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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 10/2024
[2025] NZSC 103

BETWEEN	J, COMPULSORY CARE RECIPIENT, BY HIS WELFARE GUARDIAN, T Appellant
AND	ATTORNEY-GENERAL First Respondent
	DISTRICT COURT AT MANUKAU Second Respondent
	FAMILY COURT AT MANUKAU Third Respondent
	CARE CO-ORDINATOR Fourth Respondent
	CARE MANAGER Fifth Respondent

SC 11/2024

BETWEEN	J, COMPULSORY CARE RECIPIENT, BY HIS WELFARE GUARDIAN, T Appellant
AND	CARE CO-ORDINATOR Respondent

Hearing:	20–21 August 2024
Court:	Winkelmann CJ, Ellen France, Williams, Kós and Miller JJ
Counsel:	A J Ellis and G K Edgeler for Appellant K Laurenson, M J McKillop and R E R Gavey for First and Fourth Respondents in SC 10/2024 and Respondent in SC 11/2024 No appearance for Second, Third and Fifth Respondents in SC 10/2024 A S Butler KC and D Qiu for IHC New Zealand Incorporated as Intervener D T Haradasa and B J Peck for Te Kāhui Tika Tangata | Human Rights Commission as Intervener
Judgment:	15 August 2025

JUDGMENT OF THE COURT

A **The appeal is allowed in part. The approach of the Court of Appeal to s 85 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 was incorrect. The Family Court, in considering this matter in the context of a review under Part 6 of the Act, is to address J's condition and status in accordance with our approach to s 85.**

B **The further evidence described below at [156] is admitted.**

C **The application for recall of this Court's leave judgment of 18 April 2024 (*J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2024] NZSC 34) is allowed only to clarify the matters which are properly before the Court.**

D **The judgment of this Court of 18 April 2024 (*J, Compulsory Care Recipient, by his Welfare Guardian, Tv Attorney-General* [2024] NZSC 34) is reissued accordingly.**

E **Costs are reserved.**

REASONS

SUMMARY OF REASONS
(Given by the Court)

[1] This summary of the Court's reasons on the principal issues must be read alongside the full reasons.

Background

[2] The appellant, J, is a 41-year-old Autistic person with an intellectual disability, as that term is defined in the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the Act). He is detained in a secure healthcare facility pursuant to a compulsory care order made under the Act. J has been detained under a compulsory care order for over 19 years since, in 2006, he was found unfit to stand trial on two charges for minor property-related offending. The order has been extended several times under s 85 of the Act, most recently in 2023, on the basis of his risk of self-harm and committing acts of violence if released from care.

[3] J, by his welfare guardian, T, challenges the validity of his compulsory care orders. J was unsuccessful in relation to his proceedings in the High Court. His appeals to the Court of Appeal were dismissed. Leave was granted to appeal to this Court. As the case has developed the focus is on whether there has been a breach of J's rights, in particular his right not to be arbitrarily detained which is protected under s 22 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights).

[4] By a majority comprising Winkelmann CJ, Ellen France, Williams and Miller JJ, the Supreme Court has allowed J's appeal in part.[1] The Court found that the Court of Appeal's approach to the extension of J's compulsory care order under s 85 of the Act was incorrect. The Family Court, in considering this matter in the context of its review under Part 6 of the Act, is to assess J's condition and status in accordance with the approach to s 85 set out in the reasons of Ellen France and Miller JJ with which Winkelmann CJ is in agreement. Kós J dissented and would have dismissed J's appeal.[2]

The correct approach to s 85

[5] In allowing the appeal in part, the focus of the Court was on the correct approach to the interpretation of s 85 of the Act under which a compulsory care order can be extended. The test adopted by a majority of the Court is set out in the reasons of Ellen France and Miller JJ, and is also discussed in the reasons of Winkelmann CJ.[3]

[6] In outlining the approach to be taken, Ellen France and Miller JJ said s 85 requires the Family Court to undertake an inquiry to determine whether the impact of continued detention on the care recipient's liberty interests remains proportionate to the legitimate aims of the detention under the Act.[4] These legitimate aims are protection of the health, safety and rights of the care recipient, and the interests of the community.[5] Maintaining proportionality between those interests and the legitimate aims is necessary to ensure that extending a compulsory care order does not constitute arbitrary detention inconsistent with s 22 of the Bill of Rights.

[7] The care recipient's liberty interests are the starting point of the proportionality inquiry.[6] In determining whether continued detention is a proportionate response the Family Court must take into account the inter-related, factors set out below.

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1 See below at [222] per Winkelmann CJ, [160] per Ellen France and Miller JJ, and [280] and [345] per Williams J.
2 See below at [384] per Kós J.
3 See below at [141]–[145] per Ellen France and Miller JJ, and [216]–[218] per Winkelmann CJ.
4 See below at [88] per Ellen France and Miller JJ.
5 See below at [88] per Ellen France and Miller JJ.
6 See below at [102]–[103] and [119] per Ellen France and Miller JJ.

(a) The nature of the offending that brought the care recipient into the compulsory care regime (the initial offending). Broadly speaking, if the initial offending is minor, that is a factor telling against extended periods of detention. In other words, some proportionality between the initial offending and the adverse impact on the liberty interest should be maintained.[7]

(b) The care recipient's rehabilitative prospects. Reflecting the emphasis given to rehabilitation in the statutory scheme, over time, the absence of prospects of progress by a care recipient in the immediate or near future, strongly tells against further extension of compulsory care.[8]

(c) The present risk posed by the care recipient. A sufficient risk of harm to the care recipient or others is the minimum pre-requisite for the extension of a compulsory care order. The effect of the statutory scheme is that risk is also relevant to the proportionality exercise. But eventually the risk of harm will be outweighed where the initial offending is comparatively minor; the person has been a care recipient for an extended period; and/or where the prospects of progress in the immediate future are minimal. Any other approach does not adequately reflect the relevant rights of a care recipient nor a statutory scheme with an objective of rehabilitation.[9]

(d) The length of time the care recipient has been under care. This factor is not treated as a standalone factor but it supplies the context in which the other factors are to be assessed.[10]

[8] Ellen France and Miller JJ saw the question of statutory interpretation of s 85 as one capable of resolution in terms of s 6 of the Bill of Rights. Section 6 directs that an enactment is to be given an interpretation consistent with the Bill of Rights, where possible. However, given there is an overlap between that section and s 5 of the Bill

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7 See below at [96]–[114] per Ellen France and Miller JJ.
8 See below at [115]–[119] per Ellen France and Miller JJ.
9 See below at [120]–[131] per Ellen France and Miller JJ.
10 See below at [94]–[95] and see [119] per Ellen France and Miller JJ.

of Rights in this context, Ellen France and Miller JJ accepted that there would be no difficulty in the decision-maker framing their inquiry as one of demonstrable justification under s 5 if this were easier in practice, so long as the key matters identified in the test are considered.[11]

Winkelmann CJ

[9] Although endorsing the test as to the approach to s 85 in the reasons of Ellen France and Miller JJ, Winkelmann CJ took a different view in two main regards — as to the formulation of the primary purposes of detention under the Act, and regarding the precise nature of the necessary inquiry under the Bill of Rights.[12]

[10] On the first aspect, Winkelmann CJ considered that community safety itself is not a purpose of the Act in relation to care recipients in J's position — those who have entered compulsory care via s 25(1)(b) of the Criminal Procedure (Mentally Impaired Persons) Act 2003. Rather, it is incidental to the primary purpose of the Act, which Winkelmann CJ articulated as comprising care, rehabilitation and reintegration into the community in response to the needs identified by the initial offending conduct.[13]

[11] Secondly, Winkelmann CJ said that courts considering applications under s 85 may find the *R v Hansen* proportionality analysis more useful, and saw this as engaging both ss 5 and 6 of the Bill of Rights.[14] This would involve first identifying the scope of the right, and the nature and dimension of the proposed limitation, then considering the justification for the proposed limitation: first, whether the limitation is prescribed by law; and secondly, whether the detention is reasonable, necessary and proportionate in light of the nature and seriousness of the index offending, and in light of the purposes of detention as described above.[15]

[12] Winkelmann CJ, and Ellen France and Miller JJ, agreed that the case did not involve a conflict of rights and should not be approached in that way.[16]

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11 See below at [81], [88] and [145] per Ellen France and Miller JJ.
12 See below at [216]–[218] per Winkelmann CJ.
13 See below at [203]–[204] per Winkelmann CJ.
14 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, and see below at [214]–[215] per Winkelmann CJ.
15 See below at [216] per Winkelmann CJ.
16 See below at [207] per Winkelmann CJ, and [89] per Ellen France and Miller JJ.

Williams J

[13] Williams J differed from the majority as to the correct approach to s 85, preferring an approach which emphasises that "care", the state's active obligation to provide such care, and the need to protect J's dignity and wellbeing, are central.[17] Williams J's proposed test as to the correct approach comprised two questions.[18]

[14] The first question on this approach is whether the risk and gravity of potential harm are sufficiently serious to justify further detention in secure care. This inquiry is informed in part by the length of the care recipient's detention and the maximum sentence for the index offending.[19] The second question is whether the circumstances of the care recipient's detention are such that their rights to dignity, respect and optimal quality of life are protected. The statutory mandate to detain only exists where the care being received vindicates these rights and these rights could not be provided for by less intrusive means.[20]

[15] While this approach will often lead to the same result as the approach of the majority, Williams J considered that, in this case, fresh consideration by the Family Court may not inevitably lead to J's release.[21]

Kós J

[16] In dissent, Kós J would have upheld the decisions of the High Court and Court of Appeal, concluding that the amelioration of J's current care status and conditions is a matter for the Part 6 review being undertaken by the Family Court. Kós J also considered that the approach in *RIDCA v VM* was largely correctly decided and applied by the Courts below.[22] The consequences of granting J the liberty he sought were likely to be very serious and it followed that J's liberty interests were necessarily compromised from the outset.[23] Framing the matter as a conflict between J's rights

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17 See below at [280]–[281] and [335]–[336] per Williams J.
18 See below at [322]–[334] and [341] per Williams J.
19 See below at [323]–[324] per Williams J.
20 See below at [325]–[327] per Williams J.
21 See below at [280] and [336] per Williams J.
22 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641, and see below at [349] per Kós J.
23 See below at [350], [352], [362] and [366] per Kós J.

and the rights of the public,[24] Kós J found that the limits imposed on J's rights were demonstrably justified due to, among other matters, the safety interests of potential victims, J's lack of agency, and the absence of a suitable, less restrictive alternative.[25] On this basis, J's detention in care had not been shown to be unlawful, and an order for release would be irresponsible.[26] The relief sought having been denied by the Court, the appeal should have been dismissed.[27]

Discrimination

[17] In addition to inconsistency with s 22, it was argued that the approach to s 85 taken in *RIDCA v VM* was inconsistent with the protection from discrimination in s 19 of the Bill of Rights. While not necessary to decide the appeal, which has been determined on the basis of arbitrary detention, Winkelmann CJ and Williams J[28] made some observations regarding the discrimination arguments. Winkelmann CJ said that she would also have allowed the appeal on this ground on the basis that the *RIDCA* test, which the majority have now rejected, as applied to J was discriminatory for the purposes of s 19 of the Bill of Rights.[29]

ELLEN FRANCE AND MILLER JJ
(Given by Ellen France J)

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24 See below at [352] per Kós J.
25 See below at [382] per Kós J.
26 See below at [384] per Kós J.
27 See below at [349], [376] and [386] per Kós J.
28 See below at [346]–[348] per Williams J.
29 See below at [223]–[239] per Winkelmann CJ.

Introduction

[18] J is presently detained pursuant to a compulsory care order made under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the Act). J, now 41 years old, is an Autistic person with an intellectual disability as that term is defined in the Act.[30] J was made subject to a compulsory care order and detained under the Act in 2006[31] after he was found unfit to stand trial on charges of being in an enclosed yard without reasonable excuse[32] and wilful damage.[33] The order relating to J has been extended by the Family Court on numerous occasions since 2006.

[19] The power to extend a compulsory care order is set out in s 85 of the Act. That section provides that the Family Court "may" order an extension on application by the care co-ordinator.[34] In doing so, s 85(2) states that the court must consider and decide whether someone in J's position must receive either supervised or secure care.

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30 Section 7(1) states that "[a] person has an intellectual disability if the person has a permanent impairment that— (a) results in significantly sub-average general intelligence; and (b) results in significant deficits in adaptive functioning, as measured by tests generally used by clinicians, in at least 2 of the skills listed in subsection (4); and (c) became apparent during the developmental period of the person". Subsection (4) includes skills such as communication, social skills, and reading, writing and arithmetic.

31 *New Zealand Police v [J]* DC Manukau CRN 4092034925-26, 8 February 2006 (Judge Kerr).

32 Summary Offences Act 1981, s 29(1)(b). The maximum penalty for this offence is three months' imprisonment or a $2,000 fine.

33 Section 11(1)(a). The maximum penalty for this offence is three months' imprisonment or a $2,000 fine.

34 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 [the Act], s 85(1). Compulsory care co-ordinators are appointed by the Director-General of Health under s 140 of the Act with responsibilities for the geographical and operational areas specified by the Director-General: s 5(1) definition of "co-ordinator". They are responsible for the provision of various functions and exercise various powers within their designated area.

As we shall explain, secure care requires high levels of security and supervision of the care recipient.[35]

[20] J, supported by his mother who is acting as his welfare guardian, wants his detention to be ended so he can live with his mother. To that end, he challenged the validity of his compulsory care orders in the High Court. Amongst other matters he said that, contrary to the New Zealand Bill of Rights Act 1990 (the Bill of Rights), his detention was arbitrary and that he was unlawfully discriminated against on the basis of intellectual disability.[36] J was unsuccessful in the High Court.[37] His appeal to the Court of Appeal was dismissed.[38] Leave to appeal from the decision of the Court of Appeal was granted by this Court.[39]

[21] J's appeal raises questions about the way in which the Family Court should approach the decision to extend a compulsory care order under s 85 in circumstances where J's detention has long exceeded the (three-month) maximum term of imprisonment that was available in relation to each of the charges against him; the prospects of progress for J in secure care are described as very low; and he is assessed as having a very high risk of seriously harming others and of harming himself if released into the community. The only explicit criterion governing the exercise of the extension power in s 85 itself concerns the choice between secure and supervised care. Section 85(3) provides that a care recipient may only be placed in secure care if the court considers "that supervised care would pose a serious danger to the health or safety of the care recipient or of others".

[22] In determining whether the s 85 power was exercised correctly in J's case, the Court of Appeal adopted the approach to s 85 taken by that Court in *RIDCA Central*

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35 Discussed further below at [28].

36 New Zealand Bill of Rights Act 1990 [Bill of Rights], ss 22 and 19; and see Human Rights Act 1993, s 21(1)(h)(iv).

37 *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2018] NZHC 1209 (Cull J) [HC judgment].

38 *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2023] NZCA 660 (Courtney, Katz and Clifford JJ) [CA judgment].

39 *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2024] NZSC 34 (Glazebrook, Ellen France and Miller JJ) [SC leave judgment]. Subsequently, IHC New Zealand Incorporated [IHC] and Te Kāhui Tika Tangata | Human Rights Commission [the Commission] were granted leave to appear as interveners.

(Regional Intellectual Disability Care Agency) v VM (*RIDCA v VM*).[40] In granting leave to appeal the parties were asked to address the correctness of the approach in *RIDCA v VM*. That question necessitates consideration of the way in which the rights protected by the Bill of Rights, particularly the right in s 22 not to be arbitrarily detained, effect decisions under s 85.[41] Similarly, we need to consider how the protections in the Convention on the Rights of Persons with Disabilities (the Convention), which New Zealand signed in 2007 and ratified in 2008, impact on s 85.[42] Article 12(2) of the Convention requires recognition that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life".

[23] To put these issues in context, we first set out the background to the case.

Background

[24] We begin with a brief description of the incident giving rise to the charges J faced and then summarise the key features of J's presentation and care since he was initially detained in 2006. The factual background is set out in some detail in the Court of Appeal judgment.[43] In the summary of the relevant events which follows, we draw on that description and on the detail of these matters in the written submissions of the first and fourth respondents in SC 10/2024 (the respondents).[44]

The initial incident

[25] J was living with his mother when, on 8 June 2004, he carried an axe onto a neighbour's property. He used the axe to break windows of the neighbour's garage

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40 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641 [*RIDCA v VM*].

41 See further discussion of the relevant rights below at [79].

42 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008). Ratification followed the enactment of the Disability (United Nations Convention on the Rights of Persons with Disabilities) Act 2008 and the Human Rights Amendment Act 2008.

43 CA judgment, above n 38, at [7]–[27].

44 Being the Attorney-General and J's care co-ordinator, respectively. J's care co-ordinator is also the respondent in SC 11/2024. The second, third and fifth respondents in SC 10/2024 have played no active part in the proceedings.

and van. The neighbour noted J had said he was James Bond.[45] J was 20 years old at the time.

[26] The charges against J proceeded under the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CPMIP Act) and the Act. Findings as to J's involvement in the offending and that he was unfit to stand trial were made on 7 February 2005. At a disposition hearing a year later, on 8 February 2006, Judge Kerr found J had an intellectual disability and his risk to his health and safety or that of others was such that a secure care order for a term of two years was necessary.[46]

Presentation and care

[27] As we have noted, the Family Court in making a compulsory care order may order one of two levels of care, namely, secure or supervised.[47] Those ordered to receive secure care, as J was initially — and is now — receiving, do so in a "secure facility" as defined in s 9(2) of the Act. A secure facility is one that:[48]

> (a) has particular features that are designed to prevent persons required to stay in the facility from leaving … without authority; and
>
> (b) is operated in accordance with systems … designed to achieve that purpose.

[28] Secure facilities are found in secure hospital facilities and secure community facilities. Supervised care is provided in the community. Non-secure facilities "need not have any particular features".[49] Rachel Daysh, Group Manager System Design for Whaikaha | Ministry of Disabled People, in her evidence outlined the security features required for each of the different levels of care. For secure care, Ms Daysh said that the features include an "escape-proof dwelling with locked or

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45 In an earlier incident that did not give rise to any charges, J cut the back of the neck of another student at his school. The student was taken to hospital, needed stitches, and was released that same day. She returned to school several days later. It appears that on this occasion J also described himself as James Bond.

46 *New Zealand Police v [JJ]*, above n 31, at [12]–[14]. See below at [60]–[69] for discussion of these statutory processes.

47 Above at [19].

48 Section 9(2).

49 Section 9(3). Once required to receive secure care, a care recipient must stay in the designated secure facility and may not leave without authority given under the Act: s 63(2). See also s 64(5) dealing with supervised care and the ability of the co-ordinator to direct the care recipient remain in the facility except with authority to leave.

limited opening windows", observation systems for staff observation and alarms. The Act also provides for care recipients to be placed in seclusion and restrained in specified circumstances whilst in secure care.[50]

[29] For about the first year and a half of the initial compulsory care order, J was in a facility managed by Te Roopu Taurima. They are contracted to provide secure and supervised compulsory care facilities referred to as Regional Intellectual Disability Supported Accommodation Services (RIDSAS).[51] J was transferred from their care in August 2007 to the Mason Clinic which is a secure hospital-level service. The reports filed in the Family Court said this followed on from various incidents involving, amongst other matters, absconding, secreting weapons and property damage.

[30] Between 2008 and 2010 the compulsory care order was extended under s 85 numerous times.[52] J returned to a RIDSAS facility operated by Te Roopu Taurima in May 2011. In September 2011, a recommendation was made that J's level of care be varied from secure to supervised. The Family Court made provision for this on 5 December 2011. In December 2012, and again in April 2015, there were further extensions of the compulsory care order.[53] Then, after a hearing on 2–3 February 2017, the order was extended by a further 18 months (the 2017 Family Court decision).[54] In making the latter order, Judge Goodwin agreed with J's care co-ordinator, the applicant for the extension, that it was necessary to change the terms of the order from supervised to secure care. In doing so, the Judge was satisfied that

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50 Sections 60 and 61.

51 Ms Daysh, in an updating affidavit admitted by consent, discussed changes to the delivery of health services with, for example, the disestablishment of District Health Boards and the establishment of Whaikaha | Ministry of Disabled People. She explained that Regional Intellectual Disability Supported Accommodation Services remain non-governmental organisations contracted by Whaikaha | Ministry of Disabled People and continue to provide care.

52 On 30 April 2008, Judge Adams made an order extending the compulsory care order for six months; a further order extending the order for six months was made by Judge Rogers on 28 January 2009; on 27 July 2009 Judge Hikaka extended the order for 12 months; and a further two-year extension order was made by Judge Hikaka on 6 October 2010.

53 A two-year extension order was made by Judge Skellern on 17 December 2012; and an extension for 18 months was ordered, again by Judge Skellern, on 17 April 2015.

54 *Harvey v [J]* [2017] NZFC 1079.

the requirement in s 85(3) for "serious danger to either [J] or his care team" was met.[55] The Judge referred in this regard to the following:[56]

> The incidents recorded by Ms Jensen in her report (36 in the prior six months) indicate to me that in the absence of the restrictions currently operated by [J's] care team, there would be a serious danger to his care team and quite possibly to [J] himself. Such dangerousness is inherent within the risk assessment conducted by both Dr Thomson and Ms Jensen.

[31] The Judge was also satisfied that secure care was the least restrictive option available. As the respondents record in their submissions to this Court, the specialist assessor reports prepared for this extension application:[57]

> … note that recent incidents had included attempts to secret sharp objects, threats to cut the throats of staff and European people more generally, attacks on support workers, J vocalising that he was James Bond, attempts to smash windows and escape his care facility, and assaulting the CEO of his care facility by forcibly removing her shoe and sniffing and licking her foot. J also provided one report writer with images he had drawn of assaults on women, which include written references to James Bond films and a specific threat to kill another woman (the CEO of a previous care facility).
>
> 16. The specialist assessors considered J's risk of harming others remained high. While his risk in a care setting was of relatively low-level assaults to staff, his risk outside of a care setting was of committing acts of serious violence, particularly against European women and girls.

[32] Another extension order was made in August 2018 for a further 20 months of secure care. Early in 2020, J was moved from his place in secure community care to the Mason Clinic because of concerns Te Roopu Taurima was no longer able to safely accommodate him. In September 2020, there was a further extension when the Family Court made a three-year secure care order.[58] Reflecting the evidence of the specialist assessors, Judge Wagner considered J's risk remained "in the very high range, and that he continues to present a significant and an ongoing risk to the community".[59]

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55 At [115].

56 At [116]. Ms Jensen and Dr Johnson prepared specialist assessor reports on J and gave oral evidence at the hearing. "Specialist assessors" are "suitably qualified and experienced health or disability" professionals designated as specialist assessors by the Director-General of Health for the purposes of the Act: the Act, s 5(1) definition of "specialist assessor" or "assessor".

57 Footnotes omitted.

58 *Harvey v [J]* [2020] NZFC 5981.

59 At [39].

[33] On 12 September 2023, another three-year secure care order was made.[60] Judge Goodwin observed that if released from his current secure unit, J would return to his mother's home. The evidence was that her home did not meet the required standards either in terms of security or staffing. Accordingly, the Judge said, if J was released from his current placement:[61]

> … he would be accommodated in an environment that could not provide the secure level and human resource management that the reports highlight is required to address [J's] current assessed risk.

[34] In terms of J's assessed risk, the Court of Appeal observed that some common themes of concerns emerge from the material considered by the Family Court over the years. These include, notably, J's obsessions with feet and those related to violence and weapons, incidents of violence, threats of violence, attempts to access weapons, incidents of property damage and self-harming behaviours.[62]

[35] As is apparent from this narrative, J's current care is provided at the Mason Clinic in, as we have said, a hospital secure facility. It suffices to use the respondents' description of the living arrangements as at April 2023. The respondents note that J:[63]

> … lives in a "cluster" of rooms which includes two bedrooms, a bathroom and living space where he is able to do some of his daily activities like watching television, using his cross-trainer and making simple meals. His level of risk requires a 3:1 ratio of dedicated staff. Before 2020 he was housed in a specially modified secure community facility with a locked gate and high perimeter fence topped by a net, locked and frosted windows (to prevent J becoming agitated by members of the public), reinforced walls, and with sharp objects such as kitchen knives kept in a locked cupboard.

[36] In a judgment delivered in 2024 following a further hearing to consider a review under Part 6 of the Act, which provides for the regular review of the condition and status of care recipients, the Family Court referred to the difficulties for J with the environment described above.[64] The Court noted that commercial construction adjacent to his accommodation causes J distress in a situation where it is already

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60 *Care Co-Ordinator v [J]* [2023] NZFC 9651. There was no appeal from this decision.
61 At [28].
62 CA judgment, above n 38, at [11]–[26].
63 Footnotes omitted.
64 *Lau'ese-Blaney v [J]* [2024] NZFC 11580 [2024 judgment]. We address the admissibility of the 2024 judgment below at [156] and [159].

difficult for J to receive medical attention. J has "acute hearing" and responds strongly to sudden noise.[65] The Judge also stated that there have been some outings in a van for J but these have been "very limited" due to staff resourcing available to him.[66] The Court said the Mason Clinic has access only to one van suitable for J as it has a driver's cage, and that vehicle "is not completely fitted out to the extent required for [J's] own safety and the van is shared between nine units so is not often available".[67]

[37] In context of the recent Part 6 review, the Family Court decision discussed a report filed with the Court from J's care manager which canvassed J's care and rehabilitation plans.[68] The care manager recommended funding to redesign the existing environment at the Mason Clinic so that it met J's needs and for further training, coaching and supervision directed to J's care needs. The care manager's report went on to discuss a future where J may live with his mother in the community. The Judge noted "[t]hat is what she desperately wants, and [J] wants to be with his mother as well."[69] The report noted that this course also was dependent on funding.

[38] The Judge said that the plan was "for a staged approach for" J.[70] The most pressing need was for a van, suitably fitted out, so that J could safely leave the Mason Clinic for outings. A "purpose-built space" in the Mason Clinic was also an urgent need.[71] The ultimate goal would be for J to live with his mother. The Judge made recommendations under s 76 of the Act to the Director-General of Health to consider the funding issues. These recommendations reflected the Family Court's view that the plan should be funded as a priority where J's "current situation is untenable".[72]

[39] Finally, by way of background, we note that in an updating affidavit, Ms Daysh sets out the approximate numbers of persons at each level of care in New Zealand as at June 2024. The figures are as follows:

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65 At [7].
66 At [10].
67 At [10].
68 These plans are a requirement when a care recipient's needs have been assessed: the Act, ss 5(1) and 24. As to their contents, see ss 25, 26 and 27; and as to power to vary, see s 28.
69 2024 judgment, above n 64, at [14].
70 At [20].
71 At [21].
72 At [24].

18.1 Hospital secure care under [the] Act – 39

18.2 Community secure care under [the] Act – 37

18.3 Community supervised care under [the] Act – 103

18.4 [High and Complex Framework] care other than under [the]Act– 86

18.5 Mainstream disability support services – approximately 7,500 in residential care, 70,000 in non-residential care.

The decisions in the Courts below

[40] We will come back later to some more detail of the judgment of the Court of Appeal but it is helpful at this point to briefly set out the general approach taken by the Courts below.

The High Court

[41] The appellant brought four overlapping but separate proceedings which were heard together in the High Court, all of which challenged the validity of his compulsory care orders.[73]

[42] The first of these proceedings was an application for an extension of time (by at least 11 years) to appeal against decisions made by the District Court between 2004 and 2006 under the CPMIP Act — that is, the decisions that J was involved in the alleged offending and that he was unfit to stand trial, and ordering that he be cared for as a care recipient.[74] Cull J considered this application in some detail but concluded that leave to appeal out of time should be declined. The Judge found the grounds of appeal failed, there had been no miscarriage of justice, and the determinations J was involved in the offence, his unfitness to stand trial, mental impairment and the ultimate disposition in a secure facility under the Act were safe and valid findings.[75]

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73 HC judgment, above n 37.

74 See above at [26].

75 HC judgment, above n 37, at [153]. See also at [157]. It was agreed in the Court of Appeal that there was no jurisdiction to appeal from this part of the High Court decision: CA judgment, above n 38, at [5(a)].

[43] The second proceeding dealt with by the High Court was an appeal from the 2017 Family Court decision extending J's compulsory care order for a further 18 months and varying it from a supervised care order to a secure care order.[76]

[44] When the High Court was considering the matter, the 2017 Family Court decision was the most recent extension order. The Court applied the principles relating to the extension of a compulsory care order under s 85 of the Act as set out in *RIDCA v VM* noting that the "balancing approach, between community protection and individual rights" was key to decisions to extend compulsory care orders.[77] In dismissing this appeal, the High Court considered that the Family Court had not erred either in interpreting and applying the law or in assessing the evidence of the specialist assessors. The evidence had been carefully considered, as had J's particular circumstances, and the Judge correctly assessed that J's compulsory care order should be extended and varied. The appeal against the 2017 Family Court decision was dismissed.

[45] The third of the proceedings before the High Court was an application to that Court for an inquiry under s 102 of the Act into the legality of J's detention as a care recipient.[78] Having found J was a person with an intellectual disability, and therefore was not detained illegally,[79] the Judge's conclusion that it was necessary J continue to be cared for as a care recipient was based on the following:[80]

> [427] I have taken into account the nature of the original offending, yet for the reasons I have addressed above, consider that even though J will remain subject to a compulsory care order, well in excess of a sentence for the index offending, the minor nature of the offending does not provide an accurate guide to the level of risk posed by J. J constitutes a very significant and ongoing risk to the public, even though the index offending was for minor offences. The incidents which occurred prior to J being charged with the index offending and after he was made a care recipient, reinforce that the index offending does not reflect J's ongoing risk.
>
> [428] I consider therefore, that J's status as a care recipient under a compulsory care order at a secure level of care is not disproportionate to the need to protect the community and he needs to continue to be cared for as a care recipient at a secure level of care.

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76 *Harvey v [J]*, above n 54; and see discussion above at [30].
77 HC judgment, above n 37, at [171], referring to *RIDCA v VM*, above n 40.
78 See the Act, s 102(3).
79 Sections 7 and 104(a).
80 HC judgment, above n 37 (footnote omitted); and see the Act, ss 104(b) and 105(3).

[46] The fourth matter dealt with by the High Court was the judicial review proceeding. Under this heading, the Judge focused on whether J was detained arbitrarily, subject to disproportionately severe treatment or punishment, and/or was discriminated against on the basis of his disability contrary to the protections in the Bill of Rights.[81] The Judge concluded that the detention was not arbitrary, but rather was justified by a lawful District Court order in 2006, and subsequently, following further reviews by the District Court, on the basis of specialist assessors' evidence. Nor were the orders capricious or made without reasonable cause. The reasons for J's detention had been carefully delineated in successive specialist assessors' reports from 2005 onward.

[47] The Judge addressed the submission that J had received poor rehabilitation prior to 2016 and that this supported the argument that he was arbitrarily detained. The Judge considered that the hearing leading to the 2017 Family Court decision had addressed the adequacy of J's care and rehabilitation plan and the expert evidence along with the District Inspector[82] had drawn attention to the deficiencies in his care plan. The High Court found that the Family Court had reflected these concerns by limiting the secure care order to a term of 18 months.

[48] The High Court also placed emphasis on the fact that the Act provided for frequent reviews, and conferred examination, inquiry and reporting powers on the High Court which could be initiated on the application of any person or on the Court's own motion.[83] Further, the compulsory care orders were time limited and focused on the care and rehabilitation needs of every individual who each must have a care and rehabilitation plan. There was also oversight via the provision for District Inspector monitoring. In rejecting J's argument that the fact his detention was disproportionate to the maximum sentence for his index offending supported a finding of arbitrary detention, the Judge noted the difficulty of equating "the punishment of imprisonment with the therapeutic or protective care enacted for those with intellectual disability".[84]

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81 Bill of Rights, ss 9 and 19; and see Human Rights Act, s 21(1)(h)(iv).

82 District Inspectors are barristers and solicitors appointed to ensure the Act and the Mental Health (Compulsory Assessment and Treatment) Act 1992 [Mental Health Act] are upheld, and to provide independent oversight to relevant facilities: see the Act, s 144 and Part 7 Subpart 1; and Mental Health Act, ss 94–98A.

83 Citing the Act, ss 102–107.

84 HC judgment, above n 37, at [475].

[49] In terms of the argument that the scheme of the Act was discriminatory, the High Court rejected that on the basis that the scheme was designed to respond to and treat disability-related needs and the risk of self-harm and harm to others. The scheme did not materially disadvantage the intellectually disabled but rather "provides a humane, fair and compassionate system for their care and rehabilitation".[85] The High Court also emphasised, amongst other matters, that the Act provides a protective and not a punitive scheme. In the alternative, the Judge considered that the difference in treatment was a justified limit in terms of s 5 of the Bill of Rights on the right to freedom from discrimination.[86]

[50] Finally, nor did the Judge accept that this was disproportionately severe treatment or punishment contrary to s 9 of the Bill of Rights. That was so where the detention under the 2006 Court order was appropriate, lawful and there was no miscarriage of justice. The Judge said that J's risk required this level of care at present.

The Court of Appeal

[51] The Court of Appeal dealt first with the argument that J's treatment was disproportionately severe.[87] The Court found that the available sentence for the initial or index charges was a relevant consideration in addressing this submission but was only a factor and not determinative. Instead, the Court said when considering an application for an extension under s 85:[88]

> … a court must exercise its discretion in accordance with the guidance given in [*RIDCA v VM*], which requires a careful balancing of a care recipient's liberty interest and the need to protect the health and safety of both the care recipient and the community.

[52] The Court rejected other arguments raised on behalf of J about the process for the assessment of risk and as to prosecutorial discretion. We need only note the conclusion in relation to the difficulties raised by J's case:[89]

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85 At [535].
86 Bill of Rights, s 19; and see Human Rights Act, s 21(1)(h)(iv).
87 Bill of Rights, s 9.
88 CA judgment, above n 38, at [65] citing *RIDCA v VM*, above n 40.
89 At [77].

> All three specialist assessors who assessed him prior to the 2020 Family Court decision[90] concluded that he poses a very high risk of future violent behaviour. Unfortunately, through no fault of his own, the level of risk that J poses can currently only be mitigated through controlling his environment — housing him in a secure facility, providing constant supervision, following a carefully developed care and rehabilitation programme, and so on. For the reasons we have outlined, it is our view that Cull J did not err in finding that J's ongoing detention pursuant to a compulsory care order under the [Act] is not disproportionately severe treatment or punishment, in breach of s 9 of [the Bill of Rights].

[53] Next the Court dealt with whether the High Court was correct to find that J's detention as a compulsory care recipient under the Act was not arbitrary in terms of s 22 of the Bill of Rights. The Court rejected the submission that the High Court was wrong on the basis that it did not consider whether J's rehabilitative needs could be met by less intrusive measures. The Court applied the approach in *RIDCA v VM* that, "[i]f the risk posed by the care recipient is unlikely to be reduced through rehabilitative efforts", the Court may take that into account when undertaking the balance between the community protection interests and the liberty interests of the care recipient.[91] The Court said that in the end, as was explained in *RIDCA v VM*, "the Judge determining an extension application must be satisfied that the community protection interest cannot be met other than by a compulsory care order", or expressed another way, "the compulsory care order must be the least coercive and restrictive option available".[92]

[54] In terms of J's case, the Court considered that the High Court was plainly right to find that the totality of the expert evidence "overwhelmingly" provided support for the view that J required secure care at that time.[93]

[55] The Court then addressed the submission that J's detention was arbitrary because there had been a failure to provide J with effective rehabilitation before 2016. In relation to this, the Court accepted that there were inadequacies in the rehabilitation programme provided to J before 2016. However, since that time steps had been taken to address the criticisms made. Since 2017 there had been what the Court described

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90 *Harvey v [J]*, above n 58.
91 CA judgment, above n 38, at [88] citing *RIDCA v VM*, above n 40, at [92(b)].
92 CA judgment, above n 38, at [88] citing *RIDCA v VM*, above n 40, at [92(a)].
93 CA judgment, above n 38, at [89].

as "a significantly increased focus on J's rehabilitative needs".[94] The Court considered that even if this issue had been properly pleaded, which it was not, the Court would have concluded Cull J was correct to find that J was not arbitrarily detained. Any inadequacies in the rehabilitative programme provided prior to 2016, "while unfortunate and deeply regrettable, do not render his current detention arbitrary".[95]

[56] The Court also reached the view that the statutory scheme of the Act was not inconsistent with the right to be free from arbitrary detention.[96] Nor were there deficiencies or failures in terms of the particular decisions made in relation to J that had made his detention arbitrary.

[57] The Court next dealt with the argument that the two Acts, the CPMIP Act and the Act, were discriminatory. In assessing whether the scheme was discriminatory the Court applied the approach taken by the Court of Appeal in *Ministry of Health v Atkinson* in considering discrimination claims under s 19.[97] In general terms, the Court in that case suggested a framework asking, first, whether there was differential treatment or effects as between others in analogous or comparable situations (the comparator group) on the basis of the prohibited ground of discrimination; second, if so, whether that resulted in material disadvantage for the claimant group; and finally, if so, whether the discrimination could be justified under s 5 of the Bill of Rights.

[58] Dealing first with whether the CPMIP Act regime was discriminatory, the Court considered the appropriate comparator group comprised defendants fit to stand trial. The Court accepted that those defendants unfit to stand trial were treated differently from that group. The Court took the view that the respondents were correct that the intention of this Act was to promote, not undermine, equality by providing alternative procedures which accommodated the unique needs of persons in J's position. The Court acknowledged that the existing alternative procedures under the CPMIP Act could be improved to better promote the unique needs of people in J's

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94 At [95].
95 At [96].
96 Bill of Rights, s 22.
97 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55], [60], [109], [117], [136] and [143].

position. The Court concluded that review of the laws relating to unfitness to plead was "well overdue".[98]

[59] In considering whether s 85 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act was discriminatory, the Court said it could not find an appropriate comparator group. That was because criminal culpability was predicated on the offender having agency.[99] J did not.[100] If a comparator group was chosen, the Court considered that the closest group would be non-disabled offenders posing the same degree of risk as J.[101] In conclusion on this point, the Court found that any differences in treatment under the Intellectual Disability (Compulsory Care and Rehabilitation) Act regime did not materially disadvantage persons in J's position but:[102]

> … rather reflected the fundamentally different purposes of the criminal justice system and the compulsory care order scheme, which is a protective scheme for intellectually disabled individuals who have been diverted from the criminal justice system.

The statutory framework

[60] At the time J first appeared in the District Court, the powers of the courts in relation to persons in his position who were charged with imprisonable criminal offending but "under disability" were governed by Part 7 of the Criminal Justice Act 1985. But, as we have said, his case was ultimately dealt with under the CPMIP Act and the Intellectual Disability (Compulsory Care and Rehabilitation) Acts,[103] both of which had come into force on 1 September 2004.

[61] This Court in *M (SC 82/2020) v Attorney-General* observed that the "major purpose" of the CPMIP Act:[104]

> … was to restate the law formerly set out in pt 7 and to make a number of changes, including changes which provided courts with appropriate options

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98 CA judgment, above n 38, at [143].
99 At [152].
100 At [153].
101 At [154].
102 At [160] (footnote omitted).
103 See above at [26].
104 *M (SC 82/2020) v Attorney-General* [2021] NZSC 118, [2021] 1 NZLR 770 at [9] per Winkelmann CJ, O'Regan and Williams JJ citing Criminal Procedure (Mentally Impaired Persons) Act 2003 [CPMIP Act], s 3.

> for the detention, assessment and care of defendants labouring under an intellectual disability.

[62] The High Court in the present case accordingly described the CPMIP Act as providing a means of "triaging" defendants facing criminal charges.[105] Broadly speaking, those fit to stand trial are dealt with by the criminal justice system. Those unfit to stand trial are dealt with either under the Mental Health (Compulsory Assessment and Treatment) Act 1992 Act (the Mental Health Act) or the Intellectual Disability (Compulsory Care and Rehabilitation) Act.

[63] The Intellectual Disability (Compulsory Care and Rehabilitation) Act, as this Court said in *M (SC 82/2020)*:[106]

> … created new compulsory care and rehabilitation options to better recognise and safeguard the special rights of persons found to have an intellectual disability and who were charged with, or convicted of, an offence.

[64] The Mental Health Act provides a "parallel regime" for those found to have a mental disorder.[107]

[65] The historical development of this legislation is discussed by John Dawson in *Health Law in New Zealand*.[108] Professor Dawson notes that by the 1990s, there were three principal statues in the mental health field, namely, the Mental Health Act; the Protection of Personal and Property Rights Act 1988, which deals with adult guardianship and property management for adults lacking the capacity for making particular decisions; and the Criminal Justice Act 1985.[109] The Mental Health Act excluded persons with an intellectual disability except where they were also "mentally disordered" as defined by that Act.[110] This legislative scheme meant, as Professor Dawson notes, that there was insufficient provision for the disposition of

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105 HC judgment, above n 37, at [15].

106 *M (SC 82/2020)*, above n 104, at [9] per Winkelmann CJ, O'Regan and Williams JJ (footnote omitted).

107 At [9].

108 John Dawson "The Process and Criteria for Compulsory Psychiatric Treatment" in Peter Skegg and Ron Paterson (eds) *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015) at [14.1.1]–[14.1.2].

109 At [14.1.1].

110 Mental Health Act, s 2(1) definition of "mental disorder" and s 4(e).

those with intellectual disabilities from the criminal justice system and for their subsequent care.[111]

[66] The enactment of what operates as companion legislation, that is, the CPMIP Act and Intellectual Disability (Compulsory Care and Rehabilitation) Act, was the legislative response adopted to fill the gap discussed by Professor Dawson.[112] We need to say a little more about the relevant processes under this statutory scheme before turning to the power to extend a compulsory care order under s 85 of the Act.

[67] As the Court of Appeal in this case explains, as applied to J, the CPMIP Act required the court to be satisfied on the balance of probabilities that the defendant caused the act or omission that forms the basis of the offence as charged (the involvement hearing).[113] When the court was satisfied of the defendant's involvement in the offence, it had a further hearing to decide whether the defendant was unfit to stand trial due to a mental impairment (the fitness hearing).[114] The evidence of the two health assessors as to the defendant's fitness to stand trial was required.[115] Amendment of the CPMIP Act in 2018 reversed that sequence so that the fitness hearing is now held first.[116] The matter only proceeds to an involvement hearing if a defendant is found unfit to stand trial.[117]

[68] Once a defendant has been found unfit to stand trial, and following an involvement hearing, there is a further hearing to consider the most suitable course (the disposition hearing).[118] For a person in J's position, the available options in terms

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111 Dawson, above n 108, at [14.1.2].

112 See *RIDCA v VM*, above n 40, at [18]–[19] citing the Intellectual Disability (Compulsory Care) Bill 1999 (329-2) (select committee report) [Select Committee report] at 1–2; and see also CA judgment, above n 38, at [37]–[40].

113 CPMIP Act, s 9 (as it was before 14 November 2018).

114 Section 14 (as it was before 14 November 2018). "Unfit to stand trial" was, and remains, defined as meaning, that the defendant is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so : s 4(1)(a) definition of "unfit to stand trial". The definition includes (but is not limited to) defendants who, due to mental impairment, are unable to plead, to adequately understand the nature or purpose or possible consequences of the proceedings, or to communicate adequately with counsel for the purposes of conducting a defence: s 4(1)(b) definition of "unfit to stand trial".

115 Section 14(1) (as it was before 14 November 2018).

116 Courts Matters Act 2018, ss 125–127 and 131; and see CPMIP Act, ss 8A and 10(1).

117 CPMIP Act, s 10(1). If not satisfied the defendant caused the act or omission forming the basis of the offence charged, the charge must be dismissed under s 147 of the Criminal Procedure Act 2011: CPMIP Act, s 13(2)(a).

118 CPMIP Act, s 13(4); and see Part 2 Subpart 3.

of disposition are release or detention under the Act, either as a special care recipient or a care recipient. As this Court explained in *M (SC 82/2020)*, the former "remains within the criminal justice system and must be held in a secure facility".[119] By contrast, J is:[120]

> … "a care recipient no longer subject to the criminal justice system". This class of care recipient is detained under a civil regime pursuant to a compulsory care order made by the Family Court under s 45 of [the Act] or by operation of statutory deeming provisions.

[69] As is apparent from the excerpt above from *M (SC 82/2020)*, the compulsory care order for J was made under s 45 of the Act.[121] Section 46 makes it clear that the order must state its term. The term must not be longer than three years, but the order may be extended under s 85.[122] It is helpful to set out s 85 in full. The section reads as follows:[123]

> **85 Extension of compulsory care order**
>
> (1) The Family Court may, on the application of the co-ordinator, extend the term of a care recipient's compulsory care order.
>
> (2) If the court extends a compulsory care order for a care recipient no longer subject to the criminal justice system, the court must consider and determine whether the care recipient must receive supervised care or secure care.
>
> (3) The court may order that a care recipient no longer subject to the criminal justice system receive secure care only if it considers that supervised care would pose a serious danger to the health or safety of the care recipient or of others.

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119 *M (SC 82/2020)*, above n 104, at [12] per Winkelmann CJ, O'Regan and Williams JJ.

120 At [12] per Winkelmann CJ, O'Regan and Williams JJ (footnotes omitted); and see the Act, s 6(1)–(3) definitions of "care recipient", "special care recipient" and "care recipient no longer subject to the criminal justice system".

121 Section 44 provides that in making an order, the court must be satisfied that the proposed care recipient has an intellectual disability, and if so, must determine whether, considering all the circumstances, a compulsory care order is necessary. Section 45 provides further requirements for the making of an order.

122 The Act, s 46(2)–(3).

123 A similar test applies to the decision of the court to order that a person cease to be a care recipient. In particular, s 104(b) of the Act provides the judge may make such order if satisfied "that the care recipient no longer needs to be cared for as a care recipient".

RIDCA v VM

[70] The Court of Appeal in the present case applied the test for an extension of a compulsory care order under s 85 as set out in *RIDCA v VM*.[124] The Court of Appeal in *RIDCA v VM* said s 85 required the balancing of two interests. The first of those interests was the "legitimate interest of the community in protecting the health and safety of the care recipient and others".[125] The second interest to be balanced was what the Court described as "the liberty interest of the care recipient".[126] The reference to a "liberty interest" was used to encompass the relevant fundamental rights, particularly those in the Bill of Rights.

[71] In reaching this view, the Court drew on the principles in s 11 of the Act. Section 11, as we discuss below, requires those exercising the powers under the Act to be guided by the principle a care recipient should be treated in a way that protects both the health and safety of the care recipient and of others, and the rights of the care recipient. In adopting this balancing test, the Court rejected the argument that the test for an extension was one of "undue risk"; in other words, there is not a hard and fast rule.[127]

[72] The Court went on to say that the balancing exercise it adopted would allow the court to meet the purposes in s 3 of the Act. That was because it would result in "the selection of the appropriate compulsory care and rehabilitation option for the care recipient and recognise his or her rights appropriately".[128]

[73] The Court accepted that compulsory care orders should not be made or extended unless the community protection interest outweighed the liberty interest. Nor could compulsory care orders be disproportionate to the need to protect the community or the care recipient. The orders also had to be the least coercive and restrictive options available. The Court also made the point that the liberty interest

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124 *RIDCA v VM*, above n 40.
125 At [36].
126 At [36].
127 At [44] and [93]. Warren Brookbanks says the result is that there is no "bright line test" but rather a "nuanced evaluation" is required: Warren Brookbanks "Managing the challenges and protecting the rights of intellectually disabled offenders" in Bernadette McSherry and Ian Freckelton (eds) *Coercive Care: Rights, Law and Policy* (Routledge, Abingdon (Oxon), 2013) 218 at 233.
128 *RIDCA v VM,* above n 40, at [36].

was not necessarily static. It was not possible to ignore completely the length of time that the person had been subject to detention. In such a situation, the Court said that the judge may decide that "greater weight needs to be given to the liberty interest".[129]

The issues

[74] As foreshadowed in this Court's leave judgment, we begin by addressing the correct approach to s 85.[130] The first issue that arises is one of statutory interpretation. Section 6 of the Bill of Rights requires that, where possible, statutes are to be construed consistently with the Bill of Rights.[131] It is also settled law that legislation should be interpreted consistently with New Zealand's international obligations under applicable international instruments.[132] We discuss what that requires in terms of s 85 and whether s 85 can be read consistently with the Bill of Rights. In turn this requires consideration of *RIDCA v VM* because that case sets out the principles that are currently being applied in the interpretation of s 85, and whether the approach laid out in that case is correct.[133]

[75] We add that the parties agreed there is a jurisdictional issue affecting the scope of the appeal. How this issue arises is set out in more detail at the end of this judgment.[134] At this point, it is sufficient to say that this appeal focuses on the judicial review application rejected by the Courts below, and that the jurisdiction question did not significantly alter the content of the arguments heard on this appeal.

The case for the parties

[76] We begin with the respondents' case as they support the conclusion of the Court of Appeal in relation to J that *RIDCA v VM* is consistent with the statutory scheme and that it ensures that a court exercising the s 85 power will do so consistently

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129 At [92(c)].
130 SC leave judgment, above n 39, at [2].
131 Section 6 says that whenever an enactment can be given a meaning consistent with the Bill of Rights, "that meaning shall be preferred to any other meaning".
132 See, for example, *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Blanchard, Tipping, McGrath and Anderson JJ.
133 SC leave judgment, above n 39, at [2]; and see above at [70]–[73].
134 See below at [148]–[155].

with the Bill of Rights and the Convention.[135] The appellant, supported in this respect by the two interveners, IHC New Zealand Inc (IHC) and Te Kāhui Tika Tangata | Human Rights Commission (the Commission), says it does not, and we should revisit *RIDCA v VM*. In particular, the argument is that the approach in *RIDCA v VM* is not consistent with either the protection from arbitrary detention in s 22 of the Bill of Rights or the protection from discrimination in s 19 of the Bill of Rights.

[77] The impact of the prohibition on unlawful discrimination on the correct approach to s 85 was a focus of the submissions on behalf of the Commission.[136] We have focused on the protection from arbitrary detention and, except in passing, we do not address the potentially discriminatory effect of the regime on J. It is essentially sufficient to note that, as Mr Butler KC put it for IHC, where the Bill of Rights and the Convention are the starting points, over time it must be the case that increasing regard needs to be given to what might have happened to those in J's position if dealt with under the criminal justice system. That comparative exercise may serve to demonstrate that ongoing detention may in fact comprise unlawful discrimination on the basis of intellectual disability.

The correct approach to the power to extend a compulsory care order

[78] In considering the correct approach to the extension of a compulsory care order, because s 85 itself is silent as to the criteria, it is necessary to look to other parts of the Act and to the care recipient's protected rights for guidance.

Impact of the rights of a care recipient and the scheme of the Act

[79] In terms of the rights of a care recipient under the Bill of Rights, we focus in this part of the judgment on s 22, under which everyone has the right not to be arbitrarily arrested or detained, as we consider that provides a helpful framework in this appeal.[137] We also discuss in this context, although only briefly, s 19(1), which

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135 The Court of Appeal concluded *RIDCA v VM* was neither distinguishable nor wrongly decided: CA judgment, above n 38, at [62], and see at [83].

136 The Commission adopted the submissions of IHC on arbitrary detention.

137 See also s 9 (relevantly, the right not to be subject to cruel, degrading, or disproportionately severe treatment or punishment); s 18, (freedom of movement); and s 23(5) (the right of those deprived of liberty to be treated with humanity and with respect for their inherent dignity).

protects the right to freedom from discrimination on grounds including, relevantly, intellectual or psychological disability or impairment.[138] We add that there are similar rights in the International Covenant on Civil and Political Rights (ICCPR),[139] in particular art 9(1) relating to arbitrary detention, to which New Zealand is a party and which is affirmed by the Bill of Rights.[140]

[80] Turning then to the relevant rights in the Convention, art 5 provides for the right of equality and non-discrimination before the law. Article 12 provides disabled persons the right to equal recognition and legal capacity before the law. States parties are obliged to take appropriate measures to facilitate such access. Article 13 provides that States parties must ensure effective and equal access to justice for disabled persons. Finally, art 14 provides for the rights of disabled persons, on an equal basis with others, to enjoy liberty and security of the person and the right not to be unlawfully or arbitrarily detained.

[81] The open texture and nature of s 85 of the Act mean it is possible to adopt an interpretation consistent, relevantly, with s 22 of the Bill of Rights. That is, as not authorising arbitrary detention. Reading s 85 in this way gives effect to s 6 of the Bill of Rights and would accord with the interpretative approach applicable to the relevant international instruments described above.

[82] This interpretation is also consistent with s 11 of the Act, which governs the exercise of powers under that Act and which expressly refers to the need to be guided by the rights of the care recipient in addition to the need for protection from harm. Section 11 provides that:

> Every court or person who exercises, or proposes to exercise, a power under this Act in respect of a care recipient must be guided by the principle that the care recipient should be treated so as to protect—
>
> (a) the health and safety of the care recipient and of others; and

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138 Human Rights Act, s 21(1)(h)(iv). Because of the view we take about the impact of these two rights, it is not necessary for us to consider other arguments raised in the written submissions, for example, those relating to the right to a fair trial in s 25(a) of the Bill of Rights. Nor do we deal with the challenge to the High Court decision on the basis the Judge should have met with J.

139 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

140 Bill of Rights, long title, para (b).

(b) the rights of the care recipient.

[83] In relation to the other sections in the Act of relevance to the s 85 power, reference should also be made to s 88. That section provides that, in deciding whether to apply for an extension, the care co-ordinator must have regard to the most recent certificate given under s 79 of the Act.[141] That is, a certificate produced by the specialist assessor on the conclusion of the regular reviews of a care recipient. For persons in J's position, the certificate must address whether, in the specialist assessor's opinion, the care recipient "still needs to be cared for as a care recipient" or "no longer needs to be cared for as a care recipient".[142] The test is one of necessity for ongoing care. The Family Court, in deciding on an extension application, must also consider the s 79 certificate and may obtain the opinion of another specialist assessor.[143]

[84] Construing s 85 as not authorising arbitrary detention is also consistent with the purposes of the Act. The three purposes of the Act are set out in s 3. Section 3(a) states that the Act is designed to provide the courts "with appropriate compulsory care and rehabilitation options" for those with "an intellectual disability and who are charged with, or convicted of, an offence". Importantly, s 3(b) provides that the Act is "to recognise and safeguard the special rights of individuals subject to this Act". Finally, s 3(c) states that the Act is "to provide for the appropriate use of different levels of care for individuals who, while no longer subject to the criminal justice system, remain subject to this Act".

[85] The respondents say the statutory scheme itself militates against detention becoming arbitrary. The respondents rely on the various safeguards in the Act which include the following:

(a) a requirement that a needs assessment by a care co-ordinator under Part 3 precede the making of a compulsory care order;[144]

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141 Section 88(1).

142 Section 82; and see s 77.

143 Section 88(2).

144 CPMIP Act, s 25(3) and (1)(b); and see Part 3 of the Act. The purposes of a needs assessment are described in s 16 of the latter Act and include, in para (a), assessing "the kind of care that the care recipient needs"; and, in para (c), enabling a care and rehabilitation plan to be prepared for a care recipient.

(b) a direction that an individualised care plan be prepared addressing a range of matters, such as the social and cultural needs of the care recipient;[145]

(c) a requirement to undertake a Family Court review six months after the care and rehabilitation plan has been approved under s 24(2);[146]

(d) specification of the need for regular clinical reviews by a specialist assessor;[147]

(e) provision for Family Court and High Court oversight;[148]

(f) provision for independent monitoring by district inspectors (who must be qualified barristers or solicitors);[149]

(g) recognition of a care recipient's specific rights as set out in Part 5 including matters such as respect for cultural identity,[150] entitlement to medical treatment[151] and to seek independent advice as to their condition,[152] as well as rights to information.[153]

(h) appeal rights;[154] and

(i) the status of care recipients as disability services consumers for the purposes of the Code of Health and Disability Services Consumers' Rights, and a provision that they have all the rights conferred by that

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145 The Act, ss 24–25.
146 Part 6 Subpart 1.
147 Sections 77–78, 79(1), 79(3)(a) and 82.
148 Sections 102–104, and Part 6 Subpart 1.
149 Section 95, and see s 5(1) definition of "district inspector" and s 144; and Mental Health Act, s 2(1) definition of "district inspector" and s 94(3).
150 The Act, s 50.
151 Section 51.
152 Section 53.
153 Section 49.
154 Sections 133–134.

Code.[155] One of those rights is the right to be free from discrimination that is unlawful under Part 2 of the Human Rights Act 1993.[156]

[86] However, the safeguards, while obviously important, will not necessarily achieve the intended protection of rights. That is because where, as here, the risk posed by a care recipient is high, that will almost inevitably outweigh the liberty interests. If the specialist assessors and the Court view the assessment as requiring the balancing exercise envisaged in *RIDCA v VM*, that means engaging in an analysis that does not start with the Bill of Rights and moreover permits an extension which is arbitrary. We say that because while the Court in *RIDCA v VM* saw the liberty interests as encompassing rights in the Bill of Rights, simply balancing the interests in this utilitarian way almost inevitably prioritises community protection unless the risks posed by the care recipient are very low.

[87] The weight given in *RIDCA v VM* to factors such as the impact of the initial offending and rehabilitative prospects, which we will discuss shortly, also has the effect of limiting the protection of a care recipient's rights. Or, to put it another way, the protection of the community is, effectively, the starting point in deciding whether to extend the compulsory care order.

[88] On the approach to s 85 which we favour, the key question in a case such as this is whether an extension would constitute an arbitrary detention inconsistent with s 22 of the Bill of Rights. The decision maker, in determining that question, must make an assessment of whether ongoing detention is proportionate to its legitimate aims, being protection of the health, safety and rights of the care recipient, and the interests of the community. We add that, at this first stage in the exercise, namely, how s 85 is to be interpreted, we do not see it as necessary to consider s 5 of the Bill of Rights. Section 85 of the Act can be interpreted consistently with the Bill of Rights so the real work of the analysis is achieved by ss 6 and 22 of the Bill of Rights, where s 6 provides that an interpretation of legislation that is consistent with the Bill of Rights must be preferred where such an interpretation is possible. We are

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155 Section 48.

156 Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, schedule, cl 2, Right 2: "Right to freedom from discrimination, coercion, harassment and exploitation".

satisfied that approaching the matter in this way best responds to the key issues arising.[157]

[89] We add that we do not see this case as one involving a conflict of rights. This is not a helpful response where the Bill of Rights already accommodates the fact that rights are not absolute.[158] A contrast can be drawn with cases involving purported limits to a right like freedom of expression, which by nature might infringe upon other rights affirmed in the Bill of Rights such as the right to freedom of movement, assuming both involve a challenge to governmental action.[159] The role of the State is to ensure that any conflict between them is resolved in a manner that maintains proportionality.[160] In this case, it is necessary to maintain proportionality between a care recipient's rights and the legitimate aims of detention. We accordingly do not agree that the s 6 interpretation exercise in this case has a dual rights focus.[161]

[90] As to the content of s 22, as this Court in *Attorney-General v Chisnall* observed, the concept of arbitrariness is discussed by the United Nations Human Rights Committee in the General Comment (No 35) on art 9 of the ICCPR (providing that, among other things, no one shall be subjected to arbitrary detention).[162] The Court noted the statement in the General Comment to the effect that "arbitrary" detention is not to be equated only with unlawful detention but is to be interpreted more broadly to include elements of proportionality, amongst other matters.[163]

[91] As noted in the General Comment, the ICCPR does not enumerate "the permissible reasons" for detention.[164] In terms of disability, the General Comment states as follows:[165]

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157 See also below at [145].

158 Compare below at [350]–[352] per Kós J.

159 Another example of a situation that may call for the accommodation of two rights affirmed in the Bill of Rights is demonstrated in *Re J (An Infant): B and B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA), discussed in Andrew Butler "Limiting Rights" (2002) 33 VUWLR 537 at 546–550. That case involved a conflict between freedom of religion and the right to life.

160 Butler, above n 159, at 547 and 549.

161 Compare with Kos J's reasons, below at [365].

162 *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [161] per Winkelmann CJ, O'Regan, Williams and Kós JJ. See Human Rights Committee *General comment No 35: Article 9 (Liberty and security of person)* UN Doc CCPR/C/GC35 (16 December 2014) [General Comment 35].

163 *Chisnall*, above n 162, at [161] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

164 General Comment 35, above n 162, at [14].

165 At [19] (footnotes omitted).

> The existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others. It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law. The procedures should ensure respect for the views of the individual and ensure that any representative genuinely represents and defends the wishes and interests of the individual. States parties must offer to institutionalized persons programmes of treatment and rehabilitation that serve the purposes that are asserted to justify the detention. Deprivation of liberty must be re-evaluated at appropriate intervals with regard to its continuing necessity. The individuals must be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic judicial review of the lawfulness of the detention, and to prevent conditions of detention incompatible with the [ICCPR].

[92] This Court in *Chisnall* also said that "[a] more generous approach to s 22 is consistent with the fact that the Bill of Rights is intended to affirm New Zealand's commitment to the ICCPR."[166] In any event, it is not disputed, as the Court of Appeal said in this case, that a detention which is initially lawful may subsequently become arbitrary and so inconsistent with s 22 if the detention has become disproportionate to its legitimate aim.[167] We are accordingly content to proceed on this basis.

[93] In the present context then whether a detention that would be authorised by an extension under s 85 is arbitrary requires an assessment of whether it is proportionate to the legitimate aims. This in turn requires discussion of the factors relevant to that assessment.

The relevant considerations

[94] The factors relevant to the proportionality exercise which the Act, properly interpreted, requires, and the way in which those factors are to be assessed by the Family Court, are in dispute. In terms of the factors, we need to focus on the effect of what brought the care recipient within the statutory regime, that is, the impact of the initial or index offending; the effect of rehabilitation prospects; and the approach to

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166 *Chisnall*, above n 162, at [161] per Winkelmann CJ, O'Regan, Williams and Kós JJ (footnote omitted) citing the long title of the Bill of Rights.

167 CA judgment, above n 38, at [80] citing *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [88], [90] and [100] per McGrath J and [175] per Hammond J dissenting. The Court of Appeal was not persuaded Mr Zaoui's detention had become arbitrary despite delays. This Court on appeal from that decision exercised its inherent jurisdiction and granted Mr Zaoui bail: *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC).

risk assessment. In addition, reflecting the particular issues raised by J's case, we also discuss the relevance of the statutory obligations to care for J whilst he remains subject to a care order. Finally, although we do not treat it as a standalone factor in the discussion of the relevant factors which follows, underlying that discussion is the need to keep in mind the length of time the care recipient has been detained.

[95] In terms of that need, we briefly comment on the impact of extended detention periods on care recipients. Given the coercive nature of the powers exercised in relation to a care recipient, over time, their exercise is likely to require increasing justification to maintain proportionality with the legitimate aims of the detention. Indeed, the effect of both the requirement in s 11 of the Act to exercise the statutory powers "so as to protect" relevant rights, and the statutory purpose in s 3(b), plainly necessitate giving sufficient recognition to the fact a compulsory care order involves the exercise of coercive powers, namely, a form of detention. The Convention rights similarly support an interpretation requiring increasing focus over time on the impact on the care recipient. Neeraj Gill and Norman Sartorius make the point that the Convention is "based on the central idea of respect for an inherent dignity of every human being".[168] That concept, in turn, is "an empowering notion linked to autonomy and self-determination, implying a respect for the will and preferences of the individual".[169]

The effect of the initial or index offending

[96] We begin by considering the role of the initial or index offending. The appellant's main argument in relation to the initial offending is that the period of detention must be proportionate to the original crime. The respondents' case is that the initial offending is irrelevant except in the way identified by the Court of Appeal in *RIDCA v VM*, because the index offending is simply the gateway or entry point to the Act.

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168 Neeraj Gill and Norman Sartorious "Impact of the Convention on the Rights of Persons with Disabilities on Mental Health Care: Way Forward" in Neeraj Gill and Norman Sartorious (eds) *Mental Health and Human Rights* (Springer, Cham (Switzerland), 2024) 179 at 179 (citation omitted).

169 Bernadette McSherry and Ian Freckelton "Coercive care: Rights, law and policy" in Bernadette McSherry and Ian Freckelton (eds) *Coercive Care: Rights, Law and Policy* (Routledge, Abingdon (Oxon), 2013) 3 at 5 (citation omitted).

[97] To put these arguments in context we set out the way in which the Court in *RIDCA v VM* approached the initial offending. The Court there said that whether an extension was proportionate to the initial offending was a consideration only relevant in finely balanced cases.[170] Proportionality in this sense was not a prerequisite to an extension but, rather, could be relevant to the extent that the nature of the initial offending had a bearing on the risk posed. The High Court in *M v RIDCA Central (Regional Intellectual Disability Care Agency)* (*M v RIDCA*), by contrast, took the view, which we endorse, that "in a broad sense" proportionality should be maintained with the initial offending.[171] Hence, "[t]he less serious the original offending, the less one would normally expect extended periods of detention."[172]

[98] The respondents' argument in support of the Court of Appeal's analysis in *RIDCA v VM* ignores the fact J is only detained because of the finding he was involved in the initial offending. That this has implications in terms of the appropriate length of detention was a factor recognised by the Court of Appeal in 1981, in *R v Elliot*, a case discussed in *RIDCA v VM*.[173] The defendant in *Elliot* was ordered to be detained in a mental hospital as a committed patient under the Criminal Justice Act 1954. Richardson J said the committal could be seen as something of a "benevolent alternative to a custodial" prison sentence.[174] But it would be wrong, he said, to ignore the fact the defendant was before the Court only because he had committed an offence. As Richardson J put it: "Reasonable proportionality between the offending and the severe curtailment of liberty inherent in an order for detention as a committed patient must not be lost."[175]

[99] The legislative history of the Act also supports the view the initial offending is relevant to the proportionality exercise and therefore to whether detention is arbitrary. The Intellectual Disability (Compulsory Care) Bill 1999 as introduced provided for the compulsory care of persons with an intellectual disability whether they were

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170 *RIDCA v VM*, above n 40, at [72].
171 *M v RIDCA Central (Regional Intellectual Disability Care Agency)* (2009) 28 FRNZ 669 (HC) [HC *RIDCA* judgment] at [92].
172 At [92].
173 *R v Elliot* [1981] 1 NZLR 295 (CA). See *RIDCA v VM*, above n 40, at [64]–[67].
174 At 302.
175 At 302.

offenders or non-offenders.[176] Accordingly, the Bill as introduced would have provided a civil route for the application of the compulsory care regime. The Health Committee, the select committee considering the Bill, recommended (by a majority) that the provisions dealing with non-offenders be removed.[177] That subsequently occurred.

[100] It is therefore involvement in offending that marks out a care recipient, like J, from other persons with an intellectual disability posing similar risks who do not offend. A deliberate decision was made that the latter cannot be subject to compulsory care orders under the Act. The removal of a route by which non-offenders with intellectual disability can be detained under the Act strongly supports the appellant's submission that some significance must be attached to the original offending. As the High Court in *M v RIDCA* said:[178]

> It would be surprising if a relatively minor offence justified *indefinite* State control, when but for that comparatively minor offence there would be no capacity at all to force care on V M.

[101] It follows that we disagree with an approach that sees proportionality to the initial offending as no more than a relevant consideration in finely balanced cases. Particularly where, as in this case, a lengthy period of liberty has been lost it is not consistent with the relevant rights to then consider the nature of the original offending only in a finely balanced case. Nor, contrary to *RIDCA v VM*, do we see the initial offending as relevant only to the nature of risk.[179] Where, as in this case, the lengthy period of detention is coupled with an absence of any prospects of rehabilitation potentially for years, there must be a point where it is said the detention has become disproportionate to its legitimate aim.[180]

[102] We add that the different approach to this factor in *RIDCA v VM* should be seen in context. By the time that case reached the Court of Appeal, the decision of the

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176 Intellectual Disability (Compulsory Care) Bill 1999 (329–1) (explanatory note) at i.
177 Select Committee report, above n 112, at 2.
178 HC *RIDCA* judgment, above n 171, at [74] (emphasis in original).
179 The way in which we see this as affecting the proportionality analysis is discussed below at [143].
180 The Commission makes the point that the rehabilitative nature of the regime justifies restrictions on the liberty of disabled persons but the corollary of that is that where there are in fact no rehabilitative prospects, the fact that a care recipient is detained for relatively minor offending must become more important.

High Court to quash the compulsory care order relating to VM was not challenged so the case was considered in something of a factual vacuum. Further, in terms of their facts, VM's case and that of J are poles apart. We acknowledge that VM's risk of harm was assessed as much lower than that which J presents, but she had been a care recipient for some three years. By comparison, J's care has extended for over 19 years and on the *RIDCA v VM* approach seems likely to continue almost indefinitely. An approach which is more sensitive to the stark factual variations that may occur, as illustrated by these two cases, is needed to protect the liberty interest. Updated evidence as to J's rehabilitative prospects will also be relevant to the analysis, as we discuss, given the rehabilitative objective of the Act.

[103] For these reasons we would depart from the Court of Appeal decision in *RIDCA v VM* in respect of this factor.

[104] We do not however accept the appellant's other argument, namely, that J could not be held for more than the maximum term applicable to the index offending which, as we have noted, was three months' imprisonment.

[105] The appellant relies for this submission on *Noble v Australia*, a decision of the United Nations Committee on the Rights of Persons with Disabilities (the Committee).[181]

[106] When aged 19, Mr Noble was charged with sexual offending. He was arrested and taken into custody and refused bail. A year later, in early 2002, he was again remanded in custody for assessment of his intellectual impairment. A Court granted an application that a further psychiatric assessment should be conducted. There were additional adjournments with Mr Noble being further remanded in custody in prison. A fitness to plead hearing was held. Then, in March 2003, Mr Noble was found unfit to plead and was made subject to a custody order. He remained in custody in prison until January 2012, which meant that he had been detained along with convicted offenders for some 10 years and three months. In the intervening period, in June 2010,

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[181] Committee on the Rights of Persons with Disabilities *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 7/2012* UN Doc CRPD/C/16/D/7/2012 (10 October 2016).

a further forensic psychologist undertook an assessment of his intellectual functioning and concluded Mr Noble was capable of standing trial on the condition he had access to appropriate assistance. His lawyer sought orders to the effect that he was fit to plead. When a hearing took place in September 2010, the Crown advised that they did not intend to proceed with any further prosecution. He was ultimately released subject to various conditions on 10 January 2012.

[107] The Committee found, amongst other matters, that the detention of Mr Noble was a breach of art 14(1)(b) of the Convention. Article 14(1)(b) provides that States parties are to ensure that persons with disabilities, on an equal basis with others:

> [a]re not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

[108] The New Zealand statutory scheme is different. As the respondents submit, the Act does contemplate detention beyond the maximum period of imprisonment for the initial offending. The provision for extensions and the absence of a maximum period of detention make that plain. This Court in *M (SC 82/2020)* suggested the Act did not contemplate indefinite detention.[182] However, this was as an acknowledgement that each time the order was extended, that could only be for a maximum of three years and the Family Court accordingly had to be satisfied on each occasion of an extension that it was necessary to extend the exercise of the coercive powers. We add that the submissions for the Commission make the point that relevant international bodies have expressed disquiet at the conception that those with disabilities may potentially be detained indefinitely after being found unfit to stand trial.[183]

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182 *M (SC 82/2020)*, above n 104, at [63] per Winkelmann CJ, O'Regan and Williams JJ.

183 See Committee against Torture *Concluding observations on the seventh periodic report of New Zealand* UN Doc CAT/C/NZL/CO/7 (24 August 2023) at [41(b)] and [42(b)]. There, the Committee recommended that New Zealand consider repealing provisions in the Act which allow detention for more than the maximum sentence available for the offending. The Australian Law Reform Commission has recommended that all Australian jurisdictions provide for limits on the period of detention without conviction, by reference to the period of imprisonment likely to have been imposed if the person had been convicted: Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014) at 206–210.

[109] The respondents also point to the legislative history in support of their submission. This is a reference to the Health Committee's response to a submission from the Mental Health Commission on the Bill as introduced. The Mental Health Commission was concerned about the possibility of unlimited extensions amounting to indefinite preventive detention. In response, the Health Committee relied on the various safeguards in the Bill which we have discussed, including the provision for oversight by the Family Court and the High Court as ensuring continuing care was justified.[184]

[110] The Health Committee also envisaged that "a repeat child sex offender" may remain subject to the Bill's controls.[185] The Health Committee observed that this would only transpire where it was:[186]

> … not possible to manage the individual's behaviour and if, as part of the clinical review, his or her behaviour continues to be assessed as being a high risk to others.

[111] We interpolate here that this statement is consistent with Professor Dawson's observation that the legislative gap identified and intended to be filled by the CPMIP and Intellectual Disability (Compulsory Care and Rehabilitation) Acts concerned, particularly, the absence of the necessary forensic care[187] for what he described as "a very small group of people with intellectual disabilities who were charged with serious criminal offences".[188] J is not in that category and, in any event, it remains necessary to interpret the statute consistently with the Bill of Rights as the breadth of s 85 in fact allows.[189]

[112] The other factor that tells against this part of the appellant's argument is that, as the High Court noted in *M v RIDCA*, the maximum sentence for the offending

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184 Select Committee report, above n 112, at 16–17; and see *RIDCA v VM*, above n 40, at [88].
185 Select Committee report, above n 112, at 17.
186 At 17.
187 Forensic care in this context is described as "quasi-criminal", referring to the care provided to those with mental illness or intellectual disability who are disposed from the criminal justice process: Dawson, above n 108, at [14.1], and see at [14.1.2].
188 At [14.1.2].
189 Bill of Rights, s 6. See above at [81].

reflects "different comparative punishment considerations" than those relevant to the exercise of the extension power.[190]

[113] We add that the outcome in *Noble v Australia* would naturally have reflected in part the fact that Mr Noble was remanded in a prison. As Mr Noble said, that was not appropriate for him and while there he was subjected to violence. Prisons cannot be used as a facility under the Intellectual Disability (Compulsory Care and Rehabilitation) Act albeit, as we have accepted, care recipients are subject to constraints on their freedom and the levels of security in secure care for someone like J which mirror the constraints of a prison.[191]

[114] In summary on this point, we take a different approach from that in *RIDCA v VM* to the relevance of the nature of the initial offending. Particularly where there has already been an extended period of detention, it is not consistent with the relevant rights to consider the nature of the original offending only in a finely balanced case. Nor is the nature of the initial offending relevant only to the nature of the risk.

Rehabilitation

[115] We turn then to the relevance of rehabilitative prospects. We use the term "rehabilitation" although the evidence before the High Court was that "intellectual disability is not conventionally seen as amenable to change".[192] But the point made by Ms Daysh was that persons "with intellectual disability can often learn how to better manage their impulses and regulate their dysregulated behaviours". As the Court of Appeal said in *RIDCA v VM*, a period of compulsory care and rehabilitation may accordingly improve a care recipient's functioning to a point where compulsory care is no longer required.[193]

[116] In *RIDCA v VM*, the Court rejected an argument for the appellant in that case that rehabilitation was irrelevant. The Court saw the "success or failure of

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190 HC *RIDCA* judgment, above n 171, at [91], and see at [90]. See also the observations of Winkelmann CJ as to the need to bear in mind the limits of interpretation imposed by s 4 of the Bill of Rights: below at [178] and [196].

191 The Act, s 9(4).

192 See also *RIDCA v VM*, above n 40, at [74].

193 At [74].

rehabilitation efforts" over the course of a compulsory care order along with "the prospects for further rehabilitation" as relevant factors in determining where the balance lay.[194] What is happening to a care recipient in terms of rehabilitation must be highly relevant in determining whether to extend a compulsory care order. This Court in *R (SC 64/2022) v Chief Executive of the Department of Corrections* made the point that the "primary objective" of the compulsory care order regime "is to provide appropriate care *and rehabilitation* for defendants with intellectual disabilities".[195]

[117] Again, as the Court of Appeal in *RIDCA v VM* said, the legislative history supports this view.[196] The Health Committee in reporting back on the Bill made recommendations, including adding "and Rehabilitation" to the title of the Act, to emphasise that care was not simply being custodial but also involved rehabilitation. The Health Committee said this:[197]

> We have made recommendations in this bill so that wherever possible there should be a strong emphasis on rehabilitation, not just custodial care, for those who are subject to the bill. In line with that we recommend that the title of the bill be changed to reflect this change of focus. We recommend that the title be changed to Intellectual Disability (Compulsory Care and Rehabilitation) Bill.

[118] The Health Committee went on to say as follows:[198]

> We believe there should be explicit recognition of the importance of rehabilitation, where possible, to ensure that people do not receive custodial care only. It is important to assist care recipients to develop the range of skills they need to manage difficulties in their lives in structured programmes. These programmes should be tailored to meet the needs of each client. For some there will be clear progressions through their rehabilitation programme, and for others there will be fluctuations among different levels of care. For each there will be options for the appropriate level of supervision and security to avoid danger to the health or safety of others. We recommend that the term "care plan" should be changed to "care and rehabilitation plan" to reflect the importance of rehabilitation for those who are made subject to the bill.

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194 At [85], and see at [92(b)].

195 *R (SC 64/2022) v Chief Executive of the Department of Corrections* [2024] NZSC 47, [2024] 1 NZLR 114 at [30] (emphasis added and footnote omitted), and see at [32]. While we accept the statutory emphasis on providing custodial care in a manner which reflects the care recipient's rights, we differ from Williams J's assessment that care is the "tiebreaker": see below at [335]. That is in part because of the importance, in our analysis, of rehabilitative prospects.

196 *RIDCA v VM*, above n 40, at [19].

197 Select Committee report, above n 112, at 4.

198 At 7.

[119] Another way of making this point is to recognise, as the Court of Appeal did in *RIDCA v VM*, that the liberty interest is not a static one.[199] However, where we would depart from the Court of Appeal is in the weight to be given to the absence of progress in the immediate or in the near future. That must, over time, strongly tell against further extension. Otherwise, even where there is a lack of any prospect of progress in the immediate or in the near future, on the balancing test in *RIDCA v VM* if the risk is anything but low or very low, the safety interest will always prevail. As we have said, this is to ignore the need to consider the care recipient's liberty interests as the starting point and to maintain proportionality between those interests and the legitimate aims of detention. Accordingly, where there are no real prospects of rehabilitation, that will affect the proportionality analysis given rehabilitation is one of the express aims of the Act.

Risk assessment

[120] It is not disputed that, for an extension order to be made, the applicant seeking an extension must show that the care recipient continues to pose a level of risk warranting the continued exercise of coercive power. This was the basis on which the Court of Appeal in *RIDCA v VM* and in J's case proceeded. This analysis reflects ss 85 and 86 of the Act.

[121] It is also clear from s 11 that the Act recognises the legitimate interest of the community in ensuring the safety of both the care recipient and of the community.[200] In addition, the importance of the risk of harm is apparent from the requirements in the Act to determine the level of care, supervised or secure, that is necessary. That is the case both in making the original compulsory care order and under s 85. Section 85(2) provides that if a compulsory care order for a care recipient no longer subject to the criminal justice system is extended, "the court must consider and determine whether the care recipient must receive supervised care or secure care".[201] That decision requires an assessment of the level of risk the recipient poses to themselves or to others.[202]

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199 *RIDCA v VM*, above n 40, at [90] and see at [92(c)].
200 See above at [82].
201 See also s 45(2) in relation to the making of the original compulsory care order.
202 See also HC *RIDCA* judgment, above n 171, at [66].

[122] It is worthwhile repeating s 85(3) which provides as follows:

> The court may order that a care recipient no longer subject to the criminal justice system receive secure care only if it considers that supervised care would pose a serious danger to the health or safety of the care recipient or of others.

[123] The effect of s 86(4) is that the same restriction applies before a court may vary the order so that care recipients no longer subject to the criminal justice system receive secure care rather than supervised care.

[124] As is apparent from our discussion, whilst protection from harm both to the care recipient and others is important, our view is that in some cases even a high risk of harm will be outweighed by the other factors. Where liberty interests are involved, that should not be a surprising proposition. As the High Court in *M v RIDCA* said, "[a]s a society we regularly release into the community offenders who pose a known on-going risk."[203] There is often "no power to do otherwise" than to release an offender, for example, where a finite sentence has come to its end.[204] To illustrate the point, if convicted of the initial offending, J would not have been eligible for the imposition of an extended supervision order or for a public protection order so there would have been no ability to detain him on the basis of risk prevention.[205] The triggers for non-disabled offenders for the imposition of extended supervision orders, public protection orders or preventive detention are confined to offending or apprehended offending of a serious violent or sexual nature.[206]

[125] The respondents say that this approach discounts the fact J has not had to face criminal liability, either for the initial offending, or for those incidents that have occurred whilst he has been in care for which he would otherwise be liable to be

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203 At [77].

204 At [77]. Brookbanks, above n 127, at 237 characterises the Act as "penal legislation, albeit with a protective 'flavour'", and as such, he says it is much harder to justify ongoing detention "on the basis only of static risk factors". He compares the situation with that of "a prison inmate with acute mental illness who must be released on the date of completion of sentence, regardless of any continuing risk posed by his or her mental illness".

205 And not on the basis of risk assessments made in the somewhat artificial situation in which J finds himself.

206 Parole Act 2002, ss 107B and 107I; Public Safety (Public Protection Orders) Act 2014, s 7; and Sentencing Act 2002, s 87.

charged. But the effect of that argument is to treat compulsory care as needing to be equally punitive, and to ignore the importance of the rehabilitative objective.

[126] We address also the argument the position is different here because of the absence of agency. The fact an offender may have agency obscures the point which is that individuals who present a real risk are nonetheless released into the community. Further, as the Commission submits, a focus on the absence of agency is inconsistent with the social model adopted by the Convention. That model reflects a shift from the "best interests" test. As the Commission says, the social model treats those with disabilities as:[207]

> … active rights holders, rather than passive recipients of protection. It shifts the focus onto the barriers within society that prevent disabled people from participating in society and promotes supportive decision-making.

[127] The appellant accepts that a compulsory care order can only be extended if there has been recent evidence of dangerousness or, to put it another way, that dangerousness must be assessed in terms of what is happening in the recent past, not 20 years previously. The appellant relies on *Lessard v Schmidt*, a decision of the United States District Court for the Eastern District of Wisconsin.[208] That case dealt with the civil commitment of persons with mental health issues. The plaintiffs challenged the constitutionality of the Wisconsin civil commitment statute. That permitted involuntary detention for a possible total of 145 days without a hearing. There was insufficient provision for notice and the court could dispense with notice altogether in cases where notice was deemed "injurious or without advantage" to the patient.[209]

[128] The Court concluded that the sections were unconstitutional. The Court said that civil confinement could be justifiable in some cases:[210]

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207 See also *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [66] and [93]–[99] per Winkelmann CJ and O'Regan J dissenting (but not on this point).

208 *Lessard v Schmidt* 349 F Supp 1078 (ED Wis 1972) [*Lessard v Schmidt*]. Having been vacated by the Supreme Court in response to jurisdictional issues, the District Court's judgment was later reinstated in *Lessard v Schmidt* 413 F Supp 1318 (ED Wis 1976); and see *Schmidt v Lessard* 414 US 473 (1974).

209 State Mental Health Act Ch 51, §51.02(1)(a), Wis Stat 971 at 972 (1971).

210 *Lessard v Schmidt*, above n 208, at 1093.

> … if the proper burden of proof is satisfied and dangerousness is based upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another.

[129] However, we do not see this argument as advancing the appellant's case. What makes J's case so difficult is that the clinicians say the risk of harm he presents, principally to others, is very high. While counsel for the appellant argues the requirement for recent dangerousness is not met, on the facts as before the Court, there is evidence of recent risk of harm. Further, the two statutes are quite different in that the Intellectual Disability (Compulsory Care and Rehabilitation) Act does contain various safeguards which did not appear to be present in the Wisconsin statute.

[130] In the alternative, the appellant also argues that a better process should be followed in terms of the assessment of risk. In particular, the court should be required to make findings as to whether or not the incident(s) described in the risk assessment report actually occurred and, if so, the circumstances in which they occurred. Mr Edgeler, who argued this part of the appeal for the appellant, suggested something akin to the findings in an involvement hearing would be suitable. In this way, the court could be satisfied the risks identified were real and current risks.

[131] It may be that consideration could be given to the merits of reform along these lines. But this is not something that can be addressed in the present case.

Conclusions in the present case

[132] As we have foreshadowed, the circumstances of J's case raise another consideration in the proportionality exercise which was not a focus in *RIDCA v VM*, namely, the statutory obligations relating to J's care. In terms of care obligations, we referred above to the purpose of the Act which includes, in s 3(a), providing the courts "with appropriate compulsory care and rehabilitation options" for persons in J's position.[211] Reference was also made to the provision in s 11(a) that the exercise of the powers under the Act are to be guided by the principle that treatment of the care recipient should protect the care recipient's health and safety, as well as that of others. These statements of principle are given effect to in the provisions in the Act, amongst

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[211] The background to the need for appropriate care options is set out in our discussion of the legislative history: see above at [60]–[66].

other matters, for the preparation of "care and rehabilitation" plans which must address the aspects set out in ss 25 and 26 of the Act.[212]

[133] We see the statutory obligations relating to care as aptly described by Warren Brookbanks when, in discussing the Bill which became the Act, he said that the "care" part of the equation had to:[213]

> … be given real efficacy to ensure that those from whom the public is protected are also acknowledged as people with legitimate human aspirations to whom fundamental rights and freedoms also attach.

[134] The principal emphasis is on providing custodial care in a manner which reflects the care recipient's rights. The scope of the care obligations also has to be tempered by the fact that, as the High Court in *M v RIDCA* in considering the necessity to show risk said, "[i]t has never been enough that objectively it would be good for the person to remain subject to a care order."[214]

[135] That said, as the Family Court in the 2024 judgment stated, J's case is a highly complex one.[215] There are features which mean it stands apart, as we discuss, and which require some weight to be given in the proportionality analysis to the obligations to care for him in a manner which protects him from harm whilst working towards a position in which he can be released into community care.

[136] J has been in care for over 19 years. It is apparent that detention itself has impacted adversely on him. The Family Court Judge in the 2024 judgment said that all those involved in the hearing agreed that J's "wellbeing has been detrimentally impacted by his diminished environment".[216] The Judge acknowledged the safety concerns as set out in the various reports "which explain why his environment has been so restricted".[217] The Judge continued:[218]

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212 In this sense, at least, the phrase "care and rehabilitation" is a composite one; the two concepts are linked.

213 Warren Brookbanks "New Zealand's Intellectual Disability (Compulsory Care) Legislation" in Kate Diesfeld and Ian Freckelton (eds) *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, Aldershot (UK), 2003) 529 at 533.

214 HC *RIDCA* judgment, above n 171, at [65].

215 2024 judgment, above n 64.

216 At [9]. We note an application to recall this judgment was dismissed: *The Care Coordinator v [J]* [2025] NZFC 7147.

217 At [9].

218 At [9].

> Everyone has recognised for a long time that his quality of life would be greatly improved by his environment being expanded. He needs to visit his mother at home. He needs to experience his culture. He needs to exercise and have his medical needs met. None of those things are available to him at this time because of the challenges to keep [J] safe and to keep the community safe. Those challenges cannot be met because of constraints in funding, constraints in resources available for him and constraints that his physical environment presents. Nevertheless, staff are doing everything they can to apply the available resource to extend [J's] environment which has correspondingly seen an improvement for [J]. His lawyer has said accurately that there have been two steps forward and one step back. That still shows some progress.

[137] The impact of detention can also be seen in the specialist assessor reports. Reference is made to "a deterioration in [J's] overall presentation", the causes of which Dr Andrew Craig Immelman said in his report of 24 July 2023, were "hard to pin down, being clearly multifactorial". Dr James Gardiner, another specialist assessor, in his report earlier in 2023 noted that although the causes were unclear, there was:

> … still the prevailing concern that the intensity, frequency, and speed of escalation of [J's] behaviour has worsened over time, possibly in relation to a more restrictive management plan that has resulted in a more predictable sensory environment.

[138] Finally, Dr Peter Johnston's view was that J appeared "to have become increasingly less treatable over the years, as his behaviour creates major impediments to fostering any level of therapeutic engagement".

[139] Against this background, it can be seen, albeit with the benefit of hindsight, that there were opportunities to allow J to be cared for in a less restrictive environment at a much earlier point in time applying the proportionality inquiry that we say applies other than in an exceptional case. Indeed, it can also be said that the failure to release J earlier goes some way to explaining why J's case presents as an intractable problem for both courts and caregivers. We have considered whether it would be appropriate to direct or make clear that J should be released. However, when the care obligations under the Act for J are also put into the mix, we accept that there are realistically concerns about the prospects for J himself were he to be released immediately, without any supports being put in place in the community. We have concluded that disposition of the case will require updating evidence. Further, the appeal from the 2017 decision

of the Family Court to extend the compulsory care order is not before us.[219] While our analysis allows for the fact that some time may be needed to allow the necessary steps to be taken before J can be released into the community, given the extraordinary period of time for which J has now been detained, that analysis also requires that these steps be attended to with considerable expedition.

[140] We add that the respondent submitted that if we altered the *RIDCA v VM* test in such a way that the reasons for the High Court's refusal to make a s 104 order cannot be sustained, the proper remedy would be to order a rehearing of the High Court inquiry. In our view, as the Family Court is already seized of the matter via the review under Part 6 of the Act, the better course is for that Court to determine the next steps for J. We will accordingly allow the appeal to a limited extent.

Conclusions as to the interpretation of s 85

[141] It is possible to adopt an interpretation of s 85 that is protective of a care recipient's rights. Such an interpretation is to be preferred under both the Bill of Rights and in the approach to the interpretation of legislation where there are relevant international obligations.[220]

[142] It is not in dispute, in deciding whether to extend a compulsory care order under s 85, that sufficient risk of harm to either the care recipient or others is the minimum prerequisite. Once that threshold is established, the inquiry should turn to considering whether the impact of detention on the liberty interests of the care recipient remains proportionate to its legitimate aims. The care recipient's liberty interests are the starting point of this inquiry.

[143] In determining what would be a proportionate response, the Family Court should take into account the nature of the offending that brought the care recipient into the regime; the length of the period under care to date; and rehabilitative prospects. The care recipient's present risk of harm is relevant, but even where the risk of harm is high, where the initial offending is comparatively minor; the person has been a care

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219 See *Harvey v [J]*, above n 54.

220 We agree with Williams J that the more rights-protective approach may require the adoption of less intrusive means than secure care by those exercising powers under the Act: see below at [327].

recipient for an extended period; and/or where the prospects of progress in the immediate future are minimal; the latter factors can be expected to be given greater weighting than risk. Conversely, if there are positive rehabilitative prospects, and/or the initial offending was more serious, the detrimental impact of detention on the recipient's liberty interests may be less.

[144] As is apparent from what we have said, the proportionality inquiry is affected by the passage of time in care. If the risk has remained static over this period of care or is diminishing, the other factors identified (that is, the nature of the initial offending; the length of detention; and the prospects of progress) can be expected to become more important. Any other approach does not adequately reflect the relevant rights of a care recipient and nor does any other approach sit well with in statutory scheme with an objective of rehabilitation.

[145] We have interpreted the legislation in accordance with s 6 of the Bill of Rights and the Convention and have concluded that requires the proportionality inquiry we have discussed. We accept that the ss 5 and 6 analyses overlap in this case. Certainly, the considerations to be taken into account in determining whether an ongoing detention would be arbitrary would also arise in assessing whether there are demonstrable justifications for such a detention — the most obvious example being the consideration of public safety. However, we see the question of statutory interpretation as capable of resolution in terms of s 6 of the Bill of Rights. That said, if, in applying the test we have set out, the decision maker finds it easier to frame that as a question of demonstrable justification, we see no difficulty with that approach in the circumstances.

Summary of result

[146] In the present case, because of the particular complexities presented, the obligations to care for J in terms of the Act are also relevant and may mean that there should be a further extension of the compulsory care order in order to enable the necessary steps to be taken before J can be released. These steps need to be attended to with considerable expedition. We add that the fact, as we now discuss, that the

appeal from the 2017 decision of the Family Court to extend the compulsory care order is not before us, is also relevant.

[147] For these reasons, in accordance with the views of the majority, the appeal will be allowed to the limited extent that we find the approach of the Court of Appeal to s 85 of the Act adopted in this case was incorrect. We note also that, as the Family Court is already seized of the matter by way of a review under Part 6 of the Act, J's condition and status can be addressed in that Court.

Procedural matters

Scope of the appeal — jurisdiction

[148] We return now to the jurisdictional question referred to above. This Court granted leave to appeal from the Court of Appeal judgment in general terms. Subsequently, an application for recall of the leave judgment was filed. Recall was sought on the basis the parties had not drawn to the Court's attention a provision which meant this Court had no jurisdiction to hear those parts of the appeal that originated in the Family Court. The parties were agreed that the effect of s 134 of the Act was that this Court had no jurisdiction to grant leave in relation to the application in SC 11/2024 and nor in relation to one part of the application in SC 10/2024. The parties were also agreed the appeal could nonetheless proceed as the issues could be dealt with in the context of the remaining matters in SC 10/2024.

[149] To put this jurisdictional question in context, we need to refer first to the appeal rights in ss 133–134 of the Act which govern appeals from the decision under s 85 to extend a compulsory care order. Section 133 provides for appeals from decisions under s 85 to the High Court. Under s 133(4), the decision of the High Court on such an appeal is final, unless s 134 applies. Section 134 addresses further appeals to the Court of Appeal from the High Court, which may be on questions of law and require leave. Section 134(3) provides that "[t]he decision of the Court of Appeal on" such an appeal, "and on an application for leave to appeal, is final".

[150] To understand the impact of s 134(3) on the present case we need also to provide some more technical details about what each of the appeals in the

Court of Appeal involved. In SC 10/2024, the appellant's application for leave was directed to the appeal in the Court of Appeal in CA412/2019. That appeal involved the following:

(a) the appeal to the High Court of the Family Court's 2017 decision to extend J's compulsory care order under s 85 of the Act;

(b) the application originating in the High Court for an inquiry pursuant to s 102 of the Act; and

(c) the application originating in the High Court for judicial review and for declarations of inconsistency in respect of various rights breaches caused by the decisions of the District and Family Courts.

[151] SC 11/2024 was an application for leave to appeal from that part of the Court of Appeal's decision relating to the appeal in the Court of Appeal in CA662/2021. That was an appeal, removed to the Court of Appeal, of the Family Court's decision to extend the compulsory care order relating to J in 2020.

[152] Following receipt of the recall application, this Court indicated it was willing to proceed on the basis s 134 had the effect contended for by the parties in relation to SC 10/2024. The Court asked for submissions on the point as it related to SC 11/2024 and on the effect of the transfer of the appeal in CA662/2021 direct to the Court of Appeal.

[153] On the parties' approach, the matters the Court can address are the s 102 inquiry under the Act and the judicial review application.[221] The Court would therefore not consider the appeal from CA662/2021 (SC 11/2024) and would not be able to consider the appeal from CA412/2019 (SC 10/2024) insofar as it related to the Family Court's 2017 decision to extend J's compulsory care order under s 85.

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[221] Nonetheless, it is unnecessary for us to expressly address the s 102 inquiry given the decision made in relation to *RIDCA v VM*, above n 40. There was debate as to whether the appellant could ask this Court to address the making of a declaration of inconsistency where that was not raised in the Court of Appeal. Given the way we have dealt with the appeal it is not necessary for this Court to consider the question of a declaration.

[154] If this approach is adopted, the matters that remain within our jurisdiction would enable the Court to consider the issues about the approach to s 85 the Court had decided in its judgment granting leave to appeal were of general and public importance.[222] We are content to proceed on the basis the parties advance. Any issues about the scope of the removal power or as to the effect of s 134(3) can be dealt with, if necessary, in a case where those points are crucial.

[155] The Court is accordingly recalling and reissuing our leave judgment at the same time as this judgment is delivered to reflect the position adopted by the parties and clarify the matters that are properly before this Court.

Further evidence

[156] The Court also needs to make decisions about the admissibility of new evidence. There are three categories of evidence it is necessary to discuss, as follows:

(a) the initial historical specialist assessments made in relation to J prior to his disposition under the CPMIP Act;

(b) the 2023 compulsory care order extension decision and supporting documentation (including the specialist assessor report of 6 April 2023 of Dr Gardiner, a forensic psychiatrist (the Gardiner report)); and

(c) additional documentation post-dating the 12 September 2023 Family Court decision to extend the compulsory care order:[223]

(i) the specialist assessor report of 12 October 2023 of Dr Johnston, a psychologist; and

(ii) the 2024 Family Court judgment.

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222 SC leave judgment, above n 39, at [2].

223 In the hearing, there was some discussion as to whether, as a condition of its admissibility, the specialist assessor report of Dr Johnston [Johnston report] should have been accompanied by other contextualising documentation, such as the care and rehabilitation plan which was implemented subsequent to the Johnston report. Any such contextualising material has not been provided to the Court and so we say no more about it.

[157] The evidence in the first category consists of the agreed bundle of documents dated 26 June 2017, as prepared for J's application to the High Court for an extension of time to appeal the CPMIP Act findings. This evidence was provided to the Court in response to requests made by members of the panel. This material was before the Courts below. It is not clear that a formal ruling on its inadmissibility is necessary. In any event, as there is material relevant to the question of the initial approach taken to J and no objections from the parties to its admission, this evidence is formally admitted.

[158] Evidence in the second category is in the nature of updating material as to J's position. The parties consent to its admission. The evidence is admitted.[224]

[159] Turning then to the final category, that is, additional documentation post-dating the 12 September 2023 decision of the Family Court to extend the compulsory care order. This evidence provides updated information as to the impact of detention on J and as to the objects for amending and developing his treatment plan. The appellant relied on aspects of Dr Johnston's report in particular. Counsel for the respondents did not oppose the report coming before the Court at the hearing and have subsequently indicated that they will abide the Court's decision as to its formal admission. The 2024 Family Court judgment has been useful in updating the Court as to J's prospects as well as to the implications for him of his current care. The evidence is admitted.

Result

[160] The appeal is allowed in part. The approach of the Court of Appeal to s 85 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 was incorrect. The Family Court, in considering this matter in the context of a review under Part 6 of the Act, is to address J's condition and status in accordance with our approach to s 85.

[161] The further evidence described above at [156] is admitted.

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[224] See *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA) at 649–650; and *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 2)* [2007] NZSC 1, [2007] 2 NZLR 124.

[162] The application for recall of this Court's leave judgment of 18 April 2024 (*J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2024] NZSC 34) is allowed only to clarify the matters which are properly before the Court.

[163] The judgment of this Court of 18 April 2024 (*J, Compulsory Care Recipient by his Welfare Guardian, T v Attorney-General* [2024] NZSC 34) is reissued accordingly.

[164] Costs are reserved. If costs cannot be agreed, the parties should file memoranda on costs on or before 17 October 2025.

WINKELMANN CJ

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[165] The continued detention of J is challenged on the grounds that the interpretation and application of s 85 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the IDCCR Act) in J's case has resulted in:

(a) arbitrary detention in breach of s 22 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) because the detention is disproportionate, unnecessary and unreasonable in light of the purposes of the legislation, J's rehabilitative prospects, and the nature and seriousness of the offending which made J eligible for detention under the IDCCR Act; and

(b) unlawful discrimination in breach of s 19 of the Bill of Rights in that it discriminates against J on the ground of intellectual disability.[225]

[166] The first and fourth respondents[226] say in reply to the first ground that community safety concerns can justify the long-term, continued detention of a care recipient, even where, as here, the initial offence rendering the care recipient subject to the care regime was minor, and even where there is no credible care and rehabilitation programme which would see J released from detention. They say that the Court of Appeal reached this same conclusion after its correct application of *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* (*RIDCA*) — a decision which, if properly applied, results in orders that are justifiable limits on the rights of care recipients because they will be granted only in cases where the need to protect the community outweighs the "liberty interest" of the care recipient.[227]

[167] As to the second ground, the respondents say the fact that J has been detained longer than he would have been if his behaviour had been addressed through the criminal justice system is not unlawfully discriminatory. A comparison based on length of sentence in the criminal justice system is inapt since J lacks the capacity to stand trial and also the agency and moral understanding of harm central to criminal culpability.

[168] I agree with Ellen France, Miller and Williams JJ that the appeal should be allowed on the first ground to the extent set out in the reasons of Ellen France and Miller JJ.[228] I agree that the approach of the Court of Appeal to s 85 was incorrect in the case of J, and that this Court should not confirm the approach to the extension of compulsory care orders set out in the Court of Appeal decision in *RIDCA*. I would also have allowed the appeal on the second ground, on the basis that the *RIDCA* test, as applied to J, was discriminatory for the purposes of s 19 of the Bill of Rights.

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225 See Human Rights Act 1993, s 21(1)(h)(iv).

226 That is, in SC 10/2024. The fourth respondent in SC 10/2024 is also the respondent in SC 11/2024. There was no appearance on behalf of the second, third and fifth respondents in SC 10/2024.

227 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641 [*RIDCA*]. See *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2023] NZCA 660 (Courtney, Katz and Clifford JJ) [CA judgment].

228 Above at [160] per Ellen France and Miller JJ; and below at [280] per Williams J.

[169] I write separately to set out my reasons. I see the first ground of appeal as turning on an issue of the interpretation of s 85, an interpretation which must be informed by the Bill of Rights and by New Zealand's international commitments under the Convention on the Rights of Persons with Disabilities (the Convention).[229] The issue of statutory interpretation is whether community safety is a primary (as opposed to incidental or subordinate) purpose of the legislation. As to the second ground of appeal, I apply the test set out in *Ministry of Health v Atkinson* to establish unlawful discrimination for the purposes of s 19 of the Bill of Rights.[230]

Some important context to this appeal

[170] The tasks undertaken by the courts and by other decision makers under the IDCCR Act and the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CPMIP Act) are of great importance. These are Acts which can operate to limit one of the most fundamental rights — the liberty right — of some of the most vulnerable in our community. The legislation is inadequate given the limitation on rights authorised by it.[231] There is little and incomplete guidance in it as to the purposes for which detention may be ordered. There is also little and, on any view, incomplete guidance as to the matters the decision maker must weigh when so deciding. This is also complex legislation, which is difficult for even the most determined to understand, construe or track a path through. I therefore preface the remarks that follow by observing that this is legislation which is difficult to interpret and to apply.

[171] J is an Autistic person with an intellectual disability.[232] In 2005, J was proved to have caused the acts which constituted the minor property-related offences with which he had been charged, and he was found unfit to stand trial on the ground that he was mentally impaired.[233] In 2006, orders were made under the CPMIP Act that J be

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229 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008) [CRPD].

230 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

231 I note that relevant international bodies have expressed concerns about the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 [IDCCR Act] and its provision for extensions to compulsory care orders: see Committee against Torture *Concluding observations on the seventh periodic report of New Zealand* UN Doc CAT/C/NZL/CO/7 (24 August 2023) at [41(b)] and [42(b)]; and Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of New Zealand* UN Doc CRPD/C/NZL/CO/2-3 (26 September 2022) at [27(b)] and [28(b)].

232 See IDCCR Act, s 7(1).

233 See Criminal Procedure (Mentally Impaired Persons) Act 2003 [CPMIP Act], ss 9 and 14 (now

cared for as a care recipient under the IDCCR Act, and detained in a secure facility, for a period of two years.[234] Although the initial offending was minor, as can be seen from the narrative of facts set out in the reasons of Ellen France and Miller JJ, J's case is by no means straightforward.[235] At the time of the hearing before us, J had been detained for more than 18 years, after multiple extensions of the initial order under s 85 of the IDCCR Act. This is a period of detention which, if it could be imposed as a sentence, would have been in breach of s 9 of the Bill of Rights as so grossly disproportionate that it would shock the national conscience.[236] It is now the case that there is no clear path to release for J. This is so notwithstanding the dedicated efforts of medical practitioners and caregivers, but perhaps because of the resource constraints that have latterly come to shape his care.

[172] J's case presents very considerable difficulties for those involved in his care, and indeed for society. J wants to go home to be cared for by his mother. J's mother is very supportive of this. However, J is assessed as dangerous, an assessment based on the years that caregivers and medical practitioners have dealt with him under compulsory care orders, their observations of him and their accounts of his conduct. Although quite early on in his detention J improved, and there was hope he could go home, later his condition deteriorated, and he is now subject to a highly restrictive form of detention. Living in his own apartment, apart from visits from his mother, he has contact almost exclusively with caregivers, who must deal with him in a way that is significantly constrained by security concerns. J is seldom allowed to go on any sort of outing. When he does, the outing is again conducted in a way that is highly restrictive of his freedom of movement. J perceives the intensity of his care as being "sen[t] … to jail". There is evidence to suggest this care is exacerbating rather than alleviating the risks associated with his behaviour, making it less likely that he will be able to be safely cared for by his whānau. On the facts, it is apparent that the ongoing

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repealed).

234 *New Zealand Police v [J]* DC Manukau CRN 4092034925-26, 8 February 2006 (Judge Kerr) at [15].

235 See above at [25]–[39].

236 See *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [3] and [75]–[79] per Winkelmann CJ, [159]–[167] per O'Regan and Arnold JJ, and [239] per Glazebrook J. By comparison, the two offences with which J was charged were each punishable by a term of imprisonment not exceeding three months or a fine not exceeding $2,000: Summary Offences Act 1981, ss 11(1)(a) and 29(1)(b).

detention of J is now primarily for community safety reasons, given that it is not supporting his rehabilitation or moving him towards reintegration.[237]

[173] The discussion that follows of J's detention and care should not be read as a criticism of caregivers, medical professionals or other decision makers. His case is both legally and factually complex, presenting problems that the law, in its present form, struggles to deal with.

First ground of appeal: arbitrary detention

The framework for analysis

[174] The appeal squarely raises issues under ss 5 and 6 of the Bill of Rights, provisions which work together. Under s 6, courts have an obligation to apply the most rights-consistent interpretation that can be given to provisions of the IDCCR Act. Under ss 5 and 6, decision makers who are called upon to make or review decisions under the IDCCR Act must assess whether there is a lawful basis for the limitation of a care recipient's rights, and whether it is proportionate to the purpose for which it is proposed to be imposed.[238] In undertaking these tasks, judges and decision makers are guided by the words of the legislation — what are the purposes of the legislation, and what must the decision maker consider?

[175] Section 85(1) of the IDCCR Act provides that the Family Court "may … extend the term of a care recipient's compulsory care order". This is a power to continue J's detention. Under s 22 of the Bill of Rights, J has the right not to be arbitrarily detained. It is well established that arbitrariness for the purposes of s 22 of the Bill of Rights is not to be equated with "against the law" but is to be "interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability

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237 I acknowledge there are also concerns about the risk of J harming himself or his mother, but community safety has been the primary justification for J's ongoing detention.

238 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64] per Blanchard J and [104] per Tipping J; and *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [86] and [195]–[197] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

and due process of law, as well as elements of reasonableness, necessity and proportionality".[239]

[176] The task for the Court under s 6 is to interpret s 85, to the extent possible, so that it does not authorise outcomes that are inconsistent with the Bill of Rights.[240] Under this ground of appeal, this requires interpreting s 85 so that its application does not produce a detention that is arbitrary — in the sense that it is disproportionate or unreasonable in light of the justification for the detention. It follows that it is necessary to interpret the statute to determine what is the justification, in statutory terms, for continued detention. This is a difficult task because of the deficiencies in the legislation I have already identified, including particular features that I come to shortly. Differences in view between the members of this Court as to the purpose of s 85 can be seen in the different sets of reasons.

[177] To address this issue of interpretation — the purpose of s 85 — it is necessary to identify the purpose of the IDCCR Act. It is well established that even the most broadly expressed discretions must be exercised consistently with the policy and objects of the Act[241] — and s 85 is certainly broadly expressed. This statutory analysis is also necessary to the analysis under ss 5 and 6 of the Bill of Rights. This is because the statutory purpose of detention plays a vital role in identifying and assessing the justification for the limitation of the detainee's rights, and it is with regard to that justification that issues of proportionality and reasonableness must be assessed.

[178] In interpreting the IDCCR Act, it is important to bear in mind that s 6 is in itself an important tool of statutory interpretation, creating a strong presumption of rights consistency.[242] The Court must also bear in mind the limits to interpretation imposed

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239 Human Rights Committee *General comment No 35: Article 9 (Liberty and security of person)* UN Doc CCPR/C/GC/35 (16 December 2014) at [12] (footnote omitted) as cited in *Chisnall*, above n 238, at [161] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

240 This is consistent with the courts' approach to statutory provisions conferring powers and discretions: see *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68] per Richardson P, Keith, Blanchard and Tipping JJ; *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [25]; *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [90]–[91]; *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [100] and [161] per McGrath, William Young, Glazebrook and Arnold JJ; and *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [101]–[102] per Winkelmann CJ and O'Regan J.

241 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

242 *Fitzgerald*, above n 236, at [48] per Winkelmann CJ, and [207]–[209] and [217] per O'Regan and Arnold JJ.

by s 4 of the Bill of Rights. The interpretation arrived at cannot amount to a refusal to apply the enactment.[243] There are other matters that also assist with this interpretive task. Foremost amongst these is the Convention, ratified without reservation by New Zealand in 2008. This is relevant to the interpretation of the IDCCR Act because of the principle of law that, if at all possible, domestic legislation is to be interpreted consistently with New Zealand's obligations under international law.[244] This presumption of consistency with unincorporated international instruments has been applied to restrict or expand the meaning of provisions conferring discretionary powers, as necessary, to secure such consistency.[245] It applies although New Zealand's obligations under the international instrument in question arose after the enactment of the legislation in question.[246]

[179] The Convention is a human rights treaty which aims to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity".[247] Article 4 of the Convention obliges states parties to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention. Article 5 recognises the right to equality and non-discrimination before and under the law. Article 12 obliges states parties to take measures to support persons with disabilities to exercise legal capacity on an equal basis with others in all aspects of life. Article 13 requires states parties to ensure effective and equal access to justice for disabled persons. Article 14 obliges states parties to ensure that disabled persons enjoy, on an equal basis with others, the right to liberty and security of the person and that they are not deprived of their liberty unlawfully or arbitrarily. Article 19 obliges states parties to recognise the equal right of disabled persons to live in the community and to take measures to facilitate their full inclusion and participation. Article 26 requires states parties to organise and strengthen habilitation

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243 At [60] per Winkelmann CJ.

244 *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [96] citing *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289, *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Blanchard, Tipping, McGrath and Anderson JJ, *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [40] and *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143] per McGrath J and [207] per Glazebrook J.

245 See, for example, *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) at 60–62.

246 *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [94] per Winkelmann CJ and O'Regan J citing Legislation Act 2019, s 11.

247 CRPD, art 1.

and rehabilitation services to support disabled persons' participation and inclusion in the community and all aspects of society.

[180] This is the framework within which the provisions of the IDCCR Act are to be interpreted.

The legislative provisions and history

[181] As to the statutory provisions, I start with the essential point that compulsory care orders can only be made in respect of those who have been charged with, or convicted of, an offence. There are several pathways into detention under the IDCCR Act.[248] J entered compulsory care having been found to have caused the acts constituting the charged offence but also being unfit to stand trial. Disposition options for a person with intellectual disability in those circumstances are set out in ss 24 and 25 of the CPMIP Act. Under s 24(2)(b) of the CPMIP Act, the court has power to order that the person be detained in a secure facility as a special care recipient under the IDCCR Act.[249] Such an order must be made if the court is satisfied that it is "necessary in the interests of the public or any person or class of person who may be affected by the court's decision".[250] The detention is therefore explicitly ordered to address the interests of others.

[182] That same threshold does not apply in J's case. He entered the IDCCR Act's regime pursuant to an order under s 25(1)(b). The jurisdiction to make such an order only arises if the court is *not* satisfied that an order under s 24(2)(b) is necessary.

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248 In short, these are: (a) by an order under the CPMIP Act made in the course of a criminal proceeding brought against the person; or (b) by changing the regime applicable to the person from that under the Corrections Act 2004 or the Mental Health (Compulsory Assessment and Treatment) Act 1992 to the regime under the IDCCR Act, generally by an order of the Family Court: IDCCR Act, s 4(1).

249 As this Court explained in *M (SC 82/2020) v Attorney-General*, a special care recipient remains within the criminal justice system and must be held in a secure facility: *M (SC 82/2020) v Attorney-General* [2021] NZSC 118, [2021] 1 NZLR 770 at [12]–[14] per Winkelmann CJ, O'Regan and Williams JJ. Detention as a special care recipient following an order under s 24(2)(b) is largely governed by s 30 of the CPMIP Act. Section 30(1)(b) provides that the maximum period for which a defendant found unfit to stand trial can be detained as a special care recipient is a period equal to half of the maximum term of imprisonment to which he or she would have been liable if convicted (unless the defendant was charged with an offence punishable by life imprisonment, in which case the maximum period is 10 years: s 30(1)(a)). An order under s 24 continues in force during that maximum period until the special care recipient's status is changed under s 31: s 30(3).

250 CPMIP Act, s 24(1)(c).

[183] Because the order was made under s 25(1)(b), J became a care recipient under the IDCCR Act and was no longer subject to the criminal justice system.[251] The focus of my reasons is on the operation of the IDCCR Act as it affects people in that category. As I come to, the legislation evinces different purposes in respect of those who enter the IDCCR Act regime under s 25(1)(b) than in respect of those who enter under s 24(2)(b).

[184] Even so, for all who become subject to the legislation, the IDCCR Act is not punitive legislation. It is, as its title suggests, legislation set up for the care and rehabilitation of those who become subject to it. That purpose is reiterated in s 4, which explains the legislation in outline and includes the following statement:[252]

> This Act provides a system for the compulsory care and rehabilitation of persons who have an intellectual disability and who have been charged with, or convicted of, an offence.

[185] The purpose provision of the IDCCR Act adds something to the picture:

> **3 Purposes**
>
> The purposes of this Act are—
>
> (a) to provide courts with appropriate compulsory care and rehabilitation options for persons who have an intellectual disability and who are charged with, or convicted of, an offence; and
>
> (b) to recognise and safeguard the special rights of individuals subject to this Act; and
>
> (c) to provide for the appropriate use of different levels of care for individuals who, while no longer subject to the criminal justice system, remain subject to this Act.

[186] Unhelpfully, s 3 does not stipulate what objective the compulsory care must be "appropriate" to. However, the use of the word "appropriate" no doubt reflects the fact that the IDCCR Act deals with a wide variety of care recipients — from those like J, who are no longer subject to the criminal justice system, to those who come in under s 24(2)(b) and through to those who are serving prisoners. In the case of J,

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251 IDCCR Act, s 6(3) definition of "care recipient no longer subject to the criminal justice system". See also CPMIP Act, s 4(1) definition of "care recipient" and s 26(2).

252 Subsection (1).

"appropriate" is best read as "appropriate for his care and rehabilitation". I add that in the context of legislation designed to recognise and safeguard the special rights of people with intellectual disability subject to the IDCCR Act, that phrase "care and rehabilitation" must encompass reintegration. That is because the intellectual disability will persist, notwithstanding rehabilitative efforts. This reading is supported by the obligation of states parties to the Convention to adopt appropriate legislative, administrative and other measures to support full and effective participation and inclusion in society for disabled people.

[187] Other statutory provisions to be considered under this ground of appeal are ss 11 (which provides principles to guide a decision maker under the IDCCR Act) and 85 (which sets out the particular statutory discretion at issue):

> **11 Principles governing exercise of powers under this Act**
>
> Every court or person who exercises, or proposes to exercise, a power under this Act in respect of a care recipient must be guided by the principle that the care recipient should be treated so as to protect—
>
> (a) the health and safety of the care recipient and of others; and
>
> (b) the rights of the care recipient.
>
> …
>
> **85 Extension of compulsory care order**
>
> (1) The Family Court may, on the application of the co-ordinator, extend the term of a care recipient's compulsory care order.
>
> (2) If the court extends a compulsory care order for a care recipient no longer subject to the criminal justice system, the court must consider and determine whether the care recipient must receive supervised care or secure care.
>
> (3) The court may order that a care recipient no longer subject to the criminal justice system receive secure care only if it considers that supervised care would pose a serious danger to the health or safety of the care recipient or of others.

[188] It is important to note that s 11 is a provision of general application, detailing principles to be applied by every court or decision maker exercising or proposing to exercise a power under the IDCCR Act. It is also of note that the language of "community safety" is not used here. Rather, reference is made to the "health and safety of the care recipient and of others", which is the sort of language to be expected

if the focus is on safety whilst the care recipient is subject to a compulsory care order (encapsulating the duty of the state to ensure the health and safety of care recipients, staff and visitors).

[189] The language of care and rehabilitation, and health and safety, come together again in ss 25 and 26, provisions which can be seen as the legislative instantiation of the health and safety focus of s 11. A care and rehabilitation plan must be prepared for every care recipient.[253] These plans are focused on how the care recipient is to be cared for whilst subject to the order. Section 25(1)(d) provides that the plan must identify "the circumstances in which the care recipient is likely to behave in a manner that endangers the health or safety of the care recipient or of others", and s 25(4) provides that the plan must deal with the kind of supervision the care recipient requires to avoid "undue risk" to the health or safety of those people. Section 26 provides that the plan must include a care programme for the care recipient, including "the degree of security required for the care of the care recipient and for the protection of others".

[190] Section 11 also refers to the rights of a care recipient. In *RIDCA*, the Court of Appeal said that while this was undoubtedly a reference to the rights enumerated in the IDCCR Act,[254] the focus of the principles set out in s 11(b) is the fundamental rights ensuring basic freedoms of the kind described in the Bill of Rights.[255] I agree.

[191] As noted, s 85 provides little to guide the exercise of the discretion it creates. It is silent as to relevant considerations for the decision maker, giving guidance only as to the criteria to be met if the order is to be for secure rather than supervised care — if secure care is to be ordered in the extended period, the decision maker must consider that the care recipient will pose "a serious danger to the health or safety of the care recipient or of others" if not subject to that level of care.[256] This again supports the view that the reference to health and safety is a reference to managing risk to the care recipient and others *during the period of care*.

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253 Section 24.
254 Sections 49–57.
255 *RIDCA*, above n 227, at [35].
256 IDCCR Act, s 85(3).

[192] There is little detail as to the evidence required to support the making of an order under s 85. As a matter of practice, substantial evidence is provided from clinicians as to the care recipient's condition. As judged from this case, that evidence focuses on risk to the care recipient and others if there is no extension. However, the only statutory provisions that bear upon issues of proof are ss 77–82, which provide for the regular review of a care recipient by a specialist assessor,[257] a review which is concluded by the issue of a certificate as to whether the status of the care recipient needs to be continued or changed. The court "must have regard" to the most recent certificate issued for a care recipient when deciding whether to extend their compulsory care order under s 85.[258]

[193] For care recipients like J, who are no longer subject to the criminal justice system, the form of certificate simply requires the specialist assessor to state whether in their opinion the care recipient "still needs to be cared for as a care recipient" or "no longer needs to be cared for as a care recipient".[259] There is no further guidance provided to the specialist assessor in the Act as to what matters are relevant to that inquiry.[260] This can be contrasted with the form of certificate required for someone detained as a special care recipient on account of their unfitness to stand trial (who come into the scheme of the IDCCR Act under s 24(2)(b) of the CPMIP Act), which has an explicit community safety focus — the specialist assessor must state whether it is "necessary, in the person's own interests or in the interests of the safety of … the public, that the person continue to be cared for as a special care recipient".[261]

[194] Following on from this point, what is not provided for in the statutory scheme for those, like J, who come into the scheme of the IDCCR Act under s 25(1)(b) of the CPMIP Act, is significant for the interpretive task. The phrases "public safety" or "community safety" do not appear. The language of risk assessment is not used. There is also no provision or guidance as to the type, level or evidence of risk that

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257 A specialist assessor is defined to mean a suitably qualified and experienced health or disability professional designated by the Director-General of Health for the purposes of the IDCCR Act: s 5(1) definition of "specialist assessor or assessor".

258 Section 88(2)(a).

259 Section 82.

260 See, however, the guidance published in the Ministry of Health | Manatū Hauora *Guidelines for the Role and Function of Specialist Assessors Under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (August 2004).

261 IDCCR Act, s 89(2)(b)–(c).

could justify continuation of the compulsory care order. The expression "undue risk" appears in s 25 of the IDCCR Act, but that is only in connection with the content of care and rehabilitation plans that apply during detention — these plans must address the kind of supervision the care recipient requires to avoid "undue risk to the health or safety of the care recipient and of others".[262]

[195] There is also, I note, specific provision for victims to make submissions about the grant of leave during the duration of a compulsory care order[263] — but not the making of an order under s 85.

[196] To this point, my analysis of the legislative scheme of the IDCCR Act might seem to suggest that consideration of the interests of others, including the public interest that there be no further offending, is irrelevant to the decision under s 85(1) as it applies to people in J's position. That might be thought to be the most rights-consistent interpretation for the purposes of s 6 of the Bill of Rights. However, I consider that this interpretation is not available — and indeed it was not submitted to us that the safety of others in the community was an irrelevant consideration. That is because, to put the matter in terms of s 4 of the Bill of Rights, such an interpretation would entail a refusal to apply the enactment.

[197] As I now explain, this conclusion flows out of the interaction between the IDCCR Act and the CPMIP Act. The latter Act provides for detention under the IDCCR Act as a disposition option for those who have been proved to be involved in conduct that constitutes criminal offending even when their detention is not found to be necessary in the interests of the public or any person or class of persons. It is relevant in this regard that one of the alternative disposition options under the CPMIP Act is the immediate release of the person.[264] It is something of a puzzle to see how s 25(1)(b) fits in between the "interests of the public" threshold for orders under s 24(2)(b) and the option of release under s 25(1)(d). Perhaps the only sense to be made of this scheme is that the provision for detention under the IDCCR Act under s 25(1)(b) in response to offending conduct is built on the assumption of the need for

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262 Subsection (4).
263 Sections 65B–65C.
264 CPMIP Act, s 25(1)(d).

detention to care for and rehabilitate the subject of the order so as to avoid future offending. It can also be said that addressing the risk of future offending entails weighing the public interest in being safe from offending.

[198] It must also be acknowledged that consideration of the safety of the care recipient's caregivers, family, previous victims and the community is consistent with the dignity of the disabled person. It is consistent with the requirements of the Convention that they be supported to participate fully and effectively in society, and so to live a life in which they do not harm others. It cannot therefore be said that consideration of future offending and safety of others is irrelevant to decision makers.

[199] This exercise in statutory interpretation — interpreting the language of s 85 within the legislative framework of both the CPMIP Act and IDCCR Act — leads to the conclusion that community safety is relevant as incidental to the purposes of care and rehabilitation as I have set out. But as I now come to, it does not, however, displace the ongoing salience of the initial offending in the assessments to be made about detention.

[200] As IHC New Zealand Inc (IHC) submits, intervening in this appeal, the initial offending is clearly relevant in assessing both whether a compulsory care order should be made and its appropriate duration. When regard is had to the provisions of both the CPMIP Act and the IDCCR Act, it is the need for care and rehabilitation in response to the initial offending that is, in terms of the legislation, the state's justification for the detention — other than the fact of an intellectual disability, for care recipients in J's category under the legislation, no other justification is recorded. The nature and seriousness of that offending must therefore be relevant to whether to order continued detention.

[201] As Ellen France and Miller JJ explain, the legislative history provides support for this view.[265] The Intellectual Disability (Compulsory Care) Bill as introduced would have created a civil regime providing for the compulsory care of persons with intellectual disability whether they were offenders or non-offenders.[266] The threshold

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265 Above at [99]–[100].

266 Intellectual Disability (Compulsory Care) Bill 1999 (329-1) (explanatory note) at i.

for entry to care for non-offenders was that the person had an intellectual disability, their behaviour posed a serious risk of danger to themselves or others, and there was no alternative to compulsory care.[267] On the recommendation of the Health Committee, the select committee considering the Bill, the provisions dealing with non-offenders were removed.[268] This then supports a reading of the IDCCR Act that it is legislation that responds to the risk as evidenced by the offending. It also supports the view that community safety is not a primary purpose of detention under the IDCCR Act.

[202] I agree with Ellen France and Miller JJ that a s 6 interpretation does not, however, require that the detention be no longer than the maximum sentence that could have been imposed if the care recipient had been found fit to stand trial.[269] That is because the IDCCR Act is not sentencing legislation. It may be that rehabilitation and reintegration will take longer than the notional maximum sentence would allow. It may also be that it will take a much shorter time than the notional maximum sentence.

A rights-consistent interpretation

[203] In light of the above analysis, I consider that the purpose for which continued detention under s 85 may be ordered for care recipients in J's category is to provide care and rehabilitation in response to the index offending. The initial reason for detention under the IDCCR Act is involvement in offending. The facts and circumstances of that offending are material both to the initial period of detention and to the ordering of any extension of the detention. Care, rehabilitation and reintegration of the care recipient in response to the needs identified by the offending conduct must be its primary purpose. A feature of care, rehabilitation and reintegration is enabling the care recipient to live a life which is safe and in which they do not harm others. For care recipients in J's category, community safety is not, in and of itself, a purpose of the Act. Rather it is incidental to — and plays a role in — the primary purpose of the Act, which is care, rehabilitation and reintegration. On this basis, I agree with

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267 At i–ii.
268 Intellectual Disability (Compulsory Care) Bill 1999 (329-2) (select committee report) at 2.
269 Above at [104].

Ellen France and Miller JJ that risk of harm remains relevant to the assessment of whether to extend a compulsory care order under s 85 in the way they set out.[270]

[204] I am therefore satisfied that the most rights-consistent reading of s 85 as it applies to those who enter compulsory care through s 25(1)(b) is that the nature and seriousness of the original offending conduct are significant factors in the extension decision. While care and rehabilitation are the purpose of the IDCCR Act, the nature and seriousness of the offending remain key when assessing the proportionality of the length of the detention.

[205] The interpretation of s 85 contended for by the respondents, as accepted by Kós J, is not the most rights-consistent reading for the purposes of s 6. It is, in fact, the least rights-consistent interpretation available as it applies to care recipients in J's category, as it would allow community safety to be the determinative factor, swamping the rights of J as the care recipient. There is also another issue with interpreting the IDCCR Act as having community safety as a primary purpose justifying the detention of care recipients in J's category. The absence of an express reference to or framework for that purpose is so complete in respect of care recipients in J's category, that to detain on that basis would itself be arbitrary — this is because the basis for such a detention cannot be said to be "prescribed by law" for the purposes of s 5 of the Bill of Rights.[271] There are rule of law reasons why the basis upon which detention may be ordered should be clearly provided for in the enabling legislation.

[206] The case of J undoubtedly presents a challenge to any decision maker. Those who have spent time with him believe that he will be a danger if he is released. That may be so, but Parliament did not enact a community safety model. It is not the role of the judiciary to expansively interpret rights-restricting provisions to create a model which enables the indefinite detention of people with intellectual disability when they have committed only minor offences. That is rather the antithesis of our task under the Bill of Rights. The answer to the conundrum presented by J is for the

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270 Above at [142]–[144].

271 See the discussion of the "prescribed by law" requirement in *Hansen*, above n 238, at [180] per McGrath J; Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [4.17] and [10.28]; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [6.12.1] and following.

state to provide a reintegration pathway for him, he now having spent nearly two decades in detention because he committed minor property damage and was found to be intellectually disabled.

[207] To put the matter shortly, the respondents' interpretation is inconsistent with the legislative scheme and with the legislative history, which demonstrate a rejection of a model which enabled community safety as the justification for detention. It is inconsistent with the requirement under the Convention that disabled people enjoy equal status before and under the law, and with the obligation accepted by New Zealand as a state party thereunder to ensure the right of disabled persons to enjoy, on an equal basis with others, liberty and security of the person. For these reasons, I disagree with the approach set out in the reasons of Kós J, which I consider does not give effect to the statutory scheme and gives insufficient effect to the provisions of the Bill of Rights. I also disagree that this case involves a conflict of rights, or that the s 6 interpretation in this case has a dual rights focus, for the reasons given by Ellen France and Miller JJ.[272]

[208] I also disagree with Williams J that the indefinite detention of care recipients who come into the scheme under s 25(1)(b) of the CPMIP Act can be justified. His approach would in theory permit indefinite detention even where the qualifying offence was minor (as here), if there is a risk the care recipient would harm themselves or others, so long as the standard of care being provided to the care recipient is adequate.[273] I also note that Williams J seems to equate the test to be applied in deciding between supervised and secure care (both of which may entail detention)[274] with the test for ongoing detention under s 85(1). The point I make above is that the "serious danger" test only applies to the decision as to the level of care if an extension order is made, and not to the threshold decision to extend.

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272 Above at [89].

273 Williams J also recognises that ongoing detention must be the least rights-intrusive means of securing the objects of care as he defines them.

274 See IDCCR Act, s 5(1) definition of "secure care" and "supervised care" and ss 63–64. The effect of these provisions is that while a care recipient receiving secure care "is required to" stay in a secure facility, and "may not leave" without authority given under the IDCCR Act, a care recipient receiving supervised care may also be directed to stay in a designated facility or place, in which case they too "must" stay in that facility or place and (in respect of a facility) "may not leave" without authority given under the Act. Therefore supervised care may amount in some cases to detention.

Is RIDCA *correct?*

[209] The test in *RIDCA*, which was applied by the Court of Appeal in this case, was a focus of the grant of leave.[275] The Court of Appeal in *RIDCA* approached its task under s 85 on the basis that it was required to balance two interests: the "legitimate interest of the community in protecting the health and safety of the care recipient and others" against the "liberty interest of the care recipient".[276] Like J, the care recipient in *RIDCA* came into the scheme of the IDCCR Act under s 25(1)(b) of the CPMIP Act. Nevertheless, the Crown argued in that case that a decision whether to renew a compulsory care order must focus entirely on the risk posed by the care recipient to themselves or the community.[277]

[210] The Court of Appeal rejected this interpretation of s 85. It found that unless the community protection interest outweighs the care recipient's liberty interest no extension should be granted.[278] The longer the care recipient has been detained, the more heavily will that liberty interest weigh in this exercise.[279] The nature of the original offending is relevant to the decision as an indication of the risk posed by the care recipient, and in a finely balanced case "the fact that an extension would make the period of compulsory care disproportionate to the offending of the care recipient may also be taken into account".[280] But where a judge is satisfied that the community protection interest outweighs the liberty interest of the care recipient, the fact that the period of detention would exceed any sentence they might have been subject to should not lead to the refusal of an order.[281]

[211] There is much with which I agree in the Court's analysis in *RIDCA*. But the passage of time has shown that the balance struck in *RIDCA* needs readjustment. I agree with Ellen France and Miller JJ that the test set out there should no longer apply.[282]

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275 *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2024] NZSC 34 (Glazebrook, Ellen France and Miller JJ) at [1].
276 *RIDCA*, above n 227, at [36].
277 At [14].
278 At [92(a)].
279 At [91] and [92(c)].
280 At [92(d)].
281 At [92(d)].
282 See above at [86].

[212] The difficulties I see with the test are as follows. First, it reads into the statutory scheme community safety as a primary purpose of detention for care recipients in J's category. It follows from the reasoning I have set out above that I do not consider that community safety is a primary purpose of the IDCCR Act framework as it applies to care recipients in J's category; rather it is incidental to the purpose of care, rehabilitation and reintegration. Secondly, the *RIDCA* test does not conform with the requirements of the Bill of Rights itself. As the Bill of Rights makes explicit, limitations on rights must be demonstrably justified,[283] and, as is well established, limitations on rights will only be justified if prescribed by law and if reasonable, necessary and proportionate to the justification offered for them.[284]

[213] Instead of reviewing the justification for a limitation on rights, the approach in *RIDCA* entails a balancing of interests. When the judgment is read as a whole it is clear that this was certainly not the Court's intention. But the facts of J's case suggest that the test has allowed fundamental rights to be balanced away without the protective structured analysis provided by the ss 5 and 6 requirements of reasonableness, necessity and proportionality. In this way, as Ellen France and Miller JJ explain, it provides inadequate protection from arbitrary detention.[285]

[214] It is perhaps at this point that it is useful to go back to what is said at the beginning of these reasons, that this appeal raises issues involving both ss 5 and 6 of the Bill of Rights. These sections operate together, but the overlap in their operation in this case undoubtedly makes it difficult to keep conceptually straight. That is because the issue on this appeal is arbitrariness, in the sense of disproportionality and unreasonableness. Given the right at issue, both the s 6 analysis and the s 5 analysis entail assessment of justification (requiring consideration of the objective or purpose of detention) and reasonableness, necessity and proportionality.

[215] As Ellen France and Miller JJ point out, there is not much to be gained from debating which is the better approach on this appeal.[286] The focus here has been s 6

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283 Section 5.

284 *Hansen*, above n 238, at [64] per Blanchard J and [104] per Tipping J; and *Chisnall*, above n 238, at [86] and [195]–[197] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

285 Above at [86]–[87].

286 Above at [145].

because the fundamental issue has been one of statutory interpretation — what is the purpose for which detention may be ordered? Once that issue of statutory interpretation is settled, and when applying the provision to an extension application in respect of a care recipient, my expectation is that courts will find the *R v Hansen* proportionality analysis more useful to assist them in applying s 85 in a rights-consistent manner to that case.[287] As this Court said in *Attorney-General v Chisnall*, ultimately the methodology to be adopted by a court when considering an application that engages affirmed rights should be the one that best strives to identify and secure a Bill of Rights-consistent interpretation and application to the individual case utilising ss 5 and 6.[288]

[216] The test set out by Ellen France and Miller JJ at [142]–[144] is, in my view, in conformity with the legislative scheme I have set out above and with the *Hansen* analysis. The test begins with the s 22 right of the care recipient — the right to liberty — stating clearly the scope of the right, and the nature and dimension of the proposed limitation. The analysis then shifts to the justification for the proposed limits on that right: first, whether the proposed limitation is prescribed by law; and, secondly, whether the detention is reasonable, necessary and proportionate in light of the nature and seriousness of the index offending, and in light of the caregiving, rehabilitative and reintegrative purposes for which detention may be ordered. I add that, in undertaking this analysis, the court, and indeed any decision maker under the Act, must strive for the least rights-intrusive means of securing these purposes.

[217] I agree with the matters that Ellen France and Miller JJ set out at [143]–[144] as relevant to and guiding the justification and proportionality inquiry. They mention in particular the significance of the passage of time in the analysis. In this regard, I highlight their observation earlier in the judgment that, given the coercive nature of the powers exercised in relation to a care recipient, over time their exercise is likely to require increasing justification to maintain proportionality with the legitimate aims of the detention.[289]

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287 *Hansen*, above n 238, at [64] per Blanchard J and [104] per Tipping J. See also *Chisnall*, above n 238, at [86] and [195]–[197] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

288 *Chisnall*, above n 238, at [98] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

289 Above at [95].

[218] I also agree with the view they express at [142] that there is a threshold question under s 85, namely whether it has been established that the care recipient would pose a risk to others if further care and rehabilitation were not provided. I agree that such a threshold is appropriate to the exercise of the s 85 power to extend detention, so that absence of risk would preclude the grant of an extension. This approach is rights-protective. It reflects that it is an exceptional thing to extend detention beyond the period of time that was initially assessed as proportionate when the first orders under the IDCCR Act were made. I would have preferred to leave for another day whether a risk to the care recipient themselves is a sufficient reason to meet this threshold. As Simon France J observed in the High Court in *M v RIDCA Central (Regional Intellectual Disability Care Agency)*, "it needs to be remembered there is no general capacity to control people for their own good".[290] However, for the purposes of ensuring a majority as to the appropriate test, I accept the threshold question as they formulate it.

Application to J's case

[219] The initial offending which rendered J liable to detention under the regime was minor. He committed acts of property damage with an axe he had carried onto his neighbour's property, giving rise to one charge of wilful damage and another of being in an enclosed yard without reasonable excuse.[291] At the time he was 20 years old. Had he been fit to stand trial, he could have been imprisoned for no more than three months in respect of each offence.[292] But J, an Autistic person with an intellectual disability, was found unfit to stand trial and a secure care order of two years' duration was made. For a period, continued detention seems to have been well justified, notwithstanding the minor nature of the offending. This is so because plans to address J's problematic behaviour were being successfully implemented towards a goal of J's return to the community. Part of these plans was appropriately focused on mitigating the risk that J would pose to himself and those who would care for him, such as his mother (who wishes to be involved in his care), and the risk he would pose to the community if released.

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290 *M v RIDCA Central (Regional Intellectual Disability Care Agency)* (2009) 28 FRNZ 669 (HC) at [104(a)].

291 Summary Offences Act, ss 11(1)(a) and 29(1)(b).

292 Sections 11(1) and 29(1).

[220] But years passed, and at a certain point J ceased to make progress towards release. Many more years have now elapsed in which J is being kept in very restrictive detention. There is evidence to suggest that the ongoing detention is now worsening his behaviour, as detailed by Ellen France and Miller JJ.[293]

[221] This Court has been presented with a large amount of evidence that suggests J is a risk to the community. I do not suggest that he is not. I do think it important to note, however, that this is material that was gathered when J was detained under extreme circumstances, which in themselves had begun to harm him. It is evidence gathered when J was able to be closely monitored and scrutinised by caregivers and medical professionals in circumstances that only arose because of the detention. Most fundamentally, it is evidence that the IDCCR Act provides us with no useful framework to measure or assess — because this Act, at least insofar as it affects care recipients in J's category, is not community safety legislation but rather legislation focused on the care and rehabilitation of the care recipient.

[222] I agree with Ellen France and Miller JJ as to disposition.[294] The issue of disposition is vexed in the case of J. Although the test we have set out might be thought to lead inevitably to J's release, there could be very poor outcomes for him were he simply to be released following the issue of this judgment. J has now been in detention for more than 19 years. It is important that time is allowed for a reintegration plan to be developed, and for necessary practical arrangements to be put in place. It is not therefore appropriate for this Court to direct that J should be released. The best course is for the Family Court, with its specialist jurisdiction, to determine the next steps for J to achieve his reintegration. I agree also with Ellen France and Miller JJ as to the need for considerable expedition in that regard.

Second ground of appeal: unlawful discrimination

[223] Discrimination is advanced as a separate ground of challenge to the decision under appeal. Counsel for J have now abandoned an earlier claim for a declaration of inconsistency. The remedy sought is the same as under the first ground of

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293 Above at [136]–[138].
294 Above at [139]–[140] and [160].

challenge — a direction to the effect that detention cannot be ordered under s 85 of the IDCCR Act if it is longer than the maximum penalty for the underlying offending.

[224] Ultimately, as I come to, I consider this ground is resolved by the application of the test set out in the reasons of Ellen France and Miller JJ to any application to extend detention for a person in J's category of care recipient. However, the way this ground of appeal was dealt with by the Court of Appeal raises important issues as to the appropriate comparator for the purposes of the discrimination inquiry. I provide reasons in relation to this ground in order to respond to the approach taken by the Court of Appeal, which I consider to be wrong.

[225] It is argued for J that s 85 of the IDCCR Act, as interpreted and applied by the Court of Appeal in this case (relying upon the *RIDCA* test), is discriminatory. The argument is that s 85 as applied is discriminatory because it has permitted J to be detained for a period far exceeding that which would be allowed for non-disabled offenders charged with the same offence.[295] In particular, the threshold for offenders with intellectual disability to become subject to a risk-based detention regime is lower than the threshold for non-disabled offenders. Under the extended supervision order (ESO) and public protection order (PPO) regimes, for example, the threshold for eligibility includes proof of previous serious sexual or violent offending and expert evidence relevant to risk of future offending.[296]

[226] All parties were content to apply the approach from *Ministry of Health v Atkinson* in considering discrimination claims under s 19 of the Bill of Rights, as the Court of Appeal in this case did.[297] Under that approach, the first question is whether there was differential treatment or effects as between others in analogous or comparable situations (the comparator group) on the basis of the

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295 It was argued before the Court of Appeal that the CPMIP Act regime was also discriminatory for different reasons, which centred on the standard of proof and mens rea requirements at involvement hearings: CA judgment, above n 227, at [112]–[113]. Because the focus of the appeal and argument before this Court was J's continued detention under s 85 of the IDCCR Act, that is also the focus of the discussion that follows.

296 Parole Act 2002, ss 107B, 107F and 107I; and Public Safety (Public Protection Orders) Act 2014 [PSPPO Act], ss 7, 9 and 13. See this Court's discussion of the extended supervision order and public protection order regimes in *Chisnall*, above n 238, at [37]–[66] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

297 CA judgment, above n 227, at [104] and following.

prohibited ground of discrimination.[298] The second question is whether that treatment or its effects resulted in material disadvantage for the claimant group.[299] Finally, if so, it is asked whether the discrimination could be justified under s 5 of the Bill of Rights.[300]

[227] In relation to the first question, the Court of Appeal said that it was not possible to identify an appropriate comparator group with a sufficiently comparable risk profile to that of J. That was because criminal culpability is "predicated on offender agency", whereas J "has little or no understanding" and "minimal capacity" effectively to "choose" to commit a criminal act.[301] Therefore it would be wrong to treat someone in J's position as in a comparable position to, for example, high-risk offenders who are fit to stand trial. That analysis is supported by counsel for the respondents. The parties agree, however, that if a comparator must be identified, the appropriate comparator is non-disabled offenders of the same risk as J.

[228] I consider that the Court of Appeal's approach to this issue is flawed in that it collapses together the first question under *Atkinson* (finding a comparator against whom differential treatment can be measured) with the third (whether the difference of treatment is justified).[302] As the Supreme Court of Canada said in *Withler v Canada (Attorney General)*:[303]

> … the focus on a precisely corresponding, or "like" comparator group, becomes a search for sameness, rather than a search for disadvantage … occluding the real issue — whether the law disadvantages the claimant …

[229] On the approach argued for by the respondents, and adopted by the Court of Appeal, the limitation of rights that flows out of these differences in treatment need not be justified; justification is assumed, thereby short-circuiting the discrimination analysis. In this case, agency is a poor basis for rejecting offenders without intellectual disability as a comparator because it allows the critical question to be avoided — namely *why* a lower threshold of seriousness of offending may

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298 *Atkinson*, above n 230, at [55] and [60].
299 At [109] and [136].
300 At [111]–[117].
301 CA judgment, above n 227, at [152]–[153].
302 See Asher Gabriel Emanuel "To Whom Will Ye Liken Me, and Make Me Equal? Reformulating the Role of the Comparator in the Identification of Discrimination" (2014) 45 VUWLR 1 at 5–11.
303 *Withler v Canada (Attorney General)* 2011 SCC 12, [2011] 1 SCR 396 at [57].

potentially lead to indefinite detention for a care recipient under the IDCCR Act than is the case for offenders without intellectual disability. In short, by rejecting the comparator class on the grounds of differences said to flow from the fact of intellectual disability (the prohibited ground of discrimination), different treatment unlinked to this alleged difference is condoned. That is, as IHC submits, an unnecessarily binary approach. As IHC argues:[304]

> In 21st century New Zealand both groups should be treated as similarly as possible. Otherwise, sanist stereotypes as to the 'otherness' of [people with intellectual disability] are perpetuated and [people with intellectual disability] can end up being treated in a way that would be unacceptable for [people without intellectual disability]. Importantly, treating both groups similarly means not looking simply for points of difference in intellectual functioning and using that as a pivot to justify any and all different treatment of [people with intellectual disability].

[230] There are other objections to the Court of Appeal's reliance upon agency as disqualifying the proposed comparator group. Mr Edgeler submits that while J has "impaired" agency, the argument accepted by the Court of Appeal proceeds on the assumption that J and indeed others with intellectual disability under the IDCCR Act have no capacity and hence no agency. I accept Mr Edgeler's submission that treating absence of agency as a reason to reject, as appropriate comparators, offenders without intellectual disability is flawed for this reason. The underlying assumption which informs rejection of the comparator group is also not consistent with the social model of disability adopted by the Convention. That model marked a shift away from the "best interests" principle, where decisions are made by others on a disabled person's behalf based on what is believed to be in their objective "best interests", and instead gives primacy to a disabled person's own "will and preferences".[305] As Te Kāhui Tika Tangata | the Human Rights Commission (the Human Rights Commission) says, the social model treats disabled persons as:[306]

> … active rights holders, rather than passive recipients of protection. It shifts the focus onto the barriers within society that prevent disabled people from participating in society and promotes [supported] decision-making.

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304 Footnote omitted.

305 Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014): Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [27]–[29].

306 See also Human Rights Council *Report of the Special Rapporteur on the rights of persons with disabilities* UN Doc A/HRC/37/56 (12 December 2017) at [20]; and *TUV*, above n 246, at [66] per Glazebrook, Ellen France and Arnold JJ, and [92]–[99] per Winkelmann CJ and O'Regan J.

The social model reflects the fact that disabled people are not of identical abilities, nor is their experience of barriers within society to effective participation uniform.

[231] The appellant and the Human Rights Commission submit that it is not necessary to identify a single conclusive comparator; more than one comparator group may be appropriate.[307] Nevertheless, if a comparator group is to be selected, all parties are content to adopt a comparator group comprised of offenders without intellectual disability who present the same degree of risk as J. This is on the basis that both the Court of Appeal and High Court said that, if there was to be a comparator group, this was the closest.[308] I am also content to proceed on this basis.

[232] On the approach of the Court of Appeal in this case (applying the test in *RIDCA*), J is treated differently from the comparator group because he has been subjected to potentially indefinite detention, well beyond the length of the maximum sentence for the offences with which he was charged, but with a trigger under the CPMIP Act set as low as that he was charged with an imprisonable offence.[309] By contrast, the triggers for offenders without intellectual disability for the imposition of ESOs or PPOs are, as set out above, confined to offending and apprehended offending of a serious sexual or violent nature and in respect of whom there is expert evidence addressing matters relevant to risk of future offending.[310] The offending in which J was found to be involved would not meet the threshold for any of these orders.

[233] The difference in treatment is on the basis of intellectual disability — one of the prohibited grounds of discrimination for the purposes of the Human Rights Act 1993.[311] It is the finding of mental impairment (on the basis of intellectual disability) that was the basis for the determination that J was unfit to stand trial, and it was the finding of intellectual disability that was the basis for the order under s 25(1)(b) of the CPMIP Act. It is therefore intellectual disability that set J on the relevant procedural pathway with its lesser thresholds for ongoing detention beyond the possible length of

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307 Citing *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [121].
308 CA judgment, above n 227, at [154]; and *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2018] NZHC 1209 (Cull J) at [530].
309 CPMIP Act, s 5(1).
310 Parole Act, ss 107B, 107F and 107I; and PSPPO Act, ss 7, 9 and 13.
311 Section 21(1)(h)(iv).

any notional sentence. It is also apparent from the various specialist reports that the assessments of J's risk are very much tied to his intellectual disability.

[234] That takes me to the second issue under *Atkinson*: whether the treatment has given rise to a material disadvantage. The Human Rights Commission submits the material disadvantage is clear. Those in J's position are excluded from their community and detained based on "dangerousness" and a risk of future serious offending, of which there is no prior history, and where they have never been found criminally responsible for the index offending. The Commission submits that potentially indefinite detention (possible on the respondents' submission), periodic isolation, exclusion and marginalisation may have irreparable psychological effects and result in profound disadvantage to disabled people.

[235] The respondents say there is no material disadvantage. J has benefited from not being tried in an unfair process or detained in prison. In arguing that there has been no material disadvantage, the respondents rely, as the Court of Appeal did in this case,[312] on the approach of the Supreme Court of Canada in *Winko v British Columbia (Forensic Psychiatric Institute)*.[313] In *Winko* the Court rejected an argument that the regime for those found not criminally responsible on account of mental disorder was discriminatory essentially because "[a]ny restrictions on … liberty" were put in place partially so that the defendant could obtain treatment, not for "penal purposes".[314]

[236] This is reasoning which depends on the notion that the detention imposed is treatment-focused, not punitive. I accept the argument of counsel for the Human Rights Commission, Ms Haradasa, that, notwithstanding the label, the Court must assess whether the continued detention of J is rehabilitative or whether it has become, in substance, punitive.[315] She argues that, over time, particularly where (as is the case here) there are no treatment outcomes at all, ongoing detention under regimes such as the IDCCR Act can become penal. In such circumstances detention essentially amounts to preventive detention. To relate that submission to the facts of this case, the notion the regime has no penal element becomes harder to maintain over

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312 CA judgment, above n 227, at [156]–[160].
313 *Winko v British Columbia (Forensic Psychiatric Institute)* [1999] 2 SCR 625.
314 At [94] per Lamer CJ, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.
315 See *Chisnall*, above n 238, at [132] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

the years, in circumstances of highly restrictive detention, particularly where it has ceased to fulfil a rehabilitative or reintegrative purpose.

[237] I accept the submissions of the appellant and of the Human Rights Commission that J has been materially disadvantaged by the different treatment. He has been subjected to long-term detention, with no realistic prospect of release from that detention in sight. The evidence bears out that the length and extent of the detention of J has been detrimental to him.

[238] Is this differential treatment, based on the test applied by the Court of Appeal, justified for the purposes of s 5 of the Bill of Rights? The respondents offer community safety as justification for the differential treatment identified between the comparator group and J. However, as already noted, the IDCCR Act does not permit an extension of detention under s 85 for the primary purpose of community safety, at least for care recipients in J's category. Detention on that basis cannot therefore be said to be "prescribed by law" for the purposes of s 5 of the Bill of Rights. Secondly, it is difficult to see why, if community safety is an adequate justification to detain J, the same justification would not also apply to the comparator group — exposing them to the risk of ongoing detention. As noted above, the difference in agency on the part of care recipients in J's category and the comparator group is not a convincing justification for the difference in treatment.

[239] I consider that, if applied to an application under s 85, the test set out in the reasons of Ellen France and Miller JJ avoids unlawful discrimination against care recipients in J's category (detained pursuant to an order under s 25(1)(b) of the CPMIP Act). That is because the test in those reasons is calibrated to ensure that detention is for the purposes of care and rehabilitation, and that proportionality is maintained between the seriousness of the index offence and the length of detention that may be justified to pursue these legitimate aims. In that way, the detention will not become punitive.

Procedural matters

[240] I agree with the approach of Ellen France and Miller JJ to the procedural matters they set out, and to the recall and reissue of the leave judgment.[316] I agree also with Ellen France and Miller JJ in relation to the admission of further evidence.[317]

WILLIAMS J

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[241] When an individual with an intellectual disability is charged with an offence, but found unfit to stand trial, the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act) allows the court to direct that they be detained in "secure care".[318] Such detention may be continuously extended under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act) so long as the individual poses a "serious danger" to themselves or the community.[319] But for how

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316 Above at [148]–[155].

317 Above at [156]–[159].

318 See, in this case, Criminal Procedure (Mentally Impaired Persons) Act 2003 [CPMIP Act], ss 25(1)(b) and 26(2)(a). See also Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 [IDCCR Act], s 5(1) definition of "secure care" and s 9(2) definition of "secure facility".

319 IDCCR Act, s 85.

long and on what terms? This case is about the proper limits on the state's power to detain very vulnerable New Zealanders in the name of the wider good.

[242] J is 41 years old. He is an Autistic person with an intellectual disability.[320] He is half Tongan, half Palangi (European), but he very much identifies with his Tongan side. He is, by all accounts, a big, strong man. He is closely supported by his mother, who is Tongan. He has a history of acting out violent and, at times, sexualised fantasies, hurting others and himself. It is important to understand that he does not comprehend that violence has serious and potentially permanent effects.

[243] J has been subject to a compulsory care order for nearly 20 years. He currently resides at the Mason Clinic, a secure care facility. He has his own "cluster" there in the Pōhutukawa Unit. Ordinarily, each cluster would be occupied by two residents, but the risks associated with J mean he has two bedrooms to himself, a lounge with a television,[321] table and chairs, and a bathroom and shower. J calls his cluster "Api Lanu Moli", my "orange home"—after the colour of the walls and door frames. J is cared for by male staff at a ratio of around 3:1 or 4:1.[322] His propensity for violence means he is not often able to leave his cluster and can leave the wider facility for outings only very rarely. His ability to leave the cluster depends on both the availability of male staff and J's presentation, while outings also require access to the only van with a driver's cage. The evidence is this van is heavily oversubscribed and rarely available to J.[323] He has gained a concerning amount of weight over the last 10 years, due to both the fact and conditions of his confinement. More recently, a healthier diet and exercise have been introduced into his routine.

[244] J's mother is his welfare guardian. She visits regularly and speaks to him by telephone most days, though the facility tries to limit evening phone calls to 10 minutes, to allow all care recipients to access the phone. Additionally, the clinic provides for J to work with Tongan cultural advisors to support his understanding of Tongan language and culture so as to enhance his wellbeing.

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320 As that term is used in the IDCCR Act: see s 7(1).
321 He has restricted access to channels, with a view to preventing him from accessing violent content.
322 The ratio depends on his presentation and needs.
323 The van is shared between nine units.

[245] Caring for J is very expensive, but that is not reflected in his quality of life. His physical life appears to be largely limited to the confines of his cluster; and his social connections, to his carers, support staff and mother. As far as can be ascertained, stimulation is limited to his 20–30 minutes of daily exercise (cross-trainer), cultural advisor sessions and the television programmes he is allowed to watch. He draws a lot. J's world, always limited in dimension, has become very small indeed.

[246] J wants to go home to his mother, and his mother wants him home. J has consistently talked about that prospect. J's mother has been advocating for his return home for well over a decade. There were times in the past where J's presentation allowed him to be with his mother more often. In those times, there was greater hope that he might return for extended periods, so J's mother redecorated the family home in colours he chose and she applied for funding for a care package that would better enable J to be cared for at his home safely. Subsequent circumstances have meant these hopes could not be realised.

J's behavioural history

[247] When J was 20 and living at home with his mother, he entered a neighbour's property armed with an axe. He smashed the windows of the neighbour's garage and van, causing damage valued at less than $900. There is some suggestion that the event was triggered by anger at the neighbours slamming their doors. As I note below, J has very acute hearing. It is accepted that throughout the incident he saw himself as acting out a fantasy in which he was one of his favourite fictional characters, James Bond.

[248] He was charged summarily with being in an enclosed yard without reasonable excuse, and wilful damage, the maximum sentence for each of which would have been three months' imprisonment.[324] As Ellen France and Miller JJ explain, J was found unfit to stand trial. He was dealt with under the CPMIP Act and made subject to a compulsory care order under the IDCCR Act.[325] That order was made on 8 February 2006, has been continuously extended since then and remains extant.[326]

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[324] Summary Offences Act 1981, ss 11(1)(a) and 29(1)(b).
[325] See above at [25]–[26].
[326] *New Zealand Police v [J]* DC Manukau CRN 4092034925-26, 8 February 2006 (Judge Kerr).

[249] In fact, J was involved in a few incidents of concern well before 2006. In one more serious incident, J used a knife to cut the neck of a fellow student at his special-needs school. The student required hospitalisation for her injuries. It seems J was acting out a James Bond fantasy in this incident too.

[250] Over the years of his compulsory care, J has been involved in numerous incidents which, in other circumstances, would be treated as threatened, attempted or completed offences. As the assessments in successive specialist reports demonstrate, serious concern about J's risk to himself and others has driven all extensions.

[251] There was a period when J's behaviour improved, so in 2011 (after about five years in care), he was released from secure care into community-based "supervised care".[327] There was, at that stage, hope he may eventually be able to return to his home and his mother. But less than six years later (in 2017), J was returned to secure care after the Family Court found his circumstances had changed such that he now posed a "serious danger to either [himself] or his care team" and secure care was the least restrictive option available.[328] Some of the incidents that led to this finding are outlined by Ellen France and Miller JJ above at [31] and I need not repeat these.

[252] J has a history of damaging property, absconding from care and obtaining weapons he tried to hide in his accommodation. Reports from 2022 and 2023 record similar incidents. In the six months between 1 October 2021 and 31 March 2022, J was involved in 10 "behavioural incidents". Between 1 September 2022 and 15 March 2023, 10 further such incidents were recorded.[329] Staff at the Mason Clinic noted that not all incidents are logged. They explained, for example, that J expresses an intention to hurt or kill people relatively frequently and these occasions are not all recorded. But the incidents that were logged include several occasions on which J threatened or assaulted staff.

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327 *Harvey v [J]* FC Manukau FAM-2006-092-1669, 5 December 2011 (Minute No 1 of Judge Rogers). The difference between secure and supervised care is explained by Ellen France and Miller JJ: see above at [19] and [27]–[28].

328 *Harvey v [J]* [2017] NZFC 1079 (Judge Goodwin) at [115]–[116].

329 The incident summary report recorded 11 incidents, but the specialist report treated two of these as one incident since they occurred very close together in time.

[253] J developed a particular fixation with a female occupational therapist. He explained to staff he wanted to kill her. More than once he tried to take keys from staff members so he could secure a knife from the (locked) kitchen.

[254] There were also incidents involving J's mother. In more than one case, both over the phone and in person, J became escalated and made violent and sexualised threats against her. He has threatened to break her fingers. Staff started placing J in a belt to which his wrists are tethered during family visits, this to avoid him suddenly striking either family or staff. J calls this restraint his "special safety belt". While seeing him restrained has been deeply troubling for his mother, she acknowledges that it seems to have reduced the risks associated with her visits.

[255] J has also harmed himself. He has pulled out five of his own teeth and two toenails. One report described him as "notable for his missing front teeth". These examples of self-harm have not been logged as "behavioural incidents".

[256] J still harbours fantasies about "James Bond" and has made up spy-related code names for himself and at least one other person. He fantasises about injuring and killing people, especially (though not exclusively) those of European descent. He draws pictures of these fantasies, with notations. He continues to express a sexualised obsession with feet, especially the feet of young women.

[257] Again, importantly, J does not comprehend either the impropriety or the consequences of his conduct. Nor does he comprehend the potential consequences of attempted or threatened actions. As one report put it:

> It should be noted that [J] means no harm to others as he fails to have a core understanding of the permanency of harm believing rather, for example, that his victims will get up and go home after he has cut off their feet.

[258] Another report explains:

> [J] struggles to recognise emotions, including fear and pain in others, and therefore acts in a very egocentric manner. He also has a very high pain tolerance, and therefore does not necessarily underst[and] that he will inflict significant pain onto others in the event that he does what he plans … to do.

[259] It would be wrong, however, to describe the extent of J's behavioural challenges as inevitable and incorrigible. His behaviour has deteriorated markedly in recent years, and it is the view of clinicians and judges that this is at least partly attributable to the length and circumstances of his compulsory care. For example, one report explained:

> As mentioned previously, [J]'s risks appear to be driven by fantasies associated with his restricted range of interests and his inability to understand how he can affect and damage others. Neither of these are particularly amenable to intervention. However, there is the concern that over time, his response to stimuli that [are] withheld from him is becoming stronger and more aggressive. For example, when [J] sees the feet of young females, there are concerns that he responds with more enthusiasm and vigour than previously recorded. [J]'s current management plan attempts to restrict his access to stimuli that aligns with his areas of interest related to dangerousness — mostly his belief that he is a secret spy, or his interest in the feet of young women. It is possible that the removal of this stimuli ensures that he becomes more reactive over time when something occurs that piques his interest.

[260] Another report explained:

> A number of staff members spoken with expressed the view that the situation in which [J] finds himself is unlikely to change unless there was a significant improvement in the staffing level within the unit, and in provision of necessary equipment, such as a suitably fitted-out vehicle that could safely support outings. Better staffing ratios would permit more frequent social interaction with [J], allowing him to be engaged in a wider range of enjoyable activities, and thereby alleviating the prevailing dynamic within which staff contact tends to revolve almost entirely around security and control. It is appreciated however that securing the funding that might allow for improved service delivery is highly problematic at the present time.

[261] J's wellbeing has also declined. As the Family Court put it last year:[330]

> Everyone agrees that [J]'s wellbeing has been detrimentally impacted by his diminished environment. … Everyone has recognised for a long time that his quality of life would be greatly improved by his environment being expanded. He needs to visit his mother at home. He needs to experience his culture. He needs to exercise and have his medical needs met. None of those things are available to him at this time because of the challenges to keep [J] safe and to keep the community safe. Those challenges cannot be met because of constraints in funding, constraints in resources available for him and constraints that his physical environment presents.

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330 *Lau'ese-Blaney v [J]* [2024] NZFC 11580 at [9].

[262] Quite recently, noise and vibrations from construction near the Mason Clinic have been a major problem for J. He has acute hearing and is hypersensitive to noise. He tried to block out the noise by forcing tissue paper into his ear canals. He had to be taken to hospital twice to remove this paper, to avoid infection.

[263] Plainly, to borrow the Family Court's words, "[J]'s current situation is untenable".[331]

Lower courts

[264] As Ellen France and Miller JJ explain,[332] J brought four proceedings in the High Court challenging the validity of his compulsory care orders:[333]

(a) an application for an extension of time to appeal District Court decisions under the CPMIP Act between 2004 and 2006 to the effect that J was involved in the index offending, unfit to stand trial and required compulsory care;

(b) an appeal from the 2017 Family Court decision extending and varying J's compulsory care order and so requiring his return from supervised care to secure care;

(c) an application under s 102 of the IDCCR Act for an inquiry into the legality of J's detention; and

(d) a judicial review focused on rights under the New Zealand Bill of Rights Act 1990 (NZBORA), particularly the rights not to be detained arbitrarily or discriminated against.[334]

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331 At [24].

332 See above at [41]–[50].

333 See *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2018] NZHC 1209 (Cull J) [HC judgment] at [3].

334 New Zealand Bill of Rights Act 1990 [NZBORA], ss 22 and 19; and see Human Rights Act 1993, s 21(1)(h)(iv).

[265] In a single judgment, the High Court dismissed all four proceedings.[335] Among the key findings were that the decision of the Full Court of the Court of Appeal in *RIDCA Central (Regional Intellectual Disability Care Agency) v VM*[336] (until now, the leading authority) had been correctly applied and J's detention was (and continued to be) justified given the "very significant and ongoing risk" he posed to the public.[337] The High Court noted that specialist assessors' evidence had been closely considered over the years and that there were a number of safeguards within the IDCCR Act.[338] The Court considered the poor rehabilitation J received before 2016 did not make his detention arbitrary; deficiencies identified in J's care and rehabilitation plan (CARP) were adequately addressed by the Family Court in its 2017 decision.[339] The High Court also rejected an argument that J's detention was arbitrary because the length of his detention was disproportionate to the maximum sentence available for his index offending; the Court considered this argument inappropriately equated the punitive focus of imprisonment with the therapeutic or protective purpose of compulsory care.[340]

[266] J appealed unsuccessfully.[341] The Court of Appeal upheld the High Court's decision for broadly similar reasons. The emphasis remained on the risk J posed. As to a submission that the High Court erred in failing to consider whether J's rehabilitative needs could be met by less intrusive means, the Court of Appeal applied *VM*. While low prospects of rehabilitative progress were relevant to the balance between community protection and individual liberty, the key question was whether the compulsory care order was the only way to meet the community protection interest—or in other words, whether the order was "the least coercive and restrictive option available".[342] The Court of Appeal considered that the High Court was plainly correct in its view that the expert evidence demonstrated that J required secure care.[343]

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335 See HC judgment, above n 333, at [611]–[623].
336 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641 [*VM*].
337 See HC judgment, above n 333, at [257] and [427]–[428].
338 At [504]–[505] and [619]–[620].
339 At [473].
340 At [475].
341 *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2023] NZCA 660 (Courtney, Katz and Clifford JJ) [CA judgment] at [163].
342 At [88] citing *VM*, above n 336, at [92(a)].
343 CA judgment, above n 341, at [89]–[90].

The parties' submissions

Appellant

[267] In this Court, the appellant's core proposition is that any detention exceeding the maximum sentence for the index offence is arbitrary and a care recipient subjected to such detention cannot be further detained. In this he relies on the United Nations Human Rights Committee's General Comment 35 and deficiencies identified by counsel in the operation of the IDCCR Act system.[344] Counsel argues, for example, that district inspectors are failing in their duty to hold decision-makers under the Act to account.

[268] Referring to the decision of the Grand Chamber of the European Court of Human Rights in *Fernandes de Oliveira v Portugal*—in which that Court quoted a Special Rapporteur report suggesting that the "current biomedical model … dominating the mental-health scene" should be re-evaluated—counsel submits that our courts should look to (in the Special Rapporteur's words) "[a]lternative models, with a strong focus on human rights, experiences and relationships and which take social contexts into account".[345] Relying then on a United States District Court decision in *Lessard v Schmidt*,[346] the appellant argues that the NZBORA requires that an objective test should be applied to "dangerousness". This should include evidence of recent, relevant overt acts and a likelihood of immediate harm absent intervention; and even then, appropriate provision must be made for due process rights.

[269] Counsel submits that the current approach to the application of the IDCCR Act in cases such as J's is fixated on security and control to the exclusion of NZBORA rights. The appellant advances several other arguments but, for reasons that will become clear, it is unnecessary for me to explore those arguments here.

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344 Human Rights Committee *General comment No 35: Article 9 (Liberty and security of person)* UN Doc CCPR/C/GC/35 (16 December 2014) [General Comment 35] at [38].

345 Dainius Pūras *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* UN Doc A/HRC/29/33 (2 April 2015) at [99] as cited in *Fernandes de Oliveira v Portugal* (2019) 69 EHRR 8 (Grand Chamber, ECHR) at [74].

346 *Lessard v Schmidt* 349 F Supp 1078 (ED Wis 1972).

Attorney-General

[270] For the Attorney-General, it is submitted that the Court of Appeal correctly applied its decision in *VM*. Further:

> *VM* appropriately bounds the broad discretion for the extension of care orders by reference to relevant human rights and the principles to be found elsewhere in the IDCCR Act. A proper application of *VM* will result in orders that are justifiable limits on the rights of care recipients because they will be granted only in cases where the need to protect the community outweighs the "liberty interest" of the care recipient.

[271] It is submitted that the IDCCR Act proceeds on the assumption that detention may be indefinite if the appropriate tests are met. Counsel acknowledges that J's detention has been lengthy and his liberty interest is therefore significant. But the length of his detention, it is argued, remains commensurate with his risk. It is submitted that the IDCCR Act and its range of system safeguards have been complied with, such that J's detention cannot be arbitrary. I summarise those safeguards below and need not repeat them in this summary of submissions.

[272] Further, it is submitted for the Attorney-General that proceeding on the basis that detention under the criminal justice system is an apt comparator to detention under the IDCCR Act is incorrect. Relying on the Canadian Supreme Court decision in *Winko v British Columbia (Forensic Psychiatric Institute)*, it is argued that "a formalistic comparison of the 'sentences' imposed … belies a purposive understanding of the statutory provisions in issue".[347] In any event, it is submitted that, in accordance with *VM*, it is only in finely balanced cases that the maximum penalty for the index offending will be relevant. Further, the so-called "liberty counterfactual" to detention is also flawed because J has not had to face the charges he would otherwise have faced for the "myriad … incidents" logged during his detention. In this sense, it is submitted that J benefits from not being subjected to the ordinary criminal process.

Te Kāhui Tika Tangata | Human Rights Commission

[273] Submissions for Te Kāhui Tika Tangata | Human Rights Commission (HRC) focus primarily on the anti-discrimination right in s 19 of the NZBORA. The HRC

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[347] *Winko v British Columbia (Forensic Psychiatric Institute)* [1999] 2 SCR 625 at [94] per Lamer CJ, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

submits that the threshold for subjecting an individual to risk-based detention is lower under the IDCCR Act than for offenders who are not disabled. For example, risk-based detention under the extended supervision order, public protection order and preventive detention regimes requires the offender to have committed serious violent or sexual offences.[348] Intellectually disabled "offenders" are not subject to such a protective threshold. It is submitted that the only reason for the difference in treatment is disability. Further, it is submitted that material disadvantage from such discrimination may be seen in the fact of indefinite detention, periodic isolation, exclusion and marginalisation, all of which may have "irreparable psychological effects".[349]

[274] Counsel submits that detention can have multiple purposes, not all of which are penal, and that it is not correct to say that rehabilitation is the distinguishing feature of the IDCCR regime, since that is also described as a "cornerstone of the Sentencing Act 2002".[350] Put simply, counsel submits "the question in a case like J's is whether the line between treatment and punishment has been crossed". The factors contributing to resolving that question include the trigger for the detention and the circumstances of the detention.

IHC New Zealand

[275] Counsel for IHC New Zealand Inc (IHC) emphasises that New Zealanders with intellectual disabilities participate fully in our community, a point very much worth remembering:[351]

> [Intellectual disability (ID)] covers a broad spectrum of presentation and behaviour. People living with ID ("PLWID") work, attend school, start families and participate generally in the community just like people living without ID ("PNLWID"). Indeed, the majority of PLWID live satisfying and varied lives. Examples of conditions linked to ID include autism spectrum disorder and down syndrome. Modern methods have assisted many PLWID

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348 See Parole Act 2002, ss 107B and 107I; Public Safety (Public Protection Orders) Act 2014, s 3 definition of "serious sexual or violent offence" and s 7(1); and Sentencing Act 2002, s 87.

349 Citing Committee on the Rights of Persons with Disabilities *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 18/2013* UN Doc CRPD/C/22/D/18/2013 (17 October 2019) at [8.10]; and Committee on the Rights of Persons with Disabilities *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 17/2013* UN Doc CRPD/C/22/D/17/2013 (18 October 2019) at [8.10].

350 *Taylor v R* [2018] NZCA 444 at [17] citing Sentencing Act, s 7(1)(h).

351 Footnote omitted.

> to learn skills and tools to cope with everyday living in the community; the days of being committed in large 'residential' facilities are (thankfully) gone.

[276] The essential case for IHC is as follows:

> IHC accepts that there are PLWID who pose serious risk to community safety. But there are also PNLWID who pose a similar risk. In 21st century New Zealand both groups should be treated as similarly as possible.

[277] IHC focuses primarily on arbitrary detention. Counsel submits that the longer the period of a care recipient's detention, the more likely it will be that the focus of analysis shifts from the legitimacy of the purpose of detention towards its impact on the detainee:

> Where courts go awry in such cases is by focusing too much on the continuing legitimacy of the aim of the detention and too little on the impact of the detention on the detainee's liberty interests.

[278] It is submitted that if under the IDCCR Act an index offence is relevant to entry, it must logically also be relevant to exit. Otherwise, the regime "looks like a 'workaround'".

[279] IHC submits that *VM* was wrong in failing to approach ss 11 and 85 of the IDCCR Act on the basis that liberty interests should take priority in accordance with the proper NZBORA orientation. Counsel refers to the Auckland LynnMall supermarket attacks in which an individual suffering from mental illness (but not unfit to stand trial) was released on bail despite the significant danger he posed.[352] Counsel sought to remind the Court that the community tolerates the presence of dangerous individuals without expecting that they will be subject to a risk-based detention regime in the ordinary course.

My approach

[280] I agree with the majority as to the jurisdiction question.[353] I also agree with the majority as to the appropriate result,[354] but my reasons are somewhat different, as is the task I consider must be undertaken by the Family Court under the IDCCR Act.

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352 See *New Zealand Police v Samsudeen* [2021] NZDC 14309.
353 See above at [150]–[155] per Ellen France and Miller JJ, and [240] per Winkelmann CJ.
354 See above at [160] per Ellen France and Miller JJ, and [168] per Winkelmann CJ.

I readily accept that fresh consideration by the Family Court may well lead to J's release, but (unlike the majority) I do not assume that is inevitable. In my view, a rights-based approach to the IDCCR Act leads to a focus not only on danger vs liberty, but also on care. It is ultimately care that provides the statutory mandate for detention and it is the only rights-consistent justification for detention.

[281] Though we come to a similar result, the majority approach subjects J to a form of proportionality that I consider is too fixated on the entry offence and ignores J's own wellbeing. This seems wrong in a very fundamental way. I do not see it as consistent with J's human rights. I am aware of the contemporary preference for the social model of support for people with disability over the protective model used in the past, but I do not see this as a case about choosing between models. I see this as a case that ultimately turns on protecting J's dignity and wellbeing.

[282] In what follows, I set out the key components of the IDCCR Act and the relevant rights of care recipients. I explain how, together, the Act and these rights place care at the centre of decision-making under s 85. I place particular emphasis on the IDCCR Act's more general reliance on cooperation between clinicians and courts, as well as the Code of Health and Disability Services Consumers' Rights (Code of Rights).[355] I then set out what I consider to be the test for extending secure care orders and apply this test to J's case. I also make some final comments on the relevance of the right not to be discriminated against.

The IDCCR Act

[283] The IDCCR Act is a complex statute. As this Court noted in *M (SC 82/2020) v Attorney-General*, the IDCCR Act and Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCAT Act) contain their "own sophisticated system of checks and balances":[356]

> These are designed to protect care recipients and the community from harm while respecting the inherent dignity of such recipients. They proceed from two relevant premises: first, that care recipients are *clinically vulnerable* and

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355 This Code is set out in the schedule to the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 [Code of Rights].

356 *M (SC 82/2020) v Attorney-General* [2021] NZSC 118, [2021] 1 NZLR 770 at [8] per Winkelmann CJ, O'Regan and Williams JJ (emphasis added).

> so need care even if they do not consent to it; and second, that they are institutionally vulnerable. That is, they are also *vulnerable to the unthinking, unreasonable or unlawful exercise of the state's coercive power*.

[284] I turn to those checks and balances now.

Parts 6 and 7

[285] The focus of this appeal is the power in s 85 to extend a compulsory care order. It is convenient to set it out in full below:

> **85 Extension of compulsory care order**
>
> (1) The Family Court may, on the application of the co-ordinator, extend the term of a care recipient's compulsory care order.
>
> (2) If the court extends a compulsory care order for a care recipient no longer subject to the criminal justice system, the court must consider and determine whether the care recipient must receive supervised care or secure care.
>
> (3) The court may order that a care recipient no longer subject to the criminal justice system receive secure care only if it considers that supervised care would pose a serious danger to the health or safety of the care recipient or of others.

[286] Section 85 is structured around three choices: release the care recipient, place them in supervised care or place them in secure care. Secure care may only be preferred if opting for "supervised care would pose a *serious danger* to the health or safety of the care recipient or of others".[357]

[287] As to the choice between releasing the care recipient or extending their compulsory care, s 88 provides:

> **88 Co-ordinator and court to have regard to specialist assessor's certificate**
>
> (1) In deciding whether to apply for a cancellation of a care recipient's court order, or for an extension of the term of a care recipient's compulsory care order, the co-ordinator must have regard to the most recent certificate given, under section 79, for that care recipient.
>
> (2) In deciding whether to cancel, or to extend the term of, a care recipient's court order, the court—

[357] Section 85(3) (emphasis added).

(a) must have regard to the most recent certificate given, under section 79, for that care recipient:

(b) may obtain a second opinion from a specialist assessor other than the specialist assessor who issued the certificate referred to in paragraph (a).

[288] The three options in ss 85 and 88 are part of a more complex system reflected in the other provisions of Part 6.[358] It is divided into four subparts, the first three of which are relevant in this case. Those are:

(a) Subpart 1, concerning the initial review of the CARP prepared for the care recipient and the compulsory care order;[359]

(b) Subpart 2, relating to further reviews of the care recipient's condition;[360] and

(c) Subpart 3, which provides for a change in the care recipient's status (meaning whether they should be released, placed in supervised care or placed in secure care).[361]

[289] The IDCCR Act's day-to-day operation relies on care managers and compulsory care co-ordinators, who are statutory officeholders with specific powers and functions.[362] A care manager must arrange for the preparation of a CARP for each care recipient subject to a compulsory care order.[363] That CARP must then be approved by a care co-ordinator under s 24(2). The required content of the CARP is provided by s 25. I set out the relevant parts below:

25 Care and rehabilitation plan to identify personal needs of care recipients

(1) Every care and rehabilitation plan must identify the following matters:

(a) the social, cultural, and spiritual needs of the care recipient:

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358 Section 88's reference to s 79, which I will come to, hints at the connections between sections in Part 6.

359 Sections 72–76.

360 Sections 77–81.

361 Sections 82–88.

362 Care managers are designated under s 141 of the IDCCR Act, while care co-ordinators are appointed under s 140. See also s 5(1) definitions of "care manager" and "co-ordinator".

363 Section 24(1).

(b) any medical or psychological treatment that the care recipient requires:

(c) any requirements for medication needed to manage the care recipient's condition:

(d) the circumstances in which the care recipient is likely to behave in a manner that endangers the health or safety of the care recipient or of others:

(e) any aptitudes or skills of the care recipient that should, if practicable, be maintained and encouraged:

(f) any special concerns or aversions of the care recipient:

(g) any special dietary needs of the care recipient:

(h) any other special needs of the care recipient.

…

(3) Every care and rehabilitation plan must indicate the extent to which, and the manner in which, the needs identified under subsection (1) can be met.

(4) Every care and rehabilitation plan must deal with the kind of supervision the care recipient requires to avoid undue risk to the health or safety of the care recipient and of others.

[290] We were provided with numerous iterations of J's CARP. Subpart 1 of Part 6 requires the care co-ordinator to provide the Family Court with a report on whether the initial plan (and compulsory care order) is still appropriate within six months of the CARP being approved. The co-ordinator must also provide the most recent specialist assessor's certificate on the care recipient's condition, and any other relevant specialist assessors' reports.[364] The Family Court must then review the CARP.[365] The Court may call for further reports, evidence or documents.[366] Likewise, the care recipient and others may make written submissions on the co-ordinator's report.[367] Following the review, the Family Court may make recommendations to the Director-General of Health, care co-ordinator or care manager about the care recipient's care and rehabilitation.[368]

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364 Section 72.
365 Section 74.
366 Section 75.
367 Section 73.
368 Section 76.

[291] Subpart 2 follows, requiring specialist assessors to review the care of the care recipient at least once every six months thereafter.[369] The assessor must issue a formal certificate after every review, setting out their conclusion as to whether the care recipient's status should continue or change.[370]

[292] The point of these reviews is to advise care co-ordinators who must then consider the advice and decide whether to bring an application for cancellation, variation or extension of the compulsory care order.[371] When hearing such applications, the Family Court, too, must consider the assessor's certificate before making any decision about the care recipient's status.[372] Section 84(2)(b) is worth noting. It provides that where an assessor takes the view that a compulsory care order is no longer required, the matter must be escalated as soon as is practicable to the Family Court by way of a cancellation application.

[293] It is necessary also to mention the separate safeguards contained in Part 7. Under that Part, district inspectors (designated as such under s 144) are required to visit care facilities at least twice a year, but may do so at any time without notice and for any length of time thought fit.[373] District inspectors may obtain advice from specialist assessors.[374] They must have access to every part of the facility and every person in it, whether or not that person is a care recipient.[375] They are also entitled to access certain records.[376] Further, district inspectors are tasked with investigating complaints about breaches of care recipients' rights under s 98.[377] Section 100 then provides:

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369 Sections 77–78. Section 77(2) also provides for two additional times when reviews must be undertaken, namely, (in respect of the first review) not later than 14 days before the co-ordinator is required to present their s 72 report, and not later than 14 days before a compulsory care order expires: paras (a) and (c).

370 Section 79.

371 Sections 84–86 and 88.

372 Section 88(2)(a). The Family Court may also seek a second opinion from a different assessor: para (b).

373 Section 95.

374 Section 95(6).

375 Section 96(1).

376 Section 96(2).

377 See also s 101. Note, however, that district inspectors may not themselves investigate alleged breaches of the Code of Rights: ss 98(1) and 101(3). The responsible district inspector must instead notify the Health and Disability Commissioner of every complaint concerning a breach of the Code of Rights: s 97(4).

100 Duty of care manager to put things right

On receiving a report under section 98, the care manager must take all steps necessary to correct every deficiency identified in the report.

[294] Part 7 also provides a special process whereby a High Court judge may order the release of a recipient no longer subject to the criminal justice system if, following inquiry, the judge is satisfied that the care recipient is detained illegally or no longer requires compulsory care.[378] In the course of undertaking any such inquiry, the judge may direct the district inspector to report on any matter relating to a care recipient.[379] The judge may also direct the care manager to bring the care recipient to court.[380] These steps may be taken on the judge's own initiative or on application.[381]

A cooperation-based system

[295] Parts 6 and 7 provide a framework in which both judges and clinicians make decisions about how to care for intellectually disabled people who have entered the criminal justice system but do not belong there. By design, carers and clinicians are expected to contribute to judicial decision-making and vice versa. There is a requirement of conscientious cooperation between these disciplines. One reflection of this is that the Family Court's power in respect of day-to-day care through CARPs is only recommendatory.[382] Just as important to the framework is that care recipients themselves, their whānau and supporters can also contribute to decisions made by others, including the Court.[383]

[296] The complexity and formality of these multiple systems of participation, cooperation and accountability is striking. It speaks to the deep interests at play in a system of mandatory care—interests that are often in tension. I turn to the way the IDCCR Act expresses and balances these interests now.

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378 Sections 102 and 104.
379 Section 102(1). The judge may also summon a specialist assessor or other witness to give evidence and produce relevant documents: s 103.
380 Section 102(2).
381 Section 102(3).
382 Section 76.
383 Section 117; and see, for example, s 73(2).

The balance

[297] Section 3 is the purpose provision. Paragraphs (a) and (b) are particularly apposite:

> **3 Purposes**
>
> The purposes of this Act are—
>
> (a) to provide courts with appropriate compulsory care and rehabilitation options for persons who have an intellectual disability and who are charged with, or convicted of, an offence; and
>
> (b) to recognise and safeguard the special rights of individuals subject to this Act; …
>
> …

[298] There is no power to subject an intellectually disabled person to compulsory care solely because of their disability. The Act is only engaged when a person with an intellectual disability is charged with or convicted of an offence; in other words, where there has already been community harm but where holding the person accountable through the ordinary criminal justice system is not appropriate.[384] On the other side of the equation, s 3(b) focuses on the protection of the "special rights" of a person with an intellectual disability made subject to the Act.

[299] Section 11 provides the guiding principles for all decision-making under the Act:

> **11 Principles governing exercise of powers under this Act**
>
> Every court or person who exercises, or proposes to exercise, a power under this Act in respect of a care recipient must be guided by the principle that the care recipient should be treated so as to protect—
>
> (a) the health and safety of the care recipient and of others; and
>
> (b) the rights of the care recipient.

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[384] For a person with an intellectual disability who has not been convicted of an offence to be made subject to the IDCCR Act, a court must be satisfied on the balance of probabilities that they caused the act or omission forming the basis of a charged offence: CPMIP Act, ss 10–13.

[300] This articulates the balance that must be struck by decision-makers when caring for vulnerable individuals with intellectual disabilities. Unsurprisingly, given that this is a care regime, the first focus is "the health and safety of the care recipient".[385] Likewise, that individual's rights must be protected.[386] But the health and safety of "others" is also relevant.[387] This is generally seen as reflecting the need to protect the community from the actions of individuals whose agency is limited but whose capacity to cause harm is not.

The community and "serious danger"

[301] I have already discussed the Family Court's power to extend secure care in s 85, which is at the centre of this case. Subsection (3), which I set out again here, captures how the tension expressed in s 11 (and implicit in s 3) applies to that decision:[388]

> (3) The court may order that a care recipient no longer subject to the criminal justice system receive secure care *only if it considers that supervised care would pose a serious danger to the health or safety of the care recipient or of others*.

[302] The reference to danger reflects the reality that there are circumstances in which secure care is necessary. That is because there are care recipients who have the potential to seriously harm themselves and those around them. The community's right to be protected from harm has real weight under the Act.

[303] That said, the "serious danger" standard is high—and intentionally so. It recognises the fact that secure care, by its nature, is a fundamental encroachment on care recipients' rights—particularly their liberty—without the justification of a finding of criminal responsibility. Once imposed, secure care is not to be extended lightly. It is this context that makes consideration of the other rights-protecting provisions in the Act and relevant NZBORA rights particularly important.

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385 Section 11(a).
386 Section 11(b).
387 Section 11(a).
388 Emphasis added.

Care recipients' rights

[304] Because the NZBORA rights not to be arbitrarily detained[389] and to be free from discrimination[390] were the focus of argument in this Court, it is convenient to address these first before considering J's rights under the Code of Rights.[391]

NZBORA

[305] I begin with the right not to be arbitrarily detained. As the majority of this Court recognised in *Attorney-General v Chisnall*:[392]

> … the White Paper for the Bill of Rights emphasised that the word "arbitrarily" covered not just an absence of legislative authority but was intended to measure the validity of any law allowing for arrest and detention.

[306] This reflects the approach to "arbitrariness" under the International Covenant on Civil and Political Rights.[393] As General Comment 35 explains, "arbitrary" is wider than "unlawful".[394] It captures inappropriate, unjust, unpredictable or capricious treatment, while permitting detention that is reasonable, necessary and proportionate.[395] These descriptors identify the core characteristics of arbitrariness. But they, too, are inexact—and necessarily so. That is because, in truth, it is impossible to determine whether a detention is arbitrary without completely understanding all the circumstances of that detention.

[307] It follows that I agree with the majority that s 85 does not permit J to be arbitrarily detained. But the real question is: what is "arbitrary" in J's circumstances?

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389 NZBORA, s 22.
390 Section 19.
391 See IDCCR Act, s 48.
392 *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [161] per Winkelmann CJ, O'Regan, Williams and Kós JJ citing Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [19.3.1] citing Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [10.91].
393 *Chisnall*, above n 392, at [161] per Winkelmann CJ, O'Regan, Williams and Kós JJ; and International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 9(1).
394 General Comment 35, above n 344, at [12] as cited in *Chisnall*, above n 392, at [161] per Winkelmann CJ, O'Regan, Williams and Kós JJ.
395 General Comment 35, above n 344, at [12].

[308] As to the right to be free from discrimination, I agree with Ellen France and Miller JJ that it need not be our focus. I consider there is significant overlap between what amounts to arbitrary detention and what cannot be demonstrably justified in anti-discrimination terms. I therefore make only a few comments on discrimination later in this judgment.

Code of Rights

[309] I turn now to the Code of Rights. While it was mentioned by counsel, it was not the subject of extensive argument. In any event, it is plainly relevant and I have found it of considerable assistance, both in its own right and in helping to illuminate what arbitrary means in the particular context of the IDCCR Act. Both the Code and NZBORA are premised on the proposition that neither exclusively covers the field.[396]

[310] The Code was promulgated in 1996 under the Health and Disability Commissioner Act 1994.[397] It imposes obligations in a broad range of health and disability contexts, applying generally to every health care provider and disability services provider.[398] The Code is also expressly imported into the IDCCR Act by s 48 of that Act. Section 48 provides that "[e]very care recipient … has all the rights under [the] Code [of Rights]". This emphasises that the IDCCR Act is about care—and that the people subjected to it are to be *care* recipients notwithstanding its mandatory nature.

[311] The Code enumerates a range of relevant rights. The most relevant are these. First, as to respectful treatment:[399]

> *Right to be treated with respect*
>
> (1) Every consumer has the right to be treated with respect.
>
> …

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396 Code of Rights, cl 6; and NZBORA, s 28.

397 Health and Disability Commissioner Act 1994, s 74(1).

398 Code of Rights, cl 1(2) and cl 4 definition of "provider". See also Health and Disability Commissioner Act, s 3 definition of "health care provider" and s 2 definition of "disability services provider".

399 Code of Rights, cl 2, Right 1(1).

[312] Despite being subjected to compulsory care (including secure care), care recipients are entitled to be treated with proper regard for their feelings, wishes and rights.

[313] Second, as to discrimination and coercion:[400]

> *Right to freedom from discrimination, coercion, harassment, and exploitation*
>
> Every consumer has the right to be free from discrimination, coercion, harassment, and sexual, financial, or other exploitation.

[314] The anti-discrimination aspect of this right reflects the NZBORA and the Human Rights Act 1993. It also adds a right to be free from coercion. This, of course, seems at odds with the IDCCR Act's premise of compulsory care. But importing such a right within a mandatory system is intended, I suggest, to communicate that there is a limit to what level of coercion is properly mandated by the Act. The right to be free from coercion must also be informed by the right to be treated with respect and, turning to the next right, the right to dignity and independence:[401]

> *Right to dignity and independence*
>
> Every consumer has the right to have services provided in a manner that respects the dignity and independence of the individual.

[315] This right was seen as of particular significance by the legislature. Section 20(1)(g) of the Health and Disability Commissioner Act singles out respect for "the dignity and independence of the individual" as a matter that must be included in the Code. The right to dignity and independence requires care providers to respect the agency of care recipients and not to treat them as mere objects affected by the exercise of state power, however well-intentioned that may be. Whatever the needs of the care recipient and whatever the risks in their presentation, they must be cared for in a manner consistent with their irreducible right to be treated with dignity. They must also be cared for in a manner that supports their independence so far as is possible.

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400 Clause 2, Right 2.
401 Clause 2, Right 3.

[316] Finally, care recipients have a right to be cared for in a manner that optimises their quality of life and minimises potential harm to them:[402]

> *Right to services of an appropriate standard*
>
> …
>
> (4) Every consumer has the right to have services provided in a manner that minimises the potential harm to, and optimises the quality of life of, that consumer.
>
> …

[317] This right requires care providers to do all they reasonably can to enable care recipients to live full lives.

[318] Taken together, these rights—to dignity, respect and optimal quality of life—are powerful. In fact, they go to the very idea of what it is to be human. They mean that care recipients are entitled to expect the state to exercise its power, and deploy its resources, in a manner that enables them to realise their full potential.

[319] The Code expressly confirms that care providers bear the burden of proving they have taken all reasonable steps (referred to as "reasonable actions") to comply with their duties and give effect to care recipients' rights:[403]

> **3 Provider compliance**
>
> (1) A provider is not in breach of this Code if the provider has taken *reasonable actions in the circumstances* to give effect to the rights, and comply with the duties, in this Code.
>
> (2) The *onus is on the provider* to prove that it took reasonable actions.
>
> …

[320] Taken together, these provisions of the Code assist in identifying the line between detention that is arbitrary and detention that is necessary for the purposes of

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402 Clause 2, Right 4(4). Clause 4 provides that "**optimise the quality of life** means to take a holistic view of the needs of the consumer in order to achieve the best possible outcome in the circumstances" (emphasis in original).

403 Emphasis added. I note that under cl 3(3), "the provider's resource constraints" are treated as a "circumstance" for the purposes of cl 3(1). I come back to this point below at [331] when addressing the resource implications of the test for extension under s 85 of the IDCCR Act, as I see it.

s 22 of the NZBORA, when the Court is confronted with an application to extend secure care under s 85 of the IDCCR Act.

The extension test

[321] It is convenient to set out s 85 again:

> **85 Extension of compulsory care order**
>
> (1) The Family Court may, on the application of the co-ordinator, extend the term of a care recipient's compulsory care order.
>
> (2) If the court extends a compulsory care order for a care recipient no longer subject to the criminal justice system, the court must consider and determine whether the care recipient must receive supervised care or secure care.
>
> (3) The court may order that a care recipient no longer subject to the criminal justice system receive secure care only if it considers that supervised care would pose a serious danger to the health or safety of the care recipient or of others.

[322] The power to extend a compulsory care order—in this case, a secure care order—is clearly discretionary. Subsection (1), which applies to all compulsory care orders, uses the word "may" and subs (3) further provides that the Court may only extend a secure care order where anything less would pose a "serious danger" to the care recipient or "others". What will be sufficiently "serious" in any particular case will inevitably be affected by the potential impact on the care recipient's liberty interest of a "serious danger" finding. The Court's exercise of that discretion is guided by two questions.

[323] The first question is about "serious danger". This refers both to the gravity of the harm contemplated and the likelihood of that harm coming to pass, either to the care recipient or to "others". The question is whether the risk and gravity of the potential harm is sufficiently serious to justify further detention. The longer the care recipient has been detained, the more serious the danger will need to be—both in terms of risk and in terms of gravity. For example, in a case where the gravity of the potential harm is moderate, there may come a point where release is required even where the risk of that harm occurring is high. Similarly, where the gravity of the harm contemplated is high but, for some reason, the risk of it being realised is low, further

detention may not be justified. In a case like J's, where the period of detention has been so lengthy, further detention can only be justified if it is virtually inevitable that serious harm will come to pass.[404]

[324] I pause here to address the relevance of the maximum sentence for the index offending. Contrary to the view expressed in *VM* that the index maximum sentence is relevant only in "finely balanced cases",[405] I consider it relevant in all cases. But it is not a straightforward exercise of setting the length of the index sentence against the time spent in compulsory care. Rather, I see it as an important guiderail. It reminds us how serious the encroachment on liberty has become and therefore how serious the danger must be to justify further confinement. In many cases, perhaps most, if the period of detention under a compulsory care order exceeds the maximum sentence for the index offending, the care recipient will need to be released. But this will be a matter for individual assessment.

[325] To end the inquiry at the first question, however, would be to ignore that this is a collaborative care statute—not a system of preventive detention. I do not accept that the IDCCR Act is more about public protection and less about care. Care has real meaning in this Act—as its complex checks and balances and the Code of Rights confirm. Care recipients must be treated with dignity and respect, and can expect to receive "services" that optimise their quality of life. These expectations are considerably strengthened by the guarantee in s 22 of the NZBORA.

[326] All of this is to say that there is a second question: are the circumstances of the care recipient's detention such that their rights to dignity, respect and optimal quality of life are protected? If not, they are no longer receiving care according to the Act's requirements—and so the statutory justification for the deprivation of liberty is lost. In NZBORA terms, their detention has become arbitrary.

[327] Put another way, the proposition is that a statutory mandate to detain exists only where the care recipient is being cared for in a manner that vindicates dignity and

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404 I use the phrase "virtually inevitable" bearing in mind, of course, that it is impossible to predict the future with absolute certainty.

405 *VM*, above n 336, at [72] and [92(d)].

respect, and optimises their quality of life. It follows that if dignity, respect and optimal quality of life could reasonably be provided for by less intrusive means than secure care, the care recipient must not be further detained in secure care because such treatment will have crossed the line from care to mere punishment. Mere punishment is not permitted by the IDCCR Act. Likewise, if the provider has not taken steps to meet these reasonable requirements, the care recipient must be released.

[328] Because compulsory care necessarily affects very significant rights in very challenging contexts, meeting these standards requires adequate resourcing. The Code and the scheme of the IDCCR Act both contemplate this.

[329] This exercise of identifying less intrusive alternatives may require decision-makers in the IDCCR Act system to think outside the box.[406] For example, care co-ordinators have a broad discretion to direct where *supervised* care is to take place.[407] I see nothing in the IDCCR Act that prevents care co-ordinators from directing that supervised care take place in a residential setting.[408] Appropriate modifications might, of course, be required for health and safety or other reasons.[409] But the longer a care recipient is in secure care, the greater the obligation on decision-makers to look for other, better, solutions.

[330] Starting with the Code, as I explained earlier, cl 3 places the onus on care providers to demonstrate they are doing all that is reasonable "in the circumstances" to provide the level of service required to affirm care recipients' rights.[410] It falls, therefore, to providers to justify their care decisions. It follows that reasonable resourcing (objectively assessed) must be a baseline requirement.

[331] That is the case even though cl 3(3) includes "the provider's resource constraints" as a "circumstance" relevant to the reasonableness of steps taken to comply with the Code. There are several reasons for this. First, it will never be enough

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406 See, for example, *Lau'ese-Blaney*, above n 330, at [14]–[15], [22] and [26].

407 IDCCR Act, s 64.

408 Indeed, supervised care can take place in a "facility" (which can be a "residential house") or "another place": ss 9(3) and 5(1) definition of "supervised care". See also s 9(1) definition of "facility".

409 See, for example, the matters to be identified in each care and rehabilitation plan: ss 25–27.

410 Sub-clauses (1) and (2).

for a provider simply to "toll the bell of scarce resources" to avoid Code obligations.[411] A deeper inquiry will be required into the claimed constraints. Second, while resourcing often affects the way in which health care and disability services are provided, not all resourcing issues are equal for the purposes of cl 3(3). For example, in some circumstances, providers may face organisational-level constraints on what they can provide, but in other circumstances providers may make individualised decisions. Third, and this is an aspect of the second reason, Code obligations apply to the full range of health care and disability services contexts—not just to compulsory care—so the manner and effect of the Code's application must be context sensitive. What sets the IDCCR Act context apart for the purposes of thinking about cl 3(3) is that the number of compulsory care recipients and their long-term care needs are known. This is not the same as the more typical context in which resourcing decisions constrain what can be reasonably provided because they must be predictive based on imperfect information as to the nature and magnitude of future demand. Fourth, cl 3(3)'s application must take account of the fact that, as I come to, the IDCCR Act procedures permit clinicians, providers, the Ministry (via the Director-General of Health) and the courts to engage in dialogue about resourcing. And finally, if resource constraints affect the provision or quality of care, cl 3(3) does not mean the care recipient must continue to bear that burden. The IDCCR Act requires the court to order a care recipient's release if rights-consistent care cannot be provided.

[332] The fundamental point is this: while cl 3 recognises the real issue of resourcing in healthcare, it does not permit providers to treat care recipients in a manner that undermines their dignity, is not respectful, and/or fails to optimise their quality of life. That would be to construe the Act as if it permits providers to punish non-blameworthy individuals solely to mitigate risk. It does not. It bears repeating that the IDCCR Act only permits compulsory care that both benefits the recipient *and* mitigates risk. Under s 85, both requirements must be met for a person to be kept in secure care. This is the only way any form of detention associated with care could be Code- and NZBORA-compliant. And, even more importantly, it is the measure of our own humanity.

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411 See Ron Paterson "The Code of Patients' Rights" in Peter Skegg and Ron Paterson (eds) *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015) 27 at 54.

[333] The scheme of the IDCCR Act also confirms that deference to resourcing decisions does not require the court to abandon its allocated role under the Act. Section 76 allows the Family Court to make recommendations to the Director-General of Health, care co-ordinator or care manager on review of a CARP and compulsory care order.[412] By this means the Court is able, if necessary, to comment on the adequacy of resourcing, even if the final say on allocation properly rests with the Director-General, care co-ordinators and care managers. That said, s 85 is clear that it is the Court that has the final say on continued detention. The delicate balance here is that the Director-General, care co-ordinators and care managers can refuse to implement the Court's resourcing recommendations, but there will be consequences under s 85 if the result is that the care recipient is no longer being cared for in a rights-consistent manner. The model is one of shared responsibility and at some point it may become the Court's duty to order the release of the care recipient, despite the risk. The Act's provision for iterative dialogue between judges and clinicians (s 76 being one example) is, I suggest, well capable of establishing what requirements will be reasonable in any given case both from a clinical and rights perspective.

[334] It follows that I must accept there may be a very narrow set of circumstances in which preventive detention effectively becomes an unavoidable consequence of this care-based framework.[413] But preventive detention is not its purpose. Risk avoidance alone cannot justify any form of detention under the IDCCR Act, let alone preventive detention.[414] The care imperative must also be fulfilled.

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412 IDCCR Act, s 74.

413 The select committee report on the Intellectual Disability (Compulsory Care) Bill 1999 contemplated this as a possibility in a "limited number of cases" where "it is not possible to manage the individual's behaviour and … his or her behaviour continues to be assessed as being a high risk to others": Intellectual Disability (Compulsory Care) Bill 1999 (329-2) (select committee report) at 16–17.

414 I agree with Professor Brookbanks that the IDCCR Act is not to be applied in a manner that results in routine preventive detention, but that does not mean that in exceptional cases, this is not the necessary result: see Warren Brookbanks "New Zealand's Intellectual Disability (Compulsory Care) Legislation" in Kate Diesfeld and Ian Freckelton (eds) *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, Aldershot (UK), 2003) 529 at 533; and Warren Brookbanks "Managing the challenges and protecting the rights of intellectually disabled offenders" in Bernadette McSherry and Ian Freckelton (eds) *Coercive Care: Rights, Law and Policy* (Routledge, Abingdon (UK), 2013) 218 at 237.

The majority reasons and the treatment of *VM*

[335] Before I apply the extension test to J's case, it is useful to explain where my view of the test overlaps with and differs from the majority reasons and *VM*. It is possible to frame the relationship between detention and liberty rights in proportionality terms, though as I have said, in my view, care (involving the deployment of reasonable resources) is the tiebreaker. But to the extent that a proportionality framing can be applied, I agree with the majority that the available sentence for the index offending will always be relevant—and not just, as *VM* found, in those finely balanced cases.[415] And I agree that care recipients' prospects of rehabilitation are important,[416] though I approach this consideration from the broader perspective of the statute being expressly about care as well as rehabilitation. I agree that rehabilitation in the IDCCR Act context is more about attaining life skills to achieve as much independence as possible. It is not about "getting better". Compulsory care recipients are not unwell.

[336] In the end though, and as explained above, I would attach greater importance to the care needs of the care recipient and the state's active obligation to take all reasonable measures to vindicate their broad dignity interests. This approach will in most cases end up at the same place as the majority but recognises a statutory responsibility on the state to justify how it proposes to care for care recipients, not just in terms of s 85(3) but also in Code and NZBORA terms.

The CPMIP secure care standard

[337] In her reasons, Winkelmann CJ helpfully draws attention to the disposition options in s 24 of the CPMIP Act as compared to those in s 25.[417] She points out that only s 24 employs a community interests-based test, whereas s 25's focus is the care, rehabilitation and reintegration needs of the care recipient. Further, the duration of secure care under s 24 is set at half the maximum sentence for the index offence,[418] while the duration under s 25 is up to three years per s 46 of the IDCCR Act. I agree that these different pathways into secure care provide important contextual clues to

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415 See above at [96]–[114] per Ellen France and Miller JJ, and [209]–[210] per Winkelmann CJ.
416 See above at [115]–[119] per Ellen France and Miller JJ, and [202] per Winkelmann CJ.
417 See above at [181]–[183].
418 Or 10 years if the index offence was punishable by life imprisonment: CPMIP Act, s 30(1)(a)–(b).

the correct approach to the extension test,[419] emphasising as they do that the focus for care recipients like J is on care and rehabilitation.

[338] But I do not agree that the two sections are entirely separate. In this respect the route *out* of s 24 secure care is also significant. A special care recipient remains subject to a s 24 order until a direction is issued under s 31 of the CPMIP Act or s 105 of the IDCCR Act.[420] Under s 31, a s 24 special care recipient will always, ultimately, end up as an ordinary care recipient,[421] unless they become fit to stand trial in which case there is an alternative option of bringing them before the appropriate court.[422] Section 105 provides for disposition options following inquiry by a High Court judge, including the option of continued care as an ordinary care recipient.[423]

[339] Importantly, all directions for continued care under these sections are automatically secure care orders under s 45 of the IDCCR Act.[424] They last for an initial term of six months.[425] These orders can then be varied, extended or terminated according to the ordinary provisions of the Act.[426] So, the CPMIP and IDCCR Acts contemplate compulsory care extending *beyond* the maximum length of a s 24 order.

[340] This means that, unless they are released by direction of the court or are no longer unfit, even s 24 special care recipients in secure care must eventually meet the "serious danger" to self or others standard in s 85(3) if they are to remain in secure care. That standard is both more stringent and more precise than the s 24 test of "necessity" in the interests of the public or others—and rightly so. In other words, the two pathways to secure care eventually meet at s 85's high bar.

J's case

[341] Applying the relevant principles to J's case, it is clear that the inquiry required by s 85(3)—an inquiry informed by the Code and NZBORA—has not yet been

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419 IDCCR Act, s 85.
420 CPMIP Act, ss 30(3)–(4). Note, for completeness, that the order would also be cancelled should the charges for the index offending be withdrawn or dismissed: s 30(5).
421 Section 31(5)(b).
422 Section 31(2)–(5).
423 IDCCR Act, s 105(3)(a). See subss (2) and (3)(b) for the other options available to the judge.
424 Section 94(1).
425 Section 94(1)(a).
426 Section 94(2)–(4).

undertaken. As foreshadowed, to complete that inquiry, two questions must be answered:

(a) first, is J a sufficiently "serious danger" to himself or others; and

(b) second, as to whether an extension of secure care is justified:

(i) would the conditions of his care be consistent with respect for him, his dignity and optimal quality of life; and

(ii) is an extension the only way to affirm these rights and interests?

I acknowledge that there is an overlap between sub-inquiries (i) and (ii), but keeping them separate ensures all core interests are the subject of proper focus.

[342] As to the first question, in his current presentation, J is evidently a danger to himself and others. He has also been detained in either supervised or secure care for nearly 20 years. Whether the danger is sufficient to meet the "serious danger" threshold in this most recent extension application requires an assessment of all of J's circumstances—including those of his index offending.

[343] Relevant to the second question, the evidence before this Court suggests J's detention has contributed to the deterioration of his condition, rather than his rehabilitation, making his presentation more rather than less dangerous. Again, the evidence suggests that instead of promoting J's quality of life and upholding his dignity, his current circumstances appear to have had a corrosive effect on these rights and interests. J wants to go home and his family wants him home. It has been suggested more than once that further or redirected resourcing could help improve his circumstances. I repeat the words of the Family Court:[427]

> [9] Everyone agrees that [J]'s wellbeing has been detrimentally impacted by his diminished environment. … Everyone has recognised for a long time that his quality of life would be greatly improved by his environment being expanded. He needs to visit his mother at home. He needs to experience his culture. He needs to exercise and have his medical needs met. None of those things are available to him at this time because of the challenges to keep [J]

[427] *Lau'ese-Blaney*, above n 330.

> safe and to keep the community safe. Those challenges cannot be met because of constraints in funding, constraints in resources available for him and constraints that his physical environment presents. …

[344] If any of the questions above at [341] is answered in the negative, J must be released from secure care.

[345] Like the majority, I would leave it to the Family Court to undertake the required inquiry.[428] As with all important decision-making under the IDCCR Act, this inquiry will be a collaborative, dignity-informed exercise.

Some final comments on discrimination

[346] As I said above, I agree with Ellen France and Miller JJ that the arbitrary detention lens is a more useful one for getting to the heart of the issues in J's particular case. That said, our sad history of widespread incarceration of people with intellectual disabilities clearly demonstrates the necessity of preventing unjustifiable discrimination against this vulnerable group. Differences in treatment between individuals with and without disabilities must therefore be viewed with suspicion. In this context, I make the following brief comments on discrimination.

[347] In cases like J's, it is particularly challenging to identify the correct comparator group or groups for the purposes of a discrimination analysis. The HRC's primary focus here was on dangerous offenders who are not disabled. While I accept its submission that there is a higher threshold for risk-based detention for such offenders, the argument misses the point that s 85 already has a built-in comparator: the maximum sentence for the index offending in the ordinary criminal justice system. The extension test already requires the courts to bear in mind how the period of compulsory care compares to the greatest sentence that could be served by an offender who was fit to be convicted and sentenced. That is a more tailored and relevant comparison. As I have explained, the maximum sentence for the index offending is always relevant in extension decisions, and if it has been exceeded, that will be a powerful consideration indeed in the assessment of the individual case.

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[428] See above at [139]–[140] and [160] per Ellen France and Miller JJ, and [168] and [222] per Winkelmann CJ.

[348] As a result, I consider there is significant overlap between what amounts to arbitrary detention and what cannot be demonstrably justified in anti-discrimination terms. The point at which detention becomes arbitrary will in many cases be the same point at which any discrimination becomes unjustified. A wider consideration of possible comparator groups would be of no assistance in J's case.

KÓS J

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[349] I dissent. First, I would uphold the concurrent decisions of the High Court and Court of Appeal, in circumstances in which no legitimate, less restrictive alternative was presented on the appellant J's behalf. Secondly, I consider the prior decision of the Full Court of the Court of Appeal in *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* (*RIDCA v VM*) was for the most part correctly decided, and then correctly applied by the Courts below in this appeal.[429] Thirdly, the pleaded claim seeks declarations as to unlawful detention and an order for J's immediate release. I do not consider J's detention in care has been shown to be unlawful, and—on the state of the evidence before us—an order for release would be entirely irresponsible. The pleaded claim should therefore fail on its merits and the appeal should be dismissed. Finally, the amelioration of J's current care status and conditions remains a matter for the regular Part 6 review presently being undertaken by the Family Court.[430]

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[429] *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641 [*RIDCA v VM*].

[430] See Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, Part 6.

A conflict of rights

[350] This is a tragic case, involving the very unusual presentation of a person with an intellectual disability whose liberty would create an exceptionally high risk of imminent, serious harm to others. I am not persuaded that J's liberty interests, which I do not discount for a minute, compel a dangerous man subject to continued state care because of his combined disability and danger to be released from that care into the community, thereby enlarging the tragedy we now confront. Yet that is exactly what this Court is being asked to do by the appeal presented. Instead, I think J's liberty interests need to be fairly balanced with those of the people he will inevitably harm if released.

[351] There is a conflict of rights here. As Butler and Butler put it, "what is at issue is the manner in which the state limits the rights of one individual to uphold the rights or interests of another".[431] As Professor Waldron has observed:[432]

> The idea of balance supposes that we should consider civil liberties not just in and of themselves, but in terms of the consequences of their existence. If the consequence of a given degree of liberty is an enhanced level of risk, then we must take that into account when considering whether that degree of liberty should be maintained. … We must also be sure that the diminution of liberty will in fact have the desired consequence.

[352] The issue of balancing rights and interests has to be confronted here given J's lack of agency and the sheer inevitability of harm to innocent third parties in the absence of restrictions on his ordinary liberty. As set out below, the consequences of granting J the liberty he seeks are likely to be very serious—both for third parties, including his mother who will be put in harm's way, and for J himself. It follows that J's liberty interests are necessarily compromised from the outset.[433]

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431 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [6.6.33]. See for example *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [118]–[147] per McGrath J; *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948; and *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [272] per Glazebrook J dissenting.

432 Jeremy Waldron "Security and Liberty: The Image of Balance" (2003) 11 Journal of Political Philosophy 191 at 208 (emphasis omitted).

433 See below at [361].

J's risk profile

[353] A 2023 specialist assessor report from Dr James Gardiner, a forensic psychiatrist, records J's stated desire to remove the feet of young women and use them for sexual stimulation, and his history of and propensity for violence relating to his "fixed beliefs around being a James Bond-type spy", including extensive property damage, assaults and frequent threats to injure and kill, targeted in particular at people of European ethnicity. Dr Gardiner made particular reference to the fact that members of J's care team have received "significant injuries" as a result of his assaults. A 2022 specialist assessor report from Dr Willem Louw notes J's "long-standing fixed interest in acting out violent fantasies involving people's feet and heads, and cutting their throats" and records seven incidents between October 2021 and March 2022 involving J's fixation on killing or seriously injuring a particular female occupational therapist, including a number of attempts to access a kitchen knife with which to cut her throat. This concern is by no means abstract: there is reliable evidence of an incident when J cut the neck of a female student at his school, causing injuries requiring hospitalisation. He was apparently acting out a fantasy based on a James Bond film.

[354] A 2022 report from another specialist assessor, Dr Duncan Thomson, notes J's "history of physical and verbal aggression towards his mother". Dr Gardiner's report similarly refers to her having been assaulted by J "on a number of occasions in the past", also noting that J's mother may minimise some of those assaults due to her belief that J does not intend to hurt her.

[355] Finally, J has a history of harming himself, either directly or indirectly as a consequence of his general violent and erratic behaviours. For example, J has pulled out a number of his own teeth, including removing a front tooth with a pair of earmuffs, despite not experiencing any apparent dental pain or discomfort and the visiting dentist raising no significant oral health issues. J has caused himself harm indirectly through other behaviour, for instance when he cut himself badly while breaking the glass windows of a neighbour's van in 2004.[434]

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[434] *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2023] NZCA 660 (Courtney, Katz and Clifford JJ) [CA judgment] at [8]–[9].

[356] The foregoing, while far from exhaustive, provides context for the numerous findings by specialist assessors that J is properly classified as having a high risk profile. That expert assessment, effectively unchallenged, should be respected.[435] The danger he poses is exacerbated by his inability to understand the effect his actions have, or might have, on others, including at the most basic level of understanding that injuring or maiming may cause significant pain, disability or even death.

Evidence of "dangerousness"

[357] Mr Ellis submitted for J, citing the United States District Court in *Lessard v Schmidt*, that "civil commitment could only be based on a finding of 'dangerousness', which required evidence of a recent overt act, and a likelihood of immediate harm without intervention",[436] adding that "detention on an overt act in 2004 is hardly 'recent'". Putting to one side the issue of the relevance of that authority, the Court in *Lessard* said, in full, that "a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another" would suffice to establish dangerousness.[437] In referring only to the 2004 offending, I take Mr Ellis's point to be that subsequent threats and acts of violence reported by staff at J's secure care facility are insufficient evidence of the risk he poses because they have not been proved in a judicial process.

[358] That argument is at odds with this Court's recent decision in *[S] v Chief Executive of the Department of Corrections*.[438] In that case, it was held that alleged offending which had not resulted in findings of guilt or convictions could be relied on for the purposes of determining whether an individual had a "pervasive pattern" of offending and a high risk of reoffending warranting imposition of an extended supervision order,[439] provided the court was satisfied on the balance of probabilities that the offending had occurred, having due regard to the cogency of the evidence available and the seriousness of what was at stake.[440] The same principle should apply here.

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435 But see the general discussion of evidential sufficiency below at [357]–[359].
436 *Lessard v Schmidt* 349 F Supp 1078 (ED Wis 1972).
437 At 1093.
438 *[S] v Chief Executive of the Department of Corrections* [2024] NZSC 152, [2024] 1 NZLR 690.
439 Under s 107I(2)(a) of the Parole Act 2002.
440 *[S] v Chief Executive of the Department of Corrections*, above n 438, at [50]–[60].

[359] In common with the majority, I consider the number of documented incidents and the degree of corroboration indicate that the evidence supporting J's risk classification is cogent and reliable.[441] That is consistent with the expert evidence of Ms Louisa Medlicott, a clinical psychologist, who was cross-examined on the diagnostic significance of this evidence in the High Court. I note in that regard the requirement under s 88(2) of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the IDCCR Act) for the court to have regard to certificates issued by specialist assessors under s 79 when disposing of compulsory care order (CCO) extension applications, indicating a degree of deference to expert views is expected, including as to a care recipient's risk profile. In this case, J's lack of agency and the exceptionally high risk of danger he presents cannot seriously be contested.

The relief sought is highly problematic

[360] As noted above, a declaration is sought in this proceeding that J's detention in care since 8 February 2006 was unlawful,[442] as is an order "for the applicant's immediate release". In their submissions, counsel for J maintain that he should be released in a manner similar to the orders made in *Vincent v New Zealand Parole Board*,[443] with the order lying in Court for a period so J "can move to a civil client regime with some expedition".[444]

[361] Taxed on the issue in the hearing before us, counsel for J accepted that some level of detention would be required even if J were released from secure care into the community. Just what measures would be needed, and the extent to which—and means by which—they could be implemented outside of the framework set out in the IDCCR Act, were not addressed in any depth by counsel. Mr Ellis suggested that J:

> … could be at home with some additional funding, so that, you know, the windows are barred and so on and it's not so easy to get out, and he could have a life.

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441 See above at [129] per Ellen France and Miller JJ; and see above at [221] per Winkelmann CJ.
442 Including under ss 9, 22 and 23(5) of the New Zealand Bill of Rights Act 1990 [Bill of Rights].
443 *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [114].
444 See below at [363].

[362] The evidence before the Court strongly suggests that such an arrangement would not adequately address J's complex needs and the danger he presents. Nor is it clear that living at home but with barred windows and other restraints would substantially improve J's ability to, as Mr Ellis put it, "have a life". Further, placing J in the care of his mother would be wholly inappropriate in light of his history of harming her, the very high risk of that occurring again and the existing need for staff to supervise his interactions with her. I also note Dr Gardiner's findings that J "is physically strong and athletic, and this makes it difficult for others around him to resist when necessary" and, relatedly, that "it is clear there is no realistic immediate management plan outside the hospital environment that would adequately manage the risks that [J] is thought to pose to others".

[363] The option of moving J to *supervised* (rather than secure) care was not explored by his counsel, who instead requested that this Court simply "direct that J's status as a compulsory care recipient cease" altogether. In any case, there is no satisfactory evidential basis for departure from the concurrent views of numerous specialist assessors that supervised care is untenable from a health and safety perspective. The opaque submission by counsel for J that "care under a non-compelled status with the civil assistance of Intellectual Disability Health Providers is appropriate" does not advance his case in the absence of any meaningful detail as to how that non-compelled status would achieve the objects of the IDCCR Act.

Liberty interests

[364] I agree that s 85 does not permit arbitrary detention in terms of s 22 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). I therefore agree with [81] of the primary reasons. I disagree however with [86]–[89]. As explained above at [351], I consider we are dealing here with the need to balance a conflict of rights: the positive right of J to be at liberty if he can, and the negative rights of third parties—both members of the public and J's mother—to be spared from inevitable attack by a person taken into, and then released from, state care. The latter set of rights might also be expressed in terms of a public safety interest.[445] I therefore agree with the framing in *RIDCA v VM*, drawing on the Supreme Court of Canada's decision in

[445] See Waldron, above n 432, at 204.

Pinet v St Thomas Psychiatric Hospital that "within the outer boundaries defined by public safety, the liberty interest of [a care recipient] should be a major preoccupation" of those determining their status.[446] Public safety is, if not the starting point, then a compelling countervailing factor requiring due consideration.

[365] I do not see this approach as inconsistent with *Chisnall*—a different case concerned with criminal sentencing and an established lack of justification for a retroactive penalty.[447] Nor is it at odds with the Bill of Rights. It is axiomatic that public safety concerns can render limits on individual rights demonstrably justified in terms of s 5[448]—which I consider is squarely engaged in this case.[449] The right of all members of society to be protected from avoidable harm can be traced to art 3 of the Universal Declaration of Human Rights, which provides that "[e]veryone has the right to life, liberty and security of person",[450] and finds expression in the caveats to arts 12 and 22 (freedom of movement and association, respectively) of the International Covenant on Civil and Political Rights (itself affirmed in the Bill of Rights),[451] which provide that those rights may be subjected to limits "which are necessary in a democratic society in the interests of … public safety, public order … or the protection of the rights and freedoms of others".[452] In the Bill of Rights, that right finds implicit expression in the rights to freedom of movement and association.[453] Section 6 rights consistency—to the extent it is relevant here—should therefore have a dual rather than singular focus. But as the majority in *Hansen* observed, there is in principle no need to resort to that provision where a limit on rights is demonstrably justified.[454]

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446 *Pinet v St Thomas Psychiatric Hospital* 2004 SCC 21, [2004] 1 SCR 528 at [21] as cited in *RIDCA v VM*, above n 429, at [59], n 44.

447 *Attorney-General v Chisnall*, above n 431.

448 Section 7(1)(g) of the Sentencing Act 2002 makes this explicit in the criminal justice context, for example—the criminal sentencing regime inarguably imposes justified limits on individual rights, in part on public safety grounds.

449 Compare above at [86] and [88] per Ellen France and Miller JJ. In this respect I follow the approach adopted by the majority in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [57]–[60] per Blanchard J, [90]–[92] per Tipping J and [186], [189] and [192] per McGrath J. Contrast at [6] and [24] per Elias CJ.

450 *Universal Declaration of Human Rights* GA Res 217A (1948).

451 Bill of Rights, long title.

452 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), arts 12(3) and 22(2).

453 Sections 17–18.

454 *R v Hansen*, above n 449, at [57]–[60] per Blanchard J, [90]–[92] per Tipping J and [186]–[192] per McGrath J.

[366] It is also relevant that, as intimated above at [352] and [362], it appears inevitable that J's liberty interests will be compromised given his condition. The counterfactual is not J living an ordinary life in the community, but rather (1) some kind of private secured living, involving turning the family home into a miniature fortress, or (2) constant supervision while in public and, if necessary, some resort to physical constraint. It was wholly unsatisfactory that the best alternative was not clearly identified by counsel for J, especially in light of Dr Gardiner's view—noted above at [362]—that there is no realistic management plan enabling the necessary care for J in the community while at the same time maintaining the safety of that community.

[367] Returning to the conflict of rights issue and the balancing exercise necessitated by it, the harm that will come to J as a consequence of the limits on his liberty can be carefully managed and mitigated in the secure care setting, including in response to his evolving state of mind and risk profile. There is a range of safeguards in place to protect J's rights under the Code of Health and Disability Services Consumers' Rights,[455] the specific rights enumerated in Part 5 Subpart 1 of the IDCCR Act, the Bill of Rights and other relevant rights instruments. The main safeguard is Part 6 of the IDCCR Act, under which the Family Court is currently seized of a review of J's detention in care. The wider roles and functions of the courts and of district inspectors were addressed by the Courts below.[456] Also relevant is the Ombudsman's monitoring role as a National Preventive Mechanism under the Crimes of Torture Act 1989 and the related Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[457]

[368] On the other hand, if J is released into the community there is, on the evidence before us, no apparent means of ensuring he receives the care and support he requires, and no satisfactory method of safeguarding those whom he will harm. Subject to the remaining issue of arbitrary detention, I am satisfied the *Hansen* criteria for

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455 Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch.

456 CA judgment, above n 434, at [50]; and *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2018] NZHC 1209 (Cull J) at [478]–[505].

457 "Designation of National Preventive Mechanisms" (1 August 2025) *New Zealand Gazette* No 2025-go4014. See also Crimes of Torture Act 1989, s 16 definition of "National Preventive Mechanism", para (a), ss 26–30 and sch 2.

justification are met in this case and that the limits imposed on J's liberty are demonstrably justified.[458]

Arbitrary detention?

[369] Section 22 of the Bill of Rights provides that everyone has the right not to be arbitrarily arrested or detained. Detention "must not only be lawful but *reasonable* and *necessary* in all the circumstances".[459] The White Paper "A Bill of Rights for New Zealand" similarly acknowledged that "[t]he courts will go beyond the question of legality under the legislation in issue and also concern themselves with the procedural and substantive standards contained in that law"—but the drafters contemplated that detention for public safety reasons (without necessarily requiring trial and conviction for an offence) would not necessarily be arbitrary provided there were adequate review procedures in place:[460]

> The arbitrariness of detention could arise under mental health legislation, for example, where the courts might concern themselves with whether there were procedures for regular review as to whether a detainee was a danger to the community justifying continued detention.

[370] In this case, I do not think J's detention in care can properly be characterised as arbitrary in that sense, nor in the sense in which that term is generally understood in law.[461]

[371] Counsel for J focus their argument on this ground on the lack of proportionality between the period of detention and the index offending which brought J into the IDCCR Act regime; the alleged inability of the secure care environment to provide J

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458 *R v Hansen*, above n 449.

459 Paul M Taylor *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press, Cambridge, 2020) at 254 (emphasis in original) referring to both *Van Alphen v Netherlands* UN Doc CCPR/C/39/D/305/1988 (23 July 1990) and *Gorji-Dinka v Cameroon* UN Doc CCPR/C/83/D/1134/2002 (17 March 2005).

460 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 89.

461 See for example Timothy Endicott "The Coxford Lecture: Arbitrariness" (2014) 27 CJLJ 49 at 70 (footnote omitted): "An arbitrary decision in general is one that is not distinguished, by reasons in favour of it, from an unreasoned choice. In the special sense in which arbitrariness is a departure from the rule of law, a decision is arbitrary whenever the law itself ought to demand a justification other than the fact that the decision maker made it, and there is no such justification." See also *Draft International Covenants on Human Rights: Report of the Third Committee* UN Doc A/4045 (9 December 1958) at [49].

with effective care and rehabilitation; and alleged evidential insufficiency regarding the assessment of J's risk profile. The last of those arguments was dealt with above at [357]–[359], the conclusion being that there is sufficient evidence to find that J presents a significant danger to himself and others. I address the remaining arguments below, noting that the discussion of proportionality in this context also responds to the submission that J's detention is disproportionately severe in terms of s 9 of the Bill of Rights.

Proportionality

[372] I accept that the continued detention in care of J is not proportionate to his index offending. But I do not consider the statutory scheme requires this. I make three points.

[373] First, I consider the index offending is simply the entry point to the IDCCR Act compulsory care scheme—just as a single, serious mental health episode may be the entry point for compulsory treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the MHCAT Act). The Bill preceding the IDCCR Act was amended to ensure criminal offending was a prerequisite for compulsory care as a rights-enhancing measure so there was some rational limit (in the form of concrete evidence of danger to self and others) on the scope of the regime.[462] But the initial offending is a threshold issue only. That view is reinforced by two related facts, both raised by Ms Laurenson in her submissions. The first is that throughout his time in secure care J has repeatedly engaged in behaviour that would, were it not for his compulsory care status, have resulted in criminal charges.[463] The second fact is that through his secure care arrangements, J has been prevented from engaging in even more serious behaviour which would cause significant harm to others and, but for his special status, likewise attract potentially severe criminal penalties.

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462 Intellectual Disability (Compulsory Care) Bill 2001 (329-2) (select committee report) [IDCCR Act select committee report] at 2–4.

463 That conduct includes multiple instances of threatening to kill—an offence which, if proven to the criminal standard, carries a maximum sentence of seven years' imprisonment: Crimes Act 1961, s 306.

[374] Secondly, the relevant proportionality requirement for variation or extension of a CCO relates to the compulsory considerations for decision-makers under the IDCCR Act, laid out in s 11: that is, that every exercise of power under the Act must be guided by the principle that the care recipient should be treated so as to protect (1) the health and safety of the care recipient; (2) the health and safety of others; and (3) the rights of the care recipient. The first two considerations are reinforced in ss 85(3) and 86(4) of the IDCCR Act, and the third in s 3(b). I therefore agree with [68]–[71] of *RIDCA v VM* to the extent it confirms continued detention in care must be proportionate to current health status and the ongoing assessment of risk.[464] I do not however think the index offending retains continuing relevance in the assessment to be made. Here I depart from *RIDCA v VM*, which suggested it might be relevant in a finely balanced case.[465] The legitimate aims of continued detention in care relate to J's present and prospective presentation of risk, as in the case of compulsory care under the MHCAT Act, not the original offending that brought him into care in the first place. The purposes of the IDCCR Act lie outside the criminal justice system and are concerned with care and rehabilitation, not crime and punishment.

[375] Thirdly, and relatedly, my view is reinforced by the legislative handover that occurs from the Criminal Procedure (Mentally Impaired Persons) Act 2003 to the IDCCR Act, so that (1) CCO recipients like J are expressly no longer subject to the criminal justice system;[466] and (2) the CCO jurisdiction is vested in the Family Court, rather than the District Court or High Court exercising criminal jurisdiction.[467] I also note the definition of "care recipient no longer subject to the criminal justice system" in s 6(3) of the IDCCR Act, which refers in para (a) to a person who "continues to be … subject to a compulsory care order" despite being "no longer … liable to be detained under a sentence"; and the select committee report and parliamentary debates regarding the IDCCR Act, which made a number of references to long-term (and potentially indefinite) detention of those who continue to pose a high risk to themselves or others.[468]

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464 *RIDCA v VM*, above n 429.
465 At [72].
466 Intellectual Disability (Compulsory Care and Rehabilitation Act), s 6(3).
467 Section 116(1).
468 See IDCCR Act select committee report, above n 462, at 17; and see for example (21 October 2003) 612 NZPD 9561, 9570, 9573, 9591 and 9594.

[376] I agree with *RIDCA v VM* that a CCO may be made or continued only if it is the least restrictive response available to meet the statutory objectives in ss 3 and 11 of the IDCCR Act—including those noted above at [374].[469] That applies also to the form of CCO (that is, supervised or secure care). But no realistic alternative to secure care has been presented here.[470] The relief sought—immediate release—is impossible and irresponsible. It is not evident to me that there is any less restrictive care option available that adequately balances the conflict of rights engaged.[471] Counsel barely attempted to identify alternative options. Nor can it be argued that the purpose of secure care is insufficiently important, or that it lacks a rational connection to the measure: as noted above at [369], secure care is precisely the kind of justifiable limit the drafters of the Bill of Rights envisaged.

Rehabilitation

[377] Given the purposes stated in s 3 of the IDCCR Act include rehabilitation, the CCO must incorporate this so far as reasonably possible. But where the care recipient's condition is not amenable to substantial rehabilitation despite reasonable efforts being made, the consequence cannot be discharge from the CCO itself. It cannot be the case that the consequences of both profound rehabilitative progress, and profound *lack* of rehabilitative progress, are the same. I note also that the select committee, when recommending a new emphasis on rehabilitation in the then Bill (which made no reference to rehabilitation when first introduced),[472] said: "We believe there should be explicit recognition of the importance of rehabilitation, *where possible*, to ensure that people do not receive custodial care only."[473] The italicised words are significant—a point emphasised by members from several parties in the course of debate on the Bill.[474]

[378] Here, despite an extraordinary application of resources to care for J, his risk level has not improved. That is primarily a function of J's lack of agency, on which

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469 *RIDCA v VM*, above n 429, at [59] and [92(a)].
470 See above at [360]–[363].
471 See above at [366]–[368].
472 See Intellectual Disability (Compulsory Care) Bill 1999 (329-1).
473 IDCCR Act select committee report, above n 462, at 7 (emphasis added).
474 (21 October 2003) 612 NZPD 9569–9574.

point I agree with the observations of the Court of Appeal.[475] That lack of agency reinforces, rather than erodes, the case for continued care. In that respect, I disagree with [119] of the primary reasons. I agree inability to rehabilitate may enlarge the liberty interest, but I do not think it can overwhelm the counter-considerations, including the interests of the community members who will be harmed by J if he is released—as the relief sought here would require. In this respect I am again in substantial agreement with the approach in *RIDCA v VM*.[476]

Care

[379] "Care" under the IDCCR Act is not a synonym for custody. As s 25(1) makes clear, care must encompass considerations and conditions of a very different nature to penal detention. The considerations in that subsection cannot be neatly compartmentalised as "care" or "rehabilitation". Many will overlap. Social, cultural and spiritual needs; diet, medication and treatment; and special needs, concerns and aversions are all matters engaged by the obligation to care.[477]

[380] If effective rehabilitation is impossible or impracticable in the circumstances, despite appropriate devotion of resources to that responsibility, then the emphasis on providing care must be still greater. It is an obligation the state must take seriously—as it has to date in this case. It will require the deployment of resources so that J may enjoy reasonable intellectual, creative and social stimulation despite his inability to fully enjoy ordinary liberties. That institutionalisation has worsened J's outlook and behaviour is unsurprising. In the absence of a rational alternative to institutional care, however, it behoves the state to do more, not less, to improve J's living circumstances. I record that I agree with what Williams J has to say about this at [328]–[334] of his reasons.

[381] This care obligation is owed by the state not just to J but also to others who might, now or in the future, be affected by his lack of agency. During the passage of the IDCCR Act, significant emphasis was placed by legislators on the state's duty to

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475 CA judgment, above n 434, at [153]–[154].
476 *RIDCA v VM*, above n 429, at [85]–[86].
477 I agree, therefore, with [133] of the primary reasons.

the families of those with intellectual disabilities—something which should also be borne in mind in this case.

Conclusion on arbitrary detention

[382] I take the view that the state has established justification for the limits imposed on J's liberty, because:

(a) the safety interests of potential victims must also be considered;

(b) J's outlook and lack of agency is such that, without limits imposed on his liberty, he will seriously impair the rights of others by attacking them;

(c) J's liberty is therefore inevitably compromised; and

(d) a suitable, less restrictive alternative to the existing order has not been identified.

[383] For these reasons, I do not consider J's detention in care is arbitrary in terms of s 22 of the Bill of Rights. Nor is it disproportionately severe in terms of s 9. Rather, continued care under the present order is, for now, the only realistic response to J's unusual presentation of risks.

Conclusion

[384] I would therefore dismiss the appeal on the basis that extension of J's CCO is the only demonstrated, lawful and available means of appropriately balancing the matters set out in s 11 of the IDCCR Act, in accordance with s 85.[478]

[385] As I said at the outset, this is a tragic case. But granting the relief sought—J's immediate release into the community—can only lead to further tragedy. Given the conflict of rights in this case, the law's primary impulse must be to ensure that J

[478] I record that I agree with the primary reasons above at [148]–[159] concerning jurisdiction and the admission of further evidence.

continues to receive care in an environment in which he and others will be kept safe. Only the existing orders have been shown, on the evidence before this Court, to be capable of achieving that. As I noted earlier, therefore, amelioration of J's current detention in care conditions remains a matter for the Part 6 review presently being undertaken by the Family Court.

[386] No member of this Court being prepared to grant the relief demanded on J's behalf—his release—let alone the other declarations sought, his claim accordingly ought to fail on its merits.[479]

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[479] That, in part at least, must be because of the jurisdictional limit now acknowledged above at [148].