for regarding a person as a danger to the security of New Zealand in terms of Article 33.2 of the Refugee Convention.

Now I'll come back to that criterion because it is really at the heart of, it's central to all of the issues surrounding Mr Zaoui and the review process even though that is not a matter directly before Your Honours.

So then 114D empowers the Director of Security if he holds classified security information which satisfies (1)(a)(b). And (c) in his discretion he may provide a security risk certificate to the Minister. Under 114F the effect of the certificate subs (1), the existence of the certificate is evidence of sufficient grounds for the conclusion or matter certified subject only to the Inspector General's review, the Minister may rely on it. And 114G sets out the effect. There's a two-stage ministerial process, or may be. First the Minister makes a preliminary decision to rely or not. And if under 114G(1) the Minister does so, then there's a notice goes to the Chief Executive and the effect of giving the notice under subs (3) is to have the processing of matters other than refugee status claims effectively suspended and (c) to require the detention of the named individual by a member of the Police under subs (5). Subsection (5) when the notice is served under subs (4), that is a notice on the subject of the notice to the subject of the certificate, the member of the Police must arrest the person without warrant, place the person in custody then subs (6) in effect must be brought before a District Court Judge and released unless the Judge issues a warrant of commitment under s.114O for the continued detention of the person in custody. Continue past the point of detention by the Police officer I would submit.

Then s.114H and s.114I set out rights. The right to seek a review. There are procedural rights conferred by s.114H subs (2) and these under that provision include rights under s.19 of the Inspector General

and Intelligence and Security Act. That provision is among the Crown materials.

And subs (4) of 114H says, no review proceedings may be brought in any Court in respect of the certificate or the Director's decision to make the certificate. There will be argument about the scope of that.

So the review of the certificate and the standard of the review is further set out in 114I subs (3). The review to be conducted with all reasonable speed and diligence. Subs (4), the function which I needn't read in full. And further powers from the Inspector General's Act are conferred by subs (6).

Under 114J subs (1) if the certificate is properly made, according to the Inspector General, was properly made, then the consequences under 114K follow. Subsection (2), if the Inspector General decides the certificate was not properly made, the person who sought the review must be released from custody immediately. Normal immigration processes must resume. Subs (4), reasons for the decision must be given.

114K where you have a confirmed certificate or no review has been applied for, the Minister has three working days to make a final decision whether to rely on the confirmed certificate and to direct the Chief Executive to act under subs (3). Under subs (3) on receipt of the direction certain things happen including (3)(b). An appropriate decision is to be made in reliance on the relevant security criterion as soon as practicable. And under subs (4) the Chief Executive must ensure inter alia (b) if a removal order or deportation order is not already in existence an appropriate person who may make such an order makes the relevant order immediately without further authority in this section and the person is removed or deported unless protected from removal or deportation under 114Q or 129(x) which I will come to. And then subs (c) I will not read out.

Now 114L deals with the alternative of a certificate not confirmed on review or withdrawn.

Section 114M allows the Director to withdraw the certificate at any time.

Section 114O is analysed in great detail in the submissions and I think I can postpone further dealing with that.

Section 114P allows an appeal on point of law with the leave of the Court of Appeal to the Court of Appeal. A three working day time limit for bringing the appeal against an adverse decision of the Inspector General.

Section 114Q speaks for itself.

Now one point I submit that needs to be noted arising out of this is that Part IVA contains no power to deport within itself. The process if the certificate is confirmed takes us back to other deportation powers in the Act. That is clear from s.114K subs (4)(b) to which I referred Your Honours. And so within the scenario of a confirmed certificate, the deportation would take place under either s.72 or s.73 of the Act but because of the criteria relied on, on a worst case this case would be heading for a possible s.72 deportation and that requires, I'm quoting from s.72, "the Minister to certify that the continued presence in New Zealand of any person named in the certificate constitutes a threat to national security." Section 73, which could not, as I apprehend it, be an issue, is a separate section dealing with suspected terrorists.

Now, that then is briefly the scheme of Part IVA. As I mentioned, Part IVA was introduced along with Part VIA of the Act which created a statutory framework for determining refugee status under the Refugee Convention. And it is my submission that Part IVA isn't to be looked at in isolation. On proper analysis, it's an integral part of the Immigration Act and very much is inter-related with Part IVA. Part IVA section 129(a) provides that the objective of that part is to provide a statutory basis for the system by which New Zealand ensures it meets its obligations under the Refugee Convention and although you might not necessarily notice it from looking at a current version of the Immigration Act, the text of the Refugee Convention is set out in the Sixth Schedule to the 1999 Act so that the Refugee Convention is actually directly part of the Immigration Act as a Schedule.

Elias CJ — Sorry you referred to Part IVA, were you meaning to refer to Part VI in terms of that?

Harrison — VIA.

Elias CJ — VIA I mean. Yes.

Harrison — Yes, sorry.

Elias CJ — I had heard you as saying that or I might have got it wrong.

Harrison — In Part VIA a particularly important provision is s.129(x)(i). That provides that no person who has been, I'll omit words, no person who has been recognised as a refugee may be removed or deported from New Zealand under this Act unless the provisions of article 32.1 or article 33.2 of the Refugee Convention allow the removal or deportation. Now Mr Zaoui currently enjoys that right as a recognised refugee and there's nothing in Part IVA which contradicts that. Indeed as we have seen, there are references in Part IVA to s.129(x). Now the feature then of, if we go back to the particular

refugee deportation security criterion, in 114C subs (6)(a), the feature of these provisions when placed alongside article 33.2 is that the same formula is used. Subsection (6)(a), the criterion there are reasonable grounds for regarding the person is a danger to the security of New Zealand in terms of article 33.2. Article 33.2 which can be found in the extracts from the Refugee Convention in the Respondent's Casebook at tab 13, the relevant portion of 33.2 reads, the benefit of the present provisions which is the non-reformal(?) obligation may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is and I omit the second alternative as not relied on. So that the criterion 114C (6)(a) is in almost precisely the same formula as article 33.2 and that dovetails then into article 129(x)(i). So my point really is that there is this strong inter-relationship between Part IVA and the critical criterion and article 33.2 and the jurisprudence and writings in relation to the Convention itself.

So that I think covers what I wanted to say about the Act generally. I can move now to the matter of the relevant human rights.

In paragraph 7, page 3 of my Outline of Submissions.

Gault J — Can I ask you to pause please Mr Harrison. I followed that but what does it mean for today?

Harrison — Well, it means that that is the statutory context in which the detention issues arise and that is the statutory context in which the certificate which the Crown says the Court must simply treat as conclusive is made. When the certificate certifies what it does certify, in particular in relation to that particular criterion of danger to the security of New Zealand that I have been going through, it is supposed to be certifying against a test of the Refugee Convention provision.

Gault J — Well I said I understood all that, but I just couldn't quite see where that would take us today. We are not required as I understand it to make a determination on the interpretation of the security criterion.

Harrison — That is correct. However, it is in my submission important to understand what the certificate does certify substantively in order to understand what it does not certify. It certifies in terms of the Refugee Convention provision, it does not, and this is part of the burden of my argument, certify anything about the suitability of Mr Zaoui for release into the community on bail. The statutory criterion is directed to possible deportation of a recognised refugee against the jurisprudence and learning of the Refugee Convention. And with respect unless that is accepted and given appropriate weight, we run into the argument that for example attracted Justice Paterson in the High Court to say well, goodness me, look what this piece of paper says, therefore this man can't possibly be fit for anything other than detention in prison. That I submit is wrong.

Gault J	This is a long way of saying that there are different considerations for bail as against removal.
Harrison	It is a long way of saying it and I have completed saying it and I'm sorry if I took too long.
Gault J	Thank you.
Harrison	So that takes us to the rights Judgment and while I'm mindful of Justice Gault's comment, I would like just to set what I call the rights Judgment in its context for the moment quite quickly. It's at tab 3 of the Appellant's Supplementary Bundle, just by referring to paragraph [26] of that Judgment. This appears in the Judgment of the learned President of the Court. His Honour makes a declaration on Mr Zaoui's cross-appeal in three propositions. Proposition 1.
Blanchard J	Sorry, which paragraph?
Harrison	This is paragraph [26] of the Judgment just before the Judgment of Justice Glazebrook begins. Tab 3 of the Supplementary Bundle Sir. Paragraph [1] summarises the point I have been making. Paragraph [2], the security criteria in 114(6)(a) will be met only if there are objectively reasonable grounds based on credible evidence that Mr Zaoui constitutes a danger to the security of New Zealand of such seriousness that it would justify sending a person back to persecution. The threshold is high, it must involve substantial threatened harm and there must be a real connection between Mr Zaoui himself and the prospective or current danger etc. Now I just want to put that in context. Propositions 1 to 3 are supported by the President and Justice Glazebrook. Justice Willie Young associated himself only with proposition 1 although he did not dissent from propositions 2 and 3, he simply considered that it was premature to deal with them. Now I note in paragraph 9 of the Submissions, page 3, the review of Justice McGrath in the Court below that the Appellant's detention was not in conformity with the Refugee Convention. While I accept that, with the greatest of respect to His Honour I find it difficult to see how he could reach that conclusion and at the same time reach the conclusion that the detention was not arbitrary in breach of s.22. Turning to my discussion of the Bill of Rights and ICCPR provisions, I deal with the access to justice issue. I invoke **Baigent** (**Simpson v Attorney-General** [1994] 3 NZLR 667) which is tab 1 of our main Bundle. I have set out the page reference numbers and I don't think I need to take Your Honours to those, they are well known and the reasoning of the Majority stressing article 2(3) of the ICCPR, the requirement to, and it states parties ensure an effective remedy played a considerable role in the Court's reasoning, the Majority's reasoning. And in this instance the Appellant relies on **Baigent** both, if I can put

it this way, by way of an argument that if need be other remedies, bail or habeas corpus, can be given a leg up using the **Baigent** reasoning which, as I apprehend it is not inconsistent with the approach that found favour with Your Honour Justice Gault in **Baigent**. Or if need be we rely on **Baigent** as a separate and independent avenue of redress should s.22 of the Bill of Rights be held be breached. We look at.

Elias CJ With what outcome?

Harrison With what outcome?

Elias CJ Yes. You seek?

Harrison Release.

Elias CJ Release not on bail. Release, unconditional release.

Harrison No, I mean, it seems to me that it's logically open but the Court is unlikely to reach the position that bail is unavailable but **Baigent** redress is. It's more likely that the Court, if you go with me, would say bail is available and the **Baigent** approach fortifies us and there will be a release on conditions. But were we to focus on **Baigent** alone I would take the position that effective redress would include a conditional release. So I do not seek unconditional release except on one scenario and that is that if the only avenue is habeas corpus, the Court finds the detention arbitrary but accepts the Crown argument that habeas corpus cannot involve conditions.

And if we reach that point, then I would have to say well there would have to be an outright release. But that is not the primary position that I urge the Court to move towards. Now, the substantive rights, in particular s.22 of the Bill of Rights, this is paragraph 15 of the Submissions, involve both a due process element and a substantive assessment of the detention and shall we say a qualitative assessment of the detention itself. I rely on **Neilsen's** case (**Nielsen v Attorney-General** [2001] 3 NZLR 433) which is at tab 11 of the Intervener's Bundle A. I don't need to take you to it. I rely on **Manga** which is at tab 2 of our Bundle. And I just would like to stress a couple of provisions in a couple of parts of the Judgment of Justice Hammond in that case, tab 2. I've given all the references. What I propose to do is just to stress particular portions that I particularly rely on here.

Paragraph [35] of **Manga** (**Manga v Attorney-General** [2000] 2 NZLR 64) Justice Hammond says, I note also that where there is an evidential foundation of detention the Crown has the burden of showing on the balance of probabilities that the detention was not arbitrary, citing a Decision of Your Honour Justice Blanchard. Paragraph [40] is the reference to lawful detentions may also be arbitrary if they exhibit elements of inappropriateness, injustice or

lack of predictability or proportionality and then there is a reference at paragraph [42] to the drafting history and the insistence on including arbitrary so that the standard would go beyond the merely unlawful in a technical sense.

Paragraph [119] of the Judgment, there is a discussion of the touchstone for, or if you like, criteria for the **Baigent** remedy.

Now I needn't deal with **Abu** (**Abu v Superintendent, Mt Eden Women's Prison** [2000] NZAR 260) and **Tishkovets** (**Tishkovets v Minister of Immigration (No.3)** [2000] NZAR 505). I do want to take Your Honours to **A v Australia**, tab 3 of the same Bundle (**A v Australia** (1997) 4 BHRC 210 (UN Human Rights Committee)). I'm coming ultimately to an analysis of Justice McGrath's reliance on **Chahal** (**Chahal v United Kingdom** (1996) 23 EHRR 413) and by way of spending a little time on **Chahal**, I would like to just compare these next two cases, the first **A v Australia**. That involved a Cambodian boat person who was sent to a detention centre and detained for a considerable period of time. He complained of his arbitrary detention. Page 228 of the Report paragraph 9.1 is the Human Rights Committee's examination of the merits. Down at the very bottom of the page, three questions are to be determined on their merits. Whether the prolonged detention of the author pending determination of his entitlement to refugee status was arbitrary within the meaning of article 9(1), (b) whether the alleged impossibility to challenge the lawfulness of the detention and his alleged lack of access to legal advice was in violation of article 9(4) and (c) whether there's been a breach of article 14(1).

9.2 on the first question, the Committee recalls that the notion of arbitrariness must not be equated with "against the law" but must be interpreted more broadly to include such elements as inappropriateness or injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case. For example to prevent flight or interference with the evidence the element of proportionality becomes relevant in this context. State party however seeks to justify detention by the fact that there was an unlawful entry and a perceived incentive to abscond. The question was whether these grounds were sufficient to justify indefinite prolonged detention. So the point that emerges there is that the test is whether the detention is or is not necessary in all the circumstances of the case and the reference to preventing flight or interference with evidence goes back to an earlier Human Rights Committee case, **Van Alphen** (**Hugo van Alphen v The Netherlands** Communication No.305/1988 UN Document CCPR/C/39/D/305/1988 (1990)) which is in the Intervener's Bundle A at tab 7 and particularly at paragraph 5.8. So that has been part of the jurisprudence for some time.

Back to **A v Australia** 9.4. The Committee observes that every decision to keep a person in detention should be open to review periodically so the grounds justifying detention can be assessed. In any event detention should not continue beyond the period for which the state can provide appropriate justification. I omit some words. Without such factors the detention may be considered arbitrary even if entry was illegal. In the instant case the State party has not advanced any grounds particular to the author's case which would justify his continued detention for a period of 4 years. So there's a conclusion of arbitrary detention.

Then in 9.5 there's a discussion of review. And a few lines in at (g). However the Court's control and power to order the release of an individual was limited to an assessment of whether he was a designated person. If the criteria for such determination were met, the Courts had no power to review the continued detention or order his release. In the Committee's opinion, Court review of the lawfulness of detention which must include the possibility of ordering release is not limited to mere compliance of the detention with domestic law, and I omit some words, the review must in its effect be real and not merely formal, I'm paraphrasing. Towards the bottom, article 9.4 requires the Court be empowered to order release if the detention is incompatible with the requirements in Article 9.1 or other provisions supported by Article 9.5 over the page. And so there was a conclusion of a violation of the right.

Now then **Ahani** (**Ahani v Canada** (15.6.04) UN Doc CCPR/ C/80/D/10 Communication No. 1051/2002) which is in our Supplementary Bundle at tab 2. This is a June 2004 Human Rights Committee Decision. And I'm referring to paragraph 10.2. This is a security certificate case in the Canadian context. And one of the features was that as I read it, although there was a procedure provided to review the detention itself promptly, Mr Ahani took a constitutional challenge to the entire set up which failed and took a lengthy period. So with that background, 10.2 as to the claims under Article 9 concerning arbitrary detention and lack of access to the Court, the Committee notes the author's argument, the Committee observes that while the author was mandatorily taken into detention upon issuance of the security certificate, under the state party's law the Federal Court is promptly, that is within a week, to examine the certificate and its evidentiary foundation in order to determine it's reasonableness. In the event that the certificate is determined not to be reasonable, the person named in the certificate is released. The Committee observes that detention on the basis of a security certificate on national security grounds does not result ipso facto in arbitrary detention.

Elias CJ Sorry, paragraph?

Harrison This is 10.2. We're about 10 lines down. Detention on the basis, I'm paraphrasing, of a security certificate does not result ipso facto in arbitrary detention. However, given that an individual detained under a security risk certificate has neither been convicted of any crime nor sentenced to a term of imprisonment, an individual must have appropriate access in terms of Article 9 paragraph 4 to judicial review of the detention, that is to say review of the substantive justification of detention as well as sufficiently frequent review and the Committee concludes that a reasonableness hearing as described above promptly after commencement of mandatory detention on the basis of the certificate is in principle sufficient judicial review of the justification for detention to satisfy article 9.4. The Committee observes however that when judicial proceedings that include the determination of the lawfulness of detention become prolonged, the issue arises whether judicial decision is made without delay as required by the provision. I omit some words. Although a substantial part of that delay, 4 years 10 months, can be attributed to the author who chose to contest the constitutionality of the security certification procedure, instead of proceeding directly to the reasonableness hearing before the Federal Court. The latter procedure included hearings and lasted nine and a half months after the final resolution of the constitutional issue. This delay alone is in the Committee's view too long in respect of the covenant requirement of judicial determination of the lawfulness of detention without delay.

Now at 17 I make the point then that there is both, under s.22 interpreted in the light of Article 9 ICCPR, there's both the due process standards as far as on procuring curial review is concerned and the substantive obligation as to factual justification for any detention. So this ties in of course to the interpretation argument if it's accepted that Part IV is capable of interpretation under the influence of s.22 and the international obligations. And what is clear in my submission is that the covenant and s.22 properly interpreted require access to the Court to determine not just the validity of the security certificate but to assess at least in some preliminary way whether the detention itself should be in place and should continue. Plus periodic review if the matter becomes prolonged.

Now I turn, the rest of that can be taken as read on page 6, I turn to the matter of the inherent jurisdiction to grant bail.

Keith J Just before you do Mr Harrison, you were passing over your paragraph 18 to which you directed us earlier in a different way. Isn't that a more direct way of getting to your point? It's the point that Justice McGrath flagged and suggested that his interpretation meant that New Zealand was almost in breach of Article 31.2 of the Refugee Convention and 31.2 presumably does come, doesn't it, directly into this case. It's not referred to is it, as directly as the other provisions in 129(x) but isn't there a straightforward argument that if the Refugee Convention is fully taken into our law, and as part of the Immigration

Act then Part IVA is to be read with that and 31.2 requires individual determination from time to time of the necessity for the detention.

Harrison Well yes, entirely Sir and I'm by no means retreating from paragraph 18, it's just that I'm trying just to see where I can add value by referring to the authorities in more detail. That is set out and of course I rely on it and I invite Your Honours to take it into account.

Keith J Well I just wonder whether it isn't a more direct link. Because it's about refugees.

Harrison Yes.

Keith J And this is a case about a refugee. And Justice McGrath acknowledges there's a problem in relation to that provision.

Harrison Well I would see it as being really two strings to my bow because if the s.22 argument is right and then one combines that with s.6, my argument then goes on to say, well that is actually a more potent tool of interpretation than the international covenants. Your Honour's very well aware of the interpretation force of the international covenants. But I do argue that s.6 is an even more potent tool of interpretation.

Keith J Well that's interesting because I would have thought that given that this is a refugee case, given that the Immigration Act, you were saying before anyway, takes on board the Convention, I'm not quite sure about that, but if that is the case, then it's directly employed isn't it and there's a specific provision that the Judge below has acknowledged creates problems.

Harrison Well I would argue there are those two routes to the interpretation outcome that I argue for. And they may well operate in tandem to produce the result if Your Honours accept my submission.

Keith J Thank you.

Harrison Now as to bail, and I'm coming to this argument, that the issues as regards bail seem to be how far does the inherent jurisdiction stretch, stretch may be the wrong word, in a non-criminal case and the business around whether it's ancillary only. And secondly the question of inconsistency with the statutory regime. Just dealing with the first of those sets of issues, I've given a little bit of a potted version of history, very potted. There's quite an elegant treatment in the Law Commission paper, sorry no I'm on the wrong track there. There is a treatment of the history also in **Gillbanks v Police** [1994] 3 NZLR 61, which I've given the page reference for. That's a Judgment of Justice Hammond. That Judgment is not supplied. I would like to, because the later English Court of Appeal cases seem to take a different tack, I think it's worthwhile going back to the old

case of **Spilsbury** (**R v Spilsbury** [1898] 2 QB 615) which is tab 4 of the Appellant's Bundle. And that was a Fugitive Offenders Act case at p.615 bottom. The facts are described as a defendant who'd been arrested on a warrant charging him with unlawful and riotous assembly on a steambill within the territorial waters of the Emperor of Morocco and with riotously making assault on certain soldiers of the Sultan of Morocco, firing on the Sultan's ship. He then was going to be, what we now call, extradited. He had an argument that he ought not have been made the subject of an order under the Fugitive Offenders Act which failed and his alternative proposition was that he ought to be admitted to bail pending his return. Page 620 Lord Russell in the passage I have identified, and I'll just take Your Honours through the first bit. Failing the application to set aside the order for return he asks that he may be admitted to bail until the time when he is to be returned, the first time this has arisen. It is necessary to consider first how the question is to be viewed. Was Mr Sutton right in saying that the defendant was bound to show that the power is given to admit to bail under the Fugitive Offenders Act or in other words, is the onus of showing that the power to admit to bail exists cast on the defendant. I think not. This Court has, independently of statute by the common law, jurisdiction to admit to bail. Therefore the case ought to be looked at in this way. Does the Act of Parliament, either expressly or by necessary implication, deprive the Court of that power. And then I omit the rest of the passage.

622 at the top. I have come to the conclusion that the provisions of the statute are consistent with the recognition of the power of this Court to admit to bail in such cases as the present. This inherent power to admit to bail is historical and has long been exercised by the Court. And if the legislature had meant to curtail or circumscribe this well known power, their intention would have been carried out by express enactment.

And Justice Kennedy over the page, 625, he concludes with considerable hesitation that they have the power to admit but I entirely concur in the view that the burden of proof lies on the party who asserts that the ancient and important jurisdiction of this Court to admit to bail is taken away by statute.

Now in that case the order was an order of the lower Court for the return of the defendant under the Fugitive Offenders Act. That order stood. It took on a final quality when the challenge to it was rejected but at the same time the Queen's Bench division was satisfied that there was inherent power to grant bail and I would submit that when one comes to look at the later attempted qualifications around ancillary to some other proceeding, this case demonstrates that the contrary has always been true at common law.

Keith J	Well except there is a proceeding, isn't there, in the **Spilsbury** case, there is the application for rendition under the Fugitive Offenders Act.
Harrison	My point is that that application had been granted so that there was nothing current that, as I read it, there was nothing current that the English Court was seized with.
Keith J	I see.
Harrison	There'd been a final, the rendition had been ordered.
Keith J	Except he had to get sent back to Gibraltar, where was he? How does the Fugitive Offenders Act apply to Tangier anyway? It would seem that it's a mysterious case isn't it? Maybe we don't need to go into that.
Blanchard J	They sent him to Gibraltar.
Harrison	My researches didn't extend to that point Sir.
Keith J	But the Crown accepts doesn't it, at least it seems to in paragraph 10, that there is inherent jurisdiction to grant bail but it says (1) it's got to be ancillary and (2) it's got to be consistent with statute. So we're just left aren't we in terms of the power with the ancillary point.
Harrison	Well, yes, I can deal with that now perhaps rather than leave it for reply. The whole idea that, the submission that you can't grant bail in vacuo or that it has to be ancillary, seems to me to be confused thinking with respect. You don't have detention in vacuo.
Keith J	No, no.
Harrison	I mean, detention, leaving aside a criminal conviction and sentence, no immigration detainee is detained in vacuo.
Keith J	No, no.
Harrison	He's been detained for some purpose and.
Keith J	Under a statutory power.
Harrison	Yes, so in that sense the bail won't be in vacuo either.
Keith J	No, no.
Harrison	And there's always going to be something that the application for a grant of bail is ancillary to.
Keith J	Mm. Otherwise the detention will be unlawful.

Harrison — Well quite. So to have this qualification that it's got to be ancillary to something, unless you say well it's got to be ancillary, for the High Court it's got to be ancillary to something in the High Court which, my point is that's inconsistent with the common law cases such as **Spilsbury** and our own case of **In re R** [1944] NZLR 19, that's never been the practice pre Bail Act. The High Court would always grant bail to someone before a Magistrates Court or District Court who hadn't been committed, who may have just had a first appearance and wrongly been refused bail, the High Court retained that inherent jurisdiction. So why.

Elias CJ — That was made explicit wasn't it also by later statutory amendment? Am I right in thinking that?

Harrison — Well, the cases, the point may be dealt with in paragraph 23 of the Submission. Certainly the Bail Act. You could say the Bail Act governs where it governs but it doesn't govern non-criminal matters. But it is clear from **Gillbanks** and **Burrett's case** (**R v Payne** [2003] 3 NZLR 638), that the inherent jurisdiction remains and I argue is available in a non-criminal case such as the present. So in any event, I don't think I need.

Blanchard J — It would be extraordinary wouldn't it, if the Bail Act got repealed so we had no statutory ability to grant bail. The Courts would surely go on granting bail in criminal cases, even more so one might think, they'd go on granting them in non-criminal cases where there was a detention, subject of course to particular statutory provisions which said you can't do that.

Harrison — Yes, that is.

Blanchard J — Isn't it as simple as that?

Harrison — It is as simple as that in my submission. The nub of the issue is the inconsistency with the statute point. Is a grant of bail inconsistent with the Part IVA statutory regime and all the rest of it I submit on any usual approach to the inherent jurisdiction falls to one side. And that I say with all due respect to the English Court of Appeal decisions which I deal with and comment on in paragraph 28. I refer at the top of page 9 to Stevens Commentaries, that is at tab 9 of our main Bundle of Authorities. That supports my proposition **R v Spilsbury** and **In re R**. And likewise both Justice McGrath and Justice O'Regan concurred in that view.

Keith J — Well even in the **Turkoglu** (**R v Secretary of State, Ex p Turkoglu** [1998] 1 QB 398) case they actually granted bail anyway, I think didn't they?

Harrison — In which case Sir?

Keith J The **Turkoglu** case which seems to be the strongest one against you.

Harrison Yes.

Keith J Mr John Donaldson Judgment.

Harrison Yes, they did. I mean the English cases are not particularly helpful both because there are some statutory powers there. Secondly because there were concessions that bail could be granted. And thirdly because the Judges expressed themselves very tentatively as though they're sort of groping for a point that no-one has pointed out to them in the earlier English cases in the criminal sphere like **Spilsbury**. So at 31 I criticise, with respect, Justice O'Regan's exceptional cases only test.

Keith J Well, that's a distinct point now isn't it?

Harrison Yes.

Keith J That's a new point.

Harrison That's a distinct point. And at top of page 10 of the Submissions I set out the actual passage in **Swati** (**R v Secretary of State, Ex p Swati** [1986] 1 All ER 717), which Justice O'Regan is relying on and I've highlighted the part of that that shows that those words in exceptional cases really do need to be considered in the context of what that case was concerned with, **Swati,** and I argue that a different approach results if you approach from first principles and pay regard to the Bill of Rights and international standards and of course that includes the Refugee Convention as Your Honour Justice Keith was mentioning.

Paragraph 33 the case of **Poon v Police** [2000] 2 NZLR 86, a Decision of Justice Baragwanath in an extradition case where His Honour relied by analogy on the provisions of the Bill of Rights or in fact he thought it was directly applicable, some have criticised that. Section 24(b) which relates to everyone who is charged with an offence, Justice Baragwanath also relied separately on s.22 to conclude that in extradition cases the criminal approach, criminal law cases approach should be utilised.

And paragraph 34 of the Submissions, I suppose what I'm saying here is that I'm inviting the Court, if it accepts my arguments about inherent jurisdiction and lack of inconsistency, simply to follow the criminal law analogy and adopt a test along the lines of **B v Police (No.2)** [2001] 1 NZLR 31 as in paragraph 33 but the Court is really I suppose fashioning the inherent jurisdiction to provide an appropriate remedy in the Part IVA context and I would have to accept that you could adopt a different approach than the criminal law analogy, the criminal law test, and I urge you not to but if you did, then you would

still, rather than using this exceptional cases only standard that Justice O'Regan chose, you would still have to have a test which involved reference to the justice of the individual case and recognise the seriousness of detention for the individual.

Sahin v Canada [1995] 1 FC 214, although it's only at a relatively low level as a judicial ruling, tab 11 of our Bundle. First off a machinery matter. The earlier version was a printout. We now have a report here. Could you please substitute in the last sentence where it says discussion at page references of the printout, that can read "see the discussion at p.222, 225, 227 to 9 and 230 to 232". Apologies for that. The passages are however bracketed, if that photocopying has come through. Page 225 of the report sets out the charter provisions. Those are identified in brackets. And then the discussion of Justice Rothstein in the Federal Court, is he, yes he's in the Federal Court, starts at p.227 down the bottom. And I submit this is helpful reasoning for my purposes.

Having regard to the fact that detention under s.103 is not for the purpose of punishment after conviction but rather in anticipation of an individual's likely danger to the public or likely failure to appear for inquiry, examination etc, I do not think such detention may be indefinite. In the case of **Bower** the applicant has been detained now for over 14 months. He's been found to be a Convention refugee. He's detained because of the existence of a conditional removal order pending judicial review of the finding that he's a refugee. Then there's a reference to slow processing. At about (d), from the point of view of individuals it is trite to say that the right to liberty is so fundamental that even in the absence of charter Courts of inherent jurisdiction have where necessary exercised their power of habeas corpus for hundreds of years. The right to liberty is now in s.7(e). Not only is there an interest on the part of the individual to limit detention but also from the point of the government it is costly to detain persons for lengthy periods and therefore the government itself has an interest in minimising detention. With that background in mind, s.7 is relevant to the exercise of discretion. And at, over the page 229, at (b) furthermore questions of fundamental justice envisaged by s.7 of the charter were also at stake. Under s.203 Parliament has dealt with the right of society to be protected from those who pose a danger to society and the right of Canada to control who enters and remains in this country. Against these interests must be weighed the liberty interest of the individual. I omit some words. I am satisfied that what amounts to an indefinite detention for a lengthy period of time may in an appropriate case constitute a deprivation of liberty that is not in accordance with the principles of fundamental justice. I have used the term indefinite detention. It is arguable that detention under s.103 is not indefinite because it must be reviewed at least every 30 days and may be maintained only while conditional removal order is pending. I omit some words. On the other hand, when any number of possible steps may be taken by either

side and the times to take each step are unknown I think it is fair to say that a lengthy detention at least for practical purposes approaches what might be reasonably termed indefinite. I won't read the final passage although there are at page 231 a series of what I submit are useful considerations set out and numbered as 1 to 4.

Now I turn to the inconsistency issue. I make the point in paragraph 37 really that it is critical to frame the question properly. Rather than just loosely saying, is detention mandatory under Part IVA, one must say, is it mandatory as against the availability of the inherent jurisdiction to grant bail for example given the common law approach which is referred to in **Spilsbury** for example, the long standing common law approach that you don't exclude the inherent jurisdiction because of its importance to individual liberty other than by express words or necessary implication. So that rather than just say well must Mr Zaoui be detained. The answer is yes at the moment, there's a warrant. No doubt about it. That isn't the question one asks. And so that's the point I make at 37.

At 38 I make a point which I have made from the very beginning. No-one seems to have, no Judge seems to have taken it up particularly. But I submit it's important. That you have here a detention by and pursuant to a Court Order. The warrant of commitment. We acknowledge that, mistaken identity aside, the District Court Judge must issue the warrant of commitment. But if, as the Crown argues, the detention is then mandatory for all purposes subject only to the happening of the specified statutory events, why bother having a Court involved at all? In my submission, and that is a contrast with the Australian system where under a provision which Justice O'Regan briefly refers to, the reference is at the top of page 12. There is a blunt statement that the detainee is to be locked up by a state functionary, the Courts are excluded. Here we have what I submit is a significant straw in the wind that the legislature has chosen to make this a detention under Court order. And one cannot regard that as simply cynical window dressing. It's not my only point but it is a starting point for considering whether this detention is capable of judicial review in the broadest sense. And I submit it's important.

Keith J — There is, sorry just on that point Mr Harrison, there is the, as you said before, it's for the Court to decide that the person is the person named. So there is that element of judicial decision.

Harrison — Yes.

Keith J — And secondly, and this in a way runs into your second argument, the transfer argument. There is the decision of the Judge presumably about which penal institution or prison or whatever it is the person is to go into because it is, leaving aside the issue about the prescribed

	form, there is a decision to be made by the Judge isn't there about where the person goes.
Harrison	Well not according to the Crown argument. Well yes, but.
Keith J	Well except even on the Crown argument there would be a question as between different prisons or the penal institutions wouldn't there.
Harrison	Ah.
Keith J	And it doesn't have to be at Paremoremo.
Harrison	Yes, that is.
Keith J	And that's a matter for the Judge isn't it?
Harrison	That is, if I may have just a moment. Yes, I think, well I don't want to misrepresent the Crown argument. I got the impression that they basically said it is for the executive to make every decision about the venue of a detention of the subject of a security risk certificate but.
Keith J	I think, we'll come to it I suppose, but I think that the Crown can't in a sense have it both ways. The regulation is a regulation with four purposes isn't it? So the regulation purports to say it's got to be a penal institution but it doesn't prescribe which one and of course it doesn't prescribe it in respect of an individual. The Regulation is a regulation for general purposes, not for.
Harrison	I take Your Honour's point and I acknowledge that there is some force to it.
Keith J	Well it may help you in the end I think, this issue.
Harrison	Yes, I accept that given the mistaken identity provision and given what may or may not turn out to be the extent of power to choose, there is something for the Judge to do, that's really what Your Honour is saying.
Keith J	Yes, yes.
Harrison	So that that may explain why it is a judicial decision. I acknowledge that but I also submit that there is still some remaining force in my point.
Keith J	Yes, sure.
Harrison	Now.
Elias CJ	Perhaps we could clarify that, is that the Crown position, Mr Arnold, that?

Arnold The point as I understand it is that the form 9 simply refers to a penal institution and so yes the Judge will have to determine that but inevitably there's going to be material put before the Judge that it will be a particular institution.

Elias CJ But you accept that the Judge makes the decision which penal institution?

Arnold On the structure of the Act that must be so, it seems to me.

Elias CJ Yes, thank you.

Harrison Yes, Your Honours I'm about to broaden my argument out to compare Part IVA with the other detention provisions of the Immigration Act. This is the table that's been provided and this table, I guess this may be obvious, this table works up and down. The vertical columns relate to particular powers under particular parts of the Act. The vertical columns deal with the stages in the transaction shall we say. And the right hand vertical column is of course Part IVA with which we are directly concerned. Now, I'll deal with this in more detail shortly but one can note that in some respects Part IVA is, well in my submission, incomplete or silent on things where one might expect from the drafting pattern of other parts of the Act provision to be made.

Blanchard J A pattern? In this Act?

Harrison Sorry?

Blanchard J A pattern in this Act? It's notoriously unpatterned.

Harrison Yes, well that might be a good reason for not applying expressio unias arguments to it which have.

Blanchard J It's been patched and patched and patched and they've never gone back to square one and done what should have been done and drafted an overall immigration statute. I mean that was the problem we had in the Refugee Council case.

Harrison Yes, yes. I accept that observation. Nonetheless in my submission there is a certain amount of a pattern that emerges in these detention provisions which is worth noting and the particularly useful comparison I submit is with detentions not under Part IVA but of those who threaten national security or may threaten national security. Because obviously there is a concern if there is an interpretation of Part IVA which seems out of line with the way the Act deals with security threats in other respects. So that if we look at the pattern going across the page, the authority to issue warrant provisions, we can see that the formula of having a District Court Judge issue a

warrant of commitment in a prescribed form for the detention of the person is fairly common to all of these detention provisions. Also common to these provisions, in the authority to detain column, is the proposition, statement that the warrant of commitment authorises the person to whom it is addressed to detain the person named in it until certain things happen. If we just take for example in the Part III column section 73.3 that is set out there. And again, if we go across to s.114.02 you've got that pattern. Now if we go to.

Keith J Sorry, could I just raise a sort of wider pattern issue. You earlier made a reference to the possibility of s.72 being invoked in this case at a later stage which I didn't quite understand. But if in this case s.72 had been invoked originally, there wouldn't have been the protection, there wouldn't have been, in the Inspector General procedure, there wouldn't have been the Director's certificate would there? There would simply have been an Order in Council made by the Government without any rights of appeal as opposed to the suspected terrorists who I think do have a right of appeal don't they? This really goes to my brother Blanchard's point in terms of just what the pattern is because, and it's really a substantive point about it, that I think Part III came in in the 70's some time and I can't remember quite why, and it was just a cobble onto the '64 Act and there was still that old 1919 Undesirable Immigrants Act. So the Act has just grown at times in response to (moves away from microphone) and I take your point that there's the possibility of conditional release in respect of the people who are subject to a Governor General in Council Order which on the face of it sounds a more serious matter than the standard IVA procedure.

Harrison Yes, well.

Keith J So it's really a different version of the pattern question or the lack of pattern question really.

Harrison Well, I mean there is, it seems to me, but maybe I'm coming at it the wrong way, a lack of consistency in many respects. If you take Part III in s.72, as Your Honour's saying, the deportation is by Order in Council. There's no right of appeal but there would be judicial review. That's not excluded. And yet curiously if you're a suspected terrorist under s.73, which these days would be probably one of the most serious things you could be, you get a Ministerial Order in respect of which there's a right of appeal to the High Court under s.81.

Keith J Yes, as if in the exercise of a discretion I think it says, doesn't it.

Harrison But in both cases, if when we come back to comparing the detention provisions and Your Honour's ahead of me, the person who's actually made the subject of an order as by contrast with the unconfirmed security risk certificate, which still hasn't gone through the process,

	can still be let out. And obviously that is a feature I submit that both suggests that there is a lacuna in Part IVA which can properly be filled by an inherent jurisdiction to grant bail when I develop that argument.
Keith J	Well your point is not so much can properly be filled but just hasn't been excluded.
Harrison	Well that's right.
Keith J	I mean that's your, the way you want to put it isn't it?
Harrison	Yes, yes. And at the same time there is a pattern I will explore if I may after the break in other respects.
Elias CJ	Yes, we'll take the adjournment now for 15 minutes.

Court adjourns 11.33 am
Court resumes 11.53 am

Harrison	Your Honours, by means of this table I'm attempting the exercise of looking at the elements of s.114O and asking the question well where is the provision that makes detention mandatory for all purposes. Because as I say later in my Submissions, when we come to Justice McGrath, he doesn't actually identify a provision in s.114O, a particular subsection, which is said to have this express effect. And the burden of this analysis, this comparative analysis with all the dangers perhaps that Justice Blanchard has mentioned, is to say well let's look at a provision of 114O and ask ourselves whether it can do the task of making the detention mandatory for all purposes.
Keith J	Why do you say for all purposes Mr Harrison?
Harrison	Well, that's a shorthand for saying so as to exclude the inherent jurisdiction to grant bail.
Keith J	Well really you're saying then there is no provision which excludes.
Harrison	No provision which expressly makes the detention mandatory. And when we look at.
Keith J	Well turning it round the other way, I mean you start with the proposition don't you that there is liberty, the right to liberty, the inherent jurisdiction of the Court to grant bail. Is there anything that excludes that? Isn't that what you're saying?
Harrison	Yes, well, that is the primary approach that I am adopting. But one can also go on to say, well even so, let's look and see what the express words are saying.

Keith J Yes, surely.

Harrison And what the express words say for example in s.114O(i) is where you're brought before the District Court, 1(b), unless mistaken identity, the Judge must issue a warrant in the prescribed form for the detention of the person. Now those words "for the detention of the person" in my submission don't go far enough and if we look at the other columns under the authority to issue warrant horizontal line, you can see for example similar words used in cases where there is a power to grant conditional release for example. So that if you look at the Part III column, half way down 79(2)(b) the District Court Judge shall (i) issue a warrant of commitment in the prescribed form for the detention of the person or release. And the next column, Part IV, again for the detention in custody of that person and so on moving across. It's simply a common form of words in respect of provisions that also in some cases go on separately to provide for release on conditions. So my point is subs (1) of 114O can't do the trick. Subsection (2), the warrant of commitment authorises the person to whom it is addressed to detain. That too in the authority to detain horizontal column, we move across, we find that is a common form of words and often it has the until proposition as in the Part III column downwards s.79(3).

Gault J I don't follow your analogy under Part III when the power is to issue a warrant or release on conditions. If the warrant issues, it is to detain until. If the alternative is taken there is a release on conditions. I don't see how that helps you.

Harrison Well I understand Your Honour's point. It helps me less than in the case of other provisions where the release on conditions provision is separate and free standing. The point is simply that this is a common form of words throughout the detention provisions of the Act and all it is doing is describing the nature of the warrant. It cannot be taken, as the Crown argument seems to be, to of itself make the detention pursuant to the warrant mandatory, as I've been saying as a shorthand, for all purposes. Likewise, the authority to detain is just that. It provides a defence to a claim for habeas corpus or false imprisonment directed against that person if the detention is otherwise lawful to have the warrant, and you can't say that just because there are some "until" provisions, that that again is a mandatory provision. And s.114O subs (3) which is a notice provision again has its similarities going across the release from detention provision column. Now if we compare in the places of custody column on page 2, we can see that there is what might be termed mandatory language used in other detention provisions but not in 114O(3). Section 62(2) is to be detained. Section 80 shall be held in a penal institution. 103 and those, although it's not completely set out, 128(7) and 128(b)(7) likewise use the word "shall". I just want to check that. No I'm wrong that's 128(7). So that is a feature of the language of other provisions of the Act but not of 114O(3) that arguably mandatory

language is used when it is not used in 114O(3). And then the other point about comparing the other parts, it takes us down to the bail column where you have a specific exclusion of bail in s.128(15) and 128(b)(12) and, as I note in paragraph 41 of the Submissions, those provisions excluding bail were enacted in 1991 although one has been amended more recently. So there could have been an express exclusion of bail, it is something that Parliament have addressed in this Act prior to the enactment of Part IV. So I submit, and this is 42, as I have argued that there's no provision in s.114O or in Part IVA which treats the detention as mandatory so as to exclude the inherent jurisdiction to grant bail. And 42, I address a point about the wording of subs (3) of 114O, the words "or if for any other reason the person is to be released". If we look at 114O and then go back, with that phrase in mind, and go back to 114O subs (2), you've got (2)(a) which is delivery up to execute a deportation order or a removal order, (c) is the habeas corpus and (b) is notified under subs 3 that the person should be released. Now my point here is that even if you treated subs (2) as defining the only three situations in which the warrant of commitment authority to detain can be terminated, (2)(b) takes us back to subs (3) and we have a general expression consistent with a power to grant bail. Namely, if for any other reason the person is to be released. Now there are other reasons in the Act itself and the Crown Submissions identify some of them. But there's no reason, given the interpretation values which I argue should be brought to bear, to restrictively interpret if for any other reason.

Blanchard J — You'd think if they were trying to exclude bail they'd make it very clear that that was being done rather than putting in loose language like this.

Harrison — I agree Sir. They did so, they chose to do so in other parts of the Act, the haven't chosen to do so here.

Blanchard J — It's almost as if the drafter just hasn't thought about bail. Because if they'd thought about bail they surely would have said either yes, you can have conditional release or no you can't. Rather than leaving, rather than putting in this very loose wording.

Harrison — I would.

Blanchard J — But it's symptomatic of the way the Act's drafted.

Harrison — Yes, well there is this other strange business which caused us problems earlier on where the possibility of detention other than in the prison is only dealt with by a sort of glancing blow in subs (3) rather than coming out and saying well it can be one or the other.

Blanchard J — Glancing blows can be very effective, particularly on the leg side.

Harrison — Ah, I'll leave the cricketing commentary to Your Honour.

Elias CJ It excludes me too.

Harrison Right, now at 47 then I.

Elias CJ I'm a little puzzled by some questions of status in this and they're probably things that I should know the answer to but I've just never really had occasion to think about them. What is the status of a person released on bail? Is there an underlying deprivation of liberty subject to the bond or requirements? And what is the status of a person released on conditions? Is that to be contrasted with bail because there's a statutory system of conditions there? In other words, is it possible under s.92, 79(2)(b), I was just looking it up, that bail is not excluded there either? It may be that there's some blindingly obvious answer to this that may not spring off your lips and you might like to think about it. But I'm just a bit puzzled by some of these questions of status. I don't know whether a warrant of committal is discharged if someone is admitted to bail. I suppose it is.

Harrison No, I can try and answer that fairly obliquely by indicating that in my view, in my understanding, there's a line of authority in relation to the writ of habeas corpus which says that habeas corpus will lie in respect of a person who is on bail under conditions, and there are also cases going the other way, but the notion is that bail itself is an infringement or restriction on liberty because you're still notionally in custody and you have those limits on your freedom of movement and freedom of action. And certainly in some jurisdictions, I think Canada, habeas corpus is not limited to the person who is actually physically detained but will issue to challenge the legality of the ongoing detention even if it is bail. There's one Canadian case where an Ontario doctor from memory was taken to Quebec to face a criminal charge which went on and on. He was on bail at large. He couldn't leave Quebec and that detention was challenged. So my understanding of bail is that you remain under the jurisdiction of the Court. There's a kind of notional detention. The second point.

Gault J Is it detention or custody or are they the same thing?

Harrison Custody, sorry, no that's fair enough Sir. I think it's a notional custody if you like rather than.

Gault J I think it's more than a notional one, it's an actual custody. The concept of bail was the bond of surety and that the custody was transferred to the person who gave the bond. But it was certainly custody. Whether it's detention I don't know.

Keith J These provisions complicate it don't they, by at times simply talking of detention and sometimes detention in custody.

Harrison Yes.

Keith J And when detention alone issues, at least at first glance, it looks as though that means locked up somewhere but.

Harrison Yes and just to sort of set the cat completely among the pigeons, I wonder if to some extent some of these provisions for conditional release and so on aren't dictated by concerns of returnability under the IKO convention. That is to say we don't want people who we might want to send back cheaply whence they came and were not granted an entry permit, we don't want them actually lawfully in New Zealand here so we're going to call it conditional release for example. I think they could have called it bail and it wouldn't have made any difference but all I'm doing is flagging an issue as to whether there isn't that dimension to some of that.

Elias CJ Yes, and on a point that's probably totally unconnected and has it's own statutory system, house release, I mean house arrest, presumably that's custody isn't it? I'm bothered by these question of status and how we may be making some assumptions about what the statutory language is intending to convey.

Harrison Yes, I'm not sure I can really shed much light on that.

Elias CJ Don't, no.

Harrison If bail habeas corpus is issued the precise, and there are suitable conditions imposed, the precise status may not be critical.

Keith J And it's always subject to variation and recall and so on isn't it, depending on what happens and amendment and relaxation and so on?

Harrison Yes, sir.

Eichelbaum What is the status of the warrant, is it to be regarded as suspended?

Harrison I would say that it must sort of remain subsisting there. It has been ameliorated by the grant of bail but I'm not so sure I would go so far as to say that the Court is rescinding it ipso facto by the grant of bail. My argument I don't think needs to go that far.

Elias CJ It's just that it may in fact be helpful to have that clarified because there may be no inconsistency at all with a warrant being mandatory and bail being available.

Harrison Yes, yes I accept that. I'm just not sure that there are any easy answers within this statutory framework and certainly none occur to me having pored over these provisions for quite some time now. If I may continue, in paragraph 47 and following I am with respect

critical of the reasoning of Justice McGrath who begins by attributing, this is paragraph 47, attributing significance to the failure to provide for conditional release but I say that that's at best an expressio unias point. But then at paragraphs, and I'll take Your Honours to this, paragraphs [63] and following of the Judgment, this is Case Volume 1.

Gault J — I'm sorry, which paragraph Mr Harrison.

Harrison — This is paragraph 48 of my Submissions.

Gault J — Yes, in the Judgment.

Harrison — [63].

Gault J — Thank you.

Harrison — Page 100 of the Case. Sorry 101 of the Case. His Honour first categorises the national security interests with which Part IVA is concerned as at the high end of the spectrum in **Choudry** (**Choudry v Attorney-General** [1999] 2 NZLR 582) and then attributes the information protection statutory policy as being central to the differing provisions. He does say, for conditional release and absence of conditional release. He does say because, at paragraph [64] he says, conditional release regime based on exercise of a judicial discretion would have to operate without key information. That would not be a judicial process at all. And at [68] His Honour draws the conclusion comparing Parts III and IVA that no conditional release was provided for because it was impractical to provide for the exercise of a judicial discretion for that purpose in circumstances in which parties would necessarily have to be informed of matters to be reviewed. Crucial information has always been of the classified security kind. Could not be produced at a hearing before the District Court. Such a regime would be unworkable and His Honour considers that was why no conditional release was provided for. But as I submit in my Submissions, it's equally possible, if not more likely, that what His Honour refers to in paragraph [69] as a supposition, that there would be an expedited review process with only short periods of detention, was behind the failure to expressly provide for conditional release. Or alternatively, on Justice Blanchard's theory, they just failed to think about it at all. But the point I am making is that it is with respect drawing a long bow to say first that it was the absence of access to classified security information which actually led Parliament to impliedly exclude any bail remedy, that's the effect of what he says. That is drawing a long bow because there's no support in the statutory materials and there are other explanations.

Can I just also mention, I don't think I mentioned it anywhere else, that as I say in my Submissions, from the detainee's point of view,

better a flawed or limited process of examining whether he should be at liberty than none at all. But also, what Justice McGrath describes as a flawed or unworkable process is actually something that is taken up by the Terrorism Suppression Act. And I'm just trying to find the provision here, whether it's among the provisions supplied in the Crown Bundle tab A. But in any event, the short point is that when the High Court under the Terrorism Suppression Act is called on to review the designation of a terrorist entity or associated entity, the entity or from memory anyone affected by the designation can challenge this in the High Court. And the Terrorism Suppression Act expressly says, if classified security information is used, then that goes before the High Court. The person affected is not allowed to see it and you actually have substantive rights dealt with in this, one might say one-sided way, with the person affected only getting a summary and not the full information. So.

Blanchard J But does the Judge get the full information or just the summary?

Harrison The Judge gets the full information and is responsible for providing a summary. So that, I mean personally I have some problems with that. But that's neither here nor there. The fact is that the legislature has seen that as a workable solution in that context where substantive rights are being dealt with. A fortiori I would submit in bail better to have a process that, aided by a summary because we now know that people in Mr Zaoui's position are entitled to a proper summary, at least with the aid of a summary there can be some attempt to canvas these matters. That is not so unworkable that Parliament should be deemed not to have intended the Court's inherent jurisdiction to grant bail be available. So those are my points about the reasoning of Justice McGrath.

Gault J Now Mr Harrison, I understood Justice McGrath really to make the same point as was made by Justice Paterson in the High Court that you haven't really yet addressed and I'd be grateful for your comment on it. And that is that 114O subs (2) requires that the person be detained until, and then specifies three possible times. And they seem to have read "detained until" as indicating something contrary to bail.

Harrison Well I must admit I accept that that is what Justice Paterson said. I don't read Justice McGrath as approaching the matter in that way.

Gault J Well that's what I understood him in paragraph [58] to say.

Harrison Well he's certainly paraphrasing, he's paraphrasing s.114O there in its entirety. I did not read His Honour as actually resting his Judgment on 1140(2). But to address Your Honour's point more directly, I think you put it to me that the effect of subs (2) is that it requires the person to whom the warrant is addressed to detain until. My response is, and this is the very point, it doesn't require the person to do that, it authorises the person to do that. And that form

of authority to detain is a common form throughout the detention provisions of the Act and can and should be interpreted as merely saying you're okay. You have the authority to detain, you're not at risk of false imprisonment. The warrant allows you to do it. But it doesn't allow you to continue to detain if any of the untils happen. So that would be my response. That s.114O subs (2) cannot bear the weight which Justice Paterson's interpretation placed on it.

Keith J — Justice McGrath in paragraph [58] does make the point doesn't he that the statute thus read in the last sentence makes no express provision for bail but your point again is just the reverse one, isn't it, it doesn't take it away.

Harrison — That's correct Sir.

Keith J — The broader argument you were just making was worrying. You had an argument in two parts because I don't know what, I can't remember what the Crimes Act or the Penal Institutions Act or whatever says about warrants when people are sentenced to long terms of imprisonment. Do they say the prison superintendent is authorised and required to detain the person for the period or simply authorised, because you were implying a moment ago that an authorisation doesn't impose an obligation of detention on the superintendent. But that sounds a pretty chaotic sort of proposition doesn't it in terms of the standard running of the criminal process?

Harrison — Well.

Keith J — Isn't your better point that subs (2) allows in its wide terms, I mean it doesn't allow but it does not exclude, the possibility of a.

Harrison — Well the points are all thrown in together. I can't answer the Penal Institutions Act question. But again, I mean we come down to the question, mandatory against what? And of course the person who's a convicted sentenced prisoner is not, no-one is going to seriously suggest, unless there's an appeal or something, or some other reason, that bail is a candidate. Habeas corpus is not a candidate because the Habeas Corpus Act expressly excludes habeas corpus in relation to a criminal conviction.

Keith J — You were just implying a freedom in the detainer to release somebody simply because they were just authorised rather than required.

Harrison — Oh, um.

Keith J — We don't need to go to that do we?

Harrison — Well no, I wasn't quite making that point. The warrant of commitment may well order the person to whom it is addressed to detain. The warrant itself may have that effect. It may be a command

addressed to that person and it's also, subs (2) says you're also authorised so that you're immune from suit, for example false imprisonment. But that doesn't, that only takes us so far. It still leaves the bail question.

Keith J — Sure, yes.

Harrison — Immune and separate. That's, I think we're understanding one another Sir.

Keith J — Thank you, yes.

Harrison — So going now to the interpretation issues in terms of s.6 of the Bill of Rights page 16. I haven't provided the **Noort**, **Quilter** authorities (**Ministry of Transport v Noort** [1992] 3 NZLR 260; **Quilter v Attorney-General** [1998] 1 NZLR 532), and I wasn't planning to go through them. My point is this, that 54 to 55, the standard for approaching s.6 has been formulated in various ways and as I say there's really no judicial consensus to date as to the effect of s.6. Now I must admit when I, despite having argued **Quilter** and having thought about section 6 over the years quite a lot, I had a kind of a flash of revelation when starting to think about it again this time and that's my paragraph 57. The important words are "wherever an enactment can be given a meaning". I've always tended to emphasise more the second half, shall be preferred. But there is, those words, "wherever an enactment can be given a meaning" have their own interpretation issue. What does, "can be given a meaning" mean? And it is the burden of my submission, as Your Honours appreciate, that that expression goes beyond what we seem to have done so far which is say there's got to be an ambiguity, maybe even to say there's got to be a reasonably open ambiguity before section 6 can bite. But as I argue, to interpret those words of s.6 in that limited way is really to have them do no more than what the common law would do. Indeed in the bail context the common law going back to **Spilsbury**. So that I now am arguing that something more than that is permissible and that the House of Lords case of **Ghaidan** (**Ghaidan v Godin-Mendoza** [2004] UKHL 30), if that's how it's pronounced, is in the United Kingdom provision which I set out in paragraph 58, is sufficiently on all fours to take a fresh look at just quite what s.6 can be said to achieve. If it would assist, I'm happy to spend a few minutes going through those passages from the **Ghaidan** case which I refer to in paragraph 59, that's at tab 12 of the Bundle of Authorities. Would that assist or is it?

Gault J — Well it's just a statement of synonyms isn't it? What is possible, how many times can you say the same thing? I'm perfectly content for you to take us through it. I for my own part have read that Judgment.

Harrison — Well I'm.

Keith J Well it's the one bit that's really compelling out of those references.

Harrison Well I could take you to, well let me just find, there was a point I wanted to make which I can make I think. Lord Millard's interesting because he in fact dissents on the ultimate conclusion and he sets out the contrast between ordinary principles of interpretation, no I'm sorry I'm lost here. Ah yes, at paragraph [60] which is page 19 of the printout, page 19 of 41. Despite dissenting, he seems to me at one, largely at one, with the Majority on the principles of interpretation. He says there, secondly the obligation arises or at least has significance only where the legislation in its ordinary and natural meaning, that is to say as construed in accordance with normal principles and is incompatible with the convention, ordinary principles of statutory construction include a presumption that Parliament does not intend to legislate in a way which put the United Kingdom in breach of its international obligations. This presumption will often be sufficient. It is only where this is not the case that s.3 comes into play. When it does it obliges the Court to give an abnormal construction to the statutory language and one which cannot be achieved by resort to standard principles and presumptions.

Blanchard J I thought Lord Nichols was interesting in saying that it might, this is at para [30], it might require the Court to depart from the intention of the Parliament which enacted the legislation.

Harrison Yes, yes Sir.

Blanchard J Which I find comforting because I remember a High Court case that I decided about 10 or 12 years ago in which I ventured to suggest that with old statutes, even where they had had a meaning attributed to them before, you might now have to give them a different meaning in order to meet the requirements of s.6.

Harrison Yes, Sir.

Gault J That was **Flikinger** wasn't it?

Blanchard J No, well I cited **Flikinger**.

Harrison **Flikinger** was the precursor of that in, at least perhaps not definitively but floating the suggestion, but then we seem to go away from that a little bit in the later cases. Can I just, there's one other point before I leave this. The entire s.3 is set out in paragraph [43] of Lord Steyn's Judgment. I make this point in my Submissions but one notes that in terms of addressing whether s.3 of the United Kingdom Act is broadly comparable to our provisions. Section 3(1) is set out. But s.3(2)(b) says this section does not affect the validity, continuing operation or enforcement of any incompatible primary legislation and then you've got (c) as well. So that I make the point that if you look at sections 3 and 4 there, there are, it's not expressed exactly the same

	but there are similarities to the inter-relationship between s.4 and s.6 of the Bill of Rights.
Keith J	There's also the point, isn't there, that I think Paul Rishworth makes really well under the next tab. I can't see a page number but, oh 253 I see. It's the second page 253, the last full paragraph. You were just saying they were substantially the same but his point is that 3 and 6 are identical because he can't see any difference between can and possible.
Harrison	Yes.
Keith J	Which when I heard him say that at that seminar I thought well, yes, it's good academic clearing my mind of confusion.
Harrison	Yes, well that's certainly, I'm influenced by his insights. And rely on them. Alright, well I needn't take you through Paul Rishworth either. The passages are bracketed with little ink brackets. I conclude.
Keith J	Well he goes further than you, doesn't he? You say, there seems little difference in 60. He says he can see no difference. And I think that's his clear argument isn't it.
Harrison	Yes. So I also address the question of whether s.22 of the Bill of Rights on which I'm primarily relying for my interpretation argument has any interaction with s.5 of the Bill of Rights here. That's in 62 and following and I just repeat that argument. I don't think I need to go through it unless Your Honours have any questions about it. Right so we come to page 19 and the case for granting bail to the Appellant on the assumption that the inherent jurisdiction allows it. I make the point at paragraph 66 that I accept that the existence of the certificate is a matter for consideration but I do characterise it as an as yet unconfirmed expression of opinion and one that is concluded ex parte.
Elias CJ	Well it's also directed at a different issue isn't it?
Harrison	Well that's very much part and parcel of my submission, I make that submission there.
Elias CJ	Yes.
Harrison	The Director's summary which is at Case Volume 4 page 565 is also I submit of evidential significance and I will come to looking at that in just a moment. At the moment I'm just listing what on ordinary principles would be available to the Court, this Court indeed, to weigh up the bail issues. Director's Summary, the RSAA Decision and the sworn evidence. And as I say at 67, it seems basic, simply basic, that all of those matters get considered and weighed in the balance. But

	the Crown has argued otherwise and Justice Paterson agreed with the Crown argument saying that the certificate is conclusive. He rejected all evidence to the contrary. His Honour held it to be irrelevant and inadmissible to rely on anything other than the certificate.
Gault J	Mr Harrison can I interrupt you again.
Harrison	Yes.
Gault J	If we were to reach the conclusion that bail is available in the legal sense and were to take the view that the question of whether or not the matters to which the certificate is addressed are valid, different from the considerations of whether it is appropriate in the circumstances of this case to grant bail pending review of that certificate, would it not be necessary, in view of what has been said about the certificate addressing a different issue, for the Court in making that decision to have the assistance of anything from the Crown directed to the relevant issue?
Harrison	Well, if this was a case starting off at first instance that hadn't gone on for so long and if the Crown hadn't taken the tactical approach which I'm about to mention, the answer is, one would expect the Crown to provide assistance to the Court. The Court would expect that assistance and probably hold out for it. But the tactical approach of the Crown here has been to say we put all our eggs in one basket and it's labelled the security risk certificate. We are not going to assist by providing evidence as to risk considerations. We're not even going to provide an affidavit from the Director of Security to say there is this additional sinister material which I can't disclose. That's inconsistent with the summary, we argue. But they haven't done that. This man has continued to be detained for tactical reasons I would submit. The Crown has chosen to only argue that the certificate is conclusive. It could have conducted its case in the alternative. It could have said this is our position but without prejudice to that here's some evidence, here's some suggestions about conditions for bail and so on. It hasn't. So now, assuming the premise of Your Honour's question, my answer is it would be a gross injustice with respect to say at this juncture the Crown should be given a second chance to improve its case.
Gault J	I can understand that but I think where I sit as distinct from where you stand, one would take the question of bail in the face of a security certificate seriously and one would not simply say, well tactically the parties have conducted in this way, therefore I needn't take it seriously.
Harrison	Well my response to that would be that, and this is really why I'm arguing the case on the basis that there are all these materials to have recourse to. We actually know what the Director says is underlying

the security risk certificate because he set it out in the summary. He says what his reasoning is, he's given.

Elias CJ He hasn't addressed whether release on bail poses a problem to the security of New Zealand as opposed to whether not deporting poses a risk to the security of New Zealand.

Harrison Nor indeed should he in my submission address that issue. That's not part of his role under Part IVA of the Act. And in my submission it would be quite wrong in this particular case.

Elias CJ Well it might be the Minister, it might be someone but surely some evidence. For myself I would find it hard if we get to that stage, to make a determination on the material before the Court without providing the Crown an opportunity to put further evidence before the Court.

Harrison Well.

Elias CJ Directed at the particular issue of bail.

Harrison I understand the point that is being made and I am in danger of repeating myself.

Elias CJ You say it's too late.

Harrison Yes, and it's not, I'm not saying it's too late sort of nya nya nya. It is too late because this man has already been in prison for two years. The case was assembled much much earlier and I think we started off in around March or April this year. It's been fought from pillar to post by the Crown and of course they've succeeded in the two Courts below, so so be it. But it would be most unjust and inconsistent with this man's due process rights for the Crown to be able now to construct a case which it has deliberately chosen not to construct.

Blanchard J But there is a public interest question given the kinds of allegations that have been made. There must be a public interest in whether the man should be released into the community on conditions. And surely that's got to be argued out on a proper basis with both sides knowing with the guidance of this Court what issues should be addressed.

Harrison If I may Sir just for a moment. Yes, well it's not the first time the expression catch 22 has been applied to Mr Zaoui but this is a catch 22 situation. He's applied for habeas corpus. He could have applied for interim release pending the determination of the habeas corpus. We chose not to do that, hoping for a speedy determination of these issues. The Crown has, well, we know that the material that exists and that includes the summary. Now the summary, although, let me put it this way. Although the certificate is addressed to a question

which I argue is quite separate and distinct from the release question, the summary discloses the matters of concern in relation to the ultimate danger issue, the reason why he should be deported. Now if the best reasons that can be put forward for actually deporting a recognised refugee are no better than those in the summary and those reasons are, as I say, low level, indeed according to the Court of Appeal in the rights Decision actually involve legal error in reliance on the definition of security in the New Zealand SIS Act, according to the Court of Appeal that is a fundamental legal error. Now if that is what the summary says, I submit that Your Honours can say well if that is the best that can be said about deporting him, there can be nothing more serious that can possibly be said in respect of the release decision and the Crown has had its chance. The Convention rights, the Bill of Rights entitlements that this man has should vest now and there is sufficient material, for example the psychologist's reports and evidence to which I am going to come, there's sufficient material for the Court's mind to be set at rest without giving the Crown a chance to add more. And of course the Crown has never suggested that it has more to add directed to that issue. Anyway, I have probably said enough on that point. And I can move on.

Elias CJ — Can I just pause a moment. What are you about to move on to Mr Harrison?

Harrison — Well I just wanted to deal with this issue of the conclusiveness of the certificate and whether that can possibly be the case, I was just going to take Your Honours to some useful passages in the **Tan Te Lam** decision at paragraph 72, taking the rest of that as read. (**Tan Te Lam v Detention Centre** [1996] 4 All ER 256)

Elias CJ — Yes, yes, carry on Mr Harrison.

Harrison — **Tan Te Lam** is at tab 16. It deals at page 263 with what has come to be known as the **Singh** principles and Your Honours or some of you may remember that these featured in the argument in the refugee detention case where we had the detention pending removal issue which also arises in **Singh**. The **Singh** principles are then summarised by Lord Browne-Wilkinson at p.265. Basically there's an implied reasonableness limit on a detention for purpose. But in the present context I'm referring to the case at p.266(g) under the heading "Is it for the Court or the Director to determine the facts". The Court of Appeal held the return was an adequate return and the Judge should have made no further inquiry into the facts. And the disputed facts were whether attempts were still being made for the repatriation of the applicant. Over the page, (g), the issue therefore in the present case is whether the determination of the facts relevant to the question whether the applicants were being detained pending removal goes to the jurisdiction of the Director to detain or to the exercise of the discretion to detain. In their Lordships' view, the facts are prima facie jurisdictional and then I omit the rest of that. Then there's a

discussion about judicial review and, 268 a little way in, as was emphasised by all their Lordships in **Khawaja**, in cases where the executive is given power to restrict human liberty the Court should always regard with extreme jealousy any claim by the executive to imprison a citizen without trial and allow it only if it is clearly justified by the statutory language. I omit words. Such an approach is equally applicable to everyone within the jurisdiction of the Court whether or not he is a citizen of the country. In the present case their Lordships can find no indication that the legislature intended the Director to have the power to determine the jurisdictional fact. First such a provision would be very surprising given the basic constitutional importance of habeas corpus. If a jailer could justify the detention of his prisoner by saying in my view the facts necessary to justify the detention exist, the fundamental protection afforded by a habeas corpus would be severely limited. The Court should be astute to ensure that the protection afforded to human liberty by habeas corpus should not be eroded save by the clearest words. Nothing in the ordinance would suggest that was intended. And of course the **Khawaja** line of cases which Your Honours will be familiar with, that supports the evidential point, the non-conclusiveness argument which I am advancing. What I would be proposing to do now is spend a little time, paragraph 73, on the Director's summary. Whether that is now or this afternoon, do Your Honours wish me to embark on that?

Elias CJ I'm sorry, what were you turning to?

Harrison I'm going to look at the Director's summary, this is paragraph 73 of my Submissions. So I'm going on to look, take a bit of a look at selected parts of the evidence directed to the merits of the.

Elias CJ Yes, I think we'll take the adjournment now thank you.

Court adjourns 12.53 pm
Court resumes 2.17

Harrison If Your Honour pleases. I wonder if I could return at the outset to the point that we were discussing just before the break about the prospect of a hearing at which the Crown could adduce further evidence directed to bail issues. Now that is a "what if" question I know, it's not an indication of the way the Court will necessarily decide but it is an important "what if" question and I would like to just make four points about it, having reflected over the break if I may. I'll call what was put to me a supplemented hearing just as a convenient shorthand for what we're talking about and I can put these four points in writing if need be. The points are: 1. (And these are, I should add, made without prejudice to my immediate reaction and response but assuming this were being actively considered eventually). 1. The supplemented hearing proposal properly arises in the context of the exercise of a bail jurisdiction, not habeas corpus for the reason I'll

come to. 2. If there is a finding of arbitrary detention then we look to habeas corpus and that scenario is a different kettle of fish from the bail inquiry because the bail inquiry is directed to the overall merits of release whereas the finding of arbitrary detention in my submission triggers release, albeit arguably on conditions. Thirdly, and this is important and I am stating it now so that the learned Solicitor General can take it on board with respect. The Court should not for a moment countenance a supplemented hearing unless the Crown undertakes to the Court that it has evidence, not merely submissions, because it can make submissions now, has evidence which it would wish to adduce and will adduce directed to bail risk issues and additional to the evidence already before this Court. One should avoid the prospect of a supplemented hearing merely as an academic exercise and only do it really on the urging of the Crown which would have to contend that it has something that it would wish to adduce by way of evidence.

Elias CJ Well, the supplemental hearing need not take place if the Crown doesn't wish to put further evidence.

Harrison Precisely and that is the point that.

Elias CJ But some inquiries may be required to find out whether the Crown would wish to put material before the Court.

Harrison Yes.

Elias CJ It may all be moot anyway.

Harrison It may be academic.

Elias CJ It may be that the Solicitor General, if we reach that point, says that the Crown doesn't want to put any further matters.

Harrison I'm putting that proposition forward right now so that the Crown, if need be overnight, would be in a position to respond to that point. And fourthly, in my submission, a supplementary hearing could and should be a resumed hearing before this Court, for reasons of expedition if for no other.

I return to the Submissions at page 21 and my reference to the Director's summary. This is at Case Volume 4 page 565. As I note in paragraph 73, this was in response to the Judgment of Justice Williams and I have given the relevant passages from His Honour's reasoning on the summary point. The Judgment is reported and it is at tab 18 of the Appellant's materials, I don't need to take Your Honours to it. But those passages show what Justice Williams had in mind by way of what natural justice required Mr Zaoui to be provided with. Then the summary of allegations was supplied to the former Inspector General under cover of a letter from Crown Law which is two pages before the summary itself in Case Volume 4 page 563.

There's a reference to part of the reasoning of Justice Williams in that Crown Law letter. Paragraph 2 indicates that the Director is responding and that was copied to Mr Zaoui's legal advisers at the time. So the summary of allegations, page 565, begins by setting out the factual assertions and sets these out. There are many points on which Mr Zaoui would wish to quarrel including the reference to Mr Zaoui's travel video looking suspiciously like a casing video. Then paragraph 4 sets out the previous history in Europe, Belgium conviction, the activities in Switzerland and the – over the page – the in absentia conviction in France. Then the summary goes on to say paragraph 5.

Keith J Is 4 questioned in any way or are they just.

Harrison It's questioned in the sense that what is said there undoubtedly required to be placed in a perspective and for the sake of simplicity the Refugee Status Appeal Authority decision places it in a perspective.

Keith J Yes, but the actual facts stated there about being denied and leaving places and being convicted and so on. It was just that you said.

Harrison I think largely that's right.

Keith J It's just that you said Mr Zaoui would question some of the things in 2 and I just wondered what your position was on 4.

Harrison Well it's more that they need to be, they can be put in a much fuller perspective. One might quarrel about whether he was expelled. In fact he and his family were kidnapped and removed rather than using any lawful process of expulsion.

Keith J Right, right.

Harrison But that's a matter of detail. The point about paragraph 4 is that these are what paragraph 5 calls the above public facts about which classified information is held and it is a necessary inference I suggest that the classified security information appears to originate from the enquiries in each of France, Belgium and Switzerland but that need not detain us because in paragraph 6 the Director goes on to note that the Belgians and Swiss agreed to provide an unclassified summary or version so that it's really, by inference, it's the French which are the hold-outs. So those anyway are the facts. The facts are, leaving aside this matter of interview and the video tape, it is basically Mr Zaoui's previous history of convictions or other adverse dealings in Europe. Those are dealt with in, I'm addressing the dangerousness, the risk issue here, I'm not just trying to sort of challenge the certificate. In the context of looking at the risk issue for release on bail, that is what is relied on. The summary of the Refugee Status Appeal Authority decision and that decision which is in Case Volume 6, will show that

in, leaving aside his Algerian convictions and death sentences in absentia by the military regime, the Belgian outcome was an acquittal at first instance, a conviction on appeal, a sentence of four years imprisonment suspended. So he was actually placed at liberty immediately. There was a period when he wasn't released but in effect that sentence was suspended. The French conviction, as the RSAA decision notes, involved events some years before. He had been interviewed by an investigating magistrate. There was no prosecution or arrest. It was only once he was on the other side of the world that there was a prosecution of him in absentium and he was sentenced to three years imprisonment suspended immediately and banned from setting foot on French territory for eight years. All of this is in the RSAA decision. But the point here is that these are the facts which the Director identifies as regarding the assessment of danger to the security of New Zealand .

Paragraph 7 page 566, the Director relies on part of the definition (c) of the definition of security. If we go to the Respondent's Casebook, that definition is set out at tab 9. And what this amounts to is that the test of security in New Zealand applied by the Director did not extend to a concern in terms of (a) protection from acts of espionage, sabotage, subversion, (b) foreign capabilities etc. It related to (c) but deleting the last three words or economic well-being and it did not relate to (d), that's a process of analysis which also appears in the Judgment of Justice Glazebrook in the rights Decision. I'll give the reference if need be.

So applying that definition, at page 567, the Director then sets out the whole of his reasoning leading to an assessment of risk and I'm sure Your Honours have had the chance to read that. I summarise it by submitting that the concern is adverse impact, ultimate impact on New Zealand's international well-being amounting to a perception that New Zealand has a lower level of concern about security than other like-minded countries impacting adversely on New Zealand's reputation with such countries and thus on New Zealand's international well-being. And over the page, the same concern is expressed in similar ways.

Now, if we take this at face value, my submission is that it must be regarded as the high water mark of concern about Mr Zaoui's dangerousness. At the bail level there cannot be some other concern and there cannot be any greater concern than this unconfirmed expression of opinion. So that is why I argued before lunch that the Court is actually in a position to say well, this is as bad as it gets in terms of Mr Zaoui's dangerousness. In fact the Director doesn't actually say there's a danger to anything. He doesn't even say that there's a danger to New Zealand's security. He talks of an adverse impact, not a danger. Far less, in terms of the rights decisions standard, a serious danger. And as I say, in 73, this is at best an extremely low-level threat to New Zealand's security interest.

Now at paragraph 74, I acknowledge that the Crown has applied for leave to appeal the rights decision. I have to say that in correspondence including a letter to the Solicitor General direct, we asked that the Crown expedite the leave process by getting on with providing its submissions in support of the leave application. That has not happened. There has been no response to our request to expedite. And one wonders why, with respect, why that would be so. The Majority judgment in the rights decision case, if it stands or if leave is refused, raises some significant concerns about the approach of the Director which I have identified. In simple terms, if I may just have one moment here.

If we go to paragraph 124 of the Judgment of Justice Glazebrook, this is tab 3 of the Supplementary Bundle. Justice Glazebrook, with whom Justice Anderson agreed, says at paragraph [124], this means that the Inspector General's view that international human rights obligations are beside the point is incorrect. It also means that the Inspector General's view that the Director was correct to rely on the defence of security in the SIS Act was wrong, at least insofar as that definition does not coincide with the manner in which the term is used in the Refugee Convention as brought into New Zealand law by 114C(6). A comment that the purpose of the SIS Act definition of security is to define the powers of the Security Intelligence Service and directives. It would not be expected that such powers would be defined too restrictively as that would unduly constrain their activities. As will become clear below, the definition of security in the SIS Act serves quite a different purpose from the terms used in the Refugee Convention.

Now if that reasoning stands, and I know it's subject to a leave application, it must follow that there is a fundamental error of law in the making of the certificate at all. The wrong and unduly unfavourable test, unfavourable to Mr Zaoui, has been applied and one would have thought end of story. Now this can only be dealt with in a preliminary way at the moment but the strength of the case against Mr Zaoui both on the law and the facts, as asserted in the summary, is a matter that should go into the balance when considering whether bail should be granted.

Keith J — It's really, Mr Harrison, the factual allegations though isn't it that bear on the risk of the possibility of bail? So it's the factual matters.

Harrison — Yes, but also it becomes all the more horrendous in my submission if this man is being held on the basis of a certificate which is flawed in law and has been all along. That is the point that I am making.

Keith J — That's the other case though, isn't it?

Harrison — Well, we're entitled to the benefit of that Judgment at present.

Keith J	Yes, yes.

Harrison	The Judgment does exist. I'm not trying to sort of short circuit the other appeal process. But I feel duty bound to make the point. We go to the evidence though and I've finished that point. I'd like to just go through one or two of the Affidavit's - mainly the expert, Dr Zeussman - his evidence and I'll just take you to the chapter and verse of that. First of all, Dr Zeussman's Affidavit which is in Volume 2 of the Case at page 305. As he says on page 306, he's a senior consultant with the Psychological Service of the Department of Corrections. Paragraph 5 he refers to the amount of assessment contact he's had with Mr Zaoui. Paragraph 8 last few sentences, my clinical estimation was that there was a very low risk of interpersonal violence by Mr Zaoui. It was also noted there was insufficient basis to comment on risk of or potential for involvement with other forms of violence. I clarified that in cross-examination. 9 – Based on my observation and feedback, Mr Zaoui has represented himself and behaved in his environment in a manner that reflected interpersonal and affective characteristics of sincerity, humility, respect and empathy as well as expressing and acting interpersonally upon pro-social values. These attributes are consistent with the earlier period of assessment and support continuation of my clinical estimation that Mr Zaoui represents a very low risk of interpersonal violence. He notes in 10 that he experiences psychological sequelae. He notes in 11 that he appears to be experiencing chronic symptoms of post-traumatic stress related to past experiences of imprisonment, solitary confinement and torture potentiated by on-going imprisonment. And the rest of that I rely on but need not read out.

Where are we. 12 is relied on but I needn't read it out. 17 - incarceration contributes significantly to continuation of the psychological distress experienced by Mr Zaoui. Until his situation is resolved he will not in my view be able to regain his mental health and functioning. Then he mentions in 19 his inability to visit the Mangere Centre.

22 – his opinion is that Mr Zaoui is suitable for release on bail to the Dominican Friary given my estimation of a very low risk of interpersonal violence. For example Mr Zaoui is unlikely to act impulsively or instrumentally in an aggressive or criminal manner against members of the public. In expressing this opinion of very low risk I note that I have no information on which to comment on any risk of involvement by Mr Zaoui with any other forms of violence.

Now he then gave evidence before Justice Paterson and that is at Volume 3. The Notes of Evidence are at page 434 on. And in his evidence in chief, page 434 line 35, he confirmed in effect that he's the most senior psychologist. Over the page he confirmed he was called on regularly to assess the suitability of individuals for release

on bail. And just generally for release from prison. Halfway down that page, he in effect indicated that he had had much more time than usual, than the norm he says at line 34, more intensive contact in making his assessment. I asked him at the bottom of the page in effect whether the very low risk standard was part of an accepted scale or terminology. He said yes. And he confirmed over the page that the expression very low risk of interpersonal violence is at the very bottom end of the scale. You can't get a lesser assessment than that. Then I asked him about what his formulation, no information to comment on other forms of violence meant. And he said at p.436 line 15, I am simply making a statement that whatever information may be available through that avenue, that is in effect he means to the Director of Security, was not accessible to me and any form of violence that might be implied by the certificate or the information is not something I can comment on because I haven't seen it. And he agreed it was a neutral disclaimer, not sort of a loaded proposition.

I asked him at 437, line 28 would you be prepared to go so far as to say not only is he at very low risk of committing interpersonal violence, but he is at very low risk of any law breaking or anti-social behaviour if released on bail. If considering the issue of risk within the community of committing any offence or serious offence, disturbing public order or interpersonal violence or flight for that matter, I would say Mr Zaoui appears to be at a very low risk. I asked him about the efforts he made to visit the Mangere Centre and, to summarise what he says at p.437-8, he says he attempted to get access, he was responding to a Court Order that ordered him to assess the suitability for transfer to the Mangere Centre. He was prevented by a senior person, this is line 18, the manager of Refugee Services, from accessing the Mangere Centre. So that covers that.

The two Affidavits that relate to where it is proposed Mr Zaoui be bailed to are the Affidavits of Father Leamy and Father Murnane and they indicate that they are concerned about him. For example Father Murnane of the Domincan Brotherhood says in paragraph 4, page 235, we are completely confident of Mr Zaoui's peaceful nature and character to make this offer of accommodation to him. He also says at paragraph 2, speaks of frequent contact and Father Murnane is impressed by his breadth of view on religious matters and his desire for friendship between Islam and Christianity.

And the other Affidavits ranging from people who've met him in prison such as the former Human Rights Commissioner Margaret Bedggood and Mr Bennegadi, who has known him for a considerable period, support this.

Now, and again I don't think, page 23 of the Submissions, I won't go through those reports, all of that is there to be read. I won't go through the RSAA Decision unless Your Honours wish me to. The

analysis is there as an appendix available to be read if Your Honours wish to go into that.

I do make the point about the legal constraints on Mr Zaoui's behaviour and associations imposed by the Terrorism Suppression Act, while not for a moment suggesting he needs such restraints, it is part of the background to release of a security risk assessment detainee that the law prevents a great many things that there might otherwise be a concern about in theory and that is part of the picture.

Paragraph 77, Mr Zaoui indicates a willingness to submit to appropriate bail conditions and says basically he's not going to abscond, he's got nowhere to go. Indeed he has no travel document to do so. That's all I want to say about bail.

If I turn now to habeas corpus, page 24, paragraph 78 we summarise the reasons why we contend the detention is arbitrary. I identify two issues in paragraph 80 where the habeas corpus is available to remedy any arbitrary detention which was otherwise pursuant to subsisting lawful authority and whether the detention is to be characterised as arbitrary.

I begin with the second of those. The delay issue has moved on from what Justice Hammond considered as arbitrary because, as I set out in the proceedings, the Crown decision to appeal, to seek leave to appeal the rights Decision, even on the most realistic forecast I submit, we cannot expect a determination of the leave application until the end of this year at best and if leave is granted, we are looking at a detention until the end of next year. If leave is refused, we are looking at a detention until the middle of next year. That's my estimate of how long it would take to complete the Inspector General's review, all going well.

And my submission obviously is that in looking at whether a detention has become arbitrary one looks forward as well as backward into the present time. One is entitled to say, well without intervention we are looking at a detention that is now almost two but will be two and a half to three years before the process is ended. And that per se I submit is arbitrary, judged by New Zealand standards.

Now that I think covers orally I hope without too significant omission down to paragraph 89 on page 27 of the Submissions.

I note there that Justice McGrath appeared to accept the proposition that enough delay sufficient to render the detention inappropriate or unjust would result in an arbitrary detention, but in my respectful submission, erroneously rather than focusing on the issue in a New Zealand context, Justice McGrath went almost straight, I hope I'm not misrepresenting His Honour, almost straight to **Chahal** and said well this looks like **Chahal** and **Chahal** didn't regard the delay there as

excessive. So I want to spend a minute or two on **Chahal**. It's in the Human Rights Commission's Case Book Volume A at tab 14.

Now **Chahal** takes a little bit of getting into. There was a very long detention but it went through various stages. There were various complaints of breach of the European Convention, not the ICCPR. The ones that are relevant in the extended headnotes start at page 416 which is paginated page 144. There's a heading 4. Right to liberty and security, Lawful detention with a view to deportation. And then the complaint of breach of article 5.1 is summarised there and at the end of (d) on the next page just before (e) starts, the conclusion is no violation of article 5.1 on the count of the diligence or lack of it with which the domestic procedures were conducted.

Page 418 the extended headnote at 5 deals with complaint of breach of article 5.1 which was access to judicial review of the lawfulness of detention and the conclusion just before heading 6 on the next page is violation of article 5.4, the access to judicial review provision.

If it wouldn't cause offence, I'm going to use a throat lozenge.

Elias CJ — That's fine.

Harrison — Try and put a stop to this coughing. Now then going to the actual text of the Judgment about which I wish to make some points, let me find it. Page 464 which is at p.168 of the pagination.

So at paragraph 108 article 5.1 of the European Convention is set out. This is the finding, the article 5.1 finding is the one that Justice McGrath relies on. Now we can see immediately that it is a quite different provision from our s.22. It provides that everyone has the right to liberty and security of the person. No-one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law. And then there's specific provision if the lawful arrest or detention of a person against whom action is being taken with a view to deportation. So that the legal issues arising under that article which was found not to be breached, I submit, are quite different from the s.22 issues, and the reasoning of the Court demonstrates that. He was being held with a view to deportation. He had an initial determination of refugee status quashed and I think at this time that remained the case. The issue was whether he'd been deprived of his liberty within that exception which was common ground and in accordance with the procedure prescribed by law. And the conclusion at the top of the next page, 465, two lines down, the Court says, indeed all that is required under this provision is that action has been taken with a view to deportation. It is immaterial whether the underlying decision to expel can be justified and they then go on to say it's only if the procedures are not prosecuted with due diligence that the detention will cease to be permissible. So that was the inquiry. Not in overall duration

arbitrary or excessive or disproportionate but in that context. And they decided that because of the seriousness and weightiness of the issues involved.

Elias CJ — Sorry, are you suggesting that the distinction is significant? Does it matter?

Harrison — Yes, I'm submitting that there is a narrower inquiry here than simply whether the detention, stepping back, was arbitrary overall because in effect what you have is the interpretation of an exception to the right. The right is to liberty and security of the person and not to be deprived of liberty save in cases. And what they were doing was looking at the applicability of the exception. That, as I see it with respect, is a quite differently structured provision to simply asking, well overall has this gone beyond the pale. And the more useful authorities are the authorities under the ICCPR to which I referred Your Honours this morning. Such as **A v Australia** and the Canadian case, **Ahani**, where the Court went the other way on the duration issue in part at least. So that's my point about this. It really addresses a differently worded provision and should not be regarded as providing great assistance to the present inquiry.

Page 467 does assist us though because there is article 5.4 set out there which is very akin to what the Human Rights Committee has said in the process requirement of the guarantee in the ICCPR. And there they held that, page 468, and this is consistent with the authorities I referred to this morning, that the review has to be not limited to lawfulness in the strict legal sense but must go to the merits. For example they say, at paragraph 130, the Court recollects that because national security was involved, the domestic Courts were not in a position to review whether the decisions to detain Mr Chahal and keep him in detention were justified on national security grounds. Next page – the Court recognises the use of confidential material may be unavoidable where national security is at stake. This does not mean however that national authorities can be freed from effective control by domestic Courts whenever they choose to assert that national security and terrorism are involved. They refer to the Canadian situation and the fact that techniques can be employed. It's curious, with respect to Justice McGrath, that he relies on **Chahal** on the duration point but doesn't rely on this reasoning when coming to the conclusion that what we argue for would have been unworkable. So that there was a breach, there was a violation of article 5.4. Now as Your Honours may well know, this part of **Chahal** resulted in a complete restructuring of the British system for dealing with this and if my memory serves me right, they then introduced what's now known as SIAC, the Special Immigration Appeals Committee which has got three high powered Judges on it and has a quite sophisticated process and we're seeing some major jurisprudence come out of England under that system.

So my point is therefore that, paragraph [91], Justice McGrath placed far too much weight on the ultimate outcomes in other cases and engaged in insufficient scrutiny of the real merits of the arbitrary detention claim.

Now habeas corpus lies for an arbitrary detention. The Judges who dealt with this issue, with the exclusion of Justice Hammond, have shortcutted it by saying, we don't think it's an arbitrary detention. They haven't looked at the underlying issue of principle. The only Judge who directly deals with it is Justice Hammond who says, yes, habeas corpus is available for an arbitrary detention. I've set out our arguments, page 28 and following. Without in any way detracting from the importance of the argument, I don't propose to troll through it or even trawl through it unless Your Honours have any question about what we've said, I'll move to the transfer issue.

Right, now the transfer issue is dealt with in paragraph 32 of the Outline of Submissions. I begin by referring to Justice Blanchard's Decision in **Samleung International Trading Co Ltd v Collector of Customs** [1994] 3 NZLR 285, which is also useful in the context of the main bail argument and, although I'm sure it's not been overlooked, it's at tab 1 of the Supplementary Bundle. There's actually a reference to the leading article by Master Jacob, this is at page 291 of the report in **Samleung**. And this again supports the bail argument where Master Jacob says the High Court also has power under its inherent jurisdiction to render assistance to inferior Courts to enable them to administer justice fully and effectively. And the examples are given including admit to bail. That also of course is a point relevant to the High Court's jurisdiction to order transfer which I note the Crown continues to deny.

The case of **R v Smith** which is not supplied, but Your Honours will remember it. It was a question of what could be done about the cases which needed to be dealt with in the wake of the Privy Council ruling and it is clear from **Smith's** case that the finality of judgment principle, or here what the Crown prefer to characterise as functis effecio, should not erode the inherent or implied power of every Court to correct and remedy injustice.

Alternatively there is s.16 of the Interpretation Act which Justice McGrath relied on. And equally I suggest s.13 of the Interpretation Act.

Gault J — What does the word warrant in s.15 of that Act mean?

Harrison — Sorry, s.15 of the Interpretations Act?

Gault J — It talks about the power to amend, revoke or reissue among other things Warrants with a capital W.

Harrison I don't have 15 in front of me at the moment.

Gault J Come back to it.

Harrison Thank you Sir. I won't dwell on these process or remedial issues because I anticipate that the real issue here is what I deal with under the heading "The Court or the executive" at page 33, paragraph 109 on. If we just go back to s.114O for a moment. The position is that by comparison with the other corresponding detention provisions, one does not see in 114O (1) any provision directing the Judge to consider alternative places of detention. That is not addressed there, whereas the comparable provisions, the comparable other detention provisions in the place of detention analysis in the table can be seen to expressly address that issue. Yet if we turn to 114O subs 3, it is undoubtedly and now common ground the fact that detention in other premises than a prison was something that the legislature contemplated as occurring. That I describe as a lacuna in the statute. It simply doesn't, it's made an incomplete, it's made itself clear that it's made an incomplete machinery provision if you like or failed to provide the machinery that one would anticipate. So I make the point.

Blanchard J What's the status of the Mangere Detention Centre?

Harrison It is authorised as a place of detention under s.128 of.

Elias CJ Of the Immigration Act.

Harrison Of the Immigration Act.

Blanchard J Authorised by who?

Harrison Well, we go back to the table if I can find it. If you go to the places of custody you can see that under the fourth one along, 128(7), the place of detention is a penal institution or some other premises approved for the purpose by the Registrar.

Blanchard J Who's the Registrar.

Harrison The Registrar of the Court.

Blanchard J Which Court?

Harrison The District Court.

Blanchard J So it has to be approved on an individual basis in each case.

Harrison No, the position is that the.

Keith J 128(6) isn't it?

Harrison The position as I understand it is that the Mangere Centre has been generically approved as an alternative place of detention under 128(c). If we go to the Mangere.

Elias CJ 128(c)?

Harrison Sorry, 128(7).

Keith J Well isn't it 128(6)? Because (7) is about a particular case isn't it? I don't know, I mean 128(6).

Harrison 128(6). There's also, I can also assist by referring to.

Keith J Sorry, 128(6) actually is just overnight.

Harrison I can also refer to the Mangere Centre manual which has materials attached to it, volume 3 of the Case at page 246.

Blanchard J Volume 3?

Harrison Yes. Sorry page 546. There's various approvals of the Centre including that which is set out on three consecutive pages. Those are set out.

Keith J 546 is just the overnight provision isn't it?

Harrison Yes.

Elias CJ But this approval purports to be in terms of overnight detention.

Keith J Yes, well that's what 128(6)(b)(i) is about.

Elias CJ Detention, yes.

Keith J So in terms of a longer detention?

Harrison Well all I can say is that it is definitely approved for those purposes.

Blanchard J Well it can only be approved in terms of the statute.

Harrison Yes.

Blanchard J But the statute may in this respect may be deficient again, that's what I'm trying to get at.

Harrison Well.

Keith J Well subs (7) is for more than 48 hours. I mean there's a gap between overnight and 48 hours I suppose but.

Blanchard J	But that's on an individual basis by the Registrar.
Harrison	Page 462 of the manual describes the, under A1, describes the Centre as approved premises for the purposes of detention under s.128 of the Immigration Act. And I was going to take Your Honours to these provisions anyway. I can do so now. Over to page 464 there's a section headed "Custodial Function of Person in Charge".
Elias CJ	Is this in terms of the manual?
Harrison	This is the manual.
Elias CJ	Yes, I think we're troubled about the statutory basis. Because it may tie back into the interpretation of 114O.
Blanchard J	I have to say that what is beginning to trouble me here, and I asked the question originally in all innocence, is that it might be another example of this statute getting used for purposes for which the particular provisions were not originally intended. Again, the same problem as in the Refugee Council case. Where they've just done a patchwork job without going back to basics and saying, well where's the real authority?
Elias CJ	And it looks indeed, if you go further through 128 because, and I've been wondering about this myself in terms of whether there's any connection with the Penal Institutions Act. But there is because the person detained under subs (7) which has to be in a place approved by the Registrar shall be treated for the purposes of the Penal Institutions Act as if that person were an inmate awaiting trial.
Harrison	Yes.
Elias CJ	Well that could have some, that could be quite significant in terms of the argument, in terms of your principal argument it seems to me. As to whether this is animal, vegetable or mineral. Are they all treated as if they're in penal institutions and does that?
Harrison	Well, no they're not.
Elias CJ	Does it have implications for whether they're in custody?
Harrison	Well, there's a horizontal line in the table, second page Remand Status. And that identifies the provisions including s.128 subs (10) and we find that in some instances that is provided for. In two instances, including s.114O, it is not.
Keith J	It's only half provided for though isn't it, in subs (10) because that's people who are being held in a penal institution.
Harrison	Penal institution, yes, yes.

Keith J	As opposed to being held somewhere else. Somewhere else apparently being approved for the purpose by the Registrar. And yet, I mean this document that you've taken us to is a Labour Department document isn't it and.
Elias CJ	Which is apt for the overnight accommodation.
Keith J	Mm. The only authorisation we've got by the Secretary for Labour is the overnight authority under subs (6).
Harrison	Yes, well it is clear that the … is used for much longer term stay than that and has been approved, is approved either by the Registrar or by Judges generically as the place to which the alternative to a penal institution which people are sent to under the.
Gault J	Did I read somewhere that it was expressly approved as a centre for the Tampa refugee claimants?
Harrison	It was. I'm not sure whether, that may have been an issue which arose in the Refugee Detention case rather than in the evidence in this case. Can I just say that in my submission the provisions identifying in effect remand status for those who are to be in the custody of a penal institution probably reflect the starkness of the alternatives. It's simply the Legislature indicating that they should not be treated as sentenced prisoners. They either get, the options are, treated as a sentenced prisoner or treated as a remand prisoner and it's seen as more appropriate that if they have to be in a penal institution they have one status or another and they're granted remand status. That says nothing, I submit, about the nature of the detention beyond a kind of administrative classification.
Elias CJ	It might be quite significant though, just now looking at subs (10) in terms of the initial placement.
Harrison	Yes, sure.
Elias CJ	Because on one view that's a direction that someone detained under this legislation should be treated as a remand prisoner.
Keith J	If they're in a penal institution.
Harrison	If they're in a penal institution.
Elias CJ	Yes.
Harrison	But if they.

Keith J	But if they're not, if they're detained somewhere else.
Harrison	That's my point. That it is only significant if they are to be actually detained in a penal institution and the Legislature simply says well we don't want them treated as sentenced prisoners, that would be going too far. But we clarify the position.
Keith J	Well that relates to the Crown's argument that in Part IVA the limiting of the form to penal institutions is to be explained in part by the lack of power to control people in other institutions but there seems to be the same gap here doesn't there, 128?
Harrison	Well, my short response is that there's no gap.
Keith J	The gap helps you doesn't it?
Harrison	Mm?
Keith J	I thought the gap helped you there because part of the argument on the Crown side in respect of IVA is that there is no control, there is no regulation that the status of people outside a penal institution under IVA and therefore it's okay for the form to be limited to penal institutions. Well there's exactly the same problem here and so the Crown on that basis, to be consistent I suppose, would be saying that there should be no detention in other premises under subs (7).
Harrison	Mm, yes. I mean I understood and accept the force of Your Honour's point but my rejoinder to the Crown's submission is that there is in fact no gap in terms of control.
Keith J	Yes.
Harrison	There is control.
Keith J	Simply arising from the fact that you're detained.
Harrison	No, and let's deal with this because it's cropped up. Section 140 of the Immigration Act subs (1), every person to whom a warrant of commitment is addressed under this Act is justified in detaining in accordance with the terms of the warrant etc. Subs (4) where any person in this subsection referred to as the detainee is held in custody under this Act, I omit words, the person responsible for the detainee's custody shall inform the detainee of their rights. Sorry, that's not so much it as subs (5). A person to whom a warrant of commitment is addressed may take such reasonable measures as are necessary to give effect to the warrant.
Keith J	Yes, sure, sure.

Harrison Now there is also an interpretation issue, I really don't want necessarily to go into it, about whether s.140(a) might apply beyond the person detained under 128. That is to say all you need is that the person be in charge or premises approved under 128(7) and they then, provided they're a person to whom a warrant is addressed, they have all these powers.

Blanchard J If Mr Zaoui were sent to the Mangere Centre, presumably that would be done under a warrant of commitment and s.140 would apply.

Harrison Yes, on a transfer it would be in effect an amendment of the warrant of commitment.

Blanchard J Yes.

Harrison And in my submission it really doesn't lie well with the Crown to say, well to achieve that outcome there would need to be amending legislation. The Crown has specifically enacted this regime with such powers as are in it. One can say make the statute work, **Northland Milk** [1998] 1 NZLR 530, and by all means provide it with a workable interpretation but for the Crown to say well yes, the statute contemplates these alternatives but we've fallen short on our machinery provisions is, as I submit, not.

Keith J So that 1990 amendment that you've so helpfully taken us to, it does fill all these holes.

Harrison Yes.

Keith J So that means that in your remand status, the relevant column should actually be supplemented by reference to 140 subs (5).

Harrison Yes.

Keith J So in some cases in addition to the remand status in a prison, in other cases that's the sole reference.

Harrison Yes, yes.

Keith J Do you know why that was added in 1999 because I see it's, subs (4) got amended but subs (5) actually got added.

Harrison I think the 1999 amendments were rushed through in anticipation of some rumour that a boatload of boat people were somewhere en route to us and all of a sudden there needed to be a whole lot of beefing up of these provisions and they were.

Keith J Isn't that another provision because 1999 number 16 is the Part IVA and part 6(a). So.

Harrison	Ah, you might be right.
Keith J	So it must have been some comprehensive look at, well sort of comprehensive, at refugees which was a response to the **Butler** [1999] NZAR 205 judgment wasn't it?
Harrison	Well Ms Manning thinks that that was the boatload amendment but we'd have to go back to Hansard.
Blanchard J	That's my recollection too.
Harrison	You'd have to go back to Hansard to be 100% sure. I do remember looking at the Hansard on an earlier occasion and the boatload issue certainly features in the Hansard record of the debate at the time it was enacted.
Blanchard J	Turns out to be a fictional boatload.
Harrison	Yes, yes. They were probably relying on New Zealand SIS information, I'll be cruel enough to say.
Keith J	ASIS I think.
Harrison	So if I may. Back to the essence of the argument, I argued that s.114O contains a lacuna. Therefore to argue expressly Ananias (?) as Justices McGrath and O'Regan do is really inappropriate. And the argument is really set out at paragraph 112. If you assume that I've lost my other argument that detention under 114O is mandatory and outright release is not available you then must apply a Bill of Rights analysis to the interpretation issue. The Court or the executive, the District Court or the executive. Who gets to make this decision. And I say assume the existence of a Part IVA detainee, he must by law be detained but he is plainly unsuited to detention in prison and plainly suited to detention in some alternative place. The effect of s.22 and s.23 subs (5), that is treated with humanity and with respect for inherent dignity of the person. If you take those values, apply s.6, the interpretation consistent with those values is that the Judge has the power to determine which of the two alternative places of detention the individual is to be detained at. My argument in no way requires the executive to create a place. I am simply saying that if at the time this decision is being made on the facts of the individual case there is an alternative place of detention within the contemplation of 114O subs (3) in existence, then it is as a matter of interpretation Bill of Rights consistent to have the Judge able to make that decision to put the detainee in the right place. There is no provision, there is no point at which the executive is empowered to make that decision and there is a point of time at which it is eminently suitable for a District Court Judge to make the decision.

Gault J	Does there not need to be some executive advice as to what sort of places or institutions were or were not available?

Harrison	Well, unlike other provisions in the Act, s.114O does not say that the alternative places of detention has to be approved by anyone outside the Court .

Gault J	But one wouldn't expect the Judge could contemplate a holiday camp.

Harrison	I accept that there are some limits to be read into s.114O. How far they go is a matter of interpretation. The limit, as I see it, is if it's not a prison, then it's got to be other premises in which the person is detained and there must be a person in charge of them. So for example I would have to concede that you couldn't say that like a home detention where the person is home alone and living in their own house alone, that wouldn't be premises in which there is a person in charge to whose custody the detainee could be entrusted. But beyond that limit, it may be conjectural which, I remember the Butlands Holiday Camps were said to be run fairly.

Elias CJ	Like prisons.

Harrison	Fairly rigorously. But that's hypothetical. At the end of the day what we do have is the Mangere Centre. It plainly has a person in charge and I was going to take you through the rules. The rules show.

Blanchard J	On that argument the Dominican Priory would qualify.

Harrison	Well it might well.

Blanchard J	I just don't know that it won't go that far. Surely it's got to be a public facility of some kind.

Harrison	Well I wouldn't be prepared to make that concession. It obviously has to be, it has to be a place of effective detention it says. Because they've got to be premises in which the person is detained. It can't be open home. There has to be something which in law is detention. There has to be a person in charge. And you might well say that that means a person who has control over the detainee in terms of s.140.

Elias CJ	Does s.128 apply here? Because if it does, the only options seem to me to be a penal institution or premises approved by the Registrar.

Harrison	No, with respect s.128 doesn't apply.

Elias CJ	It doesn't apply.

Harrison	It can't apply because although Mr Zaoui was initially no doubt detained under 128, that detention ceased. He was detained under 128 and the 128 warrant of commitment continued for a period. But

it was replaced by the Part IVA warrant and s.128 ceased completely to figure at that point and cannot now be revived. So he's under 114O.

Elias CJ I know he's under that.

Harrison For better or for worse.

Elias CJ But is he, are they exclusive of each other?

Harrison Yes, in my submission yes. Because the scheme of 128 is that the Immigration Services basically use it or lose it. They start up this detention which may then be the subject of periodic extensions. If he was under 128 then he could be conditionally released. And that would be the end of the story. But he ceased to be detained under a 128 warrant and he became detained under, he became subject to a different form of detention. That form of detention does not require particular premises to be approved. The choice is stark. Either the Court approves where to go on an ad hoc basis, which is my argument, or the executive can suspend the operation of the second alternative in 114O subs (3) and decide at its discretion to approve the place by prescribing the form of warrant of commitment.

Elias CJ Well I may have just read this too quickly and missed something but I can't see that s.128 does have anything to do with conditional release. It seems simply to be about the institutions in which people can be detained. And I don't at the moment see why it doesn't apply.

Blanchard J You've got to read it with 128AA I think.

Elias CJ Oh, AA, sorry.

Harrison Dealing with the first point yes. The conditional release arises under 128AA and its subs 1(b) which plugs into s.128.

Elias CJ Oh, yes, I'll read it more carefully later.

Gault J It seems to me Mr Harrison that the provision of s.140A might also bear upon the type of place or institution involved. Because the person to whom the warrant is addressed must be a person capable of exercising the kind of control that is contemplated in that section.

Harrison If s.140A applies, and I've argued that it does, but that's a question in itself, I don't have a difficulty with that. I'm not trying to argue Sir for an open slather alternative premises. I am simply saying, well let me put it this way. It seems that there is no difficulty from a practical point of view, from a detention control point of view, with the Mangere Centre. Administrative, we have a person in charge, we have quite strict procedures which are set out. So that's fine. Now we could have any number of hypothetical arguments about whether

some other place would in law qualify as an alternative place for 149(o) subs (3). Do we need to really get into that if the only options currently available and the only options which we're asking you to contemplate are the Mangere Detention Centre as an alternative to prison.

Gault J What I'm feeling for is whether the Mangere Centre itself qualifies.

Elias CJ Yes.

Harrison Yes, well then we got onto this by asking whether it was approved and if so for what purposes. If the inquiry is simply does it de facto qualify, then my response is there are two pieces of official material that I would like you to rely on when reaching that view. I've dealt briefly with one, that's the Mangere Centre rules. Can I take you to another important item, that is the New Zealand Immigration Service operational instruction of 10 Dec 2003. That's Volume 5 of the Case page 809. This is a later version of the operational instruction which featured in the Refugee Detention case. Some of Your Honours were involved in that and you will recall that being dealt with there. It addresses the exercise of discretionary powers and it talks about a number of things in terms of the international law position. At page 812 paragraph 3.5 the instruction refers to an indicative list of considerations drawn up to guide decisions by immigration officers as to whether in a particular case any restrictions on freedom of movement are necessary. This is appendix B. And over the page, page 817 is appendix B. There's various general statements. You've got half way down 817 a section "Considerations which may inform a decision to grant a permit and release into the community". So this is a progression in intensity. Top of page 818, decision to release into the community on conditions. (3) considerations which may inform a decision to require residents at Mangere Accommodation Centre. 3(b) there is a clearly identified risk of a refugee status claimant criminally offending, absconding or otherwise posing a risk to national security or public order but that risk can be managed by the claimant being required to reside at the Mangere Accommodation Centre. And for completeness over the page, "Considerations which may inform a decision to detain in a penal institution". (f) there is a clearly identified risk of a refugee status claimant, criminally offending, absconding or otherwise threatening national security and public order and that risk cannot be managed by the claimant being required to reside at the Mangere Accommodation Centre. So what we have is, I submit, arising out of this, a recognition that the Mangere Accommodation Centre is a centre at which even those posing a risk of national security or public order but one that is manageable by residence at the accommodation centre being detained there.

So that is one kind of official indication that the Mangere Centre is an appropriate alternative to prison because those are the two options.

Detention in a penal institution or detention at the Mangere Centre and even for those who pose a risk of national security or public order. It may only be a partial answer to the point but if we go back to the Mangere Centre document, I don't want to spend too much of my time on this, but we went to Case Volume 3, we were looking at page 464 that sets out the person in charge. Paragraphs 1, 4 and 6 on that page especially. Page 476 sets out the residents rules including under the first heading, not to leave without permission. Page 479 sets out rules as to the use of physical force to prevent escape and to recapture for example. Page 484 sets out the position as regards absences without permission. Page 486-7 sets out the position as regards leave for those who are entitled.

So my point really is that on the face of it the Mangere Centre is an obvious candidate to qualify as an alternative premises in terms of. Whatever weight one gives to the wording of 114O (3), whatever criteria one applies to the other premises, and we've canvassed those, the Mangere Centre must be seen as qualifying.

So I've gone into really page 35 of the Submissions, I've gone into the issue of merits of a transfer because the operational instruction policy was a feature of my submissions there. And I am conscious of the time and I don't really want to simply go through the parts of the submission which are adequately expressed as they stand. But I do with reference to page 36 of the submissions.

Blanchard J — My page numbers are different from that. They've started again at 661.

Harrison — Quite. Well do you have a paragraph 119?

Blanchard J — No. I have a paragraph 19 which I suspect is the one you're talking about.

Harrison — Well you've got a heading "Merits of a transfer of the appellant to Mangere Detention Centre".

Blanchard J — Followed by paragraph 19.

Harrison — Ah, well it's about six paragraphs on, there's a paragraph beginning, "To the contrary as the New Zealand … own operational instruction makes plain." Got that?

Blanchard J — Yes.

Elias CJ — Yes.

Harrison — So that's the point I've made about the operational instruction. I then canvas the direct evidence and I express my concern about the fact that Dr Zeussman, who was ordered by the Court, this is two

paragraphs below, despite having been ordered to attend the hearing, was obstructed at the highest level in gaining access to the Centre to enable him to prepare his evidence. And a couple of paragraphs on, in the paragraph beginning, "To further compound the outrage, Crown Counsel confirmed that Dr Zeussman had been refused access on the ground, and I'm quoting from the memorandum which is in the Case, that the terms of the Rule 405 Order and Dr Zeussman's own professional expertise did not require and could not enable him to comment on specific physical facilities." Now, again, if there is any gap in the evidence, such as an opinion from Dr Zeussman on Mr Zaoui's suitability, it is the Crown that is responsible for that. And the entire Crown case ought to be severely discounted because of the approach which it adopted. The only witness that was put forward was a Mr Quirk and I have set out the passages in his cross-examination, and the paragraph numbers are useless but it begins, "But Mr Quirk's claims were in any event." I won't take Your Honours through those but they're all set out and a fair reading of those I submit shows that he was discredited. Justice Paterson did not make a credibility finding either way with any witness, particularly not Mr Quirk. Justice Paterson, as I have argued, can be seen as really founding his conclusion as to the lack of suitability of the Mangere Centre on his view that the certificate was conclusive. Thus it is open for this Court to find that the Mangere Centre is entirely suitable and I so invite you.

Now unless I can be of any further assistance to Your Honours, those are the submissions for the Appellant.

Gault J — Just a moment, I just wanted to have a look at what Justice Paterson did say about the Centre.

Harrison — On the transfer issue.

Gault J — Para [67] of the Judgment isn't it?

Harrison — The entirety of the references are listed in the second paragraph of my Submissions following the heading, "The merits of a transfer of the appellant to the Mangere Detention Centre." It's the paragraph beginning, "McGrath and O'Regan JJ did not address this issue." Paterson J did. And then I've listed the paragraph references.

Gault J — Well it seems that Justice Paterson did not simply say that the certificate was conclusive. Because he refers in paragraph [67] to, the evidence before the Court suggests that it's a low security centre and I'm not satisfied it would have been an appropriate centre without modifications to its structure and security requirements to transfer a person subject to a security risk certificate. Now he purports to rely on the evidence before the Court.

Harrison — Yes, I set out that passage from his Judgment in the paragraph which follows in my Submissions. His Honour does say that but in my submission, if you read those passages in their entirety, the ones I have given as chapter and verse there, I can take Your Honour through them.

Keith J — You took us to some of them didn't you, you quoted two paragraphs on from the quote of Justice Paterson, you quote that operational instruction that I think you took us to a while ago.

Harrison — Yes, well if you read paragraph [67] which is at Case Volume 1 page 73, if you read 67 in its entirety or even start halfway through. It says, nor does Mr Zaoui have the right in my view to endeavour to go behind the certificate in those proceedings. The presence of the certificate is an important factor which I would have taken into account had I determined there was jurisdiction to release Mr Zaoui on bail. In the circumstances I could not have inferred there was an absence of risk factors. The same factors are relevant in considering a transfer, the evidence before the Court suggests. So then again I can take Your Honour right through everything. He said in tororum (?) at this hour of the night. But in my submission, it's a fair comment on Justice Paterson's reasoning that his view that you couldn't go behind the security risk certificate permeates his conclusions about the Mangere Centre.

Keith J — You would say the Immigration Service takes a contrary view in their operational instruction.

Harrison — That's right and I put that operational instruction to the witness Mr Quirk and he was forced to concede the point. That is, that passage in the cross-examination is referred to in my written Submissions and it's at Case 3, page 452.

Elias CJ — Thank you Mr Harrison.

Elias CJ — Yes, Mr Hesketh, we wonder whether, we've read your Submissions of course, whether there's anything in particular that you want to emphasise.

Hesketh — I'm going to take the opportunity this evening of conferring with my learned colleague Mrs Bell. We think it unlikely and if there was to be anything, it could be dealt with very briefly.

Elias CJ — Yes, alright, we'll take the evening adjournment now thank you.

Court adjourns 3.55 pm

11 November 2004

Court resumes 10.03 am

Elias CJ Yes Mr Hesketh.

Hesketh May it please Your Honours I'm obliged for the opportunity to make brief submissions. They will be by way of emphasis to the written material that's already been provided. I'm conscious of the time so they will be indeed very brief. The key points that the Human Rights Commission as Intervener would want to emphasise are first, the current circumstances of the Appellant and second, the consequences of those circumstances at both international and domestic New Zealand law.

Dealing with the first of those two matters, the Appellant's circumstances, there are really four points that the Commission would want to note. The first is that the Appellant has been granted refugee status by the Refugee Status Appeal Authority in August of 2003. Second he has not been convicted of or sentenced for any criminal offence in New Zealand. The third point in relation to his circumstances is that he remains in custody. And as my learned friend Mr Harrison informed the Court yesterday, the potential is for that to be another 12 months. Clearly it's an open-ended, if you like sine die, kind of detention. It's trite to note perhaps that even those convicted of the most serious criminal offences are at least given some notional date by which their release will be considered. And the fourth point that the Commission would wish to emphasise is that the Appellant's psychological well-being is clearly deteriorating.

Now as to the consequences of those circumstances, as a starting point it must be noted that New Zealand has ratified in particular the ICCPR. Article 9.1 guarantees freedom from arbitrary detention. Section 22, Bill of Rights Act of course contains a similar provision. The Commission's Written Submissions refer to a number of international and some domestic authorities which define what is meant by an arbitrary detention and I won't take the Court through those other than to say that the international jurisprudence at least holds that part of the analysis of whether a detention is arbitrary includes an examination of its reasonableness, and that's **van Alphen** and whether it is proportionate, and that's **A v Australia**. In summary, therefore the Commission submits that the Appellant's continued detention under Part IVA of the Immigration Act 1987 may in fact now be arbitrary, particularly in terms of the international jurisprudence. New Zealand has also ratified the Refugee Convention. The Appellant is a recognised refugee and thus clear consequences follow. In the Court of Appeal Justice McGrath at paragraph [69], in holding that release was not available for the Appellant, said that that was not in conformity with the Refugee Convention.

In conclusion, the Commission would make four points. The long title to the Human Rights Act describes it as an Act to provide better protection of human rights in New Zealand in general accordance with United Nations covenants or conventions on human rights. This, it's submitted, is a clear and public statement of New Zealand's commitment to a society where human rights are valued and protected. The Director's summary which is referred to in the Appellant's Casebook, Volume 4, and in particular I would refer Your Honours to paragraph 567 of Volume 4 of the Casebook and 568, refers to New Zealand 's reputation if the Appellant were allowed to settle here and the fact that he might attract likeminded folk and that New Zealand's international well-being would be compounded. It's submitted that the flip side to that is that his detention, effectively as I've submitted a sine die detention, has the greater potential to tarnish New Zealand's otherwise enviable reputation as a human rights stalwart. In that regard, the reputation of New Zealand has already been commented upon and I refer in particular to the CAT Committee, or the Committee Against Torture, its report which is produced in Volume A of the Intervener's Casebook, tab 5. And in particular page 29 paragraph 6B where the Committee is expressing concern about the detention of asylum seekers and remand prisoners with no segregation. And its recommendations on page 30, 7C.

Finally the Commission acknowledges that the tension between national security and human rights is a legitimate one. Nevertheless, one is reminded of the quote which is set out at the footnote to paragraph 6.1 of the Commission's Submission, rights should not derive from law but law from rights. Those are the submissions.

Elias CJ — Thank you Mr Hesketh. Yes thank you Mr Arnold, I should have indicated to the Court that since it's Armistice Day, we propose to mark the occasion at 11 o'clock by a minute's silence.

Arnold — Your Honours could I start by saying that the Crown has no interest in delaying Mr Zaoui's case. It's never had any interest in delaying its resolution. The Crown's position is straightforward. The Director of Security has made a security risk certificate. The Minister under the Act has made a preliminary decision to rely upon it. There's a statutory process for reviewing the propriety of that that's significant. The Crown wants that process to proceed. The interest is in seeing the matter resolved whatever the outcome, whether the certificate is upheld or not upheld. There's a process that should do its work. Now the Crown did not object to the deferral of the Inspector General's process to enable the Refugee Status Appeal Authority to consider Mr Zaoui's appeal. It didn't object to that because the deferral obviously was for Mr Zaoui's benefit and from the Crown's perspective, it thought a sensible thing. Now when that decision was released, the Inspector General's review process effectively started.

And following submissions from the parties the Inspector General issued a memorandum really, indicating what his process would be. And that produced judicial review proceedings (moves away from microphone).

Now the Crown's position in those was that given the structure of Part IVA, judicial review was not appropriate. There was an emphasis in Part IVA, there is, on speed but there are mechanisms to protect the rights of a person subject to a certificate, in particular a right of appeal, not a right sorry, an opportunity to appeal (… moves away from microphone). Obviously one of the Crown's concerns in making that submission and arguing that judicial review proceedings were premature was that it would produce lengthy delay. That is precisely what, Mr Zaoui obviously resisted the approach the Crown took and the Courts accepted Mr Zaoui's position on that. But now we're told the delay that has ensued is intolerable and Mr Zaoui must be released ….

Now I'm not, in saying this, intending in any way to be critical of Mr Zaoui. Mr Zaoui has exercised his legal rights, he's entitled to do that. What I am saying however is that having done so Mr Zaoui cannot come to the Court and say the delay is intolerable. The delay was entirely foreseeable from the course of action on which he embarked. And Your Honours there is before the Court an amended chronology, that is the Appellant's chronology red lined to provide something that in the Crown's submission is more comprehensive. But if Your Honours look at that chronology you will see that there has been constant activity on this matter, much of it instigated by the Appellant. Again, I'm not being critical, I'm simply saying that is the fact.

So it's accepted that time has passed but it has passed because the Appellant has chosen to exercise particular rights and as we'll see later, the international … have held that time consumed by a person in Mr Zaoui's position in exercising his legal rights does not constitute the kind of delay that produces …

Now Your Honours there are two key issues that I want to address. I will deal with some other points, but the two points that I really want to focus on are first, assuming that there is an inherent jurisdiction to grant bail, can that operate in this context. And I don't want to take you again through the provisions of Part IVA that we've already looked at apart from one or two. And the second point is that accepting as the Appellant does, that his initial detention was lawful, has that detention now become arbitrary given the length of time or the Appellant's personal circumstances? Because that is part of the arbitrariness claim.

Elias CJ — Mr Solicitor, you said in terms of your first proposition, assuming the inherent jurisdiction exists. Is that a reservation you make?

Arnold I am going to talk about the inherent jurisdiction but I'm approaching it Your Honour on this basis. I've had little joy in persuading Courts that it's not appropriate to exercise a power of judicial review. I imagine I'll have, it's a difficult task to persuade a Court that they don't have inherent jurisdiction. Now I'm certainly going to make the argument. But the fundamental point is that even if the Court does have it, when one looks at this statutory context, the exercise of an inherent jurisdiction would run completely counter to the grain of Part IVA.

Your Honours if I could ask you to take up the Immigration Act and turn to Part IVA. My learned friend in introducing Part IVA took Your Honours to the object in s.114A, referring Your Honours to paragraph (c) that relates to fairness requiring some protection for the rights of any individual affected by it. I simply wanted to draw attention to the following paragraph, subs (b) which goes on from that to say, establish that the balance between the public interest and the individual's rights is best achieved by allowing an independent person of high judicial standing to consider the information, that is the classified security information, and approve its proposed use. And that emphasises an important point that the, if you like, the mechanism for mediating between the interests of the affected individual on the one hand and the state on the other and in the protection of the confidential information is the person of high judicial standing, a retired High Court Judge who is the Inspector General.

And I say also about Part IVA, just make the obvious point, to make sure it's not overlooked, that the whole point of Part IVA is to enable information to be used while at the same time being protected from disclosure … the Inspector General. … the underlying purpose.

Now if we look, if I may take you first to s.114G and this deals with the situation where the Minister makes a preliminary decision to rely on the certificate. What happens is the Minister gives a notice, then if I could ask Your Honours to turn to subs (4). On receipt of a notice under subs (1) in respect of a person who's in New Zealand, the Chief Executive must, and then there are a number of steps are set out. And (d) is the fourth of those steps, arrange for a member of the police as soon as practicable to serve on the person concerned a copy of the notice with written information. And then subs (5) where the notice is served, that member or any other member of the police must arrest the person without warrant and place the person in custody. Subsection (6), the person arrested must be brought before a District Court Judge as soon as possible and in no case may be detained for more than 48 hours unless within the period the Judge issues a warrant of commitment to continue detention of the person in custody.

Now if we move from there to s.114O. And just to … the way that that works. Section 114O, subs (1), the person is brought before the Judge, two things may happen. First, if the Judge is satisfied that the person isn't the person named in the notice, the Judge must order that the person be released from custody immediately. And then (b), otherwise issue a warrant in the prescribed form for the detention of the person. Then subs (2) which we looked at yesterday, requires the person to whom it's addressed to detain the person until one of three events occurs. And there is of course no reference to bail here. I will come back to Your Honour Justice Keith's proposition that there's no express exclusion of bail but there's certainly no mention of it here as a circumstance in which the person to whom the warrant is addressed can relinquish custody of the person.

Now, when one then turns to s.144J, and that deals with the result of the review. If we look at subs (2). If the Inspector General decides that the certificate was not properly made, the person who sought the review must be released from custody immediately. And then if we look at s.114K, subs (4)(c), now subs K deals with the confirmation of the certificate. And there are various obligations which are imposed on the Chief Executive. But subs (4) provides that one of three things are to happen. But in relation to paragraph (c), in the case of a person who's protected from removal or deportation, the person is released from custody and given an appropriate permit. Again, released from custody.

And then finally at s.114L subs (2). There are a number of situations which are set out in subs (1) where either the Inspector General does not confirm the certificate, where the certificate is withdrawn by the Director, where the Minister decides that he or she will no longer rely upon it or decides that the relevant security criterion shouldn't be applied to the person or fails to make a decision within the statutory time frame. In any of those events the person, the Chief Executive must ensure subs (2)(a), that the person is released from custody immediately.

Now my submission is that when one looks at the structure of Part IVA and these provisions, it's quite clear that the Part contemplates that a person who is the subject of a security risk certificate will be detained until one of those events occurs.

With respect it is inconsistent with that scheme for the Court to assert an inherent jurisdiction to grant bail.

I accept, as Justice Blanchard indicated yesterday, that the Immigration Act is somewhat of a patchwork. That is so. But this much at least is clear. That there are a number of contexts in which parties going through the immigration process may be detained. They're set out in the Submission. And in those various contexts the

Act has provided mechanisms for conditional release. In some instances in great detail.

So it's not only the case that Part IVA is silent on conditional release and bail. It's also the case that other parts of the Act clearly deal with it and set out the processes.

Elias CJ — And do you say that no other part of the Act overlaps and applies to the circumstances of someone arrested and detained under IVA.

Arnold — If you're being dealt with under IVA, you're being dealt with under IVA and not 128. And one can illustrate it in Mr Zaoui's case. Because when Mr Zaoui first arrived, and I can take you through the warrants, but that was dealt with under s.128. But then the process transferred to Part IVA. And that's where it is now and that's where the Appellant's case must be dealt with.

Elias CJ — You may come on to it, but if not, can you at some stage indicate to me from the context of the statute who is the person to whom the warrant can be addressed in the scheme of the Act because that's not defined in this part.

Arnold — The warrant of committal?

Elias CJ — The warrant issued by the District Court Judge.

Arnold — Yes, the way that's dealt with in this part is that the particular provisions that the District Court Judge must issue a warrant in the prescribed form. That's s.114O(1)(b). Then one turns to the prescribed form. And the prescribed form refers to a penal institution And the term penal institution covers prisons.

Elias CJ — Police.

Arnold — Police jails and it must be largely.

Elias CJ — I don't think it covers anything else.

Arnold — Correctional, corrective training things.

Elias CJ — Oh yes, correctional training.

Arnold — But it's hard to see.

Elias CJ — It doesn't cover the Mangere Detention Centre.

Arnold — No.

Elias CJ — So your contention, and it is in your Submissions, but you've maintained the submission that effectively the legislation delegates to

	the executive council I suppose the decision where someone detained can be held.
Arnold	Yes and when one thinks about it there's a logic to that because it may be as I think happened in England, but if the problem got to a sufficient magnitude one would think about a special facility or something like that.
Elias CJ	Well except then you'd.
Arnold	There's a rationale for that.
Elias CJ	Except then you'd have to have some legislative regime established because you wouldn't be ipso facto under the Penal Institutions Act.
Arnold	Yes, actually that is so unless you made it a penal institution.
Elias CJ	Yes. Is there anywhere else in the legislation where the system of detention is delegated to the executive in this way?
Arnold	Well there are.
Elias CJ	Or indeed in any other legislation.
Arnold	There are certain things that the executive if you like can do in relation to release. For example there are powers in the Act where the immigration officer can do things in the same way as police bail as it were. So there's that sort of thing. But certainly in this legislation … other instance, the provisions themselves indicate use penal institution or something approved by a Judge or penal institution or something approved by the Registrar as another example.
Elias CJ	Yes.
Keith J	Or by the Secretary for Labour in one of those provisions.
Elias CJ	Yes.
Arnold	Or in fact the Chief Executive of CYPFS – Children and Young Persons.
Keith J	Right, right.
Elias CJ	But that's a specific statutory conferral whereas you say that simply from the requirement that the warrant be in the form prescribed through designating in the form prescribed a penal institution, that's sufficient legislative authority for mandatory detention in a penal institution. That's a much more restrictive regime than in the case of terrorists for example.

Arnold	Well the difference between, if you're talking about Part III s.72 and 73 and so on, the difference there is that Part IVA is intended to allow the use of classified security information in a way that keeps it confidential. Part III is not of the same sort.
Keith J	In what respect, because I mean that legislation looks as though it's designed to operate doesn't it, in situations of high risk and quite likely classified information and the classified information under 72 would go to the Ministers advising the Governor General in Council and in the other case under 73 it's the Minister isn't it who makes the decision. So there would be confidential information used there and in the second case, well there could well be. In the second case where there's a right of appeal to the Courts, the question of public interest, immunity or something would arise quite likely, wouldn't it, on the appeal?
Arnold	That's the second point, with respect Your Honour, that I accept. Yes. If one wanted to protect information in the context of the s.72 and 73 processes, one would have to rely on a public … with all that flows from that.
Keith J	Mm.
Arnold	But with respect one could not try and amalgamate Part IVA and Part III and use classified security information in some way if you were proceeding under s.72 or 73 in the first instance.
Keith J	Well why not? That was the material on which the state would be relying wouldn't it, to make those orders which are sort of at the highest level? Especially it's unusual to have the Governor General in Council making a decision about an individual of that kind isn't it? And wouldn't there be classified information flowing into those decisions?
Arnold	Yes indeed. But if one wanted to protect that information from disclosure, one couldn't rely on part.
Keith J	Oh no, I agree.
Arnold	One would have to rely on a public interest immunity process with all that that entails. And we know that … approach the Court would take in that.
Elias CJ	Well I wonder about that. It's probably just lack of familiarity with this legislation which happily I haven't had to consider in detail, unlike my colleagues. But it does seem to me that it's perfectly possible for different parts of the Act to be attaching to the same individual. Mr Zaoui is a refugee as well as being subject to this provision. I'm not yet satisfied that the custodial arrangements made on entry and exit, I can't remember what the heading is that s.128

comes under, don't apply except where there is a specific regime designed and constituted by the statute to the Zaoui case. I can't see why s.IVA can't be, as you say it is, a system for managing classified information even where Part III may apply. I mean I'm not sure that I understand the statute is as divided up as you're seeming to argue for.

Arnold If one looks at Part III for example.

Elias CJ Yes.

Arnold And you will see, as we saw yesterday, that there is no right of appeal in respect of a person under s.72. There is a right of appeal … s.73.

Elias CJ Yes.

Arnold In Part IVA there is a right of appeal on a point of law. … There are all sorts of provisions which simply do not sit.

Elias CJ Yes.

Arnold And so what Your Honour is really putting to me is, well in a sense you can take a clear copy as it were of Part IVA and put it over the top of Part III. And where there are direct clashes, you cut all that out and whatever's left in Part III that you want to use in Part IVA, you can't. My response to that is, with respect, that there is no indication in the Act that that was the intention. There's nothing in Part IVA which indicates that one can utilise the processes in Part III to flesh out Part IVA. What Part IVA does do though, following Your Honour's point, is to refer specifically to relevant parts outside itself.

Elias CJ Yes.

Arnold So it talks about s.129(x). You're a refugee, you've got rights. As my learned friend pointed out, it does say in s.114, I'll just find the right one, ah yes there it is, section 114K(4)(b). Your Honours may recall my learned friend pointed to that provision and where it says, if a removal order, so this is where the certificate's been confirmed or there's been no application for review and the Minister's confirmed the decision. If a removal order or deportation is not already in existence, an appropriate person who may make such an order makes a relevant order immediately without further authority than the section. Now in my submission that doesn't bring into play s.72 and s.73 and the whole of the Part III apparatus. All it does is identify the person who must make the decision. But the authority, what then happens, is all governed by IVA.

Elias CJ But the clash between Part III and Part IVA may not be a very good example because I'm thinking more of the general provisions and s.128(i) I think says at the beginning, where someone is detained under this Act. I think that's right.

Arnold — This section applies to every person other than a person to whom s.128B or s.129, 128B are people who's eligibility is not immediately apparent. 129 are basically transit people.

Elias CJ — Yes.

Arnold — Who arrives in New Zealand and is not exempt under the Act from the requirement to hold a permit and either. Initially, Your Honour is correct, initially Mr Zaoui was detained under this.

Elias CJ — Yes, but you say it's been overtaken by the application of Part IV.

Arnold — If one traces through the warrants.

Elias CJ — Yes.

Keith J — In some ways it's not a patchwork, it's a sort of heavily grafted tree isn't it? Because just thinking of the point you were just making about Part III and IVA, the protection that's in IVA by reference to the Refugee Convention is not expressly in Part III. So that somebody who is being deported under s.72, say, at least in terms of Part III just read alone, doesn't have the protection of the … provisions and so on. There's nothing specific about 128(x) or whatever it is, 129(x) is it?

Arnold — Off the top of my head I can't remember. But I'm prepared to accept Your Honours.

Keith J — Yes, well at least, I mean there's an express provision in Part IVA, but I don't think, 72 and 73 didn't get amended.

Arnold — Just on all the warrants, just to give you the reference if Your Honours want to follow that through. I think they're attached to an Affidavit in Volume 2 of the Case on Appeal at page 251.

So, summarising the response to Your Honour the Chief Justice's point, Part IVA does draw on other parts of the Act but it does so specifically.

Elias CJ — It's just that I'm not sure that it undermines the position of the Crown if the statute identifies the regime under which somebody can be detained which certainly seems a more standard approach across the legislation because it's, as I read it, the only institutions which can be approved are either penal institutions including police cells and so on and those approved by the executive or by a judge. So I don't think it undermines the thrust of your argument but you just simply say unfortunately you can't get there on the legislative scheme. That you have to look to the form of the warrant that was prescribed and it refers only to a penal institution.

Arnold Yes, that is the outcome that one gets to. If one thinks about the alternative way of dealing with it, that is that to some extent a person can be governed at the same time by Part IVA and … Part III, there really are going to be difficulties of reconciliation in that as to … Particularly if one takes the view that silence in Part IVA is not conclusive. And so one can in some way fashion or manoeuvre, it becomes a very uncertain thing then to apply.

Elias CJ Yes, thank you.

Arnold So the point simply of taking Your Honours to those provisions in Part IVA was to make the point that custody and detention are really … interchangeably and the whole structure contemplates that a person would be held in detention until the certificate process was completed.

I do accept that, and perhaps this is the explanation for it, that there is a clear legislative contemplation that this process would be a reasonably prompt one. That can't be denied, it's quite clear from the purpose, it's clear from all sorts of other provisions. For example those relating to the appointment of a temporary Inspector General because subs 114B subs (2) provides that if the Inspector General's not available within a time that will ensure that any review's completed with all reasonable speed, … somebody else. So I do accept that there is that underlying assumption.

Gault J Mr Arnold are you going to come back and deal with the significance of the words in 114O(3), the person in charge of the other premises in which the person is detained?

Arnold Yes Your Honour. One of the dangers about these words is to slip between prison and penal institution as if they were synonymous and with respect to His Honour Justice McGrath as … in our Written Outline, he does seem at a particular point in the Judgment to have done that, the two terms are used interchangeably. Now the language talks about, notify in writing the superintendent of the prison or person in charge of other premises. Now I accept immediately that it could have said, or other penal institution. But the point is that.

Elias CJ Person in charge is a bit odd too because if it's a police jail for example, the Penal Institutions Act I think identifies that the person in charge is the superintendent so you'd be able to use simply superintendent.

Arnold Police jail?

Elias CJ I think.

Arnold …

Elias CJ Yes.

Arnold I'll just check that. But I accept they, I mean the wording is more general.

Eichelbaum Mr Arnold you do accept in saying that that the wording is broader than a convoluted way of saying penal institution.

Arnold … obviously the word other premises is broader. And there's nothing contextual in Part IVA that I can point to that would say well that … premises … but one has to go back to the provision which deals with the case of the person to whom the warrant of commitment must be addressed and there it's the form set out in the regulations. So my argument is that Parliament is allowing the executive to … and this language I have to accept could include something other than a penal institution.

Eichelbaum Given then that the Legislature envisaged premises other than a penal institution, isn't it a very odd process to allow the choice to be limited by the executive, not by a regulation or other conventional means but by a form? The wording of a form?

Arnold I accept Your Honour it is certainly an unusual situation but that is the way it's been done. I mean this provision is a little unusual. All the other provisions deal specifically with the place of detention and say it must be in a penal institution or some place approved by a Registrar or … For some reason Part IVA does not have that explicit provision in it. So it is a matter of attempting to understand how Parliament intended the scheme to work. And there is a logic in leaving it to the executive because of the particular nature of the issue that's being dealt with. If one accepts that you're dealing with a person in respect of whom a security risk certificate has been made, so there's been a prima facie decision about that that there is a security risk, and yes there's a review under way … perfectly understandable that Parliament might leave the choice of the type of premise to the executive, leaving it up to the Judge then to choose within that band. But I have to accept Your Honour that, I mean it's an unusual way of doing it. It is not addressed explicitly in the way that it is in the other parts.

Blanchard J Well why would Parliament not have restricted it just to penal institutions in that case. Would it be necessary if some other purpose-built facility is constructed to have amending legislation in order to validate its use. In which case you'd put in the reference to other premises at that time rather than doing it in advance.

Arnold Well the difficulty is one somehow has to provide the powers for those who operate the institution to receive the person and to do all the things that need to be done. And if those powers can't be found

somewhere else in the statutory framework then yes there would have to be some special provision. And as the Chief Justice points out, I mean if one deemed it to be a penal institution you'd get all the powers but then …

Eichelbaum — I suppose the alternative, given that the way that you say it's been done is odd, the alternative is to consider something more conventional such as the Legislature intended the person issuing the warrant, that is the Judge, to make the decision.

Arnold — The problem with that Your Honour is that the Judge doesn't have the information that's critical. And in some senses, and certificate when one looks at bail, the sensible thing perhaps would have been to give the Inspector General that power if one wanted to do that because he's the person who has all the information. But if one comes to this question of detention and you say well give the Judge a discretion to order detention in something other than a penal institution, it's got to be an institution with powers to detain of some sort and the Judge has got to be able to assess, I mean presumably we're talking about some form of detention with a lower level of security than … in a penal institution. So on what basis would the Judge make that assessment? How could one in that sense act judicially? At least if one is dealing within a penal institution framework there are different levels obviously. But the scope if you like from the Judge's … is narrower.

Keith J — You've just accepted there though haven't you that there is a choice to be made between different penal institutions and that's the Judge's choice.

Arnold — It's difficult to see how it could work otherwise in the sense that the warrant, the form doesn't prescribe detention in a particular institution. So the Judge will have to …

Keith J — And that does mean some assessment of the situation of this particular person and of the security that's available in the different facilities in which he might be placed or the different institutions.

Arnold — It's a practical matter. It's really likely to be determined by locality Your Honour.

Keith J — Yes, but there is an assessment that still has to be made and I take your point it's narrower than it would be if the full scope of other premises was included as well. But there is still a choice being made isn't there?

Arnold — The difficulty is by definition, taking the proposition that His Honour Justice Eichelbaum puts to me, by definition we're operating outside the context of a penal institution.

Keith J — Mm.

Arnold — And so therefore the Judge has to make some assessment about detention in some place where the powers of that place, at least from my point of view, are very unclear.

Keith J — Well the powers are clear enough aren't they?

Arnold — It's difficult to see how really a Judge could do that.

Keith J — Well the powers are clear enough aren't they because of that provision added to s.140 is it, subs (5) confers the power to take all such steps as are necessary and so on and then on the specifics the Mangere Centre is said isn't it by the Immigration Service to be okay for certain categories of national security people in terms of those provisions we were taken to. So there is that information available to the Judge isn't there?

Arnold — Yes it certainly does. But the Mangere Centre, as the report that my learned friend for the Intervener, the report that he took you to, the United Nations Committee describes it as much more of an open facility than a detention centre which is exactly what it is.

Keith J — Sure, sure.

Arnold — Can I just address this question of.

Elias CJ — Mr Arnold, it's 10.59, I think we'll stop now and I'm just watching the time, I think perhaps we'll take one minute's silence now.

11.00 am - One minute's silence observed for Armistice Day.

Elias CJ — Thank you.

Eichelbaum J — Mr Arnold it's not as if the executive is exercising an informed choice in individual cases. It's prescribed the form that fixes the place for everyone. It doesn't matter whether it's Mr Zaoui's circumstances or whoever it happened to be. So if the Legislature envisaged that a choice was to be made, on my part I'm not convinced that a District Court Judge is an unsuitable person to make it. And given the ability that he or she has, he or she has the power to individualise the circumstances.

Arnold — With respect Your Honour, isn't the problem that this is a regime … deal with people in respect of whom a decision has been made to issue … and in respect of which the Minister has decided to rely. And so it's not unnatural where dealing with that subject matter for the executive to set a detention regime that encompasses a range of facilities but all of which meet the definition of a penal institution. It is simply a recognition of the nature of the … And this is perhaps where the other decision impacts a little bit and where we're in a little

	difficulty I think, but what my learned friend has referred to as the rights decision, we've tended to call it the Inspector General's process decision. But at the moment the position is according to the Majority of the Court of Appeal that there's a very high standard of national security … that has to be met before a certificate can be issued. The standard is so high that it would justify sending somebody back to persecution. Now if that is so, if the nature of the threat is that high and if that's what the statutory scheme is, in my submission it's not at all strange that the executive should limit the context in which those people can be held … penal institutions. That is the height of the threat to national security that this Part requires and surely it's a perfectly legitimate decision for the executive to limit the discretion available to the Judge in that context.
Eichelbaum	I'd have no difficulty with that if subs 3 didn't contain those additional words.
Arnold	Yes. Well they do contain the words.
Eichelbaum	Yes.
Arnold	I can say what I can say about them. But I simply do make the point that it's not as though they say superintendent of the penal institution or other premises, they say prison or other premises. And that … premises within the concept of penal institution, there are other premises included. So it's not …
Elias CJ	I'm not sure, I'm still not sure, whether the Act is as incoherent as others seem to think. Because it does make sense that in terms of Part III dealing with terrorists there is a statutory direction that the person be held in a penal institution. There are subsisting statuses, whether or not you're within Part IVA because of the fact that there's classified information and that's the main thrust of IVA, how do you deal with classified information. So I'm still not certain that we're reading this Act as a whole correctly and that the answer, and that would be consistent with the reference to other premises, isn't in other more general parts of the Act which do deal with premises. And similarly if you have someone convicted of criminal offending, then there's more supervision by the Judge I think isn't there? There's more, there's a specific regime there. But it's entirely possible that someone in respect of whom there is classified security information may be a threat to the security of New Zealand if admitted as a permanent resident in New Zealand but is not a threat if at large in New Zealand society if that's contemplated or held in some other premises contemplated by the legislation.
Arnold	Yes I can see Your Honour's point. … how is the Judge to resolve … and I don't imagine that the … security would …

Elias CJ No, I don't think in the scheme of things the Judge does resolve. Well the Judge identifies the premises but the scope available to him is settled by the executive in identifying what premises are suitable, I think that's the scheme of the Act but I'm not sure. Anyway, I think you understand where I am at the moment on that.

Arnold Yes. I don't think there's anything useful that I can add on … Your Honour's … statutory language is there. The point then, just to reiterate is that as one goes through Part IVA it seems clear in my submission that subject to Your Honour the Chief Justice's point which … extend in one … processes elsewhere in the Act, certainly taking Part IVA at its face value, it's quite clear that … triggering release mechanisms. And one of those of course may be habeas corpus. And as we accept, there would be circumstances where habeas corpus could properly lie. For example where it was the wrong person, where there was a misuse of the process, things of that sort. Or where it became clear that the purpose of the detention simply could not be … And I'll come back to that.

Now I did want to say something about the inherent jurisdiction to grant bail. Your Honours have in the material before you the well-known article by Master Jacob. There's also a useful article by … in the 1997 or 113 Law Quarterly Review. Now it's accepted Your Honours that in matters relating to procedure, the Courts will rely on their inherent jurisdiction or in the District Court's case, implied powers to enable them to control their business and to act effectively within their general jurisdiction. And as we know, historically in the New Zealand context, bail as it arose in criminal cases was dealt with in the High Court in effect by way of inherent jurisdiction in the days when there was no appeal from a refusal by a District Court Judge to award bail. But the use that's proposed here of the inherent jurisdiction in my submission is wholly novel because what is said in effect is, the Appellant says he has a right to bail and really asks for the creation of a process to give effect to that. And this is not a case where the Court is seized of some other matter. The basic application is, I should be let out on bail until the statutory process is completed. … it's very difficult to find any precedent outside the criminal context where an inherent jurisdiction sought has been … because what really is being asked is that a statutory process be supplemented by a Court in a way that …

Eichelbaum In principle, however, the High Court in pre-Bail Act days exercised that inherent jurisdiction without there being any proceedings in the High Court.

Arnold Yes, it was accepted that the High Court could assist the District Court in the exercise of its jurisdiction. And the High Court has exercised its inherent jurisdiction in that way. But this is a rather, with respect, a different situation. We have no Court process. There's no question of assisting an inferior Court. This is a matter of

… statutory process on the basis that the Act itself or the statute itself does not provide a mechanism for conditional release and therefore the High Court …

Eichelbaum I don't quite understand the concept of the High Court assisting the District Court. The District Court had power in respect of bail. It wasn't any question of a lack of power on the part of the District Court. It was the absence of the right of appeal.

Arnold Yes, and I accept Your Honour that the process if you like was adopted and accepted without question but … High Court used its inherent jurisdiction in effect to give a right of appeal, that was the substance of it. The High Court certainly has intervened to assist and that may be the wrong example. …

Eichelbaum Does the Bail Act apply to other than criminal proceedings?

Arnold I'll just check but in my understanding …

Eichelbaum So where, I think that's right, where does one look to for jurisdiction for bail in non-criminal proceedings?

Arnold … look to the Act itself … I haven't taken you through them but … submission … conditional release.

Eichelbaum Conditional release yes.

Arnold Which is exactly what … would expect in this case and what Parliament has done is in respect of those, I think there are five different regimes under which one might be detained. Parliament's gone through and created mechanisms that differ in various respects. So that in some cases … conditional release … One of the difficulties for the Court if it were to hold that it the High Court has an inherent jurisdiction which it can use in relation to Part IVA, is exactly what does one do as, if you like, as a technical matter. What are the conditions that can be set? How are they going to be monitored and policed? How is the Court going to deal with … The situation in the criminal case that Your Honour referred to me was reasonably straightforward because the High Court, even though exercising inherent jurisdiction … in to an existing bail system. The criminal bail system was there and so that provided a framework … Your Honour the Chief Justice's …

Gault J Might there be another way Mr Arnold if, as is contended and as you summarised here, the Appellant claims a right and asks the Court to create a process, that's got some resonance of Bill of Rights situations hasn't it where the Court has said it will not be without process if a remedy is called for. So if there is a right one, if there is a right, one would have thought that if the Bill of Rights is engaged, the Court would find an appropriate mechanism to give effective relief.

Arnold Yes, if the detention is arbitrary for example, I accept there will be mechanisms … but obviously the Crown's contention is that the detention is not arbitrary. What really I'm addressing, at least at the moment, is the proposition that assuming that the detention is proper, nevertheless there is a power to grant bail which is what I understand my learned friend's position is. The power to grant bail doesn't depend, as I understand it, on the detention being arbitrary. Now we then get onto a detention being arbitrary.

Elias CJ Well if it's arbitrary then habeas corpus issues.

Arnold Yes, that's precisely right and the Act contemplates that. I think with respect that my learned friend's arguments on that point are assuming the validity of the detention and they would have to really.

Elias CJ The Act does have a number of provisions which are clearly intended to apply in all situations including Part IV considerations. Section 140 is every person to whom the warrant of commitment is addressed under this Act.

Arnold Yes.

Elias CJ The conditional release provisions remind me, where are they under, what part of the Act?

Arnold Well Your Honour, could I ask you, there's a useful summary, if I could ask you to perhaps take up the Respondent's Submission, there's my learned friend's chart but could you also take up the Respondent's Submission at page 8, paragraphs 21 and following and what we've tried to do there is summarise the various … in relation to conditional release …

Keith J I was just looking at some of them, Mr Arnold, and I'm subject to correction on this but they're pretty standard aren't they? They say conditions as to residence, conditions as to reporting at least once every seven days. And such other conditions as the Judge may think appropriate. I mean the Court hardly needs to be told that does it? They would be the appropriate conditions and there's the open ended bit anyway at the end of each of the … So if there was a power under IVA, then it's not very different is it to say that's the kind of condition, the kind of set of conditions that would be used.

Arnold Then what the Act has gone on to deal with is what you do when there's a breach and other situations … there so if one is going to either bring in those provisions or … something that's … a range … Yes, so going to Your Honour the Chief Justice's point. We've tried to summarise there the various categories and the way the power works so that if one looks at the first category as persons on whom removal orders are being sought, you will see from that that the

warrant operates only for a short period, seven days … claimants. And in addition there's an overall limit of three months on the period of detention. And then when we look at the suspected terrorist or the person who's threatening national security in s.79 subs (4) we see there provisions dealing with conditions and security and so on. And as Your Honour Justice Keith says, those are standard, provision to vary and … in relation to breach, a person who's convicted of criminal offences, again there's the possibility of release on conditions, there s.99. So 101 there's the order for release. Section 101.

Keith J I suppose if there's a power to grant bail and it's implicit in that that there's the power to do it on conditions, then maybe there's an implied power to vary but your point is that the breach provisions, they're a further step aren't they?

Arnold Yes.

Keith J Because these breach provisions seem to say fairly consistently, do they, that if you breach the conditions the release is nullified and then there's a mechanism for …

Arnold …

Keith J Mm.

Arnold And then 128 … and it provides that … be granted bail but you can be released under s…. AA or … And if one looks at a s.128 (ab), (ac), (ad), you find there a detailed process for dealing with conditions, breaches and cancellation of the … under s.128(b), there doesn't appear to be any mechanism for.

Blanchard J Just before you pass onto that Mr Arnold, why was it necessary for Parliament to say that someone must not be granted bail.

Arnold I accept that, I mean that reference occurs there and later in 128(b)(12).

Blanchard J Isn't it an indicator that Parliament thought that otherwise bail might be something that would be available.

Arnold I've tried to puzzle through on what basis somebody could think that because, bearing in mind that one's dealing with a District Court Judge, where would the authority to bail have come from?

Elias CJ Imputed.

Blanchard J Well from the High Court in aid.

Arnold Or … provision. But bearing in mind the specific provisions for conditional release, it seemed to me an odd thing to put in because there wouldn't clearly be an argument there was a power to grant bail. So I must say for myself I thought this was somebody that the drafting …

Blanchard J Isn't it the drafter taking it for granted that if there's an absolute silence, bail is a possibility?

Arnold Well no, one can't draw that conclusion because part of the problem is there isn't a consistency of drafting.

Elias CJ Well doesn't it say bail shall not be granted but, and then establishes the conditional release regime which again really does underscore the point that's being put to you by Justice Blanchard, that there is an assumption that bail will be appropriate and therefore Parliament is, in excluding it, is excluding it because it's provided for a system of review.

Arnold I have to accept that that argument, that there's force in the argument Your Honours. The words are there. They came in at the same period.

Elias CJ And then the scheme is that either an immigration officer can control it and apply for release on conditions or the person themselves gets before the Court through the judicial review mechanism. Under 128A. The other one is 128AA.

Arnold I'm sorry Your Honour. What was the first part of the proposition? You got to the Court before the judicial review mechanism or the immigration officer?

Elias CJ Well the immigration officer I think under 128AA can make application for conditional release, so if it's clearly not appropriate for the person to be held in custody, otherwise the matter comes before the Court by way of judicial review including habeas corpus. Is that an indication of, that must be an indication of on application to the High Court.

Arnold The judicial review, habeas corpus, yes, obviously yes.

Elias CJ Well I must say, it seems to me that there is pattern in this. And I'm not sure that it's contrary to the Crown's position at all. But on the view that I'm looking at at the moment, and it may be that there's something that makes it quite inconceivable that the conditional release mechanism would apply and bail would be excluded on this basis. But if not, then if it doesn't apply, if the section 128 regime doesn't apply, and at the moment I can't see why it doesn't, then Justice Blanchard must be right that there must be an underlying ability to obtain bail.

Arnold That must be true then of all areas mentioned under the Act where it's not specifically excluded.

Elias CJ Yes. But it seems to me that the much more convenient explanation is that unless you're within the terrorism provisions and there's a specific regime applies to you, you're within the general regime of detention because you're someone unlawfully in the country and that's the underlying status. And therefore there is a statutory regime for conditional release which understandably allows the immigration officer to go to the District Court when there's no problem from the Crown's perspective but allows the individual affected to go before the High Court. That seems to me to make some sense. Morning tea, I'm reminded.

Court adjourns 11.32 am
Court resumes 11.52 am

Elias CJ Thank you Mr Solicitor.

Arnold Thank you Your Honour, before the break Your Honour the Chief Justice had made the point about s.128 and following. I wonder if it isn't important just to spend a moment on those provisions just to see how they work. If I could ask Your Honours to turn up s.128. Now it applies to that group of people set out in subs (1). I ask you to go to subs (5), required of an immigration officer to a member of the police, any person to whom this section applies must be detained by a member of the police and placed in custody pending that person's departure on the first available aircraft. In subs (6) every person who is placed in custody under (5) and is to be detained overnight shall be detained and we've seen that. So that provision, a quick turnout mechanism. And then in subs (7), if the detention is for more than 48 hours then there's another process that's set out. And then, as we've seen, the provisions provide for there to be detained and so on. And provide also though for the opportunity to use the conditional release mechanisms if you fall within them in s.128 (aa). So if we turn over to that, it applies, s.128(aa), to somebody who's not a refugee status claimant who is placed in custody under 128(5) or under 128(7) and subs (2), a refugee status claimant who's placed in custody under either of those two or a person who's the subject of an application. And subs (3) of 128(8) provides that an immigration officer can apply for conditional release in relation to the subs (2) people, that's an immigration officer or the individual concerned who can apply. And then there's a mechanism setting out, these are the following sections, the terms and conditions and breach and so on.

So it's clear that in relation for example to the Appellant, as I said Your Honour, he was treated as a person falling within s.128 and warrants of detention were made under subs (7) of 128 and they were updated from time to time. And then he'd transferred over to the

form 9 warrant under Part IVA. But when one does look at 128(aa), it does relate to people who are placed in custody under 128(5) or 128(7) and that's the problem, that he's in custody under another provision entirely.

Keith J So this is really designed for rapid turnaround or fairly rapid turnaround. People have been refused a permit and they're not being dealt with under any other part of the Act.

Arnold Yes, in fact some of the people who come within (7) do end up staying a little longer. But it's more of a rapid turnaround.

Keith J But anyway, they're people who haven't been brought under IVA or VIA and maybe other parts.

Arnold Now I've been dealing with the question of inherent jurisdiction and I've said all I wanted to say about that apart from the point that is emphasised in the Written Outline which is, to the extent that it has been recognised in this sort of context, that there is an inherent jurisdiction. It is in the context of some proceedings so it's an ancillary power to that proceeding. And that is a conventional use of the inherent jurisdiction. It's not surprising in the United Kingdom context and those cases that are discussed in the Submission, that an implied power or inherent jurisdiction was called upon because the United Kingdom Immigration Act is full of provisions about bail and the Court obviously felt in the particular case that there was a gap which could be filled. But even so, it could not be filled, as the Court put it, in vacuo. It wasn't a claim in vacuo. It had to be associated with some other proceeding properly before the Court.

Now moving on from that, I do want to now turn to the Bill of Rights Act perspective which was raised by Justice Gault, the approach to interpretation and then move onto the question of whether there is in fact an arbitrary detention here bearing in mind that here this is not a situation where the State has been sitting on its hands or attempting to misuse the process in some way. This is a case where, yes, there has been delay but the Appellant has been exercising his rights, as he's entitled to do.

Now the point is made in the Submission at paragraph 30 that so far as New Zealand law is concerned, there is no general right to be released on bail. It is true that s.25 of the Bill of Rights Act enacts a right to conditional release but that is in conjunction with a charge relating to a criminal offence. And it's clear from the **Barlow** case which is in the materials that one cannot read that confined right beyond its context.

I've made a reference also to the advice of Lord Hoffman in the **Boyce** [2004] UKPC 32 case, I'll come back to that.

Justice McGrath at paragraph [36] of his judgment sets out in my submission what is the conventional approach thus far in New Zealand to s.6. At paragraph [35] His Honour sets out the terms of ss.4, 5 and 6 of the rights and briefly describes if you like the reconciliation of them that emerges from the current New Zealand cases. Now my learned friend urges upon the Court the rather more expansive if you like interpretation that appears to be emerging in the United Kingdom. My friend refers to the **Ghaidan** decision and Your Honours are familiar with that. The one point I do make about it is that even within the reasonably expansive approach that many of their Lordships of the House of Lords have accepted, nevertheless the interpretation must be consistent with the underlying thrust of the legislation. So when one comes to look at this case one has to ask what is the underlying thrust of Part IVA. And I've been through that and don't want to repeat it.

I do, however, want to draw Your Honours' attention to the decision of the Privy Council in the **Boyce** case. It may be familiar to some of Your Honours. Could I ask you to take out the Appellant's Casebook tab 19. And the point of referring Your Honours to the case really is simply that it does indicate that notwithstanding the way in which the House of Lords has been approaching the interpretation of … to s.6 in the United Kingdom, nevertheless, the Court does accept that statutory language does impose real limits and there are circumstances where the Court must simply accept that language even if in a particular case as was the case here, it was felt that the particular conduct at issue, that was the application of the death penalty, did breach fundamental human rights norms. So as Your Honours will know, there's been a series of cases in the Privy Council about issues relating to the constitutionality of the death penalty in the Caribbean. This case was an attempt to resolve the matter. Nine Judges sat and ultimately divided 5-4. What was at issue.

Keith J — Reversing what they'd said just several months before.

Arnold — Precisely, yes. And the issue was the constitutionality of the mandatory death penalty in Barbados. Lord Hoffman delivered the judgment of the Majority. The issue arose because the constitution as is set out in paragraph [1] of Hoffman's Judgment, page 789, contained the provision that it was the supreme law of Barbados and any other law shall to the extent of the inconsistency be void. And then s.15(1), no person shall be subject to an inhuman … punishment but then s.26 said that no existing law shall be held to be inconsistent with or in contravention of any provisions of ss.12 to 23. And the Majority said at the end of the day the language and purpose of s.26, this provision which preserved existing law, was so clear that whatever Their Lordships' views about its morality or the efficacy of the death penalty, they were simply obliged to follow the language. Now what was argued is summarised at paragraph [4]. The argument was that because of the way in which the constitution was brought

into effect, there was an obligation to amend if you like or modify the law, the pre-existing law, to the extent possible to conform with the requirements of the constitution. And one could achieve that in this case by making the death penalty, by treating the death penalty as if it were discretionary rather than mandatory. And so the issue became, well could one make that modification, and that ultimately was the difference between the Majority and the Minority. Now the Court goes through the constitution in more detail. From paragraphs [10] to [15]. It then turns to look at the international law at paragraph [16] on page 792. And the Court concludes that the mandatory imposition of the death penalty is contrary to international human rights law norms and the particular reason for that was the definition of murder which is extended of course by what's described as the felony murder rule meant that the circumstances of people varied widely in terms of their moral reprehensibility and therefore in terms of human rights norms, to have a single rule applying in relation to the death penalty was a violation.

So that's the international position that the Majority accepted. And then it, at the beginning of paragraph [27] Their Lordships say, if we were to construe s.15(1) of the constitution we would say that it's inconsistent with a mandatory death penalty for murder. So they're quite clear about that. And then the Court goes on to talk about the role of the Court under a constitutional document. Which is, were it not concerned with the death penalty, it would be a very interesting discussion. But then the Court goes on to deal in more detail with the particular arguments and at paragraph [35], [34] sorry, the discussion of the Order in Council and what came out of that is discussed and the Court rejected the argument that was made that basically to modify a provision is not to hold it as being inconsistent with. So drawing this distinction between modifying something and saying it was inconsistent with. And the Majority rejected argument on a number of grounds, irrationality, ultra vires, language and purpose. But then the Court goes on at the bottom of page 801 at paragraph [53] to talk about the principles of construction. Mr Starmer suggested, and the Minority agree, that concerns with rationality, ultra vires and the language and purpose of the section were a rather pedantic and inhibited approach to constitutional construction deserving of condemnation as tabulated. Legalism fit for conveyances and charter parties. They said if that construction were adopted it … to the international obligations of Barbados and the constitution would be treated as a living instrument and not left trapped in a time warp and so on.

The Court then goes back to the discussion about the living instrument principle and what it's proper place is. But then goes on at paragraph [59] to say there is a limit, the living instrument principle has its reasons, its logic, its limitations. It's not a magic ingredient and so on.

So the Court here is expressing the limits of what it regards as appropriate interpretation of a statutory provision in saying yes we accept that there is a flexibility there, we accept that if it's possible one should interpret provisions consistently with international obligations but they then go on to say but there are limits. And the language does matter and at the end of the day we in the Majority are not prepared to say that a modification of the provision is not a finding of inconsistency. The Minority on the other hand were prepared to deal with the matter in that way.

Elias CJ I rather understood Mr Harrison to be saying that it wasn't necessary, that it wasn't determinative, that there was simply, that there needed to be ambiguity. And I didn't really understand him to say that an unreasonable or perverse interpretation should be preferred.

Arnold That characterisation of unreasonable and perverse is of course the characterisation of the Majority. The Minority don't characterise it in that way.

Elias CJ No, but you are taking us to it for the test.

Arnold Yes, and I'm simply saying that, at least in the view of the Majority, the words do matter. They're not infinitely flexible because my learned friend is really inviting in a sense the Court to substitute, to add to, to create a flexible remedy, I think was the language that he used, to fashion, I'm sorry, a flexible remedy.

Now when we come to look at the question of whether the detention is arbitrary we'll come back to that point. But in my respectful submission the Court does have to look at the language and if it bears a clear meaning then that is it. Now I accept there are the various points Your Honours have made, the use of the word premises, the reference to bail and things like that that one may attempt to create something out of.

Now I've referred to the practical difficulties of the Court administering a bail arrangement. I don't want to say anything further than that other than to make the point that in the criminal context there was something that the Court could plug into but here if somehow one is going to create something out of these other provisions, there is nothing for the Court to plug into.

Now I want to turn to the question of arbitrary detention. The argument has been made to Your Honours that the initial detention was lawful, that's accepted. But what is said is that the detention has now become arbitrary because of the length of time the process has taken and also I think, at least this emerges from the Written Submission, also because of the Appellant's particular circumstances. And it's here that it seems to be suggested that because of the good reputation that the Appellant has in terms of those who've put

affidavits in and in terms of his good behaviour in the facility and so on. Now the Crown's response to that is that it's accepted of course that a lawful detention can become arbitrary. But the length of time that the process has taken in this case is not in my submission an indication that the detention has become arbitrary. And nor do the Appellant's personal circumstances constitute the detention as an arbitrary one. And here it's necessary just to look quickly again at some of the decisions that Your Honours have been referred to in order to make the point.

Could I ask Your Honours to take up the Appellant's Casebook tab 14 for the **Chahal** decision. Sorry it's the Intervener's Casebook.

Now the Judgment of the Court starts at p.163 of the volume or page 454 of the report. My learned friend yesterday I think took you to page 464 or 168 of the volume. Now the point that was made about Mr Chahal's case is that Mr Chahal was detained for a period of nearly four years as he pursued his various processes in the United Kingdom. And the Court accepted that that four year detention did not of itself render the detention arbitrary. Now we've got the discussion occurring in the context of article 5.1 which is set out at, well it goes down to paragraph 117, 118. At 117 it's said, the Court observed in the context of article 3, Mr Chahal's case involves considerations of an extremely serious and weighty nature … the individual application. Not in the general public interest in the administration of justice that such decisions be taken hastily without due regard to all relevant … Against this background and bearing in mind that what was at stake for the applicant and the interests that he had in his claims being thoroughly examined by the Courts, none of the periods complained of can be regarded as excessive taken either individually or in combination. There's no violation of article 5.1 of the convention on account of the diligence or lack of it with which the domestic procedures were conducted. It also falls to the Court to examine whether Mr Chahal's detention was lawful for the purposes of article 5.1(f) with particular reference to the safeguards provided by the national system where lawfulness is an issue including the question of whether the procedure prescribed by law has been followed. The convention refers essentially to the obligation to conform to the substantive and procedural rules of national law but it requires in addition that any deprivation of liberty should be in keeping with the purpose of article 5, namely to protect the individual from arbitrariness. So the concept of arbitrariness was at the heart of the Court's consideration of the issue even thought their … in the context of article 5.1(f).

Then the Court moves to article 5.4 and this is at paragraph 124, the text of article 5.4 is set out. And then the Court over the page at 127 talks about the … of lawfulness under article 4. 5.4 has the same meaning as in paragraph 1. Further down at 129 it footnotes its earlier discussion at paragraph 118. And the question before the

Court here was, because in that case there were of course proceedings, but the real question for the Court here was whether the substantive process for reviewing the national security concerns met the definition of something that was not arbitrary. And of course the Court concluded here that the processes provided by the UK at the time were not adequate and as my learned friend said, new processes emerged from that. But if we put this into the New Zealand setting, in New Zealand we have the Inspector General's review process. And really what this part of the case is about is about the equivalent English process which the Court in that case was not sufficiently complete as it were.

And one can see that if one looks at paragraph 130. The detention was justified on national security grounds although the procedure before the advisory panel undoubtedly provided some degree of control bearing in mind that Mr Chahal was not entitled to legal representation, he was only given an outline of the grounds for the notice of … , the panel had no power of decision, it's advice to the Home Secretary was not binding, it was closed and or couldn't be considered to be a Court. And then goes on to say at 131 the Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean however that the national authorities can be free from effective control by the domestic Courts whenever they choose to assert that national security and terrorism are involved. The Court attaches significance to the fact that, as the Intervener's pointed out in connection with article 13, in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.

So that what was at stake here was whether the equivalent of our Inspector General's process that operated in England at the time was sufficient or not and the Court held it wasn't. That's not the issue with which this Court is dealing.

Though my learned friend invited Your Honours to conclude that Justice McGrath has misinterpreted this decision, with respect that's not so. The point that is important about it is the Court accepted that a four year detention, while the processes were going through, did not make the detention … like the substantive review process was inadequate.

Now I'd like to refer also to the case of **Ahani**. I think perhaps we should use the copy in the Supplementary Bundle of the Appellant because that's the one my learned friend took Your Honours to. Now this was again a case where Mr Ahani had gone to Canada. He claimed protection under the Refugee Convention. Following that,

and this is at paragraph 2.2, the Minister and the Solicitor General of Canada had the security intelligence reports and gave a certificate. That certificate was then filed in the Federal Court and Mr Ahani was taken into mandatory detention where he remained for a nine year period. Now, at paragraph 2.3 the statute envisaged a process whereby once somebody was detained there was if you like a preliminary look at the matter by the Court and then a more developed what was called a reasonableness hearing before the Federal Court. That was the equivalent of the Inspector General's review process. But at 2.4 the point is made, rather than exercising his right to be heard under this procedure, the author then challenged the constitutionality of the certification procedure and his detention subsequent to it in a separate action before the Federal Court. The decision then goes on to detail the various decisions that were made about that.

Now once the constitutionality of the process was upheld, then the reasonableness hearing resumed and that's dealt with at paragraph 2.5. And then a number of steps followed on that. So that's the factual background. If I could ask Your Honours now to turn to page 14 of the printout, consideration of the merits.

The claim under article 9. My learned friend read out portions of this and I won't re-read it. But what I do want to emphasise is the point made about three-quarters of the way down. The author's case, no such separate authorisation existed although his mandatory detention until the resolution of the reasonableness hearing lasted four years and 10 months. Although a substantial part of that delay can be attributed to the author who chose to contest the constitutionality of the security certification procedure instead of proceeding directly to the reasonableness hearing before the Federal Court, the latter procedure included hearings and lasted nine and a half months after the final resolution of the constitutional issue. This delay alone is in the Committee's view too long in respect of … requirement of a judicial determination of the lawfulness of detention without delay. So the point to be made about this is that, of that four years and 10 months that it took before the reasonableness hearing was completed, the Court removed if you like the four years that was consumed while the Appellant pursued his legal rights and focused on the period of the reasonableness hearing itself and said, well that took nine months and we think that's too long.

Now it's interesting to look at the dissents. There are several but to look at the dissent at page 18 of the printout. Because there the dissentients say that we don't agree that there's a violation of 9.4. The Committee seems to accept, albeit in language implying some uncertainty, that the first four years of the author's detention did not involve the violation of article 4 since it was the author's choice not to avail himself of the reasonableness hearing procedure pending the constitutional challenge. The Committee accepts that the

reasonableness hearing meets the requirements of 9.4, in other words as a substantive process it's sufficient. But accordingly its finding of a violation is based on the narrow ground that that hearing lasted nine and a half months and that was too long. The point on which the dissentients dissent is that it's nothing at all to indicate what the basis of that finding would properly be. So again the point of referring Your Honours again to that case is simply to say that the mere passage of time does not mean that a lawful detention becomes arbitrary. One does have to look at the circumstances and ask how does the delay occur. And if the delay results from the person affected exercising their legal rights, then that does not give rise to a finding of arbitrariness.

Keith J The Committee itself took a couple of years apparently to decide the case too didn't it?

Arnold Yes.

Keith J Yes well it would have been taken up by the exchanges I suppose. And one of the Majority is one of the Pentagon's chief supporters of the processes that have been followed at Guantanamo Bay, Pres Wedgwood.

Elias CJ A flawed authority you think?

Keith J Mm.

Arnold Yes, well Sir I hadn't appreciated that. Now if one contrasts those two cases with two other cases that were referred to in the Submissions, one does see where the boundary is crossed from lawful but lengthy detention into one that is arbitrary. And that boundary is crossed where for example the power is used for an improper purpose and the example in the materials, or one of the examples of that type of case, is the **Alphen's** decision which is in the Intervener's Casebook under tab 7. I won't take Your Honours to it but I can simply describe it. What happened there was that a lawyer was arrested and he argued that having been arrested he was improperly detained and it transpired that the reason that the authorities had kept him in detention was that they wanted him to release confidential information and it was in the nature of a sort of professional privilege type situation and apparently the clients involved had agreed to that. But the lawyer refused to release it and so he was kept in detention. And it was accepted there that that was an improper use of the power to detain because it was being done for an improper purpose. And therefore the detention was arbitrary. And so that is an example.

Another example is **A v Australia** case that … yesterday which is in.

Elias CJ As a matter of domestic law of course, that would be an unlawful exercise of the power. I mean it's not necessary really to have

recourse to arbitrariness unless you're wanting to invoke a Bill of Rights Act remedy.

Arnold Well except this, Your Honour. The initial arrest was proper. What was being talked about was the.

Elias CJ Was the retention, detention.

Arnold Detention. It was at that point. So there was no argument, as I understand it, about the validity of the arrest and the fact that the person was legitimately the subject of investigation and charges and so on. What became clear was that the reason for the extended detention was this, if you like, refusal to cooperate. And that's what changes something that is lawful into something that is unlawful. So I'm making this submission against the background that my learned friend accepts that the initial detention is lawful. The argument is that it's become arbitrary. And so the question that I'm really putting to Your Honours is, what is the circumstance that makes it arbitrary? The answer my learned friend gives is that it's the length of time and the, if you like, personal circumstances of the Appellant. And my response to that is that length of time by itself does not create arbitrariness. I do want to emphasise throughout this that I am not trying to be critical of the Appellant's use of the legal process. All I'm saying is that when one looks at the chronology, you can't in a sense create the hardship which you then seek to rely upon. Because you're in effect creating your own arbitrariness.

So in the case of **A v Australia** which my learned friend referred to, what happened was that there was a very lengthy, there was a lengthy detention. What happened was that there was a lengthy detention but what was particularly important about that case was that the person detained was shipped around the country from centre to centre and some of these detention centres were in very remote parts of Australia. Which meant that the person was unable to get consistent legal assistance and things of that sort. And when it came to seeking to justify why it was that the complainant was detained in the way that he was for that period, Australia didn't advance a justification. And so that again is an illustration really of a misuse of power. No explanation that the Human Rights Committee accepted. No explanation of why it was that he was shifted around the country in the way that he was, why it was that as he formed a relationship with a particular legal adviser he was then shifted off somewhere else and had to get a new legal adviser and so on. Now with respect there can be no suggestion in this case that the Crown is behaving that way. Far from it. The Crown's interests, as I have said, have always been to get this matter resolved.

And the particular passages, if I could just refer you to them so that you've got the reference, is the Court examines the merits at page 228, paragraph 9.1 and following of the decision. The Court poses

the question, if you like, in paragraph 9.2, asks itself whether there were grounds for the indefinite and prolonged detention and accepted that it was not shall we say arbitrary to detain people who request asylum, that initial detention wasn't unlawful. Then why was this one kept going for so long and simply no explanation.

Could I just here address the point that my learned friend made, namely that as I understood it … what we have here is an open ended detention. With respect that is not so. We have a detention in the context of the completion of a statutory process. That statutory process does not have to be completed in a specified time but plainly it is a process that the drafters of Part IVA anticipated would proceed with all reasonable speed. But it's not with respect an indefinite detention at all as that term is used in these international materials. It will come to an end one way or another when the Inspector General's process is completed and he will uphold the certificate or he will not and if he does uphold it, the Minister will then have to decide whether or not he's going to rely on it or apply the criterion and even then there will be issues about where Mr Zaoui could be deported to because it's never been the position that the Government would be deporting to persecution and the reason for that of course is the Convention Against Torture precludes it.

Now the final authority to refer to briefly in this context is the decision of the High Court of Australia in the case called Al-Kateb v **Godwin** [2004] HCA 37 and I wish to refer to that only briefly but simply to make the point that … conditions of detention will not of themselves render a detention arbitrary. We deal with a number of authorities in the Written Submission and it's well established as a proposition, the point being that if the conditions of a lawful detention are inappropriate, one deals with that directly by way of a judicial review proceeding or a complaint to the Ombudsman as indeed the Appellant has in this case. Those are the mechanisms for dealing with complaints about conditions. But the conditions don't render the underlying detention unlawful. And that position emerges clearly in the decision of the High Court of Australia in **Al Kateb** notwithstanding that that is a case where in the particular statutory context the Judges took differing views.

If I just refer quickly to tab 17 because this case provides a useful example of where the two elements of arbitrariness that we're talking about here might, if you like, kick in. What happened in this case was that the appellant was a stateless person. He came to Australia without a visa and was taken to an immigration centre. He applied for a visa and didn't get one. So he asked to be removed from Australia as soon as possible. And the Australian authorities were not able to effect that because they could not find anywhere to remove the appellant to. So the appellant remained in custody and challenged that continued detention arguing that it was unlawful. And the Majority of the Court held that the detention was lawful. I want

really just to refer to the judgment of the Chief Justice, Chief Justice Gleeson because it does make a few points that I'd like to emphasise.

First, to give you the section that was at issue, it's set out at p.127 of the Judgment at paragraph 9. It says an unlawful non-citizen detained under s.189 must be kept in immigration detention until he or she is (a) removed from Australia, (b) deported or (c) granted a visa. And then 3, to avoid doubt, subs (1) prevents the release even by a Court of an unlawful non-citizen from detention otherwise in (4) removal or deportation unless he's been granted a visa.

Now Chief Justice Gleeson, and I accept of course that provision is very explicit, that subsection (3). Chief Justice Gleeson however qualified subs (3) by saying, well that must mean lawful detention. Otherwise the provision would constitute an unconstitutional … with judicial power. Parliament cannot deprive the Courts of the power to order the release of a person from unlawful detention. So the habeas corpus option is available as it is under Part IVA in that type of case. But the problem that arose in this particular case was that you had a person in detention who was being held for removal in circumstances where there was nobody to remove the person to. And that was going to be the position for the foreseeable future. And so the question for the Court was, well what happens in the meantime? The Majority took the view that the legislation was clear and it may have been unfortunate from the appellant's point of view but he remained in custody until one of the three specified events occurred.

Now I must say for myself, it's not an interpretation that I would urge in an equivalent provision. And this is really why I've referred to the Chief Justice's decision. Because the Chief Justice, if you like, builds in a qualification which the Crown accepts is a proper one, that is that the purpose of the detention must be capable of fulfilment. If you get to the point that the purpose of the detention cannot be fulfilled, then you may move across into the area of arbitrary detention . And that's ultimately what the Chief Justice develops in paragraph 17 and following.

Elias CJ — The reference at paragraph 14 to administrative detention, is that significant? It was detention only for the purposes of removal but presumably it was under, was it under judicial warrant?

Arnold — No, no. I'm grateful to my learned friend but it points out Your Honour that at page 153 of the Judgment of Justice Gummow there's a fuller summary of the legislative text. It's an officer knows or reasonably suspects must detain the person. Justice Gummow by the way agreed, was in the Minority agreeing with Chief Justice Gleeson.

Keith J — Unusual, an unusual collection. Just trying to think of any other case when those three have agreed in a split Court.

Arnold Yes, yes it's an unusual combination. But going back to Your Honour the Chief Justice's point, I think there the use of the word administrative detention is just to distinguish if you like punitive detention, detention for the purposes of punishment as opposed to detention for the purposes of some other, the operation of some other process.

Elias CJ Well that's what I wondered originally but the text would suggest that it's because it is not judicially sanctioned attention and that that's the distinction he's making, the fuller text.

Arnold I see what you mean, yes. In any event, the reason I simply wanted to refer to this case is that the view of the Minority accepts what in my submission is a well-recognised principle in these cases, that if the purpose of the detention or the purpose for which the person is being detained becomes incapable of fulfilment, then there is an issue of arbitrariness. Now the Majority didn't accept that and just said the section was clear, it means what it means and that's that.

Now the other element of the **Al Kateb** case of course is the question of conditions and there Chief Justice Gleeson deals at paragraph 12 where it says well, where you've got a system of mandatory detention the personal circumstances are irrelevant to the operation of the system. It doesn't matter what the characteristics of the person are, they simply are detained and that's that. But even if one didn't have that mandatory requirement, the fact that the conditions of detention were an issue as I say could be addressed by other mechanism. It's certainly not the basis for saying the detention has become arbitrary.

Elias CJ You mean there could be say a s.9 argument, Bill of Rights Act, am I right, s.9? The cruel treatment or something.

Arnold The way one would deal with it is, I mean one could bring a judicial review proceeding or something like that, one could go to the Ombudsman, as I have said is exactly what's happening here. If the worry is about conditions in which somebody is kept, there are mechanisms to deal with that. What we have to address is the underlying detention . And it's the validity of that that is at issue.

Gault J Apart from conditions, could it be that duration, circumstances, particular characteristics make such a prolonged detention disproportionately severe treatment under s.9?

Arnold Again you have to go back to look at the explanation for the length.

Gault J That troubled me a bit because while it is easy to accept that a person cannot complain of a violation of his or her rights that he or she has brought about, that must be measured to some extent by a right still given their conduct not to be subject to disproportionately severe

	treatment. If it is said that this is a breach of the Refugee Convention because on the facts it is regarded as not necessary and it is prolonged, why cannot these factors give the whole system some flexibility.
Arnold	I think the difficulty there Your Honour, that you really are creating an approach which enables a person to effectively create their own arbitrariness or their own hardship.
Gault J	Well I would have thought that that's why you have judicial control and judicial supervision of these things.
Arnold	Yes I certainly accept that judicial control is a mechanism for controlling that sort of behaviour but it's interesting in **Chahal** and **Ahani** that with respect the Court didn't look at the prolonged detention in that way. It simply said that time was taken up by the individual pursuing his legal rights, entitled to do it. And that was the basis on which it was addressed. Now Your Honour's putting to me in a sense, well isn't there another dimension here because you've got the refugee and the Refugee Convention and is the detention necessary.
Gault J	You also might have a person who is so psychologically harmed by those circumstances that it seriously prejudices the exercise of the legal rights.
Arnold	Well Your Honour it would be difficult to conceive of how that might be dealt with in some other system. The fact of it is, as the evidence shows, Dr Zeussman's evidence is Mr Zaoui did suffer psychological difficulties and the correctional people have attempted to deal with those by moving the place of detention and by changing the conditions of detention in a variety of ways. And as I say the Ombudsman has assisted in that. So there are mechanisms for dealing with it but, well perhaps I'll have to reflect further over the lunch hour on the point Your Honour.
Elias CJ	And cite **Chahal** in that response but as you pointed out, **Chahal** was about whether the process complied with the covenant, it wasn't really dealing with the merits or the extent of disproportionate treatment.
Arnold	There were two elements. One element, as you'll recall in that paragraph 118 I think it was, where the concept of arbitrariness was brought into the assessment of the lawfulness of the detention.
Elias CJ	Yes, yes.
Arnold	The Court said it wasn't arbitrary because the four year period had been used in that way. So they were addressing arbitrariness. But anyway, I've gone a little over time.

Elias CJ Yes alright, we'll take the adjournment. Thank you.

Court adjourns 1.03 pm
Court resumes 2.17 pm

Elias CJ Thank you. Yes Mr Arnold.

Arnold Your Honours can I just correct one thing. I think I talked before the break about the **Alfreds** case which was a mistake, it's the **van Alphen** case and I'm sorry about that. For some reason I got the wrong name stuck in my mind, that's the case under tab 7 of the Intervener's Casebook.

Before the break Your Honour Justice Gault was raising with me the conditions of release point. Can I just leave that for the moment because I am going to come back to that point and I'll try and address Your Honour's concern. Could I take up, and I am really at Written Submission at page 18 paragraph 46. So having looked at the authorities, in my submission there are really three issues that one has to ask when considering whether the detention has become arbitrary. The first one is, is the statutory purpose for which the Appellant is detained still capable of fulfilment? Secondly, has the Crown acted with due diligence in fulfilling that statutory purpose and is there adequate curial oversight of the underlying cause of the detention which is the security concern? And in the paragraphs which follow I've gone through each of those elements. Firstly just say that obviously the statutory purpose is still capable of fulfilment. … in train but stalled. It will be completed. So this is not like a case where somebody's held for deportation or removal and there is nowhere to send the person.

The second point, has the Crown acted with due diligence? And I've referred there to the supplemented chronology and I think I've made the points about that that can be made.

And then the third point which is dealt with at paragraph 49 of the Written Outline, and that is that as we can see from **Chahal** and so on, part of the element of considering whether a detention is arbitrary is whether there is a process to look at the underlying cause of the detention. And in the New Zealand context, that's the Inspector General's process. But it's not only that, and that's the point developed in paragraph 50, that we have an independent process to scrutinise the underlying justification for the detention which is the certificate. We have also the possibility of habeas corpus as we've seen. And as I've already said, the Crown accepts that there are circumstances where that would be available. And in relation to conditions of detention, there are these other mechanisms that I'm about, and I'll come back to those.

Now I'm not going to go through the sections on the Inspector General's review process, the paragraphs, because I think for present purposes there seems to be no argument that it's an inadequate process in terms of properly scrutinising the underlying cause of the detention, that is the security concern.

Now coming back then to the conditions of detention aspect. I've referred at paragraph 56 to **Puli'uvea** [1996] 3 NZLR 538 where the threshold is established as a high one. Treatment that's so excessive as to outrage standards of decency and so on. Now the Crown certainly argues that intention is an element of that. Sorry Your Honours I've just mislaid something.

Elias CJ You mean that the treatment must have been intentionally inflicted? Or the severity must have been intentional.

Arnold It's simply this, it's not simply a matter of subjective reaction. In other words.

Keith J So it's objective then and intention's not relevant.

Arnold I'm sorry, I didn't hear the last part Sir.

Keith J Well you were saying it's not a matter of subjective reaction but does that mean it's objective and why would intention come into it?

Arnold Well if we start with the proposition that the state sets out intentionally to demean and do these various things, then that in my submission would clearly fall within s.9.

Keith J Mm. But if it just so happens that disproportionately severe treatment happens because of a lack of resources or reallocation of resources or something of that type without people really putting their minds to it, it could be quite difficult to prove an intention couldn't it on the part of a large body.

Arnold Yes, let me just think of a way of.

Keith J I partly came to the question Mr Solicitor because of paragraph 64. I know you've then moved on to 23.5. But there you say the objective nature of the assessment is needed.

Arnold Yes, that's true.

Elias CJ It must be objective Mr Solicitor. What object could there be?

Gault J The tension is it would be contrary to the rights based nature of the Act.

Arnold Yes I'm just trying to pinpoint the point I'm trying to make. It has certainly been said that, and this is **Ireland v United Kingdom** [1979-80] 2 EHRR 25 that intention is not required. But then there's a discussion of that in **Harris … Boyle and Warwick** European Convention on Human Rights 1995, page 62 at footnote 8. And the point is made there that … requires that the inhuman treatment be deliberate. Now it may be that to use the word intention is to overstate it in the sense of saying that the behaviour is designed to cause harm. But it does have to be deliberate and.

Blanchard J What do you mean by deliberate? Is negligent mistreatment not going to come within it?

Keith J And there may also be, going back to the point I made about the number of people involved, there may be issues of attribution too mightn't there if, thinking of a situation very very far removed from the present one, if it's the State's explanation that it's just a few bad apples at the bottom of the system. If there was an attempt in that context to say therefore there's not really State responsibility. We'll do something about it but. Anyway in terms of my brother Gault's point, in terms of a rights-based system, is there really a significant role for intention or deliberateness or?

Arnold We're dealing with two different, maybe this is the cause of the confusion. Section 9 and s.23(5,) and the section 9 context is talking about, which is what I'm now talking about, is talking about this very high threshold so excessive as to outrage standards of decency and so on. Now then the next if you like relevant provision, 29(3)(5), that clearly does have a lower standard associated with it.

Keith J But that's content rather than, that's fact rather than mind isn't it? That difference.

Arnold Fact rather than a mind yes, in each case it's got to be fact rather than mind, yes. If by that you mean the subjective response of the mind means that it's the subjective response of the individual.

Keith J I was also thinking of the subjective attitude of the doer as opposed to the person on the receiving end.

Arnold Yes, I certainly accept this and this may be the cause of the confusion. Section 9 says everyone has the right not to be subjected to torture or to cruel degrading … punishment. Now the fact that the state doesn't think that a mandatory death sentence fits that requirement and it's not exercising the death sentence in order to.

Elias CJ Be cruel.

Arnold In an intention sense to meet those, doesn't protect a finding that a mandatory death sentence is contrary to that principle. So I'm not

saying that there must be intention in that sense but that really goes to the characterisation of it.

Keith J But the **Ireland** case, was that the case about the methods of investigation being used by the British authorities against the IRA and so on, the hooding and standing and all of that business. Well all of those actions were deliberate I suppose. But that just goes in that case from the nature of the things that the British authorities were doing doesn't it?

Arnold Yes, I suppose the British authorities, well maybe they were doing it deliberately to demean the people.

Keith J Well assuming that wasn't the case, assuming they were just doing it to try to get confessions or try to get information or something, it's deliberate in that double sense isn't it where you're using this method to try to achieve this purpose?

Arnold Perhaps the difference between s.9 and s.23(5) is to put this way. Justice Paterson says in his judgment in the Court below at paragraph [45] which is Volume 1 of the Case, page 65 and 66 that there was no suggestion that any of the conditions of detention that Mr Zaoui is undergoing were … humiliate him. And therefore s.9 doesn't apply. Section 23(5) may possibly be broader than that in the sense that it's an obligation to be treated with humanity and respect and therefore that element of deliberateness is not …

Elias CJ But disproportionately severe treatment doesn't have to have any indication of intention to humiliate. It can be objectively assessed. And in fact the very word disproportionate suggests that you have to assess it in the context. It's really a pointer to objectivity. You don't substantiate that proposition. I put a question mark beside it. I would have thought that if you can't substantiate it with authority it might be better abandoned.

Arnold Yeah well that may well be right Your Honour. One of the difficulties I must say about that, it was a submission which was developed at much greater length in the Court below. It's been taken out of here given the 30 page limit and all the rest of it. So I mean we haven't attempted to develop it but I can certainly with respect see the force of Your Honour's point that the language of disproportionate and so on does suggest that the intention with which the person did it cannot be the decisive factor.

So maybe the point then is that the test is objective. My point for present purposes is that it's not subjective, that it cannot simply be the way in which the individual reacts to it.

Elias CJ And indeed you say that it's a significant test.

Arnold Yes well it clearly is.

Elias CJ Yes.

Arnold It's a high standard. And then I've just referred, and I won't take Your Honours to them, to the paragraphs of the Judgments below where the point is dealt with.

Blanchard J When you say it can't simply be the way in which the individual reacts, I'm not sure that I'd accept that as a bald proposition either. Surely there has to be some regard depending upon the circumstances, and I'm thinking here of what's said in the **Al Kateb** case, for the particular characteristics of the individual. If it's somebody who is susceptible to particular medical problems, treatment of them in a way which wouldn't perhaps affect badly the majority of people could be disproportionately severe if the people who were in charge were aware of the condition.

Arnold The question is whether taking that set of facts, the detention then becomes arbitrary. It may be that the conditions of detention are not consistent with the inherent dignity of the individual. The way in which that problem is resolved is to make the conditions of detention consistent with the inherent dignity of the individual. But if it's not, it doesn't lead to the conclusion that therefore the detention is arbitrary which is the context in which I am with respect dealing with this. But I do accept Your Honour's point entirely in this sense, that the Penal Institutions Act and so on as you know provides mechanisms for example for inmates who have medical conditions to get appropriate treatment out of the facility and so on. So there are a range of ways in which the special needs of persons under detention are met and can be met and if they're not adequately met and it does produce the consequences that they're not being treated humanely then I accept entirely there must be a remedy for that. All I'm saying is it's not release. And that really comes back to Your Honour Justice Gault's question that you posed to me, the difficulty with it is that if an individual reacts to detention, the underlying notion of detention in the way that Your Honour suggests, its very difficult to know what the response should be. I mean one can deal with difficulties of conditions by changing them. But if the fundamental problem is with detention, then it's not clear that there would be scope to deal with that.

Gault J I just of course raised it in the context I suppose of an interpretation aid. I know your argument in respect of 114O but at the end of the day one has to interpret it from all circumstances and when you start postulating circumstances and the impact of the Bill of Rights Act one has to wonder whether it should be construed as absolutely as you contend for unless that is clearly directed that no other way is open.

Arnold Obviously Your Honour I accept that entirely and say that, make the observation, that there are a variety of mechanisms and some have been used in this case to meet concerns about conditions. But if it is the position at the end of the day that the real problem is with detention, does that mean one then has to say well there is no form of detention which in the psychological sense this person could accept. And therefore we cannot impose it. And with respect that seems to me to be going too far.

Gault J Even I would agree with that Mr Arnold.

Elias CJ Well that's why the emphasis on proportionality or under the conventions or the Refugee Convention on necessity.

Arnold I certainly do want to come to that and perhaps I should do so now because one needs to be sure of precisely what it is that the concept of necessity is talking about here. The High Commissioner for Refugees has put out guidelines for the detention of refugees and asylum seekers. And it certainly expresses the opinion that because of the hardship which it involves, detention should normally be avoided. It can be resorted to only on grounds prescribed by law and one of them is to protect national security. So that fits within the concept of necessity. Now then there is another statement, another one of these principles which is a recommendation that detention measures taken in respect of refugees and asylum seekers should be subject to judicial or administrative review. And it's not entirely clear to me but it may be that that's what His Honour Justice McGrath had in mind when he made the observation that this wasn't in some way consistent with the Refugee Convention. But the Refugee Convention as you've said talks about necessity, the guidelines that have been put out recognise that detention for national security reasons is a sufficient justification so the only objection then can be as to the point of whether there must be some form of conditional release available in circumstances where the process is still being completed to determine whether the national security concern is a proper one or not.

Elias CJ Or whether it outweighs the other concerns because that's really what proportionality is all about and that's why judicial supervision of this sort of detention is so common because it enables you to do that in the circumstances of the individual case.

Keith J I thought that was the point that Justice McGrath was aiming at, the individual case, when he made that reference because isn't article 31 paragraph 2 about an assessment in the particular case. Shall not apply for the movements of such refugees restrictions under the … which are necessary, presumably relating to that particular individual.

Arnold Yes.

Keith J	I mean Part III contemplates that people who have a national security question mark over them might be released. And the Mangere rules contemplate that as well, that people might be at Mangere not fully released. So that I thought that's what Justice McGrath was pointing to, the need for individual determination. We're really back in a way with the very first big issue aren't we about whether Part IVA can be seen as allowing, or not excluding rather, bail?
Arnold	And I can really only give the response that I gave then. The difficulty with trying to make a comparison between the situation under Part IVA and the situation under Part III.
Keith J	Sure, yes I understand that.
Arnold	Is the information. And I mean my learned friend asked yesterday what would the Crown's attitude be on a renewed bail application. But with respect that puts the Director in a very difficult position. The Director, it's not part of his role to consider questions of detention and things like that. He has a very simple job to perform. I don't mean simple in a, of course it's a very difficult job, but simple in a narrow sense. He has a framework of national security. He has to reach a judgement and do something on the basis of that judgement and … with respect it would be unfair and in a sense rather improper to ask him to come along.
Keith J	Does it have to be him?
Arnold	Or somebody on his behalf to.
Keith J	Well does it have to be on his behalf?
Arnold	What does one say if there is this classified security information which is available only to the Director and the Inspector General. What does one say.
Keith J	And not to the Minister in charge.
Arnold	Well that's very interesting. When the, as to the way.
Keith J	Because after it was she who gave the affidavit or the certificate, I can't remember which in the **Choudry** case.
Arnold	She relies on the, she is entitled to an oral briefing under s.114, I'll just turn up the reference, but she's entitled to an oral briefing from the Director. She's not allowed, there's a limit on the way in which she can, I should just turn up the provision to give you the precise wording.
Keith J	This is the Minister of Immigration isn't it?

Arnold Yes.

Keith J What about the Minister in charge of the SIS. She's outside the scope of Part IVA isn't she?

Arnold I'm not sure on what basis the Minister in charge of the SIS would have access to the classified security information.

Keith J Well is there anything to stop, she is the Minister in charge, that's why as I say, I haven't actually gone back to look at **Choudry** and I know that it didn't involve this sort of matter. But the Director does brief the Minister in charge.

Arnold Well certainly. And I mean in a Part III context, as we talked about this morning, there might be a …

Keith J But not as between Minister and Director. That's only if it comes to Court that.

Arnold But s.114(e) is the one which enables the Minister to have an oral briefing from the Director on the contents of the certificate. And in subs (3) the Minister must not divulge the contents of the briefing to any other person and may not be called upon to give evidence in any Court or tribunal in relation to anything coming to the Minister's knowledge as a result of the briefing. So it really is the fact that there's not really anything that the Crown can do or say other than rely on the publicly available material. How is the Court then going to assess the extent of the risk and the ways in which any risk might be mitigated or covered by conditions? And I mean, it may be that the Crown can make submissions about conditions but if it's unable to explain to the Court the basis on which it seeks a particular condition, in what sense is the Court acting judicially in either accepting or rejecting the submission?

Gault J Mr Arnold, do you accept that there may be different considerations at play in respect of matters likely to prejudice the national security of New Zealand generally from those at play in considering whether some form of limited and controlled release on bail would be potentially damaging? It seems to me that you could well have a genuine and real concern that to have a person at large in the community permanently would not be the same as a limited and controlled release for a defined period. I just see that there may not be, but there could be, and we've been offered nothing to support that one way or another and that was really behind my raising this point yesterday. And if you consider that there's nothing to be said on it, so be it.

Arnold I certainly accept Your Honour's point. And can I stand back from it for a moment and invite Your Honours to assume that the Inspector General had been given, as part of his powers in dealing with this

matter, the power to order release on conditions of a particular person. The Inspector General, in full possession of the information, may be able to make precisely that sort of assessment that Your Honour indicates because I have to accept, I mean I couldn't maintain that if there's a concern about somebody being permanently in New Zealand it necessarily means inevitably in every case that there must also be a concern about them being released on certain forms of condition. So I have to accept Your Honour's proposition. But the point is that that distinction is not able to be explored because the information which is critical to it is not available to the persons who have to set the conditions. And as I say, there's no mechanism by which that can be conveyed to the Court to enable the decision to be made.

Elias CJ But there are lots of ways in which it could be conveyed to the Court. But perhaps the lowest impact one, it seems to me that it's really the substantiation of the belief that is difficult if it's based entirely on classified information. But on the face of the explanation that's been given here at the direction of Justice Williams, there's nothing really to indicate any present concern is there, if this man's released on conditions. So in other words what I'm saying is, a further certificate directed at that point might be some evidence. But we don't even have that.

Arnold Well with respect you're then asking the Director to go quite beyond his role.

Elias CJ Or from the Minister.

Arnold … the Minister's constrained as we've seen by that provision.

Keith J Not the SIS Minister.

Arnold Oh sorry, the SIS Minister. The difficulty is Your Honours, that say it's the, perhaps to get away from the present case and try and talk about an example. I mean let's say that you had somebody who was not a terrorist in the sense that he or she was going to personally blow up things and things of that sort but say they performed a leadership role or something like that in a particular organisation. Isn't the difficulty that when the Crown is invited to make submissions about conditions it's going to want conditions that will minimise the potential of any harm from the performance of this leadership role. So you might be asking for restrictions on internet use and restrictions on this, restrictions on that. If somebody comes along and says, but we don't agree to those. Why? Where is the judicial body left? It's left with an assertion that for some reason the Crown says this is important. But it's not able to examine it. And it's not able to be tested.

Keith J It would be both though wouldn't it on the Crown's statement that this particular person is not an arsonist or something but is a rabble

rouser or a leader or whatever. And so the conditions would be directed at public speaking perhaps or, I don't know. But the Crown would be identifying, without identified sources, would be identifying wouldn't it the subject matter of the concerns like those couple of pages at the end of the Director's statement where he does refer, doesn't he, to half a dozen or so items.

Arnold All of that is, if you like, publicly available material. That is as far as it could go. And whoever's making the decision would have to make the decision on that basis. I don't know.

Keith J But it would be those areas of concern wouldn't it that would be relevant to the assessment of whether release should be ordered and if it were, those areas would be relevant to the conditions that would be imposed.

Arnold I can't take the point further other than saying with respect that it does seem to me that the Crown is in a sense being put in a very difficult position because of the constraints on the information that can be made available. The Court is putting itself in a difficult position because it's not going to be able to see the material and reach an independent assessment about it.

Elias CJ It arises under the Bail Act too, these sort of considerations arise under the Bail Act too. Because I think there are specific provisions in the Act about what can be admitted as evidence.

Arnold Well yes there are a set of criteria as to things that one might look at. So there are a variety of considerations, the ordinary ones of risk, of failure to appear, interference with witnesses, reoffending on bail, in addition the nature of the offence, strength of the evidence, probability of conviction, character and past conduct or behaviour, history of offending while on bail and so on. Some of that, as I say, would not.

Elias CJ In hearing an application for bail the Court may receive as evidence any statement, document, information or matter that it considers relevant whether or not it would otherwise be admissible in a Court of law.

Arnold Yes.

Elias CJ Well in exercise of inherent jurisdiction it would be proper to have regard to that statutory procedure, would it not.

Arnold That with respect is not my point. I'm not saying that there'd be a difficulty with the Court receiving whatever material it wanted to receive subject to, the classified security information can't be there. And that inevitably constrains the type of submission and argument that can take place before the Court. To the point, in my submission,

that you're left with something that's in a sense not really a judicial process. Because presumably on some issues the Court would end up having to accept really what the executive said.

Keith J Well that does happen sometimes in these kinds of cases doesn't it, as your friend will remember from **Choudry**, where the Court pushed the Minister some distance and she moved and then the Majority of us thought that was as far as we could take it. That is the kind of thing that can happen in these areas isn't it, where at a certain point there is an end of the process.

Arnold Certainly from the Director's point of view, as I say, he would not regard it as part of his.

Keith J No, no.

Blanchard J Well he mightn't but he might have to change his view on that because if the Court were to conclude that bail was available then the Director really has to address that situation. Admittedly he can't reveal any classified information and nobody's suggesting that he would have to. But his certificate at the moment arguably isn't directed to what is really going to be before the Court in that sort of circumstance. It's directed at a different issue. He would need to refocus. He may not be able to be much more specific and I fully appreciate the difficulties for the Director and for you as Crown Counsel in the matter. But at the moment. Well all I can say is that if we reach that stage, there might have to be an opportunity for the matter to be reconsidered. The current certificate is not especially helpful.

Arnold In the context of a bail consideration.

Blanchard J Mm.

Arnold Yes I see the force of what Your Honour says.

Blanchard J But I'm sympathetic to what you're saying but we have to balance things.

Arnold Yes. Now I'm conscious of the time and I do want to leave my friend time. Let's see where I got to. Yes, and I needn't take Your Honours through it but I've dealt with some of the authorities on the question in our Submissions of detention and how they're most appropriately dealt with in paragraphs 59 and following.

Now before I leave that and come quickly to the second ground of appeal, I just make one further point about a submission I made this morning, and that is that I had intended to make the point and just overlooked it, that in the decision that my learned friend relies on in the House of Lords of **Ghaidan v Godin** where there is the

discussion of the approach to s.36, I do just remind Your Honours that Lord Steyn there reiterates a point which he's made several times previously that there is a difference between the New Zealand position and the position under the United Kingdom Human Rights Act. And I think Your Honour Justice Keith made an observation about that.

Keith J Well you were there too were you. I thought that that sentence or two of Paul Rishworth's was, I mean, what is the difference between can and possibly is what it comes down to doesn't it.

Arnold Yes it is interesting but.

Keith J That's certainly been the received wisdom because the British thought when they were drafting theirs that they were producing a tougher text and Lord Cooke said that and so on too. But if you forget about that developing understanding and their intention and so on and just look at the words. Because I'd always accepted that sort of view until I heard Paul say that.

Arnold I wondered whether the explanation for it was, when one looks at what Lord Steyn says in the **Godin-Mendoza** case at paragraph 44, whether really what he's doing is looking at the whole package of sections 4, 5 and 6 and really interpreting them in a sense as a group and saying that that's what leads to the view that s.6 in the New Zealand context does not allow as expansive an approach as s.3 in the United Kingdom. Anyway I simply wanted to draw attention to that.

Keith J Yes.

Arnold Now coming to the second ground of appeal, the jurisdiction toward a transfer. I don't want to take Your Honours through all of the Written Outline. It's there. But I do want to refer for a moment to the s.140 and 140A issue. Now the point is of course that for a facility that's not a penal institution there needs to be some mechanism to confer upon those who operate the institution the powers necessary to run a detention regime. And … references made in the Written Submission to s.140 subs (1) and then to subs (5). Now that provision isn't enough, to subs (5), isn't enough to provide all the powers that we're talking about. At subs 140A, although it's expressly said not to limit s.140(5), it then goes on to outline a range of special powers. It does with respect seem that there's a danger in relying on s.140(5) as the mechanism to provide all the powers that a detainer would require to maintain a place of detention . The other point of difference between ss.140 and 140A of course is that s.140 is addressed to every person to whom a warrant of commitment is addressed. Now in relation to the superintendent of a penal institution, that creates no problem because the Penal Institutions Act then provides a delegation type power. So you address it to the superintendent but he or she personally doesn't have to do it. You've got all the structure

underneath. If you look at s.140A, you'll see in subs (1) that it talks about the person who's in charge of the premises and any person acting under the authority of that person. So s.140A does two jobs. It confers powers on the person to whom the warrant is addressed but it also creates the delegations. So one has to bear in mind both aspects.

Eichelbaum You're not saying though that under 140 subs (5) all powers that are conferred by it have to be exercised by the person in charge personally are you?

Arnold I must confess Your Honour that, having appeared for the Crown for a while, there isn't much in the way of argument that surprises me and I would certainly prefer to be in a position where there was no doubt about it because there was a clear line of delegations as there is in the Penal Institutions Act and as there is in s.140A. Now I must confess that I had interpreted s.140 subs (5) as quite a limited provision. Simply really in terms of executing the warrant and so on. I haven't read it as a broad, you have the full range of power, you and your staff have the full range of powers that you need to do whatever has to be done to keep this person in detention. I certainly had not read it.

Blanchard J Take such reasonable measures must include using the agency of other persons to some extent, otherwise the poor bloke would be awake 24 hours of every day.

Arnold Yes, that's why I think, I've interpreted it as a fairly limited provision but what Your Honours are saying to me perhaps is that I've got it wrong. But I saw it as quite a narrow provision and hence the need for s.140A.

Elias CJ To give effect to the warrant.

Arnold Yes.

Elias CJ So to arrange for reception or transport.

Arnold It's the mechanical detail type of thing. It's not trying to set up a.

Elias CJ A prison regime, yes.

Arnold A prison regime. That's simply the way I interpreted it.

Keith J The language, reasonable measures, is not in 140A, is it? It is talking about the individual and others using physical force. So that's tighter language than reasonable measures.

Arnold Sorry Sir, that's what?

Keith J That's narrower language than reasonable measures.

Arnold	Yes.
Keith J	Do we know anything about the origin of subs (5) and 140A. Part of that 1999 Amendment Act aren't they?
Arnold	Subsection (5) of s.140A?
Keith J	No sorry, the two provisions. The addition of subs (5) first of all and then second the addition of s.140A. They were both put in in 1999 and I just wondered why.
Blanchard J	It's the boat people reaction isn't it?
Arnold	I'm not sure if that, that may be right Your Honour, I'm not saying no, I'm just not sure what the background to those additions was.
Blanchard J	It certainly comes in from the same date as the changes to 128 and.
Keith J	And along with the refugee provisions in the IVA provisions. So it's part of a big measure.
Blanchard J	What I found was curious was that 140A gives the extension of these powers that no doubt are highly desirable only where the warrant of commitment is addressed to the person who's in charge of premises approved under s.128(7). It doesn't for example help the person in charge of premises approved under s.62(2) or premises approved by the Secretary of Labour under s.128(b)(7). I'm using Mr Harrison's table here so I'm not quite sure of my contexts. And yet it's worded in 140A(1) as if there was some kind of general approval. Yet when you go to s.128(7), I think I'm right in saying, that's only the overnight provision. I've got a horrible feeling that there's a real hole in this section and I'd be very interested in an analysis of how it was operated with the Tampa boat people.
Keith J	It was the question we raised yesterday.
Blanchard J	Yeah, I'm quite worried about it actually.
Keith J	About the approvals for longer term.
Blanchard J	The whole of 128 needs major surgery as we discovered in the Refugee Council case and it hasn't had it. But there may be a real problem here. We may not have to face it in this case.
Arnold	I'm just wondering if there's some light cast on that about your point Your Honour. I'm just looking up Mr Quirk's Affidavit which I think is in Volume 3. I think he refers to, I don't know whether he, no he simply, yes he simply deals at paragraph 8 and then again at

paragraph something about the fact that a number of Tampa refugee claimants were detained … accommodation centre under s.128.

Blanchard J But I don't imagine they were just under the overnight provision.

Arnold No, no clearly they wouldn't have been.

Blanchard J So it may be that s.140A wouldn't have operated in respect of them.

Keith J Well it would operate for the first night. My colleagues tell me I shouldn't worry about the next 20, 30 hours or whatever it is but there's another gap possibly isn't there?

Blanchard J But you've then got to get a Registrar's approval in each individual case, if I understand it correctly. It's very strange.

Elias CJ Mr Arnold, are you able to tell us what the status of the Mangere Detention Centre is, what it's set up under?

Arnold Well Mr Quirk's Affidavit does deal with it. The answer is that it's just those two letters that we've already looked at I think from the.

Elias CJ The wrong official though in terms of.

Arnold Yes, one's Child Youth and Family, the other's the Department of Labour but they're both under 128(6)(a1) and 128(6)(b1) so they're both the overnight ones. And the other one is one from the Registrar which is at page 339 of the volume.

Elias CJ Oh there is one. Sorry which Volume?

Arnold Sorry, that's Volume 3 Your Honour and it's an exhibit to the Affidavit of Mr Quirk and it's exhibit D at page 339. So that's from the Registrar that refers to 128(7).

Keith J Sorry I had it back to front before when I made that comment about 140A didn't I? But can the Registrar do it generally like that?

Arnold Well, no no, but if you look at the last, third paragraph of that letter, you'll appreciate any decision under s.128(7) must be made on a case by case basis.

Keith J Right.

Blanchard J So this letter doesn't in itself have any standing, it's just an indication that individual approvals will be given later on.

Arnold That's right, yes.

Elias CJ So presumably what happens is that there's a warrant of committal and then the Registrar also exercises the power under s.128(7) and those are the documents that go with the individual detained person.

Arnold The warrant of committal would have to refer to the approved premises. So yes. But yes the decision would be made at the same time.

Elias CJ Yes. And then is the authority to deal with people in custody in the Mangere Centre, what's that to be found under, 140A?

Arnold Yes 140A. Indeed when you look at the Affidavit that we've just been looking at, the conditions there are extremely relaxed which is why the Committee Against Torture accepted that it's more of an open institution than a detention facility. Yes so Mr Quirk's Affidavit, and I've made this point at paragraph 85 of the Written Outline, does deal with the purpose of the Centre and as we saw yesterday, the trial Judge accepted that it was not an appropriate place for Mr Zaoui's detention .

Now one further point. Your Honour Justice Gault had raised s.16 or 15 of the Interpretation Act, that refers to warrant. And that in my submission refers to the warrant of appointment type of situation, not an arrest warrant of this type, hence the way it's put and in fact I think the definition of regulation includes Warrant in that capital W sense.

Gault J I don't know what it means. It's rather strange that it should appear alongside instrument, it seems extraordinary why.

Arnold Yes, yes.

Gault J And with a capital W.

Arnold Yes, yes, but it doesn't apply to this sort of situation, that's the point. So just to conclude Your Honours, the Crown's position is that Part IVA has a clear meaning that it required that the person who is the subject of a security risk certificate be held in detention until the completion of the process. The initial detention was lawful and has not become unlawful. It is accepted that time has passed, and a longer time than one would regard as desirable, but the Crown is not responsible for that and as I say, I'm not being critical of the Appellant. But there has been a use of the legal process which has meant that time has passed. And that alone cannot make an otherwise lawful detention arbitrary. And the rest of the argument Your Honours have heard and unless there are further questions, I've got nothing to add.

Elias CJ Mr Arnold if we do get to the point where we're considering whether bail should be considered by us, do I take it from what you've said

that the Crown would not seek to put further information before the Court.

Arnold — I mean I would have to reflect further on it. I have attempted overnight to give it some thought and considered the Director's position and I'd certainly like the opportunity to give a bit more thought to that. Particularly in light of the point made by His Honour Justice Blanchard. Certainly the Director's position has been that that is a matter beyond his power and really not within the scope of his duties as he sees them. But that does need further reflection. So if Your Honours got to that position, I'd certainly appreciate the opportunity to give it some thought and put a formal position to the Court .

Elias CJ — Yes, thank you.

Eichelbaum — May I ask you one question? I put this to you in quite general terms, it certainly doesn't indicate any concluded view on my part, but if in a given situation the Court has power to grant bail, and in the particular case on the merits it considers that bail ought to be granted, to what extent ought the Court to be inhibited by the fact that there may be an insufficient legislative or regulatory structure … for monitoring the bail or enforcing it.

Arnold — The difficulty Your Honour is that in a sense you've answered the question by the way in which you've posed it. Because you've said to me (a) if we have jurisdiction and (b) if we think it should be done, and of course the question of lack of process and those other things that I've been talking about in my submission go to the first point.

Eichelbaum — Mm.

Arnold — Which is why I went on about them. But if Your Honours get to the point that yes, the inherent jurisdiction remains and yes, we think it should be done, I guess the inhibition will be this, that if Your Honours consider that it is appropriate to attach conditions then I take it Your Honours' expectation would be that those conditions will bite and that they will be given effect and if they are not then something should happen. And the difficulty is to know exactly how those conditions would be monitored, how breaches of them would be dealt with and those steps. So in my submission the administrative things do matter and the Court does have to give consideration to those. Because after all bail in that sense is a two-way street. It's a two-way process. There are limitations on what a person under bail can do. And there should be mechanisms in my submission for dealing with that. Otherwise why impose the conditions, if adherence to them is voluntary.

Eichelbaum I suppose the converse view is that if that's correct and that should weigh distinctly with the Court, then the legislature can stymie the ability to grant bail in deserving cases.

Blanchard J I'm not clear that I see a real difficulty. If the Court has an inherent power to grant bail, it's got an inherent power to revoke it if a condition's not been adhered to.

Arnold So the position then is this Your Honour, that if this Court were to grant bail it's going to be in the position of anticipating that the Police or somebody else will monitor the way in which the bail is operated and if there are breaches of condition, the matter will be brought back before this Court for resolution.

Blanchard J Well I haven't thought about the detail of how reporting might be ordered for example. We haven't got to this point yet so I haven't given it any thought.

Arnold No, no, I understand entirely.

Blanchard J But I just, I don't see that there's going to be any insuperable difficulty given the Court's general powers. I mean there are situations from time to time where the High Court has to act using inherent jurisdiction to order somebody to be arrested and brought to the Court for example.

Arnold As I said in the earlier submission Your Honour, that these sort of problems in a sense didn't arise … a criminal context because one had the criminal bail system to plug into as it were. Even though the High Court, as we were discussing earlier, might be exercising an inherent jurisdiction, there was a framework that one could plug into.

Elias CJ What's that, the Police framework? I'm just trying to work out.

Arnold Well the framework at the District Court itself would have been applying. Because many of these cases were in effect an appeal from a refusal of the District Court to grant bail. There was no appeal right.

Elias CJ The District Court doesn't monitor it, it acts if there's any breach of bail.

Arnold That's right but you're plugging into an existing system.

Elias CJ But that's why I was asking, is that the policing system? What system is being plugged into?

Arnold Well it's the entire system. The way that the things are monitored, the way breaches are dealt with, all the various elements that have to be addressed in a bail system are there and are addressed, so when

problems arise, variations, all these things are all covered and dealt with. And the only point I'm making is that there is nothing for the Court here to plug into subject to Your Honour's point of whether in some way one could plug into the 128 type of things.

Elias CJ And who monitors those? Presumably the Immigration Department.

Arnold I think that's right but I should just check. I'm just checking to find the answer to that. But yes there's obviously a system for those and as we saw, quite detailed statutory provisions for dealing with the various things that can arise. My only point is there really does need to be some such system. And I really do with respect maintain the answer. But if there isn't, then one does have to wonder why the Court would take the trouble to set for example conditions in the first place.

Elias CJ But surely it's the same thing, it's the Immigration Service. Because this is all still subject to the Immigration Act.

Arnold If we could refer for example, 128A(c) sets out a whole lot of the provisions, it's the Police who deal with those ones. So maybe, I'm not trying to be difficult about this at all. But it is from a Crown point of view, the technicalities of these things do matter and it may be that somehow or other the Court would have to fashion in its orders directions that some process is to be used.

Elias CJ But it would just plug into the s.128 process wouldn't it? By analogy.

Arnold Well not unless somebody says so.

Blanchard J Well the Court could say so.

Arnold These are statutory powers that operate in relation to particular things happening and one can't just sort of plug it in in that sense.

Eichelbaum Well, coming back to the start of the discussion, I see that difficulty, my question really was whether the Court ought to feel that it was up to the Court to fix it if there's something that could readily be fixed by statute or by regulation. If the Court process puts its finger on a gap or a deficiency, isn't that then a matter for the authorities? Should that inhibit the Court from granting bail if on the merits it considers bail ought to be granted?

Arnold Well as Your Honour, as a general proposition obviously, with respect, Your Honour's obviously right. If there's a gap, it can be fixed. But over time. But we're talking about a specific case or a specific instance and that is the difficulty and circumstances if you reject the arguments that I've made … Until the Legislature acts, in my submission, the Court is obliged to put in place some process. I mean there is a public interest here as well that must be addressed.

Elias CJ Thank you Mr Solicitor. Ms Hesketh did you want to add anything?

Hesketh No thank you.

Elias CJ Yes Mr Harrison.

3.36 pm

Harrison Now I must confess Your Honours to not having any real understanding of how this Court wishes to deal with reply submissions. I have brought down in my back pocket a short submission which paragraph by paragraph replies to some of the Crown's submissions. I'm perfectly content however to proceed orally and am fairly confident I'll be finished by 4. So I just mention that there is a more formal point by point.

Elias CJ Do you mean a reply to the Written Submissions?

Harrison Yes, a written reply to the Written Submission. I'm just saying I have that because I came down not sure how the Court, what practice the Court would be adopting but if you'd prefer me just to reply orally, I'm happy to.

Elias CJ Well I must say I would have expected that in the course of your oral enlargement on your own argument you would have met the Crown argument and indeed I thought you had Mr Harrison, so it may be that really your oral argument would be more useful to us having heard the way the case has developed but I'll just check with my colleagues. Yes, thank you.

Harrison Perhaps if I can just begin with the last 10 minutes or so of exchanges with the learned Solicitor General. It seemed to me that plain practical problems and objections were being raised seemingly to indicate that the inherent jurisdiction should be regarded as not available for those reasons or alternatively just as a kind of general disinhibition on exercising that jurisdiction if it existed. The two areas where my learned friend sought to argue this was first the absence of the machinery to deal effectively with the breach of bail and so on. And secondly the difficulty in placing material before the Court. If I can just deal with the first of those.

In my submission, really there is no need to make heavy weather of the issue and in that respect I ally myself with the comment from His Honour Justice Blanchard. There is no reason in my submission why the Court cannot simply impose appropriate conditions on a grant of bail such as to residence and, if need be, reporting. Justice Hammond addressed some of those. And secondly reserve leave to apply to revoke or vary the grant of bail, remit the matter back to the High Court because it's not something this Court would need to be

concerned about and if Mr Zaoui breached a condition of his bail then there could be an application by the Crown as party to the proceedings, the originating application for bail, to apply in those proceedings. Very simple and straightforward. Now if, in any given case, the Court were in serious doubt as to the person concerned offending or absconding while on bail, well bail wouldn't be granted. But we're dealing ex hypothesi with someone in respect of whom that is not true and that, I submit, is a simple enough mechanism. Now if we want the conditions to be supervised, there's no reason why the New Zealand Immigration Service cannot do so. They are the ones who on the evidence originally applied for the warrant under 114O. The warrant subsists but the bail alleviates it. So that is perfectly appropriate. The Court could, if it had a concern, seek as a condition of the grant of bail an undertaking by, for example, the head of the Dominican Friary that, akin to suretyship, that he would advise of any breach of the conditions. It is all, I submit, quite straightforward and eminently workable. So I think that's all I want to say about that.

Keith J — Would there be implied in that, Mr Harrison, the power of arrest?

Harrison — Yes, well there would. Once the warrant of commitment, if the warrant of commitment was reinstated with full force, then the person bailed would have to surrender to the warrant and otherwise there would be the powers under s.140 and maybe 140A to deal with it, in my submission.

I don't know whether I should trespass into the s.140, 140A issue but it is, I submit, possible to interpret, as I argued earlier, to interpret s.140 subs (5) widely enough to deal with these issues, to give it a workable interpretation. It needs a workable interpretation as Justice Blanchard noted because there may well be a significant range of circumstances where s.140A may not apply. And if that is so, s.140 subs (5) should not be read narrowly.

Now the second alleged practical difficulty is informing the Court on a bail application, it is said. Now again, I submit, unnecessarily heavy weather has been made out of something which is not as difficult as my learned friend has contended. First one should note that the only limit is on the release of actual classified security information. There's no challenge to the original ruling of Justice Williams that that provision does not prohibit an adequate summary. But if we took the most kind of difficult case, which isn't this case, and considered how that might be handled, I would suggest it could be a case where someone has arrived in the country with a known terrorist record. The security services have information of a pending plot, let's say a pending terrorist attack. That person applies for bail. They don't want to disclose that the reason is they know of this attack because it will alert other people to what's going on. An affidavit could simply be sworn by the Director or someone, and we do have I know the Police Threat Assessment Unit which is also involved in

this area, saying that there is a specific extremely serious and dangerous concern entertained about this man but we cannot for the moment disclose it. And what Court would grant bail in the face of that? But at the other end in the extreme, and I submit it is the other end in the extreme, we have the present case. So that there is no reason why the existence of a hypothetical extreme case should so inhibit the Court that it rules out all prospect of an inherent jurisdiction being granted.

Now the other point I wanted to make about the evidence is that any evidence that the Crown says it is hindered in putting forward must surely relate to the question of risks if released on bail. The Director of Security was not shy in the rights proceeding where he swore an affidavit as to his position and as to the extent of the information he could and should disclose. It would be possible, as has been put to my learned friend, for the Director to rethink his position. But turning to this particular case, despite, if I may put it this way, the challenge that I threw down to the learned Solicitor General yesterday to state his position as to whether the Crown would actually want to provide further information relevant to bail issues, he has not been prepared to do so. What I say in response to that stance that he wants to think more, is that the giving of further evidence on the bail question to this Court is an indulgence which the Crown is being granted despite its having made a conscious tactical decision not to provide the Court with evidence. That indulgence, if it is to be allowed at all, should be subject to a strict time limit.

If my learned friend wants to think some more and take instructions, there should be a direction, with respect, here and now that the Crown should file a memorandum within a given period, I would submit next Friday would be ample, to say whether it would wish to file evidence as distinct from making submissions so that the Court knows, assuming it's going to be deliberating for a week at least, where we stand. Otherwise this man, assuming the jurisdiction issues are resolved in our favour, will continue to be stuck in prison unnecessarily simply because the Crown is not prepared to declare whether or not it wants to provide further evidence. That's all I want to say about those two points.

I wonder if I can just go back to the matter that was troubling Your Honour the Chief Justice and that is the question whether the detention and the warrant under Part IVA are stand alone or somehow interact with the s.128 regime.

Elias CJ I think I've come to the conclusion that 128 does relate only to warrants under that provision. I think Mr Arnold was quite right in that and also it applies to s.128(a) which I was also interested in. So I don't think there is the, I think my apology for the legislation was premature.

Harrison — Yes, I just wanted to make one point in case it hadn't fully dawned, if I may put it that way, about s.128AA. My learned friend rightly said that the non-refugee status claimant cannot apply for conditional release, the Immigration Officer does whereas under AA(4) the refugee status claimant or the Immigration Officer may apply for conditional release. But my point is it's important to note that that entitlement is for a refugee status claimant within the meaning of 129(b)(1) and that defines a claimant as a claimant who's claim has not been determined. So 128AA is not available to Mr Zaoui because he is a refugee rather than a claimant.

Elias CJ — Thank you.

Harrison — Now I want now to just address the question of the arbitrariness of the delay and the arbitrariness of the detention generally. A number of times the Solicitor General made submissions to the effect that Mr Zaoui, having exercised his legal rights of recourse to the Court, couldn't say that the resulting delay was an intolerable delay. He also made the point that a person cannot be the author of their own arbitrary delay if you like. Now that.

Elias CJ — Well it's a little unfair since he was at pains to stress that he wasn't trying to suggest that Mr Zaoui was not entitled to exercise his legal rights. So to turn it around and say it was his own arbitrary delay is over-egging it a little bit.

Harrison — Well. This is what I noted my learned friend to say. In relying on delays through litigation, and this is what I quoted him saying, you are in effect creating your own arbitrariness which you cannot do. That was my learned friend's proposition which I want to respond to. First of all, on the facts. On the facts, the delay since Justice Williams issued his decision in the first judicial review on 19 December last year has all been of the Crown's making because it was the Crown that appealed that decision.

Gault J — Can you say that is making delay, to exercise a right of appeal?

Harrison — Well, I'm perfectly content to adopt Your Honour's stricture in the sense that the point I am coming to is that for arbitrariness it isn't a question of fault and pointing at who is responsible for the delay. My only point at the moment is that it is factually incorrect to say that any exercise by Mr Zaoui of his legal rights has had any impact since Justice Williams delivered his decision on 19 December. Because it was the Crown that appealed. Then we had quite a lengthy period awaiting the Court of Appeal Decision and now the Crown has sought leave to appeal. And I make. It cuts both ways. Just as Mr Zaoui was entitled to exercise his legal rights, the Crown is entitled to as well. But when one looks at these authorities, **Chahal** and **Ahani**, what is noteworthy is that those were people who pursued litigation unsuccessfully. Thus far Mr Zaoui has pursued the relevant litigation,

that which has contributed to delay, successfully. And it's a big jump to say that someone who rightly challenges a decision such as the decision to refuse him any summary of the case against him at all, who succeeds in that, should have the period when he's pursuing his rights completely discounted for arbitrary delay purposes. I invite Your Honours to approach the matter as Justice Hammond did in terms of systemic delay and asking whether at the end of the day when you look at the fact that Mr Zaoui has been stuck in prison because the previous Inspector General got it wrong on two important counts, was disqualified for apparent bias, all of these things are part of something that has happened systemically and it is not, contrary to what is suggested in the Crown's submissions, where there's a series of inquiries to be made including whether there is a Crown default, if there's no Crown default, if the Crown hasn't misconducted itself, it's not arbitrary. The question is looking at the end result, rather than trying to attribute fault.

And there's only I think one other point I wish to make and that is on the intention issue for breaches of the Bill of Rights. I know there was that exchange but may I just refer Your Honours to a useful discussion in **Manga v Attorney-General** which is at our tab 2 of the main Bundle, paragraph [33] to [37] where the Crown argued that there needed to be some mental element on the part of the Crown to an arbitrary detention and justice Hammond at paragraph [37] on page 70 of the Report sets out a passage from Lord Cooke as he now is in **R v Goodwin** where His Honour said, Bill of Rights Act violations do not depend on a kind of mens rea. I omit words. It is primarily from the point of view of the actual effect of what is done that a Bill of Rights Act issue has to be approached. And that, I submit, says it all in a passage that's stood since 1993.

Sorry, there was one final matter and reference I wanted to make and that is to the case of **Al Kateb v Goodwin** where my learned friend referred the Court to the, I beg your pardon, that's Respondent's Casebook page 17. Two points. My learned friend referred Your Honours to the relevant legislative text which is at page 153, paragraph [122] of the Judgment. I just want to mention as a sort of indication of how far this case is removed from that, that despite that quite striking wording in the Australian legislation, there was nonetheless a four-three split in the High Court over whether that legislation could be interpreted so as to permit executive attentions. I submit Your Honours have a far far easier task than the High Court of Australia did and if anything Your Honours will get more guidance from the dissenting Judgments such as those of Justice Gummow and Justice Kirby.

The other point about **Al Kateb** and we may not get there, but there was a Crown argument, which my learned friend didn't address, that habeas corpus could not be granted upon conditions. I did just want to point to the Judgment of Chief Justice Gleeson at paragraphs 25 to

27, page 132 where he deals with the conditional habeas corpus point. And at line 32 His Honour says it is not antithetical to the nature of habeas corpus for an order to be made upon terms or conditions which related directly to the circumstances affecting an applicant's right to be released from detention and reflect temporal or other qualifications upon that right. And that's consistent with what the Law Commission said as well, that I referred to earlier.

So unless I can be of further assistance, that's the submissions in reply Your Honours.

Elias CJ Thank you Mr Harrison. Well we are grateful to all Counsel for their very helpful submissions in this difficult and important case and we'll take time to consider our decision thank you.

Court adjourns 3.59 pm.