IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 31/2024

BETWEEN	**KORO PUTUA**
	Appellant
AND	**ATTORNEY-GENERAL**
	Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

26 FEBRUARY 2025

Certified as suitable for publication under the Supreme Court Submissions Practice Note 2023

Solicitor:
Letizea Ord
Ord Legal
Level 7, 276 Lambton Quay
Wellington 6011
+64 4 472.0777
letizea@ordlegal.co.nz

Counsel acting:
Dr Andrew S Butler KC / Max Harris
Thorndon Chambers
P O Box 1530
Wellington 6140
+64 4 499 6040
andrew.butler@chambers.co.nz
max.harris@chambers.co.nz

Intro

Options available to the Court

Appellant's preferred option: overrule *Chapman*

Why?

- ICCPR-consistency
- UK and Irish developments
- Lack of cogency and stability in *Chapman* reasoning
- Consequences of *Chapman*
- Unfair/unjust
- No unfairness to the State in overruling *Chapman*

What's new since 2011?

What do these developments tell us about *Chapman*?

A close look at *Chapman* – [102]-[103] (imponderables), [176]-[178] (are judicial immunity principles applicable to BORA claims wrt judicial breaches?), [178] (the fundamental issue), [180] (matters of principal importance), [181]-[182] (finality); [184]-[192] (independence); [193]-[202] (alternative remedies); international dimension (MIA); compare [97] and [178]; Gault J; not considering Elias CJ and Anderson J in detail but appellant supports and adopts their reasoning

So what did *Chapman* actually decide?
[209] (answer to question (a)) or [204], second sentence (*Baigent* confined to executive conduct)?
[208] (Registrar)
[205], third sentence; [92] (the state)

A close look at *Thompson*

Detailed consideration of reasons to overrule *Chapman*

Caselaw and other developments

- *Thompson* (2019) and *Barrio* (2022)
- General Comment 35 (2014) (art 9)
- Legislative developments in the UK (2020 amendment to HRA (UK) 1998, s 9(3)) and Ireland (2014 amendment to ECHR Act 2003, 2024 enactment of Court Proceedings (Delay) Act)
- This Court's more recent rulings on BORA's status as constitutional: *Taylor*, *Ngaronoa*, *S v R*, *Fitzgerald*, *Moncrief-Spittle*. Making the linkage to *Attorney-General v Power*

- A-G representing the state, not just the executive (eg DOI cases and the myriad of cases against judges where CLO appeared to 'defend' the judges)
- *Maharaj (No 2)* still the leading judgment: *Duncan* (2021)
- *MTA v Lord Chancellor* (2024) (collateral attacks and finality)
- Judicial independence and immunity*:* the international statements on judicial immunity: Beijing Statement, Universal Judges' Charter, Basic Principles; wider context outside parts of the common law world: *Koebler v Austria*, ECHR jurisprudence, Olowofoyeku

Academic criticism of Chapman

Preliminary responses to A-G's submissions

Common ground in approach to departing from previous decisions:

- Previous decisions worthy of respect
- Open to this Court to depart from previous decisions
- Mere difference of intellectual preference not enough
- Structuring the inquiry is valuable
- Approach to departing from previous decision not yet settled by this Court

Three other preliminary points: no preconditions, routine for courts to revisit law, level of structure proportionate to extent of overruling sought

Five factors:

- Change in relevant legal/factual context: e.g. *Smith v MOD* (2013)
- Provenance/ background of decision (outlier?): e.g. *John* (1989)
- Cogency or stability of reasoning – e.g. *Test Claimants* (2020)
- Consequences of decision – e.g. *DPP v JC* (2015)
- Appropriate to overrule – e.g. UKHL Practice Statement

Some further comments on approach of A-G to overruling:

- Whether decision is inconsistent with development of law in other jurisdictions often has not been (and need not be) considered
- No need for greater reluctance if "competing values" weighed
- No need for "significant unintended consequences"

Appellant's approach provides sufficient justification to depart from previous decisions, allows flexibility, and protects precedent

---

Andrew S Butler KC / Max Harris

26 February 2025