

IN THE SUPREME COURT OF NEW ZEALAND

SC 17/2005

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **EDWIN CHRISTOPHER BROWN**

Appellant

AND **THE ATTORNEY-GENERAL**

Respondent

Hearing 17 August 2005

Coram Elias CJ
Gault J

Counsel C R Carruthers QC and A Shaw for Appellant
A Butler and V Sim for Respondent

APPLICATION FOR LEAVE TO APPEAL

10.00 am

Carruthers May it please Your Honours I appear with Mr Shaw for the appellant.

Elias CJ Thank you Mr Carruthers, Mr Shaw.

Butler May it please Your Honours, Butler and Sim for the Crown.

Elias CJ Thank you Mr Butler, Ms Sim. Right, Mr Carruthers.

Carruthers May it please Your Honours, the substantive argument in the case is summarised in the written submissions that have been filed. The argument which is advanced orally to illustrate the general or public importance of the case is summarised in paragraph 56 of the submissions. And the issue that arises from that paragraph is the inconsistency and now lack of clarity on the principles which apply in Bill of Rights cases. So that paragraph is taken as an illustration that really encompasses much of the particular argument in the case. There

are four features of paragraph 56 that I want to deal with which, in my submission, demonstrate general or public importance.

Elias CJ Well there may be matters of general or public importance Mr Carruthers, stated like that. But what you really need to convince us of is that they realistically arise in the present case.

Carruthers I understand that I must get to the interests of justice in the present case. Where my submission leads for example on the first of those four features is that the approach which the Court of Appeal has adopted to the Legal Services Act is inconsistent with the decisions in **Moonen (Moonen v Film and Literature Board of Review [2000] 2 NZLR 9)** and **Drew (Drew v A-G [2002] 1 NZLR 58)**, to take two examples. That what the Court of Appeal has done is to treat the Legal Services Act and the subordinate legislation and the Regulations and the Instructions as a code unaffected by the Bill of Rights Act.

Elias CJ They say in the Judgment it's explicitly acknowledged that the legislation needs to be interpreted in conformity with the Bill of Rights Act.

Carruthers Well Your Honour the reference to the Bill of Rights Act arises in paragraph [56] where the Court is dealing at that stage with the statutory scheme and between paragraphs [48] and [56]. And all that is said is that in determining exceptional circumstances, the decision-maker would be bound to take into account the legal aid defendant's rights under the Bill of Rights but that is no more than a factor in the overall scheme. Well in fact it is. Every provision of the Legal Services Act has to be read in conformity with the Bill of Rights.

Gault J Where is the disconformity for a start? What's the section that you say has been interpreted in disconformity?

Carruthers The section that I, the issue really arises under the Instructions where one deals with total remuneration. And it arises in relation to the jurisdiction of the Committee on claims for disbursements.

Gault J Is there a challenge to the validity of them as being inconsistent?

Elias CJ No.

Carruthers Yes, I'm sorry, there was an explicit challenge in the written argument.

Gault J Well we just can't find this in the papers. I mean this is wholly news to me that now there's a challenge to the validity of Regulations.

Elias CJ There's none in the Statement of Claim Mr Carruthers.

- Carruthers Well I know the criticism that was properly made of the Statement of Claim by the Court of Appeal at a point in the case where the opportunity to deal with it was probably long since past. But all.
- Gault J You can't start raising a whole new case at this level can you?
- Carruthers Your Honour it's not a whole new case. This is, a part of the complaint with the Court of Appeal judgment is that it really has not properly picked up the appellant's case at all in relation to a whole series of.
- Gault J Well why didn't you go back and ask them to recall and deal with the case on its proper basis? We're getting no assistance from a judgment of the Court of Appeal on what would appear to be extraordinarily important issues. That's most unsatisfactory.
- Carruthers Well Your Honour if I've adopted the wrong procedural course I may be caught with that unless this Court gives some direction that that's the proper course for me to follow, in which case we would have to go back and take that course. But to say that there was no challenge to the subordinate legislation is simply not correct. And there is in fact an explicit paragraph of the written submissions filed in the Court of Appeal that challenges the Instructions. And I'm instructed that orally the challenge went to the Regulations that were supervening on the Instructions.
- Elias CJ But how could the Court of Appeal have dealt with it on that basis?
- Carruthers How could the Court of Appeal?
- Elias CJ Yes. If it hadn't been pleaded.
- Carruthers Well it was a, well Your Honour it was a legal argument. And the underlying issue that the Statement of Claim raises is that the appellant had been denied his fair trial rights. Now how legally one gets to that position is exactly that, a legal argument. And there is an issue as to how far the Statement of Claim should plead a matter of law.
- Elias CJ Well, but it may turn on a matter of fact. Because if the challenge is that the Regulations were unreasonable, there may well be contextual material that would be produced before the Court if notice had been given of it.
- Carruthers Well in my submission it's difficult to see that where what is being alleged is an entitlement to have forensic tests conducted.
- Gault J Yes but there's the proposition for which you would contend if leave were granted that approval must be given to all disbursements sought by defence counsel.
- Carruthers No, no I wouldn't and couldn't put it that.

- Gault J I should hope not, it can't go that far.
- Carruthers No, no but here where what has been recognised by the Courts throughout, or particularly at first instance, is that the t-shirt and the sweat on the t-shirt was absolutely, was a crucial piece of evidence which was the way it's described. Now against the background that that is a crucial piece of evidence, it's not a matter of arguing that every disbursement that the accused person wants to incur should be granted.
- Gault J Well then why attack the Regulations? What's the purpose for attacking the Regulations if you're really saying that on the circumstances of this case the decision was not appropriate?
- Carruthers Well Your Honour, I can attack it on two bases really. I can attack it on the basis that the decision wasn't appropriate because it denied the fair trial right. I can.
- Gault J Well that's just begging the question. If it's appropriate, it doesn't deny the fair trial right. If it's not appropriate, it may do. But it doesn't say because it denied a fair trial right it's inappropriate. That seems to have it back to front.
- Carruthers Well it depends where the starting point is. If the starting point is that the legislation must be read consistently with the fair trial right then if the denial of the right to conduct the tests occurs, then that is an inherent part of the denial of the fair trial right. So that's where the inappropriateness comes in in the decision. I can tackle it at that level. I can also tackle it because of the way in which the Court of Appeal has approached it in that paragraph [56] that I cited a passage from, on the basis that really what arises is the situation that arose in **Drew** where the subordinate legislation was attacked on both bases: that it didn't follow from the Act on which it was based; and it also contravened the rights that **Drew** had under the Bill of Rights.
- Gault J It just seems to me to be a very different case from that addressed in the judgments.
- Carruthers Well I resist that Your Honour. But where the problem arises under the judgment in the Court of Appeal is in that extensive factual analysis that we have made where the case seems to have misfired on the basis that the Court of Appeal really hasn't properly analysed the facts found by the trial Judge or those other facts put to the Court on an error correction basis. Your Honour in my submission I'm not putting the case differently because the essence of the case is that the Court of Appeal has not read the Legal Services Act, the Regulations and the Instructions in a manner consistent with the Bill of Rights.
- Gault J It comes back to.

- Carruthers It's treated it as a code and said.
- Gault J It just comes back to my question. That is an interpretation question, has not read it consistently with the Bill of Rights Act. It is not a validity question. And now so I say what misinterpretations do you advance?
- Carruthers Well the misinterpretation is to go to the words of the Instructions, particularly where total remuneration is defined and where disbursements are defined or where disbursements are fixed. And if one looks at the way in which the Court of Appeal has approached that issue, it has simply said, well the Committee was entitled to find as it did but what the analysis does not go on to do is to ask that the fundamental starting point as to whether, in making its own analysis, the Committee has interpreted the Act in a manner consistent with the Bill of Rights. And the argument is that no, the Committee has not because the Committee has decided a matter that fundamentally affects the appellant's fair trial right, that is his right to have the relevant tests conducted and the right to deal with his forensic evidence as he thinks fit.
- Gault J That means that they're entitled to have all disbursements they seek. Otherwise you say that would be a denial of fair trial right.
- Carruthers No, I, no.
- Gault J You see there are real factual questions as to whether this would have made a difference. What would have happened had they got the disbursement? We just don't know do we? There's no evidence. That was a problem in both Courts below.
- Carruthers Well.
- Gault J Now you can't just assume a breach of a fair trial right.
- Carruthers No, but the analysis is that at the time this was not a test, the test was not a test that could be conducted in New Zealand. When ultimately a test was conducted in New Zealand that test was regarded as sufficient for the appellant to be discharged. Now, once you get to that point Your Honour you can say, in line with the test for causation that's been put in the cases, well yes there is a factual basis for saying it would have made a difference.
- Gault J Well that's not what prevailed in the lower Courts is it?
- Carruthers No, because one of the arguments we have is that, well we argued that it was the wrong test that was provided, that was applied, but at least what I can argue is that the test that was applied is inconsistent with

what was applied in the previous case of **Upton (A-G v Upton)** (1998) 5 HRNZ 54).

Elias CJ Well what do you say the test should have been? This is the test to be applied by the DLSS or DSSL or whatever it is, DLLS.

Carruthers I was looking then at the, I'll get the passage right. I was looking rather at what the Court of Appeal had done by contrast with what the test was in **Upton**. But it must come back to the same point. In **Upton**, which is 7 in the materials that I've provided, the way in which the test was put in **Upton**, and it's the very last page, [61] in the passage on that page. But what was said there was that Justice Tompkins, this is line 6, Justice Tompkins also emphasised the importance of the principle of the right to a fair hearing. He quoted Lord Denning to the effect that the risk of prejudice is enough. Likelihood need not be established. Now by contrast, the Court of Appeal, and I'll come back to the Legal Services Committee in a moment Your Honour, in paragraph [98] the Court of Appeal concluded, on such evidence as is available we do not think that Mr Brown established that the Silbase testing would have yielded a result which would have raised a reasonable doubt as to Mr Brown's guilt or would have had any material effect on the trial. Well, you'll see from **Upton** that it's not that test, unless the Court wants to reformulate the test, but for the moment there's an inconsistency. And if **Upton's** right, then in the interests of justice this appeal ought to be heard substantively. Because what can be established on the evidence is that there was a risk of prejudice, and I don't have to take it to the point of likelihood.

Elias CJ What do you say the prejudice risked was?

Carruthers The prejudice risk was exactly what occurred, that is that without that forensic test on the crucial piece of evidence, the appellant faced the risk of conviction. And that was the prejudice that he was not able to bring all of the evidence which was relevant and necessary to his case. And that may be tested by the fact that some other test later was sufficient to persuade the Court to discharge him.

Elias CJ Well I'm not sure that that is so, that you can infer from the fact of the discharge that all evidence relevant to the case was not able to be brought. Because what was found against you in the Court of Appeal and in the High Court, the question of fact as to whether there really was any prejudice. Even accepting that it's a risk of prejudice.

Carruthers But Your Honour if one stands back and analyses a risk of prejudice and one looks at a t-shirt that's regarded as the crucial piece of evidence.

Elias CJ Well it was crucial because it had the complainant's blood on it, that was established at trial.

Carruthers Well what was crucial was that it was really soaked with perspiration.

Elias CJ Well it did have the complainant's blood on it and it was found at the flat.

Carruthers Yes.

Elias CJ Um.

Carruthers It was said not to be a t-shirt owned by the accused. It was soaked.

Elias CJ He acknowledged some contact with it, picking it up or something and taking it home.

Carruthers Yes that's right. But what is important and what is crucial is that it was soaked with perspiration and it is that, it is the test of that.

Elias CJ But was that so critical in the scheme of the case? Because no-one was able to demonstrate from the sweat who had been wearing it.

Carruthers Well that, no, no Your Honour, but the theory of the Australian test was by elimination. And where the final test got to, which was different from the Australian test.

Elias CJ Yes.

Carruthers Put the matter into sufficient doubt as to warrant a discharge.

Elias CJ Well, with other evidence.

Carruthers Well yes but the other evidence was there in any event. So.

Elias CJ No, no there was additional evidence between the trial and the conviction being overturned. The additional facial mapping, tattoo identification evidence.

Carruthers Yes.

Elias CJ And then this slight, this indication that it was more, that it seemed, I don't know that it was a very high probability, to have been Barrett's sweat. But as you say, the test that established that was not the test that Mr Roger sought to obtain. We don't have any evidence to say what would have been discovered had the test he sought to have carried out, if it had been carried out. We don't have any evidence of what result would have come about. And indeed we've got evidence from Miss Vintiner that it's unlikely.

Carruthers Well Your Honour that went off on the basis that there may not have been a sufficient sample to get a result. But that actually overlooks the

factual evidence that was so important to the appellant, that the t-shirt was actually soaked in perspiration.

Gault J There's also a proportion of people who do not secrete DNA with their sweat isn't there?

Carruthers Yes that's so.

Gault J It's not as straightforward as you're purporting to assert.

Carruthers Well Your Honour I'm sorry, I don't mean to put it as if it is a straightforward case for a moment. But I do emphasise that if one is facing trial and this is a perfectly legitimate and proper test that is not available, that was not available in New Zealand at the time, and that the advice was that that may assist, to deny that test meets that test of risk of prejudice, meets the legal test of risk of prejudice.

Elias CJ But there's no evidence that it did cause prejudice because there's no evidence that it would have led to results which would have assisted Mr Brown. That's the factual hurdle at which the case stumbled, it seems to me.

Carruthers I think that, all I can draw on Your Honour is what in fact occurred. And really reason backwards from the test that was ultimately done to what.

Elias CJ Which is a different test.

Carruthers Well Your Honour, but I would have to go into the evidence, but my understanding of the evidence is that what was proposed in Australia was actually more sophisticated than what was finally done. Now I need to be careful with.

Elias CJ Well why isn't there evidence from the Australians about that? The Australian technical experts?

Carruthers Well Your Honour will appreciate, speaking from the position I'm in, I'm quite unable to deal with that.

Elias CJ Yes, yes I understand that but looking at it from the position of the High Court and the Court of Appeal, why is that not a fatal barrier to the claim?

Carruthers I think it is not fatal because if one looked at the factual evidence that was available to the Committee, one looked at the experience of Mr Rogers in the criminal area and looked at the issue that he was asking the Committee about, that that in my submission has sufficient weight to take it beyond the test that His Honour Justice Gault was putting to me that everything would be in. Those factors would have sufficient

weight to warrant the Committee recognising the fair trial right.
(Counsel confers)

My Junior reminds me that in relation to the test that was proposed Your Honours, Mr Rogers who gave evidence at trial, had consulted an English Silk who had recommended this test. So I can take it I think a step further towards satisfying the risk of prejudice test.

Gault J I'm sort of a bit troubled, you may help me Mr Carruthers. You say not available in New Zealand and might have assisted so that there was a risk of prejudice. That sort of test, if satisfied, warrants \$3 million compensation. You don't have to prove it actually would have made a difference. You don't have to prove an actual breach of the Bill of Rights. All you have to do is have a risk of prejudice and you're in. Now that can't be right.

Carruthers Well if the consequence of a failure to allow a right to be pursued against the background of the facts that the Committee had leads to an arbitrary detention, leads to detention in these circumstances, then.

Gault J It's that consequence that the Chief Justice has just been asking you about. There's an evidential problem in establishing that that consequence flowed from that decision.

Carruthers All, well what I can put to you is that the test that I've put as the test that applies is certainly the test that the Court of Appeal applied in **Upton**.

Gault J Taken in its context, it might have been right, but if that is the test in the circumstances just postulated by me to you, it has to be wrong, with respect.

Carruthers Well in my submission no, it does come to a question of how one evaluates the strength of the evidence that was available at the time the decision was taken.

Gault J I understand that and that has been evaluated by two Courts who've reached the same view. Really, are you seeking leave to appeal on a factual evaluation?

Carruthers I'm sorry Your Honour, I didn't mean to interrupt.

Gault J I had finished.

Carruthers But what the Court of Appeal did was to look at that factual evaluation and then apply the wrong test as to causation. Because the test for causation is the risk of prejudice, not the likelihood.

Gault J We've just gone in a circle I suspect.

Carruthers Well Your Honour we may well have. But all, this is why.

Elias CJ It's a claim for compensation and what you're seeking to have compensated for is the period of time this man spent imprisoned.

Carruthers Yes.

Elias CJ You must be able to get over the balance of probabilities that this test would not have resulted, would have exonerated him. And there's nothing before the Court on that. No probative evidence.

Carruthers Well I do have some probative evidence Your Honour. It's a question as to whether it's sufficient to satisfy.

Elias CJ You mean the exchange of correspondence?

Carruthers Yes and also, although Your Honour really sidelines the subsequent test, I still rely on that as being evidence of what, of the sort of test that must have been available at the time through Silbase, if not the same test, something analogous. Now Your Honour that, whether that gets me to the probabilities or a claim in compensation is certainly, is one issue. It's not something that I can argue in detail on the facts today. But in my submission there is sufficient in that point on the evidence to allow it to be developed more fully. Now that's in relation to the compensation claim.

The other issue in the case is that the case did seek a declaration as to a breach of the Bill of Rights. And that must still be a live issue before this Court.

Gault J Well are you saying there should be a different burden on establishing breach of the Bill of Rights from establishing a claim to compensation?

Carruthers Well I mean, the way that Your Honour introduced it to me was, I would put it as surprise, to pick a neutral term, at the amount of the claim. And I let that pass because I assume that what you were directing to was that I couldn't provide a causal nexis between what had occurred and any sort of remedy. In answer to the way in which Your Honours have put it to me, I would have to concede that the evidence, particularly in relation to the Silbase test could have been improved by having evidence as to precisely what was involved. But in my submission there is still enough there in the context of a Bill of Rights obligation to satisfy the test of risk of prejudice.

Elias CJ I'm just trying to feel for exactly how you would put the propositions to us. You say that this is about breach of the Bill of Rights Act but the only capacity in which you advance that is breach of the right to fair trial. Is that right?

Carruthers In the written argument we have in fact.

Elias CJ I know you've referred to time for preparation.

Carruthers Yes.

Elias CJ And the other.

Carruthers Yes I have, I think for convenience, have described it as a fair trial right but it has a series of facets in the way in which we've put in the argument.

Elias CJ Well what breaches are you saying occurred here? Denied the opportunity to produce relevant evidence, was that right?

Carruthers Yes, that is the essence of the argument is that the appellant had a right to have the test conducted and the right to present such forensic evidence that resulted from the test as he thought fit. And what we argue is that those tests had the potential to contribute to raising a reasonable doubt. And to deny the tests then leads to the causative result on the risk of prejudice test.

Now Your Honour, in that formulation there are subsidiary issues like equality of arms, is one that comes to mind immediately. But those arguments are really facets of that overall test. So that's the way in which.

Elias CJ Well it does seem to me really then that you do need to demonstrate that there was relevant evidence to be obtained and it's on that question that the Courts below have made factual determinations adverse to you.

Carruthers Yes. (Counsel confers) Your Honour, the difficulty for the appellant is this: that the Committee had before it a number of tests that the appellant's advisers wanted done. They were denied and it is the appellant being put in the position then of having to face the consequences of denial of his own right. Now.

Elias CJ But what we have been discussing is what were the consequences of the denial.

Carruthers Your Honour I can't take the evidence any further than I have in the way in which I have. That is to look at what Mr Rogers said in evidence, what happened subsequently and although I have findings against me, what my argument goes to is that a test consistent with **Upton** was not applied. So the question then arises as to whether the test in **Upton** is right. Whether the evidence is sufficient to establish the test in **Upton**.

Elias CJ Was **Upton** a compensation case?

Gault J It was a denial of a hearing at sentence.

Elias CJ Yes at sentence.

Carruthers Yes it was a compensation case.

Gault J It was dismissed wasn't it?

Carruthers No it wasn't dismissed. No. There was an award of \$15,000.00 and there was an appeal and a cross-appeal and both were dismissed. The cross-appeal on the basis that it wasn't enough. And you picked that up at the bottom of page 60 just before the passage that I cited.

Gault J Yes thank you.

Elias CJ What, can you help me with, you accept that somebody can't simply request a test and expect to have it and say their Bill of Rights Act entitlements have been infringed.

Carruthers Yes.

Elias CJ How do you identify the difference? How do you, what sort of test do you apply to that?

Carruthers Well Your Honour put that to me a little while ago now and in my submission if one's looking at the Bill of Rights right, it would be appropriate to apply the **Upton** test. If the Committee is sitting there with the facts that the Committee had from Mr Rogers, it was in a position to say, well if we deny in these circumstances there is a risk of prejudice to the appellant. Now that won't be so in every case, His Honour Justice Gault's point, because one would have to have a body of information that took it over the threshold.

Elias CJ Yes.

Carruthers But you did have that body here. You had the request for specific tests and the Committee also had the advantage of an experienced practitioner in the criminal law area like Mr Rogers who was putting this forward as a proper basis for.

Elias CJ But didn't give the Committee crucial information which might have brought home to them that there was some real point to this inquiry.

Carruthers Well Your Honour really raises some issues of fact about that.

Elias CJ Yes.

Carruthers Now I know that I face findings against me, particularly in the Court of Appeal, but Your Honours will know that we've actually recited a succession of facts and that is a fact that is challenged. It may, I think it is clear that Mr Rogers did not and probably could not provide

chapter and verse. But Your Honours some care is necessary in looking at how Mr Rogers had to approach this. I mean he has a professional obligation to his client. He has a privilege issue as to how much he does disclose. And I think there are issues and certainly Mr Rogers was sensitive to how much he was properly entitled to disclose to the Legal Services Committee. But just on the issue that Your Honour raised with me, that is a factual issue that is in dispute and it would require just a little time to go through that. Recognising that this Court's primary role is not an error correction role.

Elias CJ Yes thank you.

Gault J Did you have, Mr Carruthers, a copy of the paragraph of the submission you say was made to the Court of Appeal on validity?

Carruthers Yes I do. It's paragraph 128 of the argument. Your Honours I can assist you rather better. My learned friend Mr Butler tells me that it's actually in his bundle under tab 6. So if on that basis I might rescue Mr Shaw's original copy.

Elias CJ Thank you.

Carruthers I should add that I'm instructed by my junior that that paragraph was directly addressed and it was really amplified in relation to the Regulations as well. Although you'll see that the primary thrust was against the instruction.

Gault J Well basically it's ultra vires if there's a limit. Was that the argument? Because there would have been no evidence as to what limits would be appropriate or anything like that.

Elias CJ Well it wasn't an absolute limit was it, because there was the ability to go back?

Carruthers Yes.

Gault J They aren't limited because they exceed the limit.

Elias CJ Yes, yes, you can go back if there are exceptional circumstances.

Gault J They're not limits, they're a guide though aren't they, not limits?

Carruthers No, I think it's a cap in the Regulations. So it would be ultra vires because.

Gault J They cannot exceed it. They can't authorise a disbursement in excess of it.

Carruthers No, no.

Elias CJ No, s.83(2) of the Act permits the District Sub-Committee.

Carruthers Yes.

Elias CJ If there are exceptional circumstances to approve it.

Carruthers Yes.

Gault J What is the argument of ultra vires?

Elias CJ Can I, I'm sorry, had you finished answering.

Carruthers No I haven't answered.

Elias CJ No.

Carruthers I haven't answered His Honour Justice Gault. I think the way, Your Honour I think I'm bound to accept that if one looked at it on the conventional ground of the Regulations that I would have a difficulty. But if one looks at the **Drew** analysis then one can see that the argument is that the fair trial right would only arise in relation to disbursements where there are exceptional circumstances. And you see this isn't a case where the Committee actually said no on account of cost. It didn't say that we're restricted in any way and you haven't made exceptional circumstances, it just said no, without reasons. Which is part of the problem.

Gault J Yes I hadn't appreciated, even with your reference to **Drew**, why there's an ultra vires issue where the authority is to approve even in excess of any guidelines if there are exceptional circumstances.

Carruthers Well because any qualification on the exercise, because it would be a qualification on the existence of a fair trial right. You only have it, you only have the right to forensic tests if you can establish exceptional circumstances.

Gault J Fair trial would not be.

Carruthers Sorry?

Gault J I mean what more significant circumstances could there be than their right to fair trial?

Carruthers I'm sorry Your Honour, I haven't appreciated the question, I haven't caught the question.

Gault J Well it's just, if there's an exceptional circumstance exception.

Carruthers Yes.

- Gault J And in the context of the criminal law system the right to a fair trial is so significant, I don't see that there's any problem there in, obviously if there is a serious risk of a breach of the fair trial right it would come within the exception surely.
- Carruthers Well it didn't in this case.
- Gault J No well that is because the system is set up to have a committee consisting of experienced criminal counsel make an assessment . However, I don't want to detain you on the question of ultra vires. Thank you.
- Carruthers Well I think that when you put to me a moment ago the issue concerning **Drew**, if I can just give you a reference to **Drew**, I won't go to the passage. But under Tab 6 which is **Drew**, paragraphs [67] and [68] and particularly paragraph [68], deals with the analysis of the provisions and Regulations in that case against the Bill of Rights right. And Your Honour I'm not suggesting it's a complete answer to the point that you raise. But it does show the primacy of the fair trial right where there are restrictions in subordinate legislation.
- Gault J Yes, thank you.
- Elias CJ I'm sorry, I'm getting a little confused. There was no application for judicial review of the Committee's decision was there?
- Gault J Mr Rogers has filed it and didn't proceed with it, is that?
- Carruthers Well I think that it was filed and legal aid was declined for it so.
- Elias CJ Well maybe that's your fair trial point.
- Carruthers Well it still comes.
- Elias CJ I can see that there.
- Carruthers I'm sorry.
- Elias CJ I can see that there may be a more risk-averse approach if you're seeking to secure rights of fair trial than when you're dealing with the pathology of a decision that's already been made. And then you're looking at the context of what everyone did in the trial. I'm not unsympathetic to the points that you're raising Mr Carruthers. My big doubt is whether this is a case which appropriately raises the important points because of the findings of fact.
- Carruthers I would just invite some care in accepting the findings of fact without more because you will appreciate from our written submissions that even allowing for this Court's attitude to error correction, unless there

is a proper understanding of the factual basis, then the legal analysis can fall by the wayside.

Elias CJ Well I've been through the factual points in your written submission fairly carefully and they didn't make much impact.

Carruthers Well that's a disappointment Your Honour. But as, I think I've squarely recognised in my argument that my issue of general and public importance and its relationship to the interests of justice does depend on the validity of my legal analysis of the fair trial right.

Elias CJ Yes.

Carruthers Your Honours, I started with the approach in interpretation and relied on **Drew** and **Moonen**. I've dealt with the issue of the test for causation which was the second feature. The third feature was the way in which the Court of Appeal dealt with the arbitrariness issue in relation to imprisonment and there is an inconsistency between the Court of Appeal's analysis in paragraph [31] or the analysis is really [25], [26] through to [31], where the Court of Appeal concludes in relation to looking at the Department of Corrections that what the Department did was lawful and that seems to underlie the decision in relation to arbitrariness. But what **Manga (Manga v A-G [2000] 2 NZLR 65)** says is that lawful imprisonment can be arbitrary if a consequence is lack of due process. So I just.

Gault J What could the Corrections Department have done differently?

Carruthers No, Your Honour, I accept what the Court of Appeal says in that paragraph but the proposition that seems to come through in that analysis about the imprisonment is that, well it was a perfectly proper course to be followed having regard to what occurred and therefore nothing can be taken out of the arbitrariness of imprisonment. But what, the point that arises is that it's not simply a matter of looking at the lawfulness of the imprisonment because if that is a consequence of lack of due process, then that can still be arbitrary for the purposes of the.

Gault J It's not going to make any difference in this case because the challenge is to the due process aspect.

Carruthers Yes, yes. No, I understand that. What I wanted to pick up as subsidiary arguments, that if they don't arise in this case, they will arise in similar cases because what we have on the way in which the Court of Appeal seems to have analysed it is an inconsistency between its analysis in **Manga**. Now I don't need to deal with it any further. It was simply if I was looking at general or public importance, that was an issue that does seem to arise out of this case and put it into a category where, if the Court is concerned about certainty, about

certainty of what the law should be in the Bill of Rights area, that is an issue.

In the same vein, and the fourth issue that I was wanting to raise, is the issue about the availability of damages as a remedy and the point there is that the Court of Appeal did not deal with the findings of the High Court Judge that the remedy of **Baigent** (**Simpson v A-G [Baigent's Case]** [1994] 3 NZLR 667) compensation is, it was described as, an exceptional remedy and also as reserved for exceptional cases.

Gault J The House of Lords decision recently in **Greenfield R** (*Greenfield*) *v Secretary of State for the Home Department* [2005] UKHL 14 gives the lower Court Judge some support there.

Carruthers Well yes, but that analysis certainly isn't supported by **Baigent**. And another layer.

Gault J **Baigent** was not a fair trial case.

Carruthers No.

Gault J It wasn't a case where the system has built-in remedies such as appeal and re-trial. They're different environments. So it's not really suitable to come and advance these very general propositions out of context.

Carruthers Well.

Gault J That's the point made in **Greenfield**.

Carruthers Well Your Honour I certainly wasn't just trying to pluck something out of context and advance it. The underlying jurisprudence that arises from **Baigent** in my submission is that where there is a breach of a right, an available remedy is compensation. Now.

Gault J Or an available remedy.

Carruthers Yes, yes.

Gault J Yes.

Carruthers And what I was drawing attention to really is that in the context of compensation, **Baigent** wasn't a case that stood for the proposition that the remedy was exceptional or reserved for exceptional cases.

Gault J But Justice Glazebrook's comment.

Carruthers Yes it is.

Gault J Was made in the context of a fair trial right complaint.

Carruthers I understand that. But the argument must still be open that no matter what the nature of the right, one can't say that somehow there is a category of case that has to have some supervening quality that entitles compensation. If it's a breach of a fair trial right, there is nothing inherent in that right that puts it into a category where compensation can only be awarded in exceptional cases.

Gault J Well that's just what the House of Lords said.

Carruthers Well I understand that Your Honour.

Gault J You're not seeking leave to appeal against Justice Glazebrook in any event.

Carruthers No I'm not. But I am submitting to you that the Court.

Gault J You'd just like to get a few interesting questions dealt with in the process, is that the point?

Carruthers Oh no Your Honour, that's not fair to me. Although it is Justice Glazebrook, the Court of Appeal in the judgment delivered by Justice Chambers, the Court of Appeal didn't deal with that issue at all about compensation. Justice William Young did and all I'm raising is that if this is a proper case to argue fully before Your Honours, there are other issues that don't squarely arise on the way in which I have applied that are in the background of this case that may make it a proper case if the Court thought fit to deal with issues of that kind.

Just in answer to Your Honour Justice Gault on the House of Lords proposition. There's a distinction between the European Convention and the International Convention and as far as the Bill of Rights Act recognises the International Convention, the right to an effective remedy is not limited or prescribed for exceptional cases. Now Your Honour I just draw that to attention.

Elias CJ That's from the jurisprudence of the European Court isn't it?

Carruthers Yes.

Elias CJ It's not a matter of the Convention rights.

Carruthers Well Your Honour I really probably don't need to take the Court's time on it but there is a distinction between the approach that's adopted and Your Honour will know that in our written argument we've referred to a whole series of cases that show the approach, the liberal approach that's been adopted to compensation monetary remedies under the Convention.

Your Honours I suspect I've had my 15 minutes well and truly.

Elias CJ Thank you Mr Carruthers that's been helpful. We'll take a short break at this stage to consider where we're going, thank you.

Court adjourns 11.13 am

Court resumes 11.19 am

Elias CJ Yes Mr Butler, we don't need to hear from you and we will decline leave for reasons which we'll give later. Thank you Counsel.

Carruthers May it please Your Honours.

Butler As Your Honours please.

Court adjourns 11.19 am