ORDER PROHIBITING PUBLICATION OF PARAGRAPHS [124] TO [130] (INCLUSIVE) OF THIS JUDGMENT.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2020-485-000133
[2020] NZHC 1848

UNDER	the New Zealand Bill of Rights Act 1990
BETWEEN	PHILLIP JOHN SMITH Plaintiff
AND	THE ATTORNEY-GENERAL Defendant

Hearing: 9 – 10 June 2020

Appearances: Plaintiff in person
D Jones and L Dittrich for the Defendant

Judgment: 28 July 2020

JUDGMENT OF DOOGUE J

This judgment was delivered by Justice Doogue
on 28 July 2020 at 2.30 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:
Crown Law, Wellington

Introduction

[1] The plaintiff, Mr Smith, is serving a life sentence for murder and concurrent sentences for other offences. The defendant is the Attorney-General, sued on behalf of the Chief Executive (Chief Executive) of the Department of Corrections (Corrections).

[2] Mr Smith claims the Chief Executive is under an implied public law duty to provide him with rehabilitative treatment. He says Corrections has failed to provide him with rehabilitative treatment, and that this failure amounts to him being arbitrarily detained in breach of section 22 of the New Zealand Bill of Rights Act 1990 (BORA). Furthermore, he submits Corrections' failure also amounts to a breach of his rights to humanity and dignity under s 23(5) of BORA.

[3] Corrections says that the duty to provide rehabilitation is expressly provided for in s 52 of the Corrections Act 2004 (Corrections Act). They say that Mr Smith has been provided with such reasonable and appropriate treatment by the Chief Executive, so as to fulfil the duty.

[4] Mr Smith seeks:

(a) a declaration that an implied public law duty exists, requiring Corrections to make reasonable provision for access to treatment programmes for prisoners serving indeterminate sentences when the Parole Board (the Board) has conditioned their release on the completion of those programmes;

(b) a declaration that Corrections has failed to provide him with a reasonable opportunity to complete specialist treatment for his violent offending, rendering his detention from 2009 onwards arbitrary in breach of s 22 of BORA, as well as resulting in breaches of ss 23(5) and 27 of BORA and s 52 of the Corrections Act;

(c) a declaration that Corrections has failed to provide him with a reasonable opportunity to complete adequate specialist treatment for

his sexual offending, rendering his detention from 2009 onwards arbitrary in breach of s 22 of BORA, as well as resulting in breaches of ss 23(5) and 27 of BORA and s 52 of the Corrections Act;

(d) a writ of mandamus requiring Corrections to commence specialist violence treatment;

(e) public law compensation for legitimate frustration and anxiety; and

(f) costs.

[5] The issues for the Court to determine are therefore:

(a) whether or not any duty to provide rehabilitative treatment is provided for as a statutory duty in s 52 of the Corrections Act, or is an implied public law duty; and

(b) in either event, if the Chief Executive is required to provide Mr Smith with rehabilitative treatment and the Chief Executive has failed to discharge that duty, whether this amounts to a breach of ss 22 and 23(5) of BORA.

Background

Mr Smith's sentence

[6] On 16 August 1996 Grieg J sentenced Mr Smith to life imprisonment for murder, and concurrent sentences for offences of sexual violation, indecent assault on a boy, indecent act on a boy, kidnapping, and aggravated burglary. Greig J imposed a minimum period of imprisonment, requiring Mr Smith to serve 13 years' before he would be eligible for release. Mr Smith appealed his sentence, but the appeal was refused on 17 July 2003. His original parole eligibility date (PED) was 14 April 2009.

[7] Between 2007 and 2010, Mr Smith made a series of false tax credit claims using other prisoners' names. He received more than $40,000 before the fraud came to

light. On 24 August 2012, Mr Smith was sentenced to 15 months' imprisonment for causing loss by deception. His new PED was 9 April 2013.

[8] Mr Smith's sentence was interrupted by his escape from custody in November 2014. Having renewed his passport from inside prison, he travelled to Brazil whilst on a temporary release. Following his re-capture, he was convicted of escaping from lawful custody and making a false statement to renew a passport. In July 2016, he was sentenced to 33 months' imprisonment. His new PED was 22 June 2017.

[9] His release was first considered by the Board on 31 March 2009, and parole was declined. Each year since then, except in 2012 and 2016, the Board has considered his case and declined to recommend his release.

Corrections' rehabilitative interventions for individuals who have committed sexual offences against children and violent offences

[10] Before reviewing the factual background to the rehabilitative treatment Mr Smith has received, it is necessary to understand what treatment resources Corrections have and how they are deployed ordinarily.

[11] In general terms, Corrections' high intensity psychological programmes are based on the Risk, Needs and Responsivity (RNR) model of rehabilitation, which is internationally recognised as evidence-based best practice. The model is primarily founded in Cognitive Behavioural Therapy (CBT).

[12] The RNR model is a framework developed around the three core principles of risk, need and responsivity. With reference to the risk principle, it is reasoned that those presenting with higher risk require higher intensity intervention than their lower risk counterparts. The need principle refers to the criminogenic needs which, when addressed, result in changes in offence related behaviour. The responsivity principle refers to the way in which an intervention is delivered. Intervention is most effective when it is delivered in a way that engages the individual and helps them to desire and execute change.

[13] CBT is an intervention that focuses on modifying behaviour by challenging unhelpful thoughts, beliefs and attitudes and improving emotional regulation. The individual, with the support of a programme therapist, develops target behaviours (such as replacing lying with truth telling) and skills that are helpful in managing the risks of reoffending (such as self-regulation, distress tolerance, problem solving and communication).

[14] Corrections' Special Treatment Units (STUs) are purpose-built units that adhere to the principles of RNR and CBT. They operate as a community of change, or in other words, a therapeutic community within the men's prison estate. Participants are expected to demonstrate their learning from the programme through their interactions with the custody and therapy staff, and with other community members. They are also expected to demonstrate this through the auxiliary activities available in the STU such as employment, education, maintaining and developing external support, and preparing for reintegration.

[15] There are two child sexual offending STUs, located in Rolleston Prison (Kia Marama) and Auckland Prison (Te Piriti). There are four violent offending STUs, located in mainstream prisons.

[16] Ms Garrett, a registered psychologist with twelve years' experience in Corrections and presently Acting Manager of Corrections' High Intensity Psychology Programmes, gave evidence about the treatment Mr Smith has received. She explained that despite their different offence-specific focus, the STUs for violent offending are based on the same CBT principles and overarching module design as the STUs for child sexual offending. It is therefore common practice for prisoners to address other types of behaviour (for example, substance abuse and dishonesty) within these units.

[17] In addition to the programmes delivered in the STUs, there are stand-alone programmes that are delivered within the general prison population. These programmes provide shorter-term intervention for those serving short sentences.

[18] Individual treatment is also provided to individuals who are not able to attend a group-based programme for valid reasons, or to individuals who require assistance to overcome responsivity issues in order to progress to suitable high-intensity programmes. Individual treatment is not considered to be a replacement for high-intensity group-based programmes.

Eligibility and suitability criteria for the STU programmes

[19] Prisoners in Corrections' care are assessed with respect to their risk of reoffending and treatment needs and are placed on a waiting list to await a space in an appropriate programme. Entry into the programmes is dependent on the prisoner meeting the eligibility and suitability criteria.

[20] To be eligible for a child sexual offending STU, a prisoner must: be aged 20 years or older; have at least one conviction for child sexual offending; be assessed as at least moderate-high risk of reoffending or as requiring high-intensity treatment; have a security classification of low-medium or below; and have sufficient time left to serve (approximately two years).

[21] The eligibility criteria for an STU for violent offending is the same as that for a child sexual offending STU, except the qualifying offence must be one of violence rather than child sexual offending. Typically, those with child sexual offending are excluded from attendance at an STU for violent offending. This is due to the hierarchical culture among those in prison, resulting in concerns that an individual who reveals offences of a sexual nature relating to a child may be negatively targeted and ridiculed and their personal safety may even be at risk. This policy is also designed to protect other prisoners participating in treatment for violence; many have experienced childhood sexual abuse, and it is considered detrimental to their treatment to have child sexual offenders in the same STU.

[22] It is common practice when a prisoner has treatment needs for both violent and child sexual offending that their attendance at an STU for violent offending be considered by way of a comprehensive assessment at the conclusion of their treatment for child sexual offending. This is based on the standardised nature of the two STU programmes, in terms of the underpinning psychological theory and treatment targets.

It is expected that an individual prisoner generalises the insights they gain into their different presenting problems.

[23] Those prisoners with relevant convictions on indeterminate sentences should automatically be waitlisted to the higher intensity programme for child sexual offending, and likewise those with relevant convictions should automatically be waitlisted to the higher intensity programme for violent offending.

[24] The final decision regarding a prisoner's programme suitability considers a combination of factors including, but not limited to, criminal personality traits, lack of insight, acute mental health issues, physical health issues which may significantly affect their functioning, and low levels of motivation, or an unwillingness to make frank disclosures about their personal history and past offending in a group setting.

Waiting lists

[25] Corrections does not have unlimited funding for these programmes and uses "Service Lists" for the high intensity psychology programmes, which operate like a queue. The Service List for the STUs is a database maintaining records of all prisoners eligible for treatment.

[26] Those eligible, who have an identified treatment need, are prioritised in the first instance by their PED, with the aim that they successfully complete their high intensity rehabilitation prior to their first parole hearing. Eligible prisoners approaching their PED are considered for their suitability at regular intervals. Those with shorter sentences may be considered ahead of those who are serving longer sentences and who still have time left to serve. Long waiting lists and issues regarding readiness can mean that some prisoners will have passed their PED before they receive intervention.

[27] Ms Garrett explained that the reintegrative phase of a prisoner's sentence (that is, preparing for release) should ideally closely follow the rehabilitative phase. If the rehabilitative phase is too early in a prisoner's sentence, then their placement in a treatment programme may prevent the allocation of that resource to others who are closer to release and ready to engage in reintegrative opportunities.

[28] It is also common practice for psychological assessment and intervention to be deferred until pending charges are dealt with by the court, to avoid the psychologist potentially being asked to give evidence in the pending court proceedings. In the event that the outstanding charges denote additional offending, an assessment without the benefit of that information would not provide a robust assessment of the prisoner's risk and treatment needs.

[29] While Corrections can and does offer interventions to those in high and maximum-security units, the interventions provided are geared toward addressing those characteristics (such as rule breaking and boundary violations) that contribute to the prisoner's high security classification.

The treatment that Mr Smith has received

Events 1996-1999

[30] Following the commencement of his sentence, Mr Smith undertook a relationship and communication course in 1997, and at least one anger management course prior to 2000. In his evidence, Mr Smith also recorded that he undertook regular counselling with a prison social worker, some time prior to 2001.

[31] A psychological report dated 8 April 1998, prepared by the then Principal Psychologist and an Assistant Psychologist, recommended that Mr Smith receive psychological treatment to address his thinking and behaviour patterns that reflected revenge and retribution, and that he be referred to an STU for child sexual offending. The author of a second assessment from 1999, apparently undertaken at Mr Smith's request, came to the same conclusion.

Events 2000-2009

[32] Mr Smith completed a Straight Thinking Programme in September 2000, which was designed by Corrections to improve critical reasoning skills and effect behavioural change including relapse prevention. It was a group programme consisting of 35 two-hour sessions. He also completed an Avoiding Drugs, Alcohol and Offending ("Triple Trouble") programme in 2001.

[33] In November 2001, Mr Smith wrote to a Corrections psychologist, to complain about the lack of progress in his treatment. In 2003 he wrote to the Principal Psychologist at Auckland Prison, Mr McCall, making similar complaints. In response, Mr McCall indicated that certain attitudes expressed in his complaint suggested that Mr Smith was not yet ready for treatment (for example, Mr Smith had said his "risks don't even exist"), that his security was too high to access any of the STUs, and that he needed to be closer to his PED to be considered for the programmes. Mr McCall suggested Mr Smith might be eligible for consideration for entry into an STU in 2007-2008.

[34] In November 2004, Mr Smith's security classification was reduced from maximum to high-medium. Thereafter, he appears to have been involved in a number of breaches of prison regulations. In December 2005, his security classification was reduced to low-medium.

[35] A psychological report prepared in December 2008 for Mr Smith's first Board hearing noted that he had not received any specialist psychological intervention. The report recorded that Mr Smith was assessed "with criminogenic needs of offence related emotions and cognitions, violence propensity, drug abuse, relationship problems and offence related sexual arousal." It noted that Mr Smith did indicate willingness to attend treatment, and recommended Mr Smith complete the Te Piriti STU for child sex offenders and an STU for violent offending.

[36] In 2009 it appears that Mr Smith was placed on the waiting list for an STU for violent offending but was then removed on the basis that he should first undertake treatment related to his child sex offending. Treatment for violent offences at an STU would then be considered if recommended. It also appears that in November 2009, he was placed on the waiting list for one of the child sexual offending STUs. The recommendation noted that it was likely that a place on the Te Piriti programme would become available in November of the following year.

Events 2010-2014: Te Piriti

[37] In October 2010, Mr Smith was transferred to Auckland Prison. He commenced the preparation phase of the Te Piriti child sexual offending STU

programme on 17 October 2010 and moved onto the core treatment group on 15 November 2010.

[38] The intervention provided to Mr Smith at Te Piriti offered him the opportunity to address both sexual and violent offending. Towards the end of his core treatment phase in April 2011, Mr Smith wrote a personal statement which is the final assignment on the programme. The personal statement provides a prisoner the opportunity to take responsibility for their offending and identify the triggers for that offending. Mr Smith also completed the Relapse Prevention Plan assignment. In this assignment, a prisoner speaks to their risks, and provides details about how they will apply what they have learned should they encounter such risks in the future.

[39] Mr Smith completed the core treatment phase of the Te Piriti course on 4 May 2011. In a report to the Board dated 15 March 013, a Corrections Principal Psychologist working on the Te Piriti programme, Mr van Rensburg, reported that Mr Smith had gained a "remarkable level of insight" into the factors associated with his sexual, violent and dishonesty offending.

[40] Mr van Rensburg noted that Mr Smith would normally have been transferred to Unit 9 (another low-medium security unit, housing segregated prisoners) to assist his reintegration efforts, after having completed two to three months in the maintenance phase at Te Piriti. However, once he was charged with the fraud offences (committed while in prison between 2007 and 2010) Mr Smith was required to remain in Te Piriti from November 2011 until 17 September 2012 (after he was sentenced in August 2012).

[41] Mr van Rensburg assessed Mr Smith as a high risk for general offending medium-high risk for sexual reoffending, and violent reoffending was considered "less likely". He did not recommend additional treatment at that point. He recommended ongoing residence at Unit 9, where Mr Smith could attend the maintenance group. He also recommended to the Board that the Board consider both release to work opportunities, and temporary release into the care of his community support people.

[42] On 24 August 2012 Mr Smith was sentenced for his fraud offending. The additional term of imprisonment of 15 months changed his PED to 9 April 2013. On 21 September 2012, Mr Smith's security classification was reclassified from low-medium to low.

[43] Mr Smith appeared before the Board on 8 April 2013, and parole was declined. The Board noted more work was required for Mr Smith to demonstrate that he would be able to live and work in the community without posing undue risk to the public. However, the Board supported in principle his proposal for a gradual staggered reintegration, such as escorted releases and temporary absences.

[44] Between that Board appearance and his escape in 2014, Mr Smith appears not to have been involved in any formal treatment but continued to reside in a therapeutic unit. During this maintenance phase of his time at Te Piriti, Mr Smith engaged in reintegration opportunities including the Circle of Support and Accountability, and temporary releases. A Circle of Support and Accountability is a reintegration approach which provides support to high risk individuals serving indeterminate sentences. It consists of a group of people from the community who are informed of a prisoner's offending and particular risk factors. The group assists in supporting a prisoner transitioning from prison into the community. A temporary release is the release of a prisoner from the custody of Corrections, while still serving a prison sentence, and is a tool used to support a prisoner's reintegration unto the community. Mr Smith undertook a number of visits into the community, accompanied by officers to assist in his community reintegration. As part of the maintenance phase of the Te Piriti programme, he also attended weekly group sessions facilitated by a psychologist.

[45] In a psychological report to the Board dated 27 February 2014, Mr van Rensburg noted that Mr Smith had not been involved in any further formal treatment since his previous Board hearing but had continued to reside in a therapeutic unit and engage in the Circle of Support and Accountability. By this time, Mr Smith had gone on four temporary removals (four hours each), where he went into the community with custody officers to engage in reintegrative activities and on the fourth occasion he met with his support people at a café. He was then afforded three temporary releases (6, 8 and 12 hours respectively) to go out into the community

in the company of his support people, without custody staff in attendance. Mr van Rensburg noted that Mr Smith had "completed relevant treatment interventions available to him and … had demonstrated a commitment to prosocial attitude and behaviour change." Mr Smith was assessed as a high risk of general offending and a medium-high risk of sexual offending. Risk of violent offending was not specifically indicated.

[46] On 31 March 2014 Mr Smith was seen again by the Board, and parole was denied. It was recommended that Mr Smith prove himself in a wider range of situations, such as residing in a self-care unit and on release to work.

[47] In July 2014 Mr Smith was moved to Springhill Correctional Facility in order to further his reintegration progress, by implementing the Board recommendation that he be tested in a wider range of situations in the community. Mr Smith completed his first 72-hour temporary release to the home of his sponsor on 16 September 2014, and then absconded on his second 72-hour release on 6 November 2014.

[48] On 3 November 2014 (three days prior to his escape) Mr Smith was seen by his case manager. Her entry into the electronic system documented her contact with him and records "he said everything's going along smoothly and he's making good progress towards release".

Events 2015-2016: post-escape

[49] Following Mr Smith's escape and return to custody in November 2014, a psychological report dated 18 June 2015 was prepared by a registered clinical psychologist, Dr Wilson. He noted that Mr Smith's progress in his treatment for child sexual offending at Te Piriti was of high standard. However, he also noted that with the benefit of hindsight, his presentation as a compliant prisoner should not have been considered a reliable indicator of his future behaviour.

[50] Dr Wilson assessed Mr Smith as a high risk for general offending and instrumental violent offending, and a medium-high risk for child sexual offending. Dr Wilson recommended that Mr Smith engage in "specialist violence treatment that can also cover the beliefs supporting his dishonesty risk". Dr Wilson considered that

Mr Smith's underlying motivation to complete treatment could not be reliably assessed at that time, due to the outstanding charges and his maximum-security classification. Dr Wilson therefore recommended that Mr Smith's motivation to engage in treatment be assessed once those issues were resolved. Lastly, Dr Wilson identified a number of treatment needs with respect to sexual offending that were still outstanding, post-treatment. He suggested that, following completion of treatment for his behavioural attitudes towards violence, Mr Smith could then be assessed to determine if his insights into his sexual offending still required further intervention.

[51] On 2 December 2015, the Board issued a reserved decision following a hearing on 23 November 2015. At that hearing a number of legal arguments were made regarding the potential bias of panel members, a postponement order, and arbitrary detention. Mr Smith accepted that he required additional treatment for violence, but asserted that it should have been provided prior to his first parole hearing, and suggested that he could instead complete it in the community under monitoring. The Board declined parole and noted that Mr Smith had been on a rehabilitative pathway but had "squandered" it when he had escaped.

[52] On 24 May 2016 Mr Smith's security classification was reviewed and a reduction from maximum to high was approved. On 22 July 2016, Mr Smith was sentenced to two years and nine months' imprisonment, for escaping lawful custody and contravention of the Passport Act. This changed his PED to 22 June 2017.

[53] In September 2016 a Registered Senior Psychologist at Auckland Prison advised Mr Smith's case manager that he would be considered a high priority for violence related treatment, and that the initial stages would include assessment of motivation and suitability for group treatment. She noted that there were high volumes of high priority prisoners waiting for treatment and that the prioritisation involved considering those past their PED, those being released soon, and the Board's recommendations. No time frame was given, and it was considered unlikely that he would be seen in 2016.

[54] On 14 December 2016, Mr Smith's security classification was reduced to low-medium.

Events 2017-2018

[55] Mr Smith was seen in April 2017 for a further psychological assessment, by a Clinical Psychologist, Ms Bouwens. Mr Smith was assessed as a high risk for general, violent and sexual reoffending. Ms Bouwens also observed that although there had been no evidence of violence since 2005, Mr Smith's personality features and beliefs continued to influence his thinking and his behaviours. She recommended that Mr Smith complete "specialist violence treatment to address the remaining identified dynamic risk factors". She observed that this would depend on the assessed risk that other prisoners may pose towards him, and the prison's ability to safely manage him in such a setting. She recommended that if the group specialist treatment was not available to Mr Smith then he should engage in individual psychological treatment. Finally, she recommended that once the treatment for violence was completed, a further assessment should be undertaken to determine if there were any remaining treatment needs relating to his sexual offending.

[56] On 26 June 2017, Mr Smith appeared before the Board. Parole was again declined, with the Board finding "until the recommended intervention is completed within the prison structure, followed by the necessary period of re-integrative activity, risk will be undue."

[57] On 27 July 2017 Mr Smith was seen by a Registered Psychologist, Mr Symes, for individual psychological treatment. He engaged in 25 individual sessions with Mr Symes, terminating on 16 May 2018. The treatment was terminated because Mr Smith was transferred to Rimutaka Prison, to be closer to his family. I record here that Mr Smith wished to continue this counselling from Rimutaka Prison by way of audio-visual link.

[58] A report by Mr Symes dated 25 June 2018 documents that the treatment was undertaken to assist Mr Smith to develop and enhance victim empathy. Mr Smith acknowledged that he would also need to undertake a programme for violence in an STU, although he expressed concern about ending segregation (protective custody) and going into a mainstream prison environment in order to do so. It was noted that as a result of the intervention "Mr Smith should be able to better manage his behaviour

should he choose to do so and use the skills gained in treatment". Finally, Mr Symes also noted that Dr Wilson's 2015 report remained valid.

[59] Mr Smith was transferred to Rimutaka Prison on 30 May 2018. From July 2018, Mr Smith made several requests asking to be admitted to an STU for violent offending. Mr Smith was not eligible for entry into an STU for violent offending, due to Corrections' policy of excluding those with child sexual offending from the STUs for violent offending. In October 2018, Mr Symes wrote in support of an exemption to this policy, requesting that Mr Smith be considered for placement in the Puna Tatari STU for violent offending.

[60] On 6 November 2018 Mr Smith's case was reviewed by the Principal Psychologist of the Puna Tatari STU, Mr Whitehead. Mr Whitehead did not support an exemption for a number of reasons. First, the majority of the men in the STUs for violent offending hold negative beliefs about men who sexually abuse children, and Mr Whitehead held fears for Mr Smith's safety in that environment as a result. Secondly, the nature of the programme requires "offence mapping", where the prisoner discusses the circumstances, environment, and thoughts and feelings of the offender around the time of the offending, in detail in the group setting. Given the link between Mr Smith's child sexual offending and his violent offending, his offending would be intrinsically mapped together. As many of the men on the course had suffered child sexual abuse themselves it was considered unfair to expose them to the threat of further emotional trauma by being exposed to the details of Mr Smith's offending. Thirdly, Mr Whitehead found that in light of his post-treatment behaviour, Mr Smith might not have gained as much as he could have from the intervention at Te Piriti, due to his tendency to intellectualise the material and his ability to present as an extremely compliant and helpful prisoner.

Events 2019-2020

[61] A psychological report to the Board was prepared on 10 April 2019 by a Registered Psychologist, Ms Brown. Ms Brown reviewed the treatment Mr Smith had completed and concluded that the treatment he had received at Te Piriti was not of "sufficient length or intensity" to have addressed all the factors associated with his

sexual offending. Further, she found that his post-treatment behaviour indicated that he had "not yet demonstrated the appropriate level of behavioural change expected of someone who was deemed to have successfully completed treatment." She recommended that Mr Smith be considered for an opportunity to complete the intensive group-based treatment for child sexual offending a second time. Finally, as treatment in an STU for violent offending had been declined, she recommended that such intervention should be provided to Mr Smith on an individual basis and should also address Mr Smith's complex personality structure. As an overarching comment, she noted that behavioural change should be considered across time and in different contexts and should be interpreted with caution.

[62] Mr Smith was seen by the Board on 17 May 2019. They denied him parole, accepting that Mr Smith needed to repeat his group -based treatment for child sexual offending.

[63] On 7 June 2019 Mr Smith's case was put forward to the prisoner progress placement review panel, for consideration for referral to the Kia Marama STU at Rolleston Prison, for child sexual offending treatment. The panel considered Mr Smith's case on 20 August 2019, and on 2 September wrote to Mr Smith offering him the opportunity to participate in the programme. It was anticipated that he would be transferred to Rolleston Prison in late 2019 or early 2020 to allow for a period of settling in, prior to an assessment of his suitability for participation in the treatment programme.

[64] On 25 March 2020 New Zealand went into lockdown as a result of COVID-19, and all prisoner movements were stopped. Mr Smith remains in Rimutaka Prison awaiting transfer to Rolleston. When pressed, Ms Garrett was unable to confirm precisely when that may occur.

Submissions

Mr Smith

[65] Mr Smith submitted the United Kingdom's statutory context is sufficiently comparable to New Zealand's, and this Court should therefore follow the approach of

the United Kingdom and declare the existence of an implied public law duty to provide rehabilitation. He relied on the following domestic statutory provisions: Sentencing Act 2002, s 7(1)(h); Corrections Act 2004, ss 5(1)(b)-(c), 6(1)(h), and 52; Parole Act 2002, ss 7(1), 7(2)(a) and (c), 7(3)(a)-(b), 21(1), 21(2)(a)-(c), and 28; and BORA, ss 22, 23(5), and 27. He also relied on two international instruments: rr 91 and 92 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the UN Rules);[1] and art 10(3) of the International Covenant on Civil and Political Rights (ICCPR).[2]

[66] Mr Smith submitted that he has been denied access to rehabilitation on five grounds:

(a) in the delay it took between his incarceration and the provision of the treatment at Te Piriti for child sexual offending;

(b) that such treatment as was provided at Te Piriti was a failure because it was not of sufficient therapeutic length or intensity;

(c) that he has been denied any opportunity to address his violent offending;

(d) that since his escape he has been effectively denied access to rehabilitation; and

(e) that he is stuck in circular process which renders his appearances before the Board utterly futile. To use his terminology, he believes Corrections' intention to provide him with rehabilitation opportunities is a complete charade.

[67] In summary, Mr Smith submitted that as a result of these denials to access rehabilitation, Corrections have: arbitrarily detained him, in breach of s 22 of BORA;

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1 *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* GA Res 70/175 (2015).

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

and have denied him his aspirational and emotional rights to hope and to dignity, in breach of s 23(5) of BORA.

[68] For the sake of completeness and fairness to Mr Smith, I record that Mr Smith's complaints only relate to the periods during which his own behaviour did not preclude his access to rehabilitative programmes. By that, I take him to mean the periods where he was facing unresolved charges relating to fraud, and later his escape. I also take him to mean that he does not consider his detention to be arbitrary, when he was serving the punitive portions of his sentences.

Corrections

[69] Corrections submitted that ss 5, 6 and 52 of the Corrections Act do not provide Mr Smith with a right to specialist, rehabilitative treatment. Rather they submitted these sections confer a duty on the Chief Executive to provide rehabilitative courses to prisoners, and a discretion as to whom and when they are provided. Mr Smith's entitlement is that this discretion must be exercised reasonably in his case.

[70] Corrections also submitted that the freedom from arbitrary detention that is affirmed by s 22 of BORA does not give rise to a right to receive specialist rehabilitative treatment.

[71] Whether it arises under s 52 of the Corrections Act or s 22 of BORA, Corrections submitted such entitlement as Mr Smith enjoys:

(a) is an entitlement to be provided with such rehabilitative opportunities as are reasonable in the circumstances; and

(b) what is reasonable in the circumstances will depend not only on the needs of the particular prisoner, but also on the resources available to the Chief Executive and the competing demands on those resources.

[72] Furthermore, they submitted that in applying the law to the facts of this case, Mr Smith has been provided with reasonable opportunities for rehabilitation

throughout his sentence and that Corrections' treatment of him has not given rise to any breach of BORA.

The current state of the law in New Zealand on an implied public law duty

The statutory framework

[73] Section 7 of the Sentencing Act sets out the purposes of sentencing offenders, including "to assist in the offender's rehabilitation or reintegration".[3] Under s 102 of the Sentencing Act, a sentence of life imprisonment must be imposed for murder unless to do so would be manifestly unjust. When the Court imposes a life sentence it must, unless s 86E applies, impose a minimum period of imprisonment at least 10 years. The PED is the date after which the prisoner has finished serving the minimum period of their life sentence. The release of the prisoner must be considered as soon as practicable after that date.

[74] Section 7 of the Parole Act 2002 sets out the principles which must guide the Board when considering release, and the "paramount consideration" in every case is the safety of the community.[4] Other principles that guide the Board include that offenders must not be detained any longer than is consistent with the safety of the community,[5] and decisions must be made on the basis of all relevant information available to the Board.[6] When considering the risk an offender poses, the Board must consider their likelihood of further offending, and the nature and seriousness of any likely subsequent offending.[7]

[75] Section 21 of the Parole Act requires the Board to consider an offender for release on parole, as soon as practicable after their PED. The Board must consider for parole every offender who is detained in a prison at least once every two years after the prisoner's last parole hearing, unless certain exceptions apply.[8] Section 28 enables the Board to direct that a prisoner is released on parole, but "only if it is satisfied on

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3 Sentencing Act 2002, s 7(1)(h).
4 Parole Act 2002, s 7(1).
5 Section 7(2)(a).
6 Section 7(2)(c).
7 Section 7(3).
8 Section 21(2).

reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community".

[76] Section 5 of the Corrections Act 2004 sets out the purposes of the Corrections system, which include: ensuring sentences are administered in a safe, secure, humane and effective manner;[9] providing for Corrections facilities to be operated in accordance with the rules and regulations made under the Act, that are based on the UN Rules;[10] and assisting in the rehabilitation of offenders and their reintegration into the community.[11] Section 6 of the Act sets out the principles guiding the corrections system, including that prisoners must be given access to activities that may contribute to their rehabilitation and reintegration into the community.[12]

[77] Section 52 of the Corrections Act provides:

> The chief executive must ensure that, to the extent consistent with the resources available and any prescribed requirements or instructions issued under section 196, rehabilitative programmes are provided to those prisoners sentenced to imprisonment who, in the opinion of the chief executive, will benefit from those programmes.

[78] According to s 3, "rehabilitative programme":

> (a) means a programme designed to reduce reoffending by facilitating the rehabilitation of prisoners sentenced to imprisonment and their reintegration into society; and
>
> (b) includes any medical, psychological, social, therapeutic, cultural, educational, employment-related, rehabilitative, or reintegrative programme

[79] Section 196 of the Corrections Act provides that the Chief Executive may issue guidelines and instructions on the exercise of powers under the Act (or regulations) or relating to procedures to be followed or standards to be met in the management of prisons.

[80] Section 22 of BORA provides "[e]veryone has the right not to be arbitrarily arrested or detained". Section 23(5) provides "[e]veryone deprived of liberty shall be

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9 Corrections Act 2004, s 5(1)(a).
10 Section 5(1)(b).
11 Section 5(1)(c).
12 Section 6(1)(h).

treated with humanity and with respect for the inherent dignity of the person." Mr Smith also relies on s 27 of BORA, which provides for the right to justice: the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of a person's rights, obligations, or interests protected or recognised by law; the right to apply for judicial review; and the right to bring civil proceedings against the Crown, heard according to law, in the same way as civil proceedings between individuals.

Relevant international obligations

[81] The relevant articles of the ICCPR provide:

> **Article 9**
>
> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> …
>
> **Article 10**
>
> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> …
>
> 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. …

[82] For ease of reference, I note the following comparisons can be made:

(a) Section 22 of BORA is broadly consistent with art 9(1) of the ICCPR.[13]

(b) Section 23(5) of BORA gives effect to art 10(1) of the ICCPR.[14]

(c) Section 52 of the Corrections Act gives effect to the obligations in art 10(3) of the ICCPR.[15]

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13 *Miller v New Zealand Parole Board* [2010] NZCA 600 at [44].
14 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.
15 *Miller v New Zealand Parole Board*, above n 13, at [143].

[83] New Zealand has incorporated the UN Rules into the purposes of the corrections system, through s 5(b) Corrections Act. Mr Smith relied specifically on rr 91 and 92:

> **Treatment**
>
> **Rule 91**
>
> The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.
>
> **Rule 92**
>
> 1. To these ends, all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his or her social and criminal history, physical and mental capacities and aptitudes, personal temperament, the length of his or her sentence and prospects after release.
>
> …

Relevant domestic case law

[84] In 2010 the Court of Appeal in *Miller v New Zealand Parole Board* considered an argument that New Zealand was in breach of its obligation under art 10(3) of the ICCPR to provide appropriate treatment for prisoners, and that the detention of prisoners for public safety reasons was arbitrary for the purposes of art 9(1) of the ICCPR and s 22 of BORA.[16] The case involved two prisoners, both sentenced to preventive detention.

[85] The Court determined that art 10(3) is given effect by s 52 of the Corrections Act.[17] In doing so, it noted:

> [143] Section 52 is explicitly conditional whereas art 10(3) is not. We are, of course, bound by s 52 and not art 10(3). But in any event, we think that art 10(3) cannot be sensibly construed as imposing an obligation to provide "treatment" irrespective of either cost or likely benefit.

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16 *Miller v New Zealand Parole Board*, above n 13.
17 At [143].

[86] The Court of Appeal considered it "critical" that there were no targeted programmes which had been shown to be successful in treating adult sex offenders.[18] Accordingly, the non-provision of such programmes was "unremarkable and [gave] rise to no legal concerns."[19] Given the lack of effective programmes available, therapeutic programmes in that case were "not of the make or break significance" which counsel for the prisoners attributed to them.[20] In particular, the Court noted the Board's decision-making in relation to prisoners serving sentences of preventive detention were not primarily premised on completion of particular therapeutic programmes.[21] The Court observed that therapeutic programmes for those who offend sexually in relation to children have been shown to be effective in reducing recidivism,[22] and noted:

> [155] It is important to keep in mind that the two appellants are adult sex offenders and the particular considerations which may apply to child sex offenders are thus not relevant. If it is the case that for child sex offenders, release on parole is unlikely unless and until an appropriate programme has been completed, a policy of deferring the provision of such programmes until after the offenders' parole eligibility dates could have the effect of improperly or unfairly deferring the practical ability to obtain parole.

[87] The Court of Appeal distinguished the United Kingdom cases relating to sentences of imprisonment for public protection (IPP), a form of indeterminate sentence:

> [160] The IPP system had resulted in a large number of offenders receiving indeterminate sentences based on criteria which did not require particularly individualised risk assessments at the time of sentencing. Many had committed offences of only moderate seriousness (as indicated by the short minimum terms). Such a system was only rational if there was a system in place under which those offenders who did not pose an undue risk to the community (of whom there must have been many) could be released once they had served their minimum terms. But despite this, there had been a general failure on the part of the government to provide sufficient resources to make that practicable.
>
> [161] In contradistinction, Messrs Miller and Carroll were subject to very individualised risk assessment when sentenced, had committed serious offences and thus faced substantial minimum periods of imprisonment and throughout their sentences received treatment. The fact that they are still in prison is not associated with any failure to provide treatment or any related

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18 At [156].
19 At [156].
20 At [157].
21 At [157].
22 At [147].

> inability of the Parole Board to make considered and well-informed public safety assessments. Instead it is because they are still seen by the Parole Board as posing an undue risk to the community if released and this despite Messrs Miller and Carroll having had access to a wide range of treatment options and the Board having vast amounts of information about the likelihood of them re-offending.

[88] The Court did not expressly address the argument arising under s 22 of BORA, of arbitrary detention as a result of the claimed failure to provide rehabilitation. However, it did address the distinct argument that the prisoner was subject to arbitrary detention within the meaning of s 22, on the basis that the Board was not a 'court', as required by s 22 read in the light of art 9(1) of the ICCPR. The Court's response to that argument was:

> [69] As is apparent, it is yet to be established that the New Zealand parole system does not meet the requirements of art 9(1) and (4).
>
> [70] In any event, we are of the view that it would not be open to this Court to provide a direct remedy based on the alleged arbitrariness of the detention. This is because the courts must act in a way which accords with the statutory framework provided by the [Parole Act]. In practical terms, this means that a detention is not arbitrary where it was in accord with the sentence imposed by the sentencing judge and the required public safety assessments had been carried out by the Parole Board in a way which accords with the parole legislation.

[89] Mr Smith relied on the 2016 High Court decision in *Taylor v Chief Executive of Department of Corrections* in 2016, where Ellis J considered a judicial review of multiple decisions of Corrections, in which a prisoner alleged a failure to provide rehabilitation had resulted in his arbitrary detention.[23] Ellis J rejected the notion of a public law duty in relation to prisoners subject to determinate sentences, but after considering the United Kingdom authorities, she specifically distinguished the position of prisoners facing indeterminate sentences:

> [53] In other words, the total length of Mr Taylor's sentence has been fixed by the sentencing Court. It is for this reason that, even if he is never granted parole and remains in prison for the whole of that sentence, his detention will not become arbitrary or unlawful. By contrast with prisoners serving indeterminate sentences (here, either life or preventive detention) no part of his sentence (as opposed to his early release) is left for later decision by the executive (the Parole Board). Accordingly any indigenous equivalent to the art 5(4) right to test the legality of his continued detention cannot apply. Nor can any duty that is ancillary to such a right.

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23 *Taylor v Chief Executive of Department of Corrections* [2016] NZHC 1805.

[90] She then went on to consider the argument that s 52 of the Corrections Act gave rise to a duty to provide the prisoner with rehabilitative treatment, and after noting the aspirational and contingent nature of the relevant provisions, held:

> [56] Putting to one side those prisoners who are subject to indeterminate sentences (discussed above) there can, therefore, be no absolute right to access rehabilitative programmes of a particular kind at a particular time. There can, in my view, be no question of s 52 imposing either a private or public law duty to offer rehabilitative programmes to a particular prisoner; the most that can be said is that the chief executive (and his delegates) have a discretion in that regard. None of the other references to rehabilitation in the [Corrections Act] (or s 7(1)(h) of the Sentencing Act 2002) alters that position.
>
> [57] In light of the wider statutory context, however, I am prepared to proceed on the basis that s 52 constitutes (or gives rise to) a statutory power of decision, namely the power to decide whether to permit a particular prisoner to engage in a particular rehabilitative programme.
>
> [58] The starting point in terms of any application for review of the exercise of that power is that whether or not Mr Taylor or any other prisoner should be permitted to participate in a programme such as the STURP is inherently a matter for evaluation and judgment. The Court's supervisory jurisdiction does not generally permit it to engage in a rehearing of the merits of an impugned decision. The mere fact that the Court might consider that a better decision could have been made on the facts does not mean that the application for review should succeed. Failure by a decision-maker to consider a relevant consideration is only fatal if the consideration can be said to be expressly or impliedly mandatory. It is trite that the unreasonableness threshold is a very high one. ….

[91] Although Ellis J distinguished between prisoners facing determinate and indeterminate sentences, the majority of the cases in this area (including those relating to prisoners facing indeterminate sentences) show the High Court has treated s 52 of the Corrections Act as the source of the duty of Corrections to provide rehabilitation, and the appropriate challenge of the exercise of that duty is by way of judicial review. In *Ericson v Chief Executive, Department of Corrections* in 2015, a prisoner sentenced to life imprisonment sought to judicially review Corrections' alleged failure to provide programmes to support his reintegration into the community, thereby preventing him from obtaining parole.[24] He sought a writ of mandamus ordering Corrections to provide him with home leave, day parole, release to work, and counselling; or release from detention on the basis that his detention was arbitrary. In dismissing the claim,

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[24] *Ericson v Chief Executive, Department of Corrections* [2015] NZHC 1157.

Dunningham J described s 52 as imposing a "general duty" to provide rehabilitative programmes, which does not confer a right on prisoners.[25]

[92] In *Genge v Chief Executive, Department of Corrections* in 2018, a prisoner sentenced to life imprisonment brought an application for judicial review, seeking a declaration he had been arbitrarily detained, as well as release and damages.[26] One basis of his claim was that Corrections had failed to provide interventions and rehabilitative programmes to accommodate his specific needs. As a result, he claimed he was denied the opportunity to present to the Board with a realistic prospect of being granted parole, and his detention had become unlawful and arbitrary. Clark J treated s 52 as imposing an "obligation" on Corrections to provide access to rehabilitation.[27] Clark J found no failure to provide rehabilitation, so was not required to determine the subsequent issue of arbitrary detention. However, she did consider some of the international materials, including from the United Nations Human Rights Committee (UNHRC), and found the determinant in the prisoner's delayed release was his own unwillingness to engage in certain treatment.[28]

[93] In *Wilson v Department of Corrections* in 2018, a prisoner sentenced to preventive detention brought various claims against various government agencies, in which his key complaint was that he had been prevented from engaging in rehabilitative programmes that would allow him to be released.[29] In the context of a strike-out application, Cooke J referred to the "legal duty" in s 52, and granted leave for the prisoner to amend his statement of claim to pursue a claim for judicial review against Corrections in relation to access to rehabilitation programmes.[30] Cooke J held:

> [33] Considered in light of the other authorities referred to above, the report of the [UNHRC] might suggest that this Court should be more open to exercise greater scrutiny of decisions made by [Corrections] concerning the availability of rehabilitation programmes, particularly when they are effectively necessary prerequisites to release for a prisoner [who] is facing a sentence of preventive detention. It is arguable that the requirements for a lawful and non-arbitrary detention need to be considered in light of the duty in s 52, interpreted and applied in light of the international materials.

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25 At [21].
26 *Genge v Chief Executive, Department of Corrections* [2018] NZHC 1447.
27 At [9].
28 At [71].
29 *Wilson v The Department of Corrections* [2018] NZHC 2977.
30 At [30].

> [34] I say no more than these points are arguable. But given that background, in my view it would be wrong to strike out Mr Wilson's claims in totality. As presently formulated, none of Mr Wilson's claims involve judicial review challenges precisely on that basis. But it is the theme running through his challenge, and complaints based on an alleged failure to conform with the duty in s 52 are expressly contained in his tort claims. … Given the nature of Mr Wilson's complaints, he can argue that in light of s 52:
>
> > (a) the failure to offer rehabilitative programmes, and his withdrawal from the Kia Marama programme, is unreasonable/unlawful as it is inconsistent with the duty in s 52;
> >
> > …

The international jurisprudence

United Nations Human Rights Committee

[94] In its *General comment No. 35* on the right to liberty and security of the person under art 9 of the ICCPR, the UNHRC commented that while arts 7 and 10 primarily address the conditions of detention, detention may become arbitrary within the meaning of art 9(1) if the manner in which a prisoner is treated does not relate to the purpose for which they are ostensibly being detained.[31] The UNHRC also noted the need to provide for rehabilitation:

> [21] When a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals, then once the punitive term of imprisonment has been served, to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society…

[95] Subsequent to the Court of Appeal's decision, the prisoners in *Miller* took their complaint to the UNHRC, which issued a decision in 2017.[32] Most relevant to the present case was the claim that New Zealand failed to provide timely rape-oriented rehabilitation treatment to the prisoners before they first appeared before the Board

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31 Human Rights Committee *General comment No. 35: Article 9 (Liberty and security of person)* CXII CCPR/C/GC/35 (2014) at [14].

32 United Nations Human Rights Committee Views: Communication No 2502/2014 121 CCPR/C/121/D/2502/2014 (7 November 2017) [*Miller v New Zealand*].

(which hindered their ability to be granted parole), in breach of arts 9(4) and 10(3) of the ICCPR. The UNHRC noted the duty of the state, in cases of preventive detention, to "provide the necessary assistance that would allow detainees to be released as soon as possible without being a danger to the community."[33] The UNHRC found no breach of the ICCPR on this ground, noting, inter alia:[34]

(a) the state's position that the prisoners were not offered specific treatment programmes for adult sex offenders, because at the time none had been proven effective;

(b) the prisoners had received some rehabilitative treatment; and

(c) completion of rape-oriented rehabilitative programmes was not a "critical element" in the Board's decision-making.

[96] However, the UNHRC did find other breaches of the ICCPR, and provided some commentary that is useful in the present case. The UNHRC noted its *General comment No. 35*, according to which:[35]

> [a]n arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of 'arbitrariness' is not to be equated with 'against the law,' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.

[97] The UNHRC also noted that preventive detention must be subjected to specific limitations in order to meet the requirements of art 9, including that, in order to avoid arbitrariness, it must be "justified by compelling reasons, and regular periodic reviews by an independent body must be assured to determine the continued justification of the detention."[36] The UNHRC noted preventive detention conditions must "be distinct from the treatment of convicted prisoners serving a punitive sentence and be aimed at the [prisoners'] rehabilitation and reintegration into society".[37] The UNHRC found

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33 At [8.2].
34 At [8.2].
35 At [8.3]; citing *General comment No. 35: Article 9 (Liberty and security of person)*, above n 31, at [12].
36 At [8.3].
37 At [8.3]; citing *General comment No. 35: Article 9 (Liberty and security of person)*, above n 31, at [21].

that the conditions and length of the prisoners' preventive detention raised "serious concerns as to whether the requirements of reasonableness, necessity, proportionality, and continued justification and independent review that are contained in general comment No. 35 [had] been met."[38]

[98] The UNHRC held there had been a breach of arts 9(1) and 10(3) of the ICCPR:[39]

> 8.5 The Committee considers that as the length of preventive detention increases, the State party bears an increasingly heavy burden to justify continued detention and to show that the threat posed by the individual cannot be addressed by alternative measures. As a result, a level of risk which might reasonably justify a short-term preventive detention, may not necessarily justify a longer period of preventive detention. The State party also failed to show that no other, less restrictive means were available to the aim of protecting the public from the [prisoners] which would not require further extending their deprivation of liberty.
>
> 8.6 The Committee further recalls that article 9 of the Covenant requires that preventive detention conditions be distinct from the conditions of convicted prisoners serving punitive sentences and be aimed at the detainee's rehabilitation and reintegration into society. In this regard, the Committee notes the State party's position that the purposes of the detention remain the same. It also notes that the detention remains punitive, regardless of whether an individual is serving the fixed or preventive detention portion of his or her sentence.
>
> ...
>
> Based on the information made available to it, the Committee considers that the [prisoners'] term of preventive detention has not been sufficiently distinct from their terms of imprisonment during the punitive part of their sentence (prior to eligibility to parole), and has not been aimed, predominantly, at their rehabilitation and reintegration into society as required under articles 9 and 10(3) of the Covenant. Under these circumstances, the Committee considers that the length of the authors' preventive detention, together with the State party's failure to appropriately alter the punitive nature of the detention conditions after the expiration of their period of non-eligibility for parole, constitutes a violation of articles 9(1) and 10(3) of the Covenant.

United Kingdom

[99] Mr Smith's argument for the ancillary public law duty relied heavily on the United Kingdom Supreme Court (UKSC) decision in *R (on the applications of Haney*

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38 At [8.3].
39 At [8.5]-[8.6] (footnotes omitted).

& Ors) v Secretary of State for Justice,[40] which has since been reversed by the decision in *Brown v Parole Board for Scotland*.[41] In *Brown*, the UKSC adopted the approach of the European Court of Human Rights (ECtHR) in *James v United Kingdom* (which it had previously declined to follow in *Haney*).[42]

[100] These cases arose in the context of the European Convention on Human Rights (ECHR), which includes the following provisions:[43]

> **ARTICLE 3**
>
> **Prohibition of torture**
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> …
>
> **ARTICLE 5**
>
> **Right to liberty and security**
>
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> …
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

[101] I note art 5(1)(a) is similar to s 22 of BORA.

[102] In 2012, the ECtHR in *James v United Kingdom* held that a failure to properly progress indeterminate prisoners (through the provision of rehabilitation) to release after they were eligible for release made the detention arbitrary, and therefore

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40 *R (on the applications of Haney & ors) v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344.

41 *Brown v Parole Board for Scotland* [2017] UKSC 69, [2018] AC 1.

42 *James v United Kingdom* (2013) 56 EHRR 12.

43 As set out in sch 1 to the Human Rights Act 1998 (UK).

unlawful, in breach of art 5(1).[44] After finding that rehabilitation was a purpose of detaining prisoners for an indeterminate sentence, the ECtHR found that art 5(1)(a) required that indeterminate prisoners eligible for parole were to be given "a real opportunity for rehabilitation".[45]

[103] In 2014, the UKSC in *Haney* did accept that the purpose of an indeterminate sentence includes rehabilitation, and there is an implicit duty in art 5 to provide prisoners with the opportunity to rehabilitate themselves.[46] However, the UKSC rejected the ECtHR's reasoning that this duty could be found in the express language of art 5(1), and instead found that art 5(4) "gives rise to an ancillary duty on the state, breach of which does not directly impact on the lawfulness of detention."[47]

[104] The UKSC reconsidered its position in 2017, in *Brown*. The UKSC departed from its decision in *Haney*, and instead adopted the approach of the ECtHR in *James v United Kingdom*.[48] The UKSC therefore held art 5(1)(a) is the source of the duty to provide the opportunity for rehabilitation. The UKSC noted the threshold for establishing arbitrary and unlawful detention in violation of art 5(1)(a) is high,[49] and endorsed the "realism and flexibility" of the approach of the ECtHR.[50] In emphasising the high threshold, the UKSC noted art 5 does not:[51]

> entitle the court to substitute, with hindsight, its own view of the quality of the management of a prisoner and to characterise as arbitrary detention any case which it concludes might have been better managed.

[105] In finding that the prisoner in *Brown* had been provided with a real opportunity for rehabilitation, the UKSC held prison authorities could not be criticised for allocating places on rehabilitative courses in accordance with a "consistent scheme of prioritisation."[52] In relation to the content of the duty, the UKSC held:[53]

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44 *James v United Kingdom*, above n 42.
45 At [209].
46 *R (on the applications of Haney & ors) v Secretary of State for Justice*, above n 40, at [36].
47 At [37].
48 *Brown v Parole Board for Scotland*, above n 41, at [44].
49 At [27], [34] and [45].
50 At [28].
51 At [29].
52 At [83].
53 At [83], citing *R (on the applications of Haney & ors) v Secretary of State for Justice*, above n 40, at [60].

> It requires that an opportunity must be afforded to the prisoner which is reasonable in all the circumstances, taking into account, among all those circumstances, his history and prognosis, the risks he presents, the competing needs of other prisoners, the resources available and the use which has been made of such rehabilitative opportunity as there has been.

[106] The UKSC held that whether the obligation arises under art 5(1) or is ancillary to art 5(4) affects the substance of the obligation.[54] The UKSC held that its reasoning in *Haney* had resulted in the imposition of a duty which was more demanding than the duty imposed by the ECtHR, because in *Haney*:[55]

(a) the UKSC had treated the obligation as applying throughout a prisoner's entire detention, whereas under the approach of the ECtHR it is only after a prisoner is eligible for parole that questions of whether their continued detention is arbitrary, and therefore unlawful;[56]

(b) the standard of the obligation was reasonableness, as opposed to the ECtHR's more stringent standard of arbitrariness; and[57]

(c) the UKSC had treated the state's assessment of what was reasonable as conclusive evidence of whether the obligation had been fulfilled, compared to the more stringent approach taken by the ECtHR (which held that a delay, even if that delay was at odds with what the state considered to be a reasonable opportunity to demonstrate safety for release, was insufficient to meet the threshold for establishing arbitrariness).[58]

[107] Mr Smith also relied on United Kingdom authorities relating to a right to hope. The ECtHR has considered the position of prisoners serving a life sentence, subject to a 'whole life order' (meaning they are required to serve the entire life sentence, without the possibility of parole), and their rights under art 3 of the ECHR. The primary principle relevant in the present case is that art 3 of the ECHR requires a life sentence

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54 At [38].
55 At [42].
56 At [39].
57 At [40].
58 At [41].

to be "reducible de jure and de facto, meaning that there must be both a prospect of release for the prisoner and a possibility of review."[59] The ECtHR in *Vinter* held it would be incompatible with human dignity to deprive a prisoner of their liberty, without offering at least some chance of regaining their freedom.[60] The ECtHR described this as a "right to hope", the denial of which would be to deny a prisoner of "a fundamental aspect of their humanity and, to do that, would be degrading."[61]

Is there an implied public law duty to provide rehabilitation?

[108] Having considered the New Zealand authorities above, I acknowledge the Court in *Taylor* left open the question of whether a prisoner serving an indeterminate sentence might have a right to rehabilitative treatment, arising from s 22 of BORA. I also acknowledge the position of the United Kingdom and the ECtHR that art 5(1) (similar to s 22 of BORA) gives rise to a duty to provide rehabilitation. I also consider there are indications from the jurisprudence of the UNHRC that art 9(1) of the ICCPR imposes a similar obligation.

[109] However, I do not find it appropriate for this Court to declare the implied public law duty Mr Smith seeks, for the following reasons:

(a) Parliament has expressly provided for the rehabilitative needs of prisoners in s 52 of the Corrections Act;

(b) in light of s 52, an implied public law duty is not necessary; and

(c) an implied public law duty creates a distinction between prisoners facing determinate and indeterminate sentences.

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59 *Hutchinson v United Kingdom* (App No 57592/08), (2017) 43 BHRC 667 (ECtHR) at [42]; affirming *Vinter v United Kingdom* (App Nos 66069/09, 130/10 and 3896/10), (2013) 34 BHRC 605 (ECtHR).

60 *Vinter v United Kingdom*, above n 59, at [113].

61 *Vinter v United Kingdom*, above n 59, per the concurring opinion of Judge Power-Forde.

Parliament has expressly provided for the rehabilitative needs of prisoners in s 52 of the Corrections Act

[110] BORA is to be interpreted in the light of New Zealand's obligations under the ICCPR. However, in the context of complaints about the Board in *Miller*, the Court of Appeal was "of the clear opinion that the ICCPR does not give rise to rights which can be enforced directly" by prisoners.[62] The Court also held that New Zealand courts do not give declarations of non-compliance with the ICCPR,[63] and noted that while New Zealand courts "naturally would seek to avoid an outcome which is not in conformity with the ICCPR … the ICCPR is of interpretive significance only and it is not directly applicable as part of New Zealand law."[64] The Court also noted that the interpretive assistance provided by the ICCPR is "at least affected by the particular way in which NZBORA and the parole legislation are structured."[65] When discussing ss 22, 23(1)(c) and 27 of BORA, the Court also noted that art 9 of the ICCPR was not fully replicated in BORA.[66]

[111] In light of that, I note that although BORA is intended to affirm New Zealand's commitment to the ICCPR, Parliament has not incorporated the express language of art 10(3) in BORA itself. Instead, this obligation is incorporated into the Corrections Act, in s 52.[67]

An implied public law duty is not necessary

[112] The nature of the right recognised by the UKSC and the ECtHR is of a highly qualified nature: it arises only after a prisoner is eligible for parole; imposes an obligation simply to provide the prisoner reasonable opportunities for rehabilitation; what is reasonable must depend on the existing resources and competing demands on those resources; and in determining what is reasonable, a court should not adopt a rigid approach and should not substitute its judgment for those of the professionals tasked with managing prisons.

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62 *Miller v New Zealand Parole Board*, above n 13, at [13].
63 At [19].
64 At [49].
65 At [49].
66 At [42]-[43].
67 At [143].

[113] The adoption of this approach may therefore be thought to provide Mr Smith with no greater practical entitlement to rehabilitative opportunities to that which he enjoys under s 52.[68] The test, in either case, is one of the reasonableness of the approach taken by the Chief Executive in addressing Mr Smith's rehabilitative needs.

[114] I also consider caution needs to be exercised in adopting the approach of other jurisdictions, especially given this Court is bound by the Court of Appeal's decision in *Miller*. In the present case, I note in particular that the United Kingdom's approach to the duty to provide rehabilitation arose in the context of IPPs, the difficulties of which were noted by the Court of Appeal.[69] I also note that the statutory framework in the United Kingdom is different from New Zealand's and does not appear to have an express provision analogous to s 52 of the Corrections Act.

A distinction between prisoners facing determinate and indeterminate sentences

[115] The United Kingdom approach involves drawing a distinction between prisoners serving determinate and indeterminate sentences, which is not meaningful in the context of New Zealand's domestic legislation. Under the Parole Act, once a prisoner reaches their PED, they must be released unless to do so would give rise to an undue risk to the public. This is true of prisoners serving both determinate and indeterminate sentences; post PED, public safety is the only justification for detention. I do not consider it appropriate to declare that a prisoner who is serving an indeterminate sentence should, following the expiry of their PED, have a right to rehabilitative treatment whilst another prisoner serving a long but determinate sentence has no such right.

[116] Whilst there is, as the international jurisprudence makes clear, a particular need for vigilance to ensure that prisoners serving an indeterminate sentence only remain in prison as long as public safety requires it, Parliament has provided that this principle also applies to prisoners serving determinate sentences. The only difference between the two categories of prisoners is that Parliament has determined that for certain prisoners, the public safety portion of the sentence should be of indefinite length.

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68 As outlined below at [120]-[123].

69 *Miller v New Zealand Parole Board*, above n 13, at [160].

[117] Additionally, holding that prisoners serving an indeterminate sentence enjoyed a right to rehabilitation under s 22 of BORA would have the effect of providing greater rights for those serving sentences for the gravest of crimes compared with other prisoners. This is not only unfair in itself but may have negative implications on decisions as to the allocation of resources between prisoners that the Chief Executive must make under s 52.

Mr Smith's entitlement to rehabilitative treatment under s 52 of the Corrections Act

[118] As to Mr Smith's specific complaint against Corrections, I consider the appropriate approach is to consider it as a judicial review of Corrections' decisions in discharging its obligations under s 52. Although I have declined to declare the existence of the public law duty Mr Smith argued for, I do acknowledge the suggestion of Cooke J that in light of the authorities discussed above, in particular the criticisms of the UNHRC in *Miller v New Zealand*, this Court should be more open to exercising greater scrutiny of decisions made by Corrections concerning the availability of rehabilitation programmes, particularly when they are effectively necessary prerequisites to release for a prisoner is facing a sentence of preventive detention.[70] However, that does not necessarily confer an absolute right to treatment on Mr Smith, and there is a limit to this Court's ability to review the quality of the treatment provided.

[119] I note the formal burden of proof rests on Mr Smith to make out the grounds of review to support his claim.

[120] The High Court authorities discussed above have held ss 5, 6 and 52 of the Corrections Act were not intended to confer on the prisoner the right to rehabilitative treatment.[71] Rather, they confer a duty on the Chief Executive to provide rehabilitative programmes for prisoners. Section 52 makes clear that the provision of rehabilitative courses to a particular prisoner is within the discretion of the Chief Executive. Mr Smith's entitlement is that this discretion is exercised reasonably in his case.

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70 *Wilson v The Department of Corrections*, above n 29, at [33].

71 *Ericson v Chief Executive, Department of Corrections*, above n 24; *Taylor v Chief Executive of Department of Corrections*, above n 23; *Genge v Chief Executive, Department of Corrections*, above n 26.

[121] The purposes and principles of the Corrections Act which Mr Smith relies on are consistently qualified, and are to be given effect where appropriate, "so far as is reasonable and practicable", and "within the resources available",[72] and the exercise of the discretion in s 52 is explicitly conditional.[73] The duty in s 52 is subject to:

(a) resources available;

(b) requirements or instructions issued under s 196 of the Corrections Act, including instructions or guidelines relating to procedures in the management of corrections prisoners; and

(c) the opinion of the Chief Executive about who will benefit from the programmes.

[122] Therefore, consideration of whether the duty was reasonably exercised in a particular case must take into account the resources available to the Chief Executive and the competing pressures on those resources for the treatment of other prisoners, as well as the particular circumstances of the prisoner.

[123] The duty under s 52 may be informed by the principles to be found in art 9(1) of the ICCPR and other instruments of international law, and the recognition of the principle of rehabilitation may be found elsewhere in domestic legislation. However, as the Court of Appeal in *Miller* made clear, Parliament has chosen to give expression of those principles through ss 5, 6 and 52 of the Corrections Act and it is the words of those sections which define the extent of the duties of the Chief Executive and any entitlement that Mr Smith enjoys. That does not include an absolute right to access rehabilitative treatment.

Analysis of Mr Smith's case

[124] **[Redacted]**

[125] **[Redacted]**

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72 *Genge v Chief Executive, Department of Corrections*, above n 26, at [7].
73 *Miller v New Zealand Parole Board*, above n above n 13, at [143].

[126] **[Redacted]**

[127] **[Redacted]**

[128] **[Redacted]**

[129] **[Redacted]**

[130] **[Redacted]**

Has Corrections failed to provide Mr Smith with rehabilitative treatment opportunities?

[131] Mr Smith alleges an overall failure by Corrections to provide rehabilitative treatment to him. More specifically, he alleges that: he has never received any specialist treatment for his violent offending; and has only received six months specialist treatment for his child sexual offending, which Corrections itself says was inadequate. At times he said he was deemed ineligible for entry into the programmes because of Corrections' unlawful classification of his security status as maximum, and his status as an identified drug user. He said his inability to access the specialist treatment recommended by Corrections, which the Board has determined needs to be completed as a prerequisite for his release, is extremely frustrating and is causing him considerable anxiety.

[132] It is a matter of record that Corrections has provided Mr Smith with significant rehabilitative services throughout his incarceration, some even before his original PED of 14 April 2009.[74]

[133] Given the policies referred to above (which were formulated to deal with the allocation of finite resources),[75] Mr Smith's opportunities for rehabilitative treatment were affected both by long waiting lists and his individual readiness to participate in an STU. The evidence suggests that early on in Mr Smith's prison sentence, his security categorisation of high-medium or above meant that he was not eligible to

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74 See above at [30] and [32].
75 See above at [19]-[28].

participate in an STU, but he did receive interventions designed to support his transition to a lower security classification.

[134] Mr Smith first achieved low-medium categorisation in 2005 and has been on that classification for significant periods of time. Thus hypothetically, on that one criterion, he could have been eligible for entry into an STU. But it is not sufficient to look at his readiness through that singular lens, rather it is necessary to have regard to all the factors that are taken into account and referred to in Ms Garrett's evidence. In addition to having an eligible security classification, Mr Smith also needed to be considered suitable according to a range of factors,[76] in order to be ready to commence a programme at an STU.

[135] Whilst it has not proved possible to pinpoint the exact date on which Mr Smith was placed on a waiting list for an STU, the psychological report prepared in December 2008 indicated that Mr Smith was on a waiting list at that time, and Ms Garrett provided evidence he was on the waiting list in August 2008. Therefore, for several months (and possibly longer) in advance of his PED Mr Smith was actively being considered for entry into an STU.

[136] On 26 April 2010 Mr Smith wrote to Corrections, complaining about what he believed to be excessive delay in being placed into either of the STUs for child sexual offending. The Chief Advisor of Psychological Services for Corrections at the time, Mr Riley, advised Mr Smith that his request could not be facilitated at that time, because to do so would be to disadvantage other prisoners who had higher priority for treatment. He nonetheless gave a commitment to have Mr Smith transferred to one of the STUs "as soon as possible".

[137] For a relatively brief period in late 2009 and early 2010, Mr Smith was subject to an unlawful classification of his security status. However, that classification, together with his status as an identified drug user, had negligible effect on his entry into the Te Piriti STU because the recommended treatment was not scheduled to be made available to him at that time.

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[76] See above at [24].

[138] Corrections provided Mr Smith with a significant opportunity to commence and complete his rehabilitation when they provided him with the opportunity to undertake the Te Piriti programme in 2010. The current programme (also provided at Kia Marama at Rolleston Prison) is a closed programme design, where 10 participants start at the same time and work through the programme together. It is approximately 99 sessions, and usually takes approximately 33 weeks to complete. During this time, prisoners spend 2.5 hours in sessions, three to four days per week, as well as other therapeutic community activities.

[139] Prior to 2017, when Mr Smith completed the programme, Te Piriti delivered treatment using a rolling programme design, meaning participants moved through the programme by completing modules at their own pace. The number of participants therefore varied, but usually ranged from eight to 10. At the time Mr Smith attended, there were three main components to the programme. First, in the "starter's group", prisoners were prepared for the group therapy process. Second, in the "core group", prisoners completed assignments aimed at addressing their offending, including a module on sexual self-regulation. This phase also included development of a detailed plan for the prisoner's future life, to support their desire not to reoffend. Once all assignments were completed, prisoners were interviewed by a panel that included the principal psychologist, where the prisoner provided an overview of what he had learned, a description of how he had applied the skills learned, a summary of changes he had made, and an explanation of how he would apply those changes to his future life. Finally, in the "maintenance group", prisoners met once a week, in a group facilitated by a psychologist, to discuss how they were applying skills they had learned, challenges or successes they had, and what they were still working on.

[140] Mr Smith completed that programme in May 2011 and moved into the maintenance phase. He was considered by his treatment providers to have addressed his treatment needs in relation to his sexual, violent and dishonesty offending. He moved onto a reintegrative pathway and was approved for temporary release. Mr Smith engaged in a number of temporary releases; some for a period of hours, and two overnight. Mr Smith escaped from custody while on the second of these overnight temporary releases.

[141] Ms Garrett's evidence was that it is common practice for psychological assessment and intervention to be deferred until pending charges are dealt with by the Court, and prisoners facing active charges are considered lower priority for treatment. This meant Mr Smith was potentially considered lower priority for treatment after his escape in 2014, until his charges were resolved in 2016.

[142] Mr Smith acknowledged he received individual psychological treatment from July 2017 to May 2018. This intervention was discontinued when Mr Smith was moved to Rimutaka Prison, to be closer to his support people. A case note prepared by his case manager, dated 23 April 2018, indicates that Mr Smith was comfortable with the transfer, and his priority concerns at the time were having computer access and retaining his hairpiece. Mr Smith did ask for it to be continued by audio visual link, but this was not logistically possible.

[143] It would thus be fair to say that opportunities for treatment have been to a significant extent shaped by Mr Smith's own decision making and behavioural choices, and not a failure on behalf of Corrections.

Was Mr Smith's treatment for sexual offending adequate?

Mr Smith's submissions

[144] Mr Smith argued that the treatment he received to address his sexual offending was inadequate. He relied on the fact he did not benefit from Te Piriti. The risks he poses have been assessed to be high at all relevant times and have not been diminished by the treatment received. Thus, it follows that his risks have not been lowered sufficiently to justify his release.

[145] Mr Smith also submitted that he was short-changed, because his course at Te Piriti took half the usual time to complete. Mr Smith spent a total of 24 weeks on the core part of the programme, and he points to Ms Garrett's evidence that the core educational part of the programme usually takes 33 weeks to complete. He relies on Ms Brown's assessment that he did not receive the intensity and duration of treatment required to make the treatment effective.

[146] Finally, Mr Smith submitted that the decision to offer him further treatment is an indication of the inadequacy of the Te Piriti course that he undertook in 2010.

Corrections' submissions

[147] Corrections raised two substantial matters in response: a lack of authority to support Mr Smith's legal argument; and a lack of evidence.

[148] First, they said that none of the authorities relied on by Mr Smith relate to an examination of the quality of the rehabilitation programmes provided, but rather they relate to the stark question of whether or not opportunities for rehabilitation have been afforded to a prisoner in Mr Smith's position. There is no authority to suggest a Court can delve into whether Te Piriti is a substandard programme, or whether its application to Mr Smith was in some way negligent. This is not surprising, as it is not the Court's job to interfere with operational decisions involving the balancing of welfare, safety and security concerns in the highly complex environment of a prison system. It could only interfere in the starkest of cases, such as whether rehabilitation had been afforded or not. In addition to Ellis J's comments in *Taylor* recorded above,[77] I find Dunningham J's comments in *Ericson* particularly apt in the present case:[78]

> [Corrections] has provided him with such rehabilitative programmes as are available and considered suitable for [the prisoner's] particular needs and there is no basis on which this Court can substitute its own views on the merits of day to day decisions or activities of prison management, nor with decisions which are essentially clinical in nature such as [the prisoner's] eligibility for psychological treatment, or the prioritisation of treatment to him.

[149] Secondly, they said that Mr Smith has not tendered any expert evidence in support of his allegation that the treatment was substandard. And he has not.

[150] I note also that Mr Smith did not challenge Ms Garrett's professional expertise.

Analysis

[151] Even allowing for these three major difficulties, in fairness to Mr Smith and the time and effort he has put into this aspect of the case, Corrections addressed his

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77 *Taylor v Chief Executive of Department of Corrections*, above n 23, at [58].
78 *Ericson v Chief Executive, Department of Corrections*, above n 24, at [31].

arguments. I intend to also review the evidence. However, I do so not on the basis that I consider it is this Court's task to review the treatment decisions themselves, but rather to demonstrate that if it were the Court's task, Mr Smith's case would founder.

[152] I turn first to consider Mr Smith's complaint that he was short-changed because his course at Te Piriti took half the usual time to complete. Ms Garrett's evidence was that the core treatment programme takes approximately 33 weeks. Mr Smith spent only 24 weeks on the core treatment phase. However, Ms Garrett's evidence is that Mr Smith demonstrated an intellectual understanding of the material, that meant he was accelerated out of the education programme and into the reintegration phase. This is consistent with the report of a Senior Psychologist to the Board dated 24 March 2011, which records Mr Smith's meaningful engagement and diligent approach to the required assignments.

[153] It is clear that Mr Smith was accelerated through the core part of his treatment because of his intellectual prowess and his ability to conform (at least outwardly) to the objectives of the treatment. It was Ms Garrett's opinion that there is evidence of inconsistency in Mr Smith's self-reporting over time, potentially evidencing an inability of Mr Smith to be honest about sexual deviancy. She highlighted self-reporting as a key part of forming a psychological assessment. In being dishonest, it was Mr Smith who brought about a shorter time on the core treatment phase than he would have had, had he been more open and truthful with the course providers.

[154] I also note that in addition to his time in the core treatment phase, Mr Smith spent time in the maintenance group at Te Piriti between November 2011 and September 2012. During this time, and up until his escape in November 2014, Mr Smith engaged in reintegration opportunities, including the Circle of Support and Accountability, and a number of temporary releases.

[155] I do not accept there is any validity in Mr Smith's argument that he was short-changed, in terms of the length of time he spent in treatment at Te Piriti.

[156] I now consider Mr Smith's more general complaints that the treatment he received at Te Piriti was inadequate, because he did not benefit from it, and his submission that the offer of further treatment indicates it was inadequate.

[157] In Ms Garrett's opinion, the programme for the treatment of child sexual offenders that is delivered through Te Piriti is based on best international practice and can have an effect of reducing recidivism. She said that by international standards, the programmes provided by Corrections have been shown to be effective at reducing sexual reoffending as compared with receiving no treatment at all. However, the rates of effectiveness are modest and any programme's effectiveness in a particular case depends ultimately on the prisoner himself and his motivation to change.

[158] In response to the submission that Mr Smith's treatment was inadequate, Corrections said that since the success of the course is heavily dependent on the efforts and attitudes of the prisoner, the fact that Mr Smith's risks remain high following the completion of the course is not in and of itself any indication that the treatment was substandard.

[159] The provision of further treatment to Mr Smith was not an admission by Corrections of a failure in the efficacy of the Te Piriti programme. Rather, it is evidence of Corrections' continuing efforts to provide him with reasonable opportunities to work towards his rehabilitation in light of his rehabilitative needs, which were reassessed following his escape.

[160] Even if errors were made, Mr Smith's intellect, together with his high and complex needs, make his treatment a difficult therapeutic challenge where different psychologists may make different assessments of Mr Smith and have differing opinions about what treatment he should receive, without necessarily being in some way professionally substandard. This is especially the case where so much depends on a prisoner's self-report and where Mr Smith has not always been truthful.

[161] Mr Smith was observed by those running Te Piriti to be compliant and cooperative, and provided "frank and relevant" responses in interviews with psychologists. In his report to the Board in March 2013, Mr van Rensburg recorded

that Mr Smith had engaged in treatment with "sincerity and with a pro-social, positive approach, which gradually resulted in a change in the negative perceptions about him", and that he displayed a "remarkable level of insight" into the factors associated with his offending. Thus, he progressed faster than most through the early parts of the core treatment.

[162] Since his completion of the Te Piriti programme, more recent psychological reports have: noted Mr Smith's tendency to demonstrate an intellectual understanding of the treatment material; highlighted concerns regarding the degree of his manipulative behaviour; raised concerns about his lack of insight into his triggers (perceived rejection/abandonment); and concluded that Mr Smith has not adequately addressed his treatment needs in relation to sexual compulsivity and deviance, and his specific personality traits, and has demonstrated a lack of understanding with regards to the instrumental nature of his violence.

[163] It is obvious with the benefit of hindsight that those treating him at Te Piriti should have been less willing to take him at face value, and in fact underestimated his duplicity and mastery of manipulation. To a significant extent, of course, they had to rely on his self-report. Psychological assessment is only as good as the information available. It relies on the integration of psychometric testing, self-report and behavioural observation. The latter is increasingly important in the case of individuals with anti-social or psychopathic characteristics. Therefore, it is only in hindsight that the degree of Mr Smith's personality traits and treatment responsivity barriers were more fully revealed and understood.

[164] Successful treatment relies not only on the provision of service to the prisoner, but also the gaining of insight by the prisoner, the maintenance of that insight through responsivity, and the maintenance of that responsivity by deed and truthful self-report by the prisoner. In other words, treatment is not one dimensional. Success is not measured by the application of an external process, such as it might be in a treatment for a physical ailment. Rather it is two dimensional, requiring the sustained application of the learning being demonstrated over time by the prisoner in situations where the prisoner is exposed to circumstances which previously may have triggered

their offending. Motivation to change and skill acquisition need to be demonstrated through behavioural change.

[165] In an interview with Dr Wilson in January 2015, Mr Smith told Dr Wilson that it was mid to late 2013 when he began to think about leaving the country, and his plan crystallised in March 2014 after a Board hearing around that time. Mr Smith was still within his Circle of Support and Accountability at this time, where he was required to disclose and share with the group any thoughts he had about reoffending.

[166] Ms Garrett's evidence is also instructive. She undertook a review of Mr Smith's course documentation completed while he was on the programme at Te Piriti. She said it was driven by features of his personality such as the need for approval and attempts to manipulate others' positive perceptions of him. She agreed with Dr Wilson that Mr Smith has not demonstrated how his personality traits and motives of retribution and revenge feature in his instrumental use of violence, and how he plans to mitigate the risk of violent reoffending from this perspective.

[167] Despite:

(a) having completed treatment;

(b) declaring future commitment to values such as telling the truth; and

(c) having a range of support people available to process his internal experience (his desire to escape) and to support him to manage his emotions (his frustration with being declined parole);

Mr Smith chose to use reintegration opportunities to plan and effect his escape.

[168] Additionally, on 3 November 2014 (three days before his escape), Mr Smith reported to his case manager that everything was going very smoothly and he was making good progress towards his release.

[169] Mr Smith has demonstrated that he did not successfully manage his risk of reoffending, which has called into question his motivation and his responsivity to

treatment more generally. Rather than addressing his own shortcomings, in his complaint about the Te Piriti course and its inadequacy, he seems to look for a way to discredit others.

[170] Mr Smith does not seem to appreciate that having been provided with significant treatment and having displayed at least outwardly an intellectual understanding of some of the triggers of his offending, he opted to employ cynical and deceitful responses to his treatment by actively scheming to reoffend. He must take responsibility. He failed to apply what he had learnt on the programme and he failed to confide in his Circle of Support and Accountability about the offences he was planning. Corrections have not failed him in this respect; he has failed himself.

[171] In summary therefore, this aspect of his claim must fail: first because there is no legal authority to the effect that the Court, on judicial review, should get into the nature of enquiry proposed by Mr Smith; and secondly, as Mr Smith did not tender any expert evidence to challenge the evidence of the Corrections psychologists, the evidence falls short of establishing a case in support of his claim.

Has Corrections denied Mr Smith the opportunity to address his violent offending?

[172] Mr Smith has not yet been given an opportunity to attend an STU for violent offending. This is because Corrections' standard policy requires those needing treatment for child sexual offending and violent offending to complete the child sexual offending programme first.

[173] The decision made in 2009 to remove Mr Smith's name from the waiting list for an STU for violent offending was made in part for concern for Mr Smith's safety, because significant numbers of men on the violent offending programmes hold negative views of child sex offenders.

[174] It also reflected common practice to reassess the necessity for entry into a violence programme at the conclusion of the STU programme for child sexual offending, to allow for recognition of the fact that a prisoner may be able to generalise their treatment at an STU, including the insights gained into the reasons for their

offending, any triggers for reoffending, and how to regulate their behaviour so as to be not likely to reoffend.

[175] After completion of the Te Piriti programme, Mr Smith was considered by his treatment providers to have addressed the full panoply of his treatment needs in relation to his sexual, violent and dishonesty offending. This was further evidenced by the fact that Mr Smith was supported on a reintegrative (rather than rehabilitative) pathway when he was moved to Unit 9 at Auckland Prison, included in the Circle of Support and Accountability programme, and approved for temporary release.

[176] It is important to note that the Board was not then requiring Mr Smith to undergo any form of programme for violent offending, as a condition of his release.

[177] The fact that Mr Smith has not undertaken a programme at an STU for violent offending does not mean that he has not received rehabilitative treatment for the risks associated with his violent offending. The evidence of Ms Garrett makes it clear that the risks of violent offending are addressed in a number of ways, and that a specialist sexual offending course will address many of the issues that underlie the risks of violent offending.

Was Corrections' treatment after Mr Smith's escape retributive and punitive?

[178] Mr Smith places considerable store on Corrections' alleged failure to provide him with rehabilitative programmes after his escape to Brazil and considers that failure was retributive in nature.

[179] Two of the reasons Corrections relied on for any initial delay in providing Mr Smith with rehabilitative programmes were: first his reclassification as a high security risk; and the fact that the charges against him for offences associated with the escape were unresolved.

[180] By September 2016, Mr Smith was serving his sentence for these offences, and his new PED was 22 June 2017. On 16 September 2016, a senior psychologist at Auckland Prison emailed a case manager advising that, following resolution of his charges and Dr Wilson's recommendations in 2015, Mr Smith was considered

high priority for violence related treatment. The initial stages of that intervention would assess his motivation to engage, and the suitability of specific treatment. That email also noted the Board had recommended he engage in offence-focussed treatment, and a psychological report be prepared commenting specifically on the efficacy of treatment. However, during that time there were other prisoners who had completed the punitive part of their sentences who had priority over Mr Smith, and a time frame could not be guaranteed. Mr Smith was kept informed of these decisions.

[181] On 22 September 2016 the then Chief Psychologist for Corrections replied to a further enquiry from Mr Smith as to his status, reiterating Corrections' responsibility to take account of obligations relating to public safety and fairness to all prisoners, as well as the need for flexibility when allocating limited resources and the use of individually formulated treatment. She advised Mr Smith that he was on the North Auckland Psychological Services scheduling list for another assessment, as recommended by Dr Wilson, to ensure a plan for rehabilitation interventions was tailored to his needs. In November of that same year she updated him for the reasons as to his seeming lack of progress. After noting Dr Wilson had recommended a further assessment once Mr Smith's active charges had been resolved, she explained that prisoners with active charges are considered lower priority and are reviewed every three months. She noted Mr Smith's active charges had since been resolved (with convictions recorded in July 2016), and he was reassessed as high priority in September 2016.

[182] Mr Smith referred me to the decision of Katz J in 2017, regarding his security classification.[79] Although Mr Smith's classification had since been superseded, Katz J declared Corrections had made various procedural errors relating to his security classification between 2014 and 2016. Although I acknowledge these security classifications may have precluded Mr Smith's access to certain rehabilitation opportunities, I note that during this period he was also considered low priority due to his unresolved charges. By September 2016, he was being treated as high priority for receiving rehabilitation, and I do not find that these security classifications materially

[79] *Smith v Attorney-General* [2017] NZHC 136.

impacted on Mr Smith's access to rehabilitation, in a way that would support finding that Corrections failed to reasonably exercise its duty under s 52.

[183] From July 2017 to May 2018, Mr Smith engaged in a course of individual counselling with Mr Symes (25 sessions in total). These sessions allowed for a more tailored approach to address features of Mr Smith's personality and assist him to develop and enhance his empathy for victims. The focus of the treatment was on assisting Mr Smith to understand his behaviour through self-awareness of self-defeating emotional and cognitive patterns that repeat throughout his life. It was designed to assist Mr Smith to reduce dysfunctional thinking patterns and avoid coping in maladaptive ways. Mr Smith appeared to respond well, although he had some trouble acknowledging his motivation.[80] Ms Garrett explained that this tendency to justify and excuse his thinking and behaviour, while rejecting or minimising others' perspectives, will make changing his behaviour difficult for him.

[184] A significant amount of Mr Smith's cross-examination of the witnesses for Corrections was focussed on sentencing plans between December 2014 and May 2019, which he said show a complete dereliction by Corrections in providing him with rehabilitation opportunities. But what this line of questioning obviated was that for the 10 months from July 2017 to May 2018, he was receiving regular counselling with Mr Symes. This treatment was terminated by Mr Smith's transfer to Rimutaka Prison, something he was consulted about and was happy about. I also note that sentencing plans during this period in 2017 and 2018, which Mr Smith did not refer the witnesses to in cross-examination, appear to record a plan to provide treatment to address Mr Smith's violent offending.

[185] Mr Smith was offered treatment at the Kia Marama STU for child sexual offending on 20 August 2019 and will be transferred for assessment.

[186] In summary, Mr Smith did have much attention paid to his rehabilitative needs after his escape. It is simply implausible for him to now be suggesting a retributive approach by Corrections in respect of the non-provision of rehabilitative services, and further that this amounts to arbitrary detention. I also note that, between commencing

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[80] As discussed above at [129].

Te Piriti in 2010 and his escape in 2014, Mr Smith did not make any complaints about the treatment he had received. The issue here is not whether Mr Smith has been provided with reasonable opportunities for rehabilitation, but whether Mr Smith has used those opportunities and whether he is truly willing to address his risk of reoffending.

Are Mr Smith's appearances before the Board an empty exercise or a charade, as he would describe it?

[187] The answer to this question is an emphatic no. If Mr Smith demonstrates an authentic willingness to learn and engage truthfully on the Kia Marama programme, and if he genuinely addresses his risk of reoffending on that programme, then he should (as he was at an earlier time) be put on the appropriate pathway towards reintegration. If he does not, he cannot expect to be released, for the safety of the public.

[188] It is salient to return to the words of the Board following his escape from custody:

> On the question of reintegration, we acknowledge that Mr Smith appeared to have been on the appropriate pathway. It is ironic, however, that the privilege was squandered through his own actions.

Conclusion

[189] For all the above reasons, I find that the Chief Executive has exercised his duty under s 52 properly in Mr Smith's case and has provided him with reasonable opportunities for rehabilitation.

[190] It follows that I find that Mr Smith is not arbitrarily detained, and Corrections have not failed to treat him with humanity and respect for his inherent dignity as a person.

Result

[191] I decline the application for:

(a) a declaration that an implied public law duty exists, requiring Corrections to make reasonable provision for access to treatment programmes for prisoners serving indeterminate sentences when the Parole Board has conditioned their release on the completion of those programmes;

(b) a declaration that Corrections has failed to provide Mr Smith with a reasonable opportunity to complete specialist treatment for his violent offending, rendering his detention arbitrary in breach of s 22 of BORA, as well as resulting in breaches of ss 23(5) and 27 of BORA and s 52 of the Corrections Act;

(c) a declaration that Corrections has failed to provide Mr Smith with a reasonable opportunity to complete adequate specialist treatment for his sexual offending, rendering his detention arbitrary in breach of s 22 of BORA, as well as resulting in breaches of ss 23(5) and 27 BORA and s 52 of the Corrections Act;

(d) a writ of mandamus requiring Corrections to commence specialist violence treatment; and

(e) public law compensation for legitimate frustration and anxiety; and

(f) costs.

[192] To protect Mr Smith's privacy, I order that [124]-[130] herein is to be redacted, and is not to be made publicly available.

Doogue J