IN THE SUPREME COURT OF NEW ZEALAND SC 13/2017

BETWEEN **MARK DAVID CHISNALL**

Appellant

AND **THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS**

Respondent

Hearing:	22 June 2017
Coram:	Elias CJ William Young J Glazebrook J O'Regan J Ellen France J
Appearances:	A J Ellis and G K Edgeler for Appellant V L Hardy and D J Perkins for Respondent

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CIVIL APPEAL

MR ELLIS:

May it please Your Honours, Ellis and Edgeler for Mr Chisnall.

ELIAS CJ:

Thank you, Mr Ellis, Mr Edgeler.

MS HARDY:

May it please Your Honours, Ms Hardy and Mr Perkins for the respondent.

ELIAS CJ:

Thank you, Ms Hardy, Mr Perkins. Yes, Mr Ellis.

MR ELLIS:

Right, well, I'm assuming you're all familiar with the various submissions and I don't propose to trawl through them but I expect there are some questions. I have a few notes that I've made in response to my learned friend's submissions and reflecting on my own which I'm going to talk to, and obviously I'll need to occasionally refer to the written submissions but – so I wanted to start by saying Justice Miller in his sentencing notes, which are in tab 8 of the multi-coloured tabs, case on appeal, he said, at paragraph 2 and paragraph 47, so at paragraph 2 he said, "You present an acute sentencing problem," of which this is really an extension. The sentencing options are a determinate sentence in prison, a determine sentence in secure care and preventive detention, and then he goes on to say that his risk is attributable to a mild intellectual disability and personality disorders, "But you shouldn't be detained as a special care recipient because you might prey on people in that setting." And then at paragraph 47, His Honour says, "I am satisfied that this is not a proper case preventive detention … your previous history, while serious, would not ordinarily suggest preventive detention." But the reality of where we are now is the legislature have introduced a new form of preventive detention, a public protection order. So this is in reality a late appeal against the non-imposition of preventive detention.

ELIAS CJ:

I wonder really whether that is a sensible submission, Mr Ellis, in the sense that if this application had been made close to the time of the sentencing remarks one could have said that they would undermine the result that the Judge came to but this is some time on and it's what is known now that must be the focus of the application.

MR ELLIS:

Yes, I can understand that but I think it is an acceptable submission because the reality is it's a retrospective increase in his sentence. That's the reality of it, and as a prisoner or a detainee what he wants to know is, "Right, I've been released from prison. What happens to me now?" So conceptually and from his perspective he now faces a form of preventive detention in a new outside-the-wire facility and that type of detention, certainly in international human rights law, is prohibited, so I think it is a good starting point because that's actually what is happening. It's retrospective and it's a double jeopardy, and –

ELLEN FRANCE J:

Sorry, Mr Ellis, I understand the submission but the Act does anticipate, doesn't it, in section 138 this type of situation?

MR ELLIS:

138.

ELLEN FRANCE J:

So 138 of the Public Safety (Public Protection Orders) Act 2014. Or do you think that's dealing only with the other way round?

MR ELLIS:

Yes, I think that's right and –

ELIAS CJ:

Sorry, have we got – I didn't bring the Act into Court so –

GLAZEBROOK J:

It's in the first tab insert.

ELLEN FRANCE J:

It's in the appellant's one.

MR ELLIS:

Appellant's authorities, tab 1.

GLAZEBROOK J:

Tab 1. 138.

MR ELLIS:

138. What I'm saying, Ma'am –

GLAZEBROOK J:

Can I just – I mean, I've got a reasonable amount of sympathy for that submission. It's just that it's – what are you expecting us to do with that in the sense that there is legislation in respect of it? Is it to back up your submission that it has to be last resort, all other available options have to have been considered type of submission? Is that the –

MR ELLIS:

Yes, that's the thrust of it.

GLAZEBROOK J:

I'm sorry, I'm short-handing, but –

MR ELLIS:

You should treat this as a last resort and if it's possible to read the legislation down you should do so. To answer Justice France's proposition, I don't think section 138 is relevant to my argument. I am saying it's a new form of preventive detention, not the same one. So inasmuch as the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 is a form of preventive detention, so is this. There are different types of preventive detention. This is just the newest one that's come along. I say to you in interpreting the Act perhaps trying to get Justice Glazebrook's proposition in the principles of the Act, which are in section 5, every person or court exercising a power under this Act which, of course, includes interim orders, must have regard to the following principles. Orders under this Act are not

imposed to punish people. So if that is a principle, the courts dealing with it, the High Court, this Court, and the Court of Appeal, have got to determine whether what is actually being ordered is a punishment, and I've included in my submissions for that the most detailed analysis I can find of what is a punishment in the case of – in tab 7 of the appellant's bundle of authorities – the *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 case, which is a decision of the Hong Kong Final Court of Appeal and that decision was given by Sir Anthony Mason on behalf of the Court, and he does a thorough analysis of the international law and the European law on it, and he concludes on behalf of the Court that looking at the third leg, which is the really important one, what's the penalty? What's the result of the charge? That was insider trading. He concludes the fine that you get there is a penalty and the next case in the bundle, the 17 Judges of the European Court also conclude that in that case the disciplinary penalty in the prison is a penalty and attracts the relief – not the relief, attracts the article 6 fair trial right and the article 5 right and what we have here is something far worse than a fine for insider trading or some prison penalty. What we have is ultimately a detention that you could have for the rest of your life and in that context it must be a punishment and that's really how the Attorney-General has tried to get around the *Fardon v Australia* CCPR/C/98/D/1629.2007 (10 May 2010) case by saying this is civil. It's not criminal. But the reality of, in my submission, it is criminal. It is not civil, and it is a punishment. So the courts have not considered whether it's a punishment or not.

GLAZEBROOK J:

But the trouble with that is, but it says, "orders are not imposed to punish persons," so it must assume that orders aren't punishment if they fall within the public protection and public safety … and also give as much autonomy and quality of life as possible because just the whole Act makes no sense if you say it's per se a punishment. Well at least you might be right but Parliament has obviously thought it isn't.

MR ELLIS:

Right, and the Human Rights Committee says, well, just because you label it civil doesn't make it civil.

GLAZEBROOK J:

I know, I understand the argument it's just Parliament has spoken and said these aren't – so we can't disapply the Act, can we? I mean it might be inconsistent, we might think it's inconsistent. We might think it's justifiable in a democratic society and proportionate whatever the case may be but we still have to – well in the second case we could apply it in its terms.

MR ELLIS:

Well the proposition of whether you can disapply it, I suppose, could involve an analysis of section 4 of the Bill of Rights. You can't strike something down only because it's inconsistent with the Bill of Rights. I mean, in my submission it isn't only inconsistent with the Bill of Rights it's inconsistent with the International Covenant on Civil and Political Rights – very much so. So what the proposition I'm making to you is you've got to have an analysis of what it is because that's what the statute directs and I agree with you, it might be a declaration of inconsistency-type argument. We haven't got to that yet and we got a fixture, I think, for sometime in December, 5 December.

GLAZEBROOK J:

So there's actually a specific hearing on that coming up, is there?

MR ELLIS:

Well, that's the substantive PPO plus we've tagged on – we've filed a separate, we had filed a separate application for a declaration in separate proceedings which is conjoined with that so yes, that's certainly coming up.

GLAZEBROOK J:

I missed when you said that was coming up.

MR ELLIS:

December the 5th in the High Court in Auckland. So my simple proposition, that regardless of what –

ELIAS CJ:

Sorry, I hadn't appreciated that. It's set down for when, did you say?

MR ELLIS:

The 5th of December. It was set down yesterday. It was delayed because –

ELLEN FRANCE J:

Am I right, you had a fixture and that was adjourned.

MR ELLIS:

That's right. We had trouble getting reports on a contingency basis.

ELLEN FRANCE J:

Oh right. So you had that appeal to the Court of Appeal and you've now got that process underway.

MR ELLIS:

We've got that underway so now Dr Justin Barry-Walsh can do his report on public money so the Court has now set a hearing. But you wouldn't appreciate it because we only knew about it yesterday. So the point I was making was that –

ELIAS CJ:

So why is the hearing not until December?

MR ELLIS:

Lack of time in the Court.

ELIAS CJ:

The parties were happy to accept an earlier fixture, were they?

MR ELLIS:

Well, the Crown produced a schedule of when everybody was available, witnesses, counsel and so on and I think it was September onwards. I can't be precise, but the Court didn't have a week's fixture until December.

ELIAS CJ:

Thank you.

MR ELLIS:

And the continuance of the interim detention order is no prejudice to the Chief Executive, whether it's prejudice to Mr Chisnall isn't a point we're taking because, I mean, it's important that various issues are raised and we need the experts and we weren't insisting on anything before because there's a – it's a federal case as it is without worrying about undue delay. That's not in issue.

ELLEN FRANCE J:

So is Justin Barry-Walsh's report available now or is that still to come?

MR ELLIS:

No, we – I mean I advised him the day of the Court of Appeal decision which was in the last few weeks and he said he could get it done by sometime in August, and the Crown wanted originally four weeks after that to get their expert in response and then moved that out to six weeks. So that would have probably taken this to the end of Septemberish. But anyway, he's going to produce his report. And, I mean, it is interesting that in the – I don't know, I'm jumping the gun – the respondents, paragraph 5 of their submissions, sets out what they say is the summary of the argument there setting out the Court of Appeal … fundamental question is whether the Court is satisfied on the balance of probabilities that the respondent meets the threshold under section 13(1)(a), namely there's a very high risk of imminent sexual violent offending, and they further say, at paragraph 45 of their submission, that the High Court and the majority in the Court of Appeal reached the conclusion applying this high threshold that the evidence was a sufficient foundation, and

I think we're in danger of getting a little terminology confusion because, of course, there's a threshold for the Act and then there's high risk, so using the term "high threshold" is not one that I would recommend because that's a little confusion. But then, they then say that – which I think they misunderstand.

I wanted to take you to section 69, and this is why ultimately Dr Barry-Walsh is important. Section 12 is only triggered when it appears to the Court that Mr Chisnall may be intellectually disabled and one needs to look at section 12, which is just above the section there, above the paragraph they've cited. That's not right. The section says, "Assessment whether respondent mentally disordered or intellectually disabled." So it's one or the other, not just if you're intellectually disabled, and that is important because in the specialist assessor's report back in my multi-coloured bundle, tab 17, Amanda McFadden, on page 193 using the numbers in the bottom right-hand side, in her paragraph 8, psychiatric history, Mr Chisnall has the following diagnoses, ADHD, post-traumatic stress, depressive. Autistic spectrum disorder has been queried but not conclusively diagnosed, and that's the one that I wanted to focus on, and she says further, on page – paragraph 12 which is on page 196, other relevant findings, "Mr Chisnall has very complex presentation. He presents with features of autistic spectrum disorder which have been signalled with clinical data gathered from Mr Chisnall and his mother and completed by Ms de Wattinger. The current data is not unequivocable and therefore it is important that a more comprehensive and conclusive assessment of ASD is completed as this will inform the broader formulation and treatment of his mental health needs." So she alerts the authorities that he may have autistic spectrum disorder, and then Sabine Visser whose report is in the next tab, tab 18, in her conclusion on the penultimate page of her report, she says, and this is the – she's a psychologist appointed by the High Court at our request to ascertain whether or not he was intellectually disabled, and she says, "Mr Chisnall appears to satisfy the diagnosis of autistic spectrum disorder and intellectual disability."

GLAZEBROOK J:

Sorry, I'm just trying to find where you're reading from, sorry.

MR ELLIS:

In the conclusion, Ma'am, page 210.

GLAZEBROOK J:

Okay, sorry, I was in the next page. Thank you.

MR ELLIS:

At the very beginning of the conclusion.

GLAZEBROOK J:

Yes.

MR ELLIS:

So she's doing a dual diagnosis and she further says, quite interestingly, that the ID Act does not change with the current changes in diagnosis. It still has the old definition. Within this definition, Mr Chisnall doesn't meet the criteria for intellectual disability because his IQ is too high and so there's a difference between clinically intellectually disabled and legally and just in, in passing, I would say –

ELIAS CJ:

Sorry, this, the IDCCR Act?

MR ELLIS:

Yes, Ma'am, the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

ELIAS CJ:

Yes. So did you say that it has a legal definition of what constitutes intellectual disability?

MR ELLIS:

Yes, it does, Ma'am, in section –

ELIAS CJ:

In terms of this range?

MR ELLIS:

In section 7 of the Act.

ELIAS CJ:

Section 7, thank you.

MR ELLIS:

You've got to have an IQ of 70 or less, plus or – to a 50 – 95% confidence level, two adaptive functioning disabilities and this should have materialised in your development time when 18. So there's three but the important issue is is their – is his IQ, and I did make mention in my submissions of *Moore v Texas* 581 U. S. ___ (2017) a decision of the United States Supreme Court, and I noticed I haven't given you a citation. That was because it was a bit new and it hadn't got one. It was a March the 27th of this year decision and it involved the death penalty and whether somebody was intellectually disabled. So their law is perhaps more developed than ours, and essentially the Supreme Court said the trial Court and the circuit Court of Appeal said, "Look, if you aggregate all his IQ tests he's got an IQ of 70.66 which is over 70."

ELIAS CJ:

Yes, I saw that in the submissions, yes.

MR ELLIS:

And they said, "Oh, no, no, no. You've got to look at the other factors," and the margin of error which Justice Glazebrook writes about in her article is of vital importance because 70.66 you can't be certain that that is correct, and here we have Ms Visser saying, "Well, look, it's a little bit worse than that," because what we've got here is on page 211 of her report, the second page of the conclusion there, at the second paragraph there, "It was unfortunate that Mr Chisnall was not made subject to an order under the Act," the ID Act, "at the time allowing for specialist assessment and care and treatment that may

have led to a more timely and accurate diagnosis. Specialist treatment over the 11 years that Mr Chisnall spent incarcerated could have led to specialist treatment that would have reduced his risk," and, in the next paragraph, "Treatment in a specialist facility with ASD and/or ID would have served Mr Chisnall's need … It is the opinion of the writer he is disadvantaged by not being placed in such care," and so what I say there is there's been a misfiring, and I have pondered, and I haven't got my head around it, whether it would actually be possible to do a sentence appeal somewhat belatedly because of a misdiagnosis and whether, if he got a lesser sentence, he would then meet the threshold for the PPO. I only thought of this yesterday so I haven't worked it out.

ELLEN FRANCE J:

But how would that work, because Justice Miller accepted he was eligible to be – he did meet the threshold, didn't he? He did meet the definition for – but he –

MR ELLIS:

He met – yes, he was found to have been intellectually disabled but he wasn't found to have a dual diagnosis of mental disorder and intellectual disability, and Justin Barry-Walsh in – he referred to the, well, he did, in a paper at the ANZAPPL conference which is the Australia and New Zealand Association of Psychiatrists, Psychologists and the Law which Justice Glazebrook gave her Risky Business speech in. He gave a paper at the conference in Auckland in November or December last on autism, ASD, and mental disorder, saying in his view it was a mental illness or a mental disorder. So we didn't have that diagnosis for Justice Miller because the DSM-5, the Diagnostic and Statistical Manual 5 used by the psychiatrists didn't at the time include autism as a mental disorder. It does now. So anyway there's certainly an issue there, and Mr Chisnall, according to Ms Visser, has suffered as a result. If he'd been treated properly, his risk would be much lower, and I –

ELIAS CJ:

What's the submission you make based on this?

MR ELLIS:

Yes, the submission is essentially based on the one hand-up that I've got to give you which is a double-sided page.

ELIAS CJ:

Is that the one we have?

MR ELLIS:

Yes. So like I say, as a matter of principle people needing treatment should be in hospital, not prison, and then refer –

ELIAS CJ:

But what's the submission you make in relation to the application that is the subject of the appeal? What's the effect? You say that there is a prospect that when the final order comes to be considered he'll be found to be under an intellectual disability. Is that the –

MR ELLIS:

No, he'd be found to be under a mental disorder.

ELIAS CJ:

A mental disorder? Autism?

MR ELLIS:

Well, actually, Asperger's, which is part of the autistic spectrum disorder, so it's off on one end. He – yes, so essentially yes. And he shouldn't be detained in what was a prison. He should be in a hospital or a mental health facility for those with mental disorders. He shouldn't be being detained in Christchurch outside the wire. He should be receiving treatment not receiving –

GLAZEBROOK J:

But we don't have an application before us in respect of that. Haven't we only got the Anglican Action, or the Court of Appeal certainly only had that?

MR ELLIS:

Well, yes, because I don't think we had – I'm not quite sure when we got Ms Visser's report or when this dawned on me.

GLAZEBROOK J:

What is the order we should make then?

MR ELLIS:

Well you should reverse his detention on an interim detention order on the special conditions that, or the ESO, that my friends suggest you should make. You could make that order but he is detained either at Anglican Action in Hamilton or, better still, you make that with conditions that ensure that he gets proper treatment.

WILLIAM YOUNG J:

Is it contended that he is eligible for compulsory treatment under the mental health legislation?

GLAZEBROOK J:

I thought that was a suggestion the Crown was –

MR ELLIS:

Making.

GLAZEBROOK J:

– saying was a possibility but I think under the intellectually disabled –

MR ELLIS:

So would he, if there was a Mental Health (Compulsory Assessment and Treatment) Act 1992 application would he be found to require compulsory treatment? I hesitate to say no, he's under a mental disorder but that doesn't mean to say that he can't have voluntary treatment in the community, so he would be eligible for a community treatment order, that's my proposition.

WILLIAM YOUNG J:

So that would mean that principle 5, the principle (c) in section 5 isn't necessarily engaged.

MR ELLIS:

Well my learned junior says yes. I don't remember what section 5(c) says so I'm just having a look. … I see, yes, because the question is, is he eligible to be detained? He might be eligible to be detained but I'm saying he shouldn't be detained he should be given a compulsory treatment order. So I think the answer to your question says yes.

ELLEN FRANCE J:

Well I'm not quite sure where we're going with this but the view that he is autistic is challenged, isn't it, one of the other health assessors doesn't agree with that?

MR ELLIS:

Yes, Steve Berry in his report –

ELLEN FRANCE J:

That's right, I just couldn't remember which of the two it was.

MR ELLIS:

– in April I think, in his update report says he doesn't agree with Ms Visser but then he didn't physically go and assess him on that occasion and there is no real logic. He says, "I don't agree because of paragraphs," I think it's paragraphs 27 and 28 of my last report which will be in there but that's not a meaningful rejection of –

GLAZEBROOK J:

So where's his report so we can look at it?

MR ELLIS:

In the case on appeal.

GLAZEBROOK J:

Which tab, sorry?

MR ELLIS:

10, and I think he said it was 27, yes 27 and 28. Although "he has previously been identified as having a mild intellectual disability", Mr Trainor's assessment reported in the McFadden assessment says he's got adaptive functioning at a level above that and when taking into account the McFadden and Trainor findings his behaviour in recent years it's reasonable to conclude that he had specific learning disorders but does not have an intellectual disability.

ELIAS CJ:

Sorry, I had understood you to say you're not contending that he has an intellectual disability?

MR ELLIS:

If he's got any form of intellectual disability it can only be a clinical assessment not a legal one is my current assessment of it, Ma'am. But Mr Berry –

GLAZEBROOK J:

Actually, I must say, it's not responsive to 27 to 29. There are a number of people on the spectrum who don't have mild or any type of intellectual disability or ADHD.

MR ELLIS:

Well, yes, that must be true.

GLAZEBROOK J:

So saying he does or doesn't have those is neither here nor there.

MR ELLIS:

And further, going back to Ms Visser's report in 18, she's critical of – remembering that Mr Berry is referring to Mr Trainor and Ms McFadden, on

the top of 209 Ms Visser says, “While Mr Chisnall’s adaptive functioning has been assessed in the past” –

GLAZEBROOK J:
Sorry, I’ve just missed where we’re going.

MR ELLIS:
Back to Ms Visser’s report at tab 18 and at the top of page 209. Have you found it, Ma’am?

GLAZEBROOK J:
Yes.

MR ELLIS:
“While Mr Chisnall’s adaptive functioning has been assessed in the past, this has only been documented once before as being accurate. Ms McFadden used the information obtained by Mr Trainor in 2009. It was believed this data was accurate. It appears from the current assessment that the assessment of adaptive functioning was not accurate, as the current assessment of his abilities was severely overstated. Mr van Zoggel’s assessment of literacy demonstrated a level of 9.6,” that should read 9.6 years, “in September 2006 which can hardly be described as average functioning for a 30 year old. Dr Trainor’s assessment seems to indicate that these levels were average, therefore the assessments could not have been accurate.” So I would say Mr Berry’s assessment is not accurate and nobody’s really considered yet Ms Visser’s assessment that he’s got ASD and the conceptualisation of ASD as a mental disorder is a new concept and Dr Barry-Walsh is the leading, well, he’s done a paper on it which puts him in the leading category in this new assertion of mental disorder expansion so we haven’t really determined it, but there’s enough there to say that, well, Mr Berry might say that – well, he does say he disagrees but his report is inaccurate and that’s why I was saying in my little add-on paper that you’ve got to consider the one-page double-sided page.

In *Veen v R (No 2)* (1988) 164 CLR 465 which is mentioned in Justice Glazebrook's paper but for different reasons the High Court considered the level of psychiatric services relevant to the appropriate sentence and I say it's relevant to the appropriate order that you give here. You put him in Anglican Action and extend the ESO rather than the IDO to cover mental health and/or ID services, then we're cooking with gas.

GLAZEBROOK J:

The slight trouble there is we don't really have a diagnosis even now. Because, as I understand Ms Visser, she says, well, it's quite possible but he needs to be tested properly for these things including psychopathy, I notice.

MR ELLIS:

Yes. I think that's right and I seem to recall there was a previous assessment of psychopathy but I can't remember where.

GLAZEBROOK J:

Yes. I think there were. It shows – it will show some traits but she definitely says she hasn't been done properly – sorry, formally or fully.

MR ELLIS:

Well, she says this should be done and it hasn't been done and, as you'll gather, we're short of funds for getting it –

GLAZEBROOK J:

No, I quite – it's not – it certainly wasn't intended as a criticism, just a comment in terms of making orders without actually having a diagnosis.

ELLEN FRANCE J:

So is this something that Justin Barry-Walsh is looking at in his report?

MR ELLIS:

Well, the Court have appointed him, the Court of Appeal. I will certainly be sending him as something to consider this issue because he was only

appointed, what, a couple of weeks ago, I think. Yes, yes. Well, that's why wanted him because he had this particular –

ELIAS CJ:
Sorry, who's he been –

O'REGAN J:
Mr Ellis, can you just stay near the microphone? I just lose you when you move over there.

MR ELLIS:
I'm sorry, Sir. I get uncomfortable staying in one place.

ELIAS CJ:
And it's being typed too so they'll be having trouble. You'll be unintelligible. That will be what is said about you. We would hate that to be on your epitaph, Mr Ellis.

MR ELLIS:
Well, it may have nothing to do with me moving about.

WILLIAM YOUNG J:
Can I ask, what's the test for compulsory detention under the Mental Health legislation?

MR ELLIS:
Are you a danger to yourself or others?

WILLIAM YOUNG J:
But it has to be linked to mental disorder?

MR ELLIS:
Having a mental disorder, yes.

WILLIAM YOUNG J:

So if the mental disorder here is Asperger's syndrome –

MR ELLIS:

Yes.

WILLIAM YOUNG J:

– but the risk he poses to the public is not necessarily driven by the Asperger's syndrome, then there are problems with the mental health procedures?

MR ELLIS:

Well, only if you want to detain him. If he's in a compulsory treatment order, you can –

WILLIAM YOUNG J:

But he can't be dealt with for Asperger's unless his Asperger's is what leads to the risk to the public. That's right, isn't it? I may have put it slightly too specifically but I think it's broadly right.

MR ELLIS:

Well, I think that's correct if you were going to detain him. I don't think it's correct, I may be wrong, if he's on a compulsory treatment order because compulsory treatment orders are obviously for people who are less mentally ill than those who need to be detained.

GLAZEBROOK J:

I suspect that there's still a liberty there in terms of people being able to choose their own medical treatment so I would have thought the threshold has to be fairly high. So either I would have thought it's danger to yourself or the public or absolutely necessary to be treated, and one wonders whether unless it's a danger to himself or the public in this circumstance it would reach that.

MR ELLIS:

At that level. Well, I suppose even if you're right, and I just simply don't know without looking it up, there's nothing preventing him having voluntary treatment.

ELIAS CJ:

No, what does he say about all of this? Has it been broached with him?

MR ELLIS:

He wants to stay at Anglican Action.

GLAZEBROOK J:

Yes.

MR ELLIS:

And beyond that I don't think he's particularly fussed about what happens. I mean, he wants out of this place and to be held in Hamilton where he thought he was going to be held when he was given parole when he had apparently, well, he did have, insufficient risk to be held in prison. The Parole Board said, "There's not an undue risk in the next three weeks so we're releasing you," and then suddenly he becomes a very high risk. But I suppose we haven't got to the, well, I'll just do that last, the *R v Phelps* CA 295/04 case which three of you sat on in my extra paper, *Phelps*, Justice Glazebrook, William Young and O'Regan. His sentence is 10-year minimum preventive detention. He should have a proper case for release at the end of that period. Seemed to us that it'd have been better if he'd given the opportunity to be assessed earlier so he could have the possibility of completing such a course before the end of this 10-year period. Well, that's what should have happened here. He should've been assessed earlier and had a proper course. So because of, if Ms Visser is right, he's suffered in the sense that he wasn't getting the rehabilitation that was required and now he's proposing to have to suffer even more because the State hasn't done its job properly.

WILLIAM YOUNG J:

But, I mean, that's a fair enough analysis of how we've got to where we are now but the focus of the Act is on risk.

MR ELLIS:

Yes.

WILLIAM YOUNG J:

Particularly at the interim stage, isn't that going to be the primary consideration, whether that risk engages the regime provided for by the Act? Not why was this guy not dealt with more effectively in the past, but what do we do about the situation now?

MR ELLIS:

Yes, but what's happened to him is – well, a relevant consideration and I suppose what I'm saying or what I tried to say when I went to paragraph 5 of the respondent's submissions about what the basic question is, it's an imminent risk, an imminent, very high risk and I say regardless of whether it's a PPO or an IDO it is virtually impossible to come up with a conclusion that anybody is an imminent very high risk. There is no literature. The only way you can come up with it is if there's some structured, clinical judgment on that and we do know from the research that structured, clinical judgment alone is very unreliable so I would say it is virtually impossible – and the Court hasn't attempted to define it and that's the basic question. Nobody has tackled the question of what "imminent" means. Dr Wilson says – as far as one can work out – that "imminent" appears to mean to him five years, in the next five years. I would have thought "imminent" must have meant something like three weeks, the test that the Parole Board was using. "Are you an undue risk in the next three weeks? No, you're not."

GLAZEBROOK J:

Is that the submission for an interim order, is it? Because, of course, this process, rightly or wrongly, has taken a lot more time than that, and one might

say wrongly but one understands that there are – that obviously people need time to prepare properly and have proper reports and proper assessment.

MR ELLIS:

It's a submission for the interim order and it will be a submission for the PPO. I mean, I've tried to conceptualise in my mind how you could get somebody who's an imminent very high risk. The only example that I could come up with was one that was in play in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 where you'll recall we had solitary confinement for long periods of time and a case – I can't remember the name of it but in Canada where a detainee had been kept in solitary confinement for 13 years because every time he came out he killed somebody. He killed people in multiple figures. Well, I can see that's an imminent high risk. But short of that sort of catastrophic event, the Courts haven't attempted to define "imminent" and that's the crux of the matter. You're trying to say he's an imminent, very high risk, of re-offending.

WILLIAM YOUNG J:

Do we know where the language of section 13 comes from, where the concept of imminent risk comes from and where the criteria in section 13(2) comes from? Is this the language of actuarial risk assessment?

MR ELLIS:

I've never come across any descriptions of imminent very high risk. This is a new concept brought about by this Act, and as far as I'm aware – although there is one High Court case where there was a PPO granted – there's Dr Wilson, who's one of the three who says he's an imminent high risk, but it's not based on any literature or whatever. So I am not sure where it comes from. I would speculate, Sir, that it possibly comes from some Australian state legislation but –

ELIAS CJ:

Well, I was going to ask you if you'd checked the Australian legislation. I'm just having a look at what I've got.

O'REGAN J:

Well, it would probably say so, wouldn't it? If it was taken from an Australian Act it would probably say so at the base of the section.

ELIAS CJ:

I don't recall seeing imminence in the legislation and in some respects the Australian legislation is a bit more careful, I think, than ours. It doesn't allow – these orders can't run on. They have – they expire after a specified time.

MR ELLIS:

A specified time, yes. Well, they seem to be more advanced in terms of, or *Fardon*, you know, Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), that they're more advanced than we were, but I am unable to find any literature that says you can determine an imminent very high risk and I'm not aware of a statute that says it.

GLAZEBROOK J:

I can understand that submission and I accept that in terms of any of the risk assessment tools they don't say you're going to do it tomorrow because it's a risk within a period and a cohort. Well, at least I haven't looked at them again for a while but I'm sure that hasn't changed. But it would be assessed looking at all the circumstances, wouldn't it, so that there will be people who, if they get into particular situations or are confronted with particular situations, you can be almost certain in an evidential sense that they will re-offend?

ELIAS CJ:

And it's not a clinical – why do you say it has to be a clinical assessment?

MR ELLIS:

No, I don't say that. I say that – there's two questions there, Justice Glazebrook's first in order.

GLAZEBROOK J:

Well, it's a similar question to the Chief Justice's, I think.

MR ELLIS:

Okay, well, it builds on. The – I've forgotten what you said now.

GLAZEBROOK J:

I'm sorry. It's just that you look at all of the evidence because some of this offending is situational and you can be almost certain that a combination of those situations will result in it. Now that doesn't mean necessarily that this order would be appropriate because it may be an order that restricts someone from getting into those particular situations would suffice but –

MR ELLIS:

Yes, well –

GLAZEBROOK J:

Just to anticipate what the answer to that might be but one could, on all of the evidence in some cases, I would have thought, come to a view on imminent risk.

MR ELLIS:

Well, that's why I gave you the example of the Canadian mass murderer because that – and it develops into the Chief Justice's question because the evidence about whether one is a high, an imminent high risk, comes from the psychologist's reports but realistically, as the Courts have said many times before, this isn't trial by psychologist or psychiatrist. This is trial by a judicial officer. It's the judicial officer's decision and the judicial officer could say, in my view, "You've murdered somebody 13 times before so you're going to do it again. There's an imminent high risk."

WILLIAM YOUNG J:

Or you won't do it before Christmas so I'll let you out.

MR ELLIS:

Yes, so that's plausible.

ELIAS CJ:

I've just checked all the Australian legislation I can find and they don't seem to have this concept of imminence, but it is, of course, the case that imminence, the concept of imminence has to be, is a, elevates the legal test. So it operates in favour of the person affected. It's really a pointer that the Judge ultimately must be satisfied that the risk posed is not only high but that it's going to occur if restraint is lifted.

MR ELLIS:

Yes.

ELLEN FRANCE J:

That is the Act, the Act says that "imminent" means in relation to relevant offences that the person is expected to commit such an offence as soon as he or she has a suitable opportunity to do so.

GLAZEBROOK J:

There's a link to opportunity.

ELIAS CJ:

Yes, yes.

MR ELLIS:

Yes, but what does that mean?

ELLEN FRANCE J:

Well, I'm not saying it answers the questions but it is that idea, isn't it?

ELIAS CJ:

But it's directing the Court what it has to be focused on. It's not really – yes, it's the conclusion that unless this order is made, it may be Justice Heath's necessity idea, although I must say I don't quite see the difference really between what Justice Heath says and the majority, but perhaps you'll explain that.

MR ELLIS:

Well, I'm not that wise, but –

WILLIAM YOUNG J:

Can I just go back to a point just still on this imminence? Section 13(2) says that a finding of imminence can't be made unless the following criteria are satisfied.

MR ELLIS:

Yes.

WILLIAM YOUNG J:

Maybe – although it's expressed in, as it were, limiting terms, you can't do it unless, it may be that if those criteria are satisfied then that supports an imminence finding. It may be an indication of what is meant by imminence.

ELIAS CJ:

Well, intense drive was one.

MR ELLIS:

Yes, my learned junior tells me that's about the very high risk bit, evidence to a high level is not about imminence.

WILLIAM YOUNG J:

No, it is. It's (b), it's section 13(1)(b) refers to a very high risk of imminent serious sexual or violent offending. Subsection (2), the Court may not make a finding of the kind described in subsection (1)(b), that is of high risk of imminent sexual offending. So it may be that these criteria give you an idea of what is envisaged by high risk of imminence.

GLAZEBROOK J:

Possibly combined with the definition which says having all of these things, if you're provided with an opportunity, you will offend.

MR ELLIS:

Well, it seems a little peculiar in that 13(1)(b) says a very high risk, 13(2) the Court can't make a finding unless it's a high risk, and imminent as soon as he has a reasonable opportunity to do so. Well, I still think that means weeks, not years, as soon as possible.

WILLIAM YOUNG J:

It is the case that sexual offending tends not to – it's still a comparatively rare event, even for prolific sexual offenders, and imminent is a, I guess a term of – it's indeterminate and it's referable under the statute to reasonable opportunity which must presumably include at least a bolters chance of getting away with it.

MR ELLIS:

I don't think, Sir, that you can say that, that it includes a chance of getting away with it, because regardless of whether you get away with it or not the statute is saying, "Are you going to commit it?" Not, "Are you going to commit it successfully?"

WILLIAM YOUNG J:

It's got to be – what's a reasonable opportunity to commit an offence?

MR ELLIS:

Yes, but I don't –

WILLIAM YOUNG J:

There's probably not going to be an opportunity where there's a policeman standing over you all the time.

MR ELLIS:

Well, it does seem to go to that reference I made to the *Minority Report* film which I remember having an exchange with Justice Chambers about. "Bloody good film," he said. Indeed it was, but aren't you getting into the

realm of, well, I think it is speculation, isn't it? There's got to be a difference between –

WILLIAM YOUNG J:
Well, it's prediction.

ELIAS CJ:
It's prediction, yes.

MR ELLIS:
Well –

WILLIAM YOUNG J:
I mean, everyone knows that prediction isn't that easy and they tend not to be necessarily borne out by events.

MR ELLIS:
And the Human Rights Committee is somewhat critical of prediction as, well, a minority were somewhat critical of a 20% risk, and ultimately the situation moved to *Fardon*, and they're very clear on saying you're asking Judges to make a conclusion of fact on the basis of some vague psychiatric evidence which is arbitrary.

ELIAS CJ:
Well, I mean, that might be right. It's probably jurisdiction that no Judge really wants to exercise, but we have it.

WILLIAM YOUNG J:
Can I just pick up a point that I sort of raised – well, I think we didn't get there. I asked if the language of the section was based on existing actuarial practice. Now you've said, well, you're not aware of the language of high imminent risk featuring in actuarial risk assessment prior to the statute. What about the section 13(2) language, is that language part of the phraseology of actuarial risk assessors, or is it –

GLAZEBROOK J:

Well, the actuarial just is statistical, so it will be, and the likelihood of re-offending has all of the known factors put into it and they're then assessed in an actuarial and statistical way. So the language that comes out of it in the reports might say things like that but –

MR ELLIS:

Yes, I think in terms of clinical judgement in the related field of extended supervision orders, where we've actually got material from clinicians who will be using terminology not quite in these terms but they will say or they could say "an urge" or "limited self-regulatory capacity", but the language in this section develops beyond what we currently know because we haven't had that statutory test for the clinicians to apply it to, so they haven't had the opportunity to develop that language yet. And I know the section says what it says, in answer to the Chief Justice, but it is the Court's duty – I think I could put it as high as that – to consider the international obligations, and I know, well, I think it's telling that the Chief Justice said, "Well, it may be something Judges don't want to have, don't want to do."

ELIAS CJ:

Well, prediction is something that we don't normally have to do. I mean, we do in some circumstances, but we're much better with pathology.

MR ELLIS:

Yes, and I suppose what I'm saying is that – well, the Court of Appeal ducked the international material, as it did in the first preventive detention case that I ever did, *R v Leitch* [1988] 1 NZLR 420 (CA) and we managed to, I'm sure it's very clever, we didn't get, Mr Leitch didn't get preventive detention although he becomes, you know, a leading case, and they ducked the international issues here. I'm asking you to consider the international issues because –

GLAZEBROOK J:

But to do what? Because a declaration of inconsistency is some way off, so what do we do with the international material?

MR ELLIS:

Well, you consider it and you ask yourself is it possible, in line with *Fardon* 7.4.4, is it possible to come up with a solution short of detention? If it is, then that should be imposed. That's what I ask.

GLAZEBROOK J:

So you'd say especially in an interim sense that if one could get rid of the opportunity or limit the opportunity, that even if you think there's a high risk of re-offending, if the opportunity prevents, if you can put in place conditions that make sure that opportunity doesn't arise, outside of an interim detention order, it should be done, is that the submission?

MR ELLIS:

Yes, that is the submission, and –

GLAZEBROOK J:

And I'm not making a comment on whether there's a high risk or not in this case. I'm just – that's on the assumption there is a high risk, even a very high risk doesn't cut it if conditions can be put in place to make sure the opportunity doesn't arises.

MR ELLIS:

Yes, and I don't want to have any misunderstanding about what I'm going to say next. It's not inconceivable that when we get to the end of all this, by that I mean the substantive order and any appeals, that this might go to the Human Rights Committee and it will be useful to have a judgment that articulates the jurisprudence at an early stage because it will be useful for the substantive PPO. But I don't want to concede I'm going to lose.

WILLIAM YOUNG J:

Can I just ask you a question referable to what Justice Glazebrook has said? Section 13(1)(b) postulates the circumstances in which the risk will be, I suppose might crystallise, and the hypothesis seems to be an unsupervised respondent. So the competition or the comparison seems to be what risk

would this person pose if unsupervised and if it's a high imminent risk, et cetera, then there's jurisdiction anyway to make the order. The comparison doesn't have to be with what risk would this person pose if subject to, say, an extended supervision order?

MR ELLIS:

Yes, it's – I have difficulty trying to understand who (i) and (ii) were there, especially (ii), the respondent is left unsupervised. It doesn't seem to make sense other than if you look at the background of the legislation and its intent the – and the practice, I suppose, there's an application made by the Chief Executive for a PPO and an ESO but the court's not supposed to be addressing the ESO until it's finished the PPO, which seems a bit unrealistic, but anyway that's what it says, and it definitely does imply that you're going to be supervised and the reality is that if you're not on a PPO you're going to be on ESO and he's consented to, or he will consent, he has consented to an ESO. So under that he's going to be supervised, and if you look at the draft conditions that my learned friend annexes to their submissions which go to a couple of pages, which the exception of one or two, if we get to that, Mr Edgeler will deal with a few changes. We want to incorporate what I've been saying but there is no possibility that Mr Chisnall is going to be out in the community unsupervised.

GLAZEBROOK J:

It may just be that they haven't been thinking of an ESO because normally, of course, when you come to your final release date that's almost it, isn't it? If you've gone right through your –

MR ELLIS:

Yes, I see what you mean, yes. Well, it did –

GLAZEBROOK J:

So it may be they're looking at that comparison in terms of assessing the high risk.

MR ELLIS:

Well, it does seem a little odd that he's released on parole and the Parole Board say he's not an undue risk and then along comes – and they specifically say, even given this new application, "We wouldn't have changed our mind. He's still not an undue risk, in our view," and then all of a sudden he's an imminent, very high risk. Well, the Parole Board are experienced in the analysis of risk however inept it may be in international human rights law terms, but it's quite weird. You can't be working outside the wire for two years and then imminently become a very high risk of committing offences. So our proposition is that there is a very weak case for a PPO so you shouldn't have an IDO.

ELLEN FRANCE J:

Well, I'm not sure you're right about 13(1)(b) and for example it is envisaged by section 7 that you may be subject to an ESO and then subsequently be subject to a PPO if you meet the conditions set out in 7(1)(b)(i) and (ii).

MR ELLIS:

Yes, I think that's correct, but in the reality of this man's case they applied for a PPO and an ESO simultaneously.

ELLEN FRANCE J:

No, I was thinking about the Act more generally, how that works.

MR ELLIS:

Well, I can understand that. We are in the early days of interpreting what happens and I think we're all learning as we go on, myself included. But I agree with you that there is the conceptual possibility that you can move up from an ESO to a PPO which presumably would – well, I don't know that it would. If you committed a serious offence which you were on an ESO the likelihood is you're going to go to prison and you're probably going to get preventive detention. So the likelihood of – I suppose a PPO could come at the end, but it doesn't need to, does it?

ELIAS CJ:

But it needn't be triggered by a further offence, so you could move up from an ESO to a PPO depending on the assessments of the risk you pose.

MR ELLIS:

Yes, I suppose that's right but I would go back to my proposition adopting the Human Rights Committee and the European Court that what's the offence you've committed that you can be detained for this? It is an arbitrary detention. So you've got to consider section 22 of the Bill of Rights.

ELIAS CJ:

Well, yes, but if it's in accordance with this legislation the argument is that it's not arbitrary if it's according to law and the determination is reasonable.

MR ELLIS:

Well, yes, if it meets a 4, 5 and 6 analysis, yes, I agree but nobody's done that.

ELIAS CJ:

I understand that. Can you just remind me, what's the provision that says you have to deal with your PPO before your ESO? Which one's that?

MR ELLIS:

I don't know.

ELIAS CJ:

I just had a query whether – I can understand that sequencing because the more serious offence, the more serious ought to go first but I just wonder whether that applies in the case of interim orders. I just wanted to check the wording.

MR ELLIS:

I don't know. Mr Edgeler will have a look.

ELIAS CJ:

Okay. Perhaps come back to it. I'll try and find it too.

MR ELLIS:

Apparently, Ma'am, it's the Parole Act 2002, which is tab 2 on page 101 of the Parole Act there's a section 107GAA procedure we're hearing contingent on the outcome of a PPO application and in (2) of that, subsection (2)(b) the sentencing Court must not hear the application until the proceeding on the PPO has been completed.

WILLIAM YOUNG J:

But the difference between the two orders is imminence, isn't it? Imminence is required for a PPO. It's not required for an ESO.

O'REGAN J:

It's also "very" as opposed to just "high", isn't it?

WILLIAM YOUNG J:

Very high imminence.

ELIAS CJ:

But "very high" is for violence, isn't it?

WILLIAM YOUNG J:

No, no. "Very high" for both.

MR ELLIS:

"High" for sexual, "very high" for violence. I don't want to be pernickety but I don't think it's just – well, the end result is on the ESO you can be 24-hour monitored for 12 months but you're held in much stricter detention –

ELIAS CJ:

Well, it's the appropriateness of that form of detention must enter into it as well.

MR ELLIS:

Yes, I suppose that's logical. But I'm not sure that I engaged with you on the high level that I wanted to do, to say that this is a draconian sentence, it's last resort, and you've got to strictly and vigorously scrutinise what's going on, and you've got to consider the international obligations, though maybe I have and I've misread you, but I emphasise that that's the approach I'm trying to take.

O'REGAN J:

I think the Minister's statement to the House made it clear that that was the intention as well, that it would be a very, very small number of very high risk people to whom these orders would apply.

MR ELLIS:

Yes, I think he said there'd be five or six a year –

O'REGAN J:

A year? I thought it was just five or six generally. Five to 12 wasn't it?

ELLEN FRANCE J:

Yes, one a –

O'REGAN J:

Five to 12 total I thought it was.

MR ELLIS:

Then I apologise, I've got that wrong. Apparently, Mr Edgeler tells me, they said the same thing about ESO when they came in.

GLAZEBROOK J:

They did.

MR ELLIS:

And they came in – which has escaped me. But which makes it seem somewhat unlikely that a man who's had preventive detention considered and rejected then is the subject of one of these orders, it seems a bit bizarre.

GLAZEBROOK J:

Although of course, not necessarily in this case but in many cases, the preventive detention is not put in place on an ex ante basis because treatment has not been tried in many cases et cetera. And so I think the Chief Justice's point again, there will be things that have occurred in the period in prison, including treatment or not and ability to respond to treatment that will have changed the assessment, it's not so much ex ante then because there's a lot more information that will be in front of the court.

MR ELLIS:

Yes, I agree that when you're in prison you're not static, you're moving along, and you may well be a different person by the time you get to the end of your sentence. But I would still say, you know, on first principles, you've already been punished for the offence that you committed and now you're being punished for an offence you haven't committed and which nobody can put their finger on and say, "Right, you're being detained because you committed offence A, B or C." We are detaining people because they are suspected of going to commit an offence in the future.

ELIAS CJ:

So the international, the Covenant provisions that you rely on, are the arbitrary and the –

MR ELLIS:

Yes, article 15, that you can't have a bigger penalty than what you started with, a double, yes, double punishment.

ELIAS CJ:

Yes, and the retrospective, yes. Those are the two.

MR ELLIS:

Yes.

ELIAS CJ:

You're not relying on cruel or disproportionate treatment or anything like that?

MR ELLIS:

No. I tried to in *Leitch*, and withdrew that submission because of *R v Lyons* [1987] 2 SCR 309 in the Supreme Court of Canada, but I did think retrospectively that I shouldn't have withdrawn it but –

ELIAS CJ:

But just for our purposes, it's arbitrary detention, retrospective penalty, and you ask us in assessing those to look at substance not form?

MR ELLIS:

Form, yes. And do I say it's a section 9?

ELIAS CJ:

You can't raise it now, it's too late.

MR ELLIS:

Well, no, I understand that.

ELIAS CJ:

Just ticking it off.

MR ELLIS:

Well, it's not too late to argue it in –

ELIAS CJ:

No.

MR ELLIS:

– the declaration of inconsistency or the substantive hearing, but I agree with you.

ELIAS CJ:

Yes, no, I understand that.

MR ELLIS:

I hadn't thought of it in those terms, and I suppose – well, I don't know, I mean, it's an abstract argument in the absence of any evidence about what the new conditions are so it's probably better argued when there's been some – you're down the track and you –

ELIAS CJ:

It is, however, the existence of the Covenant right not to be subjected to disproportionately severe treatment is an aid to interpretation of this legislation.

MR ELLIS:

Yes. I'm just wondering, Ma'am, if I've missed it's a lack of a fair trial, article 14, because you're not being tried in the sense there's no accuser, in a sense. So I think it's an absence of a fair trial too, although I'm not sure that *Fardon* articulated that, but *Fardon* was copying, well, was developing on *Rameka, Harris and Tarawa v New Zealand*, CCPR/C.79.D/1090/2002 (2003) and *Dean v New Zealand* Communication No. 1512/2006 (17 March 2009). I did raise it in *Dean* with the Human Rights Committee and said revisit *Rameka* and they recorded the argument in the judgment and then didn't revisit it, which was a little weird, and then I did ask Chief Justice Lallah from Mauritius who had the biggest dissent why he didn't do it. He said, "I wasn't there but we will be doing it at this session in March 2010," which he did, and so his judgment in *Rameka* has got the most article breaches. If – did I put it in the bundle? I think I did.

ELIAS CJ:

Yes, I think you did.

MR ELLIS:

So if you read his judgment, Ma'am, it's got the most extensive array of rights breaches than anybody. So his one is in page 21 of tab 5 in the appellant's bundle. So he's –

ELIAS CJ:

Sorry, carry on with what you were doing.

MR ELLIS:

Yes, page – tab 5 of the appellant's bundle. That is *Rameka*, and in the penultimate and last page – he did say that, yes – "I would conclude." You've found it? Page 22 of that judgment, the last two pages.

ELIAS CJ:

22?

MR ELLIS:

Not quite the last two pages. You've found it?

ELIAS CJ:

Yes.

MR ELLIS:

"I would conclude, while it is legitimate to consider past conduct, good or bad … in determining sentence, a violation of article 15(1) has occurred, because the article only permits the criminalisation and sanctioning of past acts," not future ones.

ELIAS CJ:

But this wasn't sentence matter, was it?

MR ELLIS:

This was – yes, this was an argument –

ELIAS CJ:

So it was punishment for an offence?

MR ELLIS:

Yes.

ELIAS CJ:

So you want us to apply the reasoning but in a very different context?

MR ELLIS:

Well, in the context which has developed since because this jurisprudence moves on. But I'm trying to tell you which –

GLAZEBROOK J:

I suppose you say it's even more so because it's devoid of the punishment which has already finished?

MR ELLIS:

Yes, it becomes a lot – well, I was really giving it to you to enumerate the articles that were alleged to be breached.

GLAZEBROOK J:

Yes.

MR ELLIS:

So it's article 15(1), article 14(1), which is the one I was thinking I – yes, there's no fair trial, and article 14(2) is an anticipatory one, and article 10(3), the right to rehabilitation which is the equivalent of section 23(5) in as much as it can be in the Bill of Rights because it's not reflected anywhere other than in Covenant 10(3), and article 9(4), well, we've dealt with arbitrary detention. So that's what I'd say was in issue there, Ma'am, and then it does move on to *Fardon* where there's not – there was a seven/six majority for some breaches in *Rameka* and that moved to 11/two in *Fardon* so perhaps I was in a little early in raising the issue but it's a case, I guess, to be proud of, anyway.

Now, I think I've finished my hand-up and I'm on the last page of my notes and my learned friends say in relation to the Parole Board at their paragraph 77 the Board's decision must be seen in context and should not be overstated, and the Board says, "We are satisfied that the three weeks involved, his release – "

GLAZEBROOK J:
Sorry, I think I've missed where you are.

MR ELLIS:
I'm on paragraph 77 of the respondent's submissions. "The Board's decision must be seen in context and should not be overstated. Mr Chisnall was required to be released on 27 April. On the 12th he appeared before the Board. The Board directed his release on the following basis." The last sentence, "We are satisfied that the three weeks involved, his release would not pose an undue risk to the safety of the community." Then in 78, when the Board revokes its decision, in its indented paragraph 5 the Board observed that based on the information before it at the time it was satisfied Mr Chisnall's risk could be managed by the proposal put forward by Anglican Action. The additional information with respect to a possible application for an ESO or a PPO would not have affected the Board's consideration of parole at that time." So I'm saying the very experienced risk assessors – the Parole Board – say he isn't a risk and he's been busy working outside the wire for two years and the principal Corrections officer at the Board was supporting him, so how come he's now become one of the worst risks in the country? It's illogical.

ELIAS CJ:
Of course, do we know what information they had? They say "refer to the additional information with respect to a possible application" so they may not have had –

MR ELLIS:

I can't remember. We went to the Parole Board and on the review we asked – yes, we went to the – it was a bit ridiculous because when they revoke it they've got to have a hearing as soon as practicable and they had it on the last day of his sentence. So we were arguing he should be released that day and it was a bit unfortunate. I don't quite remember if we had all the PPO. We did? Yes, we had it and they would have had all the information.

O'REGAN J:

But the reference to the offer by Anglican Action being withdrawn, you mentioned before that that's still where he would intend to go.

MR ELLIS:

Yes.

O'REGAN J:

Is that a problem or has that been resolved now?

MR ELLIS:

Well, we were of the view that – I don't suppose you can get into it – that there had been some undue pressure to withdraw it. It is still on the Board.

ELIAS CJ:

Now, Mr Ellis, we're at the morning adjournment. Were you indicating that you were wrapping up your part?

MR ELLIS:

I was indicating I'd got to the end of my notes that I wanted to speak to, so during the break I'll read my submissions and if there's anything else, I'll raise them.

ELIAS CJ:

Yes, that's fine. We'll take the adjournment now.

COURT ADJOURNS: 11.30 AM
COURT RESUMES: 11.44 AM

MR ELLIS:
I might be another 10 minutes and Mr Edgeler is going to address you on two conditions on the ESO which is attached to the end of the respondent's submissions, which might take two minutes.

I just wanted to say two things. One was about intensive monitoring. If and when we get to the final hearing of the PPO, Mr Chisnall can be intensively monitored for 12 months and of course I don't think anybody anticipated he'd be on an interim detention order for so long and given it's in December and we might not get the result until March or something, it's quite a long time.

The only other thing I wanted to address you on as I haven't actually addressed anything from my submissions is the *Fardon* case at paragraph 59 of my submission on page 16. The reference in the footnote is to *Fardon* and *Tillman v Australia* CCPR/C/98/D/1635/3007. I don't know if anybody's read them but *Fardon* and *Tillman* are virtually identical. They're just different states, New South Wales or Queensland, but the judgments are identical.

ELIAS CJ:
Sorry, what paragraph of your submissions are you referring to?

MR ELLIS:
59. There's a footnote, 36, to *Fardon* and *Tillman*. I'm not doing any disrespect to Mr Tillman but it's the same as Mr Fardon, except it's Queensland instead of New South Wales or the other way around. But if you turn the page, please, to the long quote on page 17, and I'll just read some extracts that are highlighted in my edition.

At the top of the page there, "This new sentence was the result of fresh proceedings, though nominally characterised as civil proceedings and fall

within article 15(1)." The Attorney's problem is trying to categorise these things as civil and then the rest of the paragraph is saying there's a breach of article 15 and at the very end, "It is necessarily arbitrary within the meaning of article 9 paragraph 1."

Then in paragraph 3, "The Dangerous Person (Sexual Offenders) Act prescribes a particular procedure to obtain the relevant Court orders. This particular procedure, as the State conceded, was designed to be civil in character. It did not, therefore, meet the due process requirements of article 14 for a fair trial when a penal sentence is imposed." So you've got to articulate whether or not it is a penal sentence, despite the words of the Act.

Then lastly in the – what I think of as the ratio of the case for most purposes – in paragraph 4. "The detention as a prisoner under the DPSO was ordered because it was feared he might be a danger to the community in the future and for purposes of rehabilitation. The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists of psychiatric expert opinion. But psychiatry is not an exact science. The DPSO on the one hand requires the Court to have regard to the opinion of psychiatric experts on future dangerousness, but on the other hand requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion, they are required to consider all available relevant evidence. The reality is the Courts must make a finding of fact on suspected future behaviour of a past offender which may or may not materialise. To avoid arbitrariness in these circumstances, the state party should have demonstrated the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the state party has a continued obligation under article 10 paragraph 3 to adopt meaningful measures for the reformation, if needed, of the author throughout the 14 years for which he is imprisoned."

That's a powerful condemnation of, I suppose, the way the statute requires you to behave. Anyway, I ask you to consider that in your deliberations. Thank you, and Mr Edgeler will just deal with that short point.

ELIAS CJ:

Thank you, Mr Ellis. Yes, thank you, Mr Edgeler.

MR EDGELER:

Thank you, Your Honour. Yes, what are effectively ordinary release conditions and the special conditions are opposed, are largely unobjectionable to Mr Chisnall. The specific request he has is in respect to the first special condition, specialed with the number 12, which is at page 26 of my friends' submissions, which is the address. When Mr Chisnall was preparing for his release date he had worked with Anglican Action in Hamilton, they had visited him in the prison to get to know him and things like that, and he's certainly of the opinion that he is at less of a risk if he is with people he knows and set up to work for. My understanding is that Corrections' position if there was a probation officer who would decide, the probation officer would not be deciding that Anglican Action was the correct place for him.

WILLIAM YOUNG J:

Sorry, I didn't quite understand that I'm afraid.

MR EDGELER:

My understanding from the Chief Executive is that special condition 12, which is, "Reside at an address we specify," that the address that would be specified would not be the Anglican Action place in Hamilton, and the submission is that if Mr Chisnall is to be released on interim conditions, that intensive monitoring and all those things are appropriate, but he is saying that Anglican Action, which is the place he worked towards for his release, is the better place for him. Corrections have not told us where a probation officer would approve, but we have been told it –

ELIAS CJ:

But why would it be a probation officer approving? I mean why wouldn't the 12 – that's the proposal.

MR EDGELER:

Yes, the proposal is to reside at an address as directed and approved by a probation officer.

ELIAS CJ:

So you say, what, that the condition should be where he has to reside?

MR EDGELER:

Which is the Anglican Action in Hamilton.

ELIAS CJ:

Well, do we have anything from Anglican Action to indicate that they'd accept him?

MR EDGELER:

Certainly. I haven't spoken to them this week or anything. Certainly they have indicated several times in the past throughout the process that they still had an intensive monitoring contract with the Department of Corrections, so that that would be appropriate, and that they were willing. I mean preferably if it was going to be a release, you know, don't tell them he's coming there tomorrow sort of thing, you know, let them know so that they can put in place the things they need to put in place, but that they were an appropriate place and that they do have an intensive monitoring contract with the Department of Corrections if we need –

ELLEN FRANCE J:

I had understood from looking at the Parole Board decisions that at times there were issues as to whether there were beds available at Anglican Action.

MR EDGELER:

The Parole Board decision with the cancellation of parole was Anglican Action had been working towards his release date, "We know you're coming to us when you're released," which is – I've forgotten the date, they've released in April or whenever it was, this is – and so when the Parole Board said, "We're going to parole you three weeks before your release date," Anglican Action hadn't been working towards that date. They were, my instructions are still: able to take him but had been surprised by the change in their plans. And so that was what ultimately got told to the Parole Board as: they now won't take him. They would have taken him but were just surprised and would have had to move some things around or something like that. And they certainly would have taken him from his release date, which has been the date there were – they had not withdrawn the offer completely, certainly, and were at all times, certainly from his release date, willing to take him, and since, when I have been in contact with them.

The other condition, and it's perhaps minor, obviously if that doesn't work, you know, Mr Chisnall's preference is release on some conditions and, if it can't be Anglican Action, that, he would prefer that, the to the PPO facility. But his submission is and our submission is that he is better at Anglican Action, where he has worked towards release there, than he would be somewhere else.

The other one is special condition 16, which is about the attendance or essentially the treatment for his mental disorder or his depression, PTSD, and the other things that he has, that he is certainly, I mean, he has been working in, he has been having counselling – I don't want to overstate it – while he has been in the PPO facility, and he has been fully co-operative with that. Our particular concern is whether that is used for risk assessment, that Mr Chisnall aided with the risk assessment process for the first sets of reports from the three Corrections health assessors, but since then our advice has been to him, "Look, you've done your bit. Don't speak to them again." So it would be the concern of – if the psychological treatment/counselling, if that encompassed things like the risk assessment rather than just actual

treatment, that we would have a concern about 16, and it may just be a slight wording. But treatment or counselling as recommended by the assessment and the treatment provider, but not – at least not requiring him to assist in a further risk assessment of the type needed for the PPO. He is entitled to the right to silence and not to risk putting himself at further jeopardy. He can certainly consent to that, but it would be sort of more along the lines of condition 21, which is the other sort of treatment he might take, to take with his consent any prescription medication and for 17, to take with his consent any psychological treatment.

Other than that, he consents to the conditions and if the Court is concerned to others, well, we're concerned about this or to impose other conditions. I can't imagine that would be a difficulty for him. He has consented all along to an ESO and knows that for the length of the interim one it will be intensively monitored. So there will really be no opportunity for him to be unsupervised. However long the process for getting a final decision on the PPO takes, he won't be unsupervised. He will be intensively monitored. He's aware of that and has consented all along to it. Unless I can help with anything else.

ELIAS CJ:
No, thank you, Mr Edgeler. Ms Hardy.

MS HARDY:
Your Honour, I do intend to run through but briefly the Crown's – the respondent's written submissions. The thrust of the submissions, my friend framed Mr Chisnall's submissions as operating at a high level and for the respondent I would urge an inquiry at the practical level of the testing of the Court of Appeal's decision below.

The essence of the respondent's case is that the Court of Appeal articulated the right test in looking at section 13 of the Public Safety Act. It then applied that test correctly and it did so mindful that an interim detention order is exactly that. It's an interim one.

Importantly for the purposes of this appeal, Mr Chisnall does agree that the test was properly articulated by the Court of Appeal, and he endorses the majority articulation there.

As for the additional issues which I sketched on page 1 of the submissions, it has been an issue of the impact of assessments of intellectual disability, and I'll deal with that in more detail. The question of mental disorder which has been raised before Your Honours has been raised for the first time here rather than in the High Court or Court of Appeal. I will submit that it's been raised in a very tentative fashion also.

If it is to be pursued, then it may be something that can be properly articulated at the substantive PPO hearing, but it is not a matter before the Court here.

Just some points to pick up from the discussion through the morning, when we look at section 13 I can confirm that that is a bespoke New Zealand articulation, and as the Chief Justice noted, not one imported in its detail from the Australian or other statutory frameworks, and what we have there are concepts of imminence and very high levels of potential offending which reflects the endeavours to pitch this legislation at the appropriately-high level given that what is involved is the deprivation of liberty.

WILLIAM YOUNG J:
It's largely taken from, but with some, I suppose, intensifiers the ESO regime.

MS HARDY:
Yes, and Your Honour with those intensifiers of imminence and the very high level applying both to sexual and violent re-offending.

WILLIAM YOUNG J:
The ESO provisions, did they reflect – do you know where they came from? Did they reflect the sort of conventions of risk assessment current at the time that legislation went through which I think was, what, 2002/2003?

MS HARDY:

Mhm. I can't answer that in detail, Your Honour, but to endorse Justice Glazebrook's comment that the articulation of the assessment allows for both the combination of automated statistical assessments, both static and dynamic, as well as more bespoke personal clinical assessments and the language in both the Parole Act and the Public Safety Act seem to allow for that multi approach to assessment.

GLAZEBROOK J:

I know when they brought in the preventive detention regime there was a lot of criticism by psychiatrists and psychologists as to their inability to apply those tests because they weren't tests. I'm not sure whether – and I know that there were submissions in respect of this legislation in terms of the impossibility of applying the tests. So the answer may be that, no, they don't really accord with the psychological tests in terms of that – that slight disconnect there often is between what expert evidence or experts think they're doing and what they're required to do under the legislation, but it's not necessarily something that helps the Courts in trying to decide.

MS HARDY:

No, Your Honour. I understand that Mr Barry-Walsh is a particular proponent of that argument and is to give evidence at the PPO, but I think as the Court commented this morning, this is the legislation to be applied, and Parliament has spoken as to the tests.

GLAZEBROOK J:

I certainly would appreciate some assistance on the tests, so not just to assume because the test has been accepted that it's necessarily something that this Court doesn't need some assistance on looking at the scheme of the legislation.

MS HARDY:
Your Honour, are you looking for a reflection of the facts of the case in relation to the –

GLAZEBROOK J:
Well, I would quite like you to go through the legislation to say – especially the points that have been raised this morning in terms of whether it's a comparison being totally free, the link between that and the ESO regime and the link with the international covenants in terms of the least restrictive outcome, which might be part of the factual material you want to go to.

MS HARDY:
Yes. So to start with, the approach of the Court of Appeal to the test, and I am around page 4 of the written submissions, the fundamental question is whether that section 13 test is met.

At paragraph 22 of Mr Chisnall's submissions, the comment is made that the majority's view is correct and then the Court of Appeal acknowledged that, "In the context of an IDO, evidence before the Court on an interim application may not be as extensive as in the substantive PPO," and obviously if that were not the case then there would be no point in an interim detention order. One would only have the PPO application.

The broad submission of the respondent is that the three reports that have been provided by the health assessors do provide a robust starting point for the assessment of a PPO and then the final determination, as the Court of Appeal noted, will be for that substantive hearing. Most importantly, Mr Chisnall will have the opportunity to test that evidence that has been –

ELIAS CJ:
Presumably, though, yes, the evidence will be tested so at the moment it puts the Corrections case at its highest, doesn't it?

MS HARDY:

The Court of Appeal acknowledged that it was hearing one side of the story in the application and said that that evidence had to satisfy the section 13 requirements but acknowledged that of course contrary evidence would be produced and the evidence –

ELIAS CJ:

Yes, but as far as Corrections applications were concerned, that is the highest it can be put. It's not being suggested that there are further assessments that are required or anything like that for Corrections application.

MS HARDY:

That's not being suggested, but obviously an opportunity to respond to the contrary evidence that might come in and the High Court directed earlier that Ms Visser provide the additional evidence.

ELIAS CJ:

Yes, I was going to ask that. The Court commissioned that report.

MS HARDY:

That's right, Your Honour, and then as a consequence of the litigation that has run in parallel with this process the Court of Appeal just earlier this month directed that there be a report from Dr Barry-Walsh.

ELIAS CJ:

That's where that is coming from. I see.

MS HARDY:

Those steps are recorded in the chronology attached to these submissions. The broad submission is that the ISO would not be an adequate alternative, to answer the question is this the least intrusive approach.

GLAZEBROOK J:

Yes. I'm really asking you more at a – not at a practical level but what the test is and the link between the two in terms of the statute. So it's not – and you might be coming to that but that's what I was wanting you to – so it might be as a matter of fact in this case but it's really what the test is and the link between the two, because does – how does the Act itself see the two regimes combining? So when you look at section 13(1), are you comparing with somebody being let loose in the community with no supervision, or do you compare with – do you ask yourself whether the risk could be managed with a lesser matter such as an ESO?

MS HARDY:

The test itself is a stark one in section 13, comparing the individual under the PPO or released into the community or left unsupervised.

WILLIAM YOUNG J:

That's the jurisdiction. If the jurisdiction is satisfied, then presumably the Court would be entitled to take into account the extent to which that risk can be mitigated in other ways in terms of the exercise of the decision whether to make an order.

MS HARDY:

Yes. So it's clearly a discretion. After all the hurdles have been met, then the Court may make the order.

GLAZEBROOK J:

So the Crown accepts that proposition, that if the risk can be managed in another way, which would be consistent with the submissions made by the appellant, then it should be so managed. Or don't you?

MS HARDY:

The respondent accepts that there is a discretion there for the Court in a circumstance where – and the respondent would say this must be rare – where –

GLAZEBROOK J:
Why would it be rare?

MS HARDY:
Because of the very high hurdle that is contained in section 13 to present the risk in the first instance.

GLAZEBROOK J:
But if you can manage the opportunities and make sure that they're not available, why would it – especially in an interim sense, why would it have to be rare?

WILLIAM YOUNG J:
It might be because it's a risk that it's at a higher level than the risk for which the ESO regime has been pitched.

MS HARDY:
Yes. When we look at the conditions of an ISO/ESO, and even the special conditions, there isn't the same constraint and scrutiny that applies under a PPO.

GLAZEBROOK J:
No, I can understand that. In a practical sense it may be that you couldn't manage the opportunities under an ESO.

WILLIAM YOUNG J:
Are there statistics about re-offending on ESOs?

MS HARDY:
I'm sure there are, Your Honour.

ELIAS CJ:
They probably don't shed much light.

WILLIAM YOUNG J:

Well, they may suggest that there is re-offending and presumably the statistics would demonstrate something that's obvious, that ESO management doesn't preclude –

GLAZEBROOK J:

You have the intensive management period, though, which is quite different and I understand that there has been, actually, difficulties in monitoring in any sensible manner the people on ESOs, in any event.

MS HARDY:

Yes. Well, this is more anecdotal than statistical which would be more reliable, the ESO that applied to Mr Wilson in the Blenheim area was then breached. So there was opportunity there. It's certainly not the case that there are –

ELIAS CJ:

Well, there are a number of high profile cases that are current.

WILLIAM YOUNG J:

What about – was there any material given to the Select Committee by the Ministry of Justice at the, when this legislation went through? I mean, presumably the hypothesis that the legislation is based on is that the ESO system doesn't adequately control risk and that's a hypothesis that I perhaps might have expected to have been substantiated when the legislation was passed. Do you know or not?

MS HARDY:

I don't, Your Honour, but I can provide that.

ELIAS CJ:

It can't be categorical, though. It has to be against the background that this is incarceration. So it must be a relevant consideration whether that is necessary to manage the risk.

O'REGAN J:

The definition of "imminent" directs you towards that, doesn't it? Because it talks about suitable opportunities to offend and so presumably if some lesser form of supervision or something like that removes the opportunities, then the test for imminence becomes more problematic, doesn't it? That arguably isn't met because it assumes there is going to be an opportunity.

MS HARDY:

And the respondent's submission would be that the high evidential threshold required of section 13 and the tracking through of the subsection (2) characteristics which informs the risk assessment of imminence and very high risk coalesce to produce the rare cases that were mentioned in the Parliamentary debates over the introduction of the Bill that the alternative of the ESO is not adequate.

GLAZEBROOK J:

That might be a long-term basis but we're looking at an interim basis where one would certainly hope that that intensive supervision or that the case would be heard in under a year when you can put quite stringent conditions on an ESO. I can understand the argument in a more long-term sense, but I'm having some difficulty understanding it in an interim case.

MS HARDY:

Well, the conditions would need to be short of an incarceration, otherwise we would be back to the kind of residence which is at Matawhāiti, which is actually a residence outside the secure perimeter of the prison.

GLAZEBROOK J:

Yes, I understand that.

MS HARDY:
Yes.

GLAZEBROOK J:
I'm not really tying it to this case. I'm just asking as a general proposition to understand the legislation, that's all, or at least the Crown's position on the legislation.

MS HARDY:
As a general proposition, there must be work for that discretion to do in section 13 but my submission would be in relation to somebody who meets all of the tests, just as the meeting of the test is rare I think, Your Honours, it was Justice Adams' commentary about the statistics between about six or 12 in a five year period, which is recorded in the Court of Appeal decision. So just as that is rare, so that would diminish the likelihood of any alternative being an available one under the ISO scheme.

Just another point on page 5 which is that the respondent was urging this as a matter to go promptly to a substantive proceeding and the timeframes associated with that are set out in the chronology at appendix 2 to our submissions. Material was provided through Privacy Act 1993 requests in July of last year in order to get this matter to be heard. Then at the beginning of this year there was Mr Chisnall's application in the High Court for the appointment of Mr Barry-Walsh. There was no application for a Court-appointed assessor at that stage and that's where the issue arose as to funding, finally resolved now with the Court of Appeal's decision earlier this month. Then the further time through to what we now know is the 5 December fixture is consumed in part by the need for the assessor to prepare a report in August and then for the respondent to assess and respond to that appropriately at the substantive hearing. So while it's the case that that's an unfortunate confluence of events for delay, it does indicate the need for an IDO regime to fill the space.

ELIAS CJ:

The regime provided by Parliament doesn't provide explicitly for continuing supervision or reassessment during the period. The interim order is in effect, but I take it there wouldn't be any problem in the Court indicating that it expected to receive updates or reserving leave to come back to the Court if time drags on.

MS HARDY:

Well, certainly there would be a standard capacity to seek a quashing or alteration of the IDO if there was some miscarriage associated with it.

ELIAS CJ:

There seems to be quite limited access, isn't there, to the Courts under this – I mean, I don't know whether habeas corpus is excluded but there's some provision that looks slightly inconsistent with – I had read last night. I probably won't be able to find it.

ELLEN FRANCE J:

Just following up on that, section 107(3) that the ability to suspend the interim detention order, what sort of – in what sort of circumstances is it, would that power be exercised?

MS HARDY:

Perhaps, Your Honour, the circumstance where the supporting basis for the detention order is no longer live. It looks like a suspension, but subject to conditions.

ELIAS CJ:

Well, it presumably, it's where it is thought that conditions can manage the risk.

MS HARDY:

Yes. So if there were fresh material that altered the original risk assessment, one could conceive of that suspension.

ELIAS CJ:

No, but that might be –

GLAZEBROOK J:

Then you'd have to withdraw the application, wouldn't you?

ELIAS CJ:

Mightn't that suspension apply at the time the interim order is made and effectively it is – it permits the Court to impose conditions? It is effectively an ESO but under the compulsion of an interim PPO. But that might be quite significant, because again it's a statutory indication that meeting the risk is really what the Court should be focusing on in these applications. Is it necessary to make the order to meet the risk?

MS HARDY:

And, Your Honour, that's the assessment that the Court of Appeal made by looking squarely at the PPO criteria, not modifying that, though, concur with Your Honour's earlier comment that it's not readily discernible how distinctive Justice Heath and the majority's assessments are. But clearly, squarely looking at the PPO criteria would be the right assessment.

ELIAS CJ:

But they didn't consider whether the risk could be adequately contained in the interim through, for example, the setting of conditions, did they? In fact, I don't think in the High Court that was looked at.

MS HARDY:

Well, my understanding was that Mr Chisnall was putting up an alternative there for consideration and the Court did not accept that, an alternative ESO or –

ELIAS CJ:

But that's under the ESO – that's as an ESO but –

WILLIAM YOUNG J:

Wasn't he saying something – saying, "I want to live free of restriction" at the Anglican institution?

GLAZEBROOK J:

Well, he can't have been because he was agreeing to an ESO, so he can't possibly have been saying without restriction. I don't know what he was saying but he wouldn't have been saying without restriction.

MS HARDY:

The notice of appeal simply says that the interim detention order is quashed. But my understanding is that all along the – Mr Chisnall has put forward the notion of a lesser and less intrusive lens of management. So that would have been before the Court of Appeal and the High Court.

GLAZEBROOK J:

Do we know what it was? Because he's now prepared to accept an intensive supervision.

WILLIAM YOUNG J:

Paragraph 38 of the judgment of Justice Fogarty to an interim extended supervision order.

MS HARDY:

Mr Perkins, who handled the case in the Courts below, said that effectively the submission and the application was for the conditions that are appended, largely appended to our submissions, as being the intensified supervision.

ELIAS CJ:

Sorry, what – oh, those conditions.

MS HARDY:

Yes, that were broadly being sought in the Courts below as an alternative to the IDO so those options were before the Courts.

ELIAS CJ:

Where's it dealt with in the High Court?

WILLIAM YOUNG J:

It's dealt with – it's referred to, anyway – at paragraph 38.

ELIAS CJ:

"I was interested in and rely on"?

WILLIAM YOUNG J:

Refer to where there's justification of obtaining either an interim detention order or an interim extended supervision order. Is there jurisdiction on – presumably there is jurisdiction on this application to make an interim extended supervision order.

MS HARDY:

Yes.

GLAZEBROOK J:

Or there's an application for one, although I'm not quite sure what the sequencing does in the Parole Act.

ELIAS CJ:

I would have thought, though, that there's also – sorry, I've now lost 107 – that there's also the possibility of making an interim detention order suspended if the conditions are observed. It's just that I don't see the Judge addressing that in his reasons, I mean, addressing the conditions.

GLAZEBROOK J:

Yes, because actually there might be a difficulty with an interim ESO because of the sequencing in the Parole Act.

ELIAS CJ:

Yes.

ELLEN FRANCE J:

Because the Judge puts it in terms of, at paragraph 40, “Pending for consideration of the merits of a PPO or an extended supervision order.”

ELIAS CJ:

Yes.

GLAZEBROOK J:

Yes, so in fact it's not making the choice between the two, in fact saying –

ELIAS CJ:

He’s doing it on the jurisdiction being made out rather than on what order he made, isn't it?

WILLIAM YOUNG J:

Well I think he is with the order, isn’t he, although it's not articulated very clearly, but he’s recognising he’s got a choice of two, I think, isn't he.

GLAZEBROOK J:

Well I'm not sure actually. Well I'm not sure he actually did have a choice of two.

ELIAS CJ:

I think he might have had a choice of three. Can you just, while we're looking at the judgments, can we just look at the Court of Appeal reasons on this point, the, what was available, what they needed to confront in terms of conditions.

MS HARDY:

The Court of Appeal doesn't go through a detailed analysis of alternative conditions, the Court of Appeal turns to the risk analysis of section 13 and handles that from paragraph 44 onwards and then at possible community release the Court does address that at paragraph 64.

GLAZEBROOK J:

Well 65 seems to accept that the Anglican Action is no longer available which we're told is not right.

ELIAS CJ:

Well that's really being used though to indicate why the Parole Board revoked.

GLAZEBROOK J:

No, I understand that but, I mean, presumably it reflects the understanding of the – because they say the community is neither here nor there.

ELIAS CJ:

I am a bit troubled by the fact that the jurisdiction may have existed and some sort of interim order should have been made but that the option of dealing with it by maybe suspending the order subject to observation of conditions wasn't considered, and I'm not sure that there shouldn't have been more consideration of the option of an ESO in any event. There's very little in the judicial consideration of the option.

GLAZEBROOK J:

That might be the sequencing though.

ELIAS CJ:

Yes, well can we hear about the sequencing?

GLAZEBROOK J:

Especially for an interim order.

WILLIAM YOUNG J:

The Court of Appeal actually refers to the sequencing problem.

ELIAS CJ:

What paragraph? It's why I asked whether the sequencing problem earlier attaches to interim orders or whether it's really a sequencing in relation to permanent orders.

WILLIAM YOUNG J:

Well that's alluded to by the Court of Appeal at paragraph 39.

GLAZEBROOK J:

Yes.

ELIAS CJ:

Thirty-nine.

GLAZEBROOK J:

There's nothing in the section that indicates that it applies to –

ELIAS CJ:

Interim.

GLAZEBROOK J:

– interim.

ELIAS CJ:

No. There is nothing – I see, they say that to indicate that it applies to interim applications but that would probably mean that interim applications need not be constrained by –

GLAZEBROOK J:

And it makes sense that they wouldn't be because you don't know at that stage whether when the evidence is tested there will be proper grounds.

ELIAS CJ:

Yes.

MS HARDY:

Yes, I think contrary to Justice Heath's concerns, which he expresses at paragraph 77, in a way of explaining his test he says, "If it was possible for interim detention orders and interim supervision orders to be sought in the alternative there would be no concern about the pitching of the test," but in our submission, but of those applications could be made to cover the interim space and they are not limited to an interim detention order only linked to a PPO application.

WILLIAM YOUNG J:

He's of the view that you can't make an interim supervision order application until –

MS HARDY:

Yes and the majority disagreed with that and said that you could.

ELIAS CJ:

Well there would be a huge gap in the Act if that was so.

ELLEN FRANCE J:

So is the Crown's position that you can make an interim ESO in this situation?

MS HARDY:

An interim supervisory order.

ELLEN FRANCE J:

Sorry, interim supervisory order.

MS HARDY:

Yes you could.

O'REGAN J:

Do you say you need a separate application for that or that is just implicit in the fact that if you apply for an IDO but can only substantiate the need for an ISO that the Court automatically has jurisdiction to make the ISO?

MS HARDY:

I would have thought, Your Honour, it was implicit there because of the alternative approach of the PPO and the ESO.

O'REGAN J:

So where are you, I mean, you've asked us as a fallback to make an ISO, where do you say we'll get that jurisdiction from? Is that just an application that's always been extant through the process albeit it maybe not clearly articulated?

GLAZEBROOK J:

I think it always was accepted by the –

ELIAS CJ:

Do we have the application? We do.

MR EDGELER:

Tab 5 of the bundle at paragraph 5.5.

MS HARDY:

So the applicant seeks a Parole Act application in the alternative.

O'REGAN J:

So there is actually an application before the Court?

MS HARDY:

Yes.

ELIAS CJ:

And in terms of the consideration of that as an alternative there's no real engagement with that in the decisions of the Courts below.

MS HARDY:

There isn't, Your Honour, I think it's appropriate to infer from the careful assessment of the section 13 test and the discussion of alternative like possible community release that the Courts both were persuaded that that very high level was met and that an alternative was not appropriate.

GLAZEBROOK J:

But without looking at the conditions that were – and it might be that if they had looked at the conditions they would say they wouldn't have sufficed but without looking at them and going through them how could you come to that view? Just by saying there's a very high risk if left, without conditions, of imminent, if the occasion presents, how could you say that with conditions that wouldn't be the case without actually looking at the suggested conditions? Especially on an interim basis I can understand the more long-term argument because obviously it's a more time limited capacity to have those intensive conditions.

MS HARDY:

Yes, well the Courts would be familiar with the point that if what the Chief Executive has done is satisfy the Court of the section 13 assessment and the Court would be aware that the alternative, the conditions would fall short of a kind of secure detention that the IDO permits then it's implicit that the Court –

GLAZEBROOK J:

Well that's just saying that you could never have conditions that would, on an interim basis, that would meet the risk and you've accepted there could be rare cases where conditions might accept – might meet the risk.

MS HARDY:

Your Honours, there was a paragraph in the Court of Appeal's judgment that did address that aspect of discretion, which I am struggling to find.

ELIAS CJ:

It is relevant to – the Court was critical of the lateness in the application. It does seem to me that the –

GLAZEBROOK J:

Well, what it does say that in fact if things were done earlier then it wouldn't be a one-sided case and in fact, I mean, I do have some concern about it being one-sided. I mean, it's not quite so one-sided because we've now got Ms Visser's report but that's very inconclusive. I'm not wanting to be critical of that, it's just that she says that there are a number of things that she would need to look at before she could come to anything more sensible in that or more definitive.

MS HARDY:

There are some constraints on the department in relation to timing, so an application can only be made when there's six months or less to run on the sentence, so it can't be commenced particularly early in the piece and the instructions I –

GLAZEBROOK J:

Six months is still quite a long time.

ELIAS CJ:

I suppose six months has been eaten up in this process.

GLAZEBROOK J:

Well, no, it has but one can still understand that if you get – if they're preparing the reports and make the application in a timely manner there's quite a long time to get countervailing material, if there is any. So it really shouldn't be one-sided. It really does concern me in natural justice terms that

even interim orders that are so constraining of liberty once the sentence is finished are made on a one-sided basis without – possibly apart from cross-examination – to test.

WILLIAM YOUNG J:
There must be an ability to come back in relation to an interim order.

GLAZEBROOK J:
Well, it's not actually clear.

WILLIAM YOUNG J:
A power to make an order normally carries the correlative power to revoke it.

O'REGAN J:
Well, there's also the power to suspend it, to ask the Court to do that.

WILLIAM YOUNG J:
Isn't that really because someone's otherwise detained? I thought it was.

MS HARDY:
It looks like on the commencement of the order but certainly there's no reason why in general principle there couldn't be an application back to the Court to quash.

O'REGAN J:
107(3).

ELLEN FRANCE J:
107, the Court may suspend the order.

O'REGAN J:
I mean, presumably you could apply for a suspension.

ELLEN FRANCE J:

In the application, in terms of the conditions that would apply, so I'm looking at tab 5 paragraph 5.6, the concern was expressed that the standards and special release conditions would expire at a time when the applications were unlikely to have been finally determined. Would that always be the case or would that provide a means for applications to be dealt with more prompt, I suppose, for them to be dealt with more quickly?

MS HARDY:

So those, I understand, expire after a 12-month period.

GLAZEBROOK J:

They are relatively light-handed as well.

MS HARDY:

And so there would be a risk there that –

GLAZEBROOK J:

I would have thought they're very unlikely to deal with any. You would have to go to the ISO in order to deal with the risk of people who come within this Act, I would have thought.

ELIAS CJ:

Yes.

MS HARDY:

Your Honours, I think on the point that you have raised there hasn't been a working through of the alternatives except –

WILLIAM YOUNG J:

I see it was referred to rather conclusorily by Margaret-Anne Laws at page 87 of the case. "He has re-offended previously while under the care of specialist disability services. Therefore risk reduction is likely to be more successful

when supported by external monitoring and management of Mr Chisnall's behaviour." Now rather cryptic as to what she meant.

ELIAS CJ:
Sorry, where is that?

GLAZEBROOK J:
Page 87.

WILLIAM YOUNG J:
Page 87.

ELIAS CJ:
Paragraph, which one?

WILLIAM YOUNG J:
Right at the end.

ELIAS CJ:
Right at the end, yes.

WILLIAM YOUNG J:
So Steve Berry says at 105 that intensive external monitoring is essential as minimum requirement to manage his risk of offending.

MS HARDY:
Your Honours, I do think it goes back to the robustness of the three health assessor reports and their identification of the concerns and risk profile of Mr Chisnall.

ELIAS CJ:
But they are indicating that external monitoring and management is necessary but they're not saying that it shouldn't be tried, are they?

WILLIAM YOUNG J:

Well, there's a problem if it's not enough.

ELIAS CJ:

Well, of course, but you'd feel a lot happier if the Courts have addressed that. It just seems it's –

GLAZEBROOK J:

Specifically, yes.

ELIAS CJ:

– it's half the question that they've really looked at.

GLAZEBROOK J:

And we certainly can't, I would have thought, address it because we don't even know anything about the home that's suggested and, for myself, I wouldn't be happy about leaving it to the Probation Service, to be honest.

WILLIAM YOUNG J:

Dr Wilson deals with it at 126. "Mr Chisnall's index offending also occurred in the context of care from a wrap-around service. The writer is concerned over the use of the term 'circle of support' to categorise Mr Chisnall's release support structure." Now that's obviously not an ESO, but he was talking about then the current release plan which he said was unlikely to reliably manage his risk.

GLAZEBROOK J:

We don't really know what he's talking about because he's probably talking about being let loose.

WILLIAM YOUNG J:

No, he's not talking about ESO. Yes, he's not talking about ESO.

GLAZEBROOK J:

No, and of course they would be because they're addressing the statutory test, quite rightly. They haven't really been asked to address the conditions and even if it would be appropriate to ask them, I'm not sure.

WILLIAM YOUNG J:

Well, I suppose if you identify a high imminent risk of serious offending, you'd probably want to be reasonably confident that an alternative to this would manage, mitigate the risk.

GLAZEBROOK J:

Yes, exactly.

MS HARDY:

Yes, and just on the Anglican Action option the way that that aspect unfolded which was raised through the probation hearing process was that while Anglican Action had been initially open to accommodation and the monitoring of Mr Chisnall once they had received the reports from the health assessors they were concerned that –

ELIAS CJ:

They wouldn't be able to manage it.

MS HARDY:

They wouldn't be able to manage that.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Well we're having evidence from both bars now and it's very difficult for us to deal with that on any sensible basis because the evidence from, well, the evidence from the bar on the other side is that they were willing to deal with it it's just that not at that time?

MS HARDY:

Well it's clear from the Probation Board report and the reason underlying the cancellation of the Parole Board –

GLAZEBROOK J:

Well we're told that's a misunderstanding by the Parole Board. What are we supposed to do with that?

ELIAS CJ:

It seems to me that the problem for us is that in fact the reports themselves didn't really address this second leg, if it is a second leg, and that therefore there is no adequate information that this Court certainly could operate on. It may be that the correct outcome if we're of the view that the statutory condition is made out is maintenance of the order with leave to – well you probably don't even need leave to apply for suspension but with an indication that one would have expected, management through conditions to be looked at. In fact, I think maybe the matter would have to be sent back for that aspect to be determined because I think it should have been. At the moment I'm thinking it should have been looked at.

MS HARDY:

Well certainly, Your Honours, it's clear that this Court hasn't got factual material that would be robust to make a fresh decision.

ELIAS CJ:

No. We interrupted you, what –

GLAZEBROOK J:

Sorry, yes, it's my fault. It's just I was pointing out we can't decide whether, in fact, that was the right thing. It may well be that you're right and that's what did happen but we just don't know.

MS HARDY:

Your Honours, my submissions are clearly pitched at was section 13 met.

ELIAS CJ:

Yes.

MS HARDY:

I will just proceed to work through those. So on the intellectual disability argument that was made, and that was the only argument that was made below, the point is canvassed at paragraph 14 of the written submissions. Justice Miller did find that Mr Chisnall, on the evidence that was before him, had an intellectual disability and the argument was being made that in accordance with the section 5 principles from the legislation that there should have been no IDO but the respondent's submissions is that if you look at section 12 of the Public Safety Act which governs this and that is in the appellant's authorities. It provides that if, in this case, Mr Chisnall were intellectually disabled then the Court can direct the Chief Executive to consider applying for an assessment under the Intellectual Disability Act but in such circumstances, answer this is subsection (3), there must be an IDO in place to cover the timeframe, and here on the facts while Justice Miller apprehending a disability that might meet the section 7 requirements of the Intellectual Disability Act. There's been subsequent and more up-to-date evidence that that is not the case. So again, this is an aspect which in my submission is really a matter for the substantive PPO hearing where on the fuller evidence – which includes the recently-directed Ms Visser evidence – the Court could exercise its discretion to seek an assessment. But if an application isn't made or doesn't result in a compulsory order then there's no bar to the High Court making the PPO. So in other words, the concerns about mental or intellectual disability and now and most recently raised about psychological impairment are matters that can be held, dealt with properly at the PPO substantive hearing but are not matters that this Court can do anything with.

The question of whether the section 13 tests are met are informed, obviously, by the factual background. The Court will be aware of those, but they're variously set out in the Court of Appeal judgments, the health assessors' report, and the conviction history which is at tab 6 of the case on appeal. And

really what that demonstrates, and it's a history that informed the three health assessors, is very early serious sexual offending, the first in 2002 aged 15 when Mr Chisnall was placed in a youth facility. Then when he was on bail on that he was again offending, convicted and discharged in that case but that was – that's an indicator to the health assessors of that test of imminence and opportunity. He was then sentenced to eight years' imprisonment for sexual violation by rape, which occurred when he was only 19. Then in 2009 sentenced to three years' imprisonment for a second sexual violation which had occurred involving an eight year old girl. That was back in 2001 when he was aged 14. It's that history which has informed the assessments.

Then at paragraph 23 that does cover the points that the Chief Executive applied for a PPO alternative to a supervision order and an IDO, interim supervision order or interim conditions, so as is noted there the full range of approaches was canvassed in the application.

Then the facts note that Mr Chisnall was transferred from Auckland to the Christchurch Men's Prison under the PPO and then he's been at Matawhāiti. I think there are two residents there and with a staff of approximately six that work with those residents.

I've gone through the chronology in particular to identify and somewhat explain why there have been delays in getting to the substantive hearing. So it certainly was not the intention, I am sure, of either party that the IDO continued on beyond a relatively short period, but a practical period.

Moving on to page 12 of the submissions which record the test and here it is the majority articulation that the Chief Executive supports the comment made in the Court of Appeal there by Justices Asher and Dobson, "It will be most surprising if the threshold for an interim detention order which detains an offender who has served his or her sentence required anything less than the same degree of proof is that required for a permanent public protection order." That in the Chief Executive's submission is sound and there are interim supervisory orders as a backup if that test were not to be met.

And then there is the point I think that is of concern to the Court and articulated by Justice Glazebrook that it is the case on these IDOs that the Judge will understand the material put forward including the reports may not be as full or extensive as might be expected but there will have been sufficient detail to meet the test and that's critical in order to be able to put in place an IDO on the brink of a prisoner being released and without it there will be a gap obviously but a clear necessity for that even if one-sided application to cover the space.

The test that Justice Heath put forward was a necessity test more akin to the civil interim relief approach which, I guess, broadly is now a very preserved a position –

ELIAS CJ:
Perhaps I should just mention, I just had a look at – there are three, you may be aware of them, recent decisions in the Court of Appeal – in the High Court in Christchurch where interim PPOs were made and suspended subject to conditions, in one case which, I think, at least which mirrored an ESO which had earlier applied but in others were specifically tailored.

MS HARDY:
Thank you, Your Honour.

ELIAS CJ:
Sorry, yes, which indicates that the Courts are considering the question of conditions to be, well the High Court is, as really integral to the interim order assessment that it's a further consideration then that needs to be undertaken.

MS HARDY:
Your Honours, I then go through the meeting of the tests in section 13. Justice Venning's decision in the case of *Chief Executive of the Department of Corrections v Wilson* [2016] NZHC 1081 is a useful guide to the structuring of the section in that in His Honour's judgment the best portal for making an

assessment under section 13 is to go through the subsection (2) behavioural features and answer them and then go to the question of how that informs and satisfies the Court as to imminence and very high risk and His Honour also makes the comment, which is accepted, that the very high risk is as to the attributes or proved to a very high level of evidence applies to the attributes rather than simply the level of evidence without reference to the intensity of the risk.

GLAZEBROOK J:
Sorry, I'm not quite sure I understand that.

MS HARDY:
So in section 13(2) which is the introduction to the four criteria, intense drive, limited self-regulatory capacity, absence of understanding, poor interpersonal relations, the requirement is that there be exhibited a severe disturbance in behavioural functioning established by evidence to a high level of each of those characteristics, and there was in the case law some ambiguity as to the meaning of "evidence to a high level". Did it mean the quantification of the evidence or was it about the high level of the behavioural attribute? Justice Venning works through that in the *Wilson* case, which is amongst the authorities, pointing out that the better approach is evidence which demonstrates a high level of the attributes and the point that the respondent would make is that that approach seems consistent with the intent and purpose and rights limiting nature of the legislation. So that's accepted as the proper approach.

GLAZEBROOK J:
Right, thank you.

MS HARDY:
Your Honours, would it be helpful for you if I were to go through –

ELIAS CJ:

I'm sorry, I hadn't seen the time. We should take the adjournment now. What were you going to ask though?

MS HARDY:

I was going to ask whether it would be helpful to go through those attributes of section 13 in relation to the evidence which clearly involves a – identification amongst the health assessors' reports and the way that they relate to those tests. There's that aspect and then I was going to, Your Honours, address the question of imminence which is a point that my friend made as being an analysis that he submits is lacking in the Court of Appeal's decision.

ELIAS CJ:

Yes.

O'REGAN J:

I think the latter but possibly not the former.

ELIAS CJ:

Well, I think I'd quite like you to just touch on the assessments. I wouldn't mind reviewing them again in the light of the discussion we've had, but you can keep that fairly brief.

MR ELLIS:

Justice Young asked for statistics. Mr Edgeler has those statistics which we'll attempt to print out at lunchtime to hand up to you afterwards so that my learned friend can comment on them before our reply.

ELIAS CJ:

Thank you, Mr Ellis. Thank you.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.18 PM

MR ELLIS:

Your Honour, hopefully in front of you, you have an Official Information Act 1982 request about ESOs. There's six pages of text followed by probably what's the most important page, which will be page 7, which doesn't have a number on it, which is appendix 1, a landscape page, and if you look at that page you'll see in column B, we're now up into the high 200s of people on ESOs and in column E you'll find ESO offenders imprisoned for new, relevant offending. So there's two, three or four in this decade. Seven was the highest number and three in the last year out of 276, which is about 1% of people re-offending on relevant offences. So I hope you find that useful.

WILLIAM YOUNG J:

It is useful, I think, thank you.

GLAZEBROOK J:

What is the time period on this? Just per year?

MR ELLIS:

From 2004 to 2015. So there's 11 years. Those are offences per year.

O'REGAN J:

So the 276 is the number that have been issued. That's a cumulative number, is it?

MR ELLIS:

Yes, that's the number of people who are currently being managed, it says, so some will go off. But there's currently 270 people.

ELIAS CJ:

So it's going up quite steadily.

MR ELLIS:

Yes. It's not six to 12, as somebody said, per year. It's a bit higher than that and they do commit offences, 59, but – oh, that's a breach. 16 did new

offences but not relevant offences so they might have shoplifted or burgled or something. But not a serious offence so I would have thought that when I ask the psychologist what is their success rate, determining whether somebody is a very high risk, what are the numbers? With only three people offending, or if you add them up for five years or 10 you might get 20, there's going to be a very low success rate. So the margin of error for psychological reporters will be very relevant to whether you can actually determine what the Human Rights Committee say is a fact, because you're speculating. So that obviously, we will return to that some other day. Thank you.

MS HARDY:

So, Your Honours, as signalled before the break, my intention is to go briefly through the factual material that relates to the section 13 test and deal with the issue of imminence. Just before I do that, we have assembled the cases that Your Honour, the Chief Justice, referred to, the Christchurch cases in relation to suspension and have them available in hard copy if you would prefer that. Just by way of overview commentary on the cases, they all relate to individuals who were under an ESO on the intensive monitoring period for 12 months. An application for a PPO made because the alternative powers at the conclusion of that 12 months is to drop down to an ESO without intensive monitoring or the PPO path and an IDO was sought to cover the period before determination of the PPO application. So in those cases there was an –

ELIAS CJ:

Yes, so they had ready-made conditions and they just rolled them over effectively?

MS HARDY:

The suspensions were agreed by consent to roll-over.

ELIAS CJ:

Yes.

MS HARDY:

And the individuals had themselves satisfactorily, from Corrections' point of view, complied with those conditions.

ELIAS CJ:

Yes, during the interim, yes.

MS HARDY:

So it is somewhat different than –

ELIAS CJ:

No, but it nevertheless indicates a route that might apply more broadly.

MS HARDY:

Yes, Your Honour, it indicates a route. The distinction I was to make was that these people had been tried and tested in an ESO circumstance within the community to the extent that operates as opposed to individuals of the nature of Mr Chisnall emerging from prison.

ELIAS CJ:

Yes, I understand.

MS HARDY:

So in relation to the facts that apply to section 13, the Court of Appeal tackles that material through Their Honours' summary, paragraphs 42 to 58 of the judgment.

ELIAS CJ:

By the way, do hand those up later. We'll take those in thank you.

MS HARDY:

Thank you, yes.

ELIAS CJ:

Paragraph?

MS HARDY:

So 42 is the commencement of the analysis of high risk and then moves onto the behavioural aspects that are dealt with in section 13(2). I won't rehearse that as it's clearly set out there, just draw your attention to paragraph 50 of the judgment which sets out Dr Wilson's conclusions which are essentially at the end of his paragraph 57. "Future offending is likely to be in the form of stranger sexual assaults including a range of female victims from children to adults based on opportunity and vulnerability of victims." "With Mr Chisnall also noted to engage in sexual fantasies, victims may include people known to him who he believes have harmed him. His sexual assaults are likely to see him act out rape fantasies with offending ranging from indecent assaults to sexual violation. Based on Mr Chisnall's past sexual assaults and use of violence in general, a significant level of violence may be used by him," and the commencing statement at paragraph 56, "Mr Chisnall in the opinion of the writer has a very high and stable risk of further serious re-offending that is regarded as imminent based on consideration of his assessed risk and other relevant clinical factors."

GLAZEBROOK J:

Did he say what was imminent – do you agree that he said the five years or did he give other definitions?

MS HARDY:

No, Your Honour, we don't agree that the five years is what framed the sense of imminence. He covers imminence at paragraph 48 of his report. So Dr Wilson's report is the case on appeal at tab 11, and at paragraph 48 Dr Wilson says, "… very high risk and stable risk of further re-offending. He was assessed as both high on psychopathic traits and sexual deviancy with similar offenders found to be especially likely to re-offend and to do so quickly; the risk conferred by the combination being greater than would be conferred by the additive combination of their independent efforts alone." While compliant, assessment is based on risk if released in the community, informed by offending while on bail with supportive care and linked to his paranoia and high level of sexual entitlement, and long-term anger management. So the

language of opportunity, quickly. The five years is from the automated assessments rather than the assessment that Dr Wilson ultimately makes.

So running through the section 13 evidence, perhaps if I just assisted Your Honours by referring to the material in the casebook rather than running through it in detail, but the commencement with section 13(2)(a) which is the intense drive criteria, that's commented on by Ms Laws who completed the 2015 assessment and at paragraph 33, this is at tab 9 of the case on appeal, at paragraph 33, she concludes, "Mr Chisnall's history demonstrates he has an intense drive and desire to commit a relevant sexual offence."

Mr Berry, whose report is 2016 and at tab 10, at paragraph 47 he says, "Allowing deviant sexual and sexually violent fantasies to occur has been and will continue to be a primary coping mechanism for Mr Chisnall when stressed."

GLAZEBROOK J:
Sorry, if you're expecting us to find these you'd probably have to go just a bit slower.

MS HARDY:
Your Honours, would you like me to take this more slowly so you can find the –

GLAZEBROOK J:
Well, if you're wanting us to look at them you will have to take it slower.

ELIAS CJ:
You're responding really to my indication that I would like some help on this.

MS HARDY:
Yes, but in a speedy fashion, I understood.

ELIAS CJ:

In a speedy fashion, yes.

GLAZEBROOK J:

There's speedy and speedy. If I can't get it down then we'll look at it –

ELIAS CJ:

Give us a chance to catch up.

MS HARDY:

So Mr Berry.

GLAZEBROOK J:

So where were you now?

MS HARDY:

I'm at Mr Berry at tab 10 of his report and paragraph 47, and this relates to the intense drive analysis, and pertinently at the end of that paragraph Mr Berry says, "Allowing deviant sexual and sexually violent fantasies to occur has been and will continue to be a primary coping mechanism of Mr Chisnall when stressed."

Then if I can take you to tab 11 which is Dr Wilson's report completed in March 2016 and paragraph 49, he comments on the intense drive aspect of the test noting there are aspects of opportunism as well as planning. His treatment notes continue to indicate arousal over his offending and concludes, "While he has completed specialist sex offender treatment, the writer believes he still has a predilection and proclivity for sexual offending."

Then the second requirement of behavioural attributes is limited self-regulatory capacity evidenced by general impulsiveness, high emotional reactivity, and inability to cope with or manage stress and difficulties.

Going back to Ms Laws at tab 9, in particular paragraph 35 which deals with this attribute, poor behavioural and self-regulatory controls over time in relation to general and sex offending behaviour evidenced in prison and community settings concluding, “It is the writer’s opinion that Mr Chisnall’s self-regulatory capacity is poor.”

Then Mr Berry on the same theme at tab 10 paragraph 49. “Mr Chisnall has exhibited poor self-regulatory capacity since an early age … generally impulsive, highly emotionally reactive, and made extremely poor decisions when confronted with stressful situations. While his ADHD and post-traumatic stress disorder symptoms are better controlled, his compliance with the medication regime is critical to that.”

Dr Wilson at tab 11, pertinently at paragraph 50, “Mr Chisnall has a long history of general impulsivity and inability to cope with challenge, social isolation, or rejection. These issues are still present.” Dr Wilson confirms that in his most recent addendum update.

The next attribute is an absence of understanding or concern, essentially empathy.

At tab 9, going back to Ms Laws at paragraph 37, Ms Laws concludes, “It’s considered that Mr Chisnall has a low capability for empathy and a limited understanding of the impact of his offending on his victims.” Tab 10 –

ELIAS CJ:
This report is the one I was thinking of which identifies only three clinical risk factors and they are simply low cognitive functioning, ADHD and PSTD?

MS HARDY:
Yes, Your Honour.

ELIAS CJ:

Well they seem very much to do with his level of functioning only but anyway, go on.

MS HARDY:

Well, yes, I mean the conclusions do track the assessment of the statutory provisions. Mr Berry, tab 10, at 51, again focusing on the empathy aspect. "Mr Chisnall did not present during this assessment has having developed a strong empathetic response though he was able to articulate an intellectual understanding of the effects of behaviour on others." And a strong statement from Dr Wilson in his report at 51. "Mr Chisnall has not demonstrated reliable evidence of remorse for his offendings or a general capacity to empathise with others.

The final aspect, poor interpersonal relations or social isolation or both. Ms Laws, tab 9, does comment at paragraph 40 that Mr Chisnall's current relationship with his family, although strained, is going through a process of repair." That was back in 2015. Mr Berry, at tab 10, and around paragraph 53 comments that, "Historically relationships have been extremely poor". Treatment does appear to have made some improvement such as hostility towards women appearing to reduce. Current relationship with family, though strained, is going through a process of repair. And says somewhat more positively, "It does appear Mr Chisnall has learned through treatment that meaningful relationships have value and can contribute to wellbeing."

And then Dr Wilson canvasses the point at paragraph 52 assessing his paranoid personality traits as a barrier to the formation of close trusting relationships and concluding that in the opinion of the writer he will likely to continue to experience difficulties with trust and intimacy and to experience social isolation when released into the community.

Those ingredients from subsection (2) have informed the overall risk assessment and, in particular, the risk assessment of Dr Wilson that's relied

on by the Court of Appeal of very high stable risk of further serious re-offending.

The question of whether that risk is one that could be properly pitched to meet the requirement of imminence is not one that has been directly addressed by the Court below but in the respondent's submission there is sufficient evidence in those three reports to satisfy the test. As the Court has already noted "imminence" is defined in section 3 of the Public Safety Act and links to opportunity and as in response to Justice Glazebrook's question I would draw attention to the assessment which Dr Wilson has paid at paragraph 48, that the features of the individual do point to impulsive behaviour, paranoia, sexual entitlement, and that that is a multiplier to the statistical tools that produce the material identifying risk over five and 10 year periods. Based on that global assessment –

GLAZEBROOK J:
Did anyone else say anything that was pertinent about that, apart from, obviously, the impulsiveness and those matters go towards that, but was there anything explicitly said?

MS HARDY:
Mr Berry addresses imminence in his report also, and that's at tab 10 paragraph 45. "Mr Chisnall presents with multiple and complex challenges, including a long history of psychopathic behaviour. The positive changes that he has made are untested in a non-prison setting. He must therefore be considered more likely than those in his comparison group to commit a serious re-offence immediately upon release and/or when structure and supervision is withdrawn."

GLAZEBROOK J:
I'm not sure that's necessarily helpful. It just means he's one of the higher risk in his risk group.

MS HARDY:

No, Your Honour, the clearest statement is made by Dr Wilson on imminence. Just in terms of approaching the meaning of imminence which, even with its definition, as has been mentioned, is not – it's a matter of judgement call based on an overall assessment of risk. There are cases – the *Wilson* case, which is at the Crown's authorities at tab 10, and that's Justice Venning endeavouring to give some indication of the interpretation of imminence, paragraph 82 in that judgment. So Justice Venning says that in his judgement the concept of suitable opportunity, which is taken from section 3, carries with it the connotation that the offender would actively seek out the opportunity – a paedophile presenting an imminent risk would seek out opportunities to be alone with children to commit offending. It suggests a very brief time within which the serious violent offending will take place so it will take place, if not immediately, certainly very soon after release.

So clearly it's an ultimately judicial rather than clinical decision based on the overview of the evidence. Here the three experts do point to the aspects of paranoia, sexual deviance, the immediate offending while on bail as a youth, the length of offending from youth offending through to the final rape that became the key offence for sentence, so that in my submission there is enough in those reports to meet the imminence test despite the Court of Appeal's not going through that aspect in great detail, at least for this IDO in order to be tested in viva voce evidence and any alternative evidence which Mr Chisnall puts forward.

Your Honours, I have gone through at paragraphs 59 and following in relation to the inadequacy of an ISO and the concern that has been expressed by the Department relates to the adequacy based on those health assessments of the kinds of conditions that are set out as an appendix to these submissions. Conditions that would be relevant for an interim supervision order are the standard conditions that run, this is appendix 1 from paragraphs 1 through to 11, and then special conditions would be added. The key there is paragraph 13, subject to intensive monitoring and submit to be accompanied and monitored for up to 24 hours a day by an individual who has been

approved by a person authorised by the Chief Executive. The caution about moving to that step on the basis of the evidence, certainly the evidence that is before this Court and was before the Courts below, is that there is no capacity there for a supervisor to intervene should someone actually, Mr Chisnall, manage to move to commit an offence. It is not the rigorous control of a –

GLAZEBROOK J:
Are you suggesting that the person's going to stand there while he rapes a child?

MS HARDY:
No, Your Honour, my understanding is that the supervision isn't necessarily cheek by jowl 24 hours a day. The supervision has got some practical limitations.

GLAZEBROOK J:
Well, no, I understand that, but you said there wouldn't be an ability to intervene. So you're suggesting the person would stand beside him watching him rape a child?

MS HARDY:
No, I'm not suggesting that.

GLAZEBROOK J:
Okay, thank you. So it's the limits on supervision?

MS HARDY:
Yes, the ability to actually escape that supervision and –

GLAZEBROOK J:
No, no, I understand that, certainly.

MS HARDY:
Yes, not – yes.

ELIAS CJ:

Just since you've taken us to the submissions, your paragraph 60 really indicates perhaps a problem here because you say that the health assessors are only required to assess the risk if Mr Chisnall were released from prison into the community and that the matter of whether the risk can be adequately managed in the community is a matter for the Court, but that's the point we were discussing before, whether the Courts addressed it.

MS HARDY:

Yes, Your Honour, and I accept –

ELIAS CJ:

And so when you say, well, there is some material in the – well, no, you're not really saying that there's material in the reports which would mean that it went without saying because the reports didn't, as you say, address this point.

MS HARDY:

I think it's fair to say the reports don't directly address that aspect and it would have been for submission to the Courts below as to the meaning of the health assessors' evidence as to what the appropriate calibration would be.

ELIAS CJ:

Yes.

MS HARDY:

Your Honours went to the application that was made by the Department which has a cascade of applications and interventions, so that was before the Court, and my submission was that by inference the Court had not seen the health assessor reports as supporting a lesser intervention but as supporting the PPO and I have had to leave it at an inference.

ELIAS CJ:

Yes.

ELLEN FRANCE J:

There are the aspects albeit not very lengthy that I think Justice Young referred to earlier. So Mr Wilson, for example, at paragraph 55, tab 11, talks about what he sees is the inadequacies of the wraparound service.

MS HARDY:

Yes, thank you Your Honour.

GLAZEBROOK J:

Although that's a suggestion there as you need external monitoring, I'm not entirely sure what that means, both of, I think, maybe Ms Laws says that as well but I'm not sure what that means?

MS HARDY:

The external –

WILLIAM YOUNG J:

Another problem, so probably there was at least room for doubt as to whether an interim ESO could be made without the dismissal of the substantive PPO application. Is that perhaps a reason why they didn't address the ESO option?

GLAZEBROOK J:

No, the majority said they could –

WILLIAM YOUNG J:

No, but this was done before that.

GLAZEBROOK J:

Yes, I know that's what you mean, yes. Well they may not have been asked to address it.

ELIAS CJ:

No, well you say section 13(1)(b)(i) doesn't – well you've got a footnote to section 13(1)(b)(i) when you say that the health assessors are only required to assess risk of release into the community.

MS HARDY:

That's the statutory language.

ELIAS CJ:

So they weren't –

WILLIAM YOUNG J:

But that is only the jurisdictional threshold.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Once that's satisfied there is another issue –

GLAZEBROOK J:

Yes, and they could be asked to opine on that but they presumably weren't asked to opine on that and, in any event, it probably would be difficult without them knowing the exact parameters and what was suggested and maybe even knowing the facility that was being suggested.

MS HARDY:

Yes, I think it's a question of conditions and facility which is in the hands of the Department to bring together with the health assessor reports.

GLAZEBROOK J:

Well the health assessors presumably knowing that could comment on it but they couldn't comment on it in a vacuum.

MS HARDY:

In the abstract.

GLAZEBROOK J:

Sorry, they may be able to comment on that, they may not.

MS HARDY:

Mr Perkins has just drawn my attention, again for the complete record for the Court, Dr Wilson's addendum report which updates the report that we've been through. It's dated the 11th of April.

ELIAS CJ:

That's separate, is it?

MS HARDY:

Yes, so that's at tab 19 of the case on appeal. And perhaps there is pertinent paragraph 35 it does express some reservations about the ability to assess a planned release but he repeats his conclusions that there is a very high and stable risk of further serious offending despite the passage of time and I think general doubt about assessing what the plan for moving back into the community might be.

So, Your Honours, the overall submission would be that there is sufficient evidence here for the interim order that was before the Court of Appeal. There's certainly no guidance needed on the, or at least no contest here about the nature of the test; it's application. It's accepted that the Court of Appeal hasn't gone through the alternative options in detail to assess the intrusiveness of the PPO and that relies on an inference that they were satisfied from the high test of the PPO that that would not be viable and they certainly didn't have evidence to suggest viability of an alternative. That would be a matter that on the substantive hearing of the PPO, which is now not so far away at the beginning of December, where full evidence can go to the Court for a rigorous assessment.

GLAZEBROOK J:

To be honest, I'm still very concerned on an interim order that there isn't an issue of viability because it is interim and one – and on the basis of one-sided I would have thought there should at least have been explicit consideration of that.

MS HARDY:

Well, I think, as Your Honours have noted, it is open to the Court to send the matter back for a clearer articulation of that aspect, if that remains troubling. So, Your Honours, if you have no further questions, those are the submissions.

ELIAS CJ:

No. Thank you, Ms Hardy.

MS HARDY:

Thank you.

MR ELLIS:

I won't be very long. The first issue that my learned friend made moment of was the mental disorder in saying this was the first time it was raised, hadn't been raised in the Courts below. Well, I'm not sure if that's a fair criticism because in the respondent's submissions at paragraph 69 it's they who raise it for the first time and I'm just responding to it. They say section 12 is only trigger if it appears to the Court Mr Chisnall may be intellectually disabled and I'm saying that's a wrong submission in law because it's also mental health. So – and, as I said earlier –

ELIAS CJ:

But all the argument was addressed, wasn't it, to the intellectual disability?

MR ELLIS:

Well, yes, but then we didn't get Ms Visser's report till late in the day which brings it up. So I'm just explaining how the sequence occurred. It only arises

from Ms Visser's April report and the – I suppose the alarming bit of their submission is perhaps not the first part of paragraph 69, it's the next bit when – Justice Miller's 2016 finding it's not irrelevant, but Ms McFadden and Ms Visser, which they bring into play, would conclude he's not intellectually disabled is of greater relevance. Well, you can't cherry-pick out of Ms Visser's report and say that. You've got to look at her report in full, and it is not the law that two psychologists trump a Judge. There's a judicial finding of intellectual disability.

WILLIAM YOUNG J:
There's a timing issue though.

MR ELLIS:
I understand there's a timing issue.

WILLIAM YOUNG J:
And the facts have actually changed during that time, haven't they?

MR ELLIS:
Yes, and there's now a factual issue as to whether he's mentally disordered. You can't – I'm saying they can't cherry-pick half of what they do. That's not fair. Anyway, that was my first point.

The second point was the statistics there. If there's only one or two percent of people who are re-offending then there is an issue in terms of Justice Glazebrook's *Risky Business* article that we need to know –

ELIAS CJ:
Well, these are people though who have been through –-

O'REGAN J:
It might show that ESO's are effective.

ELIAS CJ:

Yes, it may indicate that the programme works, the detention works.

MR ELLIS:

Yes, but my point is if the experts are saying that you've got a high risk of re-offending and they don't re-offend, then what value is their report? What is the margin of error of psychologists? How right or wrong are they, because we rely upon them.

O'REGAN J:

Well, we don't know what the offending rate would have been if there hadn't been ESOs. That's the – because by definition we haven't got a comparator sample, have we?

MR ELLIS:

Well, no, that is the problem in that there's never any statistics to tell you whether these assessors are right or wrong, so it's a question of faith, but you, as Judges, have to make a decision as of fact on the basis of scientific or psychological opinion, but they can be asked, I suppose, "How many assessments have you done? How many times have you been right?" There must come a time when that material becomes available because if we don't know what their margin of error is then how do we know this is any more than what the West Australia Supreme Court calls junk science?

GLAZEBROOK J:

Well, the actuarial are based on actual re-offending and taking the factors that have come through there so that's why they are thought to provide a better measure even though they only provide group statistics based on group re-offending, and then on top of that too to look at the other factors there has to be some clinical judgement.

MR ELLIS:

Well, yes, Your Honour's quite right, the actuarial assessments have research-based numbers saying how many people re-offend but, as you just

said, you can only attach that to the group. There is no way that you can work out the individual risk of an individual person and a very relevant consideration to working out the structured clinical judgement is how reliable are the psychologists, and it's a perfectly reasonable suggestion to say their margin of error has to be disclosed to the Court, as Your Honour says the margin of error of the tests has to.

GLAZEBROOK J:
Well, it's slightly difficult to work out what the margin of error is though because by definition in a group there will be some who do and some who don't. So if you say, "Well, I don't think this person is at risk of re-offending because of my clinical view they'll come within the 80 rather than the 20," and they come within the 20, well, it's not necessarily an error in that assessment, it's that they turned out to come within the 20.

MR ELLIS:
Yes, I accept that.

GLAZEBROOK J:
That's the problem with it.

MR ELLIS:
Yes, I accept that but empirically there must come a time when we know how reliable or unreliable an assessor is –

GLAZEBROOK J:
Well that is possible.

MR ELLIS:
– and we're going to have to explore that in the High Court. I mean that's a very valid method again because if you're thesis is right that we need to know what margin of errors are, which I think it is right, then we need –

GLAZEBROOK J:

It wasn't my thesis, it was yours, I'm sorry. I was suggesting it's not –

MR ELLIS:

No, in your article that the courts need to be told what the margin of error is then they also need to be told what the margin of error of the psychologists is and that's a new departure in this field that I don't think has been addressed yet but we'll have more of that in the –

ELIAS CJ:

There are references to confidence intervals or something, aren't there, which presumably is that?

MR ELLIS:

No, Ma'am, that's not what I'm trying to say. The margin of errors are for the tests that the various actuary or instruments or an IQ test it's a margin of error. What I'm saying is what is the individual margin of error of the psychologist when –

ELIAS CJ:

I see.

MR ELLIS:

– they make a risk assessment because if their margin of error is 70% then they're worthless. If it's not better than chance their reports are worthless and there's a series of cases in the Western Australian Supreme Court which say, look, some of these reports don't rate above junk science – they don't meet the standard required for a court to receive expert evidence and that's the line I will want to develop later.

ELIAS CJ:

Yes.

MR ELLIS:
So I'm sorry if I didn't make that clear.

ELIAS CJ:
No, my fault.

MR ELLIS:
That the terminology is not easy when you're not familiar with it. Anyway that was that issue.

There was just a minor issue in section, well I don't know that it's minor, in section 12 that we dealt with. I forgot to mention it this morning. In section 12(4) in the Public Safety Act I talks about, well Justice Young raised the question of the mental health assessments and when you read section (4) at the end, "And for any determination arising out of such an application, the respondent is taken to be detained in a prison under an order for committal," which I says gives away the reality of what these orders are. We're talking about they've slipped up there. It says a prison, you're detained in a prison. Now a prison must be punishment so it's not as easy as to say these orders are not punishment it's incompatible with section 12(4) which says, "a prison."

The validity of the various reports in my submission, given the rather tentative finding of Asperger's, whether they're valid, if that turns out to be correct, must be an issue, and that is better addressed in the High Court. That is going to be an issue of some substance.

I think perhaps finally, unless there's any questions, the finding of psychologist that my client is a high risk, or a very high risk, or whatever, once again Justice Glazebrook's article says you've got to be careful of substituting psychologists' meaning of risks, and the legal meaning of risks, because you could land up, I suspect, or certainly Justice Glazebrook will remember *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627, and whatever the risk was, I think it was 14% or something like that, it might have been 24, and it was a

high risk, but the meanings need to be dissected. So just because a psychologist says it's a high risk or a very high risk doesn't mean it is high risk in terms of law. We need to actually ascertain what that's talking about, and there isn't a sufficient assessment to come to that conclusion in either the High Court or the Court of Appeal, so if it is going back that should be under consideration too.

Now apart from that, unless there are any questions, I'll resume my seat.

ELIAS CJ:
No questions. Thank you, counsel, for your help. We'll take time to consider our decision in this matter.

COURT ADJOURNS: 3.11 PM