IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2022-485-000579
[2022] NZHC 2464

BETWEEN	ELETISE NATASHA WALLACE, NICOLA RATU, RACHEL VINCENT, DOMINIQUE CARROLL, MIHI ISABELLA BASSETT, TIPARE ROPITINI, TARIANA JONES AND LARA ATKINS, INMATES OF AROHATA WOMEN'S PRISON, WELLINGTON Applicants
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing: 19 September 2022

Appearances: V E Casey KC and A L Hill for Applicants
S M Kinsler and I M C A McGlone for Respondent

Judgment: 27 September 2022

JUDGMENT OF GRICE J
(Reasons)

Introduction

[1] This is an urgent application for interim order declarations to stay the proposed transfer of a number of sentenced women prisoners presently at Arohata Women's Prison (Arohata), near Wellington, to other women's prisons in New Zealand, pending resolution of a substantive application for judicial review. This application is brought

by eight of those women against the Chief Executive of Ara Poutama Aotearoa | the Department of Corrections.[1]

[2] The substantive application for judicial review focuses on the decisions and actions of the Chief Executive leading to the decision to transfer the women from Arohata in order to accommodate women remand prisoners at that facility. The transfers were to commence the day after the hearing in this matter, Tuesday 20 September 2022.

[3] Corrections says the facts do not support the prejudice claimed against the individual applicants and it is not possible to know the views of the wider class of women on whose behalf the claimed prejudice is asserted because they are not before the Court. The Chief Executive is responsible for the operation of the prison system.

[4] Following the urgent hearing of the application, I dismissed the interim application on the evening of 19 September 2022, indicating that a reasons judgment would follow.

Background

The parties

[5] The eight applicants are each sentenced prisoners currently serving their sentences at Arohata. Arohata is one of three women's prisons in New Zealand. The others are Auckland Region Women's Corrections Facility (ARWCF) and Christchurch Women's Prison (CWP). There are 108 prisoners currently at Arohata, of whom 51 are sentenced prisoners. The remainder are on remand, either following conviction or awaiting sentencing or trial.

[6] The report *Wāhine – E rere ana ki te pae hou* set out Corrections' strategy in relation to women for 2021–2025.[2] This was launched on 28 October 2021. It is not in dispute that the majority of the sentenced prisoners at Arohata are Māori, and that

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1 I refer to both Ara Poutama Aotearoa | the Department of Corrections and its Chief Executive as "Corrections" for convenience.

2 Ara Poutama Aotearoa | Department of Corrections *Wāhine – E rere ana ki te pae hou: Women rising above a new horizon* (28 Oketopa | October 2021).

the majority have drug or alcohol-related issues, have suffered family violence, have suffered post-traumatic stress disorder (PTSD), and/or have other mental health disorders. The evidence also indicates that sentenced prisoners at Arohata have not had whānau in person visits for over a year, due to prison staffing and COVID-19-related issues.

Context — staffing shortages

[7] On 1 September 2022, Corrections publicly announced that it was experiencing staffing pressures across the prison system, which was affecting the provision of services within prisons. The Court was advised that sites under particular stress are Mt Eden Corrections Facility (Mt Eden) and Spring Hill Corrections Facility (Spring Hill).

[8] Corrections says the significant staffing shortages have arisen over the past two-and-a-half years as a result of COVID–19 and other factors, and that Corrections is now operating at approximately 70 per cent of its full-time equivalent staff across the prison system. The respondent says that a staff recruitment and retention plan has been developed, but that meaningful increases in staffing levels are not expected until late 2022 or early 2023 as a result of training lead-in times.

[9] In that context Corrections says urgent steps must be taken to address staffing issues in various sites within the national system. Prisoner welfare and wellbeing are being impacted, and minimum entitlements and services risk being compromised, which causes undue tension. Corrections advises that the situation at the relevan sites is being monitored closely to ensure staff and prisoner safety, the continued delivery of minimum entitlements, and that sentences are administered in a safe, secure, humane and effective manner.

[10] Over the coming months the intent is to redistribute the prison population, specifically by moving prisoners from sites under staffing pressures to prisons with higher staffing levels. This "rebalancing" exercise is an interim measure and necessarily must be done nationally.

[11] The movements as they relate to the present proceeding involve the relocation of 14 staff currently at Arohata to Rimutaka Prison. This is said to be a critical part of what is a complex plan. The movement of staff between Rimutaka and Arohata which are close to each other, poses fewer difficulties than moving staff between other prisons

Decision under review

[12] Mr Leigh Marsh, the Deputy National Commissioner of Corrections, provided an affidavit setting out the background and the reasons for the transfers. He has now approved the transfer of 39 sentenced prisoners from Arohata to either CWP or ARWCF in three tranches over dates in the coming weeks. On 20 September 2022, a chartered aircraft was booked to fly prisoners to Christchurch who will then travel by van to CWP. The plane then returns to fly prisoners to Auckland who will move to ARWCF later that day. A number of prisoners are scheduled to transfer to CWP this Thursday, 22 September 2022, and further prisoners will transfer to CWP the following week.[3]

[13] Four of the applicants are scheduled to travel on the first flight to CWP. One applicant is scheduled to travel on the final transfer flight to CWP. The remaining three applicants, as well as a further nine women who are currently sentenced prisoners, will now remain at Arohata. They are assessed as not suitable for transfer at this time due to their individual circumstances.

Applicants' concerns

[14] The applicants are concerned that while Corrections says that the transfers of the women prisoners are temporary, in fact the transfers are likely to be in place for the long-term and Arohata will not be used for women sentenced prisoners. Therefore, the transferred prisoners can expect to complete their sentences at their transferred location.

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[3] The respondent filed a memorandum dated 22 September 2022 advising the Court that there had been minor changes in the transfer timeline due to technical problems with the plane.

[15] The applicants set out a number of reasons as to why moving sentenced prisoners from Arohata is likely be seriously detrimental to the present applicants and to women sentenced prisoners generally both now and into the future. They say:

(a) it will remove them from their children and practically prevent any future in person contact, probably for the full term of their imprisonment;

(b) it will harm their children by denying them in-person contact with their mothers;

(c) it will remove them further from their parents, some of whom are elderly or unwell, and practically prevent any future in person contact, probably for the full term of their imprisonment;

(d) it will remove them from their wider whanau and other community supports;

(e) it will remove those applicants who are Māori and who affiliate with North Island iwi, further from their whenua;

(f) it will disrupt their access to ACC counselling and other kinds of therapeutic support and end existing established relationships of trust and confidence with their current providers, adversely impacting their mental health and wellbeing, and their rehabilitation;

(g) it will remove them from (or prevent them accessing) the special group-based therapeutic Drug Treatment Unit (DTU) programme, adversely impacting their prospect of parole and their rehabilitation;

(h) it will disrupt and potentially end their access to other rehabilitation services with which they currently engage at Arohata, including the Kowhiritanga programme;

(i) it will end their access to "outside the wire" self-care units, disrupting and compromising their rehabilitation and reintegration programmes;

(j) it will disrupt their access to the Release to Work (RtW) programme, for which many of the applicants are already approved, with direct impact on their rehabilitation and prospects of parole;

(k) it will make it practically difficult, if not impossible, for them to formulate effective release plans into Wellington or the lower North Island, with direct impact on their prospects of parole;

(l) it will increase the level of stress, distress and trauma experienced by them, adversely affecting their mental health and wellbeing, and their rehabilitation.

[16] The applicants primarily pitch their case at the systemic level rather than the effect of the transfers on the individual applicants. If Arohata were not to be available as a prison for sentenced women, the applicants say that women serving sentences of imprisonment now or in the future who have drug or alcohol-related issues will no longer have the prospect of access to the DTU at Arohata and that women in the lower North Island, including women who are pregnant or have babies, will not be housed in the region. This will prevent visits from their children and whānau, and remove them from their hapū, iwi and community supports.

Grounds of review

[17] The applicants bring their application for review on four grounds.

[18] First the applicants say Corrections' decisions and actions amount to unlawful discrimination on the basis of sex. Significant harm will be experienced solely by women wholly for the purpose of addressing staffing issues in the men's prison at a lower cost than other solutions available to Corrections.

[19] The second ground of review is that the decisions and actions are irrational and/or unreasonable. The applicants say the respondent's decisions and actions will

have significant adverse impact on women and children, and Māori women and children in particular, that is grossly disproportionate to the respondent's objectives and any perceived benefits, and that these are contrary to the legislation and relevant international obligations.

[20] Thirdly, the applicants say Corrections has failed: to have regard to mandatory relevant considerations, in particular its own strategies and policy objectives and relevant international obligations; to take into account the grossly disproportionate adverse impact on women and children, Māori women and children in particular; and to consider the availability of alternatives that would avoid those harms.

[21] Finally, the applicants say that although Corrections is obliged to act in accordance with the purposes of and principles guiding the corrections system as set out in the Corrections Act 2004, the decisions and actions taken are contrary to and fail to give effect to these purposes and principles, in particular as set out in s 5(1)(a) and (c) and s 6(1)(h) and (i).

Orders sought

[22] The applicants therefore seek the following relief:

(a) a declaration that the respondent's decisions and actions are unlawful;[4] and/or an order setting aside the respondent's decisions and directing the respondent to reconsider them;[5]

(b) a permanent[6] or interim[7] injunction (or declaration to the same effect) preventing the respondent from implementing the decisions and actions; and

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4 First and fourth grounds of review.
5 Second and third grounds of review.
6 First ground of review.
7 Second, third and fourth grounds of review.

(c) an order in the nature of mandamus (or declaration to the same effect) to the respondent to reverse the implementation of the decisions and actions that have already occurred;[8]

[23] The applicants say the interim orders sought are necessary to preserve their position of the applicants and that of other women who face serious and irreversible detriment if the plan is implemented. The applicants say that if the decisions are implemented before the substantive judicial review application is determined, the substantive proceeding will be futile as the implementation of the transfers will be practically irreversible.

Respondent's position

[24] The respondent opposes the application.

[25] Corrections says the framing of the interim orders sought is overly broad, as not all women sentenced prisoners at Arohata have a position to preserve. A number support the transfer.

[26] The respondent also says that the factual basis of the interim application and the substantive proceeding is incorrect. In particular, he has not decided to close Arohata for sentenced prisoners (and no such plans exist) and therefore the decisions do not give rise to irreversible detriment as alleged. The decisions to transfer sentenced prisoners from Arohata are part of a wider, system-level rebalancing exercise which will support the health, safety, rehabilitative and reintegrative needs of both individuals affected as well as other sentenced prisoners.

[27] The respondent also says that although the Drug Treatment Programme (DTP) will no longer occur at the DTU, the DTU is merely the venue for the delivery of the DTP and the DTPs will continue to operate at both CWP and ARWCF. The respondent says he has not decided to close the DTU at Arohata in any event. Meanwhile, those sentenced prisoners who remain at Arohata will continue to have access to rehabilitative services, including alcohol and drug treatment services.

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[8] All grounds of review.

[28] Corrections says that the applicants' case is weak on its merits. It points to the statutory power to transfer prisoners, which is framed very broadly under the Corrections Act. There are a variety of reasons why prisoners are routinely transferred and the power has been exercised lawfully and reasonably in the present case.

[29] Corrections also submits that the orders sought by the applicants will have serious and negative impacts on other sentenced prisoners. In particular, the respondent points to the wider context of "acute staff shortages" and the longer-term staff recruitment and retention strategy. The respondent says the redeployment of staff and transfer of prisoners is a rebalancing exercise intended as a temporary measure to relieve pressure on the system to enable the longer-term fixes in the form of increased staffing levels to be implemented nationally. The respondent says the rebalancing exercise is a "critical and urgent step" to avoid conditions at other prisons deteriorating to "prison emergencies". The transfer of prisoners from Arohata, the respondent says, is a critical component in the system-wide rebalancing. To pause the process risks compounding risks and downstream consequences for other prisoners.

[30] Corrections says that because it is not the intention to close Arohata to sentenced prisoners, there may be opportunities for transferred prisoners to return, but that will depend on their individual circumstances and their rehabilitative pathways. The timeframe will depend on the return to more sustainable staffing levels.

[31] Corrections says that if there is a pause in the transfer of prisoners the circumstances are such that staff themselves will still need to be redeployed. This will likely lead to more restrictive conditions for prisoners at Arohata than in place at the alternative sites to which it is planning to transfer the sentenced prisoners.

[32] The evidence and submissions on behalf of Corrections may be summarised as follows:

(a) The rotation of 14 staff currently at Arohata to Rimutaka will enable the transfer of up to 100 high security prisoners from Mt Eden, to reduce significant pressures there.

(b) The movement of staff and transfer of prisoners involves managing numerous interdependencies, including: the capacity of receiving sites; staff availability and willingness to move between sites; the availability of transport and chartered aircraft; and prisoners' individual needs, in terms of the availability of programmes and support consistent with relevant security classification and individual management plans.

(c) In determining prisoners who are suitable for transfer, their individual circumstances and needs are considered. Remand prisoners are less suitable for transfer because of the need to attend Court in a particular locality and related issues.

(d) Some sentenced prisoners will remain at Arohata for a number of reasons, including that certain prisoners are close to their sentence end dates and housed in self-care units.

[33] Corrections says that in determining who is suitable for transfer, the iwi affiliations, locations of whānau, and likelihood of in-person visits have also been considered.

Approach to interim application

[34] The applicants bring their application under s 15 of the Judicial Review Procedure Act 2016, which states:

> **15 Interim orders**
>
> (1) At any time before the final determination of an application, the court may, on the application of a party, make an interim order of the kind specified in subsection (2) if, in its opinion, it is necessary to do so to preserve the position of the applicant.
>
> …

[35] Rule 30.4(1) of the High Court Rules 2016 similarly provides that in a judicial review application, the Court may make an interim order on whatever terms and conditions the Court thinks just.

[36] The approach to such an application is well established. The Supreme Court in *Minister of Fisheries v Antons Trawling Company Ltd* described it in the following terms:[9]

> Before a Court can make an interim order … it must be satisfied that the order sought is reasonably necessary to preserve the position of the applicant. If that condition is satisfied the Court has a wide discretion to consider all the circumstances of the case, including the apparent strengths or weaknesses of the applicant's claim for review, and all the repercussions, public and private, of granting interim relief.[10]

[37] The applicants pointed to the recent summary of the approach in *Kōkako Lodge Trust v Auckland Regional Public Health Service*.[11] In that case Moore J said:

> [10] While such an order may have the effect of an interim injunction, "there is no requirement to address such an application exactly as if it were for an interim injunction".[12]

[38] The first stage is to first consider if the applicant can establish a position that is "necessary" to preserve. That is a threshold requirement.

[39] The second stage is to then consider whether to exercise the Court's wide discretion to make an order. The overall justice position must be considered.[13]

[40] There was some difference in opinion between counsel in relation to the appropriate lens through which the Court should view the present application. Ms Casey, for the applicants, saw the application as a wide challenge to the respondent's decisions or actions to close Arohata to sentenced women prisoners and use it as a remand prison for women, closing the DTU, which is New Zealand's only DTU for women prisoners, in the process.

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9 *Minister of Fisheries v Antons Trawling Company Ltd* [2007] NZSC 101, (2007) 18 PRNZ 754 at [3].

10 *Carlton & United Breweries v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430 per Cooke J.

11 *Kōkako Lodge Trust v Auckland Regional Public Health Service* [2022] NZHC 2280.

12 *Singh v Minister of Immigration* [2009] NZCA 50 at [26], citing *Carlton & United Breweries Ltd v Minister of Customs*, above n 10.

13 *ENZA Ltd v Apple & Pear Export Permits Committee* HC Te Whanganui-a-Tara | Wellington CP266/00, 18 Tīhema | December 2000 at [17].

[41] Mr Kinsler for the respondent said the approach should be more akin to a deportation case. He said given the specific provisions and process to move prisoners under the Corrections Act, the decisions at issue must be examined at the level of each individual applicant. This required a specific evaluative exercise in respect of the circumstances of each person. Any judicial review must be at an individual, not systemic, level.

[42] It is not necessary to determine the correct approach at this stage. I have heard limited argument on the matter. However, it seems at first blush that a general judicial review of the decisions of Corrections leading to breaches of rights of sentenced women prisoners as a class is not precluded. That however is a matter for further consideration later.

Relevant legal framework

[43] The Corrections Act provides the statutory framework for the operation of the New Zealand corrections system.

[44] Section 5 of the Act describes the purpose of the corrections system as follows:

> **5 Purpose of corrections system**
>
> (1) The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by—
>
> (a) ensuring that the community-based sentences, sentences of home detention, and custodial sentences and related orders that are imposed by the courts and the New Zealand Parole Board are administered in a safe, secure, humane, and effective manner; and
>
> (b) providing for corrections facilities to be operated in accordance with rules set out in this Act and regulations made under this Act that are based, amongst other matters, on the United Nations Standard Minimum Rules for the Treatment of Prisoners; and
>
> (c) assisting in the rehabilitation of offenders and their reintegration into the community, where appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available, through the provision of programmes and other interventions; and
>
> (d) providing information to the courts and the New Zealand Parole Board to assist them in decision-making.

[45] Section 6 provides the guiding principles of the corrections system as follows:

> **6 Principles guiding corrections system**
>
> (1) The principles that guide the operation of the corrections system are that—
>
> (a) the maintenance of public safety is the paramount consideration in decisions about the management of persons under control or supervision:
>
> (b) victims' interests must be considered in decisions related to the management of persons under control or supervision:
>
> (c) in order to reduce the risk of reoffending, the cultural background, ethnic identity, and language of offenders must, where appropriate and to the extent practicable within the resources available, be taken into account—
>
> (i) in developing and providing rehabilitative programmes and other interventions intended to effectively assist the rehabilitation and reintegration of offenders into the community; and
>
> (ii) in sentence planning and management of offenders:
>
> (d) offenders must, where appropriate and so far as is reasonable and practicable in the circumstances, be provided with access to any process designed to promote restorative justice between offenders and victims:
>
> (e) an offender's family must, so far as is reasonable and practicable in the circumstances and within the resources available, be recognised and involved in—
>
> (i) decisions related to sentence planning and management, and the rehabilitation and reintegration of the offender into the community; and
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> (ii) planning for participation by the offender in programmes, services, and activities in the course of his or her sentence:
>
> (f) the corrections system must ensure the fair treatment of persons under control or supervision by—
>
> (i) providing those persons with information about the rules, obligations, and entitlements that affect them; and
>
> (ii) ensuring that decisions about those persons are taken in a fair and reasonable way and that those persons have access to an effective complaints procedure:
>
> (g) sentences and orders must not be administered more restrictively than is reasonably necessary to ensure the maintenance of the law and the safety of the public, corrections staff, and persons under control or supervision:

(h) offenders must, so far as is reasonable and practicable in the circumstances within the resources available, be given access to activities that may contribute to their rehabilitation and reintegration into the community:

(i) contact between prisoners and their families must be encouraged and supported, so far as is reasonable and practicable and within the resources available, and to the extent that this contact is consistent with the maintenance of safety and security requirements.

[46] Persons who exercise powers and duties under the Act must take into account the principles set out above that are applicable so far as is practicable in the circumstances.[14]

[47] The Chief Executive has the powers and functions relating to ensuring that the corrections system operates in accordance with the purposes set out in s 5 and the principles set out in s 6, and under s 8(1)(b), of ensuring the safe custody and welfare of prisoners.[15]

[48] Under s 53, the Chief Executive also has the power to direct the transfer of a prisoner from one prison to any other prison for various reasons listed in s 54. One such listed reason is "to enable effective management of the national prisoner muster".[16]

[49] The considerations the Chief Executive must, as far as is reasonably practicable, have regard to when considering whether to transfer a prisoner, or considering how a transfer is to be effected, are:[17]

(a) the desirability of providing the least restrictive environment for the prisoner that is consistent with the maintenance of public safety and the safety of staff members and other prisoners; and

(b) the need to facilitate the rehabilitation and reintegration of the prisoner into the community, taking into account the availability and location of appropriate services and programmes that will contribute to the achievement of those objectives; and

(c) the desirability of ensuring that the prisoner is detained at a

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14 Corrections Act 2004, s 6(2).
15 Section 8(1)(a).
16 Section 54(3)(b).
17 Section 54(4).

location as close as is practicable to his or her family.

[50] If a transfer is to occur, the prisoner to be transferred must be informed of the impending transfer, and the destination, with at least seven days' notice, and be given a reasonable opportunity to inform their family.[18] This does not apply, however, if the transfer is being made to allow for the effective management of the national prisoner muster.[19]

[51] Also, of relevance is the ability of the Chief Executive to declare a "prison emergency" under s 179D. This is defined as an emergency: (a) affecting the safety or health of the prisoners or any class or group of prisoners, or the security of the prison; and (b) in respect of which the chief executive reasonably believes that the corrections system is no longer able to fulfil its purpose in s 5(1)(a) in relation to the prison or prisoners affected.[20] Under s 179D(1), if the Chief Executive determines a prison emergency exists, they must notify the Minister within seven days. So far no "prison emergency" has been declared.

[52] The applicants also point to a number of relevant documents from Corrections, including its strategy in relation to women for 2021–2025,[21] and its general strategy document for 2019–2024.[22] They also point to the United Nations Convention on the Rights of the Child (UNCROC)[23] as well as the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*, known as the Bangkok Rules.[24]

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18 Section 55(1).
19 Section 55(2)(d).
20 Section 179C definition of "prison emergency".
21 Ara Poutama Aotearoa | Department of Corrections *Wāhine*, above n 2.
22 Ara Poutama Aotearoa | Department of Corrections *Hōkai Rangi: Ara Poutama Aotearoa Strategy* | 2019–2024 (Ākuhata | August 2019).
23 United Nations Convention on the Rights of the Child, 1577 UNTS 3 (signed 20 November 1989, entered into force 2 September 1990).
24 *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)* GA Res 65/229 (2010).

Discussion

[53] I now turn to consider whether the applicants have a position to preserve before evaluating the strength of the applicants' case and the public and private repercussions of granting relief.

First stage — position to preserve

[54] The necessity to preserve the applicant's position is the statutory threshold. There must be a "necessity", as opposed to a "simple desire to preserve a position if possible".[25] However, "preservation" is not to be interpreted so narrowly that it means only preserving the status quo.[26] It is necessary to look at what is being sought by way of substantive relief to see whether there is a position which should be preserved.[27] If there is no arguable or justiciable issue raised, there is no position to preserve.[28]

[55] Ms Casey says that if the decisions are implemented, the prisoners will be transferred and the staff reallocated elsewhere. The position will then be practically irreversible and the substantive proceedings will be futile.

[56] Mr Kinsler, for the respondent, accepts that those women scheduled to be transferred from Arohata before the substantive application for review is determined have a position to preserve for interim relief purposes. However, he submits this is not necessarily the case for other sentenced prisoners affected by the transfers and there is no general prejudice to women sentenced prisoners at Arohata as a class. Some will benefit, because the proposed transfers will enable them to be closer to their whānau or to access services not available to them at Arohata.

[57] Over the past few days, it has been decided that at least three of the applicants will not be moved due to personal factors. However, on an individual basis given the concession of Corrections I accept for the purposes of the interim application that the

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25 *Bishop v Central Regional Health Authority* HC Te Papaioea | Palmerston North M47/97, 11 Hūrae | July 1997.

26 *Kōkako Lodge Trust v Auckland Regional Public Health Service*, above n 11, at [13], citing *Nga Kaitiaki Tuku Iho Medical Action Society Inc v Minister of Health* [2021] NZHC 1107 at [58].

27 *Woodhouse v Auckland City Council* (1984) 1 PRNZ 6 (HC).

28 *Whale Watch Kaikoura Ltd v Transport Accident Investigation Commission* [1997] 3 NZLR 55 (HC), upheld on appeal in *Whale Watch Kaikoura Ltd v Transport Accident Investigation Commission* CA87/97, 12 Mei | May 1997.

applicants who will be transferred have a position to preserve — namely to remain in Arohata.

[58] Taking a broader view of case as being the effective closure of Arohata for sentenced prisoners, it is less clear whether there is a relevant position which is necessary to preserve. The respondent says that the arrangements are temporary to deal with the present exigencies and there is no planned closure.

[59] However, for the purposes of this application I accept there is a position necessary to preserve.

Second stage — discretion to grant relief

[60] I now move to consider the second stage. That is whether or not to exercise my discretion under s 16 of the Judicial Review Procedure Act to grant interim relief or not. I first consider the strength of the applicants' case, in respect of each ground of review, before turning to consider the public and private repercussions of granting relief.

Strength of the applicants' case

[61] As noted, the applicants raise four grounds of review. I now consider each in turn.

First ground of review — discrimination on the basis of sex

[62] The applicants say the respondent's decisions and actions amount to unlawful discrimination on the basis of sex. They say the respondent proposes to cause significant harm, which will be experienced solely by women, and which reflects historic and contemporary disregard for the interests of women prisoners, solely for the purpose of addressing staffing issues in the men's prison at a lower cost than other solutions available to him.

[63] Freedom from discrimination is affirmed by s 19 of the New Zealand Bill of Rights Act 1990 (NZBORA). The principles to be applied in respect of unlawful

discrimination under this section are well-established and non-contentious. The two-stage test is as follows:[29]

(a) first, there has to have been differential treatment or effects between two groups in comparable situations on the basis of a prohibited ground; and

(b) second, that different treatment had to have resulted in material disadvantage to the group differentiated against.

[64] The prohibited grounds of discrimination are provided in the Human Rights Act 1993. Section 21(1)(a) lists sex as a prohibited ground of discrimination.

[65] The applicants say that with very few exceptions all sentenced prisoners currently in Arohata will be transferred out of the region regardless of their circumstances, and women sentenced in the future will be placed either in Christchurch or Auckland, regardless of family links in the lower North Island. In contrast, transfers between the men's prisons will represent only a small portion of each prison's population, which means that individual circumstances can be taken into account and transfers can be limited to those men whose current circumstances will not be unduly negatively impacted by transferring.

[66] The applicants say the proposed actions demonstrate different treatment on the basis of sex resulting in material disadvantage to women. Illustrations given are:

(a) women with children and wider whānau in the lower North Island will be permanently separated from them during the term of their sentence, while men with family links that would be disrupted by transfer out of their region have the opportunity to (and strong grounds to) remain in their current placement;

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[29] *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [43], citing *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] and [109].

(b) women whose rehabilitation programmes, parole prospects and community supports, health and mental health care would be adversely impacted and placed at risk by a transfer will be required to transfer, while men in a similar situation have the opportunity to (and strong grounds to) remain in their current placement;

(c) women from and with family links to the lower North Island who are in future sentenced to prison will not be housed in the region and will be effectively denied visits from children and wider whanau, while men in a similar situation will be able to be housed in the region, and be able to have in-person visits to maintain family connections; and

(d) sentenced women prisoners with drug and alcohol dependency issues will have no access to the DTP for an indefinite period (unless and until Corrections re-establishes the programme), with consequent negative impact on their rehabilitation and prospects of parole, while men in a similar position will retain unchanged access to the four DTPs currently operating in the men's prisons.

[67] The applicants submit that a prima facie case of discrimination is established here, based on this analysis of uncontested facts. Further, they such discrimination is not justified in accordance with s 5 of the NZBORA as "demonstrably justified in a free and democratic society". This would of course render such differential treatment, while prima facie discriminatory, not unlawful. The applicants say that there is no evidence that satisfies any of the requirements for a demonstrably justified infringement as stipulated by Tipping J in *R v Hansen*, namely:[30]

(a) Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

(b) Is the limiting measure rationally connected with its purpose?

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30 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

(c) Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

(d) Is the limit in due proportion to the importance of the objective?

[68] Corrections responds that the relevant decisions to transfer did not occur because Arohata is a woman's prison per se but rather as part of a wider plan involving numerous movements of both staff and prisoners both men and women. The respondent says there is no realistic comparator.

[69] Mr Kinsler for the respondent submits that other alternatives were considered and discarded, and that specific prejudice was not connected to the decisions. Mr Marsh affirmed in his affidavit that other options had been considered but "these were not feasible."[31]

Second ground of review — irrationality/unreasonableness

[70] The applicants also say that the respondent's decisions and actions are irrational and/or unreasonable. According to the applicants, the respondent's decisions and actions will have significant adverse impact on women and children, and Māori women and children in particular, that is grossly disproportionate to the respondent's objectives and any perceived benefits.

[71] The applicants submit these impacts are contrary to the objectives, policies and international obligations relevant to the prison system, and therefore the decisions and actions of the respondent to pursue its present plan is irrational and/or unreasonable.

Third ground of review — relevant considerations

[72] The third ground of review is that the respondent failed to have regard to mandatory relevant considerations, in particular its own strategies and policy objectives and relevant international obligations, as well as the grossly disproportionate adverse impact on women and children, and on Māori women and

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31 Affidavit of Mr Leigh Marsh, 19 September 2022, at [21].

children in particular, and that the respondent has failed to consider the availability of alternatives that would avoid those harms.

[73] The applicants point in this respect to art 3(1) of the UNCROC, which provides that "[i]n all actions concerning children … the best interests of the child shall be a primary consideration." Glazebrook J in the Court of Appeal commented that this required the relevant statute to be interpreted accordingly. Her Honour said:[32]

> … As a matter of law, the statute must be interpreted consistently with the substantive requirement to take the best interests of the child into account as a *primary* consideration.

[74] The applicants say that documents obtained under the Official Information Act 1982, which Corrections had identified as the key papers used in making the decisions, demonstrated that there has been no such consideration here.

[75] The Chief Executive has powers under the Act to transfer prisoners between prisons. Those powers are in play when considering whether the respondent had regard to mandatory relevant considerations. As Lang J noted in *Reekie v Attorney-General*:[33]

> … there is no requirement in the Act or Regulations that a Prison Manager must consult or seek input from a prisoner before a decision is made to effect a transfer to another prison. Nor is there any requirement that prisoners be consulted about the manner in which they are conveyed from prison to prison. Obligations of that kind would obviously be wholly impracticable given the number of prisoners Corrections is required to transfer between prisons for a variety of reasons on a daily basis. Those responsible for making such decisions therefore have a considerable degree of discretion so long as the transfer is being made in accordance with s 54(1) to (3) of the Act and taking into account the matters set out in s 54(4).

[76] While there are more detailed arguments to be made here, at this interim stage, for the purposes of this application the evidence of Mr Marsh supports the fact that the respondent, via his delegate and teams, had regard to the statutory mandatory relevant considerations when making the transfer decisions in the circumstances faced by the prison system at present. His evidence set out the circumstances which presented safety risks, the need to move staff and prisoners to manage that risk in the short term

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32 *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 at [88] (emphasis in original).
33 *Reekie v Attorney-General* [2019] NZHC 1697 at [76].

and the complexities involved in the "network rebalancing", a logistical exercise responding to circumstances which are evolving.[34] Mr Marsh also described the manner in which individual situations were considered and that the women who were to be transferred had been provided with written notice. He also outlined the manner in which the transfer decisions were made and that there had been consideration of whānau connections among other factors. Mr Marsh noted that other considerations had been rehabilitation, parole, medical and support needs.

Fourth ground of review — purpose and principles

[77] It is not disputed that the respondent is obliged to act in accordance with the purposes and principles of the Corrections Act. The applicants say Corrections' decisions and actions are contrary to and fail to give effect to these purposes and principles, in particular those in s 5(1)(a) and (c) and s 6(1)(h) and (i).

[78] I have set those out earlier. Section 5(1) provides relevantly here that the purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by ensuring that sentences are administered in a safe, secure, humane, and effective manner; and assisting in the rehabilitation of offenders and their reintegration into the community, where appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available, through the provision of programmes and other interventions.[35]

[79] Section 6(1) provides that principles guiding the operation of the corrections system include relevantly here that offenders must, so far as is reasonable and practicable in the circumstances within the resources available, be given access to activities that may contribute to their rehabilitation and reintegration into the community; and contact between prisoners and their families must be encouraged and supported, so far as is reasonable and practicable and within the resources available, and to the extent that this contact is consistent with the maintenance of safety and security requirements.

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34 Affidavit of Mr Marsh at [22]
35 Corrections Act, s 5(1)(a) and (c).

Preliminary conclusions as to the strength of the applicants' case

[80] I make no definitive findings at this stage as to the strength or otherwise of the applicants' heads of challenge. It is difficult, and arguably premature at this interim stage, to do so without having had the benefit of further evidence.

[81] In particular, I note that while it appears at this interim stage and on the evidence available that the decisions made by Corrections were reasonable and were made in accordance with the purposes and principles of the Corrections Act, further evidence and argument at the substantive hearing may show the case to be otherwise.

[82] Insofar as I make a definitive finding, however, I merely state at this stage that in my view the applicants' claims are arguable.

Public and private repercussions

[83] In this case Corrections points to critical issues which require the rebalancing in the prison system to maintain even minimum entitlements for some prisoners. The evidence of Mr Marsh is that the movement of the women sentenced prisoners is crucial to the present plan. That there are other prisoners who will be affected if the rebalancing stalls is a factor to be taken into account at this stage.

[84] Ms Casey for the applicants submits that the proposal to transfer the women sentenced prisoners starting tomorrow is harmful and incoherent, and suggests Corrections pause so that it can properly assess whether its plans will actually achieve its goals. She pointed to options canvassed in earlier management papers.

[85] The applicants submit that the effect on other prisoners at this stage has not been made out. In particular, there is surge staffing available from Christchurch prisons, as well as opportunities of secondments of up to one year which have been referred to in the management papers. The applicants suggest that Corrections' main interest in not pursuing other available options is the cost of doing so. They submit in this respect that the balance of convenience favours the applicants.

[86] In Mr Kinsler's submissions the "rebalancing" is a complex, difficult and evolving process managed by a government agency. Mr Kinsler described the plan involving a number of interdependencies. The situation is changing in real time.

[87] The evidence is that the transfer of prisoners from Arohata is a necessary corollary of the reallocation of staff from Arohata, which is an important component of the plan. Not only would this suggest that there will be risks to staff and prisoners and that tensions in the prisons will be exacerbated, but it appears that staffing levels at Arohata would likely be affected in any case, thus compromising the safety and welfare of prisoners there.[36]

[88] This is a case where the Court must exercise some caution before intervening in administrative or management decisions of government agencies or departments involving logistical complexities. This must particularly be so when staff and prisoner safety and possibly that of the public, may be put at risk. As the Court of Appeal put it in *Taylor v Chief Executive of Department of Corrections*, the Court must be careful to avoid stepping into what are management decisions involving resource allocation.[37]

[89] I am satisfied that the public and private repercussions of interim orders at this stage interfering with the "rebalancing" plan could be significant. Corrections says that it is attempting to manage what by any view is an acute staff shortage across the prison system through the redeployment of staff and transfer of prisoners. The evidence I have heard is that the other options Ms Casey refers to are not workable at this stage. There could be serious and negative impacts on other prisoners if the transfers are now prevented.

[90] Overall, I consider the public repercussions together with the possible private repercussions relating to safety of prisoners and staff weigh significantly in favour of dismissing the interim application.

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36 Affidavit of Mr Marsh at [7] and [8].

37 *Taylor v Chief Executive of Department of Corrections* [2010] NZCA 371, [2011] NZLR 112 at [26].

Summary

[91] I have accepted there is a position which it is necessary to preserve.

[92] In respect of the second stage, in my view the applicants' claims are arguable, although it is difficult to assess the strength of the claims at this stage.

[93] However, considering all the circumstances of the case, the repercussions, public and private, of granting interim relief weigh heavily against the granting of the relief. At this stage it is not appropriate for the Court to exercise its discretion to stay the proposed transfers.

Result

[94] The application for interim relief is dismissed.

[95] The substantive matter has been allocated an early hearing date. Counsel are to confer on an agreed timetable and file a joint memorandum in that regard within five days of the date of this judgment.

Costs

[96] Counsel should confer on costs and if orders are required any application and submissions should be filed within five days and any responses within a further three days.

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Grice J

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