IN THE SUPREME COURT OF NEW ZEALAND **SC 64/2022**

I TE KŌTI MANA NUI O AOTEAROA

BETWEEN **R (SC 64/2022)**
Appellant

AND **The Chief Executive Te Ara Poutama, Department of Corrections**
Respondent

SUBMISSIONS IN SUPPORT OF APPEAL

Appeal Hearing: 8 August 2023

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May it please the Court

1. The appellant [redacted] appeals the judgment of the Court of Appeal in *R v Chief Executive of Department of Corrections* [2022] NZCA 225, Dobson, Simon France, and Hinton JJ.

2. Mr R is subject to a rare combination of orders, being both an extended supervision order under Part 1A of the Parole Act, a criminal sanction, and a compulsory care order under the Intellectual Disability (Compulsory Care and Rehabilitation) Act ("Intellectual Disability Act"), a civil order.[1]

3. The two orders operate concurrently, imposing on Mr R additional restrictions (such as electronic monitoring) beyond those imposed on others not mentally impaired or disabled.

4. This court's consideration in *Chief Executive, Ara Poutama Aotearoa Department of Corrections v Chisnall* SC 26/2022 (judgment reserved) may assist when available.

5. Leave was granted in the following terms:

> B. The approved question is how does the New Zealand Bill of Rights Act 1990 affect the exercise of the court's discretion to renew an Extended Supervision Order when the individual concerned is also subject to a Compulsory Care Order?

6. Various sections of the NZBORA are engaged: Section 9 (disproportionately severe treatment); s 19 (discrimination); s 22 (arbitrary detention); s 26(1) (no known

[1] It is not known how many others are currently subject to final orders under both of these acts. The Chief Executive may be able to assist.

offence); and s 26(2) (second punishment). The right to refuse medical treatment, freedom of association, and freedom of movement are not considered.

7. Interestingly, Mr R became subject to the duality of these orders, as a by-product of being detained under the Public Safety (Public Protection Orders) Act ("Public Safety Act"). After decades in the Intellectual Disability system, he was (to put it simply) unable to cope and was desperate to get off the public safety regime, and committed an imprisonable offence preferring the prison system, and/or the Intellectual Disability system. This was perhaps unsurprising given his near continuously detention for 50 years since being a teenager, and now being 68 years old, and his having become institutionalised.

8. The two orders operate concurrently, imposing on Mr R additional restrictions (such as electronic monitoring), beyond those imposed on others. He is subject to two different appellate regimes, one criminal, and one civil, the latter requiring a litigation guardian. A civil case against the Respondent is currently before the High Court seeking declarations, and *Baigent* compensation, arising from a prior win in the Court of Appeal.[2]

9. A double order does not comfortably with the purposes of the Intellectual Disability Act:[3]

> **3 Purposes**
>
> The purposes of this Act are--

[2] *R (CA464/2018) v Chief Executive of the Department of Corrections* [2019] NZCA 60. [SC Casebook 63]

[3] [App Auth 003]

> (a) to provide courts with appropriate compulsory care and rehabilitation options for persons who have an intellectual disability and who are charged with, or convicted of, an offence; and
>
> (b) to recognise and safeguard the special rights of individuals subject to this Act; and
>
> (c) to provide for the appropriate use of different levels of care for individuals who, while no longer subject to the criminal justice system, remain subject to this Act.

10. To impose both orders subverts the purposes of the Intellectual Disability Act, it goes beyond the "appropriate care and rehabilitation" required by s 3(a), does not recognise the special rights of individuals under s (3)(b). It does not provide the appropriate care of someone no longer subject to the criminal justice system, under s 3(c).

11. Mr R is only subject to both orders because of the arbitrary order in which the applications were made. Mr R was made subject to the compulsory care order following an application for a public protection order.[4] However, the application for the public protection order was not accompanied by a contingent application for an extended supervision order, as the Chief Executive already had the benefit of an extended supervision order.

12. If the applications had been made concurrently, as it likely would be today (and was for example in *Chisnall*), the Applicant would be subject to the same compulsory care order, but the Chief Executive would be statutorily barred from obtaining the extended supervision order. We suggest that Parliament cannot

[4] The application was resolved by an order under s 12(2) of the Public Safety Act 2014, [COA Additional Materials, p 38] but remains in abeyance. [COA Additional Materials, p 52] The Chief Executive determined to apply for a compulsory care order but before that could be resolved, Mr R was arrested following an altercation in the Public Protection Order residence. [COA Additional Materials p 44]

have intended questions around detention to turn on so arbitrary a distinction as the order in which application are brought.[5]

Background

13. Mr R's most recent conviction for a serious sexual or violent offence was for sexual offending against his nieces committed in 1985 or 1986. He was sentenced on 21 June 1996 to a total of 9 years' imprisonment. With the exception of the period from 13 July 2018 to 10 June 2020,[6] Mr R has been in care in the community since 2003.

14. There have been allegations of less serious offending since then, but none at the level of serious sexual or serious violent offence as recognised in the Parole Act.

Mr R Placed into the Intellectual Disability System

15. In 2003, toward the end of his sentence, Mr R was placed under a compulsory care order, and moved into the community under the direction of what was then known as Regional Intellectual Disability Care Agency ("RIDCA"). Parole operated concurrently.

16. On 14 January 2005, Mr R is said to have committed a burglary, and was released on bail.

17. On 24 November 2005, Rodney Hansen J granted an application by the Chief Executive of the Department of Correction that Mr R be subject to an extended

[5] See, for example, *Booth v R* [2016] NZSC 127, [2017] 1 NZLR 362 [*Marino*]. [App Auth 006]

[6] Encompassing 176 days under an interim detention order, one night in a police cell, 80 days remand in prison, 24 days remand in hospital secure care, and 422 days compulsory hospital secure care.

supervision order ("the first extended supervision order"). The term of the order was 10 years.

18. On 29 November 2005, the burglary charge was resolved with an order under section 35 of the Criminal Procedure (Mentally Impaired Persons) Act making Mr R a care recipient.

19. On 12 June 2007, Mr R was said to have committed an indecent act. He was sentenced on 19 March 2008 to come up for sentence if called upon.

20. In August 2011, the compulsory care order applying under the Intellectual Disability Act ended. This is regrettable, albeit Mr R remained in Intellectual Disability care (at the direction of the Parole Board under the extended supervision order, rather than a care coordinator or the Family Court), with little about Mr R's day to day care arrangements changing. He remained cared for around the clock by the same community Intellectual Disability Agency, albeit in 2013 he was moved from a house operated by the agency in Northland, to one in South Auckland. At that time, an electronic monitoring component was added by the Parole Board as a condition of the extended supervision order.

Second Extended Supervision Order

21. In late-2015, with the first extended supervision order due to expire, the Chief Executive of the Department of Corrections applied for a second extended supervision order. A series of interim supervision orders were made, purporting to continue intensive monitoring as it applied under the first extended supervision order. On 27 March 2017 Edwards J granted the Chief Executive's application for a second extended supervision order. It included interim special conditions,

including intensive monitoring, and made a direction to the Parole Board to impose intensive monitoring for 12 months.

22. On 5 September 2017, the New Zealand Parole Board set the conditions of the second extended supervision order, including a condition of intensive monitoring, and on 26 March 2018, in light of the expiry of the 12-month period of intensive monitoring, the Parole Board varied the conditions of the second extended supervision order. It replaced the condition requiring 24-hour intensive monitoring, with a condition requiring the equivalent of intensive monitoring for 12 hours a day (from 7am – 7pm) and a curfew for the other 12 hours (from 7pm – 7am)

Application for Public Protection Order

23. On 11 April 2018, the Chief Executive of the Department of Corrections applied for a public protection order and interim detention order under the Public Safety, with an interim detention ordering being made on 13 July 2018. Mr R was transferred to the Matawhāiti Residence on the grounds of Christchurch Prison. Mr R appealed against the interim detention order.

24. On 7 and 8 November 2018, the application for the public protection order was heard before Whata J, and the appeal against the interim detention order was heard on 22 November 2018.

25. On 28 November 2018, Whata J released a judgment, seeking further evidence and submissions on the alternatives to a public protection order.

26. On 21 December 2018,[7] Whata J released a second judgment making a direction under section 12(2) of the Public Safety Act that the Chief Executive consider the appropriateness of an application in respect of Mr R under s 29 of the Intellectual Disability Act 2003. The interim detention order was continued.

27. On 20 March 2019 the Court of Appeal quashed the interim detention order as having been made without jurisdiction.[8] In light of events, a new interim detention order was made by Whata J.[9]

Mr R's Arrest and Unfitness to Stand Trial

28. On 1 January 2019, Mr R is alleged to have threatened to kill a resident and a staff member at the Matawhāiti public protection residence, (while held under an interim detention order) and to have been in possession of an offensive weapon.

29. Mr R was arrested, and on 2 January 2019, was remanded to Christchurch Prison.

30. Between January and April 2019, Mr R underwent processes in the District Court under the Criminal Procedure (Mentally Impaired Persons) Act 2003.

31. On 22 March 2019, Mr R was determined unfit to stand trial. An involvement hearing followed immediately, and Mr R was determined to have been involved in the acts underlying the offences charged.[10] Mr R was remanded to Hillmorton Hospital for assessment in advance of disposition under the Criminal Procedure (Mentally Impaired Persons) Act.

[7] *Chief Executive of the Department of Correction v R* [2018] NZHC 3455. [COA Additional Materials 21]
[8] *R (CA464/2018) v Chief Executive of the Department of Corrections* [2019] NZCA 60. [SC Casebook 63]
[9] *Chief Executive of the Department of Correction v R* [2019] NZHC 536. [COA Additional Materials 39]
[10] *New Zealand Police v R* [2019] NZDC 5397. [COA Additional Materials 42]

32. On 15 April 2019, Mr R was made subject to a compulsory care order for a term of three years, with a direction for secure care. His initial detention under the order was at Hillmorton.

33. On 10 June 2020, Mr R was moved into the care of another service provider, once arrangements had been made. He remained in their care in secure care in the community until the three-year review in the Family Court.

34. Upon Mr R's being moved from hospital secure care to community secure care, various conditions of his extended supervision order, which had been suspended, were reinstated. Importantly for Mr R, this includes conditions of electronic monitoring. These have been subject to reconfirmation by the Parole Board.

35. On 13 July 2022, the Family Court extended Mr R's Compulsory Care order for two years at a supervised level of care. There was a direction that Mr R would remain at secure care until a supervised placement was available.

36. That order has not been challenged. It is the appropriate order. It is the order that people charged with much more serious offending than Mr R was who are found unfit to stand trial are safely managed under. The complaint with Mr R is that he has the overlay of an additional punitive order, in addition to the therapeutic order responsible for his daily management.

Additional Relevant Background

37. Mr R has been in some form of care or detention (or both) almost continuously from age 14 to his now 68. Given R's almost continuous incarceration a few historical facts over and beyond the immediate relevant facts are canvassed.

38. W. Carmichael, Acting General Manager, Custody, wrote on 5 August 1996 to the General Manager Public Prisons in support of a Segregation request:

> Overview of historical data indicates that behaviour to date is not new and is likely to continue for the long term. **He has a psychological age of 4 years old**.
>
> Forensic intervention is minimal because of' categorisation under the Mental (Compulsory Treatment & Assessment) Act and our local psychological interventions are not applicable.
>
> [**Bold** added]

39. The facts as stated by health professionals include; Andrew Moskowitz, Consultant Psychologist to the Psychological Service, 2 September 2001:

> **Offender Background and Offence Precipitants**
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> [Mr R] troubled background is documented throughout his file, and will only be summarised here. [Mr R] was born via forceps following a prolonged labour. There is some indication of brain damage, and he claims that he was born premature. He is the eldest of six children, but did not live with his mother for the first few years of his life. Early life was very chaotic and reportedly included witnessing and experiencing physical violence at the hands of his father.
>
> Behaviour problems are reported from the age of five, and [Mr R] was thrown out of school at age fourteen after assaulting a teacher who allegedly had sexually assaulted him. He claims to have been sexually abused on two other occasions in his youth, and became involved with alcohol and drugs at a young age.
>
> At age fourteen, [Mr R] was psychiatrically hospitalised for the first time, beginning a pattern of chronic institutionalisation, punctuated by sexual assaults of varying magnitude upon his release (or escape) from an institution. Many of these assaults occurred shortly after (on at least one occasion, on the same day) he returned to the community. Within the institutions, [Mr R] appears to have benefited minimally from psychotherapeutic and pharmacological interventions, and has been described as aggressive, threatening, and at times assaultive. Due to his inability to function in the community, [Mr R] has lived outside of an institution for significantly less than one year since 1969.

> Several sources agree that [Mr R] is a severely disturbed man who is suffering from a serious personality disorder coupled with borderline intellectual functioning.
>
> There appears to be consensus however that he does not suffer from a "major" mental illness such as "schizophrenia" or "bipolar disorder". In my opinion, [Mr R] is also likely experiencing the sequalae of a highly unstable and traumatic childhood. It appears unlikely that [Mr R] would benefit from traditional forms of therapy or psychopharmacology, given its limited efficacy so far. It appears that what works best with [Mr R] is for him to be housed in a highly structured environment, with good behavioural management.

40. Dr Seth, Psychiatrist, 2 September 2001, provided a chronology, updated from Dr Chaplow's chronology which is further updated, and attached as Appendix 1. Dr Seth opined:

> MENTAL HEALTH ACT
>
> [Mr R] has previously been detained under the Mental Health Act on the grounds that he has a disorder of volition which related to impulsivity and danger to others. It was argued that his impulsivity related to his personality disorder and intellectual functioning. This issue has been debated intensely in [Mr R]'s case and there are a. number of opposing views held about his detention under the Mental Health Act.
>
> …
>
> OPINION
>
> It is arguable as to whether [Mr R] could be detained under the Mental Health Act on the grounds that he has a disorder of volition that puts him at risk of harming others (sexual offences). My professional opinion is that he could not be detained under the Mental Health Act 1992 as he does not have a treatable condition. He does not wish to enter into any treatment programme of either a psychotherapeutic nature nor one of medication.
>
> 51 Finally, [Mr R] has been institutionalised for almost his entire adult life, and has never functioned adequately in the community as an adult
>
> [e.g Dr Fernando Psychiatrist 1996]

> I acknowledge, however, that interpretations of "mental disorder" in relation to disorders of volition and personality disorder constitute a 'grey area' and may be challenged in the course of statutory reviews of the order.
>
> Dr Chaplow [1996]
>
> 3) Re 'disease of the mind' in 1985/6. Yes, it could be argued that he did (does) have a disease of the mind. It is not a clinical concept & would have to be accepted ultimately by the Judge trying the case. The presence of his intellectual impairment, the possibility of early (& probably undetectable) brain damage, plus the decision of the Tribunal in 1993 to decide in favour of [Mr R] having a 'mental disorder', would be in favour of the court accepting the notion. Commonly the notion of 'disease of the mind' stems from the 'process illness' concept, which he does not have.

Interaction of the Intellectual Disability Act and the Parole Act

41. Although the history is long, the essential disagreement between the parties to date is over only a relatively small issue. In fact, the Chief Executive considers that Mr R's risk can be managed if Mr R is detained as a compulsory care recipient under the Intellectual Disability Act. Although the Chief Executive considers that having an extended supervision order as well, adds an additional layer of protection (largely by permitting electronic monitoring), he agrees that the level of protection offered by detention as a compulsory care recipient would be sufficient to protect the public even without an extended supervision order being overlaid.

42. This is supported by the evidence in the Court below, see psychologist Paul Carlyon:[11]

> Q … how much does the compulsory care order with the direction that he be kept in secure care reduces risk?

[11] [COA Evidence p 18 line 23]

> A. At present, Sir, the care recipient status mitigates the risk more than the ESO in my opinion. That is, if I can contemplate this for a moment, that is if we were to imagine a scenario where the ESO was removed, do you want me to talk on Sir? If there was no ESO but he remained within the compulsory care framework, then that would provide an adequate level of external control in my opinion based on my appraisal of it and based on the fact there has been no contact sexual offending while he's been subject to that. If on the other hand we looked at it from the other point of view and said, "Remove the compulsory care status and have only the ESO and permit independent living and so on in the wider community, like most people on an ESO are", then I think that that – I don't think that would on its own be enough to manage [Mr R]'s risk.

43. Primarily, the position of the Chief Executive is that the extended supervision order should be continued, not because it is necessary to manage Mr R's risk now (that is sufficiently managed by the order that he be kept as a care recipient), but that it may need to manage the risk in the future, if Mr R were to cease being a compulsory care recipient, something that can only happen with the approval of a Court.

44. Whether this is legally permissible in light of the New Zealand Bill of Rights Act is essentially the question the Court has granted.

45. Mr R is both a care recipient and is subject to an extended supervision order. There is an inherent conflict between these two orders, with one a civil ordered underpinned by therapeutic goals, and the other a criminal order.

46. Under the care order, decisions about Mr R's treatment are made by medical staff, with legalities (for example, where he must live) determined by his care coordinator. Under the extended supervision order, such decisions are made by the Parole Board and Mr R's probation officer. At times, their directions have been in direct conflict: with conditions of the extended supervision order requiring residence in Auckland, and a direction by Mr R's care coordinator that he live in

Christchurch (those involved seem to have acted on the basis that care coordinator's decisions take precedence).

47. With final orders made under the Intellectual Disability Act, and operating to protect the public, the Court is faced with the question whether it would ever be appropriate to subject a person to simultaneous regulation under both the Intellectual Disability Act and the Parole Act, and whether the purposes[12] of the Intellectual Disability Act are undermined by involving the criminal justice system in its operation.

48. It is important to start with section 107P of the Parole Act, which implicitly recognises that extended supervision orders and compulsory care orders may be in place at the same time:

> **107P Suspension of conditions of extended supervision order**
>
> …
>
> (3) If an offender who is subject to an extended supervision order is detained in a hospital or secure facility under a compulsory care order or under a compulsory treatment order, then—
>
> (a) the conditions of the extended supervision order are suspended while the offender is detained, but a probation officer may reactivate any condition that is required to ensure that the offender does not pose an undue risk to the community or any person or class of persons; and
>
> (b) time on the order continues to run during the period of detention; and
>
> (c) the conditions that have not been reactivated earlier are reactivated when the offender is released.

[12] Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 3. [App Auth 003]

49. This will sometimes be sensible. Where the person is under a compulsory treatment order (as a result of a mental illness), there is the prospect of recovery. There is no prospect that someone like Mr R may recover from his disability, rather his prospects for getting out of the Intellectual Disability system turn on whether the principal cause for his need of care remains his disability or transitions to his infirmity.

50. Mr R isn't a special care recipient,[13] and he isn't a care recipient liable to detention under a sentence,[14] rather he is a Care recipient no longer subject to the criminal justice system.[15] The overlay of the extended supervision order, however, effectively moves Mr R outside this concept, despite indications of how he should actually be treated. We have a conflict between the Intellectual Disability Act, and the Parole Act. While both laws recognise the need for public protection

51. Consider the purposes and principles of the Intellectual Disability (Care and Rehabilitation) Act 2003:

> **3 Purposes**
>
> The purposes of this Act are--
>
> (a) to provide courts with appropriate compulsory care and rehabilitation options for persons who have an intellectual disability and who are charged with, or convicted of, an offence; and
>
> (b) to recognise and safeguard the special rights of individuals subject to this Act; and

[13] Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 6(2). [App Auth 003]
[14] Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 6(6). [App Auth 003]
[15] Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 6(3). [App Auth 003]

(c) to provide for the appropriate use of different levels of care for individuals who, while no longer subject to the criminal justice system, remain subject to this Act.

11 Principles governing exercise of powers under this Act

Every court or person who exercises, or proposes to exercise, a power under this Act in respect of a care recipient must be guided by the principle that the care recipient should be treated so as to protect--

(a) the health and safety of the care recipient and of others; and

(b) the rights of the care recipient.

52. There is now an additional inconsistency – not present when section 107P was drafted – which is principle (c) of the Public Safety Act:

5 Principles

Every person or court exercising a power under this Act must have regard to the following principles:

…

(c) a public protection order should not be imposed on a person who is eligible to be detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003:

53. The idea that a person who is subject to an application for a more restrictive public protection order can be protected from dual treatment, but that a person only subject to an application for a less restrictive extended supervision order can runs contrary to the idea that the purpose of the orders is public safety.

54. It is instructive to consider the following counter-factual, also argued in the Court of Appeal:

Application for public protection order made at release

54.1. Instead of being released from prison in 2003, and being made subject to a then relatively new extended supervision order, Mr R is released in 2015, at around the time the second extended supervision order application is commenced. The Chief Executive, forming exactly the same opinion as he has formed now of Mr R's risk, applies for a public protection order under the Public Safety Act, making a contingent application for an extended supervision order.[16]

54.2. The public protection order application proceeds exactly as the application did for Mr R: we get the same judgment and second judgment from Whata J about Mr R's risk, and the extent that it can be managed in different scenarios, and the same direction is made: the Chief Executive is ordered "to consider the appropriateness of an application … under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003."[17]

54.3. The Chief Executive conducts the same consideration he did for Mr R in reality, forming the same opinion: that an application under section 29 is appropriate.

54.4. Diverting slightly from the events we have here, the reports that were obtained for disposition in the District Court criminal process are instead obtained for the section 29 process, a needs assessment is conducted, forming that view that a care and rehabilitation plan and a care programme are needed within the Intellectual Disability System.

[16] Parole Act 2002, s 107GAA. [App Auth 001]
[17] Public Safety Act 2014, s 12(2). [App Auth 002]

54.5. As now, the result is that a compulsory care order is made, making Mr R a care recipient no longer subject to the criminal justice system.

54.6. But in this counterfactual, neither a public protection order, nor an extended supervision order is made. Mr R's care moves from the criminal justice system to the health system. The protection of the public is ensured not through the criminal justice system, but through the health system, ensured in the same way as it is for people who are found unfit to stand trial (as Mr R was in 1986, but not in 1996) or who are insane.

55. It is the clear policy of the public protection order / extended supervision order framework that where the intellectual disability care system is available to care for a person (and to ensure public protection from the risks that person poses) that it is to be preferred.

Arbitrary Distinctions

56. But that is not what has happened here. What is it then that distinguishes Mr R's current position, from that of the hypothetical Mr R in the counter-factual above?

57. In short, the only legally relevant difference is that the Chief Executive's applications were filed in a different order. Because he filed his application for an extended supervision order first, the resulting move to the health system came with a backdrop of a pre-existing extended supervision order. Had instead the applications been made concurrently, Mr R would be subject to the same compulsory care order, but the Chief Executive would be statutorily barred from obtaining the extended supervision order that would operate at the same time.[18]

[18] Parole Act 2002, s 107GAA(2). [App Auth 001]

This is, as addressed below, the *Togia* situation. The care of Mr R, and the protection of the public, now lies with his Care Coordinator, therapeutically-driven health authorities and the Family Court.

58. This sort of arbitrary distinction is abhorred by the Bill of Rights,[19] and should deprecated by this Court. New Zealand policy is that those who are unfit to stand trial due to an intellectual disability are instead cared for in the healthy system, with therapeutic goals. This is recognised explicitly in both the Intellectual Disability Act – declaring Mr R and those like him to be care recipients no longer subject to the criminal justice system – and the Public Safety Act.

The New Zealand Bill of Rights Act

59. The interpretation of the complex interplay of the Parole Act, and the Intellectual Disability Act, adopted by the Court of Appeal raises important issues engaging at least sections 9, 19, 22, 25(a), 26(2), and 27 of the New Zealand Bill of Rights Act.

60. That the Applicant is subject to concurrent orders because of the order the applications were made presents the sort of arbitrary distinction that is abhorred by the New Zealand Bill of Rights Act, and should be deprecated by this Court.

61. New Zealand policy is that those who are unfit to stand trial due to an intellectual disability are instead cared for in the health system, with therapeutic goals. This is recognised explicitly in both the Intellectual Disability Act declaring R, and those like him to be care recipients no longer subject to the criminal justice system.

[19] New Zealand Bill of Right Act 1990, s 22. [App Auth 004] *Booth v R; Marino v Chief Executive of the Department of Corrections* [2016] NZSC 127, [32] and [63]. [App Auth 006]

62. Arguably, then his double restrictions amount to disproportionately severe treatment, no-one unless intellectually disabled or mentally impaired is subject to dual regimes. So, this s 19 discriminatory, and s 9 disproportionate.

63. If it is either of those then it is also an arbitrary detention, see General Comment 35/12 of the Human Rights Committee:[20]

> The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law,[21] as well as elements of reasonableness, necessity and proportionality.

64. Regardless of breaches of any other NZBORA right, it is arbitrary on a stand-alone basis. See *Vincent v New Zealand Parole Board*.[22]

65. Sections 25(a) (fair trial), and 27 (natural justice) are dealt with under the heading judicial independence. Breaches of ss 26(2) were canvassed at length in the reserved judgment of this Court in *Chisnall*, and are adopted but not further expanded upon.

[20] [App Auth 010]

[21] 1134/2002, *Gorji-Dinka* v. *Cameroon*, para. 5.1; 305/1988, *Van Alphen* v. *Netherlands*, para. 5.8.

[22] *Vincent v New Zealand Parole Board* [2020] NZHC 3316. [App Auth 007]

> Undue risk and the right to be free from arbitrary detention [84] On general principles of statutory interpretation, s 28 of the Parole Act is to be interpreted consistently with the rights affirmed in NZBORA where that interpretation is reasonably available. The right to liberty and not to be arbitrarily detained are engaged here. The touchstones of arbitrariness are inappropriateness, injustice, unpredictability and disproportionality.[23] A detention may be lawful at the outset but may become arbitrary with reference to these touchstones.
> [Fn 23 *Nielsen v Attorney-General* [2001] 3 NZLR 433 at [33]–[34]; *Zaoui*, above n 21, at [86], [100] and [175].]

66. Given that an extended supervision order is a criminal penalty it is now liable for imposition 20 years after the index offence, and whilst an Intellectual Disability Act detention is in play, it is unnecessary and arbitrary.

The Problem with Concurrent Orders

67. How does one classify Mr R? Is he an offender, sexual deviant, or patient; two out of the three; or all three?[23]

68. Whatever he is, given his lifetime incarceration a more than careful scrutiny of restraints on him is required.

69. It is wrong in principle, and discriminatory, for a disabled person to be subject to both criminal, and civil detentions simultaneously, and restrictions arising from the same factual matrix, and where pure chance determines the type of order available.

70. A person made subject to a final order under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 as a care recipient is "no longer subject to the criminal justice system". The conflict between their status as such, and any extended supervision order should see their care, and the protection of the community, controlled by the Intellectual Disability Act.

[23] See Heschel Prins, Offenders, Deviants or Patients, An Introduction to Clinical Criminology, *Routledge*, London. 2015. [App Auth 013]

71. This is not the first occasion where the philosophical nature of the detention has arisen. In *Togia v The General Manager, Rimutaka Prison*, Harrison J was faced with such a dilemma (prior to legislative changes to the Parole Act):[24]

> [2] Mr Togia has applied to this Court for a writ of habeas corpus on the ground that he is being unlawfully detained in prison. Through his counsel, Mr Tony Ellis, he says that the effect of the compulsory care order was to transfer him out of the jurisdiction of the Department of Corrections and of the Parole Board. Consequently, raising an argument that shades into an application for judicial review, he argues that the recall order was a nullity.
>
> …
>
> Decision
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> [7] This application raises an issue of general importance. At one level it recognises the distinct regime imposed for the care of an intellectually disabled prisoner under the IDCCRA. **At a different and more fundamental level it raises questions about the jurisdiction of the Parole Board to deal with or recall a sentenced prisoner who is subject to a compulsory care order. A review of the relationship between the IDCCRA, the Corrections Act and the Parole Act, and the reach of each, lies at the heart of Mr Togia's application**. Resolution of these issues will require careful and detailed consideration of the relevant legislative provisions applicable to the detention of a sentenced prisoner following a compulsory care order.
>
> [8] Having heard from both counsel today, I am satisfied that Mr Ellis' argument that the effect of the compulsory care order made for Mr Togia operates to oust the powers of the Parole Board is strongly arguable. The issue is of such importance that neither counsel nor I can do it justice today.
>
> [9] In the circumstances I propose to grant Mr Togia's application on a provisional basis. I make an interim order for his immediate release from detention at Rimutaka Prison pending final determination of his application subject to the qualification (responsibly proposed by Mr Ellis) that he be released to a secure facility in terms of the IDCCRA.
>
> [**Bold** added]

[24] *Togia v The General Manager, Rimutaka Prison* HC WN CIV-2007-485-358 [28 February 2007]. [App Auth 008]

72. The sequel to that interim writ of habeas corpus, was that the General Manager on reflection agreed that Mr Togia's application was the correct position. He remained in ID care, the final writ was never heard, and the General Manager paid Mr Togia's costs.

73. It could be argued as the threshold for the public protection order was a prior serious conviction, and that interim detention was previously imposed on Mr R (with a finding of eligibility for a public protection order), and that from his perspective being forced to commit a criminal offence to escape that draconian regime, that it has been not a double, but triple punishment. Whatever it is, it is at least hugely unfortunate that a man as disabled as Mr R should ever have been placed in that position.

74. It is strange that as the Court of Appeal observed at paragraph 3:[25]

> The first allegation was of familial sexual offending when R was 14 years old. The health assessor's report records the response at the time was placement in a psychiatric facility. At age 18, R was charged with raping a fellow resident of the facility. That charge was not resolved as R was found to be "under disability".

75. Yet he was later sentenced to imprisonment, despite having a disability at 18 years old.

76. Again, the Court of Appeal observes:[26]

> [7] In 2019 R faced three charges arising from an incident at the secure facility where he resided. There were two charges of threatening to kill, and one of possession of an offensive weapon. It appears R was annoyed with another

[25] [SC Casebook 11]

[26] [SC Casebook 12]

> inmate, twice armed himself with a bottle and threatened to kill and stab the other residents.
>
> [8] R was found unfit to stand trial. The presiding Judge determined R had carried out the actus reus requirements of the charges. The matter was resolved by the making of a compulsory care order with a secure care condition. It is to last three years and at the time of the appeal is the primary order controlling R's care.

77. If he had a disability since 18, he could not lawfully have received a prison sentence, or an extended supervision order, or a public protection order.

78. In light of Mr R's detention under the Intellectual Disability Act, and his history, the residual discretion in the making and continuation of an extended supervision order, should always be exercised against an extended supervision order as this is a less rights-restricting alternative.

79. See Boyd-Caine:[27]

> … Indeed some researchers have suggested that judicial discretion has been tending to 'avoid, mitigate or ameliorate' the punitive objectives of protective sentencing in the interests of preserving proportionality (ibid; see also Henham 2003). The capacity of protective sentencing to prevent or deter future offending has also been questioned. One study on discretionary life sentences found that they may have little effect 'on those who commit the most serious crimes for which a life sentence is likely to be imposed' (Padfield 2002). Nevertheless, they remain popular sentencing policies in light of the 'increasingly extravagant' claims by politicians to be able to protect the public through the imprisonment of risky individuals (Hope and Sparks 2000: 7). Consequently:
>
> > a whole variety of paralegal forms of confinement are being devised ... not so much in the name of law and order, but in the name of the community that they threaten, the name of the actual or potential victims they violate. It appears that the convention of 'rule of law' must be waived for the protection of the community against a growing number of 'predators', who

[27] Boyd-Caine, T. (2012). *Protecting the public? Detention and release of mentally disordered offenders*. London: Routledge, ch 1. [App Auth 012, p 12]

> do not conform to either legalistic or psychiatric models of subjectivity. (Rose 2000: 334).

80. The use of the discretion needs examination in the current context.

Judicial Independence s 25(a) and s 27

81. The risk of further offending, as found by the Court of Appeal in paragraph 46 is wrong, and must be predicated on the basis he does not have a disability, despite having spent over 30 years in psychiatric care, because he had. It is also a constitutional affront to judicial independence. Dealing with that latter point:[28]

> [46] It is further noted that R's recent offending, and his alleged sexualised conduct, involve non-contact actions and the conviction for an indecent act is at the lower end of the scale. It is submitted none of this conduct meets the level of seriousness the statute contemplates. The submission concludes with commentary on the difficulty of future risk prediction, claiming it constitutes a breach of s 26(1) of the NZBORA. That provision states a prohibition on conviction for acts that were not offences at the time they were done. The proposition is that punishing someone for uncommitted acts engages that concern. In response to this latter point we simply note the statute requires risk assessment and the Court cannot decline that task.

82. That is both far too simplistic and avoids the issue. It is insufficient to merely note what the statute requires. What does the Bill of Rights require? And how do the statutes interact? The discretion exercised here is a discretion to impose a sentence in breach of the New Zealand Bill of Rights Act.

83. Mr R relies by analogy on the High Court of Australia majority in *Kable v DPP of NSW*, where Gaudron J recorded:[29]

[28] [SC Casebook 22]

[29] (1996) 189 CLR 51. [App Auth 009]

[Page 107] The proceedings which the Act contemplates are not proceedings otherwise known to the law. And except to the extent that the Act attempts to dress them up as legal proceedings (for example, by referring to the applicant as "the defendant", by specifying that the proceedings are civil proceedings and by suggesting that the rules of evidence apply (171)), they do not in any way partake of the nature of legal proceedings. They do not involve the resolution of a dispute between contesting parties as to their respective legal rights and obligations. And as already indicated, the applicant is not to be put on trial for any offence against the criminal law. Instead, the proceedings are directed to the making of a guess - perhaps an educated guess, but a guess nonetheless - whether, on the balance of probabilities, the appellant will commit an offence of the kind specified in the definition of "serious act of violence". And, at least in some circumstances (172), the Act directs that that guess be made having regard to material which would not be admissible as evidence in legal proceedings.

[Page 122] Instead of a trial where the Crown is required to prove beyond reasonable doubt that the accused is guilty of a crime on evidence admitted in accordance with the rules of evidence, **the Supreme Court is asked to speculate whether, on the balance of probabilities, it is more likely than not the appellant will commit a serious act of violence**. As Professor Williams has pointed out (223): "Predicting dangerousness is, of course, notoriously difficult." **Yet on this prediction of dangerousness, a prediction which can at best be but an informed guess by the Supreme Court, the Court is required to commit the appellant to prison**. Having regard to the object of the Act, it is impossible to suppose that the Court has any discretion to refuse to imprison the appellant once it concludes that he is more likely than not to commit a serious act of violence.

[Page 124] At the time of its enactment, ordinary reasonable members of the public might reasonably have seen the Act as making the Supreme Court a party to and responsible for implementing the political decision of the executive government that the appellant should be imprisoned without the benefit of the ordinary processes of law. Any person who reached that conclusion could justifiably draw the inference that the Supreme Court was an instrument of executive government policy. That being so, public confidence in the impartial administration of the judicial functions of the Supreme Court must inevitably be impaired. The Act therefore infringed Ch III of the Constitution and was and is invalid.

[Page 134] The Act is an extraordinary piece of legislation. The making thereunder of "detention orders" by the Supreme Court in the exercise of what the statute purports to classify as an augmentation of its ordinary jurisdiction, to the public mind, and in particular to those to be tried before the Supreme Court for offences against one or other or both of the State and federal criminal

> law, is calculated to have a deleterious effect. This is that the political and policy decisions to which the Act seeks to give effect, involving the incarceration of a citizen by court order but not as punishment for a finding of criminal conduct, have been ratified by the reputation and authority of the Australian judiciary. The judiciary is apt to be seen as but an arm of the executive which implements the will of the legislature. Thereby a perception is created which trenches upon the appearance of institutional impartiality to which I have referred.

84. See also the judgment of Toohey J:

> [Page 98] The Act answers that aspect of incompatibility which was identified in *Grollo v Palmer* as "the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution ... is diminished" (152). The function exercised by the Supreme Court under the Act offends Ch III which, as I said in *Harris v Caladine* (153), **reflects an aspect of the doctrine of separation of powers, serving to protect not only the role of the independent judiciary but also the personal interests of litigants in having those interests determined by judges independent of the legislature and the executive** (154). The function offends that aspect because it requires the Supreme Court to participate in the making of a preventive detention order where no breach of the criminal law is alleged and where there has been no determination of guilt. On that ground I would hold the Act invalid. It is not possible to sever s 5 from the rest of the Act which exists only to give effect to that section.
>
> [**Bold** and emphasis added]

85. In New Zealand, the argument engages a breach of judicial independence. So, the NZBORA is also engaged. Judges are – as Gaudron J articulates – not mere mouth pieces of the Executive.

Lack of proper connection with criminal justice system / s26(1)

86. Whilst this was the second ground of appeal in the Court of Appeal, it is recast here, it is not just a lack of evidence, but a lack of proper connection with the criminal justice system, and a miscasting of the mentally impaired.

87. Section 26(1):

> (1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

88. Section 26(1) has six pages of 1800 devoted to it in the Butler's NZBORA text,[30] it is rarely litigated.

89. The Court of Appeal noted:[31]

> [45] The primary focus of the challenge to the presence of a high risk is the use by the assessor of risk assessment tools that assess the risk of committing a sexual offence. The challenge is that the statutory test is of a high risk of committing a relevant sexual offence. In other words, the tools consider any sexual offence whereas the statute is interested in only a subset of those offences.
>
> [46] It is further noted that R's recent offending, and his alleged sexualised conduct, involve non-contact actions and the conviction for an indecent act is at the lower end of the scale. It is submitted none of this conduct meets the level of seriousness the statute contemplates. The submission concludes with commentary on the difficulty of future risk prediction, claiming it constitutes a breach of s 26(1) of the NZBORA. That provision states a prohibition on conviction for acts that were not offences at the time they were done. The proposition is that punishing someone for uncommitted acts engages that concern. In response to this latter point we simply note the statute requires risk assessment and the Court cannot decline that task.

90. Lack of committing a criminal offence, lack of determination of guilt beyond a reasonable doubt, and confidence in the independence of the judiciary also need consideration.

[30] The New Zealand Bill of Rights Act: A Commentary, *LexisNexis,* 2nd Ed, Wellington, 2016, pp 1459-1464.
[31] [SC Casebook 22]

91. It is also a major disservice to the mentally impaired otherwise.

92. Notably, the mentally impaired are wrongly cast as villains:[32]

> [Page 46] Forensic Psychiatry
>
> There is an established literature on forensic psychiatric practice, much of which underpins the policies and processes of the restricted patient system. Importantly, there is also a body of work which critically appraises forensic psychiatry as a discipline. I seek to draw out elements of both bodies of work in this section. …
>
> [Page 49] … Psychiatrists themselves are well aware of how little is known about effective risk management. The quotation from Monahan at the beginning of this section reflects a much-used legal folklore. It is a self-criticism, but also an acknowledgment of reality. Reviewing his own and other psychiatric practice, Monahan found a 33-50% range of accuracy for clinical (that is, non-actuarial) risk assessment (2004:254). Yet there is little latitude within legal and political discourse for the limitations of psychiatry. This is evident in the tension between the dictates of law and public policy – that risk be assessed accurately and be managed to provide public protection - and the opinions of psychiatrists as to whether they are capable of undertaking this.
>
> [Page 53] … Any individual subject considered a risk is irrevocably tarred with the brush of dangerousness. Risk is a self-fulfilling concept: there can never be zero risk. …
>
> Yet, If we consider the risks associated with mentally disordered offenders, the most striking factor is the risk they pose to themselves. A Department of Health inquiry found that 22% of suicides by people under mental health care in England and Wales were believed to have been preventable by care teams, with the figure even higher for those who were in-patients at the time of their suicide (Department of Health 2001). … This finding was repeated in a follow up New Zealand study by Simpson et al (2003).
>
> The dominance of the risk agenda necessarily casts mental health patients within a negative light. The conflation of mental disorder and criminal offending

[32] Tessa Boyd-Caine, "In the Public Interest? The Role of Executive Discretion in the Release of Restricted Patients" (PhD Thesis, London School of Economics, 2008). [App Auth 011]

further relegates these patients to perceptions of dangerousness, both in the public imagination and via legal classification.

93. The continued imposition of an extended supervision order would breach s 26(1).

Conclusion

94. Mr R needs to be cared for. The public needs to be protected from him. This appropriately – and legally – occurs in the Intellectual Disability system. His extended supervision order should cease, and the words of the Intellectual Disability Act, that Mr R is a person no longer subject to the criminal justice system should be applied to him.

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Dr Tony Ellis/Graeme Edgeler
Counsel for Mr R (SC 64/2022)

Counsel confirm that these submissions are suitable for public release. They contain no suppressed material.