IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-599
[2022] NZHC 2277

UNDER	the New Zealand Bill of Rights Act 1990
BETWEEN	KORO PUTUA Plaintiff
AND	ATTORNEY-GENERAL OF NEW ZEALAND Defendant

Hearing: 16 March 2022

Counsel: D A Ewen for Plaintiff
D Jones and T Li for Defendant

Judgment: 7 September 2022

JUDGMENT OF ELLIS J

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[1] On 15 September 2016, Mr Putua was sentenced in the District Court to a total of four years and six months' imprisonment on 16 charges (including burglary, unlawfully carrying firearms, receiving, theft and possession of cannabis).[1]

[2] When preparing the warrant of commitment, the Deputy Registrar mistakenly recorded that a three month sentence on one of the charges was cumulative, rather than concurrent, on the sentence for another charge.[2] The effect was wrongly to extend the total length of Mr Putua's sentence by three months. The sentencing Judge signed the warrant without noticing the defect.

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1 *R v Putua* [2016] NZDC 18322. That sentence was made up as follows: three years and four months' imprisonment on a burglary charge; a cumulative sentence of one year and two months' imprisonment on a charge of possession of a sawn-off shotgun; and concurrent sentences on the remaining 14 charges.

2 The charge being another possession offence under the Arms Act.

[3] Mr Putua says he told staff at Northland Regional Correctional Facility of the mistake upon his arrival there. He maintained his statutory release date should be 11 November 2020 but he was not released then. Eventually, on 14 December 2020, a registrar prepared a corrected warrant which the sentencing Judge then signed. Mr Putua was released that day, after serving 33 days in prison more than he should have.

[4] The Crown accepts that Mr Putua was unlawfully and, so, arbitrarily detained for 33 days, in breach of s 22 of the New Zealand Bill of Rights Act 1990 (NZBORA).

[5] Mr Putua now seeks a declaration to that effect, together with $11,000 in *Baigent* damages.[3] He calls in aid the right confirmed by art 9(5) of the International Covenant on Civil and Political Rights (ICCPR), which provides:

> Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

[6] The Crown says that the Court has no jurisdiction, and no remedy is available, because the error here was a judicial one. It relies on the decision of the three-judge majority of the Supreme Court in *Attorney-General v Chapman*.[4]

Legal framework

[7] Section 91 of the Sentencing Act 2002 relevantly provides:

> **91 Warrant of commitment for sentence of imprisonment**
>
> (1) If a court imposes a sentence of imprisonment, a warrant must be issued stating briefly the particulars of the offence and directing the detention of the offender in accordance with the sentence.
>
> …
>
> (6) If the sentence is imposed by the District Court, any District Court Judge may sign the warrant.

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3 Plus interest calculated under s 10 of the Interest on Money Claims Act 2016.

4 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 [*Chapman* (SC)], discussed in more detail below.

[8] Rule 7.2(15) of the Criminal Procedure Rules 2012 makes any warrant that is issued part of the permanent court record. Section 184(2) of the Criminal Procedure Act 2011 (the CPA) requires a court to maintain the permanent court record in accordance with the rules.

[9] As well, s 37 of the Corrections Act 2004 states:

> **37 Effect of warrant, etc for specified prisons**
>
> (1) Except where otherwise allowed by law, no person may be received in a prison without a valid committal order.
>
> (2) Any committal order issued, whether before or after the commencement of this Act, for the detention of any person in any specified prison is sufficient authority for the reception and detention of that person in any other prison to which he or she might have been committed.
>
> (3) Any committal order identifying the prison by reference to its location or by any other sufficient description is not invalid by reason only that the prison is usually known by another name or description.
>
> (4) In this section, committal order includes any warrant, writ, order, direction, or authority requiring the detention of any person.

[10] Importantly, neither s 91 of the Sentencing Act nor s 37 of the Corrections Act constitute the authority for a defendant's detention. In *AB v Attorney-General*, this Court found that whilst the receipt of a valid warrant was necessary under s 37 for the prison authorities to receive and detain a person, the lawfulness of that person's detention rested upon the Court having made an order for detention rather than on the warrant itself.[5] Similarly:

(a) In *R v Fisher*, the Court observed that when a Judge has made an order in Court for a person's detention, a warrant "is needed for administrative purposes and, if an issue is raised, for proof of the existence of the Court order" but the lawfulness of detention rested upon the order for detention itself and not on the warrant.[6]

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5 *AB v Attorney-General* [2018] NZHC 1096 at [85]–[86]. See also *Harding-Reriti v Department of Corrections* [2021] NZCA 470 at [58].

6 *R v Fisher* T236/95, HC Auckland, 4 October 1995.

(b) In *Mailley v General Manager, Auckland Central Remand Prison*[5] a writ of habeas corpus was granted because the warrant for committal was seriously defective *and* because it was not possible to determine what orders had in fact been made in Court.[7]

[11] Accordingly, it was the sentence imposed by the sentencing Judge in Court that was the lawful basis for Mr Putua's detention here. His detention was lawful only insofar as it conformed to the terms of that sentence, whatever the original warrant may have said. And as I have said, the Crown therefore accepts that his detention beyond his statutory release date—calculated by reference to the Judge's actual sentence—was both unlawful and (so) arbitrary, in breach of s 22.

[12] Also potentially relevant in this case are further dicta from the decision in *AB*. AB had, on occasion, been received by the relevant prison on the basis of an unsigned, electronically conveyed, warrant. As to the impact of that practice on the legality of AB's detention Simon France J said:

> [82] The practice of the prison of receiving the prisoner on the basis of the unsigned electronically conveyed warrant may be a practical response to difficulties that would otherwise be experienced in processing a prisoner on the day he or she is sentenced. It is no doubt a practice favoured by the sentenced prisoner who will otherwise need to wait in the court cells, and will be delayed in getting settled into the prison. However, it carries obvious risks, especially if a signed version is not received that day. It is unclear to me why a scanned version of the signed warrant is not sent immediately it is available.
>
> [83] That said, the primary issue for determination in this case is whether the absence of a signed warrant makes the prison in breach of s 37 of the Corrections Act.

[13] After setting out s 37, the Judge continued:[8]

> [84] There is little direct authority on what is a valid committal order but the key components must be that it is issued by a person authorised to do so, is sufficiently clear on its face as to its effect, explains the basis of the detention and its apparent source. So, of the electronically transmitted unsigned versions it can be observed:

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7 *Mailley v General Manager, Auckland Central Remand Prison* HC Auckland CIV-2008-404-8316, 17 December 2008.

8 Footnotes omitted.

(a) they are sourced in a court;

(b) they identify the statutory power…;

(c) the[y] identify the "offence" …;

(d) they identify the order to detain for [the relevant detention period];

(e) they identify the date of the order; and

(f) they identify the Judge making the order.

[85] In my view, even without a signature it is a valid committal order for the purposes of s 37 of the Corrections Act. If wrong in that, I do not consider the breach would render the detention unlawful because it is a detention lawfully imposed by a Judge. Section 37 is a direction given to prison managers who on the basis of it could refuse to accept AB (if a warrant is invalid without a signature). Although the prison manager could refuse to receive, there is still a valid order authorising AB's detention somewhere.

[86] Finally, I observe that even if the absence of the valid committal order made the detention unlawful, it is not in my view an error meriting relief as long as the unsigned warrant reflected a valid order.

[14] As the Judge footnoted, in *Forrest v Chief Executive of the Department of Corrections* Faire J had similarly held that an unsigned warrant constituted a valid committal order for the purposes of s 37.[9]

The decisions in *Chapman* and *Thompson*

[15] As noted earlier, the Crown says that Mr Putua's claim for NZBORA damages for his unlawful and arbitrary detention cannot overcome the impediments posed by the decisions in *Chapman* and *Thompson*.[10]

Chapman

[16] *Chapman* involved a claim for public law compensation for breaches of both s 25(h) (right to an appeal) and s 27(1) (right to natural justice) of the NZBORA. The claim was brought against the Attorney-General, but the breaches concerned were judicial acts. Put briefly, Mr Chapman had applied for legal aid in relation to his proposed appeal against conviction. The application was declined by the Registrar of

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9 *Forrest v Chief Executive of the Department of Corrections* [2014] NZHC 1205.

10 *Chapman* (SC), above n 4 and *Thompson v Attorney-General* [2016] NZCA 215, [2016] 3 NZLR 206.

the Court of Appeal. He sought a review of that decision, but it was confirmed by the Court. His appeal was then dismissed without an oral hearing.[11] Following a later, successful and legally aided appeal, Mr Chapman was not retried and eventually discharged.

[17] A unanimous Court of Appeal had held that the principles of judicial immunity did not operate to bar the claim and that it should be permitted to proceed to trial.[12] But a three judge majority in the Supreme Court disagreed, holding that the public policy reasons which support a personal immunity for judges do not justify extending the scope of Crown liability for NZBORA breaches to include actions of the judicial branch.[13]

[18] Mr Chapman's pleading had also sought to attribute responsibility for what had occurred to the Registrar. This raised the question of "whether, and if so to what extent, the Registrar, who is a public servant, is protected"—a matter with which the Court of Appeal had not dealt.[14] Of the majority judges in the Supreme Court McGrath and William Young JJ left the question open, but noted:[15]

> To the extent that the Registrar's actions were superseded by decisions of judges, or give effect to what they have decided, there can plainly be no right to Bill of Rights Act compensation. This kind of distinction is difficult to make but it calls for an exercise of judgment commonly undertaken by the courts.

Gault J did not address the issue.[16]

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11 The procedures which had been applied to Mr Chapman's appeal had been applied to such appeals generally in the Court of Appeal for a number of years. They were later held by the Privy Council in *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577 to have been unlawful and in breach of the Bill of Rights Act.

12 *Attorney-General v Chapman* [2009] NZCA 552, [2010] 2 NZLR 317 at [100]–[101].

13 *Chapman* (SC), above n 4, at [204], per McGrath and William Young JJ; and at [212]–[214] per Gault JJ. The public policy reasons deemed of "principal importance" were the desirability of achieving finality, promoting judicial independence and the availability of effective rights of appeal, rehearing and review: see [179]–[202].

14 At [208].

15 At [208]. Although the Supreme Court in *Chapman* referred the question of the registrar's possible liability back to the High Court, I do not know what the outcome of that referral back was.

16 Of the minority, Anderson J did not address the issue and Elias CJ merely observed (at [53]) that drawing a distinction between judicial breach and breach by other State actors for the purposes of remedy "may be elusive in practice and productive of arbitrary outcomes". In a footnote to that observation she said: "For example, according to whether a warrant is issued by a judge or a registrar, or whether breach of fair trial rights is attributed to judicial or prosecutorial misconduct."

[19] The Crown relies on this passage and says that because the Registrar's decision was "superseded" by the Judge signing the warrant of commitment, there is no right to compensation.

Thompson

[20] Ms Thompson's sentence had been cancelled by a District Court Judge but a deputy registrar failed to update the Court's electronic case management system (CMS) to reflect this decision. When the application to cancel was called again before a different District Court Judge, Ms Thompson (understandably) did not appear. Not knowing the true position, the Judge then issued a warrant, pursuant to which she was arrested and detained.

[21] Ms Thompson subsequently advanced four tortious claims in the High Court, alleging false imprisonment, breach of statutory duty, negligence and a claim for "systemic negligence". A fifth cause of action alleged breach of her rights under s 22 of the NZBORA not to be arbitrarily arrested or detained. The claims were made vicariously against the Attorney-General for the omission of a deputy registrar to note the cancellation of the sentence on CMS.[17] The NZBORA claim was directed at the acts of the Deputy Registrar, because the decision in *Chapman* precluded a claim for damages flowing from a judicial act.

[22] The Court of Appeal agreed with the High Court that—as far as the tortious claims were concerned—the impugned omissions occurred "in connection with the execution of judicial process", in terms of the immunity afforded by s 6(5) of the Crown Proceedings Act 1950:[18]

> It is clear the omissions which are the basis of Ms Thompson's claim were actions which should have been taken following Judge Blaikie's order cancelling the sentence. We doubt that the omitted steps could themselves be regarded as responsibilities of a judicial nature, but we consider they clearly fall within the ambit of responsibilities "in connection with the execution of judicial process". In the language of Hardie Boys J, they were steps that should have been taken "resulting from the exercise of responsibilities of a judicial nature". And in the language of Clarke LJ in *Quinland* they were part

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17 There was no claim against the Attorney-General for breach of the NZBORA as result of judicial error.

18 *Thompson,* above n 10 at [39], referring to *Quinland v Governor of Swaleside Prison* [2002] EWCA Civ 174, [2003] QB 306 at [33].

> of implementing what the Judge had ordered. Ms Cull was no doubt correct that Judge Blaikie's order was effective when pronounced, but the CMS was not updated so as to reflect the order, and to that extent the cancellation application was treated as still extant, even though it was not.

[23] As far as the NZBORA claim was concerned, the Court held that:[19]

(a) Ms Thompson's arrest and detention were arbitrary because, although the issuing judge had made an innocent mistake, there was no basis upon which the warrant could lawfully have been issued at the time; *but*

(b) the omission by the Deputy-Registrar had no direct impact on Ms Thompson's rights and as a matter of causation could not be seen as leading to her arrest.

[24] So while *Chapman* had left open the potential liability for public law damages for the actions of the Registrar, in *Thompson* it was the issue of the warrant—and not the Registrar's mistake—that was the "proximate or effective cause" of Ms Thompson's unlawful arrest.[20]

[25] As a result, the Court found Ms Thompson had no right to compensation for her unlawful detention.[21]

[26] In the present case, the Crown similarly says that the Judge signing the warrant was a superseding event that precludes Mr Putua's claim.

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19 At [65] – [76].

20 It is, perhaps, implicit in *Thompson* that the Court of Appeal would have found that the Registrar's mistake was an administrative act.

21 Ms Thompson later took her case to the United Nations Human Rights Committee (the HRC), saying that her rights under art 9(1) (right to liberty) and 9(5) (right to compensation for unlawful arrest or detention) of the ICCPR had been breached. In due course the HRC released a decision finding breaches of both arts 9(1) and 9(5). Although New Zealand had argued that compensation for judicial breaches of rights would undermine judicial independence, the HRC said that art 9(5) does not permit exceptions to the requirement for state parties to pay compensation for unlawful arrest or detention: see *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No 316/2018* UN Doc CCPR/C/132/D/3162/2018 (7 June 2022). In the course of its decision, the HRC expressly disagreed with the Supreme Court majority in *Chapman*.

The issues in this case

[27] On the state of the law as it presently stands (as articulated in the majority's decisions in *Chapman*) the Court has no jurisdiction to hear a claim for public law compensation or NZBORA damages arising from a judicial act: the signing of the warrant by the sentencing Judge. The position is less clear-cut in relation to the mistake by the Deputy Registrar. Based on the joint judgment of McGrath and William Young JJ in *Chapman* and the judgment of the Court of Appeal in *Thompson* potential liability in that respect will turn on:

(a) whether the Deputy Registrar was performing essentially a judicial function, which attracts judicial immunity; and

(b) if not, whether the Deputy Registrar's mistake was superseded by that of the Judge and so was not the actuating cause of Mr Putua's unlawful detention.

[28] I address each in turn.

Is preparing the warrant a function that attracts judicial immunity?

[29] It is important to note at the outset that a number of the decided New Zealand cases in this area concern the application of s 6(5) of the Crown Proceedings Act, which confers immunity on the Crown in tortious claims arising out of judicial action. The stated reach of that immunity is wider; it extends to protect the Crown from liability for:

> … anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

[30] It is not difficult to see how the words "in connection with the execution of judicial process" often caught (and protected) what were in essence administrative mistakes by court registrars. For example, in *Crispin v Registrar of the District Court* the s 6(5) immunity was found to apply both to the Registrar's discretionary (and so undoubtedly judicial) act of entering judgment by default and also to his subsequent

administrative act of recording that judgment in the civil record book.[22] Although recording the judgment in the civil record book was mandatory and involved no exercise of discretion, McGechan J regarded it as inseparable from, and an extension of, the (judicial) process of entering judgment by default.[23]

[31] Section 6(5) has no application to claims brought under the NZBORA. In my view, whether judicial immunity applies to protect the Deputy Registrar's mistake therefore needs to be determined by reference to:

(a) the orthodox ambit of judicial acts and processes already mentioned; and

(b) the policy underlying the immunity.

[32] As to the first, the ambit of a judicial act or process was discussed in *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson*, where Lopes LJ said:[24]

> The word "judicial" has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind—that is, a mind to determine what is fair and just in respect of the matters under consideration.

[33] Applying that definition here, the act of the deputy registrar in preparing the warrant of commitment could not be seen as a judicial one. It was not a task requiring either discretion or judgment. Preparation of the warrant is mandatory and its content, predetermined. The Registrar is simply required to record an order made by an (identified) Judge in Court, the date, and the powers under which it was made.

[34] So the only question is whether the policy justifying judicial immunity applies with similar or equal force to acts of this kind.

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22 *Crispin v Registrar of the District Court* [1986] 2 NZLR 246 (HC).

23 At 253. As in the present case, the default judgment itself was, in its terms, correct but the subsequent recording of it, wrong.

24 *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 (CA) at 452 referred to (for example) in *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA) at 689 and 695.

[35] McGechan J in *Crispin* considered that it did, at least in the context of a defamation claim. He said:[25]

> The underlying policy is that those required to exercise judicial functions should have the freedom to speak and act without fear of reprisal. That will be subverted if, while the author is free from attack, his subordinates in the form of officers of the Court required to record and despatch his decisions are not protected. Obviously a Judge must not be in a position where he knows that what he does or says may expose the staff of his Court to a personal liability.

[36] I do not find that reasoning applicable in the present case. Here, there was no underlying judicial error and so no prospect of the Judge being protected but not the Deputy Registrar.[26] Putting to one side the issue of the Judge's subsequent signature on the mistaken warrant (discussed later below) there can be no doubt that it was the Deputy Registrar's mistake and not the Judge's that caused Mr Putua to be unlawfully detained.

[37] In broader terms, the policy said to justify judicial immunity is to protect the integrity of the judicial process. It does this by avoiding the risk of collateral attacks on, and relitigation of, judges' decisions, and of judges being subject, in their decision-making processes, to the weight of improper pressure as a result of potential legal liability for their judicial acts.

[38] Again, it is difficult to see how these matters apply to administrative acts by registrars, however closely they might be linked to a judicial process. As noted already, a registrar has no choice but to prepare a warrant or as to its terms; the only obvious consequence of potential NZBORA liability is that more care will be taken. And it is not as if the registrars themselves will be personally liable for such mistakes, nor likely to be publicly pilloried for the same. They are not public figures in the way that judges are and it is hard to see how the general public would have any real interest in naming or shaming a public servant who has made little more than a clerical error. Moreover, the relevant cause of action would not be against the Registrar personally;

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25 *Crispin,* above n 22, at 252.

26 As a matter of fact, that was also so in *Crispin*: the entry in the record book did not reflect the "judicial" order actually made.

the defendant will be the Attorney-General on behalf of the Crown, as it is in all NZBORA cases.

[39] For these reasons, I conclude that the Deputy Registrar's mistake here was an administrative act that is not protected by judicial immunity. Given the absence of any dispute about Mr Putua's unlawful detention, that is also the most rights-consistent outcome.

Was the Judge's signature a superseding causative act?

[40] It is also necessary to address the question of causation. In reliance on the dicta from *Chapman* set out at [18] above, the Crown says the Judge signing the warrant was an intervening cause that operated to negate any liability for the Deputy Registrar's mistake.

[41] Mr Putua's case is, however, in marked contrast from *Thompson*. As the Court of Appeal observed, the error by the Registry in that case could not, by and of itself, have resulted in Ms Thompson's arrest or detention. It was only when a Judge later issued a warrant herself (as a rather indirect result of the Registry's error) that the mistake became of any consequence. It would be difficult to conclude that the later chain of events leading to the issuing of the warrant (and so to Ms Thompson's arrest) were reasonably foreseeable at the time the Registrar failed to update the CMS entry. Nor could it be said that, in performing what was inherently an internal, administrative act, the Registrar could properly be seen as owing any kind of rights-protecting duty to Ms Thompson.

[42] By contrast, the creation of the warrant by the Deputy Registrar here was a mandatory formal act with clear and known consequences (and—in the event of error—consequences known to be rights-depriving). And not only may the judge who signs the warrant be different from the judge who made the order recorded in it but, as the decision in *AB* makes clear, such warrants can lawfully be relied and acted on without a judicial signature at all. While I accept that there must, of course, be an obligation on a signing judge to check the warrant's correctness,[27] I consider that the

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[27] See for example *Mailley* above n 7 at [13].

act of creating the warrant itself has sufficient legal heft to give that act independent life, in NZBORA terms.[28] I do not regard the Judge's signature in this case as a superseding cause that effectively immunises the Crown from liability for the Deputy Registrar's mistake.

Remedies

[43] There is no dispute that Mr Putua was unlawfully (and so arbitrarily) detained for 33 days.[29] There can be no doubt that the registrar's mistake in preparing the warrant was a substantial and operating cause of that unlawful detention. And for the reasons just given, I have found that his claim for breach of s 22 of the NZBORA is not barred by judicial immunity.

[44] Mr Putua is, in my view, entitled to the declaration he seeks and I make one at the end of this judgment.

[45] The question of whether Mr Putua is also entitled to NZBORA damages, however, requires consideration of the Prisoners' and Victims' Claims Act 2005 (the PVCA). I record that neither party addressed the PVCA in their submissions.

The Prisoners' and Victims' Claims Act 2005

[46] Section 3 of the PVCA states that the purpose of the Act is to restrict and guide the awarding of compensation to those who make "specified claims". Such awards are to be reserved for exceptional cases and are to be made "only if, and only to the extent that, it is necessary to provide effective redress".

[47] Under s 6 of the PVCA a "specified claim" includes a claim for compensation under the NZBORA based on an act or omission of the Crown, made by a person who "is or was under control or supervision". This is a term defined to include prisoners.[30]

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28 In light of my conclusion on this issue it is not necessary for me to consider Mr Ewen's argument that the statement made by McGrath and William Young JJ is not binding on me.

29 An unlawful detention will inevitably be arbitrary – see for example *Thompson* above n 10 at [66].

30 Prisoner being defined under s 4 of the PVCA as "a person … who is for the time being in the legal custody under the Corrections Act 2004".

[48] Any compensation awarded pursuant to such a claim is paid, in the first instance, to the Secretary for Justice and a victim of the offender's offending has a right to make a claim against it.[31]

[49] Under s 13(1) of the PVCA a court may not make an award of compensation unless it is satisfied that:

> (a) the plaintiff has made reasonable use of all of the specified internal and external complaints mechanisms reasonably available to him or her to complain about the act or omission on which the claim is based, but has not obtained in relation to that act or omission redress that the court or Tribunal considers effective; and
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> (b) another remedy, or a combination of other remedies, cannot provide, in relation to the act or omission on which the claim is based, redress that the court or Tribunal considers effective.

[50] It is in determining whether a remedy other than compensation is "effective" redress for the relevant act or omission that the courts are required to take into account the non-exhaustive matters listed at s 14(2). These are:

> (a) the extent (if any) to which the plaintiff, the defendant, or both took, within a reasonable time, all reasonably practicable steps to mitigate loss or damage arising from the act or omission on which the claim is based; and
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> (b) whether the defendant's breach of, or interference with, the right concerned was deliberate or in bad faith; and
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> (c) the relevant conduct of the plaintiff; and
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> (d) the consequences to the plaintiff of the breach of, or interference with, the right concerned; and
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> (e) the freedoms, interests, liberties, principles, or values recognised and protected by the right concerned; and
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> (f) any need to emphasise the importance of, or deter other breaches of, or other interferences with, the right concerned; and
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> (g) the extent (if any) to which effective redress in relation to that act or omission has been, or could be, provided otherwise and by compensation; and
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> (h) any other matters the court or Tribunal considers relevant.

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31 Prisoners' and Victims' Claims Act 2005, s 17.

[51] I address each factor in turn.

[52] As to the first matter, the evidence suggests that Mr Putua availed himself of all the mechanisms open to him to challenge his continued detention. The Crown did not point to anything else he should have done. While, in theory, he could have made an application under the Habeas Corpus Act 2001 that seems to me to be unrealistic in the circumstances in which he found himself. So this factor counts in favour of compensation here.

[53] And as to the second, there is also no basis for a finding that the mistake by the Deputy Registrar was deliberate or in bad faith. That was a relatively neutral factor.

[54] The reference in 14(2)(c) to the "conduct" of the plaintiff was explained by the Court of Appeal in *Chief Executive of the Department of Corrections v Gardiner*.[32] The Court said:[33]

> [56] A court should also take into account the plaintiff's relevant conduct, which requires a clear nexus between his or her behaviour and the defendant's wrong — in this case, the unlawful additional period of imprisonment.47 It includes, for example, any act of the plaintiff that may have caused the defendant to act as it did. As noted, the PVCA was a response to *Taunoa*, in which Corrections was trying to manage especially difficult prisoners, and it appears that the legislature was concerned to ensure that courts must take provocation by the prisoner into account.

[55] There is nothing here that could conceivably suggest any link between Mr Putua's conduct and his unlawful and arbitrary detention.

[56] The consequences to Mr Putua of the breach of his right were that he lost his liberty for 33 days (a period almost identical to the length of the unlawful detention in *Gardiner*). As with Mr Gardiner, Mr Putua's claim is focused squarely on the value of his lost liberty; nothing has been raised that either mitigates or exacerbates that loss.[34]

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32 *Chief Executive of the Department of Corrections v Gardiner* [2017] NZCA 608, [2018] 2 NZLR 712. Mr Gardiner had been unlawfully detained because, as a result of the Supreme Court's decision in *Booth v R* [2016] NZSC 127, [2017] 1 NZLR 223, his release date had been wrongly calculated.

33 Footnote omitted.

34 Such as loss of earnings or mental health issues that were aggravated by imprisonment.

[57] As for the nature of the relevant right, the right not to be arbitrarily or unlawfully imprisoned is fundamental; a point confirmed by the fact that art 9(5) of the ICCPR provides that anyone who has been the victim of unlawful detention shall have an enforceable *right* to compensation. That was a point relied on by Dunningham J when making the first instance award of damages in Mr Gardiner's case.[35] She observed that unlawful imprisonment lasting a month "is not a trivial or fleeting breach, but rather is a period of unlawful detention which warrants compensation simply to reflect the loss of liberty."[36]

[58] But the Court of Appeal in that case noted:[37]

> [61] Finally, liberty is a fundamental right and its unlawful loss may justify the emphasis of a damages award, as s 14 recognises, but the amount need not be the same in all circumstances. The community at large places a very high value on liberty and, as Mr Perkins properly accepted, that value is not necessarily less because the plaintiff was lawfully imprisoned for a period. It is proper to begin with that value. But when converted to a per-day rate, the value of liberty may vary both with the length of the sentence lawfully imposed and with the period of unlawful detention. (The shorter the latter the higher may be the per-day rate.)
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> [62] In this regard, it has been held in England that a plaintiff who has plainly demonstrated that he or she places a low value on personal liberty — for example, by committing offences in prison and so risking delayed release — may expect that value to be reflected in the award. We prefer the view, as stated above, that conduct of the plaintiff may be taken into account where there is a clear nexus between that conduct and the additional period of imprisonment.

[59] In this case, however, there is nothing to suggest that Mr Putua placed a low value on liberty.

[60] The need to emphasise the importance of (and to deter other breaches of) or the right concerned goes hand in hand with the nature of the right itself; there is value in the Court marking a liberty-depriving mistake. I again acknowledge, however, that there has been no suggestion of bad faith on the deputy registrar's behalf.

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35 *Gardiner v Chief Executive of the Department of Corrections* [2017] NZHC 1831, [2017] NZAR 1348.

36 At [49].

37 *Gardiner* (CA), above n 32.

[61] The penultimate matter in the s 14(2) list has no real application here. There is and can be no other form of effective redress; Mr Putua's was not one of those cases that could be resolved through the criminal process; that process was at an end when the causative mistake occurred. And given the importance of the s 22 right, and the terms of art 9(5) of the ICCPR, declaratory relief may well be necessary, but it is not sufficient.

[62] All the s 14(2) factors lead inevitably to the view that an award of damages is the only effective remedy here. The only remaining question is, how should it be quantified.

Quantification

[63] In *Gardiner*, Dunningham J at first instance regarded compensation of $10,000 was an appropriate reflection of Mr Gardiner's unlawful detention for around a month.[38] She expressed reservations about analogising with the compensation payable to those wrongly convicted under Cabinet's Compensation Guidelines,[39] preferring to base her analysis on the decision of this Court in *Manga v Attorney-General*.[40]

[64] Dunningham J's figure was upheld on appeal, but the Court of Appeal took a slightly different approach to the quantification exercise:[41]

> [63] We approach the exercise by assessing damages for ourselves and comparing the result to that reached in the High Court. We do so because, as we go on to explain, we prefer not to take *Manga* as our starting point. The starting point must be that damages are at large and should not be assessed in a formulaic way.

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38 *Gardiner* (HC), above n 35, at [71].

39 Ministry of Justice *Compensation for wrongful conviction and imprisonment* (May 2015). These guidelines were superseded in August 2020.

40 *Manga v Attorney-General* [2000] 2 NZLR 65 (HC). Mr Manga received compensation of $60,000 ($86,900 if annualised) for 252 days of wrongful imprisonment. Dunningham J found that, given the number of analogies between Mr Gardiner and Mr Manga's case, Mr Manga's compensation was the appropriate starting point, to be taken on a pro-rated basis. Self-evidently, some 20 years have passed since then, which led Dunningham J (in 2017) to adjust upwards by around 30 per cent for inflation: *Gardiner* (HC), above n 35, at [68]–[71].

41 *Gardiner* (CA), above n 32.

> [64] As noted, Mr Gardiner does not claim pecuniary losses. So far as non-pecuniary losses are concerned, he points only to the loss of liberty. We have accepted … that a prisoner may suffer emotional harm throughout a sentence and so may seek compensation when detained too long, but there is no evidence that Mr Gardiner suffered such harm during the period of unlawful detention. Although that period was material, at one month, it was associated with a lawful sentence. It could not be suggested that his conduct somehow caused Corrections to act as it did. Equally, Corrections acted in good faith and there is no need for deterrence.
>
> [65] We find *Manga* a useful illustration on particular facts but do not adopt it as a starting point. The annualised figure of $130,000 adopted there was not closely related to any previous case, and it was high relative to the near-contemporaneous 2000 Cabinet Guidelines figure of $100,000 for a wrongly convicted prisoner. It reflected significant emotional harm suffered by Mr Manga and the very long period for which he was unlawfully imprisoned.
>
> [66] *Manga* also pre-dated both the PVCA and a number of cases, including *Taunoa*, in which *Baigent* damages have been awarded to prisoners for breach of protected rights. In *Taunoa* Blanchard J emphasised that damages in tort should not be equated with *Baigent* damages because the latter are a form of public law compensation and discretionary. However, the effect of the PVCA is to make tort damages discretionary and exceptional, as already noted. In our view that means claims for *Baigent* damages are an appropriate comparator in this context.

[65] After a review of several other cases in which compensation had been awarded to those who had been unlawfully arrested or detained, the Court said:

> [68] The Cabinet Guidelines are a useful point of reference, but as noted earlier they combine all non-pecuniary losses into one category so the figure of $100,000 must be discounted substantially for a plaintiff in Mr Gardiner's circumstances. He was not wrongfully convicted and imprisoned and he cannot point to the serious emotional harm that such a person would likely suffer. On the other hand, to the extent the guidelines were used an adjustment would also need to be made for the time value of money.
>
> [69] We accordingly approach the assessment on the basis that we are valuing the loss of Mr Gardiner's liberty for about five per cent of his lawful sentence. An award must be large enough to vindicate the important liberty interest, but there is no cause to increase that sum for emotional harm or deterrence. Because we have used neither *Manga* nor the Cabinet Guidelines as our starting point, it is not appropriate to adjust arithmetically for inflation from a given date; that would lend a false air of precision to the exercise and risk producing an end result that is too high when compared to subsequent cases. Rather, we make the assessment as at the date of breach, recognising that an allowance must be made for change in the value of money to the extent that we base the award on older cases.
>
> [70] In our opinion an appropriate award would be not less than $8,000 and perhaps as much as $12,000.

So what is the right amount of compensation here?

[66] Although the Court of Appeal in *Gardiner* eschewed a "formulaic" approach to quantum, the similarities between that case and this are too great to ignore. In 2017, Mr Gardiner was awarded $10,000 for 30 days of unlawful detention. I agree with Mr Ewen that $11,000 is appropriate here, taking into account the three extra days and (in a non-scientific way) inflation over the intervening five years.

Interest

[67] Mr Putua also seeks interest on any compensation payable, under s 10 of the Interest on Money Claims Act 2016 running from the date he was released (14 December 2020) until the date of payment. The Crown did not contest this. I make that order accordingly. The relevant interest rate is determined by reference to s 12 of that Act.

Result

[68] I make the following declaration:

> As a result of an inadvertent mistake by a deputy registrar in the District Court when preparing a warrant of commitment following Mr Koro Putua's sentencing on 15 September 2016, Mr Putua was arbitrarily detained for 33 days (between 11 November and 14 December 2020), in breach of s 22 of the New Zealand Bill of Rights Act 1990.

[69] In order fully and effectively to vindicate his s 22 right, Mr Putua is also entitled to compensated by way of NZBORA damages in the sum of $11,000, together with interest calculated in accordance with [67] above. As I understand it, that sum must be paid in the first instance to the Secretary for Justice under the PVCA.

[70] If the parties cannot agree costs (which should follow the event) memoranda may be submitted.

Rebecca Ellis J

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