NOTE: HIGH COURT ORDER SUPPRESSING THE NAME AND IDENTIFYING PARTICULARS OF THE APPELLANT AND OTHER PLAINTIFFS REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 82/2020
[2021] NZSC 118

BETWEEN	M (SC 82/2020) Appellant
AND	ATTORNEY-GENERAL (IN RESPECT OF THE MINISTRY OF HEALTH) First Respondent
	WAITEMATĀ DISTRICT HEALTH BOARD Second Respondent
	CAPITAL AND COAST DISTRICT HEALTH BOARD Third Respondent

Hearing:	27 April 2021
Court:	Winkelmann CJ, William Young, O'Regan, Ellen France and Williams JJ
Counsel:	A J Ellis, G K Edgeler and K P R Bekesi for Appellant M J McKillop and J B Watson for First Respondent D R La Hood for Second and Third Respondents
Judgment:	17 September 2021

JUDGMENT OF THE COURT

A The appeal is allowed.

B A declaration is made that the appellant was detained unlawfully from 21 December 2008 until 14 January 2009.

C The respondents must pay the appellant one set of costs of $15,000 plus usual disbursements. Costs in the lower Courts are unaffected.

REASONS

WINKELMANN CJ, O'REGAN AND WILLIAMS JJ
(Given by O'Regan J)

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Introduction

[1] The appellant is intellectually disabled and also suffers from a personality disorder with borderline anti-social and narcissistic personality traits. This appeal raises for determination the lawfulness of the appellant's detention for a period in late 2008 and early 2009, when he was detained at the Mason Clinic. In order to

understand the issue, it is necessary to recount the factual background and outline the relevant statutory scheme in some detail. We will begin by doing that.

Background

[2] The appellant was charged with assault with intent to rob after an incident in September 2001. He was found to be under a disability pursuant to s 115(1)(a) of the Criminal Justice Act 1985 and unfit to stand trial. On 20 December 2001, an order was made by the District Court at Waitakere that the appellant be detained as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCAT Act). His detention under the MHCAT Act continued until July 2007, at which point he was detained as a special care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act).

[3] In January 2009, the Attorney-General gave a direction under s 31(4) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act) that the appellant be held as a care recipient under the IDCCR Act.[1] In June 2009, the Family Court extended the appellant's compulsory care status under the IDCCR Act, and he continued as a care recipient until December 2013.

[4] The appellant commenced proceedings through his litigation guardian in the High Court, challenging a number of aspects of his detention under the MHCAT Act and the IDCCR Act. His case was heard along with the cases of two other detainees. All of the challenges failed and the appellant's High Court claim was dismissed.[2]

[5] The appellant appealed to the Court of Appeal, but his appeal was dismissed.[3] The Court of Appeal identified 10 main issues raised by the appellant's appeal to that Court.[4] In his application for leave to appeal to this Court, the appellant sought to challenge the Court of Appeal's conclusions on all of those 10 issues, and also two

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1 Section 48 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 [CPMIP Act] repealed and replaced Part 7 of the Criminal Justice Act 1985, which included s 115.

2 *S v Attorney-General* [2017] NZHC 2629 (Ellis J) [HC judgment].

3 *M v Attorney-General* [2020] NZCA 311, (2020) 32 FRNZ 685 (Clifford, Courtney and Goddard JJ) [CA judgment].

4 At [27].

additional issues. However, this Court gave leave on only one issue, as we describe in greater detail below.[5]

Statutory context

Criminal Justice Act

[6] As noted earlier, the appellant was detained initially under the MHCAT Act by virtue of an order made under s 115(1)(a) of the Criminal Justice Act. That provision empowered the court to detain a defendant who was found to be suffering from a disability rendering them unfit to stand trial.[6] Following the making of the s 115(1)(a) order in December 2001, the appellant was detained as a special patient under the MHCAT Act.

[7] At the time the appellant was detained pursuant to the s 115(1)(a) order, s 116 of the Criminal Justice Act provided that the maximum period of detention for which a person who has been found unfit to stand trial could be held as a special patient (and subject to the criminal justice process) was, relevantly, half of the maximum term of imprisonment stipulated for their offending. In the case of the appellant, the maximum term for assault with intent to rob is 14 years, so the maximum period of detention as a special patient (we will call this the half-sentence period) was seven years. The appellant's status as a special patient was periodically reviewed, as required by s 77 of the MHCAT Act, between the making of the order under s 115(1)(a) of the Criminal Justice Act and July 2007, when (as noted above) he was transferred into the new detention regime under the IDCCR Act.

[8] Each of the MHCAT and IDCCR Acts contains its own sophisticated system of checks and balances. These are designed to protect care recipients and the

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5 *M (SC 82/2020) v Attorney-General (In respect of the Ministry of Health)* [2020] NZSC 145 [SC leave judgment]. See below at [34]–[36]. The appellant applied for a reconsideration of the approved question on which leave was given, but that application was dismissed: *M (SC 82/2020) v Attorney-General (In respect of the Ministry of Health)* [2021] NZSC 15.

6 Section 108(1)(a)–(c) of the Criminal Justice Act defined "disability" to include a mental disorder that made the individual unable to plead, to understand the nature or purpose of the proceedings or to communicate adequately with counsel for the purposes of conducting a defence. In all material respects, that definition mirrors the meaning of "unfit to stand trial" found in s 4(1) of the CPMIP Act. For convenience, when referring to the Criminal Justice Act, we adopt the shorthand of "unfit to stand trial".

community from harm while respecting the inherent dignity of such recipients. They proceed from two relevant premises: first, that care recipients are clinically vulnerable and so need care even if they do not consent to it; and second, that they are institutionally vulnerable. That is, they are also vulnerable to the unthinking, unreasonable or unlawful exercise of the State's coercive power. It is necessary to set out relevant aspects of these systems in some detail in order to understand how that balance is reflected in the issues that arise in this appeal.

CPMIP Act and IDCCR Act

[9] The CPMIP Act and the IDCCR Act came into force on 1 September 2004.[7] The CPMIP Act repealed and replaced Part 7 of the Criminal Justice Act, under which the order to detain the appellant was made.[8] Its major purpose was to restate the law formerly set out in Part 7 and to make a number of changes, including changes which provided courts with appropriate options for the detention, assessment and care of defendants labouring under an intellectual disability.[9] The IDCCR Act created new compulsory care and rehabilitation options to better recognise and safeguard the special rights of persons found to have an intellectual disability and who were charged with, or convicted of, an offence.[10] The MHCAT Act provides a parallel regime for persons found to have a mental disorder.

[10] The appellant first became a special care recipient under the IDCCR Act on 6 July 2007, when he was effectively transferred from the MHCAT Act regime to the IDCCR Act regime by a direction given under s 47A(2) of the MHCAT Act. Section 47A(5)(c) of the MHCAT Act provides that, when a person similarly situated to the appellant is transferred from the MHCAT Act regime to the IDCCR Act regime,

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7 Criminal Procedure (Mentally Impaired Persons) Act Commencement Order 2004, cl 2. The provisions of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 [IDCCR Act] relevant to this appeal were brought into force on 1 September 2004 by cl 2(2) of the Intellectual Disability (Compulsory Care and Rehabilitation) Act Commencement Order 2004. Section 5(1) and Part 11 of that Act were brought into force on 1 July 2004.

8 CPMIP Act, ss 3 and 48.

9 Section 3.

10 IDCCR Act, s 3.

that person is deemed to be subject to an order made under s 24(2)(b) of the CPMIP Act.[11]

[11] Section 24 of the CPMIP Act provides as follows:

> **24 Detention of defendant found unfit to stand trial or insane as special patient or special care recipient**
>
> (1) When the court has sufficient information on the condition of a defendant found unfit to stand trial or acquitted on account of his or her insanity, the court must—
>
> (a) consider all the circumstances of the case; and
>
> (b) consider the evidence of 1 or more health assessors as to whether the detention of the defendant in accordance with one of the orders specified in subsection (2) is necessary; and
>
> (c) make one of the orders referred to in paragraph (b) if it is satisfied that the making of the order is necessary in the interests of the public or any person or class of person who may be affected by the court's decision.
>
> (2) The orders referred to in subsection (1) are that the defendant be detained—
>
> (a) in a hospital as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992; or
>
> (b) in a secure facility as a special care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.
>
> (3) Before the court makes an order specified in subsection (2)(a), the court must have received evidence, under subsection (1)(b), about the defendant from at least 1 health assessor who is a psychiatrist.

[12] The IDCCR Act provides for two classes of "care recipient".[12] The first class is a "special care recipient".[13] A person who has been found unfit to stand trial and is subject to an order under s 24(2)(b) of the CPMIP Act is a special care recipient.[14] The appellant had this status as a result of the direction given under s 47A(2) of the

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11 The order to detain the appellant under s 115(1)(a) of the Criminal Justice Act was, from the time the CPMIP Act came into effect, deemed to be an order made under s 24(2)(a) of the CPMIP Act: CPMIP Act, s 47(5). As just explained, that was then deemed to be an order under s 24(2)(b) of the CPMIP Act from the time the appellant was transferred to the IDCCR Act regime. For ease of reference, we refer to the original order for the appellant's detention as the original detention order.

12 IDCCR Act, s 6(1).

13 Section 6(1)(a).

14 Section 6(2)(a)(i).

MHCAT Act.[15] A special care recipient remains within the criminal justice system and must be held in a secure facility. The other class of care recipient is "a care recipient no longer subject to the criminal justice system".[16] This class of care recipient is detained under a civil regime pursuant to a compulsory care order made by the Family Court under s 45 of the IDCCR Act or by operation of statutory deeming provisions.[17] Care recipients no longer subject to the criminal justice system are subject to provisions in the IDCCR Act providing for regular reviews of the person's care recipient status including as to whether the person should be released from the restraints imposed by the Act.[18] They are also allowed greater freedoms, such as a more liberal regime for holidays.[19] A compulsory care order relating to a care recipient not subject to the criminal justice system may be extended only by an order of the Family Court.[20] Where the court extends a compulsory care order, it must determine whether the care recipient must receive secure or non-secure care. Recipients are eligible for secure care only if the court considers that non-secure care would pose a serious danger to the health or safety of the care recipient or of others.[21]

[13] Detention under the IDCCR Act, and any extension or modification of that detention, requires a direction or order of a court or other statutory decision-maker. There is no provision in the IDCCR Act that requires or authorises the detention of a person without a direction given or order made by the relevant decision-maker under the relevant provision of the IDCCR Act.[22]

[14] Detention as a special care recipient following an order under s 24(2)(b) of the CPMIP Act is largely governed by s 30 of the CPMIP Act. That provision replaced s 116 of the Criminal Justice Act but did not materially change the maximum period

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15 MHCAT Act, s 47A(5)(b) and (c). See above at [10].
16 IDCCR Act, s 6(1)(b).
17 Section 6(3). For discussion of the relevant deeming provisions, see below at [18].
18 Sections 77–79 and 82.
19 Section 65. Compare the regime for special care recipients in ss 66–67A.
20 Section 85(1).
21 Section 85(3).
22 See the discussion below at [62].

of detention applicable to persons in the position of the appellant.[23] The s 30 regime applies to detention as a special care recipient under the IDCCR Act and detention as a special patient under the MHCAT Act. The appellant comes within the former category.

[15] Section 30 of the CPMIP Act provides as follows:

> **30 Duration of detention as special patient or special care recipient where person unfit to stand trial**
>
> (1) The maximum period for which a defendant who has been found unfit to stand trial can be detained under section 24 as a special patient or a special care recipient is—
>
> (a) 10 years from the date of the making of the order under section 24 if the defendant was charged with an offence that was punishable by imprisonment for life; or
>
> (b) if paragraph (a) does not apply, a period from the date of the order under section 24 equal to half the maximum term of imprisonment to which the defendant would have been liable if he or she had been convicted of the offence charged.
>
> (2) If the defendant was charged with more than 1 offence, the relevant offence for the purposes of subsection (1)(b) is the offence punishable by the longest term of imprisonment.
>
> (3) An order under section 24 in respect of a defendant who has been found unfit to stand trial continues in force during the maximum period specified in subsection (1) until—
>
> (a) the defendant is brought before a court in accordance with a direction given under section 31; or
>
> (b) a direction is given, under section 31, that the defendant be held as a patient or as a care recipient.
>
> (4) Subsection (3) is subject to sections 84 and 128 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or to section 105

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[23] The CPMIP Act made minor changes to the maximum period of detention as a special care recipient for defendants who are charged with an offence that is punishable by imprisonment for life. Previously, s 116(1)(a) of the Criminal Justice Act provided that the maximum period of detention for such persons was seven years from the making of a s 115(1) order. This figure was arrived at using a parole-type formula, which had become out of date given changes to the law of parole which post-dated the Criminal Justice Act's enactment. The CPMIP Act therefore raised the relevant maximum period from seven to 10 years: see s 30(1)(a). The explanatory note to the Criminal Justice Amendment Bill (No 7) 1999 (328-1), which ultimately became the CPMIP Act, explains that apart from this small change, the maximum period of detention for persons found to be unfit to stand trial otherwise "follows existing section 116(1) to (3)" of the Criminal Justice Act and that for "all other cases, the maximum period of detention remains at half the maximum finite sentence" to which the persons would have been liable: at iii and x.

of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, as the case may require.

(5) An order under section 24 is to be treated as cancelled if every charge brought against the defendant in the proceedings in which the order was made is withdrawn or dismissed.

[16] The half-sentence period in the appellant's case expired on 20 December 2008. Section 31(4) of the CPMIP Act then applied. Section 31 of the CPMIP Act provides as follows:

> **31 Change of status from special patient to patient or special care recipient to care recipient where person unfit to stand trial**
>
> (1) This section applies to a defendant who has been found unfit to stand trial and who is detained as a special patient or as a special care recipient in accordance with an order under section 24 (the **defendant**).
>
> (2) If, before or on the expiry of the relevant maximum period specified in section 30, a certificate is given under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 to the effect that the defendant is no longer unfit to stand trial, the Attorney-General must either—
>
> (a) direct that the defendant be brought before the appropriate court; or
>
> (b) direct that the defendant be held as a patient or, as the case requires, as a care recipient.
>
> (3) If, at any time before the expiry of the relevant maximum period specified in section 30, a certificate is given under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 to the effect that, although the defendant is still unfit to stand trial, the continued detention of the defendant under section 24 is no longer necessary, the Minister of Health, acting with the concurrence of the Attorney-General, must—
>
> (a) consider whether, in the Minister's opinion, the continued detention of the defendant under that section is no longer necessary; and
>
> (b) direct that the defendant be held as a patient or, as the case requires, as a care recipient if, in the Minister's opinion, that detention is no longer necessary.
>
> (4) The Attorney-General must direct that the defendant be held as a patient or, as the case requires, as a care recipient if—

(a) the defendant is still detained as a special patient or as a special care recipient when the maximum period specified in section 30 expires; and

(b) no direction under subsection (2) or subsection (3) has been given in respect of the defendant; and

(c) no certificate of the kind referred to in subsection (2) has been given in respect of the defendant.

(5) A direction under this section—

(a) that the defendant be held as a patient is to be regarded as a compulsory treatment order for the purposes of the Mental Health (Compulsory Assessment and Treatment) Act 1992, and the provisions of that Act apply accordingly:

(b) that the defendant be held as a care recipient is to be regarded as a compulsory care order for the purposes of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, and the provisions of that Act apply accordingly.

(6) The powers and duties conferred and imposed on the Attorney-General by this section are not capable of being exercised or performed by the Solicitor-General.

[17] It is notable that s 31(4) does not give the Attorney-General any discretion: the direction under that subsection *must* be given if the pre-conditions are satisfied.

[18] The effect of s 31(5)(b) of the CPMIP Act is that, when a direction is given under s 31(4), the person subject to the direction is no longer a special care recipient, but becomes a care recipient no longer subject to the criminal justice system. Under s 94(1) of the IDCCR Act, the s 31(4) direction becomes a compulsory care order made under s 45 of the IDCCR Act, which must be regarded as having been made on the date of the s 31(4) direction for a term of six months, requiring that the person receive secure care.[24] Section 94(2) of the IDCCR Act provides that the order can be varied or extended.

[19] Section 77 of the IDCCR Act provides that regular clinical reviews are undertaken for all care recipients. For a special care recipient who has been detained

[24] "Secure care" is defined in s 5(1) of the IDCCR Act as "care given to a care recipient who is required to stay in a secure facility". Thus, a direction under s 31(4) of the CPMIP Act does not change the fact that the person subject to the order is detained.

because of unfitness to stand trial, s 89 applies.[25] That section provides:

> **89 Form of clinical review certificate for special care recipients detained because unfit to stand trial**
>
> (1) This section applies to a person who is detained as a special care recipient because of an order, made under the Criminal Procedure (Mentally Impaired Persons) Act 2003, following a finding that the person is unfit to stand trial.
>
> (2) When a specialist assessor completes a certificate, under section 79, for a person to whom this section applies, the assessor must state in respect of the person one of the following opinions:
>
> (a) the person is no longer unfit to stand trial:
>
> (b) the person is still unfit to stand trial and it is necessary, in the person's own interests or in the interests of the safety of any person, class of person, or the public, that the person continue to be cared for as a special care recipient:
>
> (c) the person is still unfit to stand trial, but it is no longer necessary, in the person's own interests or in the interests of the safety of any person, class of person, or the public, that the person continue to be cared for as a special care recipient.

[20] In the appellant's case, these reviews were undertaken at various times during the period up to 20 December 2008. The last took place on 19 December 2008 (one day before the expiry of the half-sentence period). None led to the provision of a certificate under s 89 that would have led to the triggering of the powers under s 31(2) or (3) of the CPMIP Act.

[21] Section 94(3) of the IDCCR Act requires that the person subject to the s 31(4) direction must be reviewed under s 77 of the IDCCR Act as soon as practicable after the s 31(4) direction is given. Because the person has transitioned from special care recipient (to whom the separate review requirements of s 89 of the IDCCR Act apply) to care recipient, this review must lead to the production of a certificate of review under s 82 of the IDCCR Act stating whether the person still needs to be cared for as a care recipient.[26] If the certificate is to the effect that the person no longer needs to be cared for as a care recipient, the person "must be released from every restraint"

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25 IDCCR Act, s 79(3)(b).

26 Section 79(3)(a). This is in contrast to the review under s 89, which does not call for an assessment of whether the recipient does not need to be cared for as a care recipient. In other words, the review under s 89 does not provide for the possibility that the recipient be released from care under the IDCCR Act into the community.

under the IDCCR Act.[27] The requirement that the person be held in secure care can also be varied through such review.[28] Section 77 provides that the condition of every care recipient subject to a court order must be reviewed at least every six months.

[22] This right to an initial review and the regular reviews that require the reviewer to address whether the recipient needs to be cared for as a care recipient at all, are features of the change of status that occurs (from special care recipient to care recipient no longer subject to the criminal justice system) when a s 31(4) direction is given.

[23] Another important consequence of a s 31(4) direction is that the person in respect of whom the direction is given is no longer subject to the risk of prosecution. This is provided for in s 32 of the CPMIP Act, which states as follows:

> **32 Proceedings stayed following certain directions under section 31**
>
> When a direction is given under section 31 that a defendant be held as a patient or, as the case requires, as a care recipient,—
>
> (a) the proceedings in which the defendant was ordered to be detained are stayed; and
>
> (b) the defendant may not be charged again with an offence with which he or she was charged in those proceedings.

[24] The practical effect of ss 30 and 31 of the CPMIP Act is that an order made under s 24 of the CPMIP Act in respect of a defendant who is found unfit to stand trial and held as a special care recipient under the IDCCR Act may be brought to an end if:

(a) a specialist assessor gives a certificate stating that the person is no longer unfit to stand trial and the Attorney-General thereafter gives a direction that the person be brought before the court or be transferred to a lower care status (s 31(2) of the CPMIP Act);

(b) a specialist assessor, the Minister of Health and the Attorney-General agree the person remains unfit to stand trial, but detention as a special

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27 Section 94(4).
28 Section 94(2).

care recipient is no longer necessary, and a direction is given to that effect (s 31(3));

(c) the half-sentence period expires and a mandatory s 31(4) direction is given by the Attorney-General; or

(d) every charge brought against the defendant in the proceedings in which the order was made is withdrawn or dismissed (in which case the s 24 order is treated as cancelled: s 30(5)).

[25] In addition, the person's detention as a special care recipient under the IDCCR Act may be terminated by an order made by the High Court under s 105 of that Act. We discuss this further below.[29]

[26] Section 31(6) of the CPMIP Act provides that the Attorney-General may not delegate the powers and duties conferred and imposed on them under s 31 to the Solicitor-General. That applies to the requirement to give a s 31(4) direction, as well as the powers under s 31(2) and (3). The appellant argues that s 31(6) emphasises the importance of the requirements imposed on the Attorney-General under s 31, including under s 31(4). That seems more obviously so in relation to the powers under s 31(2) and (3) than the mandatory requirement to give a direction under s 31(4).[30]

[27] Sections 102–103 and 105 of the IDCCR Act set out an alternative judicial process for supervising and directing the detention of a person in the position the appellant was in on or before 20 December 2008. Such a process could be initiated by patients or interests associated with patients, such as welfare guardians, caregivers, family, friends or supporters.[31] Counsel for the Attorney-General, Mr McKillop, placed some emphasis on these provisions.

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29 At [27]–[30].

30 See Te Aka Matua o te Ture | Law Commission *Mental Impairment Decision-Making and the Insanity Defence* (NZLC R120, 2010) at 10 and [10.35], where the Law Commission recommends the function of the Attorney-General under s 31(4) should be replaced by senior officials at the Ministry of Health.

31 An application may be made by any person: IDCCR Act, s 102(3).

[28] Section 102(1) of the IDCCR Act empowers a High Court judge to direct a district inspector to visit a care recipient detained in a facility and inquire into any matter relating to the recipient specified by the judge. The judge can also require the care recipient's care manager to bring the recipient to court for examination.[32] The judge may also summon other relevant witnesses.[33]

[29] Section 105 of the IDCCR Act applies when the recipient is a special care recipient who has been detained following a finding that they are unfit to stand trial.[34] The appellant was, on or before 20 December 2008, in that category. Section 105(2) gives the judge power to direct that the recipient be brought before a court for trial or that the charge against the recipient be dismissed. Section 105(3) gives the judge the power to order that the recipient be cared for as a care recipient no longer subject to the criminal justice system or that the recipient cease to be a care recipient at all.[35]

[30] The powers under s 105 of the IDCCR Act are similar in nature to those given to the Attorney-General, and to the Minister of Health acting with the concurrence of the Attorney-General, under s 31 of the CPMIP Act. However, the Minister and the Attorney-General do not have an equivalent to the power of a High Court judge under s 105(3)(b) to order that the recipient be released from the IDCCR Act regime entirely.

[31] Section 11 of the IDCCR Act requires any court or person exercising powers under the Act in respect of a care recipient to be guided by the principle that the care recipient should be treated so as to protect the health and safety of the care recipient and of others, and the rights of the care recipient.

[32] Before leaving the statutory background, we mention briefly the provisions of the CPMIP Act dealing with a defendant who goes to trial and is acquitted on account of insanity (to whom we will refer as insanity detainees). If the insanity detainee suffers from an intellectual disability, an order may be made under s 24 of the CPMIP

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32 Section 102(2).

33 Section 103.

34 Section 30(3) of the CPMIP Act is subject to s 105 of the IDCCR Act: see s 30(4) of the CPMIP Act.

35 Section 104 of the IDCCR Act provides for similar powers in respect of a care recipient no longer subject to the criminal justice system. After examining the care recipient under s 102 of the Act, the judge may order that the recipient cease to be a care recipient if satisfied the person has been detained illegally or that care recipient status is no longer required.

Act that they be detained as a special care recipient under the IDCCR Act, in the same way as would be done for a person found unfit to stand trial. But, in the case of an insanity detainee, that person continues as a special care recipient until a direction is given under s 33 of the CPMIP Act that they be held as a care recipient not subject to the criminal justice system, or a direction is given that they be discharged.[36] There is thus no maximum term of detention as applies in the case of those who are found unfit to stand trial. We revert to this category of detainee in more detail below.[37]

[33] Another category of detainees under the IDCCR Act are those who are convicted of an imprisonable offence and are sentenced to a term of imprisonment and are also made subject to an order that they be detained in a secure facility as a special care recipient under the IDCCR Act, pursuant to s 34(1)(a)(ii) of the CPMIP Act. Detainees in this category are required to be automatically transferred to care recipient status on the date on which they are no longer liable to be detained under the sentence.[38] Once this date occurs, the person's special care recipient classification automatically terminates. Under s 6(2)(d) of the IDCCR Act, the definition of "special care recipient" specifically excludes those who meet the criteria outlined in s 69(3), which means that such persons automatically become care recipients no longer subject to the criminal justice system when they are no longer liable to be detained under the sentence, pursuant to s 69(3).[39] This can be contrasted with the position of a person who is found unfit to stand trial, where the termination of special care recipient status occurs by reference to a particular direction given by the Attorney-General or by the Minister with the concurrence of the Attorney-General.

Leave

[34] As mentioned earlier, the half-sentence period expired in the appellant's case on 20 December 2008. However, the direction given by the Attorney-General under

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36 CPMIP Act, s 33(2).

37 See below at [63].

38 Section 69(3)(b) of the IDCCR Act. The date is determined under s 68, which says it must be the earliest of the date specified by the Parole Board, the person's release date (as defined in the Parole Act 2002) or the date on which the sentence comes to an end.

39 Section 69(3)(b) provides that when the person's liability for detention under a sentence expires, the s 34(1)(a)(ii) order made under the CPMIP Act becomes, for the purposes of the IDCCR Act, a compulsory care order made under s 45 for a period of 6 months. See also s 6(3)(c) of that Act, which defines "care recipient no longer subject to the criminal justice system" to include a person who is subject to a compulsory care order resulting from the operation of s 69(3) of that Act.

s 31(4) of the CPMIP Act was given on 14 January 2009. The status of the appellant after 20 December 2008 is the focus of this appeal, as is reflected in the question on which leave was granted:[40]

> Was the applicant detained unlawfully after 20 December 2008 because the direction of the Attorney-General under s 31(4) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 that he be detained as a care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 was not issued until 14 January 2009, and, if so, for how long?

[35] The appellant's statement of claim did not include a claim based on this delay in the giving of a s 31(4) direction. For that reason, the evidence that was heard in the High Court was not directed at the issue.[41] However, the Judge heard full argument on it and decided to deal with it, as did the Court of Appeal.

[36] In this Court, counsel for the appellant, Mr Ellis, argued that the appellant's detention after 20 December 2008 was unlawful and arbitrary because the initial order made on 20 December 2001 was discriminatory and the s 31(4) direction was an order made by the Executive. He also sought to argue that the appellant had a right to be heard before a s 31(4) direction could be given and submitted that declarations of inconsistency in relation to certain provisions of the Criminal Justice Act, MHCAT Act and the CPMIP Act should be made. These arguments were outside the question on which leave was granted and therefore we do not address them.

High Court decision

[37] The High Court Judge began by noting that the literal wording of s 30(3) of the CPMIP Act supported the proposition that detention of the appellant after the half-sentence date had passed was unlawful, unless a s 31(4) direction had been given.[42] The Judge particularly emphasised the introductory wording of s 30(3), which says that an order under s 24 "continues in force during the maximum period specified in [s 30(1)]", namely the half-sentence period.[43] She contrasted this with the

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40 SC leave judgment, above n 5, at Order B.

41 This may have been why there was no evidence as to the reason for the delay between 20 December 2008 and the giving of the s 31(4) direction. The respondent did not seek leave to adduce evidence about this in the Court of Appeal or this Court, which may have been expected if there was a justifiable reason for the delay.

42 HC judgment, above n 2, at [699] and [702].

43 At [699].

predecessor section, s 116(2) of the Criminal Justice Act, which referred to the order detaining a person as a special patient continuing in force until a new direction was given that the person would be held as a patient.[44]

[38] The Judge acknowledged that timeliness is properly to be regarded as important because a s 31(4) direction results in a change of status (from special care recipient to care recipient). As a care recipient, the appellant becomes entitled to have his status reviewed under a more liberal regime in the IDCCR Act. And a s 31(4) direction brings the proceedings to an end.[45]

[39] Notwithstanding these factors, the Judge did not consider that a delay of a few days, or even a week or two, in giving the s 31(4) direction meant that the individual is no longer lawfully detained at all and must be released from detention.[46] That was because the only direction that could be given under s 31(4) was one of continued detention, albeit the individual's status changes from special care recipient to care recipient. In the absence of a s 31(4) direction, the criminal proceedings would remain live.[47]

[40] The Judge considered that on a literal reading, s 31(4) suggested that there was no power to give a direction under that subsection before the expiry of the half-sentence period. That would mean that if the order that was extant before the expiry of the half-sentence period did not continue in force until a direction was made, all directions under s 31(4) would have to be carefully timed to coincide precisely with the expiry date, which would be administratively unworkable.[48]

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44 At [701]. While it is of no practical significance now, we do not think it can be said with confidence that s 116 of the Criminal Justice Act differed from ss 30 and 31 of the CPMIP Act in this respect, or, at least that it was intended to. The Criminal Justice Bill that became the Criminal Justice Act (the Criminal Justice Bill (No 2) 1984 (70-1)) replaced a private member's bill that reintroduced a bill promoted by the then Government in 1983. The relevant provision in that bill provided that the "special patient" status of a person found to be under a disability automatically terminated at the half-sentence date: Criminal Justice Bill 1983 (118-1), cl 110. The 1984 Bill was not intended to make a substantive change to that aspect of the 1983 Bill or to otherwise affect its underlying policy and objectives: (12 June 1985) 463 NZPD 4765; and (18 December 1984) 460 NZPD 2713–2714; and Criminal Justice Bill (No 2) (70-1) (explanatory note) at ii.

45 At [703].

46 At [704].

47 At [704].

48 At [705].

Court of Appeal decision

[41] The Court of Appeal upheld the decision of the High Court.[49] Its reasoning was as follows:

> [143] We agree with the Judge's reading of ss 30 and 31 of the [CPMIP Act]. The drafting of s 30(3) is somewhat clumsy. Read in isolation it could be taken to mean that the period of detention expires at the end of the maximum period prescribed in subs (1). But reading the provisions together as a whole, that conclusion makes no sense. The Attorney-General's power and duty to give a direction under s 31(4) when the maximum period specified in s 30 expires, if the other criteria set out in that provision are met, does not terminate at the precise moment of expiry of that period. On the approach contended for by Mr Ellis, the power would be exercisable only at the very instant that the period expires. If that moment was missed the individual would have to be released — even though that is not one of the outcomes contemplated by the legislation. A reading of the provisions that produces that absurd result cannot have been intended by Parliament, and is not an available meaning that could be adopted under s 6 of [the New Zealand Bill of Rights Act 1990].

When must a s 31(4) direction be given?

[42] As is clear from the Court of Appeal's analysis, the Court was concerned at the prospect that a s 31(4) direction had to be given "at the very instant that the [half-sentence] period expires" if it accepted the appellant's argument. The respondent's written submissions to this Court were also based on that premise. So, the respondent was suggesting the direction could not be given before the half-sentence period expired and the appellant was suggesting the direction could not be given after that date. Given the importance of both propositions to the argument, we address them first.

Can a s 31(4) direction be given before the expiry of the half-sentence period?

[43] As just noted, the decisions of the Courts below appear to have proceeded on the basis that it was not open to the Attorney-General to give a s 31(4) direction prior to the expiry of the half-sentence period. The Courts also seem to have been concerned that, if they accepted the argument for the appellant, the Attorney-General would have no power to make a decision after the expiry of the half-sentence period. That led both Courts to conclude that the appellant's argument postulated the proposition that the

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[49] CA judgment, above n 3.

Attorney-General had to give the s 31(4) direction at precisely the time at which the half-sentence period ended, a proposition that both Courts found to be untenable.

[44] The basis of the argument that the Attorney-General cannot give a s 31(4) direction before the expiry of the half-sentence period is as follows. Section 31(4) sets out three conditions to the giving of a direction. First, the defendant must still be detained as a special care recipient when the half-sentence period ends. Second, no direction can have been given under s 31(2) (consequent upon a certificate being issued that the defendant is no longer unfit to stand trial) or s 31(3) (consequent upon a certificate that the defendant remains unfit to stand trial but need not be the subject of continued detention as a special care recipient). Third, no certificate to the effect that the defendant is no longer unfit to stand trial has been given under s 31(2). It is argued that, since the Attorney-General cannot know that these conditions apply to a defendant until the expiry of the half-sentence period, they have no jurisdiction to give a s 31(4) direction prior to the expiry of that period.

[45] During the hearing, it was put to counsel for the Attorney-General, Mr McKillop, that it was open to the Attorney-General to give a conditional direction prior to the expiry of the half-sentence period. He conceded that that was so, but argued that, while it was an available option, it was not a requirement. Such a direction would need to be worded so as to provide that it did not come into effect until the expiry of the half-sentence period and only if no directions had been given under s 31(2) or (3) and no certificate had been given under s 31(2) in respect of the defendant.

[46] We are satisfied that it is open to the Attorney-General to give s 31(4) directions on that conditional basis prior to the expiry of the half-sentence period. Such a direction would need to be given on a date as close as possible to the date on which the half-sentence period was to expire, to ensure the decision reflects an up-to-date assessment of the special care recipient. Giving the direction in advance of the half-sentence expiry date avoids the obvious impracticality of a requirement that the Attorney-General gives a s 31(4) direction at precisely the moment the half-sentence period expires. And it would also ensure that the care recipient's status as a special care recipient is not extended, even for a short period, merely for

administrative reasons. We see this as best protecting the interests of care recipients without compromising the practical operation of the regime for the care of those similarly positioned to the appellant.

Can a s 31(4) direction be given after the expiry of the half-sentence period?

[47] The argument for the appellant is that the wording of s 31(4)(a) means there is no room for a direction to be given after the half-sentence period has expired, because the Attorney-General is without jurisdiction. Section 31(4)(a) provides that the Attorney-General must give the direction if "the defendant is still detained … as a special care recipient when the [half-sentence period] expires". The argument is that after the date of the expiry of the half-sentence period, the power to give the direction lapses. This, it is argued, is the meaning that is most consistent with the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) and therefore the interpretation that must be given to s 31(4) by applying s 6 of the Bill of Rights Act. The corollary to this argument is that, if the appellant was unlawfully detained after 20 December 2008, the unlawful detention continued until his release in December 2013.

[48] We agree with the Court of Appeal that the Attorney-General's power and duty to give a s 31(4) direction does not terminate at the precise expiry of the half-sentence period. There is nothing in the wording of s 31(4) that supports that interpretation. Section 31(4) just says that the Attorney-General must give a s 31(4) direction if the pre-conditions set out in the subsection apply. It is silent on when this must be done. The appellant's interpretation of s 31(4) would be inconsistent with s 16 of the Interpretation Act 1999, which provides that a statutory power, duty or function may be exercised or performed "from time to time".[50] This meaning is clear and there is no place for an alternative interpretation under s 6 of the Bill of Rights Act.[51]

[49] In the present case, the appellant's detention as a care recipient no longer subject to the criminal justice system was authorised by the s 31(4) direction given by the Attorney-General on 14 January 2009. However, for reasons we will come to, the

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50 See, for example, *Boscawen v Attorney-General* [2009] NZCA 12, [2009] 2 NZLR 229 at [46], where the Court of Appeal held that s 16 of the Interpretation Act 1999 "applies where a provision imposes a duty, without specifying that the duty must be undertaken at a particular point of time or on the happening of a certain event".

51 CA judgment, above n 3, at [143], quoted above at [41].

giving of a direction under s 31(4) some time after the expiry of the half-sentence period leaves a lacuna in the period between the expiry of the half-sentence period and the date of the giving of the direction (in this case, between 20 December 2008 and 14 January 2009).

Was the appellant's detention lawful after 20 December 2008?

[50] The essential argument for the appellant is that the original detention order ceased to authorise his detention once the half-sentence period had expired. That argument relies on the wording of s 30(3) of the CPMIP Act, which says that such an order "continues in force during the maximum period specified in [s 30(1)]" (in other words, the half-sentence period) until the defendant is brought before a court (to stand trial) in accordance with a direction given under s 31 or a direction is given that the defendant be held as a care recipient.

[51] Not surprisingly, the appellant relies on the fact that s 30(3) says an order made under s 24 of the CPMIP Act continues in force *during the half-sentence period*, which, since that is expressed in s 30(1) to be the maximum period for which a defendant can be detained under such an order, must mean that if the maximum period goes past without one of the directions described in s 30(3) being given, then the detention becomes unauthorised.

[52] For the respondent, Mr McKillop relies on the fact that s 30(3)(b) says an order made under s 24 of the CPMIP Act continues in force *until a direction is given under s 31* that the defendant be held as a care recipient (in this case, the s 31(4) direction given by the Attorney-General, which was given on 14 January 2009). Thus, he argues that the original detention order continued to authorise the appellant's detention until the s 31(4) direction was actually given.

[53] As the Court of Appeal noted, the drafting of ss 30 and 31 of the CPMIP Act is clumsy. If the words "during the maximum period specified in [s 30(1)]" were not included in s 30(3), it would be arguable that the original detention order would continue until the s 31(4) direction was actually given. The High Court Judge pointed out that that argument was available under s 116(2) of the Criminal Justice Act, which

did not have the qualifying words "during the maximum period". We accept the argument was stronger under s 116(2) than it is in the present statutory context.

[54] The drafter of s 30(3) does not seem to have realised that if no direction was given during the half-sentence period under s 31(2) or (3), then a s 31(4) direction would be given right at the end of the half-sentence period. As noted earlier, the respondent's initial argument was that it was not open to the Attorney-General to give a s 31(4) direction before the expiry of the half-sentence period. That meant that, unless the respondent's position prevailed, it would be incumbent on the Attorney-General to give the s 31(4) direction at the precise moment that the half-sentence period ended, so that there would not be a lacuna between the original detention order and the s 31(4) direction. However, now that it has been established that the s 31(4) direction could be given in advance of the expiry of the half-sentence period, that concern is resolved.

[55] Another potential lacuna remains, however. For example, what if the certificate produced under s 89 of the IDCCR Act after the clinical review of the appellant, that we understand took place on 19 December 2008, had said the appellant was now fit to stand trial? It is unlikely that a decision under s 31(2) as to whether the appellant should be brought before a court could have been made quickly, given that factors such as availability of witnesses, views of victims and the like would take time to ascertain. If it was not possible to make a decision under s 31(2) before or on the expiry of the half-sentence period, the Attorney-General would be obliged to give a direction under s 31(2)(b) that the appellant be held as a care recipient; the possibility of making a direction under s 31(2)(a) that the appellant be brought before the court for trial would be foreclosed once the half-sentence period had expired. We accept that is the position. But we see this as a product of a less than ideally drafted statutory regime, rather than as an indication that continued detention as a special care recipient after the expiry of the half-sentence date is permitted.

[56] In the case of persons detained pursuant to a compulsory care order in the civil regime, the possible need to defer the expiry of the order to allow consideration of next steps is specifically provided for. Section 87 of the IDCCR Act makes provision for the deferral of the expiry of a care recipient's compulsory care order if the order is

due to expire and an application has been made under s 85 to the Family Court to extend it. Under s 87, the care co-ordinator can apply without notice for a deferral for a period to allow for the application for extension to be heard and determined.[52] There is no equivalent provision in the CPMIP Act that would allow the deferral of the expiry of a detention order under s 24 of the CPMIP Act to allow time for the consideration of the possible steps under s 31 of that Act.

[57] As noted earlier, both the High Court and Court of Appeal accepted that the literal meaning of ss 30 and 31 indicates that detention of a person in the appellant's position beyond the end of the half-sentence period is unlawful, unless authorised by a s 31(4) direction.[53] Both departed from this literal meaning because of their concern that such an interpretation would lead to an absurd result, that is, a requirement that the s 31(4) direction be given at precisely the moment the half-sentence period ended, with the risk that the detainee would otherwise have to be released into the community. For reasons we will come to, we see the literal meaning as the one that best fits with the statutory regime. As we have now established that neither of the absurd consequences highlighted above arises as the s 31(4) direction can be given before the expiry of the half-sentence period, the requirement to adopt what we see as the strained reading of ss 30 and 31 advanced by the respondent to avoid absurd consequences no longer exists.

[58] At the hearing, Mr McKillop submitted that special care recipient status is designed to allow treatment, care and rehabilitation to be administered with a view to returning the defendant to court for the resumption of criminal proceedings. Special care recipient status is thus linked to the underlying criminal charge. Based on that purpose, Mr McKillop argues that s 30(1)'s reference to a "maximum period" for which a defendant can be detained under s 24 is not truly a maximum period of *detention*. Rather, he submitted that s 30(1) is best understood as prescribing the maximum time for which a defendant is liable to be brought before the court. Adopting this view would, he argued, reconcile the tension between s 30(1) and the statement in s 30(3) that a s 24 order continues in force *during the maximum period*

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52 An example of this is discussed in *Care Co-ordinator v R* [2020] NZCA 574. There is a similar provision in relation to extended supervision orders: Parole Act, s 107FA(1)(b) and (2).

53 See above at [37] and [41].

specified—the maximum period simply refers to the defendant's potential liability to face criminal proceedings coming to an end.

[59] On this reading, s 30(1) and (3) would regulate different things. The former would regulate the maximum period for exposure to criminal proceedings whereas the latter would regulate the duration of detention as a special care recipient. When the half-sentence period expires, all that happens is that the focus on assessing whether the defendant has become fit to stand trial terminates, meaning the defendant can no longer be returned to court. However, the lawful justification for detention continues based on the wording of s 30(3) that a s 24 order "continues in force … until" a s 31(4) direction is given. As Mr McKillop said at the hearing, this involves giving preference to ss 30(3) and 31(4) over a "strict construction" of s 30(1). So, Mr McKillop says it was permissible for the Attorney-General to give the s 31(4) direction some time after the expiry of the half-sentence period, because the appellant's detention was still authorised by the original detention order.

[60] Part of Mr McKillop's concern seems to have been the need to avoid a reading which requires the absurd result of releasing the appellant into the community if the s 31(4) direction was given late. His submission was made primarily in response to the alternative view proposed by the appellant, which would require a finding that the appellant was unlawfully detained between December 2008 and December 2013 (see above at [47]).[54] We see this submission for the Attorney-General as being essentially motivated by this concern, which was also identified in the Courts below. For the reasons already covered at [57], that concern can be put to one side, meaning the strained reading advanced by Mr McKillop is not required.

[61] To the extent that Mr McKillop's argument purports to have wider application, we do not consider this attempted reconciliation of the various statutory provisions is available on the wording of s 30(1) and (3). There seems to be no reason to read the

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[54] For example, Mr McKillop submitted that when the maximum period of detention under special status is reached, that does not bring about the expiry of the lawful basis for detention, but rather it triggers a change in the nature of the detention from a "forensic form" linked to the underlying criminal charge(s) to a civil regime on the giving of the s 31(4) direction. This submission seems clearly directed at the appellant's contrary argument that on expiry of the maximum term, the basis for continued detention terminates if the s 31(4) direction is not given contemporaneously with expiry of the maximum term.

words of s 30(1), "maximum period for which a defendant … can be detained [as a special care recipient] under s 24" as meaning "maximum period for which a defendant … is liable to be brought before the court under s 31". Why would Parliament refer to the half-sentence period being the maximum period of detention under s 24, if the half-sentence period was not, in fact, the maximum period of detention under s 24? And if it were true that s 30(1) really meant that the half-sentence period was not the maximum period of detention but the maximum period of liability to being brought before the court, one would expect the stay of proceedings to occur automatically on the expiry of the half-sentence period. But this is not the case. As noted earlier, the proceedings are formally stayed under s 32 of the CPMIP Act only when the s 31(4) direction is actually given.[55]

[62] In our view, the correct interpretation of s 30(3) is that it does not permit any extension of the original detention order beyond the expiry of the half-sentence period, being the maximum period for which such an order can apply under s 30(1). We consider that fits with the overall scheme of the CPMIP Act and the IDCCR Act, which, with one exception, contemplates that orders or directions requiring a person to submit to compulsory care as a special care recipient or a care recipient must be made or given by a court or a person authorised by the relevant statute to make the order, and must be for a period that is defined or in respect of which a maximum term is specified in the statute.

[63] The possible exception to this general scheme is s 33 of the CPMIP Act (see above at [32]), which governs the detention of insanity detainees. As mentioned previously, there is no maximum term of detention for insanity detainees. However, this is not a true exception to the general proposition that neither the CPMIP Act nor the IDCCR Act contemplate indefinite detention for persons required to submit to compulsory care. As with other compulsory care recipients, the status of insanity detainees must be the subject of regular reviews, and, if a certificate is given by a specialist assessor that the insanity detainee should cease to be a special care recipient, this must be referred to the responsible decision-maker, the Minister of Health, for decision as to whether the person should become a care recipient or be discharged.[56]

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55 Above at [23].

56 See ss 77(1), 79(3)(c), 92 and 93 of the IDCCR Act; and s 33(3) of the CPMIP Act.

The review obligations therefore impose a trigger-event for bringing about the cessation of an insanity detainee's detention as a special care recipient, being the issuing of a qualifying medical certificate. So, while no maximum detention period exists, there is nevertheless a clearly defined endpoint for detention.

[64] Interpreting ss 30 and 31 to permit continued detention as a special care recipient after the half-sentence date would also mean persons found unfit to stand trial would be treated less favourably than intellectually disabled offenders who do stand trial and are convicted and sentenced of an imprisonable offence and are detained under s 34(1)(a)(ii) (see above at [33]). That would be an odd outcome, which suggests it is unlikely that Parliament intended it.

[65] The interpretation we favour is also the interpretation that is most consistent with the rights of the appellant under the Bill of Rights Act and also the most consistent with the Convention on the Rights of Persons with Disabilities (CRPD), to which New Zealand is a party.[57] Article 12 of the CRPD is headed "Equal recognition before the law". Article 12.4 requires States Parties to ensure, amongst other things, that measures relating to the exercise of legal capacity are proportional and tailored to the person's circumstances, apply for the shortest possible time and are subject to regular review by a competent, independent and impartial authority or judicial body.

[66] We consider that the interpretation that requires specific authorisation for the continued detention of the appellant at the expiry of the half-sentence period best reflects Article 12.4.[58] It needs to be remembered that special care recipients are vulnerable people who may be a risk to themselves and/or others. Those in the position of the appellant have not been convicted of any offence. The legislative regime requires punctilious administration of their care status and appropriate authorisation for, and continued monitoring of, their care to ensure that they do not fall into a limbo

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57 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008). New Zealand ratified this Convention on 25 September 2008.

58 The need for any detention to have lawful authority and the reluctance of the courts to construe vague or uncertain wording as conferring authority to detain was noted in *O'Connor v Chief Executive of the Ministry of Vulnerable Children, Oranga Tamariki* [2017] NZCA 617, [2018] NZAR 94 at [43], and endorsed by this Court in *Woods v New Zealand Police* [2020] NZSC 141, [2020] 1 NZLR 743 at [61], n 44.

where the basis for their detention is uncertain. We see our interpretation of ss 30 and 31 as best upholding those principles and respecting the inherent dignity of care recipients.

[67] We conclude that the original detention order ceased to authorise the appellant's detention as a special care recipient once the half-sentence period had expired on 20 December 2008.

Counterfactual

[68] The appellant argues that the corollary to that finding is that the appellant was entitled to be released from detention on expiry of the half-sentence period so that he was no longer subject to the IDCCR Act regime. This argument was rejected by the Courts below.[59] Mr McKillop echoed the Court of Appeal's conclusion that such an interpretation would be absurd, given that the only possible outcomes for the appellant in circumstances where no directions had been given under s 31(2) or (3) of the CPMIP Act was a change in his status from special care recipient to care recipient. Release into the community was not an available outcome.

[69] Mr McKillop contrasted ss 30 and 31 of the CPMIP Act with the very specific provisions relating to the release from detention of prisoners at the end of their sentence as provided for in s 52 of the Parole Act 2002 and the definition of "non-release day" in s 4(1) of that Act. He argued these provisions were very specific and detailed, unlike s 31(4) of the CPMIP Act. He argued that if Parliament had intended that a detainee was required to be released from detention altogether if a direction was not given under s 31(4) on the expiry of the half-sentence period, it would have included specific provisions for the release of the detainee of the kind that are found in the Parole Act. We think there is some force in that argument.

[70] We consider that release into the community was not the counterfactual to continued detention of the appellant after the expiry of the half-sentence period when no s 31(4) direction has been made. This can be contrasted with s 52 of the Parole Act, where the only available step is the release of the inmate into the community, so

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[59] See above at [39] and [41].

that any failure to act in accordance with s 52 leads to the continued detention of a person who should be at large.

[71] In the present case, the practical effect on the appellant of the delay in giving the s 31(4) direction was as follows:

(a) After 14 January 2009, he remained detained in secure care. Had the s 31(4) direction taken effect on 20 December 2008, he would still have been detained in secure care from that date as required by s 94(1)(b) of the IDCCR Act. The delay made no difference to the practical reality of his detention.

(b) Section 32 of the CPMIP Act was not triggered and the criminal proceedings were not formally stayed until 14 January 2009. But in practical terms, there was no power to bring him to trial after 20 December 2008 anyway.

(c) However, his right to a clinical review "as soon as practicable" after the s 31(4) direction (and at least every six months thereafter) of the continued necessity for his secure care, or indeed for any form of compulsory care, was delayed by more than three weeks.[60] He was also potentially deprived of the far more liberal treatment of care recipients no longer subject to the criminal justice system in terms of holidays, for example, for the same period.[61]

[72] While his was not the usual unlawful detention scenario, this does not alter the fact that, in the absence of a timely s 31(4) direction, the appellant was, from the expiry of the half-sentence period (20 December 2008), unlawfully detained.[62] The unlawfulness does not arise because he would have been entitled to immediate release after 20 December 2008. Rather, it arises because the terms on which he was detained in the period between the expiry of the half-sentence period and the giving of the

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60 See above at [21]–[22].

61 See above at [12].

62 The fact that the counterfactual is detention does not prevent a finding that detaining the appellant during the lacuna period was unlawful. See generally *R v Briggs* [2009] NZCA 244 at [85]; *Edwards v Police* [1994] 2 NZLR 164 (HC); and *Cocker v Police* (1995) 2 HRNZ 410 (HC).

s 31(4) direction were not authorised under either the IDCCR Act or the CPMIP Act. He was entitled to better treatment.

Insubstantial non-compliance?

[73] The respondent argues that a short delay between the expiry of the half-sentence period and the day on which the s 31(4) direction was given amounts to an insubstantial non-compliance with the requirements of the CPMIP Act and the IDCCR Act that should not render the appellant's detention after 20 December 2008 unlawful. The respondent referred to *Sestan v Director of Area Mental Health Services, Waitemata District Health Board*, *J v The Attorney-General*, *Care Co-ordinator v R* and the reasons given by Tipping J in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* in support of that submission.[63]

[74] In *Sestan*, the Court of Appeal found non-compliance with one of the requirements of the procedure for assessing Mr Sestan under the MHCAT Act. Section 9(2)(d) of that Act required that a family member be present when an explanation of the assessment procedure was given. This had not occurred. The Court of Appeal found this non-compliance did not render the assessment invalid. The Court commented:

> [88] The statute is aimed at defining and protecting the rights of people who may be mentally disordered. Courts will not countenance breaches of the Act's provisions and obligations lightly. It should not be overlooked that, within the statutory framework, ongoing protective mechanisms exist. These checks and balances operate both during the periods of assessment and treatment and after a compulsory treatment order has been made under s 17 by a Judge.
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> [89] Because of the nature of the jurisdiction, it is almost inevitable that there will at times be some variance or deviations from strict statutory requirements. It is important to view any non-compliance in the round rather than from a blinkered focus on isolated provisions which ignore the statutory context.
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> [90] We do not accept that whenever it is demonstrated that there is any degree of non-compliance with a specific provision the only consequence will be the total invalidity of all subsequent actions. The Court must assess what happened, why it happened and how it happened, remembering that the

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63 *Sestan v Director of Area Mental Health Services, Waitemata District Health Board* [2007] 1 NZLR 767 (CA) at [50]–[55] and [88]–[90]; *J v The Attorney-General* [2017] NZHC 701 at [112]–[114]; *Care Co-ordinator*, above n 52, at [78]; and *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [74]–[76].

> protection of a vulnerable person, and potentially the community, is at the heart of the legislative framework.

[75] In *Tannadyce*, Tipping J, writing for himself, Blanchard and Gault JJ, observed that a failure to comply with an apparently mandatory requirement does not automatically lead to the process miscarrying. The Court will focus on what the legal consequence of non-compliance with a statutory or regulatory provision should be.[64]

[76] In *J v The Attorney-General*, the High Court found the Family Court had made orders deferring the expiry of J's compulsory care order until further notice, rather than to a fixed date as required by s 87 of the IDCCR Act.[65] As it turned out, the Family Court extended the order promptly on both occasions.[66] The Court found that non-compliance with the fixed-date requirement did not invalidate the subsequent extension orders.[67]

[77] In *Care Co-ordinator*, the Court of Appeal commented that *Sestan* and *J v The Attorney-General* stand for the proposition that minor breaches of statutes such as the MHCAT Act and the IDCCR Act do not necessarily invalidate subsequent steps and decisions under those Acts. However, the Court added that that proposition cannot be invoked where the non-compliance was so fundamental it deprived courts of jurisdiction to take further steps under the legislation.[68]

[78] We do not consider these authorities apply in the present situation. Mr Ellis argued they were wrong and should be overruled. We do not need to address that submission because the issue before us does not amount to an infelicity in the formality of the decision concerned, but a failure to give the required direction at the expiry of the half-sentence period. We accept that the Attorney-General was not prevented from giving the required direction after 20 December 2008, but that does not deal with the lacuna that arose when the decision was not given on (or before) that date. The only basis on which the appellant's detention could have been authorised between 21 December 2008 and 14 January 2009 was if the original detention order remained

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64 *Tannadyce*, above n 63, at [74].
65 *J v The Attorney-General*, above n 63, at [112]–[114].
66 At [110].
67 At [114].
68 *Care Co-ordinator*, above n 52, at [78].

effective, notwithstanding the expiry of the half-sentence period. For the reasons already given, we do not consider it did.

Alternative processes

[79] Mr McKillop argued that the existence of alternative processes for the appellant to bring about a change of status from special care recipient to care recipient would avoid the possibility of a person languishing as a special care recipient long after the half-sentence date had passed in the event that there was a substantial delay in a s 31(4) direction being given. He pointed to the jurisdiction of the High Court under ss 102–103 and 105 of the IDCCR Act, which include the power to direct that the special care recipient be cared for as a care recipient no longer subject to the criminal justice system or that they be released altogether.[69] He also pointed to the possibility that a care recipient could seek an order in the nature of mandamus to compel the giving of a s 31(4) direction. These processes are in addition to the possibility of seeking habeas corpus.

[80] While we accept that these alternative processes exist, we do not think they bear on the question of the legality of the appellant's continued detention as a special care recipient after 20 December 2008. In almost all cases of unlawful detention, potential remedies exist, in particular habeas corpus. That does not stop the detention being unlawful.

Result

[81] The appeal is allowed.

[82] We make a declaration that the appellant was unlawfully detained from 21 December 2008 until 14 January 2009.

Costs

[83] The respondents must pay the appellant one set of costs of $15,000 plus usual disbursements. As the issue in the present appeal was one of a great number of issues

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[69] IDCCR Act, s 105(3), discussed above at [27]–[30].

on which the appellant was unsuccessful in the Court of Appeal and the High Court, we do not consider there is any need to revisit the issue of costs in those Courts.

WILLIAM YOUNG AND ELLEN FRANCE JJ
(Given by Ellen France J)

[84] We write to briefly explain why we disagree with the majority that the appellant was unlawfully detained from the expiry of the half-sentence period until 14 January 2009.

[85] In this respect, we consider there is merit in the submission for the respondent that s 30(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CPMIP Act) does not prescribe the maximum period of detention. Rather, it simply sets out the maximum period for which status as a special patient or special care recipient can be maintained. As Te Aka Matua o te Ture | Law Commission explained in its report, *Mental Impairment Decision-Making and the Insanity Defence*, the maximum period in s 30(1) is not about punishment of a defendant who has been found unfit to stand trial but, rather, concerns "the length of time for which it is proper in principle for a person to remain in jeopardy of a prosecution".[70] In that sense, as the Commission also said, s 30 "achieves … something akin to the civil Limitation Act, or statutory timeframes for laying some criminal charges".[71]

[86] The link made in the statutory scheme between status and the criminal process underscores the point. A critical consequence of the direction under s 31(4) is to remove the possibility of jeopardy under the criminal law so that there is no longer any risk of prosecution.[72] There is also some support for this view in the language of

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70 Te Aka Matua o te Ture | Law Commission *Mental Impairment Decision-Making and the Insanity Defence* (NZLC R120, 2010) at [10.24]. See generally the discussion in Warren Brookbanks *Competencies of Trial: Fitness to Plead in New Zealand* (LexisNexis, Wellington, 2011) at 319–323; and *R v Carrel* [1992] 1 NZLR 760 (HC) at 768.

71 At [10.23]. Before making an order that a person found unfit to stand trial be detained as a special patient or special care recipient, the court must be satisfied that the order is necessary in the "interests of the public or any person or class of person who may be affected" by that decision: s 24(1)(c) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 [CPMIP Act]. In *M (CA819/11) v R* [2012] NZCA 142, (2012) 28 FRNZ 773 at [7], the Court said the interests of the public are twofold: the public safety aspect, and "to ensure that the offender is … treated in a manner best calculated to achieve the ultimate goals of rehabilitation and reintegration into the community". See also *H (CA841/2012) v R* [2013] NZCA 628, (2013) 26 CRNZ 628 at [10]–[13].

72 CPMIP Act, s 32.

s 31(4). The subsection contemplates ongoing detention after the half-sentence expiry date, given the direction can be made "if" the defendant is "still" detained as a special patient or special care recipient "when" the maximum period in s 30 expires. But of course, after the half-sentence expiry date, the person is no longer dealt with as an offender.[73] From that point, the charges could not be revived against the appellant.

[87] It must nonetheless be accepted that the provisions are not well drafted.[74] The appellant and the majority advance alternative approaches to interpretation in the face of the rather awkward drafting. But, as we see it, there is a level of artificiality in both of these alternatives which suggests that neither can be the correct approach to the required purposive interpretation.

[88] On the appellant's approach, it is fatal to lawful detention if a direction under s 31(4) is made after the expiry of the half-sentence period specified in s 30(1). But, as the Courts below recognised, there are practical difficulties in making such a decision at the exact point in time that the period expires.[75] Those difficulties are apparent in the present case where, as we understand, the last review of the appellant's treatment by a Specialist Assessor pre-direction occurred on 19 December 2008, just a day before the half-sentence period expired. Further, if the decision is, for example, whether an individual who is no longer unfit to stand trial should be brought before the court under s 31(2)(a), that may require inquiries to be made about the availability of witnesses, the willingness of a complainant to pursue the matter, and so on.

[89] Similarly, the approach favoured by the majority has its difficulties. The notion of a conditional direction does not sit well with the scheme of the statute. In particular, the CPMIP Act envisages that consideration of whether continued detention is no

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73 See the discussion in Warren Brookbanks and Jeremy Skipworth "Reclassification and leave of special patients unfit to stand trial" [2015] NZLJ 215 at 217.

74 We agree with the High Court Judge that it would be much more difficult to advance the appellant's argument under s 116(2) of the Criminal Justice Act 1985: *S v Attorney-General* [2017] NZHC 2629 (Ellis J) [HC judgment] at [702]. Compare the reasons given by O'Regan J above at [37], n 44 and [53].

75 *M v Attorney-General* [2020] NZCA 311, (2020) 32 FRNZ 685 (Clifford, Courtney and Goddard JJ) [CA judgment] at [143]; and HC judgment, above n 74, at [704]. See at [48] of the reasons given by O'Regan J where the majority reached a similar view, although for slightly different reasons.

longer necessary in terms of s 31(3) would be addressed before consideration is given to the making of a s 31(4) direction.

[90] Further, on the majority approach, in making a conditional direction, the Attorney-General would have to undertake an analysis which may in fact be premature or may need to be re-made if new material comes to light late in the piece.[76] On the majority approach as it applies in the present case, the power authorises the Attorney to make what must be a fresh detention decision. There is also a level of artificiality in treating the detention as unlawful for the interim period when the statute contemplates ongoing detention, albeit under a different status. The logic of the conclusion that detention beyond the half-sentence date is unlawful is that the appellant should be released. The matters identified by the majority at [71](a)–(c) may address a claim that the ongoing detention is arbitrary, but it is difficult to see that they provide an answer to the submission that the alternative was release from care.

[91] We see the position as dictated by the overall scheme and purpose of the CPMIP Act. That scheme envisages ongoing detention subject to the various safeguards in place such as the regular six-monthly reviews and the powers of the High Court under ss 102–103 and 105 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, relied on by the respondent. At the relevant point in time, ongoing detention was the only option for the appellant. What form that should take remained a live issue, that is, whether as a patient or as a care recipient, but release was not an option.

[92] In these circumstances, we agree with the High Court Judge who found, first, that timeliness was important given the direction results in a change of status,[77] and, second, that "notwithstanding that importance, it cannot be right that a delay of a few

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[76] These timing issues could be largely addressed by treating the Attorney-General's direction given on 14 January 2009 under s 31(4) as taking effect from 20 December 2008. This would mean that the delay would not adversely affect the timing of the right of review and, in this way, remove the only substantial element of delay from the point of view of the appellant. However, as this point was not argued, we do no more than flag it as a possible solution to the awkwardness of the legislative scheme.

[77] HC judgment, above n 74, at [703].

days or even a week or two in making the direction" means the detention is unlawful.[78] That is because, as the Judge said, "*none* of the s 31 options involve release".[79]

[93] We accept that in a particular case, the delay in making the direction may be unreasonable and give rise to an arbitrary detention. But whether that was the position here cannot be determined. We have no evidence as to the reason for the delay.

[94] Accordingly, we would have dismissed the appeal.

Solicitors:
Crown Law Office, Wellington for First Respondent
Luke Cunningham & Clere, Wellington for Second and Third Respondents

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78 At [704].
79 At [704].