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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 64/2022
[2023] NZSC Trans 11
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R (SC 64/2022)
Appellant

v

CHIEF EXECUTIVE OF DEPARTMENT OF CORRECTIONS
Respondent

Hearing:	08 August 2023
Court:	Winkelmann CJ (via AVL) Glazebrook J O'Regan J Williams J Kós J

Counsel: A J Ellis (via AVL) and G K Edgeler for the Appellant
U R Jagose KC, R K Thomson and L C Hay for the Respondent

CRIMINAL APPEAL

MR ELLIS:
Ellis and Edgeler, Ma'am, for Mr R, name suppressed.

WINKELMANN CJ:
Tēnā kōrua Mr Ellis and Mr Edgeler.

MS JAGOSE KC:
E ngā Kaiwhakawā, tēnā koutou, kei kōnei mātou ko Ms Thomson, ko Ms Hay, mō te Karauna. Your Honours, with your leave, Ms Thomson will lead for the respondent.

WINKELMANN CJ:
Tēnā koutou Ms Jagose, Ms Thomson and Ms Hay. I just note neither Mr Ellis nor I, I think, can see Ms Jagose, but I suppose that's just the inevitable. I hope you've (inaudible 10:07:23) submissions.

WILLIAMS J:
That's a bit harsh.

O'REGAN J:
Yes.

MS JAGOSE KC:
You know what I look like.

O'REGAN J:
You'll be able to see her which is – yes.

WINKELMANN CJ:

I know what you look like. Right, Mr Ellis. Oh, is there anything – any preliminary matter before we get underway?

MR ELLIS:

Well, yes I suppose I sent you a memo about my disabilities, so I did a few before Justice Cooke yesterday and apart from really not being able to read footnotes, I think I'm all right.

WINKELMANN CJ:

All right.

MR ELLIS:

So I do apologise in advance if I rush off to the bathroom. It's a physical problem.

WINKELMANN CJ:

Yes, well we can make the arrangement – yes, any arrangements you need to make the hearing run, Mr Ellis, you just tell us.

MR ELLIS:

Thank you for that. Right, so how – I understand we've got half a day.

WINKELMANN CJ:

Yes.

MR ELLIS:

So in consultation with the Solicitor, we've agreed that we'll have until 11.30 and then five minutes at the end for reply, and the respondent will have 11.45 to 12.55. The way we divided up between Mr Edgeler and I is that I've got page 1 and page 19-30, and he's got the materials in between although he might have to help me if somebody's got some question that I can't find the reference to because it's in the footnotes, but I'm sure we'll manage.

It is a little surprising, the case in the respondent submissions, which spend 20 pages dealing with what they call "evidence" that's filed after we'd written our submissions, but we'll see how we go okay. So, we have what is a criminal case, which isn't necessarily obvious from the submissions, but it is a criminal case and consequently there is no question of costs because he's got legal aid. 1010

There's a rare combination of orders, being both an extended supervision order and the compulsory care order, and questionably was set out in paragraph 5, a very short question. The approved question: how does the New Zealand Bill of Rights Act 1990 affect the exercise of the Court's discretion to review an ESO when the individual concerned is subject to a compulsory care order? As we say, various sections of the Bill of Rights are engaged, although the respondent says that's not so.

But nevertheless, he became subject as set out in paragraph 7 to the duality of these orders as a biproduct of being on a public protection order, and after decades in in the intellectual disability system he was, to put it simply, unable to cope and was desperate to get out of the PPO regime, safety regime, so he committed a minor offence and got sent back to prison and then to the intellectual disability system. That is unsurprising since he is 68 and he's been detained since he was 14. So this man has had a lifetime in, essentially, state care.

The two orders that occur concurrently impose additional restrictions such as electronic monitoring beyond those imposed on others, but the respondents say that the reverse is true and this is actually an assistance to him. Peculiarly, seeing as he is subject to two appellate regimes, one criminal and one civil, the civil regime requires a litigation guardian and we have got litigation going on from when we were in the High Court. But you don't need a litigation guardian in this case, and there's something not right about that. Anyway, that's no doubt for another day.

We say a double order doesn't sit comfortably within the purposes of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. Provide courts with appropriate compulsory care or rehabilitation for persons of intellectual disability to recognise and safeguard special rights and to provide the appropriate level of care for individuals no longer subject to the criminal justice system. I think that's another peculiarity of this, that somebody is detained who is not subject to the criminal justice system. He's passed out of it. He's only subject to both orders because of the way it came about in a temporal sense, and that's probably unique.

If the applications had been made concurrently then it is likely, as in *Chisnall*, that he would be subject to the same compulsory care order but the Chief Executive would be statutorily barred from obtaining the ESO, and we suggest that wasn't Parliament's intention.

WINKELMANN CJ:

Mr Ellis, can you just clarify that because that point's made in your submissions, that if things had occurred in a different order the ESO couldn't have been made. Can you hear me?

MR ELLIS:

Yes, yes I can. Yes I can.

WINKELMANN CJ:

So you submit that if the applications had been made in a different order the ESO could not have been made?

MR ELLIS:

Yes.

WINKELMANN CJ:

Can you tell us on what – how you come to that?

MR ELLIS:

How I come to that conclusion? Well, I could tell but Mr Edgeler will tell you much better so I'll leave that to him.

WINKELMANN CJ:

Okay, all right, that's fine. Yes, that's fine.

MR ELLIS:

The most recent conviction he had was in 1986 when he got nine years for rape and with the exception of two years, he has been in the community since 2003. There have been allegations of less serious offences since but none at a serious enough level to concern us.

In 2003 towards the end of his nine years' imprisonment he moved into the community under the direction of what was then RIDCA, parole operated concurrently, and that of course is because of the implementation of the Intellectual Disability (Care and Rehabilitation) Act, which was new at the time. You will have seen that some of the medical professionals, not sure that speculate is the right word, give their opinions on whether it was actually right for him to be detained at all given his mental status in the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992 that applied at the time. Anyway –

KÓS J:

Can I ask you why that challenge isn't advanced? I mean, it seems to be, in some respects, a stronger position for the appellant. I mean, we have a person who was unfit, who has essentially a stable condition, who was early on unfit then seems to have been treated as fit to plead and then has become unfit again, which seems perverse.

MR ELLIS:

Well, yes, I agree with you. It's, you know, it's rather bizarre. I'm trying to recollect and it doesn't come back to me whether that's an issue in our civil proceedings, and if it isn't, well, we can amend those proceedings because that particular case…

KÓS J:

Well, I would have thought it was a simpler course, Mr Ellis, to seek a review of the ESO and to submit that the ESO should not stand given his, you would argue, continuous unfitness.

MR ELLIS:

Yes, well, yes. I mean he is under a compulsory care order so he must be unfit. Well, it may be simpler, but it did not occur in that fashion, Sir, but that's not to say that it can't. I don't think I –

WINKELMANN CJ:

I think it would require an application to vacate the earlier convictions to set aside the ESO wouldn't it?

MR ELLIS:

Yes, I did have – I do remember having some great difficulties trying to decide how to appeal Justice (inaudible 10:19:08) decision which said that he was sentenced to nine years, and my proposition was of course well he can't be because he's not fit to plead, so he can't be tried at a lone sentence. But the paperwork around there was difficult to ascertain what the medical opinions were in 1985. I did look at it in some detail and consider how to do it.

But I must say quite simply that I didn't think of the suggestion, the proposition, that Justice Kós has just said. It's not as if it's been, you know, forgotten or glossed over. It has had serious consideration to it, and for whatever reason it didn't transpire. I mean, it's not too late to do that, but anyway. That's how we got here. So, I'm sorry I can't shed any more light on that.

1020

WINKELMANN CJ:

I think a similar case did come before the High Court about, oh, 12 years ago perhaps or even more perhaps in front of Justice Potter where applications were made in respect of historic convictions on such ground.

MR ELLIS:

Yes, and that was successful, and I think there's been a subsequent one too, and I've also got one where it was one of the last ones that Justice Simon France did, a judicial review, and the gentleman concerned is on preventative detention although he'd previously been found to be unfit to plead. I may need to bring an appeal on that, but I am not sure –

WINKELMANN CJ:

In any case that's not the, yes, that's not the proceeding we have before us today is it? So…

MR ELLIS:

No, no. We've got what we've got, but I take the point that it might have been simpler to do it some other way.

So, he was placed in the intellectual disability system. He committed a burglary it was said and was released on bail. In 2005, Justice Rodney Hansen granted an application for an ESO, which started and ran for 10 years. The burglary charge was resolved in making him a care recipient.

In 2007 he was said to have committed an indecent act and sentenced to come up if called upon.

In 2011 the compulsory care order, applying under the Intellectual Disability Act, ended and you will recollect that you can only make an order for three years, but they can be rolled over. So in fact, they become potentially indefinite to a form of preventative detention. But anyway, it expired in 2011 and he remained in care around the clock by the same care agents, the intellectual disability agency, although he moved residence and there was an electronic monitoring component added by the Parole Board.

So, in 2015 he got his second extended supervision order. No, it was actually 2017 by the time it was granted. It was going to expire in 2015 and the Department applied, and Justice Edwards granted the second order, so he had

20 years of ESOs. The Parole Board, in paragraph 22, the Parole Board set the conditions of that second order which was only, only allowed you a 12-month intensive monitoring period. I know I am extending a little too far into Mr Edgeler's area, so I will stop at the end of this paragraph and move on to page 19, because then you've got some idea of what the history was. Anyway, he placed the condition with a 24-hour intensive monitoring and that is the subject of some litigation elsewhere.

Then moving to 19, which is my bit of the submissions, the Bill of Rights Act. In principle, I am really saying this is wrong. How can you be detained under the civil system and the criminal system simultaneously, and is it right that you treat an intellectually disabled person? One hopes not.

So the interpretation of the interplay between the Parole Act 2002 and the Intellectual Disability Act raises some important issues. The applicant is subject to concurrent orders and this point of arbitrary distinction is what we say is something that should be deprecated by the Court. New Zealand policy is that those who are unfit to stand trial are instead not locked up in the prison system, but they are cared for in the health system because they're a therapeutic (inaudible 10:25:53). This is recognised explicitly in the Intellectual Disability Act and the fact that he is no longer subject to the criminal justice system.

Arguably, these double restrictions amount to disproportionately severe treatment, because who else gets treated in this fashion. Nobody else, unless you're intellectually disabled or mentally impaired. So this is discriminatory and disproportionate.

The UN Human Rights Committee's general comment says more on that, and I suppose I should have put the first line of the general comment, which says you can – whilst it might be in national law lawful it doesn't mean it's not arbitrary, and then they expand on what the notion of arbitrariness is, which is well-known to you. It came up in the case of *Vincent v New Zealand Parole Board* [2020] NZHC 33168, where Mr Vincent had been detained for, I think, for

51 or 52 years, and he was released because it was an arbitrary detention, but regrettably died three weeks or two months later, a short time later.

Anyway, the section 25(a) and 27 are dealt with under judicial independence, and the breaches of section 26(2) that we allege are well-known to you, being canvassed in *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 and we don't expand those any further. Given that the extended supervision order is a criminal penalty, it is now liable for imposition 20 years after the indexed offence.

The problem with concurrent orders: how does one classify Mr R? Then a search of the literature showed the question, is he an offender? Is he a sexual deviant? Is he a patient? Is he two out of three or is he all three? But whatever he is, given that he's had a lifetime of incarceration it needs a careful look at the restraints that are on him and, no doubt, in that spirit you granted leave for that argument to be heard.

Well, you say –

WINKELMANN CJ:

Mr Ellis?

MR ELLIS:

Yes, Ma'am?

WINKELMANN CJ:

Sorry to interrupt you. I just wondered, I don't know if you're going to respond or Mr Edgeler's going to respond to the proposition that the Crown makes that the use of the electronic monitoring system is actually liberty-enhancing for the appellant because it enables him to be more free than he would be otherwise? To be dealt with in more freedom-enhancing, liberty-enhancing way than he would otherwise be dealt with.

MR ELLIS:

Yes. I did say a little earlier that that's what they said, and we do, there's a – I think that Mr Edgeler is more of an expert on the detailed statutory provisions than I am. I can say that it's ridiculous to say that being detained under more conditions is more liberty-creating, that's just nonsense, but I think Mr Edgeler will expand on that.

1030

WINKELMANN CJ:

Thank you.

MR ELLIS:

And we've done 70, the no longer subject to the criminal justice system. Then we had what I call a philosophical debate, at least that's what I call it, in *Togia v The General Manager, Rimutaka Prison* HC WN CIV-2007-485-358 (28 February 2007) where Harrison J was faced with an application for writ of habeas corpus. He'd been released and then he had committed some alleged minor offence. He was really, it was a strange case in that the lady carer who was looking after him seduced him into a sexual relationship and he was living with her, and then she accused him of bad language, which resulted in, I think it was a threatening behaviour charge, or something fairly trivial anyway, and he got recall to prison, and the argument was, well, once you've been released into the health system, can you be recalled to prison, and his Honour said there in the middle of the page, 22: "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."

And ultimately he got an interim writ and was released, and then were discussions with Crown counsel at the time which was well (inaudible 10:32:22) they agreed the position I was advancing was correct, and he remained in ID care. The writ didn't need to be heard and the general manager paid his costs.

Then I think 74 is helpful. It's strange that the Court of Appeal observed the first allegation there was familial sexual offending at 14 and he was based in the psychiatric facility. At 18 he was charged with rape. But that was resolved and he was found to be under the –

TECHNICAL ISSUE – PARTICIPANT LOST FROM AVL CONNECTION

WINKELMANN CJ:
I think I'm back. Thank you. So I've been away about five minutes, I assume that you stopped the hearing in my absence.

O'REGAN J:
We did.

WINKELMANN CJ:
Carry on Mr Ellis, where were you?

MR ELLIS:
Thank you Ma'am. I was on paragraph 74 I think. Well I think we've discussed 75, 76, 77 really with the exchange of Justice Kós, and then I've added a passage in, from Boyd-Caine *Protecting the public?* At paragraph 79: "… some researchers have suggested that judicial discretion has been tending to 'avoid, mitigate or ameliorate' the punitive objectives… The capacity of protective sentencing to prevent or deter future offending has also been questioned. One study on discretionary life sentences found that they have little effect 'on those who commit the most serious crimes… Nevertheless, they remain popular sentencing policies…"

It does, I think *Togia* which was, when was it, a long time ago, 2007, this jurisprudence as to the inter-reaction between the various statutes doesn't seem to have developed at all, and I don't know if it's surprising, but for whatever reason it hasn't, and then if we go to judicial independence at paragraph 25: "The risk of further offending, as found by the Court of Appeal…

is wrong and must be predicated on the basis he does not have a disability, despite having spent over 30 years in psychiatric care..."

Well the proposition I put is that the Court of Appeal's approach is too simplistic and avoids the issue. It is insufficient to merely note what the statute requires. This is a rights issue. What does the Bill of Rights require, and how do the two statutes interacts. The discretion here is a discretion to impose a sentence in breach of the New Zealand Bill of Rights Act. It is what you recently did in *Fitzgerald v R* [2021] NZSC 1316. So we have a new approach and it's surprising that seeing as the Bill of Rights is supposed to infest the whole of New Zealand law that you still have to say these things. It doesn't seem to be sufficiently ingrained in the system to not need constant reminding of.

Then I take you through, and I'm conscious of what (inaudible 10:40:29) to Mr Edgeler, I take you through the *Kable v DPP of NSW* (1996) 189 CLR 51 case in New South Wales, where Mr Kable was regrettably the subject of ad hominem legislation in the New South Wales State Parliament, and the idea was he had to be locked up and nobody else, and the Justices there put short shift to that and said no, we're not doing that, as it says at the bottom of page, page 26, this is "an extraordinary piece of legislation", and so it was.

The Act was incompatible with the judicial system where independence plays a part, as it does in the Australian society and their own, and the simple distillation of it is on Justice Toohey's judgment there on page 84 in the underlined passage: "The function offends that aspect because it requires the Supreme Court to participate in the making of a preventative detention order where there's no breach of the criminal law alleged and where there has been no determination of guilt." Well, one might well think that 20 years on, connect the causal connection between Mr, I can't say his name, Mr R, his criminal guilt and imposing yet more extended supervision order needs more than a cursory consideration.

So I've then turned to section 26(1) of the Bill of Rights that nobody can be convicted for somebody which didn't constitute an offence. I say that the Butlers

in their 1,800 word textbook had six pages on it illustrating that this is rarely litigated.

Then I say at page 90 that 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, and I say the continued position of an ESO is in breach of that section.

Then my final point and then I defer to Mr… He needs to be cared for. The public needs to be protected from him. This appropriately occurs in a health system, not in a penal system. In occurs in the intellectual disability system. His extended supervision order and criminal penalty should cease and the words of the Intellectual Disability Act, that he is a person no longer subject to the criminal justice system should be respected and he shouldn't have a further criminal penalty applied to him when he's not subject to the criminal system.

I notice there's less questions and you're indulging me which I appreciate, and you might I have noticed I am not at my best. Mr Edgeler can continue.
1045

WINKELMANN CJ:
Thank you, Mr Ellis. And we don't accept you're not at your best. Mr Edgeler, I can't see where you are but I assume you're making, ah, I see you now.

MR EDGELER:
Thank you your Honour. I did have, as Dr Ellis noted, from page approximately 4 to 19. Large bits of that are additional facts, some of which I think are useful, but I don't think that I necessarily need to go into them.

WINKELMANN CJ:
No you can assume we've read them. We've read through –

MR EDGELER:

Yes, no of course, yes, it's one of those sort of weird cases, but I think some of the background is useful to have. I was trying to remember during the discussion with Dr Ellis whether we had, my collection is we appealed some of Mr Togia's convictions at some point, but that there was some difficulty –

KÓS J:

You said Mr Togia?

MR EDGELER:

Yes, that was the case I was trying to think of, that was the comparison with Mr R, and my recollection is with Mr Togia, who was in a similar position, Mr Togia was clearly unfit to stand trial and had been found to be in his, the prosecution that resulted in prison, he was the lead offender in an armed robbery. He was the mastermind behind it, was the basis on which he was sentenced in the District Court, and so as part of the challenge, or a later challenge to that we tried appealing his conviction out of time to the High Court with leave being denied. Mr Togia, at that point, was out of the criminal justice system and it didn't make much of an effect on him but equally a situation like this where he could arise, you know, aggravated robbery as a basis on which one can be subject to an ESO, as with the offending here from Mr R in the 1980s, for which he was convicted in the 1990s.

WINKELMANN CJ:

My recollection of the case before Justice Potter was that, in fact, there'd been no reports done in relation to the applicant, at the time of the original offending, but the expert's post-fact reconstructed from what was known about him at the time of the hearing as to what must have been the situation.

MR EDGELER:

Yes and this is potentially something that could be done here. This is, in a sense, I think Mr R is responding to an application by the Chief Executive and so it's the Chief Executive brought one, and then a second ESO and now because it's a second ESO, the ESO itself is 10 years long, but there must be a court review every five years. So it's an ESO application at 10 years,

five years later we review, five years later after that potentially a third ESO. That's sort of the situation we're legally in.

WINKELMANN CJ:

Mr Edgeler, I'll leave it to you as to what order you approach this in, but we would like to hear, particularly interested to hear two things. One is the basis on which you say that the order had occurred, order, if application had been made different order ESO couldn't have been made, and the second thing is your response to the Crown's argument that the making of the ESO is, in the circumstances, liberty enhancing because it gives more ability to provide freedom to the appellant, and I think that, responding to that involves, is taking us to the counterfactual. What would be the limits of what could be imposed upon the appellant under the CCO regime, that he's currently subject to absent the ESO.

MR EDGELER:

Certainly. I think those were the two – that's useful to the additional comparison *Togia*. One of the places also mentioned by Dr Ellis where it's a slight disjunct with the submissions of the Chief Executive is that we filed out submissions three weeks before the additional evidence that they have sought to introduce, was filed, so we haven't addressed it. I don't think we are intending to address the evidence in detail, our views were, I think, laid out in the memorandum we filed on the notice of opposition we filed to the admission of, I shouldn't call it fresh evidence, the new evidence. Some of the evidence, you know, was reports that were filed in court in the early, 20 years ago almost. We don't think it's admissible, I can certainly address the Court on that, but the written notice of opposition rather than sort of additional submissions, I just, we made a rather extensive notice of opposition so that the objections were clear, and I can certainly address you on them.

1050

WINKELMANN CJ:

I mean I think your point is well made, Mr Edgeler, because as I understand it, and Ms Jagose might correct me about this, it's changed, the evidence has

changed the basis on which the Crown supports the orders because in the High Court and Court of Appeal it seems to be made on the basis that it's just in case –

MR EDGELER:

Yes.

WINKELMANN CJ:

Whereas now it's made on the basis that it's actually liberty enhancing.

MR EDGELER:

Yes, and I think the question the Court is asking, and it's sort of the application that the Crown was trying to say should've happened in *Chisnall* with the intense factual analysis in a particular case and question we had in *Chisnall* are all orders ESO, PPO, unjustified limitations. The question we have in this case is, well, is this particular order a justified limitation. Why does Mr R need to be punished a second time. Of course in Mr R's case why does he need to be punished a third time. He was punished for the sexual offences in the 1980s, with the punishment in the 1990s to the early 2000s, at which point the second punishment, retrospective legislation that were not in place at the time of the offence or at the time of the conviction, with the new –

WILLIAMS J:

It does seem that the Crown's best argument is that the bracelet lets him be in the community safely, and so it actually enhances the quality of his life because a CCO would keep him within the confines of offence. What do you say to that?

MR EDGELER:

If the Crown – well, the Crown, I think this might actually be the Crown rather than – the Crown's concern is that community care orders are insufficient, operated factually in insufficiently rights sensitive manner, then it should be directing its concerns and submissions made in the Family Court or in judicial review of the compulsory care order or care –

O'REGAN J:
That's just not answering the question.

MR EDGELER:
Sorry your Honour?

O'REGAN J:
Is he better off or not?

WINKELMANN CJ:
That's not the question I don't think Mr Edgeler. I think it's the question – I mean, I think you need to come more directly at it. It's simply said to you that – said against you that the ability to have electronic monitoring in fact enables the CCO regime to be, to operate in a more rights enhancing fashion. So it's an enhancement of the CCO regime, a rights, a liberty enhancement of the regime, and that's probably what you need to answer, and I think that you can say, well no it's not because under the CCO regime he couldn't be subject to this extended limitation, but you need to make your argument.

MR EDGELER:
Yes, certainly that is our position. That the CCO regime, the regime which operates for, I don't know if it's everyone, but almost, at least almost everyone else who is found unfit to stand trial, even for very serious charges. People who have killed and who are not subject to both sets of orders. The community is protected and the person themselves is protected.

WILLIAMS J:
But that's because they get secure care instead of supervised or community care. How's that good for your client?

WINKELMANN CJ:
Can Mr Edgeler just finish his sentence because I hadn't got the end of what he was saying. So you were saying that you were, can you just go back to what you were saying Mr Edgeler?

MR EDGELER:

At the beginning, give the example of someone found to have killed someone, I won't call it a murder, essentially a manslaughter if you don't have the intention. If someone found responsible for a manslaughter who is then made a, would be probably made a special care recipient, and after the 10 years that applies for, would become a care recipient. So 10 years where they are a special care recipient, someone who is subject to the criminal justice system. After the 10 years or the seven years, or whatever it is, might be in a particular case, they become a person who is no longer subject to the criminal justice system, a care recipient, which could be secure care, which could be secure hospital care, or secure community care. It could be supervised care, and in fact in Mr R's case, and a lot of cases, the difference between secure hospital care and secure community care is much greater than the difference between supervised care and secure care in the community. That people can be subject to secure care in the community and supervised care in the community at the same place that, you know, the order might change, some applications we know of the order might change, but their place of living doesn't, the people who are caring for them, the care manager is the same. If you were to look at it and go into the community placement, you would not know the difference if there was a secure order or a supervised order, and certainly supervised orders can be less but at the highest level and in Mr R's case his supervised order is detention. So the question, and it's one of the difficulties in having a client with –

KÓS J:

Sorry, he's supervised now, isn't he?

MR EDGELER:

He is in supervised care now.

KÓS J:

And he's able to go into the community with a bracelet as a result of the ESO because otherwise he would only be able to go with, effectively, line of sight monitoring by a staff member.

MR EDGELER:

Which is how he also goes now. So he goes with line of sight and a bracelet. The particular people who are employed to care for Mr R are people who are instructed not to restrain him. So if he runs off, they run after him if they can. Can you come home. But will not –

WILLIAMS J:

So is this in the – or the background you're giving here, is this in the care co-ordinator's notes is it?

MR EDGELER:

I believe some of it is, and some of it I think was in a small amount in perhaps the evidence in the High Court to a very limited extent.

KÓS J:

I think Dr Carlyon goes through some of that.

MR EDGELER:

Yes, there was some, so there was some cross-examination, sorry your Honour.

WINKELMANN CJ:

Mr Edgeler, the recent relaxation by the Family Court, what was the impact of the relaxation by the Family Court?

MR EDGELER:

He moved to a different place, although that doesn't necessarily happen. I understand he moved to a different place. From his perspective, and it's difficult to get instructions, from his perspective not much. My suspicion is that the difference between secure care and supervised care for him is probably in the level of funding that the Ministry of Health needs to provide, and potentially the types of staff who are qualified to look after him, whether he needs two people or one, are just sort of factual things that happen depending on whether someone is secure care or supervised care. Whether that is in this particular

case I don't know, and I don't think the evidence filed addresses sort of staffing type relationships. Certainly the level of staffing isn't a legal requirement under a supervised care or secure care, but just factually what is provided under a secure order versus a supervised order, it just factually just sort of how the contracts work between private organisations and the Ministry of Health is –

KÓS J:

You mentioned a couple of times now how instructions are difficult to obtain. How are we to draw proper inference here as to Mr R's preferences?

MR EDGELER:

Yes, I was about to do that. I think I got sort of sidetracked, but I think reasonably sidetracked, that Mr R –

WINKELMANN CJ:

Can I just ask Mr Edgeler, just to clarify back on that Family Court. He was ordered to remain in secure care until supervised placement was available. Does that mean, so he's now in supervised care on the community, that's where he is now?

MR EDGELER:

I believe so.

WILLIAMS J:

And just to nail this point, because it does seem to me your submission is that the point of distinction advanced by the respondent is not as real as is suggested, because with or without the bracelet there will be security personnel with this individual when in the community.

MR EDGELER:

Yes, although I –

WILLIAMS J:

It's quite an important point.

MR EDGELER:

Yes, yes, yes. Very much so, and it's the question that, the one bit of evidence I think I actually rely on, as I say, the cross-examination of Mr Carlyon.

WILLIAMS J:

Can you give me the page?

MR EDGELER:

Certainly it's paragraph –

GLAZEBROOK J:

Although presumably the point they're making about the bracelet is because they can't restrain him, if they lose him they'd be able to follow him with the bracelet. Is that the…

MR EDGELER:

I believe it's, if he was to abscond and – the additional assurance that they can call Corrections or police, the people administering the bracelet and say, can you go and find this person, we've lost him. If he's wearing the bracelet it is easier for police to find him, and so they –

WILLIAMS J:

So that's the point of difference?

1100

MR EDGELER:

I think that is the point of difference that they have someone extra they can call whose job it will be made easier if he does abscond.

KÓS J:

But returning to his perspective.

WINKELMANN CJ:

But for that to – yes.

MR EDGELER:

His perspective. So it's something where the differing of abilities – our position is certainly that Mr R has been unfit to receive a fair trial, but he has been able to in the past and less so now make his views about certain matters clear, and his view for a very long time with me was: "When can I get the bracelet off?" That instruction was very clear.

WINKELMANN CJ:

But taking it back to the impact of the bracelet upon him. From his – from Corrections' point of view it enables them to find him if he absconds more easily but from his point of view does it make, does it create a more free environment? Does it enable them, Corrections, to allow him to do things he wouldn't otherwise do, to be where he wouldn't otherwise be?

MR EDGELER:

My understanding, and again it's evidence which hasn't been subject to cross-examination, is that the people, his care co-ordinator and care manager appear to give evidence, again only one of them actually giving evidence, not subject to cross-examination that when they make their decisions about how to administer his compulsory care order it is a factor they take into account when approving leaves, for example. Because you know, even under a supervised care, Mr R is required to stay where he is. The supervised care order is more restrictive than an ESO with intensive monitoring even, probably equivalent to an ESO with intensive monitoring with full-time residential restrictions in the levels of monitoring that take place. A compulsory care order is much more restrictive which was why I did the thing in the High Court you're not supposed to do as a lawyer, ask the question I didn't know the answer to. So we have the question and I've got it from paragraph 42 is the paragraph I was about to take your Honour Justice Williams to.

WILLIAMS J:

42 of?

MR EDGELER:

Paragraph 42 of the submissions. But it's I think page 18, I can probably bring it up. But this section, the one bit of evidence, which – if he could only have – central question, if he could only have one, the ESO or the compulsory care order, which would you give him? Essentially the question. The answer, my suggestion of why Crown now are at a point where it is not a big fan of the evidence that it brought in the High Court was that on cross-examination it was accepted that a compulsory care order was sufficient to protect the needs of the public. So in answering question, why does Mr R need to be punished a third time? The answer is he doesn't because the public can be protected.

O'REGAN J:

That doesn't deal with the Crown's point though, that the reality is under a compulsory care order he would be under more restrictive conditions if it weren't for the fact he had a bracelet on. Isn't that what we need to deal with? Nobody's suggesting he couldn't be under a compulsory care order. What the Crown's saying is without the bracelet he would be under a more secure environment than he is with the bracelet.

GLAZEBROOK J:

The question might be why the CCO legislation –

MR EDGELER:

Yes.

GLAZEBROOK J:

– doesn't allow for that if that's more liberty-enhancing.

MR EDGELER:

I think the answer is the CCO legislation would allow for that. One specific thing to note, that the CCO legislation does not specify –

GLAZEBROOK J:

So, sorry, do you say that – sorry.

MR EDGELER:

Sorry.

GLAZEBROOK J:

Can I just check, you say the CCO legislation does allow electric monitoring, electronic monitoring?

MR EDGELER:

The CCO is about the – the Intellectual Disability Act, yes, does not provide for electronic monitoring. But it doesn't provide for very much at all. The Intellectual Disability Act says, in short, the circumstances, the conditions are up to the care co-ordinator. So there are very few specified – it's unlike the Parole Act. The Parole Act says, here are the types of conditions you can apply, there are no –

WILLIAMS J:

That's a pretty big intrusion for a civil liberties lawyer to running in favour of his case.

MR EDGELER:

Yes. No, it's –

WINKELMANN CJ:

Can I just ask that though. It does actually – it authorises detention though doesn't it?

MR EDGELER:

Yes, it authorises detention yes.

WINKELMANN CJ:

So –

MR EDGELER:

So we have detention in this case.

WINKELMANN CJ:

And you might say that an electronic monitoring bracelet is a lesser imposition than detention, so it could be taken to authorise that as a condition. You might or (inaudible 11:05:13).

MR EDGELER:

Except he is detained currently with the bracelet.

WINKELMANN CJ:

Can I just say –

WILLIAMS J:

Yes, and to be fair, there's no suggestion that detention will change. It's necessarily for the safety of the individual and the community. No one's arguing against that.

MR EDGELER:

Unfortunately, there is a suggestion that detention will change, which I think the two concerns that the Crown – the concern that the Crown argued –

WILLIAMS J:

Oh.

MR EDGELER:

– in the High Court and the Court of Appeal and the concern that they've added in this one. The concern they've added in this one is –

WILLIAMS J:

The PPO, right.

MR EDGELER:

– rights-enhancement of – we can approve more and more types of leaves than we would otherwise approve because we have the surety of a bracelet. The other one is –

WINKELMANN CJ:

I think for – carry on.

MR EDGELER:

The other one is we're not convinced that, you know, it's a three year roll over period for a CCO and the additional evidence and the prospect is that the CCO will not continue. We had that in 2011 here the compulsory care order that Mr R was under at the end of his prison sentence and during the period of his release under parole. He was then under a compulsory care order and it just stopped because the health – his care co-ordinator, I can't remember if it was his care co-ordinator didn't apply or just said we're happy for him to become a person who deals with the health system as a client but without a compulsory order, and so the concern is that at the end of this – so, he had a three year order. He's got a two year re-up.

WILLIAMS J:

Right.

MR EDGELER:

We get to the end of the two years, they are concerned that the care co-ordinator will not apply for a new CCO.

WILLIAMS J:

Well he, in 2011 he was still subject for an ESO anyway, right? When the CCO lapsed?

MR EDGELER:

Yes.

WILLIAMS J:

Right. So it's hard to think your way through the proposition that you're reflecting –

MR EDGELER:

Yes, yes and I think –

WILLIAMS J:

– from the respondent's point of view. I mean, they either get one or they don't. If it's needed it's needed, if it's not then it's not.

MR EDGELER:

Yes, and that is the position and sort of – when it was up for renewal I was slightly concerned with the suggestion that it would become a supervised care order, because all secure care orders are detention, some supervised orders are detention but not all, and if the supervised order was felt by Corrections to be a form that did not involve detention, then Justice Whata's interim detention order at the end of the public protection order process would be in place and someone could go and arrest him and take him to Matawhāiti. If he's not detained anymore, there's an interim detention order, let's bring on the public protection order that has been suspended and will remain suspended while he is detained under an intellectual disability order, but if that ends the concern I had tried to indicate to his Family Court appointed lawyer was that if the supervised care order was such that it didn't amount to detention, the interim detention order would kick in I think, and we'd be back in the public protection order facility and the odd situation would be we'd get to the end of that and the process would start again with trying to make him subject to compulsory care order, because that was the end result of the PPO application. He's very high risk of imminent offending, but he's intellectually disabled so I direct you to make an application to have him made a compulsory care recipient.

That application ultimately not being needed because he was arrested and the criminal court did it instead, but the criminal court would be deemed to have the power to do it, or the Family Court would be deemed to have the power to do it as if he were a prisoner, as sort of happened, say, with Mr Togia. He was a prisoner. The manager of the prison can apply to have him made a CCO recipient. If the CCO would end, the end result would be he'd be locked up for a year, probably in the PPO facility, before the CCO started again and that was –

WINKELMANN CJ:

Mr Edgeler, can I ask two things?

MR EDGELER:

Certainly.

WINKELMANN CJ:

I've got two questions. Firstly, your primary submission in response to the Crown's liberty-enabling point now is that it's the evidence of one or two people which is so late in the piece and you haven't had the opportunity to cross-examine on it?

MR EDGELER:

Yes, certainly that is what – and the compulsory care regime has a wide ability for the care co-ordinator to operate the scheme or the application to an individual in a rights-sensitive manner. Unlike the ESO regime, unlike the PPO regime, there is nothing in this statute that prohibits the compulsory care order from operating a regime which is more respecting of his rights.

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Mr R will be detained but even under whether it's secure care or supervised care, access to the community is possible as it is for many others under compulsory care orders, and the concern that in this case perhaps the Attorney, as soon as the attorney has with the administration of a CCO regime, we or he should be judicially reviewing decisions of the compulsory care so it can operate in a rights-enhancing manner, and potentially that's something that the Family Court is sort of in renewals or reviews: like 'Mr R is being denied access to the community, we think he should have access to the community'. And so you bring up the care plan with the Family Court or you know, parens patriae with a High Court judge or something. The care plan does not provide for suitable access to the community, and the solution is in that regime, not in the criminal regime. The idea that we will need a – it's not too long now until the ESO, so this is the five year review, but you know, five year review sort of two years ago.

In three years about the ESO itself will end and the Chief Executive will have to apply to punish Mr R a fourth time for his offending from the 1980s.

Is this second punishment necessary to protect the public? No. The evidence says it's not. So why would you need to punish Mr R to enhance his liberty, and the answer is you dont, because there's nothing in the legislation governing CCOs which requires any of the restrictions they have.

O'REGAN J:
But he's also under the IPO, isn't he?

MR EDGELER:
No. The IPO is –

O'REGAN J:
But won't that be retriggered though if the CCO ends and there's no ESO?

MR EDGELER:
That would I think be retriggered if the CCO ended and there was still an ESO.

WINKELMANN CJ:
So that takes me to my second question Mr Edgeler. So the Crown has said, these are all the possible scenarios we have, and you've started referring to some of them. Can you give us the possible scenarios because this responds to the second ground on which I'm not sure the Crown still maintains that the ESO was appropriate, which is that it closes off possibilities of lack of proper public protection. So what are the future scenarios you see?

MR EDGELER:
If the ESO ended the Chief Executive could not apply to a criminal court in the future for a new ESO. You can have an ESO. You can have a re-tread. You have to apply for the re-tread before the ESO expires. So if the ESO was expired, like ended by this Court, or the High Court on a five year, if it had been ended by the High Court on a five year review, the Chief Executive could not

apply under the Parole Act for a new ESO if circumstances changed. Factually in this case because the Chief Executive has an extant and suspended PPO application, that could be brought back to court, and could result in a direction that the manager of the prison, the manager of the, the Chief Executive applying as if he was a manager of a prison to starting new CCR. So factually in this case if they were so concerned that the ESO ended, and let's say the CCO ended, in this particular case, although I accept perhaps in another circumstance not every case, but this particular case, the interim detention order is laying in a court somewhere in a sense. It could be brought on. We would suggest that that interim that that interim detention order be amended to detain Mr R at his current place rather than in a PPO facility. There'd be an argument of whether an interim detention order can do that, or whether an interim detention order has to be at Matawhāiti. A PPO certainly has to be at Matawhāiti. Interim detention order is the Judge making it, directs where the detention should occur.

KÓS J:

How would it be interim in that case?

MR EDGELER:

Interim awaiting for the conclusion of the public protection order.

KÓS J:

Right.

MR EDGELER:

By the direction followed by the Chief Executive to apply –

KÓS J:

So that's, we really have to focus on the PPO don't we?

MR EDGELER:

The IDO provides the immediate protection from the public.

KÓS J:

Yes, yes.

MR EDGELER:

The PPO would again probably fall away and we'd go and start a CCO process again, which is why the solution is, to be perfectly honest, that the care co-ordinator in two years time from the last renewal should apply for a CCO again because that's clearly what Parliament has said should happen under the PPO legislation.

WILLIAMS J:

So your argument is I think if I'm understanding it correctly, not with the bracelet, but with the penal paraphernalia that comes with it, and that it is possible to read IDCCR and the CARP provisions if I can call them those, read in the context of BORA as if the bracelet could be provided for therapeutically under IDCCR and exclude the penal paraphernalia of the ESO, while achieve the same outcome.

MR EDGELER:

If it was thought necessary. From Mr R, so the submissions I'm making versus the submission Mr R would make if he could, was he doesn't want the bracelet, and that's been his sort of clear – that's his concern.

WILLIAMS J:

Well it actually needn't be a bracelet of course.

MR EDGELER:

No, no.

WILLIAMS J:

You can track with an Apple Watch I've discovered.

MR EDGELER:

If it was thought therapeutically beneficial to Mr R to have the particular excursion to the community from his place of detention, that there would be measures that his care co-ordinator and care manager that could use that are not prohibited by the Intellectual Disability Act, to allay their concerns, and that factually it might be something that they have not done. My strong suspicion is that, you know, it's got to be clinically indicated. The people making decisions largely, what should we do, clinicians.

GLAZEBROOK J:

I'd be slightly concerned about, well certain if I were a care co-ordinator I wouldn't be forcing somebody to wear tracking devices without something specific in the legislation that allowed me to do that. Obviously if somebody agrees to that voluntarily, although there is an issue about how, about whether people can agree.

MR EDGELER:

Yes there is, and again –

GLAZEBROOK J:

I mean obviously they should be given the opportunity to agree as far as they can but – under the disability convention, but there's still an issue, as you've indicated.

MR EDGELER:

There is, yes, there is.

WINKELMANN CJ:

But those aren't your first order arguments, are they Mr Edgeler, your first order arguments are, first, it's not liberty – there's no proper evidence that's been able to be tested that it's liberty enhancing, and you haven't had the opportunity to cross-examine it. In any case the CCO requires a liberty-enhancing approach and the Family Court imposes that. So you don't accept the point that it's liberty enhancing and you say that the kind of backstop argument is met by the fact

that it's within, that if the CCO ends you'll just go through a loop where the CCO will be reimposed. The obvious thing is that the CCO not be allowed to end, and that's what anyone would logically arrive at, and that's where we get.

MR EDGELER:

Yes, and my thought being when it came up, and if it was, if we got an indication from a compulsory care order that he was not going to reapply, that whether we would be seeking, I don't know, you're mandamus now, you have to apply might be the correct answer, as difficult as that may to get instructions in that sort of circumstance, but that very much seems, in particularly in line with the sections that I won't take you to from the public protection order legislation about the appropriate place for people to be cared for when they are intellectually disabled, but also at the very high risk that the High Court agreed Mr R is.

WILLIAMS J:

Isn't there a fear, too, of absconding from the residence itself?

MR EDGELER:

I don't know. Certainly –

WILLIAMS J:

I thought that had happened?

MR EDGELER:

The residence, and it's again not – the residence can be locked. It is a form of detention –

WILLIAMS J:

But I mean, yes, yes, quite, but there is some history of this, is there not? This has happened is my point.

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MR EDGELER:

Some years ago I think.

WILLIAMS J:

Yes.

MR EDGELER:

When he was, for example, before he went to the PPO I think.

WILLIAMS J:

Right, okay.

MR EDGELER:

In Auckland there was a suggestion. One of his not charges but the most recent sexual offending that they keep calling was, you know, an indecent exposure to a woman who needed a wheel, a tyre replaced on a car or something like that. That was the, well not index offence, the sort of the most recent sexual offending of what they called a serious-ish nature. Of course, we didn't get leave to argue whether he was dangerous or not, so I shouldn't go too much into that.

There is now I think probably, and I've got 10 minutes or so to answer the other question that the Chief Justice brought up earlier that I might hopefully be particularly – assist on. So if we could turn to page 16, bottom of page 16 of the submissions. It's the start of – looking up, I see paragraph 52 has the principles of the Public Safety Act 2014 I mentioned. Paragraph 54, and so going over to the next page is why we say if this wasn't a case like Mr R, so I re-tread here, so this was Mr R in the place that Mr Chisnall was in. Coming up for release from prison, about to be released, the Chief Executive says we want to keep detaining you under a public protection order. We are going to apply for it under the Public Safety Act, get an interim detention order and then try and resolve the public protection order matter. But we accept that the test for a public protection order is high is high so we might not get one, so we're going to have a backup application for an extended supervision order. Very specific sections of the Parole Act which permit if you're making a PPO application you can have a contingent application for an extended supervision

order. So it happened in Mr Chisnall's case and the ESO finally will be heard next week for Mr Chisnall.

So, didn't get a PPO, can still get an ESO, the Court does nothing with the ESO until the PPO decision is determined. If the PPO is refused then the Court looks at the ESO and can make it or again not make it, although we anticipate in Mr Chisnall's case will.

KÓS J:

But in this case the ESO was imposed by Justice Edwards in March 2017 and the PPO application was a year later in April 2018.

MR EDGELER:

Yes. If those applications had been brought at the same time or Mr R being in the same position as Mr Chisnall, those applications were brought at the same time because a release from prison, or factually those applications being brought at the same time because of an ESO about to expire, and then in that case it would be allowed to expire while say interim detention that Mr Chisnall was under and Mr R was under, we would get to the end of the process.

Exactly the same thing's happening now, the same reports having been obtained, the same evidence being heard, the same cross-examination of the experts who said is it very high or just high? Is it imminent or it's high but not imminent? Exactly the same thing's happened on the 54 and the bullet points sort of I have in the paragraph 54, 54.1, 54.2, giving the sort of, the counter example. If we got to the end of the process and the same thing happened in this case had happened with that slight change, Mr R was subject to a PPO application, if we get to the end of that PPO application and the High Court judge says I agree that there's a very high risk of imminent sexual or serious offending. But I also recognise that Mr R, or whomever it is, is intellectually disabled and so I direct you, the Chief Executive, to consider whether to apply to the Family Court that he be made a compulsory care recipient.

If that happened and that application was made, the PPO application would be suspended as it is in Mr R's case, and having not been determined, the backup application for an ESO could not be brought on. It would be I tried for a PPO, the judge agreed you were dangerous, but said you're intellectually disabled, let's move you to the health system. I make that application as the Chief Executive. That's where Mr R would be, and there could be no ESO to run alongside it because the ESO – sorry, your Honour?

WINKELMANN CJ:

I was just going to ask. Is that subject – is that just court practice or is in fact there a statutory provision which say that the ESO can only be, the application can only be dealt with after PPO?

MR EDGELER:

It's a section that I am wondering if I footnoted it, my guess being –

WINKELMANN CJ:

Because I couldn't find it.

MR EDGELER:

GAA is it. 107GAA(2) is my guess, of the Parole Act. It's one I footnoted so hopefully I got it right. Footnote 18 on page 18. That's the right one.

WINKELMANN CJ:

Can we have that section up?

MR EDGELER:

The problems with being legally aided is I'm not even sure they're paying for two lawyers, they certainly wouldn't pay for three, I'm having to do my…

WINKELMANN CJ:

I'm sorry Mr Edgeler. The problem with being at a distance is I couldn't see that.

MR EDGELER:

Yes.

GLAZEBROOK J:

I think we're wanting subsection (2).

MR EDGELER:

Yes.

WINKELMANN CJ:

It's on the wrong section, isn't it.

MR EDGELER:

Yes it is. G, not GAA.

WILLIAMS J:

It's G, not GAA?

MR EDGELER:

Yes, we'll turn that off.

WINKELMANN CJ:

No it's GAA and he's trying to –

MR EDGELER:

Yes, but G is the one on the screen. So it's GAA, the section applies where an application for a PPO has not been determined or withdrawn. "The sentencing court must not hear the application." (2)(b).

WILLIAMS J:

Say that again sorry?

MR EDGELER:

So subsection (2)(b). If the application has not been determined, so that's the application for the PPO has not been determined, which would be the case if a direction was made to apply under the, to the Family Court for a compulsory

care order, the application would not be determined. That was the finding in, I think, judgment number 4 of Justice Whata.

WILLIAMS J:
Right.

MR EDGELER:
Is the application still on foot or is it suspended. If the application is suspended it still exists. Then we have –

WILLIAMS J:
Just one second.

MR EDGELER:
Certainly Sir.

WINKELMANN CJ:
Can you scroll down then. So on your analysis, Mr Edgeler, how does the, how does it come to be that the Act contemplates an ESO and a CCO co-existing?

MR EDGELER:
The specific example we give and it can't be the complete answer, is that the Act refers to both CCOs and patient orders. So care recipient, a care recipient is, care order, care recipient, so it applies in both the Mental Health Act and the Intellectual Disability Act. It has an obvious place in the Mental Health Act because someone might get better, and so you could see why, well, this person's been temporarily placed in a mental hospital while we try and care for them and treat them and hopefully get them to a position where they don't need compulsory detention in a mental hospital. If they are improved to a position where they would now be an outpatient treatment or something like that then, okay, the ESO can come back on. So it makes a lot of sense in the mental health context where someone can better. It makes significantly less sense in the intellectual disability circumstance.

WINKELMANN CJ:

And is that in your submissions, that point?

MR EDGELER:

Yes, though I can't take it quite that far. One of the examples in the Court of Appeal, we put that position a bit more strongly and so there was a good interchange with his Honour Justice Simon France on the specific alternatives we were giving. It could apply for an interim order and so – but the definition of "compulsory care recipient" can't be, is someone in respect of when a final order is made, so there is, certainly 107P of the Parole Act does say that they can operate together and one is suspended but still running but as happened in this case, the Chief Executive or rather Mr R's parole officer applied to reinstate a couple of the conditions, including one being the electronic monitoring.

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Once Mr R went from secure hospital care to secure community care, which is where he was when the 15 year review happened. So this statute clearly allows them to run or to operate at the same time. It's again why I think this Court has given leave on the question of discretion. The discretion in this particular case is the question I asked at the beginning: why does Mr R need to be punished a third time?

Is it necessary that he be punished a third for the protection of the public? The answer is no. The Chief Executive, his own witness at the High Court said that wasn't necessary. So the question now is, well, Mr R does not need to be punished twice for any of the important things that these applications have all been brought for and why they continue to bring them now, protection of the public, protection of Mr R or any of those types of things. It's not necessary, and so it's an unreasonable limit for second/third punishment which might in three years' time become a fourth punishment. There does not need to be an ESO, and –

WINKELMANN CJ:

So you say that the public safety concerns do not outweigh his liberty interests?

WILLIAMS J:

Well, you're saying they're adequately dealt with under the IDCCR.

MR EDGELER:

Yes, yes. The public safety concerns are adequately dealt with and that was the evidence in the High Court when I asked that question –

WINKELMANN CJ:

But they don't outweigh some of the interests in not having an electronic bracelet on his ankle?

MR EDGELER:

Yes, and that's the evidence of Mr Carlyon under that question.

GLAZEBROOK J:

So they're adequately dealt with under the CCO which is whatever the detention, whatever the level of detention is that's needed for therapeutic and public safety reasons?

MR EDGELER:

Yes.

KÓS J:

I think you're also saying it's not for the Crown to determine what the best allocation of his rights are.

MR EDGELER:

No. Or, if the Crown is concerned about the protection of his rights, it's through other means. It's making a submission to the Family Court or it's addressing, you know, directions to care coordinators of, no, you have to make sure you are careful to look after the interests. Which, you know, generally they are but in particular cases one can imagine it not happening and that's why we have reviews in the Family Court and appeals of those reviews, and there's a section in the Intellectual Disability Act which allows you to apply to the High Court for,

you know, directions. I forget what section it is. We brought one for, was it M? I can't remember, Dr Ellis will remember, but hasn't been – sort of, there's a section in the Mental Health Act which allows you to go to the High Court and is used relatively frequently. There's a similar section in the Intellectual Disability Act that we used for the first time six years ago for not Mr R but for someone else, and there are processes, if there are concerns about his rights not being respected by his care team there are processes dealing with that which do not require punishment.

WINKELMANN CJ:

So on your submission it's quite significant that he doesn't want an electronic bracelet?

MR EDGELER:

Yes. That's certainly I think –

WINKELMANN CJ:

You –

MR EDGELER:

– probably why we're still here, yes. For the most part the ESO doesn't make a difference to him, but his advice throughout while he's been on it and including particularly, you know, before the PPO application which is particular times when, you know, I spoke to him a lot more because I was the person whose phone number he had and didn't have, you know, a care team in a particular – call up Graeme, speak to him on the phone sort of thing, that: "How can I get the bracelet off? How can I get the bracelet off?" was a very common request from him and including, you know, recent times when I'm speaking to him if – that has been something that's come up in the conversation.

KÓS J:

So if the result of this is that he is then detained more, it's fewer leaves, that's then a question for you to seek review on a separate proceeding.

MR EDGELER:

Yes.

KÓS J:

Or to deal with on a review of the CCO?

MR EDGELER:

Yes.

KÓS J:

Yes.

MR EDGELER:

I note we're past 11.30, so.

WINKELMANN CJ:

Yes.

MR EDGELER:

I think that is everything I wanted to say, so thank you your Honours.

WINKELMANN CJ:

We'll take, yes, take the morning adjournment. Bye-bye.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.52 AM

MS THOMSON:

May it please the Court. My learned friend Mr Ellis' final submission was that Mr R needs to be prepared for –

WINKELMANN CJ:

Can I just ask, who is counsel addressing, because I missed the introduction of who it is and I can't see you.

WILLIAMS J:

Ms Thomson.

WINKELMANN CJ:

Ms Thomson, thank you.

KÓS J:

Could you move the microphone a bit closer to you? Thank you.

MS THOMSON:

My learned friend's final submission was that Mr R needs to be cared for and the public needs to be protected from him. The Crown entirely agrees. That is happening currently legally under both the ESO and the CCO. It's appropriate for him to be under both because that benefits him in a tangible way, and I note that although it is rare, there are currently two other people in this situation under both an ESO and a CCO. It's not often that it comes up in the context of an ESO application or renewal hearing, and that is why there's no High Court case law on it aside from Mr R's own ESO in 2005, and another case from 2006 called –

MS JAGOSE KC:

Sorry to interrupt my colleague but that was suppressed name.

MS THOMSON:

That didn't take me long.

GLAZEBROOK J:

We probably need to do something about the livestreaming. We've got a 10 minute –

MS THOMSON:

We understand from the registrar that that is in train.

GLAZEBROOK J:

Thank you.

MS THOMSON:

People are standing by to correct my mistakes.

WINKELMANN CJ:

If that could be noted thanks, and that needs to be removed from the transcript as well. What was the name of the case you referred us to?

MS THOMSON:

Chief Executive of the Department of Corrections v Manihera HC Hamilton CRI-2006-419-000041, 21 July 2006, your Honour.

WINKELMANN CJ:

And we don't have any evidence about the number of people subject to CCOs and ESOs, do we, that's just something you found out?

MS THOMSON:

Something that came to me from the Ministry for Disabled People about half an hour ago your Honour.

What I propose to do first is to take the Court through the chronology which is appended to the Crown submissions. Hopefully that will address some of the factual and legal issues which have arisen in my learned friend's argument. Then to address the new evidence which the Crown has provided, the affidavits from Mr R's probation service manager and care co-ordinator, and then to move to the main points of the Crown's argument, such as they remain.

Turning then to page 27 of the Crown's submissions. I just note for fairness' sake that this chronology of events is largely agreed. The description of some of Mr R's offending behaviour is obviously disputed. I've tried to be a neutral as I could in drafting it.

The important parts for this hearing begin in 1996 with the sentence for Mr R's historical rapes. It was that sentence which enabled him, 10 years later, to be subject to an ESO. At the time that that sentence was imposed the IDCCR did

not exist. Justice McGechan considered whether to direct Mr R into a mental health regime but was advised by practitioners at the sentencing hearing that it wasn't appropriate for him to do that through the sentence itself. Mr R could be directed into mental health care as a part of his sentence. IDCCR then came into force shortly before March 2003 when Mr R was almost immediately confirmed to meet the eligibility criteria for intellectual disability services, and that was a part of his release on parole into supported accommodation. The ESO regime then came in shortly after his release on parole.

GLAZEBROOK J:
I think you should address yourself forward.

WINKELMANN CJ:
Could you just pause for a moment.

GLAZEBROOK J:
I know you're looking at the screen there but I think that means you're looking at nobody at all.

WINKELMANN CJ:
Can we pause for a moment because just, someone is using loud machinery outside. I'm just going to ask them to pause. It's a very confusing thing isn't it, and it's confusing for me because the view is so tiny that I can't, it's about the size of a five cent piece because of the share screen impact. Anyway. So where were you at with the chronology Ms Thomson?

MS THOMSON:
We were up to 2005. Your Honours will see in January 2005 once Mr R's supervision was decreased at his supervised facility he immediately offended. That was part of the absconding behaviours to which your Honour Justice Williams was referring before.

WINKELMANN CJ:

Ms Thomson, I don't think we need to go through the chronology unless it's to correct anything you think was wrong or to elucidate a point. But we don't need to go through to make the point about his offending behaviours et cetera.

MS THOMSON:

No your Honour. I do have legal points to make further down once the ESO has been made at the end of 2005.

WINKELMANN CJ:

Right, perhaps just cut to the chase on that.

MS THOMSON:

That ESO decision was made in light of the CCO which was about to be imposed five days later.

WINKELMANN CJ:

In 2005.

MS THOMSON:

Yes your Honour, and the ESO was imposed in order that Mr R's risk would be managed for the full 10 year term rather than three years that was known to be managed by the CCO, and because it serves a very different purpose from the CCO.

WINKELMANN CJ:

Are those points expressly made in the ESO, in the judgment making the ESO order?

MS THOMSON:

They are your Honour.

WINKELMANN CJ:

Can you give us a document reference for that?

MS THOMSON:

I can. In the Court of Appeal case on appeal, the decision of Rodney Hansen begins at page 21, and the relevant passage is at pages 31 and 32, particularly paragraph 35 on page 32.

GLAZEBROOK J:

Are we going to try and get that up. I know it's not that easy obviously. Thank you.

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MS THOMSON:

So this ESO was made on the basis that the CCO would be Mr R's primary mode of care and control. The ESO was not likely to have any effect until the CCO ended, which in fact it did in August 2011.

It was ended because there was no real rationale for continuing it while the ESO provided appropriate controls on his behaviour. Mr R had exhausted his treatment options. He'd either partaken of them and then not been effective or had refused to undertake any further treatment. He was able to continue living at his current intellectual disability placement while on the CCO – sorry, the ESO.

KÓS J:

I don't understand that because it's commonly the case with intellectual disability that there's very limited rehabilitation, and yet surely the CCO remains the primary, or ought to be the primary, method of dealing with that condition.

MS THOMSON:

It's a fundamental philosophical problem with the IDCCR, yes your Honour, which was recognised in the parliamentary debates upon the introduction of the legislation that people with intellectual disabilities by the definition have a permanent impairment which is not likely to be responsive to treatment. What can be achieved is changes to the structure within which they live.

KÓS J:

That's the point Dr Scott was making, yes.

WINKELMANN CJ:

So do you say that this arises from the statutory scheme of the IDCCR?

MS THOMSON:

It arises from the nature of the people who are subject to the IDCCR.

WINKELMANN CJ:

No, the requirement that they only be subject to CCO whilst there's a responsiveness to treatment or prospect of treatment.

MS THOMSON:

No, your Honour. But the people – the health practitioners who administer the IDCCR are wary of turning it into a preventive detention regime unless that is entirely and truly necessary. Where there is an ESO already in place which provides all of the external measures of control upon someone's behaviour, they're reluctant to continue the CCO regime and expend those resources which could be put towards someone who doesn't have the alternative external control measures available on someone like Mr R.

WILLIAMS J:

So R gets an ESO and is held in the punitive system because there isn't enough money to look after him in the disability system, is that what you say?

MS THOMSON:

From the point of view of the Family Court and those making decisions under the IDCCR, the question is the practical reality of the care, of how best to care for the person they have in front of them and what regimes are available. From their perspective, the philosophical punitive nature of an ESO versus the care nature of the CCO doesn't come into it so much, I think would be their answer. We obviously don't have any evidence from a health practitioner.

WILLIAMS J:

Can you explain that to me? It's a genuine question, explain that to me? This guy doesn't need care anymore?

MS THOMSON:

No, your Honour, that care is able to be provided under the ESO because he is able to receive funded placement in an intellectual disability residence civilly, without compulsory powers under the IDCCR, his ESO can provide, as a condition of the ESO, that he be placed there.

WILLIAMS J:

Right. So is this just about the fact that it comes out of the justice pot and not the health pot?

WINKELMANN CJ:

Yes (inaudible 12:03:52).

MS THOMSON:

That is a way it's been described to me, your Honour.

WILLIAMS J:

Really?

KÓS J:

I mean, the Crown's indivisible.

MS THOMSON:

It is, your Honour.

KÓS J:

What on earth is the point of this? I mean, he didn't move location, did he?

MS THOMSON:

When that CCO ended –

KÓS J:

When the CCO ended he stayed where he was?

MS THOMSON:

Yes, your Honour.

KÓS J:

So, presumably at the same cost to the state, just a different bit of the state, if we play that game?

MS THOMSON:

Although then, as we'll see further down the chronology, problems did arise around the consent that was required for him to be supervised at that intellectual disability placement. Under the CCO, the consent would not have been relevant because his care and rehabilitation plan could have provided for him to be supervised constantly, which currently it does. But he was able to breach his ESO by evading supervision of those who were caring for him. Corrections then applied for intensive monitoring condition which had just become available in early 2015.

When those expired in, a year after the imposition of the second ESO, the absence of any compulsory supervision on Mr R is what prompted the PPO application by the Chief Executive. The end result of that would have been either a PPO which truly detained Mr R under constant supervision, or a CCO which could, again, impose that compulsory supervision, which he now has not because of the PPO but by coincidence because he had offended while being assessed for a CCO, and he's been through CPMIP become again subject to a CCO.

WINKELMANN CJ:

So to be fair to the caregivers, well the health practitioners who administer the IDCCR, they're not just motivated in being reluctant to see a CCO imposed in the long-term. They're also motivated by the view that they don't want people

to be detained for health reasons in the long-term and in this case the appellant was able to be cared for on a consent basis, but subject to the ESO.

MS THOMSON:

Back in 2011, certainly, and that could be the outcome next year. The evidence that we have from Mr R's care co-ordinator is that if the ESO remains in place he may not be minded to apply for renewal of the CCO when it comes up next year because Mr R will be able to be kept at his current residence, and the electronic monitoring will continue to provide some security of mind for those who are caring for him there.

There is a small wrinkle which I ought to draw to your Honours' attention. The recent declaratory judgment of Justice Isac in the *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 case, which we have in our materials, has determined that someone subject to an ESO cannot be placed in the care of someone with whom they also reside because that would amount to residential restrictions which aren't possible under an ESO after the first year. That decision is currently under appeal by both the Attorney and the New Zealand Parole Board. So I'd be loath to attempt a full argument here.

WILLIAMS J:

It's a long judgment.

MS THOMSON:

As your Honours can see from the decision it's a complex area but there is an open question mark at the moment over exactly how the conditions would be crafted to enable Mr R to stay in the care of Emerge in his current placement. But there are several –

WILLIAMS J:

Which all suggests, doesn't it, it would be better if these powers were in the IDCCR, then the problems that keep popping up and the slipping between those two stools.

MS THOMSON:

Yes. Although electronically monitoring is resolutely not available under the IDCCR and where restrictive powers are contemplated by that Act in part 5(2) if I could ask Ms Hay to bring that up. The powers for seclusion, restraint, enforced medical treatment and collection of biometric information are specifically provided for with particular tests that must be met before they could be implemented. As your Honour Justice Glazebrook said, it would be a bold care co-ordinator who ordered electronically monitoring without any specific statutory authorisation.

KÓS J:

Perhaps not, perhaps, who ordered it or directed it but could offer it, surely. Look, Mr R, if you want to go down to the town, the bottom of the town today, you'll have to put your bracelet on. What are you going to do? Can that offer not be made?

O'REGAN J:

But I don't think that's the reason for the bracelet.

GLAZEBROOK J:

The difficulty might be actual consent in those cases.

O'REGAN J:

The bracelet is because he will leave without it. That's why he has to have it on all the time.

WINKELMANN CJ:

And also –

KÓS J:

Well no not wholly. It's also if he absconds during the course of his, you know, public visitation.

MS THOMSON:

Yes, although also the risk of absconding during the night or just simply while on the residence. The doors are lockable, but they're not locked, mmm.

KÓS J:

But that's why we have evidence that, from your side, that says that he'd probably be moved to secure care if they didn't have the ESO in place.

MS THOMSON:

At least that it's unlikely he would have been moved to the community without the ESO yes.

WINKELMANN CJ:

Isn't his move to the community-based on the Family Court judgment?

MS THOMSON:

Yes, your Honour, but the Family Court judgment was based on the recommendation of the care co-ordinator, and the care co-ordinator's evidence in Mr Berrill's affidavit at page 5, paragraph 15.

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WINKELMANN CJ:

Just before we go to the updating evidence is there any evidence that that was taken into account by the Family Court Judge or that that was the position put before the Family Court Judge?

MS THOMSON:

Yes, your Honour. We do have the Family Court decision in the Supreme Court casebook at page 85, although that might be the move down to community supervised care rather than the secure care decision. We –

WINKELMANN CJ:

Well, can I – can you just answer, did the – which Family Court decision do you say is relevant?

MS THOMSON:

Both, your Honour, but we have not been able to locate a copy of the decision where Mr R was moved from –

GLAZEBROOK J:

Can we note that again please in terms of the livestreaming and the transcript, thank you.

MS THOMSON:

We've not been able to locate a copy of the decision.

WINKELMANN CJ:

Just call the appellant the appellant I think is a good thing.

MS THOMSON:

Yes, your Honour. When I'm reading a page which has his name on it it's quite difficult.

WILLIAMS J:

Yes.

KÓS J:

Yes, we understand.

MS THOMSON:

We haven't been able to locate a copy of the Family Court decision moving him from – there isn't a decision, I'm informed by my learned friend, moving him from hospital secure to secure in the community, because obviously that's the same level of care. That's a matter which was sole for the care co-ordinator to decide himself. We have his –

WINKELMANN CJ:

So there was no Family Court decision then?

MS THOMSON:

Because he remained at a secure care level, either in the hospital or the community, it's the same order under the IDCCR.

WINKELMANN CJ:

But there aren't – there is no, it's not that you haven't been able to locate the decision, there is no decision is your point.

MS THOMSON:

Yes, your Honour. I had mixed up my decisions there.

WINKELMANN CJ:

So there's really only one Family Court decision and that Family Court decision enables him to move from secure, from – can you help me?

MS THOMSON:

Secure community care to supervised community care.

WINKELMANN CJ:

Yes, and are you saying that that is the one in which it was taken into account that the appellant was subject to electronic monitoring?

MS THOMSON:

It was both decisions, your Honour. You can see in this document which my learned friend has brought up, but it's not on the screens is it?

WILLIAMS J:

Yes.

MS THOMSON:

Could the registrar confirm that the ClickShare is not available on the livestream?

REGISTRAR:

No, not (inaudible 12:12:51).

WINKELMANN CJ:

It probably is, it was, if it's what I'm seeing.

O'REGAN J:

No it's not on the livestream I don't think. It's just on the – for counsel and Chief Justice.

MS THOMSON:

Good, that was my understanding.

GLAZEBROOK J:

We've got three, it's very complicated, and I quite understand it's very difficult for you.

MS THOMSON:

It's a different environment.

GLAZEBROOK J:

Actually, we hadn't quite realised how complicated it was for counsel addressing the Court, so perhaps we need to actually have some documentation that means that you're not so taken by surprise in terms of when we do have judges online.

WINKELMANN CJ:

Yes. We'll just clarify that. Right, okay, so anyway, can you just tell us, you don't need to show us the documents, just tell us because you must know, whether the Family Court Judge explicitly refers to this, Judge Hambleton?

GLAZEBROOK J:

I think we did have that up just before, didn't we?

WINKELMANN CJ:

I know, but I'm not – we don't need to have it up, just tell us whether the Family Court Judge explicitly refers to the availability of electronic monitoring in her decision-making?

MS THOMSON:

Not in so many words, your Honour. Judge Hambleton does refer to the application which was brought by –

KÓS J:

In the evidence.

MS THOMSON:

– the care co-ordinator and we have the care co-ordinator's evidence in his affidavit at page that both the decision to move Mr R from hospital secure to community secure care and in the making the decision to move from secure to community supervised care, the existence of electronically monitoring was crucial.

WINKELMANN CJ:

So it's difficult for us to deal with this application on a final appeal and I don't know, because I wasn't the only – forgetting as to who's handling what. I seem to have come in once everybody was underway, but is Ms Jagose going to speak about the points taken, which is that this evidence has come in so late it seems to shift the grounds on which the ESO is sought to be supported and what we're to do about that? Because there's been no opportunity to challenge or test this evidence.

MS THOMSON:

No, your Honour. Ms Jagose has ceded the entirety of the Crown's argument to me.

WILLIAMS J:

You say that with a –

GLAZEBROOK J:

Well in that case, do you want to answer that question then?

MS THOMSON:

I do. This evidence addresses the leave question directly. It fills in gaps in the Court of Appeal's reasoning which was based on an inference from the Parole Board decision continuing the electronically monitoring condition of Mr R's ESO. We seek leave –

WINKELMANN CJ:
But this is a very, this is a non-responsive answer I think.

MS THOMSON:
I hadn't quite finished.

WINKELMANN CJ:
It's just you seem to be setting off in a direction that's not answering the question.

MS THOMSON:
We seek –

WINKELMANN CJ:
So why is it emerging only now?

MS THOMSON:
It's emerging now because the High Court was operating under the misapprehension that the ESO was doing no work at all at the time that the renewal decision came up.

WINKELMANN CJ:
And why were they operating under that misapprehension if it wasn't the evidence that they had before them?

MS THOMSON:
The evidence they had – two points, your Honour. There was a misapprehension because the Court of Appeal decision confirming the second ESO being made at all had referred to the ESO being suspended under section 107P while Mr R was in hospital secure care, which was in fact the case

at the time that that decision came out. The review hearing shortly thereafter actually happened when Mr R was in secure community care and certain of his conditions, including the EM monitoring, had been reactivated. It appears that counsel at that hearing were unaware of that. It definitely appears that Mr Carlyon, the health assessor, was unaware. I won't take your Honours to it, but –

WILLIAMS J:

It's referred to in the judgment isn't it?

MS THOMSON:

Yes, and it's referred to in his Honour's judgment.

WINKELMANN CJ:

So are you saying the High Court wasn't aware that there'd been a reactivation of the –

MS THOMSON:

Yes, your Honour. The Court of –

WINKELMANN CJ:

So, Justice Osborne wasn't aware that there'd been a reactivation?

MS THOMSON:

Yes, your Honour. By the time of the Court of Appeal hearing it was apparent that Mr R was under some ESO conditions, in particular the EM monitoring one. Counsel produced as much information as she was able to at that hearing, which were documents in Corrections' possession, particularly the letter from the probation officer reactivating the conditions and the Parole Board decision extending the EM monitoring on the basis that the care co-ordinator had told the Parole Board it was very important for the operation of the CCO that he continue to have EM monitoring. When this Court's leave decision really crystalised to the question of the interaction between the ESO and the CCO, and the appellant had not produced any evidence about their interaction and

their impact on his day-to-day life, we thought it prudent to fill in the evidential gaps.

WINKELMANN CJ:

See, but that –

MS THOMSON:

This court does have the power to receive it.

WINKELMANN CJ:

I'm just worried about the process, because the Court has the power to receive it seems that the issue of the interrelationship between the regimes has been live throughout and it has been defended on the basis that there was this long-run gap, possibly a gap it was filling, and now it's being supported on a different basis in this court and there's an issue of process in terms of how, that that is unfair to the appellant, and I'm just interested to know what the Crown says about it, because I'm not sure how the Court could rely on that evidence without having been tested.

KÓS J:

Can I add something? It's something we did discuss briefly after we adjourned, which is whether one outcome in this case might be given it miscarried in the High Court that in fact it should be remitted to the High Court.

WINKELMANN CJ:

Which is what I've been wondering myself in isolation in Auckland.

MS THOMSON:

Two points in that case –

WINKELMANN CJ:

It might be – yes. I wonder if it might be an idea if we adjourn for a short period of time. I am really concerned about that and I just wonder if we should adjourn for a short period of time so I – there seems to have been a conversation that I

haven't been party to, and perhaps if we just adjourn for five or 10 minutes, and then there's an opportunity for that, for me to confer with my colleagues about a pathway forward and you can talk to Ms Jagose, because it might – yes. So that's what we'll do, I think. We'll adjourn until 12.35, and if my colleagues put it – I'll try and call you in the upstairs meeting room.

COURT ADJOURNS: 12.20 PM

COURT RESUMES: 12.32 PM

WINKELMANN CJ:

We've had a chat and we've agreed that the logical pathway forward is that we're obviously going to have to deal with the leave question because it's effectively a legal question in any case, and if the evidence that we've received is material, the late evidence we've received is material to that in a way which suggests that there should have been an opportunity to test it or produce further evidence then the solution will probably be to remit the matter to the High Court pre-hearing. So, that means we just box on today.

MS THOMSON:

Thank you, your Honour. In which case, we had come to the evidence of the care co-ordinator at paragraphs 15 and 16 of his affidavit in particular, which was that the "viability of Mr Rs access to the community" and the community secure placement to begin with and then a community supervised placement was reliant upon the retention of the electronically monitoring component of the ESO. As he says, it was "crucial to the application" to lower his status of care.

From there we move to the Crown's primary submission, which is that in combination, the ESO with its electronically monitoring component, operates to enable a more liberty-enhancing administration of Mr R's CCO. If he did not have the ESO his current care placement would not have been comfortable taking him on and he would have remained in Hillmorton Hospital certainly longer than he would have otherwise. Obviously, we can't speculate as to exactly how long.

That's really the nub of the Crown's position, is that the –

GLAZEBROOK J:

Given that relies on the evidence, do you want to – because we – given the indication the Chief Justice has just given that we would remit the evidence because we have no idea, it hasn't been tested, whether that's the case or not, do you want to concentrate on the actual provisions of the Act in terms of allowing that and the argument that having a punitive overlay to the CCO regime is not rights-compliant?

MS THOMSON:

In terms of the provisions of the Act the only relevant part is the bare discretion in section 107RA for the High Court to confirm a second ESO if satisfied that the risk threshold is met. The Bill of Rights Act overlay to that, the content to that discretion, comes through section 3 of the Bill of Rights Act. This Court's decision in *D (SC31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 that "strong justification" is needed when exercising a discretion which will impose a rights-restricting outcome on someone. It will be exceptional to find that an ESO ought not be made once the threshold of risk has been met. That's because the risk threshold in itself provides strong justification. The whole aim of the ESO regime is to protect the public and reduce the risk of reoffending.

GLAZEBROOK J:

But if somebody's already subject to a CCO regime is that actually a true and proper submission?

MS THOMSON:

So there's where the discretion would come into it is when the Court decides whether, with the additional controls on someone's behaviour which are also directed the risk that they pose through the CCO regime, the ESO regime with its inherent breaches of section 26(2) is also, is actually justified as necessary in the strong way that is required.

WINKELMANN CJ:

Don't you face the difficulty that if you're saying the justification – I imagine you would accept the CCO is adequate, as Mr Edgeler submits, to manage the public safety issues? Not to take – putting to one side the issue of where he's placed, whether he's placed in secure or supervised care, but Mr Edgeler says that there's adequate compulsive content in that regime to protect the public, so therefore your real justification is not public protection but enhancing his liberty and he says he doesn't want his liberty and if that's enhancing his liberty he doesn't want it enhanced in that way.

MS THOMSON:

Yes, your Honour. At its very highest the CCO regime can control someone's behaviour in a way similar to a PPO. It can provide far stronger detention powers and supervision powers than an ESO ever could. Which is why the Crown's –

KÓS J:

Sorry, the CCO can?

MS THOMSON:

A CCO can, your Honour.

KÓS J:

Yes.

MS THOMSON:

Which is why the Crown's submission here has been in the actual circumstances of Mr R's case, the way that his ESO and CCO are being administered he has the benefit of a much more lax regime under the CCO than someone with his risk profile could warrant if there were no ESO component over the top.

WINKELMANN CJ:

What about the fact that he doesn't want that? So the only justification is his liberty interests which therefore – which is quite a strange argument. You're saying that the imposition is punitive, rights-restricting regime is justified by his liberty interests and he says he doesn't want it, so how do you say that plays in?

MS THOMSON:

Well, your Honour, that could be another reason to remit this to the High Court if that becomes an important consideration. We don't have any evidence from Mr R about his desires beyond what we've had from the bar. We do have some references in the Parole Board and health assessor's reports as well, but we don't have anything directly from him. There's also the open question of his capacity to consent to restrictions on his liberty. There are some things to which people can't consent, grievous bodily harm, that type of thing. Whether stricter detention which is not absolutely because of the other regimes that the state has subjected you to is something you can consent to is a difficult philosophical problem.

WILLIAMS J:

The – one of the problems with taking that reasoning further along the track is that this safety belt, if you like, it's kind of held up as a sword of Damocles when you've already got two security guards, and the question then becomes the structural question of how long do you need the penal system in place just to be really really really really sure? There's got to be some doubt about that, particularly if as seems – appears to me anyway it should have been the case, there should be a specific provision in the IDCCR so that that therapeutic monitoring can be undertaken in a way that is rights-enhancing, just as you say.
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MS THOMSON:

It is operating as a sword of Damocles in that sense your Honour but it's also enabling him to be in this placement in the first place.

WILLIAMS J:

Because of the judgment call that's being made about, you know, we really, really, really need more than two security guards walking around town with him.

MS THOMSON:

Because we know that he meets the threshold for not just an ESO but a PPO as well at that very high risk of imminent harm.

WILLIAMS J:

Yes, but he's 68.

MS THOMSON:

The only way to know whether or not that risk of harm will eventuate, is if he is removed from the care regime, the supervision regime, and yes, though, and that's precisely what the aim of the regime is to prevent, is to prevent him having the opportunity to commit those – to crystallise the risk that he poses. The regime is there to prevent him creating more victims.

WILLIAMS J:

Yes, well I guess the point, how much, what's the minimal intrusion, right? That's the test under BORA. Was the minimum intrusion necessary to protect appropriate, in this case, community safety considerations, given that he is not allowed out of his residence without, I think it is two other security people with him at all times, and the only thing where we are attempting to mitigate the risk of, is a 68-year-old man running away.

MS THOMSON:

I've heard him described as spritely your Honour.

WILLIAMS J:

Have you?

WINKELMANN CJ:

I mean the evidence actually is that he doesn't really go out anymore anyway. So, yes it's all very factually intense, but you accept that the CCO regime is

actually has all the armaments needed to keep the public safe. The only rights justification therefore, given that that, this additional ESO is the rights, the liberty-enabling aspect and what's said in response to you is that, well, he doesn't want this liberty- enabling aspect and you say, well that's a factual issue because, in fact, we don't really know what his instructions are on that nuanced point?

MS THOMSON:

Or what he has capacity to consent to, yes your Honour. Can I turn back briefly to your Honour Justice Williams. If Mr R no longer met the risk threshold for an ESO, he can apply to cancel it at any time under section 107M. So the question isn't whether he doesn't meet the threshold anymore and that's why this is a greater than minimum impairment. It's whether having met that risk threshold, being actually at a high risk than sexual re-offending, he is under the least restrictive regime.

WILLIAMS J:

Yes, well that last part of that sentence is the key being a person of high risk of relevant recidivism is the CCO regime enough to manage that risk. That's the question. Because anything beyond that, it might be said, is intrusive and then triggers BORA and the analysis under BORA might go one way or the other, but the analysis is necessary.

MS THOMSON:

But the Crown says don't ignore the fact that the CCO regime can be far more restrictive than the ESO regime.

WILLIAMS J:

That's my point and it counts against you.

KÓS J:

I mean the answer to Justice Williams' question must be affirmative. A CCO must be adequate to protect the public safety, you've really accepted that.

You're arguing for the ESO on the basis it's liberty-affirming. But if the CCO is over employed by the authorities, he's entitled to apply for review.

O'REGAN J:
The ESO you mean?

KÓS J:
No, the CCO. In other words if they are over enforcing the CCO provisions, he can seek review of the hospital or the care facility's conduct.

WILLIAMS J:
Of the plan.

KÓS J:
Exactly.

WILLIAMS J:
Of the CARP. I can't remember what those words – you know what I mean.

MS THOMSON:
It is the CARP.

KÓS J:
What does it stand for?

MS THOMSON:
Care and rehabilitation plan your Honour.

KÓS J:
Ah, rehabilitation.

WILLIAMS J:
Thank you.

MS THOMSON:

Not fishing.

WINKELMANN CJ:

Did you have an answer to that Ms Thomson, because I have three questions I think you've still got to answer. Well two questions you've got to answer and one additional one I'd like you to answer.

KÓS J:

The answer to mine first?

WINKELMANN CJ:

Yes, what was your question Justice Kós, which is that they can apply to enforce the – they can apply for review if the –

KÓS J:

Correct.

WINKELMANN CJ:

– CCO regime is used?

KÓS J:

CCO must be adequate surely to meet public protection needs.

MS THOMSON:

The answer is that a CCO at its highest level would be adequate to meet the public protection needs. Whether that's in fact the least liberty-infringing regime available is what the Crown says the question is for the Court addressing the ESO review.

WINKELMANN CJ:

Justice Kós' point is that the Family Court could decide that they could impose the least rights-infringing regime under the CCO?

MS THOMSON:

But it wouldn't have the option of having a CCO and electronic monitoring.

WINKELMANN CJ:

Yes, I think we've got that point. So the three, the three questions I have for you, the first is a – is something that hasn't been discussed yet which is what the – we've talked about the future pathways and the possibility that there'll be no application to extend the CCO regime. I'm interested in what the statutory requirements are on the decision maker, the care co-ordinator I think in making that decision. Do they – should they make that if there's a public safety issue?

My second question is, does the Crown still maintain the belts and braces argument that was used to support the ESO in the High Court and the Court of Appeal?

MS THOMSON:

Regarding the time of the – the term of the ESO?

WINKELMANN CJ:

Yes, so the basis on which it was – yes. The fact that at the end of the CCO if the ESO's still there you can – can be revived.

Then the third question is Mr Edgeler's argument about that this is a happenstance, is just the result of magic of the order the applications were made in. So those are – so there's two issues outstanding that haven't been dealt with, which is whether the Crown still maintains the position it argued in the High Court and Court of Appeal courts justifying the ESO. The second is meeting Mr Edgeler's argument about the order of the application. The third question is one which I'm interested in which is, you know, how much – is it a realistic – it's relating to the backstop point, is it really realistic that there's a risk that a man who's high risk will have now made, application made against him for continuation of a CCO or, failing that, a PPO leading down the CCO pathway.

MS THOMSON:

If I could answer those in the order I think the answers will be the simplest.

WINKELMANN CJ:

Yes.

MS THOMSON:

The first is the belts and braces one. The Crown accepts the Court of Appeal's reasoning that if the CCO were to come to an end the PPO application with its section 12 referral would come back into force and the pathway would lead back to Mr R being subjected to a CCO, or not being subjected to a CCO if that were the decision of the assessors in the Family Court.

GLAZEBROOK J:

I'm sorry I don't think I quite got the round logic of that.

MS THOMSON:

The PPO application ended in Justice Whata making a decision under section 12 to suspend the PPO application while the Chief Executive considered whether to apply for a CCO under section 29 of the IDCCR. When Mr R in fact became subject to a CCO, not through that process but through seeking that, the PPO was suspended by operation of section 107(4) of the Public Safety Act. That means that the direction under section 12 is also suspended and when Mr R is no longer detained under a CCO they will come back into force.

The Chief Executive would then need to make a decision about whether to pursue the referral for a CCO and depending on the why the CCO comes to an end, it may be that it would not be appropriate to apply for a renewal, but there is a means by which to extend the CCO if it does come to an end. So we no longer say that the ESO has to be (inaudible 12:49:36) just in case the CCO ends. There is a mechanism by which to put it back into place.

KÓS J:

Presumably the other alternative being a PPO.

MS THOMSON:

Precisely, if the CCO application under section 12 were not successful. Obviously, that would not be the more liberty-enhancing outcome for Mr R.

The second question is the arbitrary order of the applications. I found this difficult to follow because of the linear nature of time and the order in which the ESO and PPO legislation came into force. Mr R was able be to subject to an ESO because his sentence of imprisonment ended at the time that the ESO legislation came into force. It was then some 10 years that the PPO legislation became available.

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Mr R was subject to intensive monitoring under his ESO because the CCO was no longer available to supervise him. When that ended it was apparent that continuing supervision would be necessary and that is why a PPO application is made. There was no possible universe in which Mr R could have had an ESO application at the same time as a PPO application, and so the counterfactual of Mr Chisnall simply doesn't arise.

WINKELMANN CJ:

Yes. I think the point that is made by Mr Edgeler is that it shows that there's a contemplation that the mainstream at least of the legislation, there's – the statutory scheme doesn't really contemplate CCOs and ESOs being in force at the same time, and that really the interaction – the provisions that suggest that they can be dealt with directed at the mental health provisions rather than IDCCR provisions.

MS THOMSON:

That requires a radical reading down of section 107P for which I can't see any justification. The Parole Act clearly contemplates that the two will co-exist and provides for the ESO conditions to be suspended during the period of legal detention under a CCO and the reactivation of any conditions that are necessary to continue managing the ESO side risk.

WILLIAMS J:

But it does indicate that the fit is not entirely comfortable because it controls it in ways that it doesn't say both can run simultaneously, it says be careful about managing how these two potentially conflicting systems interact with one another.

MS THOMSON:

The other parts of section 107P deal with other means of detention for someone on an ESO.

WILLIAMS J:

Yes, yes.

MS THOMSON:

So Parliament had in mind someone under an ESO could be detained in any of these ways. This is what will happen in each of those situations.

WILLIAMS J:

That's right, but it freezes these things in particular circumstances which indicates Parliament was aware of the potential conflicts and didn't want to double up except in particular circumstances.

MS THOMSON:

Which it dealt with by giving the discretion to the probation officer.

WILLIAMS J:

Yes, but that – it's an indication that there is a problem here that needs to be carefully managed because rights are being intruded upon, BORA is in play, et cetera, et cetera. So you can read the section 107P provision as confirming that we've got a problem here and we have to look very closely at it, we can't assume anything.

MS THOMSON:

Or it's an indication that, as the Crown says, an ESO and a CCO could have conditions which operate together for the benefit of the person subject to both.

WILLIAMS J:

Yes.

MS THOMSON:

If a careful decision is made then –

WINKELMANN CJ:

Well that (inaudible 12:53:37) is it, the provision –

MS THOMSON:

I beg your pardon, your Honour?

WINKELMANN CJ:

That provision that says you deal with the PPO first and you don't deal with the ESO until you've resolved the PPO doesn't indicate that the legislation contemplates that as a mainstream use of the legislation.

MS THOMSON:

It's – I don't believe there's ever been a PPO application yet that resulted in a CCO. There are currently people subject to –

WINKELMANN CJ:

No no, an ESO. The legislation that Mr Edgeler took us to which was the section 107GAA, says that you can't go onto the ESO application until you've resolved the PPO application.

MS THOMSON:

Yes, but you do need to be subject to an ESO – one of the situations in which you become eligible for a PPO is if you are currently subject to an ESO. So, GAA is only dealing with someone who is currently ending their sentence of imprisonment or just come back from Australia under the returning offenders regime and is then faced with an application for a PPO and an ESO simultaneously.

WINKELMANN CJ:

Which provisions of the Parole Act relate to that, people who are subject to an ESO and coming under the PPO?

MS THOMSON:

That's the Public Safety Act, your Honour. The eligibility provision is I think section 11 at the start. Not 11. Six. No. Not six either sorry. It's seven. Is the eligibility criteria and the threshold.

GLAZEBROOK J:

And one of the issues in *Chisnall* I think is that it's not the least restrictive because if you were allowed to continue with the ESO provisions then the PPO wasn't needed. So these are very complicated provisions that haven't, it might be said, been thought through totally carefully.

MS THOMSON:

I would hate to ascribe to Parliament anything less than total thought your Honour.

GLAZEBROOK J:

Well I think the implications in certain cases, I think, become clear when you see those cases rather than when you're looking at it…

MS THOMSON:

As a whole.

GLAZEBROOK J:

As a whole.

MS THOMSON:

I haven't looked for that specifically off the top of my head your Honour, but they would obviously be inconsistent because someone subject to a PPO would be detained, and someone who is detained can no longer be subject to an ESO. The ESO would have to be suspended at least, but I suspect it would also be –

WILLIAMS J:

One of the prerequisites is there's an ESO in place, of course, in section 7.

MS THOMSON:

Could be, yes, as in Mr R's situation.

WILLIAMS J:

Yes.

WINKELMANN CJ:

But that's like the starting point of my question. If they're eligible for a PPO because they've got an ESO in place, is there explicit treatment of what happens to the ESO when the PPO is imposed.

MS THOMSON:

I might need to come back to your Honour on that. There must be somewhere in the Act because…

WILLIAMS J:

There's probably no need for it.

MS THOMSON:

My learned junior is offering to look for me.

WILLIAMS J:

I mean it just gets swamped, doesn't it?

MS THOMSON:

Precisely. Is it 107P, that seems to deal with the tension under the Corrections Act rather than the Public Safety Act.

WILLIAMS J:

These provisions and the management of interaction between the systems points up the problem that from a public sector point of view you mentioned, which is that these two regimes come out of different money pots and there are different deciders.

MS THOMSON:

Who are operating from different frameworks.

WILLIAMS J:

Operating for different purposes, and that's almost always a recipe for problems that need to be carefully managed. It seems to me that's what we should take out of this.

MS THOMSON:

And some comfort from the new evidence which your Honours are not considering, that the interaction of Mr R's health and Probation – the people who are looking after him are talking to each other. There are monthly meetings in which they all discuss how he's going, what they ought to change, what's going to happen in the future.

WILLIAMS J:

It does seem a little strange though because there wouldn't need to be monthly meetings if it was operating in one system.

MS THOMSON:

There are, in fact, still monthly meetings on either side. It's just that they've come together because he's subject to both.

WILLIAMS J:

Yes I understand but if the disability team had control, then that would make thing simpler. In a system, it's not that large, controlling actually very few people.

MS THOMSON:

Mr R is in a very small subset of a very small population.

WILLIAMS J:

Exactly.

MS THOMSON:

That does lead me, though, to the Chief Justice's first question about the future pathway under the CCO. Section 85 of the IDCCR provides for the extension of a CCO for a further term on the application on the care co-ordinator. That test is contentless. There is a provision if a secure order is being continued, that must be necessary – I'll just bring up the exact phrase, or my learned junior will bring up the exact phrase in section 85. If the person no longer poses a serious danger to the health or safety of their own health or safety or that of others, then they can be moved down from secured to supervised care. But there's no content to whether a supervised order continues.

WILLIAMS J:

Where is, what section are you…

MS THOMSON:

Section 85, subsection (2).

O'REGAN J:

It's on the screen.

MS THOMSON:

Oh it is on the screen now.

WILLIAMS J:

I'm analogue.

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MS THOMSON:

I agree your Honour, safer. The leading case which does provide content to that is *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641, which is in our bundle, where the Court of Appeal looked back to the principles in section 11 to see what the Family Court ought to be balancing when addressing section 85, and if we go to section 11. Every discretion under the Act needs to be guided by "…the health and safety of the care recipient and of others; and (b) the rights of the

care recipient." The health and safety of others includes, incorporates the undue risk, to the community that someone might pose. The rights of the care recipient include their liberty interest and in *RIDCA v VM* the Court of Appeal contemplated the situation where someone is entered into the IDCCR world, just squeaked by essentially. They committed very minor offending. They had an intellectual disability, they ended up here. They pose a small risk to the community but not a great one. Over time there is less and less justification for continuing their compulsory care order because their liberty interest expands over time in those finely balanced cases. For someone like Mr R, if you are not also subject to an ESO, which provides some layer of protection against his risk to the community, his risk is not at that level. He came into this through minor offending, but that doesn't reflect the risk that he actually poses, the sexual offending, to the community. So it's never –

WINKELMANN CJ:

But really that –

MS THOMSON:

– going to be finely balanced against his liberty interest. My apologies your Honour?

WINKELMANN CJ:

But when you look at section 11 that would suggest that anyone taking a decision under this would have to take into account public safety.

MS THOMSON:

Yes your Honour. They do.

WINKELMANN CJ:

Can I ask then another question. You said, referring to the evidence which we're not taking into account, well, if we don't take that evidence into account then you've got no grounds to resists the appeal, have you, because you've given away your belts and braces ground in which it has really been upheld, the ESO has been upheld to this point.

MS THOMSON:

We still have the same position which was before the Court of Appeal, which was the documents available to Corrections, including the Parole Board decision which records the care co-ordinator's view that the electronic monitoring was important for Mr R's current placement in the community. All that we've done is try to cure the logical leap which the Court of Appeal made from that Parole Board decision back to the care co-ordinator's actual decision-making, by providing the care co-ordinator's actual reasons for his decisions.

WINKELMANN CJ:

Where does the Court of Appeal make a leap, because it seems to me the more I read the Court of Appeal decision, where does it make that leap?

MS THOMSON:

Leap is a strong word. They drew an inference which was available to them on the documents that they had. But it would be tidier, and is now tidier that we do have the first-hand account from the care co-ordinator.

WILLIAMS J:

Are those all the answers?

MS THOMSON:

Those are all the answers to the Chief Justice's three questions.

WILLIAMS J:

The great three questions, yes.

MS THOMSON:

And I see that we have now extended our half day.

WILLIAMS J:

Well you lost a chunk of it because there was an offsite meeting, and I have a question anyway.

MS THOMSON:

Marvellous.

WILLIAMS J:

So is the concurrent sets of controls situation discriminatory?

MS THOMSON:

No. Because the difference in effect is because Mr R has offended in the past, not because of his intellectual disability.

WILLIAMS J:

What if he's offended because of his intellectual disability?

MS THOMSON:

Then the purpose of the legislation is all the more brought into play.

WILLIAMS J:

But that's not whether it's discriminatory, that's whether it's reasonably justified.

MS THOMSON:

Perhaps your Honour could expand upon your question?

WILLIAMS J:

Well it's at the heart of the BORA analysis.

MS THOMSON:

Is your Honour concerned about the imposition of the ESO or the IDCCR?

WILLIAMS J:

Well the argument is about the concurrent imposition of two controls. So the ESO –

GLAZEBROOK J:

That's slightly the tricky part here, isn't it, because the CCO is not really before us and there are much more difficult arguments as you've noted in terms of

minor offending can get you into the regime and what's the difference between minor offending getting you into the regime and somebody who hasn't offended but poses a risk in terms of future offending, and that would be the discrimination side and also the justification side probably.

But those issues arise in *Chisnall*, to a degree, but not in the intellectual disability, because the intellectual disability is even more difficult because as you say there's no treatment for intellectual disability.

WILLIAMS J:

The question is, is this person subjected to double controls because of his intellectual disability? If so, is it to his material disadvantage? If so, is that disadvantage demonstrably justified? So, on the first question, what do you say?

MS THOMSON:

The first question is he's subjected to two controls because of his offending behaviour, not because of his intellectual disability. There are people who pose the same risk but aren't subject to the regimes. It's unthinkable that Parliament would require every member of the population to undertake a risk assessment and then divvy them up under different control regimes according to that outcome. We need –

WILLIAMS J:

But this is – I mean one of his controls is the Intellectual Disability et cetera Act, so obviously that's focused on people with intellectual disability. The jump to the ESO was because, according to the submissions, there would come a day where his concerns could be more easily controlled under the ESO regime I think you said. So, clearly it's related to the same problem.

MS THOMSON:

The –

WINKELMANN CJ:

So you've got – a counterfactual you have to answer is would a person who is not subject to an intellectual disability be subject to a dual regime, I suppose?

MS THOMSON:

Well, no, because they couldn't qualify for the IDCCR. But the difference for both of them is that he's entered them through criminal behaviour. From the ESO it's because of his original conviction. For the IDCCR, it's because of his involvement in criminal offending which then led to him going this way under CPMIP.

WILLIAMS J:

Yes, there's a trick –

WINKELMANN CJ:

My counter –

WILLIAMS J:

– it's a tricky issue. It's a tricky issue, because that dodges the point in a sense. It's like saying a blind person is not allowed into this building, not because they're blind but because they're clumsy. Or, you know, legislation that said women cannot enter this particular building is not because they're women but for some other reason. I mean, you've got to get to the base reason, don't you, and then manage your analysis around that. Once you put in another group of disabled people you've kind of solved your own problem.

WINKELMANN CJ:

Can I just say, wouldn't the answer actually be yes he could be? Because he could be subject to a public protection order which is what they were trying to do.

MS THOMSON:

Only if he weren't properly managed under the IDCCR though.

WINKELMANN CJ:

No, but that's the counterfactual. The counterfactual is people who aren't subject to the IDCCR. To work out, you know, where there's discrimination on one of the permitted grounds.

MS THOMSON:

The comparative group here is slippery. It's either people who have offended like Mr R but don't have an intellectual disability, in which case he would most likely be under a PPO, or it's people who do have an intellectual disability but haven't offended, in which case they won't be under either an ESO or an IDCCR order.

WILLIAMS J:

Right, so if you take – you'd have to take people with the same propensity who are not intellectually disabled to have an appropriate comparative group, otherwise you run –

MS THOMSON:

In which case, we do end up at the PPO route and then there's no material disadvantage.

WILLIAMS J:

Right, so you get a PPO regime but it's one regime.

MS THOMSON:

But there is a material disadvantage because that is the most liberty-restricting –

WILLIAMS J:

Well that's the next question, we're just walking this through the steps right?

MS THOMSON:

Yes. Right, if that is the comparator group then –

WILLIAMS J:

So it's clear there is differential treatment because this guy's getting controlled twice. The circumstances where people without intellectual disability would have only been subject to one control.

WILLIAMS J:

The next question is, is that to their material disadvantage, and that's where your argument about this as rights-enhancing fits, isn't it?

MS THOMSON:

Yes. Well, at least an analogous argument to it, yes, that a PPO regime is far more restrictive than the regimes to which he is currently subject.

WILLIAMS J:

Doesn't that means you're arguing there's no material disadvantage here?

MS THOMSON:

Yes, I am, your Honour, thank you.

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WILLIAMS J:

Yes, and then even if there is a material disadvantage what do you say about section 5?

MS THOMSON:

That the statutory purposes do still justify the dual regimes to which Mr R is subject.

WILLIAMS J:

What do you mean by –

MS THOMSON:

That the statutory purposes of protecting the public, which is a purpose under both the Parole Act and the IDCCR –

WILLIAMS J:

Yes.

GLAZEBROOK J:

It probably only works though if one is more rights-enhancing, doesn't it? Because otherwise, because if one gives you more restrictions on your liberty than the other one, i.e., the criminal one gave you more restrictions on your liberty than the CCO then it couldn't be justified, could it?

MS THOMSON:

But both of them together are less rights-restricting than the PPO.

GLAZEBROOK J:

No, I understand that that –

MS THOMSON:

The question that we're dealing with is the combination of them both rather than either of them separately.

WINKELMANN CJ:

Well Justice Glazebrook (inaudible 13:10:59).

GLAZEBROOK J:

No but I think the point is that it only works if one makes it less restrictive rather if the other one makes it more restrictive, doesn't it? Your argument.

MS THOMSON:

I'm sorry, I'm afraid I've lost it.

GLAZEBROOK J:

So if the criminal provisions make it more restrictive than the CCO then your argument wouldn't work, would it?

MS THOMSON:

Yes, but that I think is –

WINKELMANN CJ:

I don't think you advance it anyway, do you? You just don't advance that argument.

MS THOMSON:

No, no.

WINKELMANN CJ:

That's not – you don't advance an argument that it's just –

GLAZEBROOK J:

No, exactly, you're advancing the argument that they are fine as long as one of them makes it less.

MS THOMSON:

Yes.

GLAZEBROOK J:

Well certainly the criminal ones make it less rights restrictive.

MS THOMSON:

We certainly wouldn't be making this argument if the ESO were making the situation worse.

GLAZEBROOK J:

Yes.

WILLIAMS J:

So right, so your analysis really loops you back to step 2, which is to say section 5 is really only met if at stage 2 there is no real material disadvantage. In fact, there is a material advantage because –

MS THOMSON:

Then you don't need to go to section 5.

WILLIAMS J:

You don't need to go to section 5 because if there was a material disadvantage –

MS THOMSON:

Then you'd need a justification.

WILLIAMS J:

– there's no justification for anything more than the CCO regime because that's enough.

MS THOMSON:

I think that might be right. But the CCO regime would be at the higher level of detention.

WILLIAMS J:

Quite, yes.

MS THOMSON:

So it would not in fact –

WILLIAMS J:

That's, well that's –

MS THOMSON:

Oh, apparently paragraph 5 of our written submissions deals with this.

WILLIAMS J:

Yes.

MS THOMSON:

The aim that BORA drives us to is what is the least restrictive outcome for this person, and that requires for close analysis of the actual facts of how he is being managed under both.

WILLIAMS J:

See, I'm just suggesting to you that your argument is really at step 2, not step 3.

MS THOMSON:

Yes.

WILLIAMS J:

You're actually saying there is no material disadvantage at all, so although there is a differential treatment it is not discriminatory.

MS THOMSON:

On the discrimination point –

WILLIAMS J:

So you don't get to section 5.

MS THOMSON:

Absolutely your Honour, yes.

WILLIAMS J:

Right, okay. Thank you.

GLAZEBROOK J:

Then we still haven't said in – and understand it's complicated what Mr R's views may or may not be. Again, note that.

WINKELMANN CJ:

Okay, so those –

MS THOMSON:

I'm grateful for your Honour for making me not the only one to mess up.

WINKELMANN CJ:

Are they your submissions Ms Thomson?

MS THOMSON:

Unless the Court has any further questions.

WINKELMANN CJ:

I fear we've questioned you quite a lot.

MS THOMSON:

As the Court pleases.

WINKELMANN CJ:

Thank you very much. So, Mr Ellis how are you going to – how do you wish to handle the reply? Are you going to handle it or Mr Edgeler? You probably already told me that. And you're on mute, Mr Ellis. I don't know if that's – you have to handle that or we do.

MR ELLIS:

That's better?

KÓS J:

Yes.

MR ELLIS:

Right, okay.

WINKELMANN CJ:

We can hear you better.

MR ELLIS:

I haven't had an opportunity to speak to Mr Edgeler so I don't know what else he might want to say in addition to what I want to say. I've got five minutes I suppose I want to say, and it's probably easier to ask him to see what he wants to say rather than me asking it, which will take longer.

WINKELMANN CJ:

I should say that I'm just proceeding on the basis that we're going to sit through and finish this. I haven't had a chance to discuss that with my colleagues who may be passing out from hunger, but let's just carry on.

MR ELLIS:

Well that's great. So, I wanted to say just something briefly about the chronology and what my learned friend Ms Thomson said about it. She was discussing – it's on page 27 of the respondent's submission, and she was discussing the two boxes at the bottom of the page, March and October 2003, and saying diagnosed with an intellectual disability and it is the context of this.

The Intellectual Disability Act was not assented to until the 30th of October 2003, and apart from part 2, which is principles or purposes, the rest of it, the bulk of it, didn't come into play until September 2004. So what was going on in 2003 must clearly then only be the tension in a civil scheme not a criminal scheme, and further Ms Thomas said that section 85, which allows the extension of the three year term, was the legislative to provision and the leading case was *RIDCA v VM*. Well in *J* in the Court of Appeal last October or November, judgment reserved, that was challenged, both section 85 and *RIDCA*, and we await the decision which will probably come your way. Then lastly on that the Committee Against Torture in responding to the New Zealand's Seventh Periodic Report last month in Geneva, has a lot to say about, intellectual comes up 10 times in the report. For example, it is further concerned, it reported arbitrary practices which disproportionately affect Māori and Pacifica inmates, and inmates with intellectual or psychosocial disability.

Finally, it's concerned with a high rate of incarceration of inmates with disabilities, in particular intellectual or psychological disabilities, and it calls for the, if I can find it, calls for the repeal of, here we go, consider repealing provisions within the Intellectual Disability (Compulsory Care and Rehabilitation) Act does allow for persons with disabilities to be detained for periods of time exceeding the maximum amount at sentence, they will be liable to in the criminal justice system and more. So that, I mean I would have put

that in if they'd reported it when I wrote my submissions, but I think it is important, so perhaps I could have leave to just email that report to...

WINKELMANN CJ:
Yes, you have leave to file that.

MR ELLIS:
Right and –

GLAZEBROOK J:
Although it's not actually before us, that particular point is it, because the CCO is accepted.

WINKELMANN CJ:
It's a UN document in any case, isn't it, it's a public –

GLAZEBROOK J:
No, no, it's just doesn't get us anywhere, is what I'm suggesting, because the CCO itself is not challenged under this proceeding. Or this appeal.

MR ELLIS:
Well in the chronology further you'll see on page 28, the next page, what's going on here. The 29th of November 2005, CCO imposed, and then August 2011, so in six years we have an intervening masturbation event. CCO discontinued because no identified rationale for a further extension in a compulsory care order with little scope for rehabilitation, and with the external controls required to manage his risk to continue until the end of the ESO, and then the Parole Board imposed special conditions. Then breaches his ESO, which from recollection was he drank two beers together with staff, which he'd been doing for six or seven years, always thought he'd be in prison, and so on. But you'll see some stages the CCO isn't required at all and at other stages it is. So I think it is in –

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WINKELMANN CJ:

File it, go ahead and file it Mr Ellis, yes. Go ahead and file it.

MR ELLIS:

Thank you. Okay, that's my bit. I don't know if Mr Edgeler had anything to say (inaudible 13:20:21) haven't spoken, so perhaps you could ask him.

WINKELMANN CJ:

Mr Edgeler, do you have anything to say?

MR EDGELER:

One matter, thank you your Honour. It was one matter that came up during my friend's submissions and I can't remember, there was a question or a suggestion that perhaps the High Court miscarried on a point of evidence about whether the Court knew that Mr R was – sorry, that's three now.

WILLIAMS J:

It's catching.

GLAZEBROOK J:

We've all done it now, Mr Edgeler.

WILLIAMS J:

No we haven't.

MR EDGELER:

Whether he was electronically monitored at the time that the ESO 15 year review was considered, so I have four documents to take you through and I've got them all hopefully in order ready for me. First is paragraphs 81 and 82 of the High Court decision, so in the bundle –

WINKELMANN CJ:

Well do they show – they show that they knew he was electronically monitored, do they?

MR EDGELER:

Yes, so 81 and 82 of the High Court decision on the screen now. So the cross-examination at page 14 on the screen now, so particularly at the start. Mr Carlyon: "I'm not aware of any person only under an IDCCR who has electronically monitoring", so people under an ESO can be, but people who are only under the IDCCR, Mr Carlyon was not aware of anyone.

Third document is that Parole Board decision, so it's something that will make a little more sense when you re-look at the High Court decision. The two lawyers for Mr R and for the Chief Executive, or rather for the parole officer at the Parole Board decision which was debating should the electronically monitoring condition continue were the same lawyers as appeared in the High Court.

The fourth one, not in the bundle, but I hope the Court will accept this, is paragraph 5 of my –

WINKELMANN CJ:

Sorry, we decided that that report of the Parole Board was before the High Court, was it?

MR EDGELER:

Yes that occurred before, so it was 10 July and the Court of –

WINKELMANN CJ:

But was it before? But was the report –

MR EDGELER:

The decision was not in the High Court. The order that things happened was it was before the decision, and finally, so this is a matter in the High Court not in the bundle, but these were my written submission in the High Court, paragraph 5: "Mr R thinks about things in concrete terms. The main effect of the ESO has on his life is that it manifests itself in a condition that he is electronically monitored. He would like the electronic monitoring bracelet to be

removed. That itself was not before this Court. That is a matter for the Parole Board, which it confirmed last year, but the Court has the power to discontinue the ESO, it should."

There was no miscarriage. The Court was well aware. That was very firmly a submission at the beginning, at the end, why are we even here? Mr R wants me to argue this because he is electronically monitored and he doesn't want to be.

Perhaps in the years since his ability to give instructions firmly on issues like that has waned, but it was very clear to the Court in submissions and to the witnesses and to the lawyers who were present that electronically monitoring was happening at the time the High Court looked at this in the 15 year review.

KÓS J:
That was the submissions in July '21?

MR EDGELER:
Yes.

KÓS J:
Thank you.

MR EDGELER:
Unless there's anything else, that's what I have in reply.

WINKELMANN CJ:
No, thank you, Mr Edgeler.

Well, thank you counsel for your submissions and we will take some time to consider our decision. Court will now adjourn.

COURT ADJOURNS: 1.24 PM