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

RESPONDENT'S SUBMISSIONS ON APPEAL

3 February 2025

Te Tari Ture o te Karauna
Crown Law

PO Box 2858
Wellington 6140
Tel: 04 472 1719

Contact Person:
Una Jagose KC / Daniel Jones / Olivia Kiel
Una.Jagose@crownlaw.govt.nz / Daniel.Jones@crownlaw.govt.nz /
Olivia.Kiel@crownlaw.govt.nz

COUNSEL FOR THE RESPONDENT CERTIFIES THAT THIS SUBMISSION CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

CONTENTS

SUMMARY OF SUBMISSIONS

1. The Court of Appeal was correct to find that the issuance of the warrant of commitment (**the warrant**), including the Deputy Registrar's preparation of the warrant for a District Court Judge to sign, was a judicial act for which the Crown was not liable in damages, following the judgment of this Court in *Attorney-General v Chapman* (***Chapman***).[1] That is not the focus of the appellant's submissions before this Court which invite the Court to depart from *Chapman*—an invitation that the respondent submits the Court should resist. These submissions respond to the issues advanced by the appellant in the order raised.

This Court's judgment in *Chapman* should be upheld

2. The restriction on the availability of damages for judicial breaches of the New Zealand Bill of Rights Act 1990 (**NZBORA**) that this Court found in *Chapman* is consistent with bedrock constitutional principle: the separation of powers and judicial independence; the scheme of public law remedies established by common law and statute and affirmed by NZBORA; the role of the Attorney-General in proceedings against the Crown; and other decisions of this Court on remedies for breaches of NZBORA.

3. NZBORA must be approached in our legal framework consistent with foundational, constitutional principle; the separation of powers and judicial independence. Section 3(a) of NZBORA emphasises that separation by requiring each branch of government to give effect to its provisions. Neither NZBORA nor New Zealand law recognises a unitary state actor and the judiciary must be, and be seen to be, separate from the executive Crown. How domestic effect is to be given to international obligations arising in this case must be resolved in accordance with those principles.

4. Although this Court has the power to depart from its own judgments, that power should be exercised "rarely and sparingly".[2]

5. A review of domestic and overseas authorities suggests that the factors that may justify an apex court departing from an earlier judgment are that the judgment in question: (i) is inconsistent with relevant domestic law; (ii) is out

---

1 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 **[[App BoA Tab 2]]**.
2 *Horton v Sadler* [2006] UKHL 27, [2007] 1 AC 307 at [29] per Lord Bingham **[[Resp BoA Tab 25]]**.

of step with the approach taken by other common law jurisdictions; (iii) either was or has become clearly wrong; and (iv) is giving rise to difficulties in the development and application of the law. For the following reasons, none of these factors apply to *Chapman*.

6. *Chapman* is consistent with relevant domestic law as:

   6.1 it is consistent with and gives effect to the constitutional principles of the separation of powers and judicial independence, and is consistent with the framework of public law remedies established through the common law, the Crown Proceedings Act 1950 (**CPA**) and NZBORA;

   6.2 it is consistent with the jurisprudence of this Court in *Taunoa v Attorney-General*,[3] and *Taylor v Attorney-General* on the nature and purpose of remedies for breaches of NZBORA.[4]

7. *Chapman* is consistent with the approach to damages for breaches of rights by judicial bodies adopted in other common law jurisdictions as:

   7.1 no common law jurisdiction recognises general state liability for judicial breaches of fundamental rights;

   7.2 when the issue of compensation for the acts of judicial bodies breaching fundamental rights has been before courts of other jurisdictions, they have adopted similar approaches to that taken by this Court in *Chapman*; and

   7.3 two common law jurisdictions (Ireland and the United Kingdom) do provide limited rights to state compensation for judicial actions giving rise to arbitrary detention and wrongful conviction only. However, they do so pursuant to express statutory schemes defining and limiting the right to compensation, to give effect to art 5(5) and (in the case of the United Kingdom) art 6 of the

---

3 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 **[[App BoA Tab 11]]**.
4 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 **[[App BoA Tab 30]]**.

European Convention on Human Rights (**ECHR**),[5] which have been incorporated into those countries' domestic law.

8. *Chapman* was correctly decided, reasons no less applicable to alleged breaches of s 22 that for the fair trial rights in issue in that case:[6]

8.1 *The effectiveness of existing remedies*: There is a "high degree of general effectiveness of remedies in the justice system" that renders the extension of damages for judicial acts unnecessary.[7] The appellant contends that this is insufficient, and the justice system must guarantee to always provide an effective remedy. Although *Chapman* was not concerned with arbitrary detention, the remedies for arbitrary detention recognised at common law and affirmed by NZBORA are habeas corpus and bail. As the Privy Council has held, if a detainee had the opportunity to apply for habeas corpus or bail, they have been provided with an effective remedy even if they do not exercise it.[8]

8.2 *The risk to judicial independence*: Crown liability for actions of the judiciary would threaten judicial independence by mutually reinforcing risks of the judiciary being drawn into litigation, judicial behaviour being modified to avoid this prospect, future Crown interference with the operation of the judiciary and loss of public confidence in its independence.

8.3 *The risk to the finality of litigation*: Crown liability for actions of the judiciary poses a significant risk of collateral litigation that would undermine the finality of legal proceedings.

8.4 *The risk of inconsistency with existing measures for compensating those convicted of criminal offences*: Crown liability for actions of the judiciary risks inconsistency with legislation and executive

---

5 Convention for the Protection of Human Rights and Fundamental Freedoms 2889 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) [European Convention on Human Rights] **[[Resp BoA Tab 53]]**.

6 As the Court of Appeal and this Court found in *Thompson*: *Thompson v Attorney-General* [2016] NZCA 215, [2016] 3 NZLR 206 [*Thompson* CA] **[[App BoA Tab 5]]**; and *Thompson v Attorney-General* [2023] NZSC 27.

7 *Attorney-General v Chapman*, above n 1, at [193]–[194] and [198] **[[App BoA Tab 2]]**.

8 *Duncan and Jokhan v Attorney General of Trinidad and Tobago* [2021] UKPC 17, [2021] 4 LRC 570 at [40] **[[Resp BoA Tab 16]]**.

schemes for compensation for those wrongfully convicted of criminal offences.

9. *Chapman* has not given rise to problems in the development and application of the law. It has not proven difficult to interpret and apply and has been relied on in a number of cases to strike out collateral challenges to criminal proceedings. The appellant has not identified a significant gap in the established range of remedies for judicial breaches of NZBORA that means victims of such breaches do not have access to an effective remedy.

10. Article 9(5) of the International Covenant on Civil and Political Rights (**ICCPR**) does not demand that the Court adopt a different approach:[9]

10.1 NZBORA affirms New Zealand's commitment to the ICCPR and enacts all the procedural protections against arbitrary detention guaranteed by art 9, except for the right to compensation under art 9(5). This omission must be regarded as deliberate.[10]

10.2 The obligation to compensate for unlawful detention brought about by judicial actions is not recognised in the common law, which instead affirms habeas corpus and bail as the procedural remedies for unlawful detention. And to compensate every breach of arbitrary detention is contrary to the approach to compensation for breaches of NZBORA that this Court adopted in *Taunoa*.[11]

10.3 Therefore, art 9(5) is an international treaty obligation to which the Court may have regard and not a domestic obligation to which it must give unqualified effect. As the High Court of South Africa held in *Claassen v Minister of Justice and Constitutional Development*, whether to "give unqualified effect" to art 9(5) should be a matter for the legislature and not the courts.[12]

11. None of the appellant's proposed modifications of *Chapman* would address the significant constitutional concerns about judicial independence nor the

---

9 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR] **[[App BoA Tab 59]]**.

10 *Claassen v Minister of Justice and Constitutional Development* [2009] ZAWCHC 190 at [36] **[[Resp BoA Tab 11]]**.

11 *Taunoa v Attorney-General*, above n 3 **[[App BoA Tab 11]]**.

12 *Claassen v Minister of Justice and Constitutional Development*, above n 10, at [36] **[[Resp BoA Tab 11]]**.

practical concerns about collateral litigation that underpin the majority judgments in *Chapman.* Adopting any of them would give rise to the uncertainty that the Court in *Chapman* was rightly concerned to avoid.

The Court of Appeal's judgment in the present case should be upheld

12. For the reasons given by the Court of Appeal, the act of the Deputy Registrar was a judicial act for which the Crown should not be liable. For the Crown to be liable for the act of a registrar, undertaken when assisting a judge in the performance of a judicial act, would expose the judge to a "flank" attack,[13] would "[blur] the line of supervision between judge and registrar" and also "incentivises claimants to go behind judicial decisions and seek to attribute fault to non-judicial actors".[14] The Crown should not be liable for the judicial acts of registrars insofar as this is necessary to ensure that the Crown are not liable for judicial acts to thereby uphold the principle of judicial independence.

SUBSTANTIVE SUBMISSIONS

The correct approach to whether the Court should depart from a prior judgment

The importance of precedent

13. In a series of decisions in *Noort v Ministry of Transport*,[15] *Baigent's Case*,[16] *Chapman*,[17] *Taunoa*,[18] and *Taylor*,[19] the Supreme Court and Court of Appeal developed a scheme of remedies under NZBORA. These judgments now form part of our constitutional law.[20] They may be built upon, but the Court should be slow to revisit their central determinations.

14. This Court may depart from one of its previous judgments.[21] However, the stability and certainty that precedent provides means that this power should be exercised "rarely and sparingly".[22]

---

13 *Crispin v Registrar of the District Court* [1986] 2 NZLR 246 (HC) at 252 **[[App BoA Tab 7]]**, citing *Lincoln v Daniels* [1962] 1 QB 237 (CA) at 263.

14 *Attorney-General v Putua* [2024] NZCA 67, [2024] 2 NZLR 420 at [57] **[[101.0017]]**.

15 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).

16 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) **[[App BoA Tab 3]]**.

17 *Attorney-General v Chapman*, above n 1 **[[App BoA Tab 2]]**.

18 *Taunoa v Attorney-General*, above n 3 **[[App BoA Tab 11]]**.

19 *Attorney-General v Taylor*, above n 4 **[[App BoA Tab 30]]**.

20 K Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in Cabinet Office *Cabinet Manual 2023* at 2.

21 See *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [104] per Tipping J **[[App BoA Tab 27]]**.

22 *Horton v Sadler*, above n 2, at [29] per Lord Bingham **[[Resp BoA Tab 25]]**.

15. The importance of stability and certainty in the law is well recognised,[23] but respect for precedent has an additional benefit. The common law is woven by many hands, drawing strength from being developed by judges of different generations and perspectives. By the courts respecting precedent and working within the restraints created by previous judgments, the law embodies the toleration and pluralism it seeks to promote. In contrast, for judges of a particular perspective and/or generation to overturn earlier judgments to ensure that the law reflects their values or judicial philosophy risks a narrowing of legal reasoning and the consequent loss of respect for the law, as it comes to reflect intellectual preferences of particular judges rather than a body of reasons established over time.

16. In *Couch* this Court held that it would only depart from one of its judgments in compelling circumstances where it is "evident that the previous decision was or has become clearly wrong, rather than simply representing a preferred choice with which the current Bench does not agree".[24]

17. Observing the distinction between a case that is "clearly wrong" and one in which a differently constituted bench may take a different view is of particular importance in cases decided by majority. These cases are likely to have involved difficult issues leading to divergence of opinion among judges. This provides a temptation to parties to relitigate the issues, in the hope that a differently constituted bench will reach a different conclusion; a process by which the "[f]inality of decision would be utterly lost".[25] As the United Kingdom Supreme Court explained in *JTI Polska Sp Z oo v Jakubowski*, "[i]t will always be necessary to do more than to persuade the present panel of Justices that the prior decision is wrong"; and "[t]he fact that the decision is by a bare majority does not weaken the authority of the decision. Indeed, it may be strong evidence that both sides of the argument are tenable".[26] The Court cited Lord Wilberforce in *Fitzleet Estates Ltd:*[27]

---

23 See statement to this effect in *Chandler v Trinidad and Tobago* [2022] UKPC 19, [2023] AC 285 at [64] per Lord Hodge; and *Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* [1973] AC 435 (HL) at 455 per Lord Reed.

24 *Couch v Attorney-General (No 2)*, above n 21, at [105] per Tipping J **[[App BoA Tab 27]]**.

25 *R v National Insurance Commissioner, ex parte Hudson* [1972] AC 944 (HL) at 997.

26 *JTI Polska Sp Z oo v Jakubowski* [2023] UKSC 19, [2024] AC 621 at [42] **[[Resp BoA Tab 28]]**.

27 *Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 1 WLR 1345 (HL) at 1349 **[[Resp BoA Tab 19]]**.

> Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected. … But doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it.

18. In order to avoid the relitigating of issues, it is necessary to identify those factors that may justify this Court departing from one of its judgments.

Factors that may justify departure from a previous judgment

19. In *Couch* the Court did not purport to provide an exhaustive account of the matters that may be relevant to departure from precedent.[28] However, *Couch*, itself, and the authorities from other common law jurisdictions cited by the appellant, suggest a number of common factors.

Supreme Court of New Zealand (*Couch*)

20. The following factors emerge from the judgments of the majority in *Couch*: (i) the Privy Council in *Bottrill* was clearly wrong,[29] by reference to inconsistencies in that Court's judgment;[30] (ii) *Bottrill* was inconsistent with the leading authorities of *Rookes v Barnard* and *Broome v Cassell & Co Ltd*;[31] (iii) *Bottrill* was inconsistent with the approach taken by other common law jurisdictions;[32] and (iv) *Bottrill* had been subject to significant academic criticism.[33]

21. However, *Couch* should be relied on with some caution. The Court was not considering departure from one of its own judgments, but from a Privy Council judgment. It had regard to the statutory obligation to resolve important legal matters "with an understanding of New Zealand conditions, history, and traditions",[34] as a factor that justified departure from the Privy

---

28 Blanchard J in *Couch v Attorney-General (No 2)* suggested adopting the approach adopted by the High Court of Australia in *John v Federal Commissioner of Taxation* [1989] HCA 5, (1989) 166 CLR 417 **[[App BoA Tab 36]]**. However, this framework was not adopted by the other judges: *Couch v Attorney-General (No 2)*, above n 21, at [51] **[[App BoA Tab 27]]**.

29 *Couch v Attorney-General (No 2)*, above n 21, at [105] per Tipping J and [51] per Blanchard J **[[App BoA Tab 27]]**. See also [118]–[135] per Tipping J in which his Honour (with whom Blanchard J agreed) subjected the Privy Council decision in *Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721 to close criticism.

30 *Couch v Attorney-General (No 2)*, above n 21, at [52] per Blanchard J **[[App BoA Tab 27]]**.

31 At [13] per Elias CJ, [53] per Blanchard J and [139]–[145] per Tipping J **[[App BoA Tab 27]]**.

32 At [69] per Blanchard J, [162]–[171] per Tipping J and [237] per McGrath J at [237] **[[App BoA Tab 27]]**.

33 At [68] per Blanchard J and [146]–[149] per Tipping J **[[App BoA Tab 27]]**.

34 Supreme Court Act 2003, s 3(1)(a)(ii). This was addressed in *Couch v Attorney-General (No 2)*, above n 21, at [204]–[210] per McGrath J and [251] per Henry J **[[App BoA Tab 27]]**.

Council when it had "made a policy choice which was not the right policy choice for New Zealand conditions".[35]

United Kingdom

22. In *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* the United Kingdom Supreme Court held:[36] (i) the judgment in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners*,[37] concerning the commencement of limitation periods, contained some 13 errors including illogicality;[38] (ii) it was inconsistent with Parliament's intention in enacting the relevant section of the Limitation Act 1980 (UK) and undermined the effectiveness of the statutory scheme;[39] and (iii) it was inconsistent with another statutory regime and various common law principles, rendering the relevant statutory scheme unworkable and so impeding the proper development of the law.[40]

23. In contrast, in *Test Claimants* the Court considered that another previous judgment, *Kleinwort Benson Ltd v Lincoln City Council*, "was not supported by convincing reasoning",[41] but emphasised this was "not a sufficient basis for this court to reverse a previous decision which it or the House of Lords has made that this court considers that a previous decision was wrong".[42] It upheld *Kleinwort* on the basis it could be applied without giving rise to serious injustice or impeding the development of the law and should therefore not be departed from, notwithstanding the serious criticism that it attracted.[43]

---

35 *Couch v Attorney-General (No 2)*, above n 21, at [106] per Tipping J and [208] per McGrath JJ **[[App BoA Tab 27]]**.

36 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47, [2022] AC 1 **[[App BoA Tab 41]]**.

37 *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558.

38 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*, above n 36, at [213(5)]–[213(18)] per Lord Reed and Lord Hodge (with whom Lord Lloyd-Jones and Lord Hamblen agreed) **[[App BoA Tab 41]]**.

39 At [213(5)] and [213(9)] **[[App BoA Tab 41]]**.

40 At [213(10)]–[213(17)] **[[App BoA Tab 41]]**.

41 At [242(1)] **[[App BoA Tab 41]]**; and *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL).

42 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*, above n 36, at [245] **[[App BoA Tab 41]]**.

43 At [173] **[[App BoA Tab 41]]**.

Australia

24. The appellant suggests that the approach of the High Court of Australia is "guided by four matters"[44]—the "*John* factors"[45]—and cites *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* as an illustration of these factors being applied.[46] However, although the High Court in that case cited *John*, it decried reliance on any test or set criteria, instead holding that the factors bearing on departure "are incapable of exhaustive definition", but the approach was to be "informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law, that such a course should not lightly be taken".[47]

25. In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,[48] the High Court of Australia overturned one part of a previous judgment,[49] as it was inconsistent with the constitutional principles governing lawfulness of immigration detention established in an earlier, leading judgment of that Court,[50] and applied in subsequent cases.[51] It concluded that the previous judgment had rendered that principle "devoid of substance".[52]

Canada

26. In *R v Bernard* the Supreme Court of Canada overturned *Leary v The Queen*,[53] finding that:[54] (i) it was inconsistent with the subsequently enacted Charter of Rights and Freedoms; (ii) it was clearly inconsistent with another Supreme Court case, *Pappajohn v The Queen*, to the extent that the Court found it "difficult to imagine how it is humanly possible to follow the jury instruction apparently mandated" by both cases;[55] (iii) it had more broadly led to "confusion and uncertainty in relation to the specific/general intent

---

44 Appellant's submissions on appeal at [34].

45 In *John v Federal Commissioner of Taxation*, above n 28 **[[App BoA Tab 36]]**. The criteria are referred to by Blanchard J, but not the other judges, in *Couch v Attorney-General (No 2)*, above n 21, at [51] **[[App BoA Tab 27]]**.

46 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37, (2023) 415 ALR 254 **[[App BoA Tab 37]]**.

47 At [17] **[[App BoA Tab 37]]**, citing *Wurridjal v Commonwealth* [2009] HCA 2, (2009) 237 CLR 309 at [70] (full citations omitted).

48 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, above n 46 **[[App BoA Tab 37]]**.

49 *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562.

50 *Lim v Minister for Immigration Local Government & Ethnic Affairs (Cambodian "Boat People" case)* (1992) 176 CLR 1.

51 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, above n 46, at [34]–[35] **[[App BoA Tab 37]]**.

52 At [45] **[[App BoA Tab 37]]**.

53 *Leary v The Queen* [1978] 1 SCR 29.

54 *R v Bernard* [1988] 2 SCR 833 **[[App BoA Tab 46]]**.

55 At [37] and [48]–[50] **[[App BoA Tab 46]]**, citing *Pappajohn v The Queen* [1980] 2 SCR 120.

dichotomy";[56] and (iv) it had expanded the scope of criminal liability in a way that is impermissible for the Court to do.[57]

27. Similarly, the Court in *R v Henry* found "compelling reasons" to depart from *R v Mannion* because it:[58] (i) was contrary s 13 of the Charter (protection against self-incrimination), as interpreted in earlier cases; (ii) the courts had "struggled to work with" it; and (iii) it had led to a dilution of the s 13 protection, in a way that was "contrary to sound principle", and was "completely inconsistent with a purposive reading of s 13".[59]

Ireland

28. In *Director of Public Prosecutions v JC*, the Supreme Court of Ireland departed from its previous decision in *DPP v Kenny*,[60] which had adopted a near absolute exclusionary approach to evidence obtained in breach of the accused's constitutional rights.[61] The Court considered departure justified on the following bases: (i) *Kenny* was clearly wrong,[62] being based on a rationality that does not withstand scrutiny,[63] and on a linguistically and grammatically implausible construction of the relevant constitutional provision;[64] (ii) *Kenny* had the effect of overruling an earlier case,[65] without that case having been considered. Departure from *Kenny* was therefore necessary to correct a previous failure to respect precedent;[66] (iii) the relevant authorities in other common law jurisdictions indicated that the approach adopted in *Kenny* was significantly out of step with the approaches to the exclusion of unconstitutionally obtained evidence in those jurisdictions;[67] and (iv) *Kenny* had been subject to "penetrating" academic criticism.[68]

---

56 *R v Bernard*, above n 54, at [48]–[50] **[[App BoA Tab 46]]**, citing *Pappajohn v The Queen*, above n 55, at [54].
57 *R v Bernard*, above n 54, at [48]–[50] **[[App BoA Tab 46]]**, citing *Pappajohn v The Queen*, above n 55, at [55].
58 *R v Henry* 2005 SCC 76, [2005] 3 SCR 609 at [44]–[45] **[[App BoA Tab 47]]**; and *R v Mannion* [1986] 2 SCR 272.
59 *R v Henry*, above n 58, at [45]–[47] **[[App BoA Tab 47]]**.
60 *Director of Public Prosecutions v Kenny* [1990] 2 IR 110 (SC).
61 *Director of Public Prosecutions v JC* [2015] IESC 31, [2017] 1 IR 417 **[[App BoA Tab 56]]**.
62 At [99] per O'Donnell J **[[App BoA Tab 56]]**.
63 At [52] **[[App BoA Tab 56]]**.
64 At [51] **[[App BoA Tab 56]]**.
65 *Attorney-General v O'Brien* [1965] IR 142 (SC).
66 *Director of Public Prosecutions v JC*, above n 61, at [52] **[[App BoA Tab 56]]**.
67 *Director of Public Prosecutions v Kenny*, above n 60.
68 *Director of Public Prosecutions v JC*, above n 61, at [94] **[[App BoA Tab 56]]**.

United States of America

29. In *Planned Parenthood of Southeastern Pennsylvania v Casey* adherence to precedent led the United States Supreme Court to decline to overturn *Roe v Wade*,[69] notwithstanding the majority justices' concerns about its correctness.[70] When the Court (by a majority) did overrule *Roe* in *Dobbs v Jackson Women's Health Organization*,[71] it held that precedent did "not compel unending adherence to *[Roe]",* given that *Roe* was "egregiously wrong", an "abuse of judicial authority", had "damaging consequences" and had "deepened division" on the issue of abortion.[72]

Whether the identified features are present in *Chapman*

30. Common to all the authorities cited by the appellant is the recognition of the importance of precedent leading to a "strongly conservative cautionary" approach.[73] Although the factors that may bear on departure may be "incapable of exhaustive definition",[74] the following four factors are generally present and provide a useful framework for considering whether this Court should depart from a previous judgment:

30.1 Whether the impugned judgment is inconsistent with the wider framework of domestic law, including relevant statutory or constitutional provisions and other judgments of high authority.

30.2 Whether it is inconsistent with the development of the law in other common law jurisdictions.

30.3 Whether it was clearly wrong in the sense of being intellectually unsustainable and in error on its own terms. This must be contrasted with cases in which in the weighing of competing values judges can reasonably disagree without being "in error".

30.4 Whether it has given rise to significant unintended consequences that threaten the proper development and application of an aspect of the law.

---

69 *Roe v Wade* 410 US 113 (1973).
70 *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992) **[[App BoA Tab 52]]**.
71 *Dobbs v Jackson Women's Health Organization* 597 US 215 (2022) **[[App BoA Tab 53]]**.
72 At 5 per Alito J, giving the opinion of the Court **[[App BoA Tab 53]]**.
73 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, above n 46, at [17]–[18] **[[App BoA Tab 37]]**.
74 At [17] **[[App BoA Tab 37]]**, citing *Wurridjal v Commonwealth*, above n 47, at [70] (full citations omitted).

31. None of these factors are present in *Chapman*. This should be dispositive of the appellant's challenge.

32. However, the above cases also suggest two other factors that may be relied on by the appellant:

32.1 *Academic criticism of the impugned judgment*: *Chapman* has been the subject of criticism, particularly from Professor Joseph.[75] However, the fact that a decision has attracted such criticism is not by itself a factor that would justify departure absent those factors set out at paragraph [30] above. Further, for reasons addressed in the course of these submissions these criticisms are not justified.

32.2 *Inconsistency with international obligations*: The appellant says *Chapman* is inconsistent with art 9(5) of the ICCPR, as indicated by the Views of United Nations Human Rights Committee (**HRC**) in *Thompson v New Zealand*.[76] He identifies that the United Kingdom Supreme Court has departed from its previous judgments when necessary to ensure consistency with the jurisprudence of the European Court of Rights (**ECtHR**).[77] However, the Human Rights Act 1998 (UK) has incorporated the ECHR into domestic law and requires the domestic courts to take into account the decisions of the ECtHR when giving effect to it.[78] Consistency with ECtHR jurisprudence is therefore an important principle of domestic United Kingdom law.[79] In contrast, the status of art 9(5) of the ICCPR is an international obligation that has not been incorporated into domestic New Zealand law. The appellant has cited no instance in which an apex court has departed from one of its previous decisions because of inconsistency with an international as opposed to

---

75 See Philip A Joseph "Constitutional Law" (2012) 3 NZ L Rev 515 **[[Resp BoA Tab 61]]**; and Philip A Joseph *Joseph on Constitutional and Administrative Law in New Zealand* (5th ed, Thomson Reuters, Wellington, 2021) at ch 27. See also Stephanie Woods "Judicial immunity: State immunity?" [2012] 1 NZLJ 6; and Abimbola Olowofoyeku "When courts get it wrong: judicial errors and common law underenforcement" (2018) 134 Jul LQR 450.

76 *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No 316/2018* UN Doc CCPR/C/132/D/3162/2018 (7 June 2022) **[[App BoA 60]]**.

77 Appellant's submissions on appeal at [33].

78 Human Rights Act 1998 (UK), s 2(1)(a) **[[Resp BoA Tab 54]]**.

79 Even then the Supreme Court has made it clear that inconsistency with the European Convention on Human Rights, above n 5, is not sufficient for it to depart from its previous judgments. The Court must still be satisfied that the previous judgment was wrong: *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373 **[[Resp BoA Tab 44]]**.

domestic obligation. For the reasons addressed below at paragraph [116] this Court should not do so in this case.

Chapman *is consistent with relevant domestic law*

The constitutional principles and the statutory framework governing public law remedies

33. *Ubi jus ibi remedium*—where there is a right, there is a remedy, is a fundamental principle of the common law.[80] However, the common law shapes and sometimes restricts the availability of remedies in areas where to provide them would be contrary to constitutional principles or public policy.[81] Therefore, whilst NZBORA is a statute of constitutional importance to which a generous approach must be given in order to render rights "practical and effective",[82] the approach to remedies for NZBORA breaches must be developed in light of constitutional principles and relationships if those rights are to be effectively "woven into the fabric of New Zealand law".[83] As the Supreme Court of Canada said in *Attorney-General v Power*, the availability of constitutional remedies against public bodies must be considered in light of "constitutional design and institutional relationships".[84] Similarly, in *Ernst v Alberta Energy Regulator* that Court held that Charter damages "will not be an appropriate and just remedy where there is an effective alternative remedy or where damages would be contrary to the demands of good governance".[85]

34. The restriction on the availability of damages that this Court recognised in *Chapman* is consistent with bedrock constitutional principle: (i) the separation of powers and judicial independence; (ii) the scheme of public law remedies established by common law and statute and affirmed by NZBORA; (iii) the role of the Attorney-General in proceedings against the Crown; and (iv) other decisions of this Court on remedies for breaches of NZBORA.

---

80 *Ashby v White* (1703) 2 Ld Raym 938, 92 ER 126 at 136 **[[Resp BoA Tab 6]]**; and *Baigent's Case*, above n 16, at 717 per McKay J **[[App BoA Tab 3]]**.

81 The law of judicial immunity and the limitation on tortious liability that the law recognises for public policy reasons, as identified by this Court in *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [156], are well established areas in which liability is limited where to extend it would not be in the public interest.

82 *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1 at [25] per Elias CJ and [103] per Tipping J.

83 *R v Goodwin (No 2)* [1993] 2 NZLR 153 (CA) at 156 per Cooke P.

84 *Attorney General v Power* 2024 SCC 26, [2024] SCJ 26 at [74] **[[App BoA Tab 51]]**.

85 *Ernst v Alberta Energy Regulator* 2017 SCC 1, [2017] 1 SCR 3 at [26] **[[Resp BoA Tab 17]]**.

Separation of powers and judicial independence

35. As the Constitution Act 1986 recognises, the structure of the New Zealand constitution is based upon three separate branches of government,[86] each exercising its distinct functions to be performed independently of the others.[87] Section 3(a) NZBORA mirrors this separation.

36. The principle of judicial independence was said by Lord Cooke, extrajudicially, to be one of the "two unalterable" fundamentals of the constitution.[88] For the purpose of this appeal, it has the following features:

36.1 It involves not only "the individual independence of a judge" but also "the institutional independence of the court".[89]

36.2 The judiciary must be independent, not simply from the other branches of government, but of any person who would improperly interfere with the judicial function.[90] Judicial immunity serves to support judicial independence by ensuring that judges are not subject to improper attack or harassment.[91]

36.3 The judicial branch is vulnerable to perceived or actual interference by the executive branch, as the judiciary are appointed by the Governor-General on advice from the senior Law Officer who also holds ministerial roles in the executive, and is entirely reliant on the resources and support of the executive to function.[92] This vulnerability necessitates a number of statutory provisions,

---

86 For judicial statements of the importance of the doctrine see: *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 (CA) at 567 per Lord Mustill **[[Resp BoA Tab 42]]**; and *Director of Public Prosecutions of Jamaica v Mollison* [2003] UKPC 6, [2003] 2 AC 411 at [13] per Lord Bingham **[[Resp BoA Tab 14]]**. See also Lord Johan Steyn "The case for a Supreme Court" 188 LQR 382 at 383: "Our system is undoubtedly based on a constitutional principle of the separation of powers." Although, Professor Joseph in *Joseph on Constitutional and Administrative Law in New Zealand*, above n 75, suggests that in New Zealand the separation of powers is "not an organising principle of constitutional thought", noting the significant way in which legislative and executive powers are merged in the Westminster system of government (at 247). He nevertheless concludes that the "separation of the functions of government, although interlocking and merging at the margins, is a necessary condition of the rule of law and limited government" (at 278). Further, academic statements of support for the fundamental constitutional importance of the principle are cited in Bradley, Ewing and Knight *Constitutional and Administrative Law* (18th ed, Pearson, London, 2022) at ch 4(c).

87 The Westminster model of government involves a modified approach to the separation between the executive and legislature, but not of the independence of the judiciary from both the legislature and the executive.

88 Sir Robin Cooke "Fundamentals" [1988] NZLJ 158 at 164 **[[Resp BoA Tab 62]]**.

89 *Valente v R* [1985] 2 SCR 673 at [20] **[[Resp BoA Tab 48]]**.

90 *Taaffe v Downes* (1813) 13 ER 15 (CPD) at 18 **[[Resp BoA Tab 46]]**.

91 *Harvey v Derrick* [1995] 1 NZLR 314 (CA) at 324 per Richardson J **[[Resp BoA Tab 23]]**.

92 See Ministry of Justice "Principles observed by the Judiciary and the Ministry of Justice in the Administration of the Courts" (29 November 2018) at [1.3] **[[Resp BoA Tab 63]]**.

constitutional conventions and legal principles, including judicial immunity, that support judicial independence.[93]

36.4 Judicial legitimacy rests on a culture of public confidence in judicial independence. Without public confidence, the judicial system cannot "claim any legitimacy or command the respect and acceptance that are essential to it".[94] For confidence to be established and maintained, "it is important that the independence of the court be openly 'communicated' to the public".[95] Further, because it is "important that a tribunal should be perceived as independent" it is necessary that "the test for independence should include that perception".[96]

Consistency with application of NZBORA

37. NZBORA must be interpreted and applied in order to give effect to the principles of the separation of powers and judicial independence. Section 3(a) of NZBORA requires each branch of government to give effect to its provisions, indicating that its obligations are to be given effect to by each branch, in accordance with its particular constitutional role.[97] It does not recognise a unitary state actor. Therefore, whilst the ICCPR as an international instrument imposes obligations upon the New Zealand state,[98] how domestic effect is to be given to these obligations is to be worked out in accordance with the separation of powers and other relevant principles governing the relationships between the branches of government.[99]

---

93 See for example Crown Proceedings Act 1950, ss 2 and 6(5) **[[Resp BoA Tab 1]]**.

94 *Mackin v New Brunswick Minister of Finance* 2002 SCC 13, [2002] 1 SCR 405 at [38] **[[Resp BoA Tab 33]]**.

95 At [38] **[[Resp BoA Tab 33]]**.

96 *Valente v R*, above n 89, at [22] **[[Resp BoA Tab 48]]**.

97 *Baigent's Case*, above n 16, at 676 per Cooke P **[[App BoA Tab 3]]**.

98 "Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries" adopted by the International Law Commission, see *Report of the International Law Commission on the work of its fifty-third session* UN Doc A/56/10 (23 April–1 June and 2 July–10 August 2001). Article 4, and its commentary, recognises that the unitary state which is bound by international treaty obligations includes the judicial branch.

99 Whether and in what circumstances the common law recognises that the branches of government form a single unitary state is a matter of uncertainty that this Court in *Attorney-General v Chapman Attorney-General v Chapman*, above n 1, noted but did not explore: see [116] per McGrath and William Young JJ **[[App BoA Tab 2]]**. Judicial and academic statements of the issue can be found, see: *Chagos Islanders v Attorney-General* [2004] EWCA Civ 997, [2004] All ER (D) 85 (Aug) at [20] per Sedley LJ "The English common law has no knowledge of the State". See also Joseph *Joseph on Constitutional and Administrative Law in New Zealand*, above n 75, at 609–610. Compare with the debate in PW Hogg and PJ Monahan *Liability of the Crown* (3rd ed, Carswell, Scarborough Ontario, 2000) at 13–14; and Joseph *Joseph on Constitutional and Administrative Law in New Zealand*, above n 75, at 585 and n 18, noting that:

Consistency with s 27(2) of NZBORA

38. In *Baigent's Case* Cooke P said, of the development of remedies under NZBORA:[100]

> First, although the New Zealand Act contains no express provision about remedies, this is probably not of much consequence. Subject to ss 4 and 5, the rights and freedoms in Part II have been affirmed as part of the fabric of New Zealand law. The ordinary range of remedies will be available for their enforcement and protection. Secondly, the long title shows that, in affirming the rights and freedoms contained in the Bill of Rights, the Act requires development of the law when necessary. Such a measure is not to be approached as if it did no more than preserve the status quo.

39. Although NZBORA does not contain a general remedial provision,[101] it does affirm the right to a number of procedural remedies that are established through statute and common law and may be relied upon to vindicate substantive rights.[102]

40. In cases such as *Baigent's Case* and *Taylor* the courts have found it necessary to develop the law to provide effective remedies for NZBORA in areas in which the established procedural protections that NZBORA does expressly affirm were not available to protect the infringed right. However, this Court should proceed with caution to ensure that the recognition of new remedies only occurs when necessary to give effect to otherwise unprotected rights and consistently with the scheme of remedies that Parliament, through NZBORA, has decided to affirm. This is particularly so in cases such as *Chapman* when the Court was considering whether it was necessary to develop the law by recognising new procedural remedies in an area where the law, in general and through NZBORA in particular, already recognises a number of procedural remedies to protect rights.

41. Sections 23–25 of NZBORA affirm a range of procedural protections for those subject to detention and subject to criminal proceedings including, relevantly for this appeal, the right to challenge detention by way of habeas

---

"Whatever the theories of jurisprudence or the position under public international law, English common law has never accorded legal standing to the State as a juristic entity." See also KHF Dyson *The State Tradition in Western Europe* (Blackwell, Oxford, 2010) at 36–44; Martin Loughlin "The State, the Crown and the Law" in M Sunkin and S Payne (eds) *The Nature of the Crown* (Oxford University Press, Oxford, 1999); HJ Laski "The responsibility of the State in England" (1919) 32 Harv L Rev 447 at 472; and FW Maitland "The Crown as Corporation" (1901) 17 LQR 131.

100 *Baigent's Case*, above n 16, at 676 per Cooke P **[[App BoA Tab 3]]**.

101 At 676–677 per Cooke P **[[App BoA Tab 3]]**.

102 For example, the right to habeas corpus is affirmed in s 23(1) and the right to bail is affirmed in s 24(b).

corpus. Further, s 27(1) recognises the right to natural justice that was recognised under the common law, whilst s 27(2) provides for the protection of that right through judicial review (and, implicitly, the remedies available in judicial review proceedings). Where Parliament has affirmed a well-established common law right and affirmed certain procedural remedies for breach of that right, the courts should proceed on the basis that this is the remedy that Parliament intended, and be slow to develop additional remedies, subject to the overriding requirement to ensure that there are remedies capable of ensuring the effectiveness of the rights affirmed. Although the Court in *Chapman* framed its approach as one of policy rather than consistency with the scheme of the Act, its inquiry into whether there were effective existing remedies to protect fair trial rights served to ensure consistency with the scheme of the Act.

Consistency with s 27(3) of NZBORA and the Crown Proceedings Act

42. At common law there was no right to bring civil claims against the Crown, other than judicial review and habeas corpus.[103] The right to bring other civil claims was established by statute and is currently governed by the CPA, s 3(2)(c) of which provides for a right to bring civil proceedings against the Crown when "a claim or demand may be made against the Crown under this Act or under any other Act which is binding on the Crown".[104]

43. The CPA does not enable actions to be brought against the Crown in respect of judicial acts. Section 6(5) excludes actions undertaken in connection with a judicial process in relation to tort claims. But s 2, in excluding judges from the definition of Crown "officers" and "servants" for the purposes of the CPA, provides that the Crown should not be liable for judicial actions more generally.[105] The CPA is thereby part of the architecture that supports and promotes the separation of powers and judicial independence.

---

103 *Case of Prohibitions* [1607] EWHC J23 (KB); and *Viscount Canterbury v Attorney-General* (1843) 1 Phillips 306 (Ch). However, the rigours of the law were mitigated by the practice of Petition of Right, as discussed by Professor Joseph in *Joseph on Constitutional and Administrative Law in New Zealand*, above n 75, at 688.

104 Crown Proceedings Act 1950, s 3(2)(c) **[[Resp BoA Tab 1]]**. It confirms that a number of statutory causes of action are available against the Crown, including the Declaratory Judgments Act 1908, see s 5 and sch 1.

105 Crown Proceedings Act 1950, s 2 **[[Resp BoA Tab 1]]**.

44. NZBORA affirms rights to procedural remedies which are consistent with the independence of the judiciary. It affirms the right to habeas corpus,[106] and judicial review.[107] However, through s 27(3), it also affirms "the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals". The use of the term "Crown" in s 27(3) contrasts with the use of the terms "executive" and "branches of government" in s 3(a) and is an intentional reference to the principles of the CPA, as confirmed in the White Paper.[108] Section 27(3) therefore affirms the right established in the CPA to bring civil actions against the Crown but not in respect of judicial actions.

45. That limitation in the right to bring claims against the Crown applies to claims brought in respect of NZBORA itself. The Court of Appeal indicated in *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* and *Baigent's Case* that actions for damages under NZBORA are not actions in tort and therefore not subject to s 6(5) of the CPA, but are brought by virtue of s 3(2)(c) of the CPA.[109] The Law Commission in "A New Crown Civil Proceedings Act For New Zealand" has subsequently suggested that there is doubt about whether actions for NZBORA damages are subject to the CPA and proposed that the CPA be amended to clarify that they are.[110] However, the cases which the Law Commission suggests cast doubt on whether claims for damages for breaches of NZBORA rights proceed under the CPA do not, on consideration, indicate any doubt as to the position.[111] The wording of

---

106 New Zealand Bill of Rights Act 1990, s 23(1)(c) **[[Resp BoA Tab 3]]**. And the right to bail in criminal proceedings is affirmed in s 24(b) **[[Resp BoA Tab 3]]**.

107 New Zealand Bill of Rights Act 1990, s 27(2) **[[Resp BoA Tab 3]]**.

108 Geoffrey Palmer "A Bill of Rights for New Zealand – A White Paper" [1984–1985] I AJHR A6 at [10.176] **[[Resp BoA Tab 58]]**; and New Zealand Bill of Rights Act 1990, s 3 **[[Resp BoA Tab 3]]**.

109 *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720 (CA) at 729 per Hardie Boys J giving the judgment of the Court: "In my opinion, consistency with the worldwide approach to basic human rights mandates a remedy based on the Bill of Rights, which falls within s 3(2)(c) of the Crown Proceedings Act, if recourse to that provision is necessary, and is therefore not barred by Crown immunity." **[[Resp BoA Tab 8]]**; and *Baigent's Case*, above n 16, at 697 per Hardie Boys J: "This, it is said, is not an action in tort giving rise to vicarious liability such as to attract immunity under s 6(5) of the Crown Proceedings Act; but one which, if it is not altogether independent of that Act, may certainly be brought under s 3(2)(c)." **[[App BoA Tab 3]]**

110 Law Commission *A New Crown Civil Proceedings Act For New Zealand* (NZLC IP35, 2014) at [4.7]–[4.17] **[[Resp BoA Tab 60]]**.

111 The report suggests that *Baigent's Case* doubts whether New Zealand Bill of Rights Act 1990 claims are subject to the Crown Proceedings Act 1950: at [4.7]–[4.9] **[[Resp BoA Tab 60]]**. However, the Court of Appeal in that case simply stated that s 6 of the Crown Proceedings Act 1950 (tort claims) did not apply to New Zealand Bill of Rights Act 1990 claims: *Baigent's Case*, above n 16, at 677 per Cooke P, 692 per Casey J

s 3(2)(c) of the CPA clearly encompasses claims brought for breaches of NZBORA.

46. Therefore, the approach of the Court in *Chapman* was, although framed in policy terms, consistent with the scheme of Crown liability established through the CPA and affirmed by s 27(3) that excludes the Crown from being liable for the acts of the judiciary, thereby upholding judicial independence.

The role of the Attorney-General in civil claims against the Crown

47. As the senior Law Officer of the Crown, the Attorney-General is responsible for determining the Crown's view of the law and for ensuring that its litigation is properly conducted,[112] but nevertheless does so in the context of membership of the executive with a legitimate interest in limiting Crown liability.[113]

48. Therefore, when the Attorney-General is named on behalf of the Crown pursuant to s 14 of the CPA, including in NZBORA claims, she is named in her capacity as representative for the Crown with responsibilities to her client. But as both representative of the Crown, and its senior lawyer, she is an advocate for its interests. This obligation that the Attorney-General owes to the executive, as a member of the executive, militates against her being named as the defendant in respect of judicial actions. As Kirby P said in *Rajski v Powell*:[114] "…the theoretical basis for rendering a law minister responsible for the acts of a judicial officer, simply does not arise from the relationship between them." Although, as McGrath notes, the Attorney

---

and 718 per McKay J **[[App BoA Tab 3]]**. The report also suggests that in *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA) at 595 **[[Resp BoA Tab 9]]**, and *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA) at 404, a claim for damages for breach of s 21 of the New Zealand Bill of Rights Act 1990, "it was assumed, without being decided directly, that the provisions of section 27 relating to discovery did not apply directly to the actions for public law compensation" **[[Resp BoA Tab 10]]**. However, in those cases it was simply noted that under a number of enactments, including the Crown Proceedings Act 1950, the High Court Rules 2016 and the District Court Rules 2014, the Official Information Act 1982, and the New Zealand Security Intelligence Service Act 1969, Ministers had apparently conclusive powers to prevent access to information but that those powers had not been exercised in that case before the Court.

112 John McGrath QC "The Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197 at 207 **[[Resp BoA Tab 59]]**. The point is made specifically in relation to the Solicitor-General's conduct of civil litigation but applies no less to the first law officer. This representative role is distinct from the other role of the Attorney-General in litigation, described by McGrath at 204 as "a separate responsibility to represent the public interest on behalf of the general community by enforcing the law as an end in itself. In that capacity, the Attorney-General must act independently of the political interests or preferences of the government of the day and is a guardian of the public interest." **[[Resp BoA Tab 59]]**

113 At 204 **[[Resp BoA Tab 59]]**. See also Crown Law "Attorney-General's Values for Crown Civil Litigation" (31 July 2013); and Cabinet Office, above n 20, at [4.8].

114 *Rajski v Powell* (1986) 11 NSWLR 522 (NSWCA) at 530 **[[Resp BoA Tab 45]]**.

General "carries the principal responsibility in government for the relationship of the executive government with the judiciary", it is a relationship to be conducted at constitutional arm's length being "a relationship with a separate branch of government".[115]

49. Whilst the Attorney-General, through Crown counsel, may defend judicial decisions in judicial review proceedings and statutory appeals, such defences are advanced on behalf of the Crown, usually when the Crown has been a party to the proceedings out of which the challenge arises.[116] Crown counsel may be instructed on behalf of a court or tribunal when its decisions are subject to challenge,[117] but it "is well-established that a judicial decision-maker will abide the decision of the Court on judicial review, rather than defending their decision".[118]

50. Whilst the Court in *Chapman* was "not able to think of anyone other than the Attorney-General who could adequately represent the state" in NZBORA claims against the Crown for judicial breaches, the fact that it found the Crown should not be liable for such breaches meant that it did not need to grapple with "legal uncertainties as to the juristic nature of the state in domestic law and the constitutional awkwardness of the Attorney-General being sued for the actions of judges".[119]

Consistency with the Court's approach to remedies in Taunoa

51. In *Chapman* the Court held that *Baigent's Case* did not establish a general right to compensation in respect of NZBORA breaches but rather a general obligation on the Court to provide an effective remedy, and that may require compensation where no other effective remedy is available.[120] The obligation was derived from art 2(3) of the ICCPR but also from the common law principle that where there is a right there must be a remedy, and the presumption that Parliament cannot have intended NZBORA to be

---

115 McGrath, above n 112, at 203 **[[Resp BoA Tab 59]]**.

116 When the Crown is named as respondent in accordance with s 9(1)(b) of the Judicial Review Procedure Act 2016.

117 Pursuant to s 9(3) of the Judicial Review Procedure Act 2016.

118 *Braun v Legal Complaints Review Officer* [2022] NZHC 2020 at [8], citing *New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration* [1976] 2 NZLR 283 (CA) at 284–285; and *Secretary of Internal Affairs v Pub Charity* [2013] NZCA 627, [2014] NZAR 177 at [27].

119 *Attorney-General v Chapman*, above n 1, at [116] **[[App BoA Tab 2]]**.

120 At [203] per McGrath and William Young JJ **[[App BoA Tab 2]]**. See *Baigent's Case*, above n 16, at 677 per Cooke P, 692 per Casey J, 703 per Hardie Boys J, 712 per Gault J and 718 per McKay J **[[App BoA Tab 3]]**.

ineffective through the absence of an effective remedy for breach of the rights it affirms.[121]

52. In *Taunoa* this Court adopted a similar analysis of *Baigent's Case,* emphasising that the fundamental purpose of remedies for rights breaches is to vindicate the right and make it effective by deterring future breach, with punishment and compensation playing only subsidiary roles.[122] Blanchard J (with whom Tipping J agreed) reviewed the approach to public law damages in other common law countries,[123] and found that the "primary task is to find overall a remedy or set of remedies which is sufficient to deter any repetition by agents of the State and to vindicate the breach of the right in question".[124] In doing so, it was necessary to consider whether non-monetary remedies were sufficient to achieve this aim. Similarly, McGrath J indicated that "[t]he court's principal objective must be to vindicate the right in the sense of upholding it in the face of the state's infringement".[125]

53. The Court did not rule out other remedies, including damages where "a breach of rights is of a serious nature, and the case is not one where exclusion of evidence is a practicable remedy".[126] And it suggested that violations of certain rights, in particular s 9, were so serious that compensation would generally be required.[127]

54. The issue of compensation for judicial breaches of NZBORA was not before the Court in *Taunoa* which was, instead, concerned with breaches of rights by the executive. Not all its reasoning about the necessity for damages in certain circumstances carries over to judicial breaches of rights.

55. The Court in *Taunoa* recognised that there may be a need for damages to deter future NZBORA breaches.[128] However, deterrence is neither required nor appropriate for judges whose decisions are subject to review and

---

121 *Baigent's Case*, above n 16, at 676 per Cooke P, 691–692 per Casey J, 698–700 per Hardie Boys J and 717 per McKay J **[[App BoA Tab 3]]**.

122 *Taunoa v Attorney-General*, above n 3, at [255] and [259] per Blanchard J, [318]–[320] per Tipping J and [366]–[369] per McGrath J **[[App BoA Tab 11]]**.

123 At [243]–[250] per Blanchard J and [275] per Tipping J **[[App BoA Tab 11]]**.

124 At [253] per Blanchard J **[[App BoA Tab 11]]**.

125 At [366] per McGrath J **[[App BoA Tab 11]]**.

126 At [370] per McGrath J **[[App BoA Tab 11]]**.

127 At [261] per Blanchard J **[[App BoA Tab 11]]**.

128 At [109] and nn 186–187 per Elias CJ, [253] per Blanchard J, [318]–[320] per Tipping J and [368] per McGrath J **[[App BoA Tab 11]]**.

correction by higher courts. Further, the public nature of the judicial function means that the judiciary are already publicly accountable for their decisions, and the independence of the judge from the administrative state means that they lack the temptation to breach NZBORA rights to which law enforcement agencies may be exposed. Finally, deterrence is not achieved when it is the Crown and not the judge who bears the burden of liability. If, however, judicial decision-making may be affected by Crown liability, then this gives rise to precisely the concerns about the impact of Crown liability on judicial independence that were of concern to the Court in *Chapman.*

56. In *Taunoa* the appellants were subject to conditions amounting to inhuman treatment for many months, although a declaration ultimately brought their conditions to an end.[129] In contrast, errors in formal judicial decisions can be identified and challenged in a timely fashion in applications for habeas corpus, bail, judicial review and statutory appeal. When judicial errors are made in criminal proceedings, the affected person will generally be legally represented and therefore will not lack the ability to seek an appropriate judicial remedy.

57. The approach of the Court to remedies in *Chapman* is therefore consistent with that adopted in *Taunoa*, albeit adopted to the particular considerations that arise when NZBORA breaches are caused by judicial rather than executive acts.

Consistency with the approach to declarations of inconsistency in Taylor

58. The appellant suggests that *Chapman* is inconsistent with the Supreme Court's more recent approach to remedies in *Taylor*.[130]

59. *Taylor* was not concerned with Crown liability for judicial decisions but with the power of the High Court to make a declaration of inconsistency in relation to a statute. As the Supreme Court of Canada explained in *Attorney-General v Power*, different considerations are at play when determining the appropriate remedies against legislative and adjudicative bodies.[131]

---

129 *Taunoa v Attorney-General*, above n 3, at [107] **[[App BoA Tab 11]]**.
130 *Attorney-General v Taylor*, above n 4 **[[App BoA Tab 30]]**.
131 *Attorney General v Power*, above n 84, at [74] **[[App BoA Tab 51]]**.

60. An important consideration in *Taylor* was that the obligation to provide an effective remedy could only be fulfilled through declaratory relief because, in respect of legislation, "there was no other effective remedy".[132] And "[t]he making of a formal declaration is also another means of vindicating the right in the sense of marking and upholding the value and importance of the right".[133] In contrast, the judgment in *Chapman* was predicated on the existence of alternative, effective remedies for judicial breaches.

61. Further, declaratory relief is one of the "ordinary range of remedies" available to the courts,[134] that may be made under the Declaratory Judgments Act 1908 "even when there is no lis".[135] In contrast, the right to sue the Crown in respect of NZBORA breaches by judges is novel and not known to the common law and contrary to our constitutional arrangements.

*Consistency with pre-*Chapman *caselaw on Crown liability for breaches of fair trial rights*

62. The appellant's suggestion that *Chapman* is "an outlier and an aberration" in the caselaw concerning Crown liability for judicial breaches is without foundation.[136] Before *Chapman*, the only two cases in which the courts ordered damages against the Crown for breaches of fair trial rights or other judicial breaches of NZBORA rights were cases in which the Crown conceded liability, so the issues were not subject to reasoned decision.[137]

63. In cases where the issue was not conceded, the courts largely indicated that damages for breach of fair trial rights would not be available as a matter of course but declined to rule on whether compensation might ever be available.[138] However, William Young J in his Honour's judgment in *Brown v Attorney-General* and Fogarty J in *McKean v Attorney-General* both found

---

132 *Attorney-General v Taylor*, above n 4, at [41] per Ellen France and Glazebrook JJ **[[App BoA Tab 30]]**.

133 At [56] per Ellen France and Glazebrook JJ **[[App BoA Tab 30]]**.

134 At [38] per Ellen France and Glazebrook JJ: "…an effective remedy should be available for a breach of the Bill of Rights and the courts can draw upon the ordinary range of remedies to provide such a remedy." **[[App BoA Tab 30]]**

135 At [53] per Ellen France and Glazebrook JJ **[[App BoA Tab 30]]**.

136 Appellant's submissions on appeal at [79].

137 *Upton v Green (No 2)* (1996) 3 HRNZ 179 (HC) **[[Resp BoA Tab 47]]**, and its appeal in *Attorney-General v Upton* (1998) 5 HRNZ 54 (CA) **[[App BoA Tab 34]]**; and *Rawlinson v Rice* [1997] 2 NZLR 651 (CA) **[[App BoA Tab 33]]**.

138 See *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA) **[[Resp BoA Tab 35]]**; *Upton v Green (No 2)*, above n 137 **[[Resp BoA Tab 47]]**; and *Attorney-General v Upton*, above n 137 **[[App BoA Tab 34]]**; *Rawlinson v Rice*, above n 137 **[[App BoA Tab 33]]**; *Attorney-General v Udompun* [2005] NZCA 128, [2005] 3 NZLR 204 **[[Resp BoA Tab 7]]**; and *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 **[[Resp BoA Tab 12]]**.

that damages should not be available for reasons that foreshadow the majority judgment in *Chapman*.[139]

Chapman *is consistent with the jurisprudence of other common law jurisdictions*

Privy Council caselaw

64. In *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* the Privy Council recognised that the state, as defined in the Constitution of Trinidad and Tobago,[140] may be liable for damages for a breach of constitutional rights, following error tantamount to a "failure to observe one of the fundamental rules of natural justice" and there was no likelihood of a reversal of the order on appeal at the crucial time.[141]

65. However, subsequently in *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago,*[142] *Hinds v Attorney General of Barbados,*[143] and most recently *Duncan and Jokhan v Attorney General of Trinidad and Tobago,*[144] the Privy Council has clarified that damages are not available for judicial breach when appropriate procedural remedies of appeal, bail or habeas corpus were available, even if the plaintiff did not exercise those rights.

Canada

66. At first instance provincial level, McDonald J in *R v Germain* said, obiter, that damages may be available for judicial breaches of the Charter, following the approach of the Privy Council in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*.[145] Subsequently in *Koita v Toronto Police Services Board* Cameron J found that the position was not "wholly settled".[146] However, in *Ernst* the Supreme Court held that Charter damages should not be available against a quasi-judicial body, noting that Charter damages "will not be an appropriate and just remedy where there is an effective alternative remedy

---

139 *Brown v Attorney-General* [2005] 2 NZLR 405 (CA) **[[App BoA Tab 13]]**; and *McKean v Attorney-General* [2007] 3 NZLR 819 (HC) **[[Resp BoA Tab 37]]**; and *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC) **[[App BoA Tab 14]]**.

140 As recognised by the Constitution of the Republic of Trinidad and Tobago, cl 1(1): "The Republic of Trinidad and Tobago shall be a sovereign democratic State." **[[Resp BoA Tab 52]]**.

141 *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*, above n 139, at 399 **[[App BoA Tab 14]]**.

142 *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190 at [92]–[93] **[[Resp BoA Tab 27]]**.

143 *Hinds v Attorney-General of Barbados* [2001] UKPC 56, [2002] 1 AC 854 at [24] **[[Resp BoA Tab 24]]**.

144 *Duncan and Jokhan v Attorney General of Trinidad and Tobago*, above n 8, at [50] **[[Resp BoA Tab 16]]**.

145 *R v Germain* [1984] AJ No 878 (QB) at [29] **[[Resp BoA Tab 40]]**.

146 *Koita v Toronto Police Services Board* 2000 CarswellOnt 4826 (SCJ) at [49] **[[Resp BoA Tab 30]]**.

or where damages would be contrary to the demands of good governance".[147] The Court found that judicial review of the decisions of judicial bodies would provide an effective remedy for Charter breaches without the need for damages claims and also that, for reasons similar to those given in *Chapman*, protecting judicial and quasi-judicial actors defending their decisions in damages suits upholds and strengthens public confidence and preserves impartiality.[148]

67. Although the appellant cites *Attorney-General v Power* as an incidence of the Supreme Court's expansive approach to constitutional damages, the Court in that case made it clear that its finding that Parliament did not enjoy absolute but only limited immunity and was not inconsistent with *Ernst,* given the different considerations in play when determining the appropriate remedies against legislative and adjudicative bodies:[149]

> An assessment into immunity must focus on the branches of government implicated by the claim… It is not surprising that a different form of state action raised different concerns about constitutional design and institutional relationships.

United States of America

68. The United States does not recognise any right to state compensation for judicial acts that breach constitutional rights.[150] The right to compensation for violation of Fourth Amendment rights by the federal agents was established in *Bivens v 6 Unknown Federal Narcotics Agent*s.[151] However, the Supreme Court has been reluctant to extend the availability of damages for breaches of constitutional rights beyond the context considered in *Bivens*, on the basis that the extension of a financial remedy for breaches of executive power is generally, where there are policy implications for the recognition of such a remedy, a matter for the legislature and not the Courts. In *Ziglar v Abbasi* the Court held:[152]

---

147 *Ernst v Alberta Energy Regulator*, above n 85, at [26] **[[Resp BoA Tab 17]]**, citing *Vancouver v Ward* 2010 SCC 27, [2010] 2 SCR 28 at [33].

148 *Ernst v Alberta Energy Regulator*, above n 85, at [30] **[[Resp BoA Tab 17]]**.

149 *Attorney General v Power*, above n 84, at [74] (citations omitted) **[[App BoA Tab 51]]**.

150 Lisa Tortell *Monetary Remedies for Breach of HR: A comparative study* (Hart Publishing, Oxford, 2006) at 17 and 35–36.

151 *Bivens v 6 Unknown Federal Narcotics Agents* 403 US 388 (1971) at 395.

152 *Ziglar v Abbasi* 137 S Ct 1843 (2017) the Court ruled that persons detained after the September 11 attacks could not maintain a *Bivens v 6 Unknown Federal Narcotics Agents*, above n 151, action against federal officials responsible for their detention under harsh conditions. Kennedy J gave judgment for the majority, with Breyer J dissenting (citations omitted) **[[Resp BoA Tab 50]]**.

> When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is "who should decide" whether to provide for a damages remedy, Congress or the courts? … The answer most often will be Congress. When an issue "involves a host of considerations that must be weighed and appraised," it should be committed to "those who write the laws" rather than "those who interpret them." … In most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if "the public interest would be served" by imposing a "new substantive legal liability." … As a result, the Court has urged "caution" before "extending *Bivens* remedies into any new context." … The Court's precedents now make clear that a *Bivens* remedy will not be available if there are "special factors counselling hesitation in the absence of affirmative action by Congress."

Ireland

69. In *Kemmy v Ireland* the High Court of Ireland declined to recognise State liability for judicial acts leading to arbitrary detention.[153] In rejecting the suggestion that the state should be liable for the errors of a judge, McMahon J said:[154]

> The fundamental reason for supporting this conclusion, however, is that when the judge is exercising judicial authority he is acting in an independent manner and not only is he not a servant of the State in these circumstances, he is not even acting on behalf of the State. He is not doing the State's business. He is acting at the behest of the people and his mission is to administer justice.

70. Subsequently, s 54 of the Human Rights and Equality Commission Act 2014 (IE) establishes a statutory right to compensation for unlawful deprivation of liberty as a result of judicial action. It was introduced to ensure Ireland's compliance with art 5(5) of the ECHR (the functional equivalent of art 9(5) of the ICCPR).[155] Subsection (3) provides that the Court "shall not compensate an affected person, other than to the extent required by Article 5(5) of the Convention and then only to the extent that he or she suffered actual injury, loss or damage".[156] The section prescribes a limitation period and narrowly defines "judicial act" as one "done in good faith but in

---

153 *Kemmy v Ireland* [2009] IEHC 178, [2009] 4 IR 74 **[[Resp BoA Tab 29]]**.

154 At [76] **[[Resp BoA Tab 29]]**.

155 Human Rights and Equality Commission Act 2014 (IE), s 54 **[[Resp BoA Tab 56]]**. The European Court of Human Rights found Ireland to be in breach for lack of a right to compensation for deprivation of liberty on judicial order: *DG v Ireland* (2002) 35 EHRR 53 (ECHR) **[[Resp BoA Tab 29]]**.

156 Human Rights and Equality Commission Act 2014 (IE), s 54(3) **[[Resp BoA Tab 56]]**.

excess of jurisdiction and includes an act done on the instructions of or on behalf of a judge".[157]

United Kingdom

71. To give effect to the United Kingdom's obligations under the ECHR,[158] s 9(3) of the Human Rights Act 1998 (UK) provides a limited statutory right to compensation for judicial acts done in good faith that breach art 5(5) or art 6 (right to a fair trial) insofar as that breach of art 6 gives rise to detention.[159] Like Ireland, the United Kingdom does not recognise a wider Crown liability for judicial actions.[160]

72. In *MTA v Lord Chancellor* it was argued, on the Lord Chancellor's behalf, that it was an abuse of process for a plaintiff to launch a freestanding claim for damages under s 9(3) and that such a claim would give rise to a "constitutional quandary", since any move by the Lord Chancellor to settle a claim rather than defend it would be inconsistent with his statutory duty to uphold the independence of the judiciary.[161] The Court of Appeal rejected that argument and held that through s 9(3) Parliament must have intended that the Lord Chancellor should enjoy the ordinary rights and responsibilities of a litigant, albeit to be exercised with a full awareness of the respect to be accorded to a judicial decision, therefore it was not necessarily improper to settle a claim even if it indicated a lack of confidence in the impugned judicial decision.[162]

Australia

73. Australia does not recognise a right to public law damages for judicial actions. In *Kruger v Commonwealth* Brennan J observed that the Constitution, which contains few, but some, rights, guarantees, immunities

---

157 Human Rights and Equality Commission Act 2014 (IE), s 54(8) **[[Resp BoA Tab 56]]**.

158 As made clear in the background to the second report of Human Rights Act 1998 (Remedial) Order (opened 17 October 2019) UK Parliament Committees <https://committees.parliament.uk/work/3232/human-rights-act-1998-remedial-order-second-report/>.

159 Human Rights Act 1998 (UK), s 9(4) provides that a claim will be against the Minister responsible for Courts (the Lord Chancellor) who must be joined as a party **[[Resp BoA Tab 54]]**. "Judicial act" means a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge, see s 9(5) **[[Resp BoA Tab 54]]**.

160 The appellant suggests that the United Kingdom is contemplating Crown liability for judicial actions breaching art 8 of the European Convention on Human Rights, above n 5 (right to private and family life) **[[Resp BoA Tab 53]]**. The bill in which that change would have been effected has now been abandoned following a change of government: Bill of Rights Act Bill 2022 (UK), cl 19.

161 *MTA v Lord Chancellor* [2024] EWCA Civ 965, [2024] 3 WLR 1037 at [59] **[[Resp BoA Tab 38]]**.

162 At [69] **[[Resp BoA Tab 38]]**.

and freedoms, "reveals no intention to create a private right of action for damages for an attempt to exceed the powers it confers or to ignore the restraints it imposes".[163]

74. The appellant cites s 18(7) of the Human Rights Act 2004 (ACT) which provides: "Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention." However, this provision does not provide any right to compensation for judicial acts because that Act excludes courts from the definition of "public authorities" who are required to give effect to the Act and whose failure to do so may give rise to legal action.[164] Further, the Australian Capital Territory Supreme Court held that s 18(7) does not give rise to a freestanding right to apply for damages for unlawful detention.[165] In *Lewis* the Court held that s 18(7), read in light of art 9(5) of the ICCPR, was satisfied by the availability of the tort of false imprisonment.[166]

South Africa

75. South Africa's Constitution contains a broad remedial clause under which courts have awarded damages for breaches of constitutional rights.[167] Although, as Blanchard J observed in *Taunoa*, courts have adopted a cautious approach to the awarding of damages.[168]

76. In *Claassen v Minister of Justice and Constitutional Development* the High Court declined to recognise the liability of the state for judicial acts that led to unlawful detention, whilst recognising that its absence may be inconsistent with South Africa's obligations under art 9(5) of the ICCPR:[169]

---

163 *Kruger v The Commonwealth* [1997] HCA 27, (1997) 190 CLR 1 at 46 per Brennan J **[[Resp BoA Tab 31]]**.

164 Human Rights Act 2004 (ACT), ss 40(2)(b), 40C and 40D **[[Resp BoA Tab 55]]**.

165 See *Lewis v Australian Capital Territory* [2018] ACTSC 19, (2018) 329 FLR 267 at [468] and [474] **[[App BoA Tab 39]]**, disapproving earlier obiter observation about *Morro v Australian Capital Territory* [2009] ACTSC 118, (2009) 4 ACTLR 78 **[[App BoA Tab 38]]**. And more recently in *McIver v Australian Capital Territory* [2024] ACTSC 112 at [424] **[[Resp BoA Tab 36]]**. See also *Morro v Australian Capital Territory* in which the Court found that the right under s 18(7) could be satisfied by the tort of false imprisonment **[[App BoA Tab 38]]**.

166 *Lewis v Australian Capital Territory*, above n 165, at [468] **[[App BoA Tab 39]]**.

167 The Constitution of the Republic of South Africa affirms the right to liberty and art 38 empowers the Court to provide "appropriate relief" for a breach of substantive rights **[[Resp BoA Tab 51]]**. In *Fose v Minister of Safety and Security* [1997] ZACC 786 at [100] the Constitutional Court found that this may entitle the Court to impose remedies **[[Resp BoA Tab 20]]**. However, more recently caselaw has suggested a conservative approach to awarding of damages: *Residents of Industry v Minister of Police* [2021] ZACC 37; and *Thubakgale v Ekurhuleni Metropolitan Municipality* [2021] ZACC 45, 2022 (8) BCLR 985.

168 *Taunoa v Attorney-General*, above n 3, at [231]–[242] **[[App BoA Tab 11]]**.

169 *Claassen v Minister of Justice and Constitutional Development*, above n 10, at [36] **[[Resp BoA Tab 11]]**.

> [36] The ICCPR is not a self-executing legal instrument in the sense that this country's formal adoption of its provisions did not, without more, amend our established domestic law. It seems to me that the current case illustrates the need, if unqualified effect is to be given to article 9(5) of the ICCPR, for South Africa to enact legislation of broadly similar effect to that contained in s 9 of the HRA. (This approach is consistent with the observation in *Carmichele* supra, at para. [36] that the legislature, not the judiciary, should be the major engine for law reform, most particularly, in my view, when additional charges on the exchequer are entailed.)

Chapman *was correctly decided*

Effective existing remedies

77. The Court identified a number of remedies that are available to address the consequences of judicial actions.[170] Having done so, it said:[171]

> This is not to say that such remedies will invariably be effective. There can be situations where wrongly convicted persons may have inadequate remedies because of high public policy considerations. But in deciding whether the *Baigent* cause of action should be extended to judicial breaches of rights, the high degree of general effectiveness of remedies in the justice system is highly relevant.

78. A fair legal system will generally provide an effective remedy for judicial breaches by administering justice through formal reasoned decisions provided to the parties, which are then capable of challenge through clearly demarcated avenues of appeal or review.

79. The appellant says this is not sufficient and it must be shown that a plaintiff would never be denied an effective remedy.[172] This is not an appropriate test. As Lord Bingham observed in *Hinds v Attorney-General of Barbados*:[173] "The fundamental human right is not to a legal system that is infallible but one that is fair."

The availability of effective remedies for arbitrary detention

80. *Chapman* was concerned with breaches of fair trial rights. However, the Court's conclusion that there are effective procedural remedies for judicial breaches of fair trial rights also applies to the right to be free from arbitrary detention.

---

170 *Attorney-General v Chapman*, above n 1, at [194] **[[App BoA Tab 2]]**.

171 At [198] (citations omitted) **[[App BoA Tab 2]]**.

172 Appellant's submissions on appeal at [83]–[84].

173 *Hinds v Attorney-General of Barbados*, above n 143, at [23] per Lord Bingham **[[Resp BoA Tab 24]]**, citing *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*, above n 139, at 399 per Lord Diplock **[[App BoA Tab 14]]**.

81. Section 23(1)(c) of NZBORA affirms the right to habeas corpus. In the common law it has been established as the effective procedural remedy for violations of the right to be free from arbitrary or unlawful detention.[174] It has been described as "perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement".[175] In *Fay v Noia* the US Supreme Court explained:[176] "Vindication of due process is precisely its historic office." More recently, in *Duncan and Jokhan v Attorney General of Trinidad and Tobago*, the Privy Council held:[177]

> According to the tradition explained by Lord Bingham in the *Belmarsh* case, by virtue of the fundamental nature of the right to liberty and security of the person and its due protection by law it is of great importance that an individual who is detained and claims the detention is unlawful should be able to come to court very quickly to test the matter and secure their prompt release if there is no proper or sufficient justification in law for their detention. That was the objective of the habeas corpus statutes, and the value accorded by them to vindicating the right of liberty has been recognised by the common law over centuries. It is also inherent in the European Convention and the ICCPR. Similarly, it has been identified by the Board in *Maharaj (No 2)* and *Independent Publishing* as inherent in the Constitution, particularly as reflected in s 4(a) and s 14. The ability to apply promptly for bail where a court has ordered detention of an individual is the functional equivalent of a prompt application for habeas corpus in other contexts involving detention.

82. The Board went on to find that it was only when a system did not provide the detainee with the opportunity of seeking release through habeas corpus or bail in criminal proceedings that they would be entitled to damages for breach of their constitutional right to liberty.[178] However, when the system did provide the opportunity to apply for habeas corpus or bail, then there was no entitlement to compensation even when the detainee did not exercise their procedural rights.[179]

---

174 See for example *Thompson v Attorney-General*, above n 6, at [73] **[[App BoA Tab 5]]**.

175 *Secretary of State for Home Affairs v O'Brien* [1923] AC 603 (HL) at 444.

176 *Fay v Noia* 372 US 391 (1963) at 402. More recently the Supreme Court in *Boumediene v Bush* 553 US 723 (2008) cited Federalist Paper No 84, which described habeas corpus as: "a remedy for this fatal evil [of arbitrary detention] he is everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls 'the bulwark of the British Constitution.'" In *Preiser v Rodriguez* 411 US 475 (1973) the Supreme Court emphasised that it was recognised as a remedy available to challenge judicially ordered detention as well as executive detention.

177 *Duncan and Jokhan v Attorney General of Trinidad and Tobago*, above n 8, at [39] **[[Resp BoA Tab 16]]**.

178 At [39]–[40] **[[Resp BoA Tab 16]]**.

179 At [35]–[41] per Lord Sales, giving the judgment of the Board **[[Resp BoA Tab 16]]**.

83. In this case, the appellant—although he appeared to have been aware that the warrant was defective from the time that he entered prison and although he appears to have been legally represented—did not commence any legal action to seek correction of the defective warrant.[180]

84. Further, those who are unlawfully detained may have a claim against the Crown, either for false imprisonment or for breach of s 22. This would apply in cases when someone is unlawfully detained as a result of an incorrect sentence calculation by the Department of Corrections.[181]

The risk to judicial independence

85. The Court in *Chapman* identified the following mutually reinforcing risks to judicial independence: (i) judicial decision-makers being drawn into litigation;[182] (ii) judicial decision-making being influenced by the prospect of litigation;[183] (iii) executive interference with the conduct of judicial business;[184] and (iv) the public perception of the independence of the judiciary being affected.[185]

The risk to judicial independence arising from litigation

86. The Crown may presently defend judicial decisions in appeals and judicial reviews arising from proceedings in which it was a party at first instance. However, obligations of pleading, evidence and discovery in civil proceedings mean that claims for damages directly against the Crown pose a threat to judicial independence and impartiality that judicial reviews and appeals do not.[186] In *Ernst* the Supreme Court of Canada acknowledged that the decisions of judicial bodies may be challenged by appeal and judicial review,

---

180 See *Putua v Attorney-General* [2022] NZHC 2277, [2023] 2 NZLR 41 at [3] **[[101.0035]]**; *R v Putua* [2016] NZDC 18322 **[[301.0001]]**; and *Putua v Police* [2017] NZHC 103. See also composite of first amended statement of claim, first amended statement of defence and reply at [2.8] **[[101.0057]]**.

181 *Manga v Attorney-General* [1999] NZHC 1712, [2000] 2 NZLR 65 **[[Resp BoA Tab 34]]**. Due to a sentence miscalculation by the Department of Corrections, the prisoner was not discharged from prison at the conclusion of sentence but kept in custody for an additional 252 days. Therefore, the error was that of the Crown and not of the judiciary. Hammond J found that false imprisonment was rightly conceded by the defendant at [29]: "A failure to discharge a prisoner at the end of his sentence was held to be actionable as long ago as *Withers v Henley* (1614) Cro Jac 379."

182 *Attorney-General v Chapman*, above n 1, at [186] and [188] per McGrath and William Young JJ **[[App BoA Tab 2]]**.

183 At [189] per McGrath and William Young JJ **[[App BoA Tab 2]]**.

184 At [190] per McGrath and William Young JJ **[[App BoA Tab 2]]**.

185 At [184]–[185] per McGrath and William Young JJ **[[App BoA Tab 2]]**.

186 Decisions are generally accepted on their face. Live evidence and cross-examination takes place only at the discretion of the court and there are no formal discovery obligations. See Judicial Review Procedure Act 2016, s 14; and Graham Taylor *Judicial Review A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at ch 10.

but suggested that "in order not to compromise the decision-maker's impartiality or the finality of his or her decision, the decision-maker has a limited role in an appeal or judicial review proceeding". However, no such limit can apply to "the scope of a quasi-judicial regulatory board's defence against damages claims". And further, that such claims expose the body in question to collateral attack.[187]

87. Further, although NZBORA liability does not turn on questions of personal culpability, assessments of quantum may involve questions of good faith, intention and previous conduct.[188] It may therefore be necessary to answer challenges to judicial motivation, history of practice, and allegations of bad faith, particularly since a dissatisfied plaintiff or defendant in civil proceedings may use civil proceedings to make personal, unjustified allegations against judges. This would risk drawing the judicial decision-maker into the arena.

88. Professor Joseph criticises the Court's suggestion that judges may be required to give evidence, pointing out that judges are not compellable.[189] However, the concern is not that judges would be compelled to enter the witness box, but that they would decide to do so either to assist the Crown or out of a desire to defend their own decision-making. In *Upton v Green (No 2)* (determined before *Chapman*) a District Court Judge gave evidence for a day about a decision that was challenged in a NZBORA claim for compensation.[190] Court officers and the Duty Solicitor were also called to give evidence.[191]

89. Although the Attorney-General would seek to defend such claims in a way that does not draw the judge into the litigation, this may conflict with her countervailing duty to robustly test claims for compensation in order to limit

---

187 *Ernst v Alberta Energy Regulator*, above n 85, at [54] **[[Resp BoA Tab 17]]**.

188 For example, assessment of quantum in *Taunoa v Attorney-General*, above n 3, was in the context of a breach of ss 9 and 23(5) **[[App BoA Tab 11]]**. In *Taylor v Attorney-General* [2018] NZHC 2557 at [87], the High Court took into account the failure of the Department of Corrections to give effect to previous rulings of the Court in exercising statutory powers of search.

189 Joseph "Constitutional Law", above n 75, at 524 **[[Resp BoA Tab 61]]**, citing s 74(d) of the Evidence Act 2006 **[[Resp BoA Tab 2]]**.

190 *Upton v Green (No 2)*, above n 137, per Tompkins J **[[Resp BoA Tab 47]]**; and, on appeal, *Attorney-General v Upton*, above n 137 **[[App BoA Tab 34]]**. It was one of two cases determined before *Attorney-General v Chapman*, above n 1, in which the Crown accepted that it would be liable for the breach of the New Zealand Bill of Rights Act 1990 rights by a judicial officer **[[App BoA Tab 2]]**.

191 *Attorney-General v Upton*, above n 137, at 59 **[[App BoA Tab 34]]**.

Crown liability. It would place a difficult burden on her to meet these competing obligations. It would create particular difficulties in cases where she must also provide effective representation for the Crown (in those cases where alleged breaches of rights are attributed to both Crown and judicial actors) and in which there is a conflict of interest between Crown and judicial actors as to where responsibility for any breach lies. It may also place a significant burden on the trial judge to ensure that the judicial decision-maker is not drawn into the arena whilst upholding fair trial rights. However, the particular concern of the Court in *Chapman* was how the risks of such litigation would impact upon the decision-making of judicial actors, the Crown and the public's perception of judicial independence.

Risks of influencing judicial behaviour through prospect of litigation

90. There are risks that judicial decision-making would be influenced by the prospect of litigation in the following ways:

90.1 Judicial decision-making may be affected by the prospect of improper challenge by dissatisfied parties.[192] Such concerns provide part of the rationale for judicial immunity, even in such cases as *Harvey v Derrick* where the judge was indemnified and would not be exposed to personal financial risk.[193]

90.2 Judges may modify their decisions out of concern that such litigation may give rise to cost to the Crown.[194] This is a risk that may be particularly present in respect of registrars, who are employed by the executive and do not enjoy the protections as judges, and judicial officers who do not enjoy the same security of tenure as High Court and District Court Judges.

90.3 Although not mentioned by the Court in *Chapman,* there is also a risk that Crown defence of judges' acts and liability for errors may erode the Court's own sense of institutional independence.

---

192 *Attorney-General v Chapman*, above n 1, at [188]–[189] per McGrath and William Young JJ **[[App BoA Tab 2]]**.

193 *Harvey v Derrick*, above n 91 **[[Resp BoA Tab 23]]**.

194 *Attorney-General v Chapman*, above n 1, at [185] per McGrath and William Young JJ **[[App BoA Tab 2]]**.

91. The Court may be assisted by consideration of which judicial actors' decisions may be subject to NZBORA claims in order to assess the significance of these risks.[195] In addition to judicial decisions that may limit substantive NZBORA rights, judicial decision-making invariably engages s 27(1). Therefore, it is not only the decisions of criminal courts that may give rise to NZBORA compensation claims but also other courts and judicial officers who are part of the judicial branch of government under s 3(a) of NZBORA and also, potentially, tribunals that fall under s 3(b).[196]

92. Not all judicial decisions-makers enjoy the same security of tenure as Senior and District Court Judges.[197] Further, court registrars exercise their own limited judicial powers,[198] subject to the oversight and review of the judiciary, but lack the institutional protection enjoyed by the judiciary and may be in a particularly exposed position as Ministry of Justice employees employed by the executive who perform judicial functions.[199]

93. Therefore, Crown liability for judicial decisions would expose a range of judicial decision-makers to having their decisions challenged in claims brought against the Crown. Not all of them will be immune from concerns about their decisions giving rise to litigation and Crown liability, particularly those judicial decision-makers who do not enjoy the same standing and institutional protection as Senior Court and District Court Judges.

---

195 In addition to New Zealand Bill of Rights Act 1990 damages, claims against the Crown have been advanced arising from a decision of a Prison Visting Justice (*McKean v Attorney-General*, above n 139 **[[Resp BoA Tab 37]]**) and the Family Court (*White v New Plymouth Family Court* [2024] NZHC 1824).

196 The distinction between judicial bodies that fall under s 3(a) of the New Zealand Bill of Rights Act 1990 and other judicial bodies that may fall under s 3(b) is not always clear and may be hard to draw in particular cases. Professor Joseph in *Joseph on Constitutional and Administrative Law in New Zealand*, above n 75, at 251 speaks of "insuperable difficulties distinguishing courts from other bodies". Indeed, it is not obvious that Crown liability would be restricted to s 3(a) and not s 3(b) judicial bodies, since the principal reason for not rendering the Crown liable in damages for breaches caused by s 3(b) actors is their independence of the Crown and the Crown's inability to exercise control over their actions (*Lawn v Waikato Bay of Plenty District Law Society* HC Auckland CP229/00, 30 March 2001). These factors that may have decreased force in the event that Crown liability for judicial actions is recognised.

197 Sections 23 and 24 of the Constitution Act 1986 provide protections of tenure and salary to High Court Judges. The Senior Courts Act 2016 provides that judges of the Court of Appeal and Supreme Court retain their office as High Court judges. In contrast, Prison Visiting Justices for three years and the periods of appointment for various tribunal chairs and members, community magistrates, justices of the peace, and various temporary or relief judges vary.

198 Including under various provisions of the Criminal Procedure Act 2011, the Bail Act 2000 and the High Court Rules 2016. Examples include: under the Criminal Procedure Act include issuing of a warrant (s 34(3)); and under Bail Act 2000 imposing certain conditions of bail (s 30).

199 The "Principles observed by the Judiciary and the Ministry of Justice in the Administration of the Courts" (29 November 2018) provides a degree of protection but not of the same degree of the statutory protection enjoyed by the judiciary **[[Resp BoA Tab 63]]**.

The risk of executive interference with judicial business

94. The Court's concerns about interference with judicial business are set out in *Chapman*.[200] Elias CJ rejected them on the basis that "executive interference with judicial function is constitutionally illegitimate":[201]

> The prospect of such interference is unthinkable. Such spectre, even if expressed as concerned with appearances rather than reality, should not be conjured up against the fundamental principle that rights must be remedied.

95. However, if judicial independence could rest safely on the presumption that the executive would always be a responsible actor, there would be little need for protections for judicial independence to be enshrined in law. The framework of statutory provisions and common law principles that protect judicial independence—of which *Chapman* now forms part—exists because formal protection is necessary for either real or perceived incursions over this foundational constitutional line. A constitution should provide protection for judicial independence that is effective, not simply in times when the branches of government enjoy respectful mutual relationships, but also in anticipation of future challenging times when governments may be elected and ministers and officials appointed who are either unconcerned about, hostile to or simply not competent to protect the independence of the judiciary. The judgment in *Chapman* forms part of the constitution's robust protection for judicial independence that the inherent vulnerability of the judicial branch of government to interference from the executive branch makes necessary.

96. Even in the current period of stable, responsible government, the relationship between the executive and the judiciary requires careful management to ensure that the independence of the judiciary is respected. This involves sensitive and respectful decision-making in various matters impacting on the courts, such as policy and legislative development, decisions in relation to court resourcing and the employment of registry staff. Good decision-making is supported by a legal framework in which the

---

200 *Attorney-General v Chapman*, above n 1, at [190] per McGrath and William Young JJ **[[App BoA Tab 2]]**.

201 At [65] per Elias CJ (footnotes omitted) **[[App BoA Tab 2]]**.

separation between the executive and judicial branches is made clear and not blurred, as Crown liability for judicial actions risks doing.

Risk that public perception of the independence of the judiciary will be weakened

97. The Court in *Chapman* was concerned that the Crown defence of judicial decisions in claims for NZBORA compensation would lead to an impression that the judiciary lacked independence:[202] "To an outside observer, the executive government will appear to be defending the judge and the judge will be helping the government." Further, that the public would be concerned that the prospect that judges' decisions exposing the Crown to litigation and liability would affect their decision-making.

98. The fact that the judiciary are appointed by and reliant on administrative support from the Crown makes the judiciary vulnerable not simply to Crown interference (however remote that may be in practice), but to the public perception that judges work for or may be subject to influence by the Crown. That this impression already exists among some members of the public is illustrated by the pleadings in *Rajski v Powell*.[203] If the Crown were to be liable for judges' decisions and appear to defend those decisions, that impression is likely to increase. Vicarious liability is a well-established principle of the law that liability for another's actions arises through control and responsibility for those actions, and the public may well regard Crown liability for the actions of judges as indicative of Crown control over judges.

99. Any perception of lack of independence that might currently arise from the fact that the Crown defends judicial decisions on appeal and judicial review is limited by the fact that the Crown is defending its own interests in proceedings in which it was likely to have been a party at first instance. However, for *Chapman* to be reversed would raise the prospect of the Crown being exposed to liability for breaches of s 27(1) made in private litigation. The Crown may appear to be intervening in private litigation in order to defend judicial decisions.

---

202 At [190] per McGrath and William Young JJ **[[App BoA Tab 2]]**.

203 *Rajski v Powell*, above n 114, at 529–530 **[[Resp BoA Tab 45]]**.

Conclusion in relation to the risk to judicial independence

100. The Court's assessment of risk has been criticised by Professor Joseph on the basis that it was "strained and speculative".[204] However, assessing the impact of extended liability on judicial independence involves considering the long-term effects of a major legal change that has not occurred in this or in any other common law jurisdiction. It is an exercise in which precision is not achievable. However, the concerns of the Court were well founded and its conclusion that risk to judicial independence did not justify the extension of liability was justified in light of the overriding importance of the principle of judicial independence, and the existence of other effective remedies for breaches of rights.

Risk to the finality of proceedings

101. In *Chapman* the majority considered that the availability of damages risked giving rise to a significant number of collateral challenges to judicial decisions, since "there will be no shortage of potential plaintiffs if litigation in relation to judicial conduct is held to be permissible".[205] However, Elias CJ suggested that the risk of collateral litigation was "overblown".[206]

102. Notwithstanding the decision in *Chapman,* the respondent is aware of at least 22 damages claims against the Crown for alleged judicial breaches of NZBORA rights that have been dismissed or struck out,[207] and a number of claims currently before the Court.[208] Those claims include challenges to decisions made in family and criminal proceedings in which the public interest in the finality of litigation is high and in which statutory appeal processes should not be undermined by parties seeking to challenge judicial

---

204 Joseph "Constitutional Law", above n 75, at 519 **[[Resp BoA Tab 61]]**.

205 *Attorney-General v Chapman*, above n 1, at [188] per McGrath and William Young JJ **[[App BoA Tab 2]]**.

206 At [70] per Elias CJ **[[App BoA Tab 2]]**.

207 *Colman v Attorney-General* [2012] NZHC 1343; *Rafiq v Auckland District Court* [2013] NZHC 2640; *Siemer v Court of Appeal* [2013] NZHC 3344; *Siemer v Auckland High Court (No 3)* [2013] NZHC 3540; *Siemer v Brown* [2014] NZHC 3175; *Peterson v Attorney-General* [2015] NZHC 1336; *Brown v Sinclair* [2016] NZHC 3196; *O'Neill v Toogood* [2017] NZHC 795; *Tamihere v Commissioner of Inland Revenue* [2017] NZHC 2949; *Rafiq v Auckland Transport* [2018] NZHC 641 **[[App BoA Tab 18]]**; *Greer v Attorney-General* [2018] NZHC 1290; *Williams v Attorney-General* [2019] NZHC 754; *Jones v New Zealand Bloodstock Finance and Leasing Ltd* [2021] NZHC 3220; *PN v Rollo* [2022] NZHC 402; *Deliu v Thomas* [2022] NZHC 2358; *O'Neill v Commissioner of Police* [2022] NZCA 501; *Siemer v Attorney-General* [2022] NZHC 2789 **[[App BoA Tab 20]]**; *Deliu v District Court at Auckland* [2023] NZHC 658; *Dunstan v Manukau District Court* [2023] NZHC 2742 **[[App BoA Tab 21]]**; *Dunstan v X* [2023] NZHC 2958; *White v New Plymouth Family Court*, above n 195; and *Davis v Robinson* [2024] NZHC 344.

208 *Marong v Attorney-General on behalf of Immigration New Zealand* CIV-2024-409-377; [*Parties' names suppressed*] CIV-2024-404-1519; *Deliu v District Court at Auckland* CA219/2023; *Baines v District Court at Tauranga* CIV-2024-485-176; *Ishaya v Attorney-General of New Zealand* CIV-2021-485-614; and *Ferrin and Sevillano v Attorney-General* CIV-2022-485-315.

decisions through free-standing applications for damages.[209] If *Chapman* was departed from it would be reasonable to expect a greater range and number of claims. This suggests that the concerns of the majority were well founded.

103. These concerns are particularly well founded given the absence of a test or "control mechanism" that would enable a Court to consider the nature of a NZBORA breach for which damages may be an appropriate remedy.[210] Even commentators critical of this Court's approach in *Chapman* concede that "state liability cannot be at large, and that some control mechanisms are required".[211] However, no such mechanism is proposed by the appellant who simply suggests that damages be at the discretion of the Court hearing an NZBORA claim. It should be noted that the distinction proposed by the Privy Council in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* between judicial errors or irregularities in procedure which would not attract damages, and breaches of fundamental rules of natural justice which may, was criticised by Lord Hailsham in a dissenting opinion,[212] and was subsequently found by the Privy Council in *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* to be unsatisfactory.[213]

Risk of inconsistency with legislation or executive schemes for compensation

104. The majority in *Chapman* considered that Crown liability for NZBORA breaches caused by judicial decisions in criminal proceedings risks giving rise to inconsistencies and anomalies with New Zealand's reservation to art 14(6) of the ICCPR and the domestic scheme for the compensation of the wrongfully convicted, which limits the circumstances in which the wrongfully convicted may receive compensation.[214] Such inconsistencies and anomalies may also

---

209 See Criminal Procedure Act 2011, pt 6; and Family Proceedings Act 1980, pt 10.

210 Olowofoyeku, above n 75, at 473 **[[Resp BoA Tab 57]]**.

211 At 473 **[[Resp BoA Tab 57]]**.

212 *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*, above n 139, at 409–410 per Lord Hailsham **[[App BoA Tab 14]]**.

213 *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago*, above n 142, at [93] **[[Resp BoA Tab 27]]**.

214 *Attorney-General v Chapman*, above n 1, at [199]–[201] per McGrath and William Young JJ **[[App BoA Tab 2]]**. See Ministry of Justice "Compensation Guidelines for wrongful conviction and detention February 2023".

arise if convicted offenders are compensated for judicial decisions that breach s 22 through unlawful sentences,[215] or wrongful convictions.[216]

105. Although not touched on by the Court in *Chapman*, Parliament has legislated to limit the rights of prisoners and others charged with criminal offences to costs and compensation, through such provisions as s 364 of the Criminal Procedure Act 2011,[217] s 5 of the Costs in Criminal Cases Act 1967,[218] and the Prisoners' and Victims' Claims Act 2005, s 6 of which provides provisions of that Act apply to cases in which compensation is sought for acts of "the Crown".[219] As with the reservation to art 14(6), those provisions are aimed at managing the sensitive questions of rights and public policy at play when those charged with criminal offences seek costs or compensation from the Crown, an area of liability which "'involves a host of considerations that must be weighed and appraised', and "should be committed to 'those who write the laws' rather than 'those who interpret them'".[220]

Chapman *is not causing difficulties in the development or application of the law*

106. The number of cases in which *Chapman* has been relied on to strike out NZBORA causes of action, noted above at paragraph [102], along with the fact that many of these claims occur in the course of criminal proceedings, suggests that *Chapman* has the intended effect of providing a clear, straightforward basis to strike out collateral challenges to criminal cases that would otherwise risk the finality of litigation.

107. None of the cases in which *Chapman* has been relied on, including this one, suggest that it is giving rise to a gap in effective remedies for rights breaches.

---

215 See for example *Fitzgerald v Attorney-General* [2022] NZHC 2465, [2023] 2 NZLR 214 **[[Resp BoA Tab 18]]**.

216 *Lloyd v United Kingdom* ECHR App 29798/96, 1 March 2005 **[[Resp BoA Tab 32]]**. Although *Fitzgerald v Attorney-General*, above n 215, appears to be the only domestic case in which the courts have found that an offender serving a sentence of imprisonment has been arbitrarily detained, the European Court of Human Rights has recognised that convictions and sentences may lead to arbitrary detention if they were, without lawful basis, obtained following gross procedural unfairness or in excess of jurisdiction **[[Resp BoA Tab 18]]**. The reversal of *Attorney-General v Chapman*, above n 1, would be likely to give rise to similar litigation in this country, in which the ambit of s 22 would be contested.

217 Section 364 of the Criminal Procedure Act 2011 empowers the Court to make such orders as it considers just and reasonable for significant procedural failures made without reasonable excuse; a power that the Court of Appeal has held has a primarily deterrent but may also have a compensatory function: see *Bublitz v R* [2019] NZCA 379; and *R v Lyttle* [2022] NZCA 52, [2022] NZAR 117.

218 Section 5 of the Costs in Criminal Cases Act 1967 provides that the payment of costs to acquitted defendants must be determined by reference to a number of matters, including the evidence of the defendant's guilt.

219 Prisoners' and Victims' Claims Act 2005, s 6 **[[Resp BoA Tab 4]]**.

220 *Ziglar v Abbasi*, above n 152, at 12 **[[Resp BoA Tab 50]]**, citing *United States v Gilman* 347 US 507 (1954) at 512–513.

108. To support the suggestion that *Chapman* is proving difficult to apply, the appellant relies on a comment by Palmer J striking out proceedings in *Tamihere v Commissioner of Inland Revenue*.[221] However, limited weight should be given to an obiter comment in relation to an issue that the Court expressly did not consider. Further, the "complex and less clear question" that Palmer J had in mind may have been the limits of judicial immunity to which *Chapman* may be relevant, rather than any doubt about whether the Crown would be liable for judicial actions following *Chapman*.[222]

109. The appellant also suggests that the application of the principle established in *Chapman* to declaratory relief, as well as to court registrars, is indicative of the difficulties to which it is giving rise. However, a decision cannot be criticised for not providing clarity in relation to matters that it did not purport to determine. *Chapman* was concerned with Crown liability for compensation; it did not address declarations at all and only briefly commented on the position of the Registrar.[223] It has not therefore been necessary for the lower courts to consider the implications of *Chapman* for matters not determined by the Court.

110. The question of declaratory relief arose in *Siemer v Attorney-General* in which the High Court (Toogood J) found that the reasoning of the Court in *Chapman* was applicable to declaratory relief for an alleged breach of s 27(1) by this Court and should be struck out.[224] That approach was followed by Gwyn J in another application brought by the same plaintiff.[225] Neither case was subject to appeal.

111. Crown liability arising from the acts of registrars was considered by the Court of Appeal in *Thompson* and in this case where the Court of Appeal held that

---

221 *Tamihere v Commissioner of Inland Revenue*, above n 207, at [14]: "I do not need to consider the more complex, and less clear, question of whether the District Court can ever be liable for damages in breach of the Bill of Rights in view of the Supreme Court's decision in *Attorney-General v Chapman*." **[[App BoA Tab 17]]**

222 This is suggested by the fact that the defendant was the Judge and not the Crown. Questions about the limits of judicial immunity precede *Attorney-General v Chapman*, above n 1 **[[App BoA Tab 2]]**: See Law Commission *Crown Liability and Judicial Immunity: A response to* Baigent's *case and* Harvey v Derrick (NZLC R37, 1997) at ch 6 **[[App BoA Tab 69]]**; and *Harvey v Derrick*, above n 91, at 324–325 **[[Resp BoA Tab 23]]**.

223 See *Attorney-General v Chapman*, above n 1, at [207]–[209] **[[App BoA Tab 2]]**.

224 *Siemer v Attorney-General* [2013] NZHC 1111 at [50] **[[App BoA Tab 19]]**.

225 *Siemer v Attorney-General*, above n 207, at [29] **[[App BoA Tab 20]]**.

Chapman did apply to judicial acts of a registrar.[226] In neither case did the Court indicate that it had difficulty in understanding or applying *Chapman.*[227]

112. These cases provide little support for the appellant's suggestion that *Chapman* is giving rise to difficulties in practice and may be contrasted with the very real problems identified by the apex courts of common law jurisdictions in the judgments outlined above at paragraphs [22]–[29], when they have been persuaded to depart from one of their own judgments.

WHETHER ART 9(5) REQUIRES THIS COURT TO DEPART FROM *CHAPMAN*

113. The long title of NZBORA provides that it is an Act to affirm New Zealand's commitment to the ICCPR. However, it did not give domestic effect to all ICCPR rights but instead established a unique scheme of domestic rights that gives effect to much of the ICCPR,[228] but departs from it in certain respects: affirming certain rights not contained in the ICCPR,[229] affirming some in an expanded or more attenuated form,[230] and not affirming a number of ICCPR rights, such as art 9(5).[231]

114. Article 9(5) has therefore not been incorporated into domestic law. However, the "historical approach to the State's international obligations as having no part in the domestic law unless incorporated by statute is now recognised as too rigid".[232] It is therefore necessary to consider whether the interpretation and application of NZBORA should take account of art 9(5), as

---

226 *Thompson* CA, above n 6, at [75]–[77] **[[App BoA Tab 5]]**; and *Attorney-General v Putua*, above n 14, at [42]–[59] **[[101.0013–101.0017]]**.

227 Clearly, at first instance in *Putua v Attorney-General*, above n 180 **[[101.0035]]**, Ellis J reached different conclusions from the Court of Appeal as to Crown liability arising from the actions of the registrar. But the difference between her Honour's approach and the Court of Appeal did not arise from any difficulty in understanding and applying *Attorney-General v Chapman*, above n 1. Rather, it arose from Ellis J's resistance to the implications of *Chapman* by seeking to attribute liability to a Crown actor, straining the law in order to do so.

228 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [42] per Winkelmann CJ **[[App BoA Tab 31]]**.

229 Neither the right to refuse to undergo medical treatment (affirmed by s 11 of the New Zealand Bill of Rights Act 1990), the right to trial by jury (affirmed by s 24(e)) nor the right to bring civil claims against the Crown (s 27(3)) are to be found in the ICCPR, above n 9.

230 The right to natural justice affirmed by art 27(2) is arguably broader than the right to equality before the Courts and Tribunals in "suits at law" that is affirmed by art 14(1) of the ICCPR, above n 9 **[[App BoA Tab 59]]**. In contrast, whilst the New Zealand Bill of Rights Act 1990 affirms the right to freedom of association through s 17, art 22(2) prescribes the grounds upon which that right may be limited **[[App BoA Tab 59]]**.

231 Other rights in the ICCPR, above n 9, not incorporated are the right to self-determination (art 1), the right to a remedy (art 2), the right to be free from slavery and enforced labour (art 8), the rights of remand prisoners to be segregated from convicted prisoners (art 10(2)(a)), the right not to be imprisoned for failure to comply with a contractual obligation (art 11), the right of aliens in relation to expulsion (art 13), the right to privacy (art 17), the prohibition on war propaganda and incitement of hatred (art 20) and the rights of the family (art 23(1)) **[[App BoA Tab 59]]**.

232 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [6] per Gault P and Blanchard J **[[Resp BoA Tab 26]]**.

interpreted by the HRC in its Views in *Thompson*, notwithstanding the fact that the right it provides for has not been expressly affirmed in NZBORA.

115. This Court has drawn upon ICCPR obligations that were not expressly affirmed in NZBORA on two occasions:

115.1 In *Baigent's Case, Chapman* and *Taylor* the courts drew upon art 2(3).[233] However, art 2(3) marched in step with the principle of *ubi jus ibi remedium*, long recognised in the common law; it was consistent with the intention of Parliament in enacting NZBORA to provide for remedies in order to ensure the effectiveness of the rights it affirmed; and it was consistent with jurisprudence from other common law jurisdictions indicating a willingness of those courts to develop public law remedies to ensure the effectiveness of the rights that the law recognised.

115.2 Similarly, in *Hosking v Runting* the Court drew upon art 17 of ICCPR (right to privacy), finding that the value of privacy was also recognised in the common law and in relevant domestic statutes as well as in the jurisprudence of other common law countries.[234] In that case the Court did not "accept that omission from the Bill of Rights Act can be taken as legislative rejection of privacy as an internationally recognised fundamental value".[235]

116. In relation to art 9(5):

116.1 There is no doubt that the Court should have regard to art 9(5), but it cannot give "unqualified effect" to it in light of legislative intent, common law jurisprudence and judicial independence.[236]

116.2 Through NZBORA, Parliament affirmed all the procedural protections against arbitrary detention that are guaranteed by

---

233 *Baigent's Case*, above n 16, at 676 per Cooke P, 690 per Casey J, 703 per Gault J and 718 per McKay J **[[App BoA Tab 3]]**; *Attorney-General v Chapman*, above n 1, at 676 per Cooke P, 690–691 per Casey J and 718 per McKay J **[[App BoA Tab 2]]**; and *Attorney-General v Taylor*, above n 4, at [41] per Glazebrook and Ellen France JJ **[[App BoA Tab 30]]**.

234 *Hosking v Runting*, above n 232, at [92] per Gault P and Blanchard J **[[Resp BoA Tab 26]]**.

235 At [92] per Gault P and Blanchard J **[[Resp BoA Tab 26]]**.

236 *Claassen v Minister of Justice and Constitutional Development*, above n 10, at [36] **[[Resp BoA Tab 11]]**.

art 9(2)–(4) of the ICCPR but not art 9(5).[237] This pointed omission must be regarded as intentional and the presumption of intended compliance with an international obligation is therefore displaced. Whilst the Court may give weight to broad principles of international law when they accord with principles of the common law, it cannot give domestic effect to specific remedial obligations that Parliament has decided not to enact, particularly when, for the following reasons, to do so would be contrary to the principles of the common law.

116.3 Should the Court give unqualified effect to art 9(5), it would create tension with the approach to compensation for NZBORA breaches that was enunciated by this Court in *Taunoa*; an approach that was itself arrived at after review of the common law and international jurisprudence on the purpose of public law remedies.[238]

116.4 Whilst customary international law may be part of the common law,[239] art 9(5) remains a treaty commitment that in its unqualified form does not reflect a customary norm.[240]

116.5 Further, it is contrary to the position adopted by the Privy Council in *Duncan and Jokhan v Attorney General of Trinidad and Tobago* that the effective remedy for arbitrary detention is habeas corpus

---

237 Article 9(1) (the right to liberty) is affirmed by s 22 of the New Zealand Bill of Rights Act 1990; art 9(2) (the right of arrestee to be given reasons) is affirmed by s 23(1)(a); art 9(3) (the right of a detainee in criminal proceedings to be produced before a Court and be provided with reasons for detention, right to trial within reasonable time and bail) is affirmed by s 23(2) and (3) and s 24(b); and art 9(4) (right to habeas corpus) is affirmed by s 23(1)(c).

238 *Taunoa v Attorney-General*, above n 3 **[[App BoA Tab 11]]**.

239 "Of Offences Against the Law of Nations" in W Priest (ed) *Blackstone's Commentaries on the Laws of England: Book IV Of Public Wrongs* (Oxford University Press, Oxford, 2016) at ch 5.

240 The obligation to provide compensation for arbitrary detention is recognised in art 9(5) of the ICCPR, above n 9, **[[App BoA Tab 59]]** and art 5(5) of the European Convention on Human Rights, above n 5, but not the *Universal Declaration of Human Rights* GA Res 217A (1948), the African Charter of Human and Peoples' Rights (opened for signature 27 June 1981, entered into force 21 October 1986) nor the American Convention on Human Rights 1144 UNTS 123 (signed 22 November 1969, entered into force 18 July 1978). The fact a number of other common law jurisdictions do not recognise the right to provide compensation for arbitrary detention caused by judicial acts, and only some international treaties do so, means that near unanimity of practice is not established. In order to give rise to a customary international norm state practice must be extensive and "virtually uniform": *Denmark/Federal Republic of Germany/Netherlands [The North Sea Continental Shelf cases]* [1969] ICJ 1 at 43.

and as long as it is available there is no additional right to compensation.[241]

116.6 The Views of the HRC have "considerable persuasive authority",[242] but it is an expert body, not a court, and those Views are not binding as a matter of domestic or international law.[243] The fact the HRC has reached different conclusions than those of this Court in *Chapman* does not itself compel reconsideration of the Court's approach. The reasons of policy and principle relied on by this Court in *Chapman*, suggest that it should not be adopted.

116.7 The HRC's approach to art 9(5) may reflect what one commentator has identified as the willingness of international institutions to recognise "state" compensation for human rights breaches by judicial actions, in contrast with the reluctance of courts of common law jurisdictions to do so arising out of "institutional concerns".[244] Those institutional concerns include concerns for judicial independence and therefore with the relationship between the judicial and executive branches of government within a particular domestic legal framework, a fundamental feature of common law constitutionalism.[245] In contrast, whilst international human rights bodies recognise and seek to uphold the individual's right to a hearing by an independent court, they are not tasked with upholding the constitutional relationships between the branches of government within a particular national legal order.

116.8 As set out above at paragraphs [69]–[72] the United Kingdom and Ireland have given effect to art 5(5) of the ECHR when breaches are caused by a Court but have done so through express statutory provisions, not through judicial recognition. As the High Court of South Africa has found in *Claassen v Minister of Justice and*

---

241 *Duncan and Jokhan v Attorney General of Trinidad and Tobago*, above n 8, at [39]–[40] **[[Resp BoA Tab 16]]**. See also the discussion above at paragraph [74] regarding the approach in *Lewis v Australian Capital Territory*, above n 165, at [468] **[[App BoA Tab 39]]**.

242 *R v Goodwin (No 2)*, above n 83, at 393 **[[Resp BoA Tab 41]]**.

243 Whether the Views of the United Nations Human Rights Committee are binding as a matter of international law was considered by the Court of Appeal of Ontario in *Ahani v Canada* 2002 OJ No 431 at [34]–[40] **[[Resp BoA Tab 5]]**.

244 Olowofoyeku, above n 75, at 454 **[[Resp BoA Tab 57]]**.

245 At 453 **[[Resp BoA Tab 57]]**.

Constitutional Development, whether to give "unqualified effect" to art 9(5) is a matter for Parliament and not the courts.[246]

116.9 For all these reasons, compliance with art 9(5) does not provide a good reason for this Court to depart from its approach in *Chapman*.

THE ALTERNATIVE DISPOSALS PROPOSED BY THE APPELLANT

Chapman should not apply to breaches of s 22

117. As the Court of Appeal held in *Thompson*, the reasoning of the Court in *Chapman* is not restricted to fair trial rights but applies to breaches of all NZBORA rights.[247] For all the reasons set out above, the reasoning of the Court in *Chapman* applies to s 22 breaches.

118. Since art 9(5) has not been incorporated into domestic law, there is no basis upon which to treat judicial breaches of s 22 differently from judicial breaches of other NZBORA rights. Further, unless the Court found a breach of s 22 must always attract damages, a departure from *Chapman* would not succeed in giving unqualified effect to art 9(5).

119. To provide that *Chapman* applies to breaches of all rights except s 22 is to replace the existing limitation on who may be entitled to compensation with another. However, whilst restricting the availability of compensation to those whose rights have been breached by the executive is justified by the matters of principle and policy relied on by the Court in *Chapman*, there is no principled basis for restricting compensation to breaches of s 22 alone.

Confining *Chapman* to the acts of Judges and excluding registrars

120. The Crown should not be liable for the acts of registrars when those acts are undertaken to assist the judiciary in carrying out a judicial function. The principles underpinning the application of *Chapman* to the acts of registrars were considered by the Court of Appeal in this case.[248] As set out at paragraphs [123]–[136] below, the Court was correct for the reasons it gave. Those reasons are fatal to the appellant's argument that the application of *Chapman* should be restricted to judges and not registrars.

---

246 *Claassen v Minister of Justice and Constitutional Development*, above n 10, at [36] **[[Resp BoA Tab 11]]**.
247 *Thompson* CA, above n 6, at [74] **[[App BoA Tab 5]]**.
248 *Attorney-General v Putua*, above n 14, at [58]–[59] **[[101.0017]]**

121. Further, although in this case the Deputy Registrar was acting to assist the District Court Judge, registrars also exercise their own limited judicial powers, subject to review by a judge.[249] For the Crown to be liable for the judicial act of a registrar this would be as inimical to judicial independence as for it to be liable for the acts of judges.

***Chapman* should apply only insofar as the Judge enjoys judicial immunity**

122. It is difficult to understand the benefits of applying *Chapman* only insofar as a judge enjoys judicial immunity, given the scope of judicial immunity.[250] Further, if the judge is not protected by judicial immunity, the aggrieved party may bring an action against the judge and has no need to bring an action against the Crown.

CHALLENGE TO THE COURT OF APPEAL'S JUDGMENT IN THIS CASE

123. If the Court finds for the respondent in relation to *Chapman,* it will go on to consider whether the Court of Appeal was right to find that the *Chapman* principle precludes Crown liability for the act of the Deputy Registrar in preparing the warrant.

124. For the following reasons, the Court of Appeal was correct, and its judgment should be upheld.

125. As discussed above at paragraph [36] judicial independence requires the independence of the Court, and this includes the administration of the Court, insofar as it is a necessary part of the conduct of judicial business.[251]

126. Judges do not conduct judicial business alone, but with the assistance of the court's registry.[252] As Hale LJ observed in *Quinland v Governor of Swaleside Prison*:[253]

> The Court Service may be an agency of the executive but it exists, in part if not in whole, to facilitate and implement the workings of the judiciary. There are some of its activities over which the judiciary and not the executive must have the ultimate control. Whatever else these may include, they must include the putting into effect of the orders or

249 As discussed above at paragraph [92] and n [198].
250 Senior Courts Act 2016, s 28; and District Court Act 2016, s 23.
251 *Valente v R*, above n 89, at 709–710 **[[Resp BoA Tab 48]]**.
252 Registrars, deputy registrars, and other officers of the court may be appointed under the Public Service Act 2020 for the conduct of the business of the court: Senior Courts Act 2016, s 33; and District Court Act 2016, s 62.
253 *Quinland v Governor of Swaleside Prison* [2002] EWCA Civ 174, [2003] QB 306 at [41] per Hale LJ **[[Resp BoA Tab 39]]**.

> directions of a court. There is little point in having an independent judiciary if the executive, through the Court Service, is free to pick and choose which of its orders to implement.

127. In *Greer v Smith* this Court found that judges had "the general right to direct and supervise the Registrar in relation to the business of the Court" arising from the inherent power of the Court to regulate its own procedures.[254]

128. In *District Court at Christchurch v McDonald* the Court of Appeal found that this power has found expression in principle 3.1 of the "Principles observed by the Judiciary and Ministry of Justice in the Administration of the Courts", which gives definition to the relative and shared responsibilities of the judiciary and the executive in courts management.[255] It states:[256]

> 3.1 The judiciary's responsibilities in relation to conducting the business of the courts include:
>
> …
>
> c) … the direction and supervision of Registry staff in relation to the business of the court;

129. Therefore, the assistance provided by a registrar to a judge in carrying out a judicial act is a part of that judicial act, carried out under the supervision of the judiciary in order to give effect to a judicial decision.

130. To seek to disaggregate a judicial act into that which was personally done by a judge and that which was done by a registrar, in order to attribute liability to the registrar as an employee of the executive would, as the Court of Appeal found:[257]

> … creates uncertainty as to the extent of judicial immunity, blurs the line of supervision between judge and registrar and also in our view incentivises claimants to go behind judicial decisions and seek to attribute fault to non-judicial actors.
>
> … To insert liability in relation to the drafting of a judicial document is also problematic from the point of view of judicial independence… The exposure of their employer to liability as a result of them undertaking tasks for judges creates an obvious conflict of interest, or at the very least the perception of one.

---

254 *Greer v Smith* [2015] NZSC 196, (2015) 22 PRNZ 785 at [6] **[[Resp BoA Tab 22]]**. See also the Court of Appeal's discussion in *O'Neill v Bridgman* [2020] NZCA 460 at [27].

255 *District Court at Christchurch v McDonald* [2021] NZCA 353, [2021] 3 NZLR 585 at [31]–[32] **[[Resp BoA Tab 15]]**.

256 Ministry of Justice "Principles observed by the Judiciary and the Ministry of Justice in the Administration of the Courts" (29 November 2018) at [3.1] **[[Resp BoA Tab 63]]**.

257 *Attorney-General v Putua*, above n 14, at [57]–[58] (footnotes omitted) **[[101.0017]]**.

131. The approach of the Court of Appeal was informed by McGechan J's judgment in *Crispin*.[258] In that case it was argued that judicial immunity did not extend to the act of a registrar in recording a default judgment, since that was a purely administrative act. However, McGechan J refused to "dissect" the act of entering and recording default judgment, rather they were both "integral parts of one single operation".[259] The "immunity of registrars when giving effect to judges' decisions was seen as a necessary corollary of judicial immunity".[260] To treat it otherwise would risk the effectiveness of judicial immunity and expose a judicial decision to a "flank attack".[261]

132. *Crispin* concerned the limits of judicial immunity. However, as the Court of Appeal found in this case, "the principled basis for the immunity of registrars must be relevant to determining the extent of a registrar's immunity in relation to claims under the Bill of Rights".[262]

133. Further, as the majority in *Chapman* said:[263] "To the extent that the Registrar's actions were superseded by decisions of judges, or give effect to what they have decided, there can plainly be no right to Bill of Rights Act compensation."

134. For the reasons set out by the Court of Appeal, the issuance of the warrant was a judicial act. The Court rightly concluded that confining "judicial acts" only to those acts which involved the exercise of discretion, as Ellis J held at first instance, was too narrow. It was inconsistent with *Gazley v Lord Cooke of Thorndon*,[264] and *Chapman*.[265] Further, it would mean the District Court Judge's signing of the warrant was not a judicial act which was inconsistent with what Ellis J, herself, had found.

135. Therefore, when the District Court Judge signed the warrant, this was a judicial act and the act of the Deputy Registrar in preparing it was not to be

---

258 *Crispin v Registrar of the District Court*, above n 13 **[[App BoA Tab 7]]**.
259 At 250 **[[App BoA Tab 7]]**.
260 *Attorney-General v Putua*, above n 14, at [52] **[[101.0017]]**, citing *Crispin v Registrar of the District Court*, above n 13, at 252 **[[App BoA Tab 7]]**.
261 *Attorney-General v Putua*, above n 14, at [52] (citations omitted) **[[101.0017]]**; and *Crispin v Registrar of the District Court*, above n 13, at 252 **[[App BoA Tab 7]]**.
262 *Attorney-General v Putua*, above n 14, at [56] **[[101.0017]]**.
263 *Attorney-General v Chapman*, above n 1, at [208] per McGrath and William Young JJ **[[App BoA Tab 2]]**.
264 *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668 (CA) at 678–682 **[[Resp BoA Tab 21]]**.
265 *Attorney-General v Putua*, above n 14, at [42]–[43] **[[101.0017]]**.

considered as an independent, administrative act, but an act preparatory to the signing of the warrant:[266]

> In the present case, the task of preparing the warrant was a task of implementing a judge's decision, namely the sentencing decision that had been pronounced by the Judge in open court. It was also a task to assist the Judge with the exercise of his statutory powers and duties under s 91 of the Sentencing Act.

136. To find otherwise would, as the Court of Appeal held, not only be inconsistent with the principles of judicial independence and the proper functioning of the Court,[267] but would also lead to the anomalous outcome that liability arose from the act of the Registrar in preparing a warrant and not from that of the Judge who was ultimately responsible for ensuring its accuracy.[268]

CONCLUSION

137. For the above reasons, the Court is invited to dismiss this appeal.

138. As the appellant is legally aided and the statutory grounds for making a costs order against a legally aided party do not arise,[269] the respondent will not seek costs in event the appeal is dismissed.

3 February 2025

U Jagose KC / D Jones / O Kiel
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The appellant.

AND TO: The intervener.

266 At [49] **[[101.0017]]**.
267 At [57]–[58] **[[101.0017]]**.
268 At [41] and [81] **[[101.0017]]**.
269 Legal Services Act 2011, s 45.

LIST OF AUTHORITIES TO BE CITED BY THE RESPONDENT

Statutes

New Zealand

Bail Act 2000.

Constitution Act 1986.

Coroners Act 2006.

Corrections Act 2004.

Costs in Criminal Cases Act 1967.

Criminal Procedure Act 2011.

Crown Proceedings Act 1950.

Declaratory Judgments Act 1908.

District Court Act 2016.

District Court Rules 2014.

Evidence Act 2006.

Family Proceedings Act 1980.

High Court Rules 2016.

Judicial Review Procedure Act 2016.

Legal Services Act 2011.

New Zealand Bill of Rights Act 1990.

New Zealand Security Intelligence Service Act 1969.

Official Information Act 1982.

Prisoners' and Victims' Claims Act 2005.

Public Service Act 2020.

Senior Courts Act 2016.

Supreme Court Act 2003.

International

Bill of Rights Act Bill 2022 (UK).

Constitution of the Republic of South Africa.

Constitution of the Republic of Trinidad and Tobago.

Human Rights Act 1998 (UK).

Human Rights Act 2004 (ACT).

Human Rights and Equality Commission Act 2014 (IE).

Limitation Act 1980 (UK).

Cases

New Zealand

Attorney-General v Chapman [2011] NZSC 110, [2012] 1 NZLR 462.

Attorney-General v Putua [2024] NZCA 67, [2024] 2 NZLR 420.

Attorney-General v Taylor [2018] NZSC 104, [2019] 1 NZLR 213.

Attorney-General v Udompun [2005] NZCA 128, [2005] 3 NZLR 204.

Attorney-General v Upton (1998) 5 HRNZ 54 (CA).

Auckland Unemployed Workers' Rights Centre Inc v Attorney-General [1994] 3 NZLR 720 (CA).

Braun v Legal Complaints Review Officer [2022] NZHC 2020.

Brown v Attorney-General [2005] 2 NZLR 405 (CA).

Brown v Sinclair [2016] NZHC 3196.

Bublitz v R [2019] NZCA 379.

Choudry v Attorney-General [1999] 2 NZLR 582 (CA).

Choudry v Attorney-General [1999] 3 NZLR 399 (CA).

Colman v Attorney-General [2012] NZHC 1343.

Combined Beneficiaries Union Inc v Auckland City COGS Committee [2008] NZCA 423, [2009] 2 NZLR 56.

Couch v Attorney-General (No 2) [2010] NZSC 27, [2010] 3 NZLR 149.

Crispin v Registrar of the District Court [1986] 2 NZLR 246 (HC).

Davis v Robinson [2024] NZHC 344.

Deliu v District Court at Auckland [2023] NZHC 658.

Deliu v Thomas [2022] NZHC 2358.

District Court at Christchurch v McDonald [2021] NZCA 353, [2021] 3 NZLR 585.

Dunstan v Manukau District Court [2023] NZHC 2742.

Dunstan v X [2023] NZHC 2958.

Fitzgerald v Attorney-General [2022] NZHC 2465, [2023] 2 NZLR 214.

Fitzgerald v R [2021] NZSC 131, [2021] 1 NZLR 551.

Gazley v Lord Cooke of Thorndon [1999] 2 NZLR 668 (CA).

Greer v Attorney-General [2018] NZHC 1290.

Greer v Smith [2015] NZSC 196, (2015) 22 PRNZ 785.

Harvey v Derrick [1995] 1 NZLR 314 (CA).

Hosking v Runting [2005] 1 NZLR 1 (CA).

Jones v New Zealand Bloodstock Finance and Leasing Ltd [2021] NZHC 3220.

Lawn v Waikato Bay of Plenty District Law Society HC Auckland CP229/00, 30 March 2001.

Manga v Attorney-General [1999] NZHC 1712, [2000] 2 NZLR 65.

Martin v Tauranga District Court [1995] 2 NZLR 419 (CA).

McKean v Attorney-General [2007] 3 NZLR 819 (HC).

Ministry of Transport v Noort [1992] 3 NZLR 260 (CA).

Morgan v Superintendent, Rimutaka Prison [2005] NZSC 26, [2005] 3 NZLR 1.

New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration [1976] 2 NZLR 283 (CA).

North Shore City Council v Attorney-General [2012] NZSC 49, [2012] 3 NZLR 341.

O'Neill v Bridgman [2020] NZCA 460.

O'Neill v Toogood [2017] NZHC 795.

O'Neill v Commissioner of Police [2022] NZCA 501.

Peterson v Attorney-General [2015] NZHC 1336.

PN v Rollo [2022] NZHC 402.

Putua v Attorney-General [2022] NZHC 2277, [2023] 2 NZLR 41.

R v Goodwin (No 2) [1993] 2 NZLR 390 (CA).

R v Goodwin [1993] 2 NZLR 153 (CA).

R v Lyttle [2022] NZCA 52, [2022] NZAR 117.

Rafiq v Auckland District Court [2013] NZHC 2640.

Rafiq v Auckland Transport [2018] NZHC 641.

Rawlinson v Rice [1997] 2 NZLR 651 (CA).

Secretary of Internal Affairs v Pub Charity [2013] NZCA 627, [2014] NZAR 177.

Siemer v Attorney-General [2013] NZHC 1111.

Siemer v Attorney-General [2022] NZHC 2789.

Siemer v Auckland High Court (No 3) [2013] NZHC 3540.

Siemer v Brown [2014] NZHC 3175.

Siemer v Court of Appeal [2013] NZHC 3344.

Simpson v Attorney-General [Baigent's Case] [1994] 3 NZLR 667 (CA).

Tamihere v Commissioner of Inland Revenue [2017] NZHC 2949.

Taunoa v Attorney-General [2007] NZSC 70, [2008] 1 NZLR 429.

Taylor v Attorney-General [2018] NZHC 2557.

Thompson v Attorney-General [2016] NZCA 215, [2016] 3 NZLR 206.

Thompson v Attorney-General [2023] NZSC 27.

Upton v Green (No 2) (1996) 3 HRNZ 179 (HC).

White v New Plymouth Family Court [2024] NZHC 1824.

Williams v Attorney-General [2019] NZHC 754.

International

Ahani v Canada 2002 OJ No 431.

Al-Kateb v Godwin [2004] HCA 37, (2004) 219 CLR 562.

Ashby v White (1703) 2 Ld Raym 938, 92 ER 126.

Attorney-General v O'Brien [1965] IR 142 (SC).

Attorney-General v Power 2024 SCC 26, [2024] SCJ 26.

Bivens v 6 Unknown Federal Narcotics Agents 403 US 388 (1971).

Bottrill v A [2002] UKPC 44, [2003] 2 NZLR 721.

Boumediene v Bush 553 US 723 (2008).

Case of Prohibitions [1607] EWHC J23 (KB).

Chagos Islanders v Attorney-General [2004] EWCA Civ 997, [2004] All ER (D) 85 (Aug).

Chandler v Trinidad and Tobago [2022] UKPC 19, [2023] AC 285.

Claassen v Minister of Justice and Constitutional Development [2009] ZAWCHC 190.

Denmark/Federal Republic of Germany/Netherlands [The North Sea Continental Shelf cases] [1969] ICJ 1.

Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners [2006] UKHL 49, [2007] 1 AC 558.

DG v Ireland (2002) 35 EHRR 33 (ECHR).

Director of Public Prosecutions of Jamaica v Mollison [2003] UKPC 6, [2003] 2 AC 411.

Director of Public Prosecutions v JC [2015] IESC 31, [2017] 1 IR 417.

Director of Public Prosecutions v Kenny [1990] 2 IR 110 (SC).

Dobbs v Jackson Women's Health Organization 597 US 215 (2022).

Duncan and Jokhan v Attorney General of Trinidad and Tobago [2021] UKPC 17, [2021] 4 LRC 570.

Ernst v Alberta Energy Regulator 2017 SCC 1, [2017] 1 SCR 3.

Fay v Noia 372 US 391 (1963).

Fitzleet Estates Ltd v Cherry (Inspector of Taxes) [1977] 1 WLR 1345 (HL).

Fose v Minister of Safety and Security [1997] ZACC 786.

Hinds v Attorney General of Barbados [2001] UKPC 56, [2002] 1 AC 854.

Horton v Sadler [2006] UKHL 27, [2007] 1 AC 307.

Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago [2004] UKPC 26, [2005] 1 AC 190.

John v Federal Commissioner of Taxation [1989] HCA 5, (1989) 166 CLR 417.

JTI Polska Sp Z oo v Jakubowski [2023] UKSC 19, [2024] AC 621.

Kemmy v Ireland [2009] IEHC 178, [2009] 4 IR 74.

Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349 (HL).

Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions [1973] AC 435 (HL).

Koita v Toronto Police Services Board 2000 CarswellOnt 4826 (SCJ).

Kruger v The Commonwealth [1997] HCA 27, (1997) 190 CLR 1.

Leary v The Queen [1978] 1 SCR 29.

Lewis v Australian Capital Territory [2018] ACTSC 19, (2018) 329 FLR 267.

Lim v Minister for Immigration Local Government & Ethnic Affairs (Cambodian "Boat People" case) (1992) 176 CLR 1.

Lincoln v Daniels [1962] 1 QB 237 (CA).

Lloyd v United Kingdom ECHR App 29798/96, 1 March 2005.

Mackin v New Brunswick Minister of Finance 2002 SCC 13, [2002] 1 SCR 405.

Maharaj v Attorney-General of Trinidad and Tobago (No 2) [1979] AC 385 (PC).

McIver v Australian Capital Territory [2024] ACTSC 112.

Morro v Australian Capital Territory [2009] ACTSC 118, (2009) 4 ACTLR 78.

MTA v Lord Chancellor [2024] EWCA Civ 965, [2024] 3 WLR 1037.

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs [2023] HCA 37, (2023) 415 ALR 254.

Pappajohn v The Queen [1980] 2 SCR 120.

Planned Parenthood of Southeastern Pennsylvania v Casey 505 US 833 (1992).

Preiser v Rodriguez 411 US 475 (1973).

Quinland v Governor of Swaleside Prison [2002] EWCA Civ 174, [2003] QB 306.

R v Bernard [1988] 2 SCR 833.

R v Germain [1984] AJ No 878 (QB).

R v Henry 2005 SCC 76, [2005] 3 SCR 609.

R v Horncastle [2009] UKSC 14, [2010] 2 AC 373.

R v Mannion [1986] 2 SCR 272.

R v National Insurance Commissioner, ex parte Hudson [1972] AC 944 (HL).

R v Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 AC 513 (CA).

Rajski v Powell (1986) 11 NSWLR 522 (NSWCA).

Residents of Industry v Minister of Police [2021] ZACC 37.

Roe v Wade 410 US 113 (1973).

Secretary of State for Home Affairs v O'Brien [1923] AC 603 (HL).

Taaffe v Downes (1813) 13 ER 15 (Ch).

Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2020] UKSC 47, [2022] AC 1.

Thubakgale v Ekurhuleni Metropolitan Municipality [2021] ZACC 45, 2022 (8) BCLR 985.

United States v Gilman 347 US 507 (1954).

Valente v R [1985] 2 SCR 673.

Vancouver v Ward 2010 SCC 27, [2010] 2 SCR 28.

Viscount Canterbury v Attorney-General (1843) 1 Phillips 306.

Wurridjal v Commonwealth [2009] HCA 2, (2009) 237 CLR 309.

Ziglar v Abbasi 137 S Ct 1843 (2017).

International instruments and treaties

African Charter of Human and Peoples' Rights (opened for signature 27 June 1981, entered into force 21 October 1986).

American Convention on Human Rights 1144 UNTS 123 (signed 22 November 1969, entered into force 18 July 1978).

Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights] 2889 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

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

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

Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No 316/2018 UN Doc CCPR/C/132/D/3162/2018 (7 June 2022).

Texts

"Of Offences Against the Law of Nations" in W Priest (ed) *Blackstone's Commentaries on the Laws of England: Book IV Of Public Wrongs* (Oxford University Press, Oxford, 2016).

Abimbola Olowofoyeku "When courts get it wrong: judicial errors and common law underenforcement" (2018) 134 Jul LQR 450.

Bradley, Ewing and Knight *Constitutional and Administrative Law* (18th ed, Pearson, London, 2022).

Cabinet Office *Cabinet Manual 2023*.

Crown Law "Attorney-General's Values for Crown Civil Litigation" (31 July 2013).

Federalist Paper No 84.

FW Maitland "The Crown as Corporation" (1901) 17 LQR 131.

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

Graham Taylor *Judicial Review A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018).

HJ Laski "The responsibility of the State in England" (1919) 32 Harv L Rev 447.

John McGrath QC "The Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197.

KHF Dyson *The State Tradition in Western Europe* (Blackwell, Oxford, 2010).

Law Commission *A New Crown Civil Proceedings Act For New Zealand* (NZLC IP35, 2014).

Law Commission *Crown Liability and Judicial Immunity: A response to* Baigent's case *and* Harvey v Derrick (NZLC R37, 1997).

Lisa Tortell *Monetary Remedies for Breach of HR: A comparative study* (Hart Publishing, Oxford, 2006).

Lord Johan Steyn "The case for a Supreme Court" 188 LQR 382.

Martin Loughlin "The State, the Crown and the Law" in M Sunkin and S Payne (eds) The Nature of the Crown (Oxford University Press, Oxford, 1999).

Ministry of Justice "Principles observed by the Judiciary and the Ministry of Justice in the Administration of the Courts" (29 November 2018).

Philip A Joseph "Constitutional Law" (2012) 3 NZ L Rev 515.

Philip A Joseph *Joseph on Constitutional and Administrative Law in New Zealand* (5th ed, Thomson Reuters, Wellington, 2021).

PW Hogg and PJ Monahan *Liability of the Crown* (3rd ed, Carswell, Scarborough Ontario, 2000).

Report of the International Law Commission on the work of its fifty-third session UN Doc A/56/10 (23 April–1 June and 2 July–10 August 2001).

Second report of Human Rights Act 1998 (Remedial) Order (opened 17 October 2019) UK Parliament Committees <https://committees.parliament.uk/work/3232/human-rights-act-1998-remedial-order-second-report/>.

Sir Robin Cooke "Fundamentals" [1988] NZLJ 158.

Stephanie Woods "Judicial immunity: State immunity?" [2012] 1 NZLJ 6.