

BETWEEN

AHMED ZAOU

Appellant

AND

THE ATTORNEY-GENERAL

First Respondent

AND

THE SUPERINTENDENT,  
AUCKLAND CENTRAL  
REMAND PRISON

Second Respondent

AND

THE HUMAN RIGHTS  
COMMISSION

Intervener

Hearing 9 December 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

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**CIVIL APPEAL CONTINUED**

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10.00 am

Harrison If Your Honours please I appear for the appellant with Ms Manning.

Elias CJ Thank you Mr Harrison.

Arnold If Your Honours please I appear with ... for the ... (away from microphone)

Elias CJ Yes Mr Solicitor. Well Counsel we had an opportunity to consider the Submissions that have been filed and given the indication Mr Solicitor that the respondents do not oppose transfer to the Mangere Centre, we would be assisted by hearing from you first on the question of bail and also on the questions of any conditions in either eventuality.

Arnold Your Honours I've dealt in the Written Outline at paragraph 3 and following with the principles which in my submission apply in relation to the bail analysis and then I've dealt towards the end of the Submission briefly with release on bail. And if I could just expand on those materials. The first point Your Honours is that bail in this context in my submission is essentially remedial. It's difficult to draw an analogy with the criminal process because there is no criminal process here, there is no criminal charge. But it's accepted, as the Court has said, that it has an inherent jurisdiction. And in my submission the purpose of that is essentially a remedial one to mitigate the effects of what has become an unduly long detention, albeit a lawful one. And I make the point or submission Your Honours that this is unlike the ordinary criminal case of somebody awaiting trial on a charge, because in this case there has been a statutory decision and that is the Director of Security has made a Security Risk Certificate. There has been a further decision and that has been the decision of the Minister to rely upon the Certificate. Now if nothing else were to happen by way of a challenge, those would effectively be final decisions and one would then move on to consider other issues such as whether the person could be removed or deported, that type of thing. Plus the Crown has always accepted that in the Minister's final decision he or she would have to consider what has been described as the human rights (HR) context. That was always accepted by the Crown to be part of the Minister's final decision-making in this area. The argument has been about the extent to which those issues are relevant to the Inspector General on the review.

So subject to the Minister's final consideration, one has statutory decisions that have been made.

Elias CJ I'm sorry, I know that this case isn't before us, and I haven't read the papers for the other case, but does that mean the Crown opposes human rights being taken into account by the Director General but says the Minister must take that context into account?

Arnold It's the Inspector General.

Elias CJ I'm sorry the Inspector General.

Arnold The Inspector General, yes. This issue has I must say developed as the case has come through the process but the way it originally started out

was to what extent was it relevant to the Inspector General in conducting a review of the Certificate to consider a range of human rights considerations relevant to the appellant's position. The Crown's position on that was that that was not part of the Inspector General's function. His function was simply to review the Certificate. In other words, it was a security function.

Elias CJ I see.

Arnold But it was always accepted when the Minister had to make the final decision about whether to rely on the Certificate and all of the decisions that he or she must make, at that point the human rights considerations were very relevant.

Elias CJ Thank you.

Arnold So it's just that at what stage in the process do they come into play.

So there has been a decision then of the Director and a decision of the Minister to rely upon it at least in a preliminary way. So that if there were no review, the process would simply go on. The question now is, there being a review, what is the approach that the Court should take. And in my submission to the extent that one can draw analogies from the criminal area, and I accept immediately that it's difficult, but the more appropriate analogy is from the situation where a person has been convicted and is appealing, particularly in the context or on the ground of new evidence. So that's the general framework in my submission in which the analysis should be undertaken.

Now when one turns to the particular circumstances, the critical difference in my submission in this case is the existence of the Certificate and the way in which any arrangements for release or transfer can be structured to take account of the existence of that Certificate.

Now I accept at once the point made by Your Honours in your earlier Judgment that of course the Director when he makes the Certificate is making it from the point of view of somebody staying permanently in New Zealand and he is saying, in my view this person is a risk to national security. And I accept of course that the considerations that apply in terms of a temporary release may be different. But in my submission it is proper that the Court look at the nature of the security concern that has been expressed and consider whether bail is compatible with that concern.

And I also make the submission that I'll come to that it is relevant to have regard in this context to what has occurred in the past.

Now if I could turn first to the national security concern. Could I ask Your Honours to take out Volume 4 of the Case to look again at the Certificate. I'm sorry the summary of the Director's reasons.

Elias CJ If this is taken at face value Mr Solicitor, this represents does it not the high water mark of the Crown case? There's no other material before us. This is the most complete statement of the Crown's concerns.

Arnold This is a summary of the allegations, there's a great deal of material underlying it.

Elias CJ Yes.

Arnold Some of which is protected.

Elias CJ Yes. Oh no, I fully accept that.

Arnold But working within that context, this is the Director's attempt to explain what it was that he was concerned about.

Elias CJ Yes, but my question was directed at, it has seemed to me that we really don't need to go beyond this for the Crown argument.

Arnold No, Your Honour, I'm not inviting Your Honours to go beyond that.

Elias CJ No.

Arnold So when one, now my learned friend has really characterised this in his submissions as really reflecting simply a concern that New Zealand might in some way be soft or be perceived to be soft in terms of the way in which it deals with particular classes of people. Now in my submission that is not an accurate or fair characterisation of the concerns expressed by the Director in the summary. The summary goes through the background and half way through on the first page it sets out the prior dealings with Mr Zaoui with Belgium and then later Switzerland and then later France, Akino Faso (?), Malaysia and so on. Paragraph 6 deals with the two decisions, the first from the Belgian courts, the second from the Swiss Federal Council. And then, and this is the important part, at paragraph 8 the Director sets out his concerns. The first one, and I'm quoting, it is reasonable to suspect that if permitted to settle in New Zealand Mr Zaoui would in due course undertake, facilitate, promote or encourage activities like those of which he was convicted in Belgium and France and or which the Swiss Government decided endangered Switzerland's domestic and external security. His presence here would attract both directly, that is people who wish to work with him, and indirectly, people encouraged to believe that New Zealand is a safe haven for people with his sort of record, other people likely to engage in activities of security concern. So you'll see there are two elements to that. One is the direct or active

participation of the appellant in the activities. The second element is the attraction catalyst that the appellant would provide if he were here.

The second point, Mr Zaoui is a foreign person who has a long record of involvement with foreign persons and foreign organisations including leadership. There is good reason to believe that any future activities he may undertake will be influenced by other foreign persons and or by foreign organisations.

In the next element, further down, the activities of which he was convicted in Belgium and France were clandestine or deceptive or threaten the safety of persons. The Swiss Government believed that his activity in Switzerland “may lead to acts of violence and even attacks in Switzerland”. Activities of this kind in New Zealand by Mr Zaoui or by others attracted to New Zealand by his presence here could threaten the safety of New Zealanders.

And then finally the element of impacting adversely on New Zealand’s international wellbeing. Now with respect to my learned friend, given the analysis undertaken in page 3 and the top of page 4, it is I submit quite misleading to portray the Director’s concern as simply being a concern about New Zealand being perceived as a soft touch. There is much more to it than that.

Now given that concern, and given that the position remains that that Certificate is maintained and the Minister maintains the decision to rely upon it, that is the position in a formal sense. Of course there is a review and the Inspector General when the review is completed may uphold the Certificate or may say that it’s not properly given. So that uncertainty remains. But for the moment there is a statutory decision on that basis. My submission is that whatever arrangements are put in place for Mr Zaoui from now needs to reflect the security concern that is expressed in that Certificate. And the basis of the Crown’s submission that it does not oppose the transfer to the Mangere Accommodation Centre but does oppose bail, is that in the former context, the Crown considers that the risks will be more manageable than they are if Mr Zaoui were to be bailed for example to the care of the Dominican Friars.

Elias CJ Summarise the risks that can be better managed in the Mangere Centre than on bail.

Arnold Simply because the.

Elias CJ No, not how they’d be managed, but what the risks are that would be being managed.

Arnold Ah, well there we would have to look at the convictions because those, as one can see from the Certificate, form an important part of the Director’s analysis.

Elias CJ We've all read those and what I was hoping was that you could identify the risks drawn from that record.

Arnold The risks are that, and really they are summarised in the passages that I've just read, that.

Elias CJ Well they're not.

Gault J Well with respect Mr Arnold, those risks are phrased with such expressions as in due course. We are looking at a period of say 6 months to a year. And having read what happened and what he was convicted of, particularly in Belgium, one for the present purpose can consider that that is the type of activity that there is concern would be engaged in in New Zealand. Well what of it? Is it really a serious risk of occurring in the timeframe we have to focus on?

Arnold Well with respect, the basis as you will have seen that the Swiss authorities ultimately deported Mr Zaoui was that he had been present in the country for quite a short time and had engaged in issuing communiqués and so on which the Swiss Government felt threatened it's national security. Now in response they imposed upon Mr Zaoui a variety of limitations, as Your Honour will have seen, on use of email and internet and facsimile. All of which were challenged by the appellant in the European Court and the European Court of Human Rights upheld it. Now that activity occurred in quite a short period of time.

Elias CJ So in answer to my question, is that sort of activity one of the risks you say can be better managed in the Mangere Centre?

Arnold Absolutely because there is at least a modest ability to monitor what is occurring and it may be that in the event nothing that would create a security concern does occur. But at least the position would be that some monitoring could occur. But if Mr Zaoui were to be bailed for example into the care of the Dominican Friars, there is no realistic way in which the State could closely monitor the activities. So something may occur and it may be learned of by the appropriate authorities but obviously the degree of monitoring and control is so much less.

And that is the essence of the position. It is about a degree of control over simply what is happening in terms of the flow of visitors and the.

Elias CJ Yes, yes, I'd like to note these down. So one is the ability to communicate?

Arnold Yes.

Elias CJ And another is the flow of visitors?

Arnold            That's right.

Elias CJ        What else?

Arnold            Well there is also the physical monitoring. The terms that the Crown would seek if Mr Zaoui were to go to the Mangere Accommodation Centre would be that he'd be confined to the Centre. Of course if he is bailed to the care of the Dominican Friars, again the Crown has no capacity really to monitor that.

Elias CJ        But what's that benefit directed at? Isn't it simply another method of ensuring that he doesn't communicate and meet with people thought to be undesirable. I'm just trying to identify the risks first.

Arnold            The risks, I'm sorry if I'm not assisting Your Honour, but the risks are those set out in the Certificate and essentially involve if you like the function of leadership, the function of, as occurred in Switzerland, the production of communiqués urging and supporting certain types of action. That's the concern and that was the concern in Belgium. It was, as you saw, conspiring with groups of people who had particular ideologies that were considered to be a threat to national security. So that's the concern. The question as to what extent can the appellant be given more in the way of a, well less in the way of a restricted detention environment, at the same time doing what one can to ensure that those activities are not reinstated or re-enacted.

Elias CJ        Well they seem to be association and communication activities.

Arnold            Yes in essence that's what it comes down to, yes.

Gault J         Can I just get some further help on this Mr Arnold? One could understand the opportunity for association in Europe where there were many displaced Algerian people of particular persuasions anxious to combine with a view to resisting the regime in Algeria and the like. Now this man's involvement, so far as his convictions indicate, seems to have been as a leader or catalyst as you put it. He didn't seem himself to have been charged with any activity other than the dealing in passports. What I'm trying to do is translate the risk of that sort of activity into a New Zealand environment in a timeframe with which we are concerned. I don't know anything about the expatriate Algerian community in New Zealand. I don't know whether there's any organisation or group with which he would associate and we don't seem to have much help on that. I understand there are security issues but I feel we don't have a sufficient grasp of the risk of which you are concerned.

Arnold            Well Your Honour is correct, there is no thing in the material going to the extent of the, for example, Algerian community in New Zealand or indeed the broader community. So I'm not able to point to evidence which says there is a concern that the appellant will link up with A, B

or C. I have not got that material and I can't point to that material in the record before the Court.

Gault J Well one would infer from the material we do have that he's more likely to communicate with those in Europe and elsewhere with whom he was previously associating. He seems persistently to have done that. But how does that affect New Zealand's security immediately?

Arnold Your Honour, if it were the case that Mr Zaoui resumed the activities for which he was convicted in Belgium and for which he was expelled from Switzerland, the threat to New Zealand's security with respect is precisely the same as the threat to the security of Belgium or Switzerland. It's not simply a matter of numbers with the particular jurisdiction. This is the point at which New Zealand does have to recognise that it is part of an international community. And if Your Honour was satisfied on the basis of the material before the Court given what's happened in the past that there is a real risk of a resumption of that activity, then in my submission the Court should be imposing conditions to deal with that. Because on any view of it that is the kind of conduct which is regarded by states and nations as a threat to their security.

Gault J Thank you.

Elias CJ I'm sorry, when you say that activity, the activity in Belgium was principally concerned with possession of blank Belgian passports and association with other people. So one can appreciate the direct impact upon Belgian security in those circumstances.

Arnold The conviction in Belgium was, apart from the passport ones, was of being a leader and instigator of a criminal association with the intention of attacking persons and property. Now the proposition that Your Honours seem to be putting to me is that if that is occurring, let's assume for the sake of argument that the appellant were to resume his activities of issuing communiqués and doing all the things that he's been doing but it is directed at people who are outside New Zealand. And I'll ask you to accept just for the sake of the argument that it is with the intention of attacking persons and property. The proposition that Your Honours seem to be putting to me is if that activity, the publication or the communication, although deriving from New Zealand or originating in New Zealand, if it's really impacting on people overseas or his communications to people in other countries, that somehow it is not a threat to New Zealand security. But with respect, that simply takes a very isolated view of the way in which.

Elias CJ Well you say security is inter-related?

Arnold Yes, of course, it must be.



Elias CJ Yes thank you I was just wanting to explore the answer that you'd given because you didn't identify those sort of activities.

Arnold Well I'm really taking the, I mean it is the convictions which form an important part, as Your Honours have seen, of the Director's analysis. And so the conviction in France was participation in a criminal group with a view to preparing terrorist acts. That is the conviction.

Blanchard J Do we know where those terrorist acts were intended to be committed?

Arnold They were from memory the French conviction related to activities that were actually directed at Algeria.

Blanchard J Mm.

Arnold The foreign nationals in Algeria.

Blanchard J Yes.

Elias CJ And the communiqués were all about Algeria weren't they?

Arnold Yes, yes.

Elias CJ That the Swiss complained of?

Arnold That's right, they were not specifically talking about Switzerland at all, they were talking about the Algerian situation.

Blanchard J Would it be fair to say there's no suggestion of a concern, a realistic concern, about violence occurring in New Zealand as a result of any activities that he might be involved in?

Arnold I think that's fair Your Honour but there's no.

Gault J The third bullet point in paragraph 8 of the summary is about the high point on that isn't it?

Arnold Yes, that's exactly right Your Honour. Yes that is the high point.

Now besides the issue of meeting the security concerns and just to restate the submission, the point is that a more relaxed detention than Mr Zaoui currently faces in the Mangere Accommodation Centre does allow an ability to monitor what is happening in a way that it really is in my submission difficult to recreate through bail conditions where somebody is placed in the care of an organisation such as the Dominican Friars.

The second element is this. That there is of course, and it will have to be resolved in due course, a dispute about the convictions. And one of the issues that was identified by my learned friend at the very

beginning of the previous Inspector General's review process was what weight should be given to the findings of the Refugee Status Appeals Authority. And in particular of course in relation to their analysis of these convictions and decisions of the Swiss authorities. Now that issue has not been resolved because of course the Inspector General, previous Inspector General, never got to the point of having to resolve it. The new Inspector General has indicated that it is an issue which he will have to resolve and will do so.

So there's that issue remaining to be resolved. But certainly from the Crown's perspective, those convictions remain. They are convictions entered into countries that as you've seen in France and Belgium which are governed by the European Convention of Human Rights and decisions made in Switzerland which have been challenged before the Court and the Court rejected the challenge.

- Elias CJ Not on the substantive issues, however, on the conditions imposed.
- Arnold Yes, on the right to impose the conditions.
- Elias CJ Yes.
- Arnold The other element of that experience is that it does illustrate, as I said in answer to Your Honour the Chief Justice's earlier question, that the appellant has, while under conditions of detention, continued with the activities which have caused the concern. And in Belgium when placed under a form of administrative custody which confined him to a particular street or area, Mr Zaoui essentially fled and entered Switzerland illegally. While there, continued with these other activities. So this is not a case where the concern that I am raising is fanciful. With respect it does have a basis in what has occurred in the past.
- Eichelbaum Mr Arnold when you speak of monitoring and the relative ease of monitoring as between detention at Mangere and a freer form of bail, what is it that you envisage? Is it the activities or is it a set of conditions?
- Arnold If one takes the Mangere Centre and one looks for example at the visitor policy. Assuming the Court were to, if the Court were to order that he be detained there and that there were no variations to the way in which the visitor policy works, the way that policy works as set out in the manual is that if somebody wants to come and visit one of the residents, they indicate in advance that they wish to come so that it's noted and so on and appropriate arrangements can be made. There is in the manual a right on the part of the manager of the facility to refuse permission for a visit, although I understand that's rare. So in that way an eye could be kept on visitors. That's the sort of control Your Honour that I'm talking about.

Now looking at it if you like from the other end of the lens. If Your Honours were to grant bail, and Mr Zaoui were to be released into the care of the, say the Dominican Friars, there really are two points. First Your Honours have to develop a regime to be applied and I don't want to go again through the arguments made at the earlier hearing. But Your Honours will appreciate that this doesn't fit within the sort of Bail Act regime, so Your Honours are going to have to consider how it is that for example if conditions are breached they can be enforced and so on. So there are those if you like procedural issues.

Elias CJ Would that not be met, leaving aside the question of monitoring, and detection of breaches, would that not be met by a condition granting leave to apply for revocation of the warrant, of the bail or a variation of it.

Arnold Yes one could deal with it in that way. The problem of course is that there would be no sort of state agency which had either the responsibility for monitoring or any real power to monitor as part of the bail regime. In the normal course the Police or whoever do have a variety of powers but those won't apply.

Elias CJ Wouldn't the Immigration Service have power under the Act?

Arnold Well is Your Honour referring there to s.140 sub (5), that very broad provision about, I don't see that as applying in this context. If Your Honour has in mind some other provision.

Elias CJ Alright I'll look at it.

Arnold But perhaps Your Honour's point is that one, I mean bearing in mind that the Immigration Act does allow for conditional release, there may be some way of.

Elias CJ Well that would be enforced by whom? Those conditions, who are they enforced by under the legislation?

Arnold Normally the Immigration officials as I understand it, yes.

Elias CJ Yes.

Arnold So then the question would be whether the Court could in some way hook into those provisions. But it does need to be clear who's got power to do what. Because as Your Honours will appreciate, if the need arose to exercise any power, one could expect it to be heavily contested and in fairness there should really be no doubt about how those mechanisms are to work.

So there are those problems, but the second element is this. That the Dominican Friars have indicated that they're happy to receive Mr Zaoui and indeed in one of the affidavits there's an indication I think

that some sort of undertaking would be given to ensure or attempt to assure that Mr Zaoui met any terms. Now with respect, that doesn't seem appropriate where one is dealing with a person in respect of whom a National Security Certificate has been made. It really doesn't seem appropriate that such a person be bailed to the care of a private individual on the basis of undertakings. What realistically would the Crown do if those undertakings were breached or if something went wrong?

Blanchard J What would the undertaking be other than an undertaking to notify the Immigration Service if Mr Zaoui ceased to be in residence?

Arnold Well that will depend on the nature of the conditions. I may have misunderstood it but my understanding of the indication that had been given was that the undertaking would relate to the compliance with the conditions on bail. And presumably they might be more than residence.

Blanchard J Well that depends again on what the conditions are.

Arnold Yes Your Honour. Now if it was a straightforward one like residence, then yes I accept Your Honour's point, that it's very easy to determine whether that has been breached, it doesn't require any real assessment to be made. But again, one would have to ask in what sense could the Crown enforce that in relation to the person giving it? And indeed is it really fair, would that be fair notwithstanding that they are willing to accept the obligation?

Blanchard J Well if they accept the obligation it would be on a basis that they would notify a failure to meet conditions. One would have to think, and I accept this, that one would have to think about what those conditions were. One couldn't impose onerous obligations on someone like the Dominicans. But if it was a simple matter of notification for example that he had not remained in residence overnight, I don't see any particular difficulty about that. There's an element of trust, but if we can't trust the Dominican Order, who can we trust?

Arnold I'm not talking about trust Your Honour. As I'm sure you'll appreciate, yes if the condition is a simple and straightforward one, of course it can be enforced. But with respect, the submissions I've been making is that given the context, that is the existence of the Security Risk Certificate, the conditions that the Court would have to devise are rather more complex and then it becomes very much a matter of judgement or assessment about whether somebody thinks they've been breached or not. And there really is a question as to whether it is appropriate to leave that to some private individual, with respect.

Keith J That kind of condition could be imposed, could it Mr Solicitor, just under a straight application of part 3, the national security and

suspected terrorists part where there is provision isn't there for release under s.79. Subsection 4 provides for a ... conditions.

Arnold

Yes.

Keith J

And so someone in respect of whom there is the prospect of deportation or removal under those sort of high level provisions, national security and suspected terrorism, there is the possibility of bail with conditions and that's a situation very close to the current. I know there's the additional element here of the Certificate.

Arnold

And it does all come back to what is the nature of the security concern. The underlying security concern. Because as I indicated earlier Your Honour, I obviously accept the proposition made in Your Honour's earlier judgment that the Certificate is given in one context and we are now looking at another.

Keith J

Sure, sure.

Arnold

So one can conceive of situations that would fall within this but my remarks really are addressed to this particular situation and this particular Certificate. And accepting that the concerns raised in that Certificate are legitimate, which I think in my submission the Court is bound at this stage to do, what conditions can one identify that will reduce the risk of there being any activity of that sort?

Keith J

But the conditions, to go back to earlier exchanges that you've have with members of the Court, the conditions do go back to the particularities of what it is alleged in the Memorandum from the Director and go back to just how they play out in New Zealand don't they?

Arnold

Yes.

Keith J

And a shorter period ... could be envisaged ... (coughing).

Arnold

Yes.

Keith J

Because understandably the Director is focusing on someone settling here, not someone being under some form of supervised release over a period.

Arnold

That's so but again I come back to the previous experience which does show that in short times these activities have been resumed.

Keith J

Actually on the Swiss one you said the Swiss took that action within quite a short period. I wasn't clear where that short period was identified. I didn't notice it in their.

- Arnold I'll just ask somebody to try and find that and we'll give you the reference Your Honour.
- Keith J Yes.
- Arnold Now just to deal with two points that have arisen in the questions to give Your Honours some references. Where there's a conditional release under the Immigration Act, in fact the answer I gave was wrong, it's the Police who generally enforce the breach of conditions. If I could refer Your Honours just perhaps to take a note of this, s.79, s.98, s.128 AC. The point being that those provisions give the Police powers to enforce them. So Immigration officials generally do the background work but they've got the Police there with those Police powers in aid.
- Gault J The conditions under, I was looking at s.79, are no more than a requirement to reside at a specific address and report to the Police at intervals.
- Arnold Yes but for the judicial officer who's making the decision, if the officer felt that those conditions wouldn't meet the proper concerns, then obviously bail wouldn't be granted. If those were the only conditions one could set.
- Elias CJ But they're empowered to impose other conditions as the judge may think fit.
- Arnold Yes.
- Blanchard J What other conditions would the Crown seek if there were to be bail?
- Arnold I'm sorry, in this particular case?
- Blanchard J Mm.
- Arnold Well the conditions would be the conditions of the sort that we've been talking about in relation to association, communication and so on. And the difficulty is of course that it becomes, it does become difficult to formulate them. And much more difficult obviously for the Friars to monitor them. It's in that context that the Mangere option is so much better because one doesn't want to stop visitors, that would be quite wrong. But at least that option allows the monitoring of the position. But it would be very difficult to replicate that from a bail condition.
- Gault J It seems to me it would be also very difficult to distinguish between reasonable exercise of the rights of association and freedom of expression on the one hand and matters which might be seriously regarded as inappropriate on the other.

Arnold Yes I accept that immediately Your Honour. And I mean it's for that reason of course that there would not be any light interference with the ability to receive and meet visitors. And it's for that reason that one would expect that before any effort was made to restrict visitors there would be a sound basis for it. And that's precisely the point of the monitoring that enables one to understand what is going on, at least to some extent.

Blanchard J Would the actions that you're suggesting Mr Zaoui might indulge in constitute criminal acts in New Zealand?

Arnold Well some may.

Blanchard J Well it would almost go without saying that he'd be in breach of bail if he committed any criminal act in New Zealand.

Arnold Well that's so but that's true in any bail situation Your Honour.

Blanchard J Yes. So the more extreme examples would be controlled by that anyway.

Arnold Well with respect that's not the position that one would normally take on a bail application in the criminal context - have no concern about future behaviour because the criminal law will control it. I do accept Your Honour that yes the behaviours may constitute criminal activity or even offences against the Terrorism Suppression Act as the point that my learned friend has made. That's correct.

Elias CJ Can I ask you again on this association and communication point? How practically does the Mangere Centre control that? I know that there is, is a judgement exercised in every case? Is there a request to visit which is then considered before a visit is arranged?

Arnold I can point you to the policy and I can point you to the evidence about that.

Elias CJ I've read that and I understand the general controls but I just wondered on the ground how that really works because you're saying it can't be replicated in a bail situation and I'm not sure that I'm convinced of that.

Arnold As you'll have seen from the material, it operates in an on the ground sense in a reasonably low key and flexible way. However.

Elias CJ They haven't had to deal with someone in respect of.

Arnold Well that's the point I was going on to make.

Elias CJ Yes.

Arnold           What we're talking about is taking a facility, the Mangere facility which is really designed for a rather different group or two groups of people.

Keith J           The second group.

Arnold           The second group has an affinity.

Keith             Has an affinity.

Arnold           Yes I accept that Your Honour. And really just trying to devise a way of ameliorating Mr Zaoui's position so that he has more freedom but at the same time recognising what in my submission is a legitimate national security concern. So the, as the material does indicate, one would look at the way the visitor regime worked but it would not be with a view to operating it repressively in respect of Mr Zaoui obviously. One would try and keep the sort of features of the Centre to the extent that one could.

Elias CJ         Well a register of visitors for example.

Arnold           Yes, those are the sort of techniques one could use. And as the evidence indicates, access to and from the Centre is relatively easy, people have swipe cards, the various NGO's can buzz you in at the gate. In the period when the Tampa refugees were there, there were security guards on the gate as well to slightly beef up the security elements but it does remain a pretty low key and open facility.

The reference of Justice Keith to sequence of events in Switzerland is dealt with in the RSAA's decision at p.52 paragraph 234 and following.

Keith J           Thanks, thank you.

Arnold           Arrived there on 4 November and then things ...

Keith J           Thank you.

Arnold           One further point in relation to the ability of for example the Friars to deal with breaches, they of course have no power to prevent a breach. .... as within the Accommodation Centre the manager does have powers although as you'll have seen from the manual, they are fairly limited and low key but there are powers which could be used to prevent a breach in the way that the Friars couldn't.

And I do want to emphasise Your Honours that nothing that I am saying about bail is an attack on the reputation or good faith of the Friars, obviously not. The issues really are those of principle and how practically a bail regime could be made to work to meet the concerns expressed by the Director.



So the Crown's submission at the end of the day is that while the Mangere Accommodation Centre is not from its point of view an ideal place, it can with some modification ... in a way that will meet both needs, the need to give Mr Zaoui a less restrictive environment but also really enable ... to monitor, albeit loosely I accept, his activities simply to ensure that the sort of thing that has occurred in the past, which is raise a security concern, doesn't occur in this period of time.

Now Your Honours have put it to me that we're talking about six months to a year. We are talking I imagine about at least a year. It's unknown yet of course whether the Court will grant leave to hear the appeal in the Inspector General review case but if that were to occur it would take some time and then the Inspector General's review has to take place. It seems clear that my learned friends will be leading much of the evidence that was led before the RSAA and perhaps more. So that will not be a short hearing. So we are talking about a reasonably significant period of time.

Can I make one final point, unless Your Honours have any questions. And that is that if Your Honours did decide to vary the warrant so that it directed a transfer to Mangere, there would need to be a few days to make organisational arrangements and get Mangere set up in an appropriate way.

Elias CJ Mr Solicitor I understand that your preferred option is not bail, but we would be assisted by hearing anything you want to add on any potential conditions, should the Court accept that.

Arnold Yes, on the bail question, the conditions of bail should in my submission be directed at meeting the concern that we've been discussing, that is the communication, association and so on. The difficulty is that it's hard to see how one could properly formulate bail conditions in a way that would meet the concern because, as His Honour Justice Gault said, there is a right of association and one can't develop a term or a condition of bail which removes the right of association. And yet on the other hand I think Your Honours would all accept that if one takes the past experience, there is a legitimate concern about certain types of association.

Elias CJ But non-association clauses are commonly inserted in bail conditions.

Arnold Yes of course they are Your Honour but they are very specific in relation to particular people. Now and so one might have non-association with a named person or non-association with the members of a named group. But with respect that's not the situation we're talking about. And I maintain the submission Your Honour that it would be difficult to formulate a term of bail that would provide sensible guidance to the person and sensible guidance to those responsible for him as to what was within it and without it. And in my

submission it is a much more sensible solution simply to rely on the kind of monitoring that I've been talking about through the Mangere Accommodation Centre. Because in that way the freedom of association can be maintained. It is only if something occurs which raises some problem that there will then be any need to do anything.

- Elias CJ      What criteria will the manager at the Mangere Centre apply?
- Arnold        Well that will be something that will have to be devised. I mean that is not something that the Manager of the Centre will have sat down and thought about at this stage.
- Blanchard J   He's going to have to think about it when people start turning up as visitors.
- Arnold        That's right, that's right.
- Gault J        What's the situation about visitors in the remand prison?
- Arnold        Well it's very similar in the sense that as with all facilities, the superintendent can exercise control, can note who's coming and going and so on. And obviously some of those controls have to do with management of the facility as well. I mean it's not simply an association point. So there's a list, in effect a list, of approved persons and it's dealt with in that way.
- Gault J        Presumably a person is not disapproved until there are grounds for disapproval. Why can there not be grounds for disapproval of any association leading to a variation of conditions should that arise?
- Arnold        Who's going to monitor the visitors and make a decision about whether a particular visitor is or is not appropriate Your Honour?
- Gault J        Well I have real doubts that this man will not be monitored wherever he is.
- Arnold        With respect Your Honour I'm not sure that I fully understand the point. Is Your Honour saying that you would expect that the Police will monitor this in some way?
- Gault J        I'm saying that I imagine that the security services are interested in this man and will continue to be.
- Elias CJ      And that the decision in terms of letting in visitors won't simply be something that the manager of the Mangere Centre will have to consider.
- Arnold        But how can one replicate that process outside the Centre? Unless Your Honours are saying that the Dominican Friars are obliged to keep a record of all visitors and submit that to somebody?

Elias CJ Is that something that could reasonably be suggested by you Mr Solicitor? A record, notification and then leave to apply for variation of the conditions of bail.

Arnold With respect, it's a very, it then places a number of responsibilities on those who, that is the Dominican Friars, and again.

Blanchard J Well he wouldn't be there 24 hours a day so they couldn't monitor his activities once he was outside the door of the Friary.

Arnold That's right. With respect, it's very difficult to see a way in which one could replicate what could be done in the Mangere Accommodation Centre if one accepts the security concerns expressed in the Certificate.

Blanchard J Consequently you're really seeking a form of detention.

Arnold That's absolutely the point Your Honour yes.

Blanchard J Yes.

Arnold That it is a continuation of detention but in a more relaxed environment, one that will give more freedom but does allow some control by the State. Or some monitoring by the State. And the difficulty is, as I've been saying, that it's hard to see how one could achieve any realistic level of control through a bail arrangement because unless one were to say for example that Mr Zaoui could not leave the premises of the Friars, which in itself would be a form of detention.

Eichelbaum If your preferred option, the Mangere Centre, ensued, would you be seeking a non-association clause? Or would you leave that, would you be content if that were left to the manager?

Arnold With respect Your Honour, I think it could be dealt with through the visitor policy in the manual. That just the visitors would be monitored in the normal way. And if something emerged which caused concern, at that point an application could be made to the Court or some other process invoked. But no I wouldn't be suggesting Your Honour that there be some attempt in advance to do something.

Eichelbaum Likewise with communication?

Arnold Yes, it's precisely the same point, yes Your Honour.

Gault J I have just one more question Mr Arnold. One of the proposed conditions of his detention at the Mangere Centre in your submissions was that he be confined to the Centre. It seemed to me one of his

major concerns was an inability to go to a Mosque. You would preclude that?

Arnold The centre itself really does attempt to cater to the religious needs of those who are there as well as the special dietary needs and so on. So yes that would ...

Keith J There is a prayer room attached to one of the buildings isn't there?

Arnold Yes, that's right.

Keith J But that may not meet the Mosque point fully.

Arnold There may be a mechanism within the concept of the form of detention that I am talking about to permit an accompanied visit of that sort. So I wouldn't want to preclude that but in terms of the if you like the conceptual basis, it would be that Mr Zaoui would be being detained in the Mangere Accommodation Centre .

So going back to Your Honour's question, Your Honour the Chief Justice's question, what conditions. The difficulty with respect that I have in answering that submission is that I cannot see how one can devise conditions which meet the type of security concern that has been expressed without making them so onerous that they become unfair to Mr Zaoui because it does, or unfair to the Dominican Friars, because of the obligations it imposes on them of an administrative sort.

Because as I've said on the association point, one doesn't want to interfere unnecessarily with that right of association. But one does want to have the ability to do something if it becomes necessary and to do that one needs knowledge. And similarly with the other elements.

Eichelbaum If it was a question of bail, would the conditions that you seek be limited to reporting?

Arnold No, Your Honour, if Your Honour is saying to me if the reality of it is that the Court were to object to the transfer option, and were to grant bail, then I suppose one would have to try, I must say I cannot see how one could do it, but I don't want to be taken as accepting that if he is to be released on bail that the only term that need be set is that he report. In my submission that does not meet adequately the concerns. And my basic submission is I do not see how they can be met in terms that are fair either to Mr Zaoui or to the security interest.

Eichelbaum Well you have mentioned reporting and you've made clear the difficulties that you ... association and communication. Are there any other terms that we ought to consider?

Arnold Well presumably the terms of the bail would also have to deal with place of residence which we're assuming.

Keith J           And curfew?

Arnold           Well curfew is typically a term. Logically if one is going to set a place of residence, in my submission one would have to set a curfew as well. The other issues that arise from the Crown's perspective, there is the issue of internet access. And how that would be monitored given the security concerns. We've talked about monitoring of visitors.

Elias CJ          Well again I understand it's not the preferred option that you're putting forward here but are you not able to assist us, have you not come prepared to assist us further on the subject of conditions?

Arnold           No, in terms of the precise wording of what condition one would try and fix if Mr Zaoui were to be released on bail to deal with for example issues like visitors and internet access. Because it seems to me very difficult to formulate a term that meets the legitimate interests either way. Now I accept Your Honour's point that there are non-association provisions but I mean they're quite different really from what we're talking about here unless you come up with a provision which says you're not to associate with anyone who may be engaged in the sort of activities that create the security concern. But in what sense does that give any guidance to those responsible for administering the bail or even Mr Zaoui himself?

Elias CJ          But all of these things are having to be controlled now.

Arnold           That's right.

Elias CJ          While he's in a penal institution. They will have to be controlled if he's transferred to the Mangere Detention Centre. That's why I started by asking you about the risk. Because the risk is common however he's held. And that seems to me to be the first start in devising conditions.

Arnold           In a general sense the risk is common of course. But it is the mechanisms for control that make all the difference. And the submission I've been making is that obviously in the Auckland Central Remand Prison there isn't an issue, and mechanisms are in place. Similar mechanisms could be replicated in Mangere. Mechanisms which do not unduly restrict visitor access but simply allow a monitoring. The point of my submission is that as soon as the framework of detention is removed, one then has to articulate by a series of if you like substantive conditions what it is that one would permit and what it is that one would prohibit. At that point in terms of a substantive articulation in a bail context, my submission is that in these key areas it simply becomes too difficult to come up with a meaningful condition or term that is fair to Mr Zaoui, fair to those in whose care he's bailed and recognises the legitimate interests underlying the Security Risk Certificate.

Elias CJ Well one would hope that those policies would be articulated in any event. I understand your point about control. But if these controls are not being exercised arbitrarily, somebody is going to have to turn their minds and do that balancing. So I don't see it as a different exercise but I accept the point that you're making about the authority and the control dimension.

Arnold Yes and the point about the underlying principles, is that there is no arbitrary exercise of power. People apply to come and visit and visit. If there are concerns about individuals who visit, that then triggers some sort of a process. But it has a foundation in what has occurred. And I accept Your Honour that it is the opinion of the manager or person who administers the facility but there is a process that can then be triggered. And in the Mangere environment ... Central Remand Prison environment, if there is a dispute about whether a particular visitor should or shouldn't come, there are mechanisms for dealing with that. My point is simply that it is on these key issues extremely difficult to see how one can replicate that in a non-detention environment. Because it requires, or the danger is one is either too cautious or too incautious. Because you're trying to articulate a set of principles that somebody else is going to apply about what sort of communication or visit is appropriate and what isn't. Now that's not to say that the way the regime operates through Mangere is arbitrary. Not at all. It is simply operating if something of concern is thrown up, then a process happens.

Elias CJ Yes, well.

Arnold That's not arbitrariness.

Elias CJ No, I wasn't suggesting to you Mr Solicitor that it was arbitrary. I'm saying that these matters do need to be assessed.

Arnold Yes.

Elias CJ In every case and that assessment presumably is happening wherever this man is, whether he's in a penal institution or whether he's in the Mangere Detention Centre, because if it's not then it would be arbitrary.

Arnold Yes, yes.

Elias CJ And I don't think for one moment it would be.

Arnold Yes. So the mechanisms, I mean in the penal institution you've got the Act and the Regulations and in the Mangere Accommodation Centre you've got the manual subject to any additional conditions that the, or variations the Court might order. But in the bail context, you've just got whatever terms the Court is able to develop. So I'm not trying to

be unhelpful, but with the best will in the world, it is difficult to see how you could make a term on these key issues of communication and visitor and so on that operate fairly. So apart from place of residence, issues of curfew, internet access, monitoring of visitors. I suppose the other issue is whether. Could I just take a moment Your Honours? (Counsel confers)

I suppose the final point is that if Your Honours accepted that there was a legitimate association concern, you'd then have to devise a system whereby if Mr Zaoui is bailed into the care of the Dominican Friars you've got to have some sort of a system that if he leaves the premises that he must be accompanied or something. So if Your Honours accept that association and communication may be legitimate issues and for example one accepts that one might try and meet that concern by a reporting mechanism, then you do have to deal with the situation that occurs when Mr Zaoui is not present at the Monastery. And that's the point that came up earlier.

Keith J Presumably there would also be a right would there on either side to seek amendment or to seek revocation of bail ...?

Arnold Well I'm just assuming that that would if you like be par for the course.

Keith J And you mentioned earlier the statement in one of the affidavits about an undertaking from the Dominicans. Is that something that you would see as important?

Arnold If any undertaking were given, it would really have to be in relation to quite specific obligations.

Blanchard J It would really only relate to residence and curfew wouldn't it?

Arnold Well yes, the difficulty is as I've said, if one tries to set terms which deal for example with distinguishing between appropriate associations and inappropriate.

Blanchard J You couldn't impose that on them.

Arnold No it seems quite wrong with respect to have an undertaking about such a term.

Elias CJ On that question, it was suggested that you would seek a reporting requirement. Would you really seek a reporting requirement if there was a residence requirement and an undertaking to notify, if that changed?

Arnold Well it's a pretty standard term. I'm not quite sure why one would not require it.

Elias CJ            Because people are usually bailed on their own recognizance or with sureties who may or may not be reliable. If one of your worries is this man being out on the streets, I wouldn't have thought you'd want necessarily a reporting requirement. I mean it's not a big deal. As you say it's a pretty standard condition.

Arnold              Yes. Well I'm assuming that if Your Honours were to grant bail that the terms of the bail would be such that the appellant would be free during the course of the day to go wherever. So that's the basis on which I'm working. The consequence of that as I say is that in essence it becomes impossible to monitor an association or communication policy and in effect Your Honours are saying that you don't accept that the security concerns are likely to be manifested in the reasonably short to medium term, that is in the course of the year. That seems to me to be the effect of what Your Honours are talking about with respect. Were there any other matters Your Honours?

Elias CJ            No, thank you Mr Solicitor, we'll take the morning adjournment now.

Court adjourns 11.35 am

Court resumes 11.58 am

Elias CJ            Mr Solicitor we have a further question for you. If we're minded to grant bail, then one mechanism I think we would consider is whether the form of bail should be simply a suspension of the warrant of committal until a particular time. And I'd like to hear whether you have any thoughts on when any such suspension would determine. It seems to me that it probably has to be when the decision of the Inspector General is made but do you have any thoughts on that.

Arnold              No Your Honour that would have been the time that I would have suggested in any event is the sensible time that the thing should determine. Because at that point either the Certificate will be confirmed or the Certificate won't be confirmed and that triggers a release mechanism anyway.

Elias CJ            Yes, thank you. Now Mr Harrison we need to hear you only on, because we've read your submissions, we would be assisted by hearing anything you wish to add on conditions of bail and the conditions of residence, curfew, reporting and any undertaking both by the prior of the Dominican Order and also the question of leave to apply for variation or revocation. So the conditions being residence, curfew, reporting and the issue of undertaking both by the Dominican Prior and also by Mr Zaoui himself and any leave to vary or revoke.

Harrison            Thank you Your Honour. Your Honours I realise I'm being asked to cut to the chase very much. I accept that as appropriate with respect. But I wonder if I could cut obliquely for a moment. Because underlying the question as to appropriate conditions of bail are some matters that have been put to you by my learned friend which I would



like to respond to in a reasonably developed way. I won't take too long but if I seem not to be addressing the matters immediately, please bear with me.

Elias CJ Mr Harrison I think it is unnecessary for you to do so because the conditions that we particularly asked you to address don't really require it.

Harrison Well in that case if I take it that those are the only conditions that are in contemplation, that is to say, residence and reporting. I understood that.

Elias CJ And curfew.

Harrison And curfew. But when you raise the question of undertakings by the Friars and Mr Zaoui, I thought that that might relate to some of the other matters that were being put to you, concerns about freedom, about expression and association.

Elias CJ No, they're directed simply at those conditions.

Harrison Alright then. Well the position I submit is that one must, as Your Honour's questioning of my learned friend indeed addressed, ask what is it 10 years later and on the other side of the world from the events in Europe which led to convictions is really feared in relation to this man if released on bail. And I submit you did not receive a convincing argument or response on that point. Then one must ask, having examined that issue, what for example would a curfew protect against as against the absence of a curfew.

Blanchard J It would identify residence.

Harrison Ah, well then that issue can be dealt with by way of defining what is meant by residence. Now if.

Blanchard J Well residence would mean being in residence between particular hours.

Harrison Yes.

Blanchard J It doesn't need to be particularly onerous. And it could be the subject of an application for variation which could be dealt with rather quickly if there was a good reason for not being in residence during particular hours.

Harrison If it is simply designed to ensure that he sleeps in the same bed every night, then that is one thing. If it is directed to saying well he basically needs to be home by dark or something like that, that would be a matter I would wish to address. I don't accept with respect that it is necessary to have this man every night in bed at the friary. But I'm certainly not

going to seek to get into an extensive argument over it. My submission is that his observed behaviour over the 770 days he has been in prison, observed and reported on every day with no incident at all shows that there is nothing to be concerned about in terms of requiring that he reside all the time at the friary every night but nonetheless if that is the condition that is to be imposed, I accept that a curfew designating reasonable hours will ensure that, combined with the condition as to residence.

Now as to the matter of an undertaking, we have offered an undertaking that can be by Father Lemey who's sworn the affidavit. It can be directed in the form of a formal undertaking to the High Court that he will report any breach of the conditions imposed that comes to his attention to whoever may be nominated. We haven't had assistance from the Crown on that but I'm happy that it be a senior official of the Immigration Service or whatever. That undertaking would of course be an undertaking enforceable by contempt proceedings in my submission.

Whether there needs to be an undertaking by Mr Zaoui I would submit is open to question because the sanction would be revocation or variation of his bail. And I suspect that probably the undertaking by him is legally unnecessary but again, we have no problem with an undertaking, a separately filed undertaking that he would comply with the imposed conditions of bail and surrender on any Court order that he do so.

The reporting condition, we have always offered that. I mentioned in my submissions that once weekly to Auckland central Police Station would be acceptable. The curfew hours.

Keith J            You actually said twice Mr Harrison.

Harrison            Sorry, alright, twice weekly. Yes. The curfew hours, I submit that if he is to put it the other way round, if he is allowed to be at liberty between 7.00 am and 11.00 pm. By at liberty I mean not required to be under the roof of the Dominican Friary, those I would submit would be reasonable hours that would allow him for example to attend social engagements in the evening.

And we have of course encouraged the Court to incorporate a leave to apply provision in any bail order and of course we continue to support that proposition.

Now I'm not sure, I think that has covered all the matters that you wished me to address Your Honours.

Elias CJ            Oh yes, the question that I put to the Solicitor General about the period and the mechanism of suspension of the warrant of committal, the period during which it would operate.

Harrison Yes, I agree that the period appropriately ends upon the giving of a decision on the review by the Inspector General. But I would invite Your Honours to consider building in an, or further order, aspect to that as well. So that those existing proceedings would be a vehicle to extend the period should that seem appropriate at the time.

Elias CJ Well there could be a fresh application for bail at that stage if necessary.

Harrison Well that's one way of doing it. The other way of doing it would be to empower the High Court to extend it beyond that finite time.

Gault J That would be a whole different scene. That would be subsequent to confirmation of the Security Risk Certificate.

Harrison I accept that Your Honour.

Keith J And at that point it would be under the regular Immigration Act provisions wouldn't it, so.

Harrison Well no, there is likely.

Keith J There's the linking provisions.

Harrison It has been conceded by my learned friend in the last session that if the Certificate were to be confirmed and acted on by the Minister, there would then be a lengthy end game having regard to the international convention so it may or may not be under specific other Immigration Act provisions. But I don't press the point, I just raise it.

Elias CJ Thank you. Mr Solicitor is there anything arising out of that?

Arnold No Your Honour.

Elias CJ Alright, we'll adjourn now and we'll give our decision at 4.00 pm today.

Court adjourns 12.10 pm