IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 26/2022
[2025] NZSC 126

BETWEEN	ATTORNEY-GENERAL First Appellant
	CHIEF EXECUTIVE OF ARA POUTAMA AOTEAROA | DEPARTMENT OF CORRECTIONS Second Appellant
AND	MARK DAVID CHISNALL Respondent

Hearings:	17–18 October 2022 3–4 April 2023
Court:	Winkelmann CJ, Glazebrook, O'Regan, Williams and Kós JJ
Counsel:	U R Jagose KC, D J Perkins and M J McKillop for Appellants and Cross Respondents A J Ellis, B J R Keith and G K Edgeler for Respondent and Cross Appellant
Judgment:	30 September 2025

JUDGMENT OF THE COURT

A **We make the declarations of inconsistency set out at [18].**

B **The appellants must pay the respondent one set of costs of $70,000 plus usual disbursements. We allow for second counsel.**

REASONS

WINKELMANN CJ, O'REGAN, WILLIAMS AND KÓS JJ
(Given by Winkelmann CJ)

[1] In an earlier judgment in this proceeding the Court made findings that the Public Safety (Public Protection Orders) Act 2014, and the detention-authorising aspects of the extended supervision order (ESO) regime within the Parole Act 2002, were inconsistent with s 26(2) of the New Zealand Bill of Rights Act 1990.[1] We determined that declarations of inconsistency should be issued but gave the parties the opportunity to make submissions on the form of the declarations.[2] In this judgment we address issues as to the form of the declarations and make formal declarations. We also address outstanding issues as to costs.

Form of declarations

[2] From the submissions received it is apparent there is a good deal of agreement between the parties as to the form the declarations should take. We address points of difference below.

[3] Counsel for Mr Chisnall suggest more detail should be included in the declaration. It is argued that part of the purpose of the declaration is to vindicate the rights of those whose rights have been unjustifiably limited. There are also access to justice implications (in the sense of access to information about the content of the law). Both Mr Chisnall and the public should be able to understand the basic outcome from the declarations, without having to read through a judgment. As a consequence, it is suggested that detail should be included sufficient to ensure that someone reading the declarations, and nothing else, can understand the issues decided simply by reading the declarations. The Attorney-General's suggested approach to the content of the declarations is more minimalist — involving only limited reference to the content of the right in question.

[4] We agree that the approach suggested by counsel for Mr Chisnall is appropriate, given that the formal orders of the Court are the primary remedy that

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1 *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 (Winkelmann CJ, Glazebrook, O'Regan, Williams and Kós JJ).
2 At [266] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

Mr Chisnall receives. Moreover, it is an approach which accords with the requirements of the access to justice aspects of the rule of law.

[5] Counsel for Mr Chisnall also submit that it is not necessary to make a declaration that the retrospective application of the public protection order regime and the detention-authorising aspects of the ESO regime cannot be justified, notwithstanding the findings of the Court to this effect.[3] This is argued on the basis that such a statement is a subset of the declaration that the relevant parts of the regimes are not justified. Any other detail, it is argued, should be left for the reasons. The Attorney-General's proposed draft specifically addresses the issue of retrospectivity.

[6] On this point we are not persuaded by the argument made for Mr Chisnall. It is a position which seems inconsistent with Mr Chisnall's position on the first point — that more detail be included to assist with public understanding of the declarations. We agree with the Attorney-General that the issue of retrospectivity should be addressed in the declarations, so that the distinction this Court's judgment drew between prospective and retrospective application is plain on the face of the declarations.

[7] Finally, counsel for the Attorney-General submit that in the case of prospective application, the phrase "has not been justified" should be used rather than "is not justified". Counsel for Mr Chisnall contends for the latter formulation. We consider that the latter form of words is appropriate in this case. This is so for two reasons. The first is that the judgment's conclusions are based in significant part on legislative provisions or their absence.[4] Second, as the judgment made clear, if the Crown's case is that the limitation is justified, it carries the onus of justification.[5] The assessment of the Crown's case was that the limitation in question is not justified.[6] That is therefore the appropriate form of words.

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3 At [169(a)] per Winkelmann CJ, O'Regan, Williams and Kós JJ.
4 At [239]–[244] per Winkelmann CJ, O'Regan, Williams and Kós JJ.
5 At [118] per Winkelmann CJ, O'Regan, Williams and Kós JJ.
6 At [28] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

Costs

[8] It is submitted for the Attorney-General that costs should lie where they fall on the basis that the Crown's appeal was successful to a significant degree — the Court concluded that the statutory power to impose an ESO second penalty, even when retrospectively imposed, could be a justified limit on the s 26(2) right where the ESO does not extend to detention. It is also argued that Mr Chisnall's cross-appeal was unsuccessful. In light of this, and because the Attorney-General has already paid $78,000 in costs to Mr Chisnall in the Courts below, it is appropriate that costs lie where they fall.

[9] Mr Chisnall seeks costs in this Court. His counsel argue that he was substantially successful in maintaining the declaration made in the Court of Appeal. They reject the Attorney-General's characterisation of the Crown's appeal as a "major success". Counsel submit that Mr Chisnall's cross-appeal did not add greatly to the expense or time involved in the proceeding. In relation to the preparation for the second hearing, it is submitted that:

> The appellants' appeal also gave rise to the series of broader issues of methodology under the Bill of Rights Act which led to the adjournment of the appeal part-heard; the preparation of further submissions by the parties and by the intervener, and the bulk of two additional days of hearing time. Notably, the appellants' positions on those issues — for example, that a different approach to Bill of Rights Act consistency was required for discretionary powers — were successfully opposed by the respondent.

[10] Further, it is argued that the Court should assess whether this case is an appropriate one to consider whether costs might be a component of an effective remedy in cases under the New Zealand Bill of Rights Act. In support of this argument, we were referred to *Taunoa v Attorney-General* and *Attorney-General v Udompun*.[7]

[11] In *Taunoa*, Tipping J observed that costs may be a component of an effective remedy:

> [334] I mention finally that when appropriate in cases of this kind, the court may award solicitor and client costs to a successful plaintiff as an ingredient

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7 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429; and *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA).

> of its provision of an effective remedy. Whether that should be done will depend on the overall circumstances of the case and the elements of the remedial package otherwise provided. I mention this dimension only lest it be overlooked.

[12] Writing separately, McGrath J also noted:

> [368] The court's finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in the circumstances to vindicate a plaintiff's right. That will often be the case where no damage has been suffered that would give rise to a claim under private causes of action and, in the circumstances, if there is no need to deter persons in the position of the public officials from behaving in a similar way in the future. If in all the circumstances the court's pronouncement that there has been a breach of rights is a sufficiently appropriate remedy to vindicate the right and afford redress then, subject to any questions of costs, that will be sufficient to meet the primary remedial objective.

[13] In *Udompun*, a majority of the full Court of Appeal made several observations as to costs:[8]

> [186] In our view, the Judge was not wrong in principle to award indemnity costs, even though not all of Mrs Udompun's claims succeeded before him. In this area it may not always be appropriate to allow costs to follow the event. It is important to remember that *Baigent* damages are awarded only where other remedies are not sufficient and awards are, in any event, modest. Applying the normal costs rules in such circumstances may discourage litigants from bringing BORA claims. This would clearly have the result of weakening BORA protections. Indemnity costs could also, in suitable cases, be seen as necessary for a proper vindication of the right. This does not mean, however, that indemnity costs are to be awarded as a matter of course in BORA cases.
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> [187] In this case, if we had upheld the view of the Judge as to the extent of the breaches, we would have considered indemnity costs to have been appropriately awarded. The breaches found were sufficiently comprehensive to justify the award, touching as they did on all aspects of Mrs Udompun's involvement with the New Zealand Immigration Service and the Police. We have not, however, taken the same view of the extent of the breaches as the Judge did. It is inappropriate in our view for the Police to bear the costs of Mrs Udompun's unsuccessful claims against the Immigration Service. The extent to which the Police should bear the costs of the claims against them is remitted back to the High Court to be considered in the light of this judgment.

[14] Mr Chisnall seeks costs at what he says is the regular scale for Supreme Court hearings for two two-day hearings, amounting to $70,000 — noting that the adjournment of the original hearing increased the time taken to deal with the appeal,

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8 *Udompun*, above n 7, per McGrath, Glazebrook, William Young and O'Regan JJ.

such that this is a fair approach. Alternatively, Mr Chisnall seeks $25,000 for the first day and $10,000 for each subsequent day, resulting in $55,000. As another approach, his counsel propose doubling the $48,700 awarded in the Court of Appeal to obtain a figure of $97,500. It is argued that the possibility for increased or indemnity costs in the New Zealand Bill of Rights Act context supports an award at the upper end of this range.

[15] This case is not the appropriate proceeding to address whether increased or indemnity costs might be awarded in declaration of inconsistency proceedings — it is an issue that raises questions of constitutional complexity. Full argument has not been presented to us on the point. There is also nothing in the conduct of the proceeding that would suggest such an order is appropriate. All parties and counsel conducted themselves responsibly throughout in taking the positions that they did and the Attorney-General's argument did enjoy some measure of success. There is, moreover, considerable public interest in the resolution of the issues addressed in the proceeding.

[16] We are also not persuaded that costs should lie where they fall. The Attorney-General was successful in arguments narrowing the scope of the inconsistency found in the Court below. However, Mr Chisnall was successful in defending the issue of declarations of inconsistency and is appropriately viewed as having enjoyed overall success. Some adjustment downward of a costs award in Mr Chisnall's favour will appropriately reflect that outcome.

[17] We accept the approach suggested for Mr Chisnall of treating each of the hearings as individual hearings for the purposes of costs. This is appropriate because of the significant additional work required for the second hearing. The Court's current regular scale for two two-day hearings is $100,000 (rather than the $70,000 identified by Mr Chisnall).[9] We consider that a 30 per cent adjustment downwards is appropriate to reflect the fact that the Attorney-General was successful in narrowing the scope of the declarations issued. We therefore will award costs in the sum of $70,000 plus disbursements.

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[9] One set of costs of $50,000 plus usual disbursements was awarded for one two-day hearing in *Routhan v PGG Wrightson Real Estate Ltd* [2025] NZSC 68 at [237] per Glazebrook and Miller JJ.

Result

[18] The Court makes the following declarations of inconsistency:

(a) Public protection orders made under the Public Safety (Public Protection Orders) Act 2014 are a second penalty for offences for which offenders have already been punished. They therefore limit the right to be free from second penalty protected by s 26(2) of the New Zealand Bill of Rights Act 1990. This limitation is not justified under s 5 of the New Zealand Bill of Rights Act. To the extent that s 3 of the Public Safety (Public Protection Orders) Act authorises the retrospective application of public protection orders, that limitation cannot be justified. Therefore, provisions in the Public Safety (Public Protection Orders) Act that authorise the making of public protection orders are inconsistent with s 26(2) of the New Zealand Bill of Rights Act.

(b) To the extent that ss 15, 107FA, 107IA, 107IAC and 107K of the Parole Act 2002 authorise the imposition of special conditions requiring detention as an aspect of an extended supervision order, they are a second penalty for offences for which offenders have already been punished. They therefore limit the right to be free from second penalty protected by s 26(2) of the New Zealand Bill of Rights Act 1990. This limitation is not justified under s 5 of the New Zealand Bill of Rights Act. To the extent that s 107C(2) of the Parole Act authorises the retrospective application of detention-authorising special conditions as an aspect of an extended supervision order, that limitation cannot be justified. Therefore, to the extent that ss 15, 107FA, 107IA, 107IAC and 107K of the Parole Act authorise the imposition of special conditions requiring detention as an aspect of an extended supervision order, they are inconsistent with s 26(2) of the New Zealand Bill of Rights Act.

[19] The appellants must pay the respondent one set of costs of $70,000 plus usual disbursements. We allow for second counsel.

GLAZEBROOK J

[20] In our earlier judgment, I dissented: I would not have made a declaration of inconsistency.[10] I therefore make no comment on the form of the declarations made by the majority.[11]

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Appellants and Cross-Respondents
F J Handy, Wellington for Respondent and Cross-Appellant

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10 *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 (Winkelmann CJ, Glazebrook, O'Regan, Williams and Kós JJ) at [271]–[274].

11 See above at [18] per Winkelmann CJ, O'Regan, Williams and Kós JJ.