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**NOTE: HIGH COURT ORDER [2017] NZHC 2629 SUPPRESSING THE NAME AND IDENTIFYING PARTICULARS OF THE APPLICANT AND OTHER PLAINTIFFS REMAINS IN FORCE.**

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

[2021] NZSC Trans 5
SC 82/2020

**BETWEEN** **M**
Appellant

**AND** **ATTORNEY-GENERAL (IN RESPECT OF MINISTRY OF HEALTH)**
First Respondent

**WAITEMATA DISTRICT HEALTH BOARD**
Second Respondent

**CAPITAL AND COAST DISTRICT HEALTH BOARD**
Third Respondent

Hearing: 27 April 2021

Coram: Winkelmann CJ
William Young J
O'Regan J
Ellen France J
Williams J

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| Appearances: | A J Ellis, G K Edgeler and K R Bekesi for the Appellants<br>M J McKillop and J B Watson for the First Respondent<br>D R La Hood for the Second and Third Respondents |

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**CIVIL APPEAL**

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**MR ELLIS:**

Kia ora. May it please your Honours. Ellis, Edgeler and Bekesi for M, the appellant.

**WINKELMANN CJ:**

Tēnā koutou.

**MR McKILLOP:**

E te Kōti, tēnā koutou, ko McKillop ahau. I appear for the first respondent along with Mr Watson.

**WINKELMANN CJ:**

Tēnā korua.

**MR LA HOOD:**

Tēnā koutou, e ngā Kaiwhakawā, ko La Hood ahau for the second and third respondents.

**WINKELMANN CJ:**

Tēnā koe Mr La Hood. Now I just remind everyone that the appellant's name is suppressed so I suggest that we simply refer to him as the appellant this

morning. We have no one in the public gallery but proceedings are recorded. It saves us having to edit the transcript. Mr Ellis?

**MR ELLIS:**
I have discussed the timetable with my learned friends and it is our belief, subject of course to how many questions we get, that we will be finished by lunchtime. That does, obviously, depend on the questions.

So in terms of my submissions, there is only one point on which leave was granted. I haven't dissected the argument to any of my juniors and I should record that Ms Bekesi is –

**WINKELMANN CJ:**
Mr Ellis, can you just make a point of speaking into the microphone, you're drifting in and out there.

**MR ELLIS:**
Sure. Ms Bekesi is having her debut in your court.

**WINKELMANN CJ:**
Well we are very pleased about that. And Mr Edgeler not?

**MR ELLIS:**
No, no, Mr Edgeler has been here many times before.

**WINKELMANN CJ:**
Well not debuting but speaking?

**MR ELLIS:**
No, not speaking today. As I say we have only got the one point. We usually give him something to do but there is only the one point. It is a little hard to divide. Anyway, speaking to my submissions, which I know you read, I am just going to briefly go through them and touch on a number of paragraphs, and I am also going to touch on seven paragraphs of my learned friend's

submissions. Now I view the case as reasonably straightforward. Whether your Honour's have the same view or not, I don't know. So starting with my paragraph 5, the government introducing the substantial amendment last month and on the 6th of April issuing the statement relating the Mental Health Amendment Bill, which was to improve the protection of individual rights and, by example, eliminating indefinite treatment orders, and they note that opinion is being expressed that the Act fostered archaic and risk-adverse attitudes towards people with mental health conditions, and they are passing this amendment obviously because it is of such urgency that they are not waiting for a full repeal and replacement of the whole Act later this year, on the top of page 3, and they note the Mental Health Act is almost 30 years old and is not working the way it should, and we need to meet our domestic and international human rights commitments, and the general policy statement in the explanatory note said that indefinite treatment orders have been widely criticised as a serious breach of human rights, and they may discriminate agianst people with a mental disorder and it could amount to an arbitrary detention and restriction to justice. So that was a timely piece of legislative amendment, as I was just about to write my submissions, and I note, with some surprise, that my learned friends don't engage with that issue.

I suppose when I think back to, you know, the years that this case, and similar cases, have been before the New Zealand courts, in pushing for recognition of the Convention on the Rights of the Disabled, and strangely New Zealand championing that convention and chairing the working group, took – it was brought into force in 2006, but individual complaints were not permitted until 10 years after that. So I suppose recalling standing here in *Taunoa* and saying I had one achievable ambition left, which was to win a case before the Torture Committee. Well I have done that, got another one now, to win a case before the Disabilities Committee, which of course wasn't around in 2007.

So the crux of the appeal is at paragraph 13, I say. That the detention is not for public safety. It is because my client, and others like him, are suffering from a disability. So at paragraph 14 the core reason for the detention was mental impairment or disability, and the approach from the beginning has

been, in the High Court, has been that the Courts of New Zealand should adopt a paradigm shift, which were the words of the UN High Commissioner quoting from Ambassador MacKay of New Zealand, Chairman of the Ad Hoc Committee. There should be a paradigm shift, and there has been commentary, as you will see in the submissions, from the European Court of Human Rights and the Disability Committee, and very few countries have yet adopted a paradigm shift but there is a slow and forward movement towards that. And I was thinking of Mr Condon who you might remember in this Court, his case, and he was in contact recently saying: "Well, since my retrial was ordered because I didn't have a fair trial, I've managed to be locked up as a special patient for over 10 years." I haven't got his file yet but obviously this form of indefinite detention may or may not be a problem and no doubt – I don't know in which court. That will have to find its way to start with, but there are very human consequences to being detained for a substantial period of time.

Anyway, the appellant, in 19 there, was detained because he had a mental and psychosocial disability, and psychosocial disability is the new jargon for the description certainly or the person suffering intellectual disability. He didn't have a fair trial. He didn't have a trial, and a trial is an absolute necessity as we saw from *R v Condon* [2007] 1 NZLR 300 in footnote 6, so it's an absolute right. The absence of a fair trial, in my submission, is worse than not having a trial at all, and according – "accordingly", that should be – the appellant's detention based on his disability is discriminatory and arbitrary and I rely upon the authority of *Noble v Australia* CRPD/C/16/D/7/2012 with the long footnote down there, number 7. At the very bottom of the page, the committee therefore considers that the author's detention amounts to a violation of Article 14 according to which "the existence of a disability shall in no case justify a deprivation of liberty", which is what happens here, and it is a difficult concept to come to grips with how the mentally ill and M'Naghten and the intellectually disabled shouldn't be treated in the way they are, but the jurisprudence of the Disabilities Committee is, how shall put it, embryonic might be a polite word. When I last checked, there's probably more now, in the 10 years – well, no, it's 15 years now, 2006 – there were 22 cases that

had been decided. So they're few and far between. Seven of them are from Australia. So it's not a widely used committee, and we had – I'm not quite sure if we still do – we had a New Zealand representative on the committee and it's unfortunately strangely, for a committee that's concerned with discrimination, it's the only major UN committee that doesn't have a proper or approximate proper gender balance, vastly over-represented by males.

But what we have at paragraph 23 is the comment that a section 31(4) detention is further statutorily expressed in 31(1) as being because the detention arises from being found unfit to plead. So my learned friends can go round the houses, the airports and the ports. It doesn't matter. The section speaks for itself. You're going to be detained because you've been found unfit to plead, and having been found unfit to plead negates your right to a trial and everything that goes with it, and what it amounts to, I suppose, is a similar proposition to what was argued in *Taito* that this is a second-rate system of justice for people with disabilities.

**WINKELMANN CJ:**
It's not just that you are detained, not just that you've been found unfit to stand trial, it's also that you're found to meet the conditions in section 24, isn't it, such as they are?

**MR ELLIS:**
Well, yes, and I suppose since this case started there was some significant lobbying of the government to reverse the order in which section 9 appeared, you know, were you shown to have done it, and that was successfully amended. So you've got to be shown on the balance of the probabilities to have committed the offence. But why should you as a disabled person have one standard and a person without a disability have another, or, more accurately, somebody with a mental disability has a different standard because if you have a physical disability you don't get locked up in this fashion and you don't get detained because you're unfit to plead. It's only certain disabilities that are…

**O'REGAN J:**

But you don't necessarily get locked up if you're unfit to stand trial, do you?

**MR ELLIS:**

Sorry, I didn't quite catch that, Sir.

**O'REGAN J:**

You are not necessarily locked up if you are unfit to stand trial. It's only if you also meet the section 24 criteria.

**MR ELLIS:**

Yes, that's right, yes. I mean it's got to be serious enough.

**O'REGAN J:**

Presumably if you're unfit to stand trial, that means it's not possible to have a trial, doesn't it? How do you have a trial for someone who isn't fit to stand trial?

**MR ELLIS:**

Well, you – that's a debate about substituted decision-making, whether it is possible to change the way that we look at that and give as much assistance as possible so that you can have a trial. So, for example, there was an argument in the tripartite case that was before the High Court about whether litigation guardians were needed and during the course of the litigation the appellant's litigation guardian deceased and all you were waiting for was the judgment, and it's quite interesting in that if you are, as in this case, bringing a case in the civil jurisdiction, you don't – you need a litigation guardian. You don't need one in the criminal jurisdiction, somewhat strangely. So I think there needs to be a rethink of how people with disabilities are treated in the criminal trial jurisdiction.

**O'REGAN J:**

But that's a legislative change that's required, isn't it?

**MR ELLIS:**

Well, yes, the – and the legislation, the legislature said we're going to – sorry, the government said, we propose to change it and we propose to change it urgently because this sort of –

**O'REGAN J:**

How does that relate to this appellant's detention under section 31(4)?

**MR ELLIS:**

Well, it relates to a change in mindset that perhaps the time has come when the government and the Court should adopt the proposition that we require a paradigm shift to the way that we treat persons with disability. I mean we've been through over the last, I don't know, 30 years, I might be inaccurate, to recognise the rights of women, recognise the rights of Māori, we've changed our attitudes to them. There's a requirement, in my submission, to affirm, protect and promote human rights in the long title to the Bill to have a paradigm shift and treat people in a different fashion, and that is what this case was all about.

**WINKELMANN CJ:**

So we have got you, your submissions, I think you are up to paragraph 24, and you are making the point that this argument, which is not one you have been granted leave on, but the argument you have and maintain is that this is a, that the powers under section 31(4) are inevitably exercised in an unfairly discriminatory fashion and therefore your argument is the detention was void ab initio.

**MR ELLIS:**

From, yes.

**WINKELMANN CJ:**

But under section 31 actually per se.

**MR ELLIS:**

Yes.

**WINKELMANN CJ:**

And that takes us through to your submissions in relation to the point on which leave has been granted, does it?

**MR ELLIS:**

Yes, well we have begun at 23 talking about section 31(4), yes. So I think that is correct. But I have been obviously backgrounding it and trying to comment on what the Court of Appeal said that, the interpretation that you place on that is absurd, and I, with respect, say no. The interpretation the courts have to this date is absurd, and compare it with the public protection order where there are safeguards. You don't get locked up for life possibly, certainly for five years or more in a public protection order, unless you are a serious sexual offender or a serious violent offender. Whereas, you know, the appellant doesn't really fit the same criteria there and the requirement for making it a public protection order in 25 is that the detainee essentially has to have this ability. You can't be locked up unless you have got the criteria in section 13(2) set out there in the paragraph, and I simply say that that is a discrimination because you are being discriminated against because of an intellectual or psychological disability or impairment or any other loss of abnormality et cetera and look at section 19 of the Bill of Rights too. I suppose for good order I should say the Statutes of Westminster; The First 1275, which was the essence of the *Taito* case, that it was unfair and discriminatory, a team shall do right to all mean, rich or poor, equally applies to rich or poor intellect as it does to money. So the whole approach is wrong.

So we get then to section 31(4) in paragraph 29 of my submissions, where I think the Chief Justice was pushing me to, and the argument is, as the Court says, arbitrary detention, and I suppose I start with a different philosophy to my learned friend's approach, who say in their submissions, and I will come to it, but they say, look, the last, the final argument is the Bill of Rights, and I say, no. The first argument is the Bill of Rights, and that is where we should start, not come to it in the end, and at 140, over the page on page 9 at 140, or

maybe 139(b) there, the detention was inconsistent with the convention and I also expressed the context in the guidelines expressed that the detention of people unfit to stand trial without the opportunity to defend themselves against criminal charges at a trial amounts to a deep arbitrary deprivation of liberty. So that is my argument. Times have changed and it is time that New Zealand's highest court changed as well, and that should do that sooner rather than later because the convention has been there since 2006. So the narrow argument –

**ELLEN FRANCE J:**
Can I just check, Mr Ellis? As I understand the pleadings you are saying the person who's doing the detaining is the Attorney-General. This is your idea of an executive detention?

**MR ELLIS:**
Yes, in respect of the grant of leave on this?

**ELLEN FRANCE J:**
Yes.

**MR ELLIS:**
On this point yes.

**ELLEN FRANCE J:**
So how does that work then? I'm trying to – so what happens on your approach? What happens on the expiry of the term?

**MR ELLIS:**
On the expiry of the term, if the Attorney hasn't already made a decision, I say he's statutorily without jurisdiction to make any decision because you can't have a detention, as my learned friends say, well, it doesn't matter if it's a day or week or possibly a month late. Well, of course it matters. You must treat people with disabilities the same as you treat people without disabilities. You can't detain somebody simply because they're disabled and they're late

because you feel that it's only a minor breach of the mental health legislation, as my friends put it, and they refer you to the case of *Care Co-ordinator v R* [2020] NZCA 574 which is in footnote 53, I think, of their case, at the bottom of the penultimate page I think it is, where Mr La Hood was trying to say that what was plainly not in order was in order and the Court of Appeal said no, you can't do that, you've got to make a specific order, and I took that to mean you have to make a specific order in accordance with law which means you've got to make it in time, and that's what I say here. If the Attorney hasn't made it, where is his jurisdiction to make a decision that you're going to be further detained?

**O'REGAN J:**
But his jurisdiction arises only at expiry, doesn't it? Are you saying there's a sort of millisecond in which he must make the decision?

**MR ELLIS:**
No, I'm saying he can make his decision prior to.

**O'REGAN J:**
Well, can he, because he can only make it at expiry, can't he?

**MR ELLIS:**
Well, yes, but in a practical sense he needs to make it prior to and then issue it as at the expiry date. He's can't – it's not going to do it in a millisecond because it requires some consideration and it's a very important decision because it's only capable of being made by the Attorney-General. It can't be delegated to the Solicitor-General. So he makes his – he collects his paperwork, his advisers give it to him, he makes a decision, and that decision is effective on the expiry of the 10 years or whatever it is.

**WINKELMANN CJ:**
So Mr Ellis, you would say that the most rights consistent – well, if we look at this with a rights lens, in order for the appellant to be lawfully detained the

legal requirements for detention have to be fulfilled and a legal requirement for the detention was the Attorney-General issuing the certificate.

**MR ELLIS:**
Yes.

**WINKELMANN CJ:**
And so just in simple conventional terms, the legal requirements for detention were not so in Bill of Rights terms he was unlawfully detained, and you take it beyond the 14 days because you say that – I understand your argument to be a Bill of Rights analysis also requires that you read this provision so that the certificate has to be issued before – at the particular point in time, and if it's not the jurisdiction to issue the certificate goes. Is that correct?

**MR ELLIS:**
Yes, that's spot on, Ma'am, yes.

**WILLIAM YOUNG J:**
If the Attorney-General had done nothing would it have been possible for the hospital or whoever had care of M to seek an order effective for mandamus to make him issue an order.

**MR ELLIS:**
If he hadn't done one, well, if he hadn't, I suppose there's two answers to that.

**WILLIAM YOUNG J:**
Under section 31(4) unless in the absence of pre-conditions which hadn't been satisfied, or circumstances that hadn't materialised the Attorney-General was required to direct that the defendant be held as a care recipient. That was a mandatory requirement, on the literal wording of the statute.

**MR ELLIS:**
Yes, but you're not to know, as the hospital, whether the Attorney-General is in the process of making it. I mean if you knew, I mean if the

Attorney-General wrote to you and, as the hospital authorities, I'm finding this decision difficult. I'm not going to be able to make it within the timeframe, yes you could apply for mandamus. But –

**WILLIAM YOUNG J:**
But that wouldn't apply, and could that mandamus be granted after the sentence had expired?

**MR ELLIS:**
No Sir. That's my proposition. It's without jurisdiction. What you could do –

**WINKELMANN CJ:**
It's not a sentence, it's a maximum period, isn't it.

**MR ELLIS:**
A maximum period of detention, yes. What you could do, presumably, as the hospital, is you could make a, go through a Mental Health Act assessment, your section 8 and start from the beginning, or alternatively – or I don't know that you could manage to do an intellectual disabled one because we might have spent that one, but certainly you could apply under the Mental Health Act for a fresh –

**WINKELMANN CJ:**
So your point is though we're just left with mainstream mental health responses.

**MR ELLIS:**
Yes, it would be, you'd start again. So the hospital is not without a methodology of locking somebody up again. But then, of course, that could equally be challenged in the normal way. But I suppose –

**WILLIAMS J:**
That would make sense if we were drafting subsection (4). The problem with subsection (4) is that it's drafted on the basis that any directions under (2) and

(3), or absence thereof, are in the past tense. In other words, you can't do any of these things until after the expiry of the half-sentence. That's the way it's drafted.

**MR ELLIS:**
Yes, and I think as the Court of Appeal say, I can't quite remember the word they use, it's a mess anyway.

**WILLIAMS J:**
Well it is, but that means, it must mean that the Attorney-General has no jurisdiction.

**MR ELLIS:**
Yes.

**WILLIAMS J:**
To pre-make the decision because the decision cannot be made until after expiry.

**MR ELLIS:**
Well, I would say that the Attorney-General can make a decision and issue it at the expiry date to make sense of the section.

**WILLIAMS J:**
Right, but you agree that it's after expiry.

**MR ELLIS:**
Yes.

**WILLIAMS J:**
It's not even at expiry, because at expiry still gives jurisdiction under (2) and (3), it has to be after expiry.

**MR ELLIS:**

Well, I maintain that to make the section work it has to be done simultaneous with expiry/

**WILLIAMS J:**
So subsection (2) and (3) talk about “on”.

**MR ELLIS:**
Yes.

**WILLIAMS J:**
(2) talks about “before” as well, I think from memory. So that’s your millisecond, your nanosecond, or whatever it might be.

**MR ELLIS:**
Yes.

**WILLIAMS J:**
And it’s at that point, once that’s passed, the Attorney-General having not done any of those things, must now do this thing, and I agree it’s very clunky.

**MR ELLIS:**
Yes well, I didn’t draft it, you didn’t draft it.

**WILLIAMS J:**
Exactly.

**MR ELLIS:**
And we’re faced with an anomaly which is why the government say, look, this isn't working. This is 30 years old, it doesn’t work, we get indefinite detentions which may be arbitrary, we’ve got to change it, and in my submission the Court can determine that as well as the government.

**O’REGAN J:**
But where we seem to be getting to is that it’s not reasonable to say the Attorney-General has to exercise the power at the precise moment of the

expiry. So the Court of Appeal said it's okay to exercise it for a period afterwards, and you're saying it's okay to exercise it for a period beforehand.

**MR ELLIS:**

Well, yes, I'm saying if we look at what the Court is saying and what my learned friends are saying, look it doesn't matter if it's a few days late or a few weeks late, and I say, well, how is it that only somebody with a disability is about to be locked up for a few extra weeks. I mean that is treating people with disabilities as second-class citizens.

**O'REGAN J:**

Well, except that the only order that can be made under section 31(4) does involve detention, doesn't it? So it's not as if there was a possibility of an order being made for his release.

**MR ELLIS:**

It doesn't have to be detained. He can be locked up in supervised care, not – no, not locked up, no. He can be subject to a, not a secure care order but a supervised order.

**WILLIAMS J:**

So held as a patient, what does that technically mean?

**MR ELLIS:**

Sorry, Sir?

**WINKELMANN CJ:**

Well, not held as a patient but if you assist us with what you mean. If you can take us to section 31(4) and take us through what you say the alternative outcomes for the appellant under section – were the alternative outcomes for the appellant because you're saying it could have resulted in him not being detained.

**WILLIAMS J:**

Yes, I just want to know what the statute means when it says "held as a patient". You say that doesn't necessarily mean detained. I'd welcome being educated about what the statute means by that.

**MR ELLIS:**

Mr La Hood reminds me that when we asked for a re-call in the Court of Appeal the argument was that, and we didn't address it in any detail because it didn't come up, was that you could be subject to a secure or a supervised care order, but care in that context in the leading case of *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641 says that that is a detention and I – well, in one of my arguments in *J*'s case, *J v Attorney-General* [2018] NZHC 1209, when we get to that, is that *VM* is wrong and – but as the law currently stands, a supervised care order is still a detention but it's a lot less of a detention, I guess, than a secure care order.

**ELLEN FRANCE J:**

It's partly why I struggle a little with your notion that the Attorney is detaining him. In this period when you say the Attorney hasn't done anything but he's still in detention, the detention that he's in then at that point is the earlier detention, isn't it, flowing from section 24, and what's happened subsequently?

**MR ELLIS:**

Yes, I was – forgive me for saying I was a little suspicious when you asked me the question about detention, thinking: "Where's this going?" and yes, in the sense that we're suing, or we were, three people, the Health Board, the Attorney, the Health Board and the Care Co-Ordinator, Capital Coast Health, we're suing two Boards, the original detention, like all detentions, is the Attorney-General ultimately in respect of the Bill of Rights and the international commitments New Zealand have. If you're asking me is it more accurate that the hospital are the detainer rather than the Attorney-General, I can see room for there being both of them are rather than just one and the

other because in a practical sense the Attorney is supposed to be making the decision to do it, so he's the detainer, and the person with the, being simple, with the keys is the hospital.

**WINKELMANN CJ:**

I mean isn't the simple answer that there's no one, on your argument, there is no lawful basis for him to be detained once a certificate has not been issued so it's actually simply the people who are in physical custody of him, who are detaining him at that point in time.

**MR ELLIS:**

Yes, that's right. They're physically and arbitrarily detaining him. At that point in time. So the hospital's detention is purely pragmatic in terms of law. I mean they're just detaining him because the Attorney-General told them to. But the Attorney-General had no power to do so, so they could presumably seek a declaration saying no, he should be released or –

**WINKELMANN CJ:**

But your point is that actually on the 20th of December they no longer had the Attorney-General telling them what to do.

**MR ELLIS:**

Yes.

**WINKELMANN CJ:**

And so they could have released him at that point in time.

**MR ELLIS:**

Yes or he could have applied for habeas, but again, you see, when this process is going on, the detainee isn't told, look you're now being detained under a fresh statutory power. You've got the right to a lawyer. You've got the right to habeas corpus. It's just ignored and if we were to go with my learned friend's submission, well it doesn't matter if it's got a week or a month, well why doesn't it matter. What difference is there that a disabled person can

be unlawfully detained. Where does that power come from. It doesn't. And as I've already said, the power is of such importance, according to the statute in my paragraph 31, just after the Court needs no convincing the section is important. It is a non-delegable power, forbids delegation, and that's a very important – I mean how often do you ever see that? Very rarely.

**WINKELMANN CJ:**

I can understand your argument in relation to the significance of the failure to issue a certificate that the requirements for legal detention had not been met. But I'm finding it difficult to work my way through, to get to the point where it's a one-off opportunity for the Attorney-General to do it and then it's gone, because of how poorly it's drafted it has to be given something to make it work.

**MR ELLIS:**

Yes, yes, I agree. I mean it is difficult but one has to come up with the most consistent Bill of Rights meaning that is possible, and that should err on the side of liberty, not on the side of detention.

**WINKELMANN CJ:**

Can you say what's the most Bill of Rights consistent interpretation of section 31(4) in those terms?

**MR ELLIS:**

In that after the expiry of the half-term, that the appellant is released.

**WILLIAMS J:**

I wonder whether one way of thinking about this is that the subsection (4) default contemplates a lesser form of treatment, as you've said, as was covered in that additional paragraph in the Court of Appeal's re-call decision, that there is that direct interest of the possibility of care and therapy that does not involve hard incarceration, that that, in itself, is an interest, and therefore you should read the head of subsection (4) as if it says, must immediately direct.

**MR ELLIS:**

Yes, I think I could adopt that.

**WILLIAMS J:**

And the failure to immediately direct produces shall we say problematic consequences for the Attorney-General and the health system, but that's its problem.

**MR ELLIS:**

Yes, very much so, plus this overall proposition that we signed up to an international treaty to protect the rights of the disabled, in fact we championed it, and then we put it on the backburner until the government woke up.

**WILLIAMS J:**

Yes, so I guess your argument is, can the system please get its act together.

**MR ELLIS:**

Yes.

**WILLIAMS J:**

And regularise things immediately so that we don't get stuck in a twilight zone, whether it's a week or two weeks or six months.

**MR ELLIS:**

Yes, that's very much my argument. That the Attorney-General needs to look at the release or otherwise in good time, so that it can be accomplished by half time.

**WINKELMANN CJ:**

Mr Ellis, what's the Court of Appeal decision which looked at an issue quite similar to this where an order had to be made before the expiry of a time period?

**MR ELLIS:**

That's the *C*, the Caregiver or *Care Co-Ordinator*. This is – it's…

**WINKELMANN CJ:**

And *R*.

**MR ELLIS:**

Yes, it's – I've got a printout of it here because I wanted to refer to it and my friends refer to paragraph – it's in their bundle. It's their footnote 52, is it? Their footnote 52. It's called *Care Co-ordinator v R* 2020 judgment of – November – Justices French, Brown and Collins, and my learned friends in their submissions – I'll just go to it now to save me going to it later – discuss paragraph 78. I would prefer to look at it in paragraphs 77 and 78 and in 77 the Court of Appeal, it was discussing Justice Cull's judgment in *J v Attorney-General*. The High Court was concerned with a case in which multiple extensions of compulsory care and deferrals were made. Two of the deferrals were made until further order of the Court. Deferral orders were made before the extant extension orders expired under 87(1) of the Intellectual Disability Act. They should have been to a specified date. Within a matter of weeks the Family Court extended the orders. The High Court held the failure to comply with the time limit of 87(1) did not invalidate the subsequent extension orders. And then my learned friends set out the argument in 78, *Sestan v Director of Area Mental Health Services, Waitemata Health Board* [2007] 1 NZLR 767 (CA) and *J v Attorney-General*, and maybe I should just…

**WINKELMANN CJ:**

Yes, there's another case actually but I don't see it in the materials because I recollect being on the panel and so was Justice French. It was to do with public safety orders where an order had to be made before a certain period was expired and it wasn't and I think the Court said it couldn't be.

**MR ELLIS:**

Yes, well, I think we've got a monopoly on those orders, haven't we? Yes, the *Rutherford* interim detention order appeal which I think was our case. But can I go back to my paragraph?

**WINKELMANN CJ:**

Yes.

**MR ELLIS:**

In paragraph 78 there's reference to *Sestan* and in case you don't remember what *Sestan* was, Mr Sestan was – that was a habeas corpus case that I brought and then lost and lost in the Court of Appeal as well and then over Christmas, the Court was unable to assemble because of Christmas, and by the time we got back in – I think it was February the 6th or something like that, the first case of the year – Mr Sestan had been released onto a community treatment order and David Collins QC, I remember, stood here and said: "I'd like to join in the case as Solicitor-General," and I said, well, I haven't been able to find a single final Appellate Court who would treat a community treatment order as a detention so I don't think I can proceed with the appeal because we've effectively won by passage of time. So, you know, we didn't get anywhere but – unfortunately – so it didn't really get resolved. But 78 says *Sestan* and J stand for the proposition that minor breaches of the two Acts do not necessarily invalidate steps. That proposition cannot be invoked in circumstances where a failure to comply with the legislation is so fundamental it deprives courts of jurisdiction to take any further steps under the legislation. Well, I say that that that is completely and absolutely wrong. That is anathema to the Bill of Rights. That does not affirm, protect and promote human rights. That is a recipe for the detention of the mentally disabled in a different fashion to the non-mentally disabled and is just discrimination and second-rate treatment. It is simply wrong and this Court should not follow that.

**WILLIAM YOUNG J:**

Can I just ask you a question about the effect of the Attorney-General's direction? Section 31(4) provides for a direction that the defendant be held as a care recipient and that is treated as a compulsory care order. Is the fact that it's a secure order simply implicit in the words "held as"?

**MR ELLIS:**

No. You must detain somebody either in a secure or supervised order. You have to do one or the other. Mr La Hood tells me section 94 of the ID Act says that this must be a detention as a secure order. Don't know what it says in the Mental Health Act.

**WILLIAM YOUNG J:**

So section 90?

**MR ELLIS:**

94. Is that right, 94? Yes, 94.

**ELLEN FRANCE J:**

I see, right.

**WILLIAMS J:**

Right, so 94(1)(b). So does that mean supervised care is not on the table?

**MR ELLIS:**

On an intellectual disability order, yes, it does.

**WILLIAM YOUNG J:**

But it can be varied or – later it can be varied and there was the hearing later in 2009 before Judge Adam, I think, wasn't there?

**WILLIAMS J:**

Yes.

**WILLIAM YOUNG J:**

I understand now.

**WINKELMANN CJ:**

But the point is it puts – once they're in that, they're on a different track now, aren't they? They're on a track which creates the possibility of lesser status.

**MR ELLIS:**

Yes.

**WINKELMANN CJ:**

Less detained. Less detention.

**MR ELLIS:**

Well, the fact that he's come to the half way point, I mean the implication in that must be that he's moving to something lesser. Why bother to have it there at all otherwise? So…

**WILLIAM YOUNG J:**

Was there any practical – what worked – what practical difference did it make to him at the time? Were his care arrangements varied, because I assume presumably that those responsible for them would have been well aware that his status was going to change and that there would have to be a review hearing sooner or later, preferably sooner.

**MR ELLIS:**

Yes, I would have – I think I would concede that there wouldn't have been any change in his care arrangements, but it's a little bit like, if I can make an analogy, it's *Miller & Carroll v New Zealand*. You come to the end of your preventive detention and then the Human Rights Committee says, well, you've done your minimum non-parole period. You've got to now be kept in conditions which are quite different to what you were detained with otherwise and you must be rehabilitated and that's the purpose of the penitentiary system. Well, it's also the purpose here. You're going to be rehabilitated. It's in the name of the Act. So your – shouldn't be kept in the same conditions. You should be kept under lighter conditions by analogy with that proposition.

**ELLEN FRANCE J:**

Just so I'm clear, there's no practical change on the expiry and that doesn't change until after the review hearing. Is that the chronology?

**MR ELLIS:**

Yes, I think so. My learned friend will – yes, there's some possibility of getting day release which there wasn't before.

**ELLEN FRANCE J:**

Immediately?

**MR ELLIS:**

Yes.

**WILLIAM YOUNG J:**

But I thought he could get day release as a special care –

**ELLEN FRANCE J:**

That's before, mmm.

**WILLIAM YOUNG J:**

– under a special care order.

**MR ELLIS:**

It's not as easy and much like – just trying to think – Mr Condon, he's done his 10 years and he's still a special patient and he can't, as I understand him to tell me, he can't get day release.

**ELLEN FRANCE J:**

But the appellant did have day release. When he goes to visit that family isn't he on day release, at least on some occasions?

**MR ELLIS:**

Yes, and he got, at the time of the appeal – no, at the time of the High Court hearing, he was no longer under an order so part of the argument was he's no longer being detained, why does he need a litigation guardian? He's fit enough to be let out so – and then subsequently he's been redetained because of some arson, well, I suppose an alleged arson because he hasn't

had a trial, that was compounded mentally by the COVID conditions, and now he's back in the Mason Clinic which is about as secure as it's possible to get.

**WILLIAMS J:**

So are we on common ground then that what gets triggered by expiry is not a change but an expectation under section 77 of a review at the earliest possible time or whatever it is section 94 says? It's the chance of that review that only gets triggered by the direction.

**MR ELLIS:**

Yes, Sir. That's really where the possible change of conditions or release would come somewhere down the track.

**WILLIAMS J:**

It says as soon as practical after the direction, after the CP(MIP) direction.

**MR ELLIS:**

Yes, and – as soon as practical, yes.

**WINKELMANN CJ:**

So that delays it on your argument?

**MR ELLIS:**

Yes, it – I mean why can't there be a review beforehand which is fed in to the Attorney to make his decision about what he's going to do? I mean that, on a practical level, one's got to juxtapose the various timelines, but whether that's done statutorily or informally or even formally but not under a statutory power, he can be reviewed any time at all. I mean that's a rights-consistent analysis, so there's an assessment medically of him before the Attorney makes a decision.

**WILLIAMS J:**

Can the Inspector of Mental Health walk in at any time?

**MR ELLIS:**

Yes.

**WILLIAMS J:**

So what is the difference?

**MR ELLIS:**

Well, after the expiry of the half-time provision he's still being detained without a lawful provision. It's an arbitrary detention. Beforehand it wasn't. Well, I argue it was. It was an arbitrary detention, as the Chief Justice said, ab initio, because you can't get to section 31(4) unless you've been detained anyway, and I suppose no doubt that will be an argument before – well, depending on what your decision is, of course – before an international tribunal.

**WINKELMANN CJ:**

Your point is, I suppose, there is – you point to this prejudice because it delays things, et cetera, but your more fundamental point is that it's an arbitrary detention and you don't need to point to prejudice. The prejudice is detention without fulfilment of the legal requirements.

**MR ELLIS:**

Yes, you know, that is my point. It's an unmistakable arbitrary detention and the Bill of Rights needs to be considered not only by the Crown but the Bill of Rights needs to be considered by the decision-maker, the Attorney-General.

**WILLIAM YOUNG J:**

The decision – the Attorney-General had no choice in the circumstances but make the direction, did he? All alternative pathways had been closed off by the effluxion of time.

**MR ELLIS:**

Well, but that doesn't – that's not an ouster of the Bill of Rights, is it?

**WILLIAM YOUNG J:**

Well, no, I'm just saying when the scheme of the Act is that the other things not having happened he was to be held as a secure – as a person – sorry, the language is unfamiliar to me – care recipient, and that was what the statute required. Now something didn't happen in the middle for two weeks.

**WINKELMANN CJ:**

It is an ouster of the Bill of Rights when it comes to the Attorney's decision, isn't it, because how does he take into account the Bill of Rights when he has to make this – leaving to one side when he must do it, if he was acting in compliance with the statute, or she was acting in compliance with the statute, she would have to do – she would not have – there's nothing for Bill of Rights to bite on. She would have to make the certificate – issue the certificate to comply with section 31(4). Must make it.

**MR ELLIS:**

Yes, I understand where your Honour is going but that was why there were applications in the High Court for declarations of inconsistency which both the High Court, or both the Court of Appeal and yourselves in your lease submissions said there wasn't. Well, there was, to cover that prospect, but you didn't give leave on that. So we could have had, and remember there's a legislative reform also, the Bill of Rights Amendment Act, the inconsistency is before the House too, so we could have had a declaration of inconsistency and then presumably the Attorney's got five or six days to bring it before the House. So it's quite an urgent proposition if a court makes one. So that's why, well, I'm going to say it whether I should or I shouldn't, it's unfortunate we've been confined to the narrow point.

**WINKELMANN CJ:**

All right, so your point about that is in relation to the declaration of the inconsistency?

**MR ELLIS:**

Yes, and I do ask for one on my last page, paragraph 55, I do ask for them because the argument is really incomplete without it.

So right, perhaps we could move on, if we could, to the Court of Appeal in 34 discussing the issue at paragraph 135 and I set out quite a number of paragraphs there, and then say that dealing seriatim, in my paragraph 35, with each, except 137 which needs to be dealt with before 137, 135 is the starting point and 136 records the rejection of the argument, but it introduces, I say in 36, a concept which is a human rights heresy, that an arbitrary detention of a few days or a few wees is acceptable. Well, it is not. Where does such an unprincipled position end? A few months or years? If the detention is unlawful for one day, one week or one month, it is still unlawful. If your new detention is delayed for a week or a month, how are you to know that you're freshly detained under a new power? Are you aware of your Bill of Rights rights which are very important rights? I mean habeas corpus isn't just the Bill of Rights right, of course. It's a statutory right under the Habeas Corpus Act 2001, I think, and he's got a right to a lawyer and a right to be heard. The proposition it makes no difference to have a hearing rather belies the serious issue which now needs to be considered by this Court. There's an ouster of a hearing. This is, in effect, a *Fitzgerald v Muldoon* proposition, you've got not right to a hearing. Well, of course you have a right to a hearing because we've got natural justice and we've got section 27 of the Bill of Rights. So if I turn to that point, if I can –

**ELLEN FRANCE J:**

Just before you do, in terms of I understand your argument about one day is no better than two or three or longer, but on your approach you wouldn't allow any particular practical reason that might, in fact, be favourable to a person in the appellant's position. So let's say a place is available at another institution, but not until three days later, let's say. On your approach that can't be fed into the equation? In the sense of the subsequently standing back and saying, well, is what the Attorney-General did.

**MR ELLIS:**

Yes, I understand the question. Let me make an analogy to this that your prison sentence expires but you're going, as part of your rehabilitation you're going to go to the Salisbury Street Foundation or the Bridge one, you're going to have drug treatment and whatever, but a place isn't available for another three weeks. You can't be kept in prison awaiting a place, and no more can you be treated in a like fashion as a disabled person. That shouldn't be, that's just prior planning.

**ELLEN FRANCE J:**

No, I understand that. On my hypothetical I'm assuming there has been prior planning, it's not as though, it's not where the various actors are just, you know, cooling their heels. But it is slightly different here, potentially, from your prison analogy where there are only the two options available under 31(4).

**MR ELLIS:**

Well yes but I think I'd like to take the moral high ground, even though you might not like it. I mean what you're suggesting really is the triumph of pragmatism over principle.

**ELLEN FRANCE J:**

No, I'm just trying to understand whether on your approach you allow of any one reading. There's your reading, another reading is there shouldn't be unreasonable delay, and I'm just trying to understand why you say a flat no to that, or do you say a flat no to that?

**MR ELLIS:**

Yes, I do say a flat no because you're either lawfully detained, and beyond that even if you were lawfully detained, you're still not detained arbitrarily, there's no room for suggesting oh right, you're, because there's something helpful coming in a few days' time, or a few weeks' time, we should extend your detention unlawfully because it might help you in a few weeks. I mean there's no…

**WINKELMANN CJ:**

Could I ask you a related question. Is there, in fact, a choice for the Attorney-General in any case, because isn't it the case that whether – the certificate would already have been given under section 24 under either the Mental Health (Compulsory Assessment and Treatment) Act or under the Intellectual Disability (Compulsory Care and Rehabilitation) Act, so the appellant's existing status under section 24 would dictate which of those the Attorney-General gives, is that right, or am I misunderstanding that?

**MR ELLIS:**

It sounds right.

**WINKELMANN CJ:**

So he's either going to be a patient –

**MR ELLIS:**

Or a special –

**WINKELMANN CJ:**

– under the Mental Health (Compulsory Assessment and Treatment) Act or a care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act.

**MR ELLIS:**

Yes, I don't think there's any other option.

**WINKELMANN CJ:**

I suppose there's the remote possibility that the Attorney-General would receive advice to swap the person from one thing to the other.

**MR ELLIS:**

Yes.

**WINKELMANN CJ:**

Yes.

**MR ELLIS:**

But I suppose what I think is happening here is the, was reported by the, I think it was the UN Subcommittee Against Torture which at the time I think Justice Goddard, Lowell Goddard, was a member of when they visited New Zealand in 2014, I think it was 2014, or it might have been the working group on arbitrary detention who were here at approximately the same time, and they said the Ministry of Health doesn't really consider itself as a detainer, doesn't have that concept, and it needs to, you know, wake up, and people – they criticised the number of people in mental health and intellectual disability and said that their rights needed to be seriously reconsidered. So we've had an international visitation to New Zealand and some criticism of that. I'm sure I can find the citation to it if you need one but it's not as if the government hasn't been forewarned, and, of course, it had its mental health review and at long last we have some movement there. Justice France, had I finished to your satisfaction?

**ELLEN FRANCE J:**

Yes, yes. No, that's – thank you.

**MR ELLIS:**

Right, so I'd like to turn to natural justice.

**WILLIAM YOUNG J:**

But is this really on something on which leave was granted?

**MR ELLIS:**

Well, when the Attorney makes a decision, the issue is, under 31, does he have to abide by natural justice or not?

**WILLIAM YOUNG J:**

Well, the question was whether there was unlawful detention because the direction was not issued until 14 January 2009.

**MR ELLIS:**

Yes, but isn't it – well, implicit in that, I say, is you've got to consider natural justice, and I've only got one page on it. It's not going to take me long to get through it.

**WINKELMANN CJ:**

Well, you just go ahead and give us that page, Mr Ellis.

**MR ELLIS:**

I'm just saying there's a special place, in 38, there's a special place for people with mental impairment and the courts won't turn a blind eye to it. Affording a patient the right to be heard prior to the Attorney-General making his 31(4) could make no conceivable difference, the Court says, is alarming because that is effectively denying your right to a lawyer, habeas and natural justice.

**WINKELMANN CJ:**

Isn't your – and I don't think it helps you today, but the argument would be made and in relation to section 31(3) that if there is that possibility under section 31(3) an opportunity should be made to argue about it at some point as opposed to it just going by the board without anyone turning their mind to it.

**MR ELLIS:**

Yes, I think that's right. I mean I had to be I suppose a little inventive to fit the leave question and I see – well, I don't need to read you what the right to be heard means. We all know what it means. I should just say, at paragraph 41 – I think that should read section 26, not section 29 – sometimes there's a statutory right to dispose with a hearing but there isn't on this one. So that's the natural justice point.

And I'll move on to the executive detention point. I had planned, I'm not doing badly, to finish at half past 11, so might actually do it. That was the discussion I had with my learned friend.

The Court of Appeal at 137 record that the Petition of Rights argument that the detention at the order of the Attorney is an executive detention. I say to come to that conclusion is reminiscent of Lord Atkins in *Liveridge v Anderson* [1941] UKHL 1, [1942] AC 206, [1941] 3 All ER 338. "I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister," and putting that into more modern proposition in 2017.

**WINKELMANN CJ:**
So what are you protesting about against your – protesting against the fact the Act gives it to him or are you protesting against a construction of the Act which doesn't put strict time limits on him?

**MR ELLIS:**
The latter.

**WINKELMANN CJ:**
Okay.

**MR ELLIS:**
And Judge Pinto De Albuquerque in the Grand Chamber decision of *Hutchinson v The United Kingdom* ECHR Grand Chamber, Application No 57298/08, 17 January 2017, he sets out the Humpty-Dumpty proposition. You make things say what they do. So those concepts – and I join in that. Why should the Minister have an uncontrolled power of detention? And at 44 I say that really all arrests are statutorily exercising an executive detention, as are the Mental Health Act ones, but such powers are subject to prompt judicial scrutiny. It's widely accepted in international human rights law, and I set out the whole gambit, and our Bill of Rights makes it clear in sections 23(1), (2) and (3), and I have avoided going down the Guantanamo Bay modern examples of executive detention because that would take another 20 pages.

At 45, the expiry of half the sentence, and only the Attorney-General deciding, and the Court's view is absurd. I've already touched on that. With respect, the unreasonable reading of the appellant's position is the only absurdity.

Section 31 makes plain the jurisdiction only arises if he's detained as a special detention. There's no room for a decision after the maximum period has expired, Attorney is without jurisdiction, and section 6 of the Bill of Rights should –

**ELLEN FRANCE J:**
Sorry, Mr Ellis. Under the Interpretation Act 1999 there's the provision about powers being exercised from time to time. A power conferred by an enactment may be exercised from time to time. That's obviously subject to the context otherwise requiring. So do you say here the context otherwise requires in the sense of there's only one time on your approach that it could be exercised?

**MR ELLIS:**
Yes, I hadn't considered the Interpretation Act proposition but given the context of only the Attorney-General can do it and the half-time provision, it's difficult to see how it could – if you logically made the decision again, it would make nonsense of 31(4).

And then in paragraph 50, from the Grand Chamber in the Portuguese case, it's again commenting on the paradigm shift and the history of psychiatry demonstrates good intentions on the part of service providers, but they can turn into violations of human rights. Traditional arguments that restrict the human rights of people diagnosed with psychosocial and intellectual disabilities are based on the medical necessity to provide these people with treatment and/or protect public safety are now seriously questioned as they are not in conformity with the Convention.

And on paragraph 99, now there's a strong focus in alternative models and at the same time the Court reiterates the very essence of the convention is

respect for human dignity and freedom. The authorities must discharge their duties in a manner compatible. And 3, as regards mentally ill persons, the Court has considered them to be particularly vulnerable, and that's the same as *R v Narayan* [1992] 3 NZLR 145, 149 in the Court of Appeal, there's a special place. So again in Judge Pinto – I won't try his surname – the italics there, the criticism in his part-dissenting/part-concurring judgment is that the Court's ideologically charged minimalist approach to the State's positive obligations, the time regarding the particularly vulnerable people under state control, the effect is the downgrading of the level of Convention protection to an inadmissible level of State inertia, and I adopt that wholeheartedly as what is happening here. The Court of Appeal is downgrading the position of vulnerable categories of psychosocial patients under State control to State inertia. They should have done it in a timely and reasonable fashion, well before they did, and as I say, this sort of decision is no longer possible. The governments are changing. I didn't say "possible", did I? I said it's no longer government policy. And then the conclusion is self-explanatory.

**WINKELMANN CJ:**
Yes, but there was one point you wanted to raise in relation to costs Mr Ellis.

**WILLIAMS J:**
Just before you go to costs, can I ask a question.

**WINKELMANN CJ:**
Sure.

**WILLIAMS J:**
Any decision of the Attorney-General under (2) or (3) is that subject to the Review Tribunal's jurisdiction?

**MR ELLIS:**
Mental Health Review Tribunal?

**WILLIAMS J:**

Yes.

**MR ELLIS:**

I'm not an expert on the Mental Health Review Tribunal.

**WILLIAMS J:**

That's fine.

**MR ELLIS:**

I don't know. I can look later on.

**WILLIAMS J:**

We can pick it up later on, thank you. Sorry, now costs.

**WINKELMANN CJ:**

Yes, we were surprised to see that you had been declined legal aid for this appeal, is that right, you applied and declined?

**MR ELLIS:**

Yes. I wrote, I spent two days on asking for legal aid and then reconsidering, I just got fed up. I mean it takes you longer than you get the money.

**WINKELMANN CJ:**

Well when you got fed up, did you actually get declined?

**MR ELLIS:**

Yes. Yes, I got declined and a reconsideration was declined. So two days of applying went and I thought, well, you could go to the Legal Aid Tribunal High Court and all the way here but it took me four years with *Marteley* to do that one.

**WINKELMANN CJ:**

And the application was made prior to the grant of leave, or were they aware of the grant of leave?

**MR ELLIS:**

It was made prior to. It has to be because you need to try and get a waiver of fees and –

**WINKELMANN CJ:**

Yes, I know, but as time went on I wondered if you made them aware of the grant of leave.

**MR ELLIS:**

Later on in the reconsideration. At least I think I did.

**WINKELMANN CJ:**

You can't say for sure?

**MR ELLIS:**

I can't remember to be honest. It took, I recall I spent two days trying to get the – it wasn't an insignificant effort to get legal aid and I thought, well, let's get on with the case rather than spend another few years fighting about whether you get legal aid or not. So if we've finished that I wanted to say a few things about, as I said about seven or eight paragraphs, in my learned friend's submission. If we turn to that I'm going to deal with, it says paragraphs 2, 3, 35, 36, 41, 45 and 50. So paragraph 2, CPMIP Act requires a "maximum period of detention". Well that's it, it's a maximum period of detention. It's not, we're going to give you some more because it's suitable and pragmatic. And at 3, "following an orthodox interpretation" there's always a delay, "even if the direction is made the following day." Well that should come to an end. There should not be "always a delay". It should always be determined according to the rule of law, not the different rule for mentally impaired persons.

On page 13, in paragraph 35, under the heading "Compelling release through a High Court inquiry". Hypothetically, what would occur if a direction was never made. The thing about a High Court inquiry, at least certainly under J's

case there in 36, was described as an important supervisory function of the Court. Well that matters in itself very interesting as that was 2018 and nobody had ever brought an application under that section since whenever the Act came in, was it 2003/2004, whenever the – so it's an important supervisory jurisdiction that nobody has ever used.

**WILLIAMS J:**
As at 2018 or as at today?

**MR ELLIS:**
Yes, at 2018. That was the –

**WILLIAMS J:**
Can you say as at today?

**MR ELLIS:**
At today, well I don't know if there's a further one since.

**WILLIAMS J:**
Okay.

**MR ELLIS:**
I've not noticed one.

**WILLIAMS J:**
Okay.

**MR ELLIS:**
I try to follow these cases. So it's tricky. Arbitrary detention, on page 15, paragraph 41. I think I prewarned you I was going to say this. The final issue is whether the Bill of Rights – paragraph 41 – requires a different reading. It's not the final issue. It's the crucial and first issue, and the Crown and its various entities, the other two respondents, are bound by the Bill of Rights and they are supposed to affirm, protect and promote the Bill of Rights, not

relegate it to page 15 and say this is the final issue. And then on page 16 there's a footnote 45 which is denied. Where is it?

**ELLEN FRANCE J:**
In paragraph 45, second…

**MR ELLIS:**
Page 16. Yes, I'm looking on page 16. I'm looking at footnote 45 and I can't find where it is in the text.

**WILLIAM YOUNG J:**
It's in paragraph 45.

**ELLEN FRANCE J:**
Paragraph 45, second sentence.

**MR ELLIS:**
Right, paragraph 45, second sentence. I see. And even if it were accepted that 30 to 31 of CPMIP can give rise to an arbitrary detention, which is denied, it would lead to worse outcomes to special care recipients. There is nothing worse than having a system that special care patients are arbitrarily detained, positively reject that. And then finally…

**WINKELMANN CJ:**
Your point on that is, I think, that – and you say this, you make the submission that it has resulted in this case, is that when people believe that they have been dealt with in a way which sits outside the law they – well, part of the point is, it's not all their point, it creates a sense of injustice and the appellant had, you say, some of his rage was because of the manner in which he was dealt with.

**MR ELLIS:**
Well, I think he was enraged more by the entire fashion. I mean, his case started with, as you will have seen, I think, Justice Ellis' judgment was

260 pages long, it was one of a strands of the rope and we're left with one strand at this stage but we have more strands on an international argument. At – I was just going to finish, wasn't I? So in the argument of my learned friends on page 17 under the heading "Alternative argument" at paragraph 50, if in the alternative the Court holds there's some sort of time-bound duty, and that duty was breached, the respondents submit it was minor. Well, I think we've dealt with that. We're back to *Sestan* and *J* which we discussed in paragraphs 77, 78, of the *Care* – so it's at really paragraph 50.3 where, at the top of page 18 there, my learned friends quote from paragraph 78 of – in footnote 52 – which I've taken you to previously and said that you really need to consider 78 and 77 together and that minor breaches, I just – the philosophy that says you can have a minor breach of the Act and it doesn't matter is alien to the rights under the Bill of Rights and the Convention and it is quite the wrong approach. It is time the Crown took the approach that they're affirming, protecting and promoting human rights, not diminishing them, and that is the case –

**WINKELMANN CJ:**
I don't want to make your argument for you, Dr Ellis, but wouldn't you also argue that if, that a failure to comply with the pre-conditions to detention is not a minor breach?

**MR ELLIS:**
Yes, I would argue that the detention arising from section 31(4) is a very important right which is echoed by the legislative drafting that only the Attorney-General may make that decision. It's very important and it is not a minor argument.

And, unless there are any questions, I've made my 11.30 self-imposed deadline, those are the submissions for the appellant.

**WINKELMANN CJ:**
Thank you, Mr Ellis.

**MR ELLIS:**

Apparently, my learned junior tells me I did say –

**WILLIAM YOUNG J:**

You need to go near the microphone.

**MR ELLIS:**

Sorry. When I was quoting you from the Subcommittee on the Prevention of Torture, it wasn't the working report – it was the working report – not the Subcommittee on the Prevention of Torture, it was the working group. Thank you. Are there any questions?

**WINKELMANN CJ:**

No. Thank you. We'll take the morning adjournment at this point.

**COURT ADJOURNS: 11.31 AM**

**COURT RESUMES: 11.49 AM**

**WINKELMANN CJ:**

Mr McKillop.

**MR McKILLOP:**

Thank you, your Honour, may it please the Court, I don't intend to step through my written submissions paragraph by paragraph. I think I have about half an hour of oral submissions to make in total on behalf of all three respondents and I hope that this approach means there's plenty of time for the Court to ask questions both during or after that submission.

I largely want to focus on making three main points. First I want to talk about how a special care recipient order comes about for someone who has been found unfit to stand trial and what its purpose is.

**WINKELMANN CJ:**

That would be very helpful, just to get the oversight of the scheme.

**MR McKILLOP:**

Yes, I think we've talked a lot about the text but not the purpose, possibly missing one of the major things we're meant to look at under the Interpretation Act. So my submission will be that special status is connected to an underlying criminal charge. It doesn't end with release from detention; it ends with the charge either being heard or being stayed. Detention will, if it is stayed, continue.

**WINKELMANN CJ:**

You were saying the special status ends with the charge being – does it?

**MR McKILLOP:**

Yes, it does. Sorry, if the person returns to court because they've become fit to stand trial and the charge is heard, and there's a trial, obviously the charge is not stayed but if that never occurs the charge is stayed by the Attorney-General making the section 31(4) direction and that is the end, in my submission, of the person's special status.

**WINKELMANN CJ:**

Are you saying that the section 31(4) direction has the effect of staying the charge?

**MR McKILLOP:**

Yes, and that's provided for in section 32 of the CPMIP Act. But I'll come to all this, your Honour.

The second point that I want to discuss is M's particular circumstances and the central –

**WILLIAM YOUNG J:**

You should just refer to him as the appellant otherwise in the transcript –

**MR McKILLOP:**

I'm sorry. The appellant was the – well, sorry, I should say first the central idea here is that the appellant's detention was always, in my submission, authorised by law. He – and the third issue that I want to talk about is the appropriate interpretative approach to the CPMIP Act. That's the way that I've referred to Criminal Procedure (Mentally Impaired Persons) Act, all of the –

**WINKELMANN CJ:**

Perhaps you can just call it the Criminal Procedure Act for these purposes. CPMIP is a bit…

**MR McKILLOP:**

Well, perhaps. I may actually end up referring to the Act called the Criminal Procedure Act later, but all of the acronym options are awful in this case, unfortunately.

**WINKELMANN CJ:**

So you call it the CPMIP?

**MR McKILLOP:**

CPMIP Act. I'm…

**WILLIAMS J:**

It rhymes at least.

**MR McKILLOP:**

It doesn't quite roll off the tongue as I've demonstrated but it's perhaps all we have. The central idea of my third point is going to be that where Parliament has expressly authorised detention, the purpose of section 22 of the Bill of Rights Act, which is the right to freedom from arbitrary detention, is not to undermine what Parliament has tried to do. Rather it's to fill in the procedural or the substantive gaps that could mean detention that Parliament has authorised could become arbitrary or could be administered in some sort of arbitrary way.

**WINKELMANN CJ:**

Could you just say, make that submission again?

**MR McKILLOP:**

Well, I'm saying that Parliament's intention to require detention is clear but there – and we've heard already about how perhaps poorly drafted this Act is. It has a long history and it reflects similar drafting in the Criminal Justice Act 1985.

**WINKELMANN CJ:**

So can I reformat that submission for you?

**MR McKILLOP:**

Yes.

**WINKELMANN CJ:**

Is your submission that the most rights-consistent reading of section 31(4) is what?

**MR McKILLOP:**

Well, the right is freedom from arbitrary detention and that is not breached by the plain reading of section 31(4). The emergence of arbitrary detention is already prevented within the scheme of the Acts as a whole by all of the protective mechanisms that exist, such as the High Court inquiry jurisdiction and such as the other mechanisms that monitor the lawfulness of someone's detention and treatment in order to address any problems with that which may emerge. So in my submission it shouldn't be necessary for the Court to read anything further into section 31(4) beyond its plain meaning that an obligation arises once the maximum period has expired and…

**WINKELMANN CJ:**

So your submission is that a rights consistent reading doesn't require strict compliance with the timing suggested in section 31(4)?

**MR McKILLOP:**

Yes, that's right. It doesn't require any particular limit to be put on timing because if we look at the scheme of the Act and the scheme of the related IDCCR and MHCAT Acts – I'm sorry, I'm lapsing back into acronyms – but the Mental Health and Intellectual Disability Acts, I should say, those Acts provide all of the mechanisms which will prevent arbitrary detention from coming about.

**WILLIAMS J:**

I just want to get your sentence, the initial one where you said basically BORA doesn't allow us to undermine that purpose, rather its role is to fill in procedural…

**MR McKILLOP:**

And any substantive gaps that might come along.

**WINKELMANN CJ:**

You were saying that's BORA's role?

**O'REGAN J:**

I think this is just outlining what the point is going to be. We might as well wait until we actually get to it.

**MR McKILLOP:**

It may help for me to elaborate on that further later.

**WILLIAMS J:**

But that's your point?

**MR McKILLOP:**

Yes.

**WILLIAMS J:**

It fills in procedural and substantive gaps?

**MR McKILLOP:**

Yes. And as – yes, well, perhaps we'll leave it to the point where I actually get to that submission.

So before I get to these three points, I just want to start by explaining the background to this appeal and the respondent's position. It's a single issue, as my learned friend has noted, which has been taken from a wide-ranging civil claim about the appellant's treatment, first as a special patient and then as a special care recipient and finally as a care recipient between 2001 and 2013, and I think, looking at our records, the first draft statement of claim was prepared in 2009, so even before that. The proceeding was concerned largely with the substance of the appellant's care and rehabilitation and investigated essentially every facet of the way that the DHBs operate forensic, mental health and intellectual disability inpatient services. So for that reason his legal status at any particular moment was not the focus of the parties' evidence and I would just note here that it was so not the focus that we didn't actually have a copy of the original court order which justified his detention as a special patient in the evidence here until we agreed to include it when we were preparing the case on appeal for this proceeding. And this was also noted in the High Court by Justice Ellis who noted that this specific issue being considered in the appeal was never pleaded but rather it emerged at the hearing itself, and I can – the reference in her Honour's judgment for that is paragraph 691 where her Honour notes that it was an issue that emerged at trial.

So the respondents have – that is to say that the discovery and the evidence in this proceeding is largely based off the DHB's files that were maintained for the appellant and the other two claimants in the High Court and there has not been the same discovery given from Ministry of Health or Crown Law files which I haven't had any indication that the Court is interested in any other steps in the –

**WINKELMANN CJ:**

Well, are you suggesting that it's incomplete and giving a wrong impression?

**MR McKILLOP:**

I'm not suggesting there's any wrong impression about the Attorney-General's direction. I'm only suggesting that were the Court to look through the entirety of the case on appeal and wonder why did this happen this way on this particular date, there may be more which we haven't included because of the way that the cases unfolded. So that's just really a note of –

**WINKELMANN CJ:**

So we might be lacking an explanation?

**MR McKILLOP:**

Yes.

**WINKELMANN CJ:**

We might. We don't know.

**MR McKILLOP:**

Yes, perhaps. So it's really just a note of caution. And I also just note as a preliminary issue that the respondents have taken a common approach to this proceeding at every level. As the detaining authority, the DHBs, Mr La Hood has taken responsibility for the evidential side of things. The Crown has taken responsibility for the legal argument side of things. So if – I'm expecting hopefully to make every point Mr La Hood would make but he'll, I'm sure, let you know if I haven't.

And there's also one housekeeping matter that I just wanted to amend a reference in the submission that I filed which is on page 17 of that submission. It's footnote 51 on page 17. There are multiple cases named *J v Attorney-General* about the same person and I've given the wrong reference there, and the reference should be [2017] NZHC 701.

**WILLIAM YOUNG J:**

2017, sorry?

**MR McKILLOP:**
NZHC 701.

**WILLIAM YOUNG J:**
But the paragraph references are still correct?

**MR McKILLOP:**
The paragraph references are correct, yes. So turning to the first of the issues I wanted to discuss, the relationship between special status and the underlying criminal charge, it would probably be best to do this by having the Criminal Procedure (Mentally Impaired Persons) Act open in front of you, and I'll be starting at section 23. The process for making a finding of unfitness to stand trial as provided earlier in the Act, and I don't think this case, we don't really need to get concerned with that. Section 23 assumes there has been such a finding and it also – it provides the mechanism for decisions to be made about someone for whom a not guilty by reason of insanity verdict has been entered, but we're also not talking about that sort of situation.

So the Court, if an unfitness to stand trial finding has been made, must make inquiries to determine the most suitable disposition for that person, and this can include detention in a hospital or a secure facility under section 23(2) and those are terms used specifically to link back to – well, hospital links back to the Mental Health Act, secure facility links to the Intellectual Disability Act.

Having had those inquiries made, the Court must then make a decision under sections 24 and 25. So first turning to section 24, the Court must consider all of the circumstances of the case and the evidence of health assessors which would have been prepared as a result of the section 23 orders, and then, if necessary in the public interest or the interest of the defendant, can make a special status order under subsection (2). So the two forms of special status are special patient under the Mental Health Act or special care recipient under the Intellectual Disability Act.

If the Court is – I should say for that – this is obviously a multifactorial sort of judgment and the severity of the charge, the ongoing risk of harming others and, of course, the person's ability to benefit from the sort of care and rehabilitation available under those regimes, will all be relevant factors in the Court's decision when special status is being considered. If special status is not thought to be necessary, then one of the alternative directions under section 25(1) has to be made and these are also pathways into the Mental Health or Intellectual Disability systems, but lacking the same link, which I'll come to, to the underlying criminal offence. The orders can be either as a patient under the Mental Health Act which is the civil status or as a care recipient under the Intellectual Disability Act which is the – well, there's no civil route into the Intellectual Disability Act without there being a criminal procedure but it's the lesser standard for people who are no longer subject to the criminal justice system. And if those orders aren't necessary, the person can be released. If there's a sentence of imprison already in place, the Court may decline to make any order.

**WILLIAM YOUNG J:**
Where does the power to release come from, or is that just a default that if no order's made under 24 and 25 –

**WILLIAMS J:**
25(1)(d).

**MR McKILLOP:**
25(1)(d), yes. That's the last option.

So the criminal charges remain active while someone who has been found unfit to stand trial is subject to special status under section 24, and the goals of this special status can be seen by the sorts of ways out of it that are provided by section 31. So as your Honours will be aware, one route out of it, out of special status, is to be found fit to stand trial and be returned to court for the criminal charges to be heard, and that's under section 31(2). The alternative which can occur is that the person may remain unfit to stand

trial but their detention under special status is no longer necessary, and that's under subsection (3) of that section. And my submission on that is that that gives us an indication as to what the purpose of special status is. It's to provide treatment and rehabilitation with the aim of addressing the risk that the person poses and to allow the person to gain or regain the capacity to participate in the criminal trial.

Now obviously, and this is most relevant where someone is a special care recipient because they will have and intellectual disability that they have developed as a result of something that happened in their childhood and so intellectual disabilities are most often not changeable. They are not amenable to treatment in the same way that, for example, a short-term psychosis might be that is preventing someone from being fit to stand trial. There's a different approach taken with intellectually disabled offenders. So it may be that people cannot gain the capacity to participate in a criminal trial. Very, very often this will be the problem with special care recipients. But that doesn't mean that their special status is indefinite, has to, as we obviously have seen, end once the maximum period of detention is reached. But my key point here is that the end of special status does not mean the end of detention. Rather it signifies the staying of criminal charges and the beginning of a civil level of detention which is under the supervision of the Family Court. It's disconnected from the criminal process by the act of the Attorney-General giving his or her direction under section 31(4).

So I would direct your Honours then to section 32 of the Criminal Procedure (Mentally Impaired Persons) Act which notes that a direction of the Attorney-General under section 31 results in the proceedings being stayed and fresh charges not being able to be brought, and I would contrast this with the process that occurs if special status is not imposed and instead one of the alternative patient or care recipient orders is made under section 25. So if we turn back a little bit to section 27…

**WINKELMANN CJ:**

So you're contrasting it with what, Mr McKillop?

**MR McKILLOP:**

I'm contrasting this with the special status where the criminal process is ended by the Attorney-General making this direction under section 31 which stays the charges, and I am saying that when it is not a special status it is up to the Court to stay the charges at the time when the alternative direction is made, and most often criminal proceedings will end at that point and, indeed, in the Intellectual Disability Act care recipients are often referred to as "care recipients no longer subject to the criminal justice system". And there is no process for returning to court if a person subject to one of these alternative dispositions was to later become fit to stand trial, unlike the section 31 options that we've seen where someone could become fit and then can be directed to return to court by the Attorney-General. There's no such equivalent process for someone who is not subject to special status.

**WILLIAMS J:**

What, there's no equivalent process in which terms?

**MR McKILLOP:**

Sorry, I don't think I follow that question.

**WILLIAMS J:**

So 27 creates a discretion to stay.

**MR McKILLOP:**

Yes.

**WILLIAMS J:**

And you can't re-bring the charges while the stay is in force.

**MR McKILLOP:**

Yes.

**WILLIAMS J:**

But one, there's a discretion, and two, the stay can be lifted.

**MR McKILLOP:**

Yes.

**WILLIAMS J:**

And your point was, sorry?

**MR McKILLOP:**

My point was that there's no express process for this to happen as a matter of the person's treatment. Special status people will be subject to clinical reviews every six months where a clinician has to assess their condition and say this person is either fit to stand trial or they're not fit to stand trial, and if they're not fit to stand trial they have to say – they have to then also look at whether or not the special status needs to continue or not, and if they're thought to have become fit to stand trial then that prompts the Attorney to make a call under section 31(2). There is no such automatic process of review and decision-making if someone is subject to one of these alternative dispositions. What happens instead is that, and I'm suggesting at least based off the experience of the Intellectual Disability Act, that these people are most often no longer subject to the criminal justice system and there would have to be some positive step taken by the courts to re-enliven those charges should that, I suppose –

**WILLIAMS J:**

Someone would have to be convinced to lift the stay.

**MR McKILLOP:**

Well, exactly. It would be reversing a stay.

**O'REGAN J:**

Section 31 – a section 32 stay is permanent.

**MR McKILLOP:**

Yes.

**O'REGAN J:**
A section 27 stay is not. I think that's right.

**MR McKILLOP:**
Is not permanent. Yes, it says – I mean section 27(2) says "while a stay is in force" which, I suppose, obviously implies that it could be lifted.

My point then I'm trying to return to is that the special status is linked at all times to an underlying criminal charge and the end of that status is by the Attorney-General making this direction in section 31(4) means the end of that charge and one of the purposes of special status is to provide the sort of treatment or care and rehabilitation that could allow the person to return to court for the charge to be heard. The maximum period of detention is, as a special – under special status, is linked to that purpose, in my submission, that there is a limited runway for which this treatment may be given with this aim of being able to return to court for the criminal trial to proceed. Once that –

**WILLIAMS J:**
So you say the statute section 31 and so on is about the maximum period of detention under a particular status, not the maximum period of detention?

**MR McKILLOP:**
Yes. It is, my submission is that it is linked inexorably to the criminal process and it is designed to provide for an ability to return to court during that period for charges to be heard if the person becomes well enough for that to proceed.

And so when the maximum period of detention under special status is reached, it's not the end of detention but it's change of the form of detention from a forensic form of detention linked to the underlying criminal charges, flipping over instead to a civil form of detention, the charges being stayed and the person's ongoing treatment being under the supervision of the Family Court which then has the ability to extend the order, be it under the

mental health or intellectual disability regimes, for as long as is necessary for that person's treatment.

Noting that I'm going to come onto two more points, were there any further questions that I can assist with while we're discussing this part of the Criminal Procedure (Mentally Impaired Persons) Act?

I'll move on then. The second point then that I want to come to is that the appellant was always lawfully detained, in my submission, first as a special patient, then later as a special care recipient, and finally as a care recipient for a further five years.

**WILLIAMS J:**
Can you just list those again for me, please? I type slowly.

**MR McKILLOP:**
Yes, certainly. He was first detained as a special patient, his status was changed in 2007 to special care recipient under the intellectual disability regime and then with the Attorney-General's direction he became a care recipient under the intellectual disability regime, which is a status he had for a further five years due to successive Family Court orders.

**O'REGAN J:**
And the reason he changed to a special care recipient in 2007 was just that the new legislative regime came in, was that…

**MR McKILLOP:**
It was a combination of the new legislative regime which created – it filled a gap to permit for the specialist care and rehabilitation of offenders with intellectual disabilities but it also required a direction to be made by the Director of Mental Health under the Mental Health Act, and I can refer you to the direction. It's in the case on appeal and there's probably no need to actually go to it but it's at 201.0059.

**O'REGAN J:**
And did the Director of Mental Health have to do that in relation to everybody who was under the regime at the time?

**MR McKILLOP:**
Yes, so there was no automatic –

**O'REGAN J:**
Or decide whether to do it, rather?

**MR McKILLOP:**
Yes, yes. It was something – it was a power that became available and it was thought in the appellant's case to be an appropriate step to take.

I was going to begin with the warrant that the District Court issued in December 2001. I'm not sure if the Court has looked at that warrant yet. Might be good to actually go to that in the case on appeal. It's dated 20 December 2001. The reference is 201.0043. Do members of the Court have that document?

**WINKELMANN CJ:**
Yes.

**MR McKILLOP:**
I just want to really draw attention to the features of this warrant. It notes that the appellant was charged with aggravated robbery and was found to be under disability, and "under disability" was the terminology under the Criminal Justice Act 1985 which is now referred to as "unfit to stand trial". Then we can see that an equivalent process of hearing medical evidence about the suitability of the appellant for different kinds of order had been heard by the Court and that there was a public interest in making a special status order. The Court made a special patient order under the Criminal Justice Act, and, of course, at the time that was the only option in terms of a disposition where the

appellant would be detained in a hospital. There was no intellectual disability statutory regime at the time.

Now I just note about this warrant that there was no expiry date specified in this warrant for the detention of the appellant and that, of course, is because the Criminal Justice Act and now the Criminal Procedure (Mentally Impaired Persons) Act does not provide a fixed date for the end of detention. It was, as I've submitted, ended by the person either returning to court for the charge to be heard or for their special status to be removed but without detention actually ending.

And as your Honour, Justice O'Regan, has already noted, with the coming of the intellectual disability legislation, there was then the option to treat the appellant under a more appropriate statutory regime, and that direction was made in 2007, and with the Criminal Procedure (Mentally Impaired Persons) Act we also no longer refer to him as someone under disability but we refer to it as someone unfit to stand trial. So this warrant was substantially modified by events but, in my submission, remains the document – well, it remained the order which justified his detention.

**WINKELMANN CJ:**
But it was modified even then by the Criminal Justice Act, wasn't it?

**MR McKILLOP:**
What was modified, your Honour?

**WINKELMANN CJ:**
Well, it was subject to the conditions that were in the Criminal Justice Act as to how long you could detain a special patient?

**MR McKILLOP:**
Yes, yes, absolutely. I mean certainly that was the background. It was the same way of calculating the maximum period as well. So it was a 14-year

sentence on aggravated robberies which converted into a seven-year maximum period, and there was certainly a need to be…

**WINKELMANN CJ:**
So you could only be detained as a special patient for seven years?

**MR McKILLOP:**
Yes, yes, at which point his status would have to be changed to that of a patient. One issue that your Honour raised earlier, which it might be a good time to mention that, is that obviously when there was no intellectual disability regime it was a clear path from special patient to patient and Justice Winkelmann noted the possibility of a discretion on the part of the Attorney-General to flip someone from the mental health regime to the intellectual disability regime. I…

**WINKELMANN CJ:**
I queried if it existed.

**MR McKILLOP:**
Yes. On a strict construction of the Act, I suppose it is possible that that exists. It's not something that I'd ever actually considered before today. In light of the history of the provision where it was a clear path through the Mental Health Act statuses of special patient to patient, my assumption had always been that it would be the same under the Intellectual Disability Act from special care recipient to care recipient and that it would – as a non – and the method for switching between those two forms of special status was the power that was inserted into the Mental Health Act in 2003 which I was discussing with Justice O'Regan and that that would be the most appropriate place because it's a clinical decision-maker rather than the more discretion-free functionary kind of direction that the Attorney-General has to make, that that would be the more appropriate place for that flip between the two regimes to occur. So on my –

**WINKELMANN CJ:**
Where would, sorry? 31(3)?

**MR McKILLOP:**
Sorry, it's section 47A of the Mental Health Act which was inserted by the Intellectual Disability Act which allowed the Director of Mental Health to transfer special patients across to be special care recipients. In my submission, I'm doubtful that Parliament would have intended the Attorney-General to be able to do something similar and –

**WINKELMANN CJ:**
Going back the other way would be the relevant one in this case and it's unlikely.

**MR McKILLOP:**
In this case it would because he'd already been transferred. I'm not sure if there's a section in the Intellectual Disability Act allowing you to transfer people to the Mental Health Act. I would have to check on that.

Because of the history of the regimes, it's far more likely that someone was made subject to a Mental Health Act special patient order which may later be thought to be inappropriate.

But my submission there was going to be, sorry, that I'm doubtful that it was Parliament's intention that the Attorney-General would be making that sort of discretionary call in a section 31(4) direction setting. That would require us to read quite a lot into the words "as the case may be" in section 31(4), or, sorry, "as the case requires". I'm not sure that the section would stand such a big implication of discretion on the part of the Attorney-General, especially in light of that statutory role by a clinical decision-maker within the Ministry of Health to transfer people across where appropriate.

Mr La Hood has informed me that the equivalent power is contained in section 136 of the IDCCR Act, I'm sorry, the Intellectual Disability Act.

**O'REGAN J:**
136 did you say?

**MR McKILLOP:**
136.

**WINKELMANN CJ:**
So it's unlikely reading then that this is an additional power given in such a casual way?

**MR McKILLOP:**
Yes, that would be my submission, that it was up to – it's up to a more considered clinical decision-making process for that sort of slip to happen.

So returning to the appellant's treatment during his detention as a special care recipient, as I noted just before to Justice Williams there is an obligation to review the condition of a special care recipient every six months. That's provided in section 77 of the Intellectual Disability Act. At the conclusion of that review there has to be a certificate issued which requires the assessor to state whether he was unfit or fit to stand trial or to determine whether special care recipient status continued to be necessary.

The maximum period of detention under the special status ended on 20 December 2008 under section 30(1) of the Criminal Procedure (Mentally Impaired Persons) Act, and in my submission, harking back to the purpose, the link to criminal process that I discussed earlier, what that meant was that this was the last day on which a clinician could certify that the appellant was capable of being returned to court to be tried on that charge of aggravated robbery. That was the last day in which one of those certificates by a clinical assessor could be issued.

If, theoretically, a clinician had purported to issue a certificate saying he's fit to stand trial the day after the maximum period ended, in my submission that wouldn't have any legal effect. The Attorney-General would have, in those

circumstances, still have been obliged to issue a direction converting him to – a direction ending his special status and therefore staying the charges because that maximum period in which he could be returned to court to hear those charges had elapsed before such a decision, such a certificate was issued, and so the obligation to make that direction had arisen under section 31(4).

Throughout the appellant's detention under special status he was found unfit to stand trial on multiple occasions by his clinical assessors. It could be a little confusing trying to piece that together by looking at each individual assessment. What was prepared for the trial was a chronology which is the last document in the case on appeal, and so if the Court is interested in seeing the different stages of this process and of the appellant's detention overall, that would be the best document to look at. So that's the last document in the evidence bundle.

The 20th of December 2008, as I've said, was the last day of his maximum period of detention as a special care recipient. That was the Saturday before Christmas in 2008. The next day was the first day from which the Attorney was obliged to make a direction. Obviously that was a Sunday. There was a window then of working days prior to the Christmas break in which presumably a direction could have been made but that did not occur and the direction was eventually issued on 14 January 2009.

**WILLIAM YOUNG J:**
When was the election in 2008?

**MR McKILLOP:**
I'm not sure. It may have been the first of these that the new Attorney-General did. I'm not too sure.

**WILLIAM YOUNG J:**
No, I think it was about September, wasn't it? It was a bit earlier.

**MR McKILLOP:**

It was certainly not on Christmas Day or anywhere around there.

**WILLIAM YOUNG J:**

Has the practice been to issue directions on or around the day or is a two-week delay not uncommon? Was there evidence of that?

**MR McKILLOP:**

I would say this is at the longer end. I have no stats to back that up but I can talk about my practice as a Crown counsel in the team that sends these documents to the Attorney-General for a decision. The first thing would be that you would hope to receive it in good time to prepare something for the Attorney-General to sign. I would then aim to send –

**WILLIAM YOUNG J:**

What do you mean by "good time"?

**MR McKILLOP:**

Well, say, two weeks prior you could be informed by the Ministry of Health that this person's maximum detention date is coming up, there will need to be a direction made after this day, and –

**WINKELMANN CJ:**

So the reality is you get all the clinical information in advance?

**MR McKILLOP:**

Yes, and then you would then brief the Attorney-General and note that the direction has to be made after this maximum detention date has been reached. So ask the Attorney-General to make the direction but not until a date perhaps a few days in the future after your briefing goes up, and then –

**WILLIAM YOUNG J:**

So it's customarily done within – always after the expiry but somewhere between a few days and at the outer end perhaps two weeks?

**MR McKILLOP:**

Yes, perhaps, and so I would say that the standard practice is that there is always a gap. It would be rare for there to be the – for the Attorney-General to perhaps be signing one of these at 8 o'clock the morning after this expires. I'm not privy to all the internal workings but these things can take a few days, up to a few weeks.

**WINKELMANN CJ:**

Well, can I just ask you this question? You, I think, rely on the warrant as providing authority for continued detention?

**MR McKILLOP:**

Yes.

**WINKELMANN CJ:**

The problem I see with that argument is that the warrant gives authority to detain as a special patient and the special status expires after the maximum period.

**MR McKILLOP:**

So what I'm saying is that the special status continues until a direction is made. The maximum period is the maximum time in which someone can be returned to court but special status continues until the Attorney-General makes a direction which replaces the Court's warrant.

**WINKELMANN CJ:**

And you get that from what wording in the max – which is the provision which has the maximum period? Section 30, is it?

**MR McKILLOP:**

So section 30(1) creates the maximum period, and this was the section that the Court of Appeal said if viewed in isolation could be thought of as providing support to my learned friend's argument. But the important section to then look at is subsection (3) which says that an order continues in force during the

maximum period specified in subsection (1) until a direction is given, under section 31, that the defendant be held as a patient or a care recipient.

**WINKELMANN CJ:**
Isn't your problem there the words "during the maximum period"?

**MR McKILLOP:**
Well, that is more awkward wording. It's…

**WILLIAM YOUNG J:**
Need an "and" to be read in.

**MR McKILLOP:**
Yes, it's undeniable that that is again awkward wording. The courts below have taken the view, which I support, that the only way of making this work alongside the way that section 31(4) is drafted where you don't even have jurisdiction until the period expires, is to prefer section 31(4) to a strict construction of section 30 which would suggest that detention ends.

**WINKELMANN CJ:**
Well, can I try out an alternative interpretation which is that it only continues in force until the end of the maximum period and it then needs the Attorney-General's certificate to give an alternative basis for detention under section 31(4)? That is another interpretation?

**MR McKILLOP:**
Is your Honour talking about the…

**WINKELMANN CJ:**
I'm just looking at what is authorised, because you're saying the warrant authorises his detention up until the certificate is issued?

**MR McKILLOP:**
Yes.

**WINKELMANN CJ:**

But the warrant, and you accepted from me earlier, is subject to time limits within the relevant legislation and if you read section 31(3) as saying, well, this detention under that warrant only applies up until the end of the maximum period, then there's a lacunae, which is what Mr Ellis' point is.

**MR McKILLOP:**

Yes, well, I – and my submission is that because the ability to make a direction only arises after the maximum period, that Parliament is saying that that lacuna is filled by the warrant continuing to justify detention until that direction is issued.

**WINKELMANN CJ:**

It's what Parliament must have intended?

**MR McKILLOP:**

It's what Parliament must have intended. It's inherent to making section –

**WILLIAM YOUNG J:**

Need to read the word "and" in.

**WINKELMANN CJ:**

Where do you read the word "and"?

**WILLIAM YOUNG J:**

Just before "until".

**WINKELMANN CJ:**

Yes, okay.

**WILLIAM YOUNG J:**

What happens if there's an order made on the last day that the person goes for trial? May take a day or so before the person will get to court.

**MR McKILLOP:**

I would actually say that it may take quite a lot longer than that –

**WINKELMANN CJ:**

It doesn't fix it.

**MR McKILLOP:**

– and it's something I was going to – and obviously that actually indicated – one of the pre-conditions in section 31(4) is that no certificate of the kind referred to in subsection (2), the fit to stand trial certificate, has been issued. So the Attorney does not have the ability to make a direction that a – to simply – sorry – I should say the ability – the Attorney does not have a duty to make a direction under subsection (4) if a certificate that the person is now fit to stand trial has issued from a clinician during one of these regular reviews, and that might come on the last day of the maximum period, it might come a week before or whatever. But that prompts a decision under section 31(2) where the Attorney must either direct that the defendant come before the Court or that they be held as a care recipient. And so, in my submission, that is not necessarily a simple decision to make. With the path – there are all sorts of considerations under the guidelines for the – the prosecution guidelines – as to whether after a large period of time has passed it would be appropriate to return someone to file charges. Continuing with criminal charges would have to be in the public interest and there may also have to be an assessment about the availability of witnesses after, say, nearly seven years of treatment under special status.

So I think that were there to be a certificate of that kind issued very close to the end of detention as a special status person, that you could probably expect the period to again expire while the Attorney-General is deciding whether the person goes back to court or is converted to a civil, one of these care orders, and that is again something which reflects poorly on the drafting of the Act that that possibility isn't explicit, but that would be one of the examples of why I would caution the Court against reading too many words into section 31 and section 30.

**WINKELMANN CJ:**

Well, I'm not sure, why does Mr Ellis' analysis depend on reading in words? I've just lost that thread, I'm sorry.

**MR McKILLOP:**

It's not necessarily on my learned friend's analysis but, for example, the suggestion of adding in "and" or –

**WINKELMANN CJ:**

Which doesn't fix it.

**WILLIAM YOUNG J:**

That's my –

**MR McKILLOP:**

Or Justice Williams had a suggestion of words that –

**WINKELMANN CJ:**

"Immediately" or "forthwith". "Forthwith".

**MR McKILLOP:**

Yes. So there were lots of ways in which this could be judicially approached to look for a fix.

**WINKELMANN CJ:**

So it cannot be a rights-consistent reading to have no time constraint there. The person can just languish until – I mean because they could theoretically languish until they bring what, a habeas corpus application or what?

**MR McKILLOP:**

So I completely agree that a person languishing, in fact, would not be rights consistent. It would really run the risk of arbitrary detention emerging. If someone remains detained while the Attorney-General is, for example, deciding whether or not they go back to court or not then they are still being detained for the purpose of special status even if that period expires, and it

would be – that maximum period expires – and so it would again undermine Parliament's intention here for us to add too much of a gloss onto these words, and that's why the third point, which I'm going to come to, is that the appropriate mechanism for avoiding arbitrary detention from arising is to rely on the supervision of the Court to which the people under special status are always subject through the High Court inquiry mechanism which is contained in both the Intellectual Disability and the Mental Health Act, and that process permits the Courts to take the matter of decision-making about return for trial or conversion to civil status or release altogether from any compulsion into its own hands.

**WILLIAM YOUNG J:**

Are the documents that preceded the decision in the case on appeal? Are there clinical notes saying, hey, the seven years expires just before Christmas? We need to put in place the process for regularising or determining, depending on how you see it, what happens next?

**MR McKILLOP:**

Not – so those documents aren't in this, the case on appeal before this Court. There are some documents that discuss that issue which were in the Court of Appeal case on appeal which could be provided and perhaps Mr Edgeler put that case on appeal on the USB that was given to the Court or no? No. Well, those could always be provided. But there's also any Ministry of Health documents and Crown Law documents about the appellant, as I was explaining earlier, haven't been discovered in the course of this proceeding because this issue emerged at trial. So if that is a matter of interest for the Court, we could always look into…

**WILLIAM YOUNG J:**

Do we know anything about how the review hearing before the Family Court was planned, whether that was in the wings in late 2008?

**MR McKILLOP:**

So I don't know if there had been any consideration about that, about exactly how that review hearing would proceed, but what was quite clear was that a further six-month secure care order wasn't going to be enough to ensure that the appellant was in a safe situation where no further compulsion was necessary. So he was transitioned from the hospital secure unit where he'd been living at the Mason Clinic over a very long period of time into a community facility and that transition didn't actually begin until early 2012 and he was discharged from the Mason Clinic in –

**WILLIAM YOUNG J:**

I haven't looked at your chronology which is the last document. What does that say about all this happening at the end of 2008 and the beginning of 2009?

**MR McKILLOP:**

Well, it is really –

**WILLIAM YOUNG J:**

Quiet on it, is it?

**MR McKILLOP:**

I'm sorry?

**WILLIAM YOUNG J:**

Is it reasonably quiet on it because the issue – the documents weren't produced at trial?

**MR McKILLOP:**

Well, there were documents – there were some clinical documents from this time which I could – and I don't have the exact reference in front of me but one of the things that his clinician records at that time is that the appellant put a lot of personal stead on this maximum period arriving at the end of 2008 and that the view of the clinicians is that reaching that maximum period wouldn't

actually change a lot about his treatment. It would allow them to start planning for his very gradual transition out of hospital secure care and into community settings, but the immediate transition wouldn't occur in the way that the appellant was hoping.

**WILLIAMS J:**
Presumably they wouldn't need the expiry of that to start thinking about his transition if transition was plausible.

**MR McKILLOP:**
Yes…

**WILLIAMS J:**
You said this whole thing is treatment based so – even while he's a special patient.

**MR McKILLOP:**
Yes, that's absolutely right. The problem is the issue of where someone has to live when they are a special care recipient. They have to live in a hospital secure unit, and there's a few of those throughout New Zealand, so he was in the Mason Clinic.

**WILLIAMS J:**
Yes.

**MR McKILLOP:**
A secure care recipient, which is the status that he would go on to have, they could live in a secure facility but it needn't necessarily be a hospital one. So yes, the planning could occur but the actual –

**WILLIAMS J:**
Of course, not the transition itself.

**MR McKILLOP:**

– the actual transition itself, and there was also a large number of behavioural events and issues of concern which arose all throughout the appellant's treatment at Mason Clinic which made that a very difficult to achieve transition and a very slow process.

**WINKELMANN CJ:**

It's about to be the lunchtime break but I've been sitting here gazing at subsection (4) and just before we go to lunch I thought I'd suggest an alternative. There is no reason when you reading subsection (4) to require that the Attorney-General give that direction after the expiry of the period. He could give it, or she could give it, in advance of it. So it's contingent on them – well, contingent on it. So if, it could give a direction that if by the end of – so you could do it towards the end of the period and say if that direction hasn't been given, if no direction under subsection (2) or (3) has been given in respect of the defendant, "I certify that".

**MR McKILLOP:**

This might be something I have to make some further submissions on after lunch but in my –

**WINKELMANN CJ:**

Yes, so just – I'll leave it with you. We'll go for lunch adjournment.

**WILLIAMS J:**

Could I just ask a quick clarification question, Chief Justice? This is apropos of the languishing matter that was the subject of exchanges. I took your submission to be the real risk here over the first half of the sentence is continued jeopardy, continued criminal jeopardy, but detention, the terms, context and so forth of detention is unaffected by special status.

**MR McKILLOP:**

The?

**WILLIAMS J:**

I took you to be saying special status only in terms of the context within which this person was required to live and be treated, special status only affect jeopardy.

**MR McKILLOP:**

So the other aspect of that is the requirement for hospital secure care as opposed to merely secure care.

**WILLIAMS J:**

Yes, but that would…

**MR McKILLOP:**

Which is a theoretical difference, yes. There is a theoretical difference between special care recipient status where someone must be detained in a hospital secure unit.

**WILLIAMS J:**

Right, and so I just want to get this point because I want to chew on it over lunch.

**MR McKILLOP:**

Sure.

**WILLIAMS J:**

So the expiry of the half-sentence means jeopardy is no longer available with or without the Attorney's direction?

**MR McKILLOP:**

Yes.

**WILLIAMS J:**

What about secure hospital care?

**MR McKILLOP:**

So the addition of “hospital” to secure care just simply means in a hospital. So a person could continue to be a secure care recipient but be detained in a hospital secure care unit.

**WILLIAMS J:**

Sure. Yes, I understand that, but what’s the status of that thing when the half-sentence has expired but there is no direction from the Attorney?

**MR McKILLOP:**

In my submission, they remain a special care recipient until the direction of the Attorney is issued and so they would remain obliged – the District Health Board would remain obliged to detain them in a hospital secure unit.

**WILLIAMS J:**

So your point is there’s no equivalent to section 30 saying you can’t go any longer and therefore it impliedly continues?

**MR McKILLOP:**

No, my submission is that it continues as a function of special care recipient status which doesn’t end until the Attorney-General’s direction is issued. For as long as someone is a special care recipient, hospital secure care is what is necessary.

**WILLIAMS J:**

All right.

**MR McKILLOP:**

And I would note while – very, very quickly – that the appellant remains in the same hospital unit at the Mason Clinic that he was in when his maximum period expired. He remains there until he began to be transferred to a community secure facility called Tīmata Hou in February 2012 so –

**WILLIAMS J:**

That's obviously the case. I'm just trying to work out what the legal underpinning of this is.

**MR McKILLOP:**

Yes.

**COURT ADJOURNS: 1.04 PM**

**COURT RESUMES: 2.16 PM**

**WILLIAM YOUNG J:**

Can I ask you a question right at the outset while it's still on my mind? Looking at your chronology there is an entry for the 19th of December 2008 which says: "Continuation of status as special care recipient under the IDCCR Act." That document isn't in the case on appeal. Is it possible for you to get a copy of it?

**WILLIAMS J:**

Isn't that a statement rather than a document?

**WILLIAM YOUNG J:**

No, but something must have made an – no, it's a…

**MR McKILLOP:**

It certainly reads as that because there's no document reference in the – beside the right-hand column.

**WILLIAM YOUNG J:**

Isn't that (inaudible 14:18:56) – aren't they just what's in the case on appeal?

**MR McKILLOP:**

They are and –

**WILLIAM YOUNG J:**

So I looked at that and I couldn't find it in the case on appeal.

**MR McKILLOP:**

The reason that, well (inaudible 14:19:11) document exists because (inaudible 14:19:14) it's indicating (inaudible 14:19:15) that entry is essentially (inaudible 14:19:17) M number. The M actually refers to the surname, the discovery code.

**WILLIAM YOUNG J:**

I see. It's a discovery code?

**MR McKILLOP:**

Yes, and – but all it says (inaudible 14:19:30) that document is under IDCCR Act, so I'm sorry, I can't be sure –

**WILLIAM YOUNG J:**

So you don't know whether that records something happening or whether it's just a statement of the obvious, although if it is a statement of the obvious it's funny that it's got a date on it.

**MR McKILLOP:**

Yes.

**WILLIAMS J:**

Well, it happens to be the date immediately before expiry so presumably that's why.

**MR McKILLOP:**

That –

**WINKELMANN CJ:**

It's a diary entry perhaps.

**MR McKILLOP:**

Perhaps, I'm…

**WINKELMANN CJ:**

But we don't know?

**MR McKILLOP:**

We don't, yes, we don't know. He's obviously obliged to be reviewed every six months and –

**WILLIAM YOUNG J:**

Well, I say that because there is something that's happened on the 3rd of July.

**MR McKILLOP:**

Yes, which was a review.

**WILLIAM YOUNG J:**

Yes, nothing else happens that's relevant till the 29th of June 2009.

**MR McKILLOP:**

Yes, I'm – so I mean there are lots of steps here that aren't recorded and aren't (inaudible 14:20:48) in any documents. So, for example, after the Attorney-General's direction is made in January of 2009 there should then be a review by a specialist assessor as to whether or not it's (inaudible 14:21:11) on a compulsory care order or be released. That's a mandatory step.

**WILLIAMS J:**

As soon as possible?

**MR McKILLOP:**

As soon as possible (inaudible 14:21:19). (inaudible 14:21:26) it's another of these – another of the issues that's arisen out of this particular issue only arises (inaudible 14:21:33). All of this could be looked into but it would obviously be (inaudible 14:21:44).

**THE COURT ADDRESSES REGISTRAR – AUDIO ISSUES** (14:21:50)

**COURT ADJOURNS: 2.22 PM**

**PLEASE NOTE:** ***The remainder of the hearing has been transcribed while lectern microphone was not recording. The accuracy of the content cannot be guaranteed. Dialogue which is unable to be transcribed is indicated by (inaudible) and the time stamp.***

**COURT RESUMES: 2.45 PM**

**WINKELMANN CJ:**

Thank you for waiting counsel. I understand it's all fixed so all systems are go.

**MR McKILLOP:**

Yes, hopefully you can hear me well now. Prior to the break, and hopefully not (inaudible 14:45:20) the transcript, Justice Young was asking me about whether or not there was any evidence about those particular –

**WILLIAM YOUNG J:**

Entry.

**MR McKILLOP:**

– notes in the chronology and I have, Mr La Hood has found a paragraph in the evidence of Dr Mhairi Duff who was the clinician who was very closely responsible for both the appellant's care and the Pōhutukawa Unit and Mason Clinic more generally, who noted that his treatment was subsequently reviewed by a specialist assessor on the following dates, 12 January 2007, 12 January 2008, 3 July 2008, 21 July 2008, 19 December 2008, 16 March 2009, 20 June 2009, 23 December 2009, 13 June 2010, 13 March 2011, 26 September 2011, 2 October 2012, 7 December 2013, that was in the Court of Appeal case on appeal at page 1094 and each of – sorry I should say most of those dates are reference to a particular document. Not all of those documents would up in the Court of Appeal case on appeal but they were produced as a result of the discovery.

**WINKELMANN CJ:**

And those documents are clinical notes, are they, of the review?

**MR McKILLOP:**
They should be certificates that record the reasoning process under the clinical review provisions of the IDCCR Act.

**WINKELMANN CJ:**
Okay.

**MR McKILLOP:**
And they normally will come also with a quite extensive clinical background about where the care recipient is up to in their care and any recent developments and future planning. So as I say the Court has been looked at, at various points. The documents exist and are out there but they're not quite on point for this particular issue. That could be made available if the Court sought anything.

Now I know the time is now limited so I'm going to first just address one issue that Justice Williams raised this morning where I perhaps misled by suggesting that it was a statutory requirement that a special care recipient have hospital secure care. To be more precise, hospital care is simply an administrative arrangement that the national intellectual disability care agency has to provide for people requiring the most secure level of care. That is not a requirement in the IDCCR Act which distinguishes special care recipients from care recipients. Both special care recipients and care recipients must be detained in – I'm sorry, I'll put it another way. Special care recipients must be detained in secure care and care recipients may be detained in secure or supervised care, both levels of which we're all agreed are detention and was also the finding in *VM*.

**WILLIAMS J:**
But they're different levels of detention?

**MR McKILLOP:**

They have different conditions attached to them, or different – sorry, the best way to put it is that they have, is that the, a secure care facility and a supervised care facility must have different levels of security. They are both detention and sometimes people are on both secure and supervised care orders in the same facility, but it's about the, as I understand it, and Mr La Hood will correct me if I'm wrong on this, it's about the features of the facility rather than so much the impact on the care recipient.

**WILLIAM YOUNG J:**

What features?

**MR McKILLOP:**

The different features of these facilities is covered in the evidence of Rachel Daysh which is the first document in the evidence part of the case on appeal.

**WILLIAMS J:**

825?

**MR McKILLOP:**

825 is the Court of Appeal case on appeal reference. It's page 201.0011 in this case on appeal. It starts at paragraph 29, and Ms Daysh there describes the different levels of care that are provided. She notes that – the distinction Ms Daysh makes is between hospital secure care and community secure care. That's an administrative distinction and not one that's found in the IDCCR Act, and in fact in this case, as I've noted, the appellant remained in a hospital unit, the Pōhutukawa Unit at Mason Clinic, until 2012.

**WILLIAMS J:**

So does it get us any closer to understanding what the difference is? There's obviously a difference.

**MR McKILLOP:**

The difference between…

**WINKELMANN CJ:**

Special one?

**MR McKILLOP:**

So no, it's of course the – sorry, I should finish my point. It's of course the submission that there is no substantive difference from the end of a special care recipient order over to a secure care recipient order. There's no –

**WINKELMANN CJ:**

There's no treatment difference?

**MR McKILLOP:**

There's no treatment –

**WINKELMANN CJ:**

Immediate treatment difference?

**MR McKILLOP:**

Yes.

**WINKELMANN CJ:**

Nor level of detention.

**MR McKILLOP:**

No.

**WILLIAMS J:**

So and I'm interested in the distinction between supervised care, which is a phrase used, and – what's the other one?

**MR McKILLOP:**

Secure care.

**WILLIAMS J:**

Secure care. Although supervised care is a subset of secure care, isn't it?

**MR McKILLOP:**

Well, they're both forms of detention. That's something that is agreed. The features of secure units are noted at paragraph 41 and 42 of Ms Daysh's brief of evidence, and the features of supervised facilities are noted from paragraph 44. It's about the levels of security which are necessary in the facilities.

**WILLIAMS J:**

Is there greater freedom, is what I want to know?

**MR McKILLOP:**

People remain detained so –

**WILLIAMS J:**

No, no, no. Is there greater freedom because there are – there's detention and there's detention, obviously. There's home D and jail. Tell me the difference. Not between home D and jail. I mean between these two categories.

**MR McKILLOP:**

I'm going to just consult with Mr La Hood before I answer this question.

**WILLIAMS J:**

Sure.

**WINKELMANN CJ:**

Mr La Hood, why don't you just tell us the answer?

**MR LA HOOD:**

Well, I'm not sure there's a quick answer but I can tell you that supervised care doesn't arise in this case because (inaudible 14:55:15) security (inaudible 14:55:17). So supervised care is completely irrelevant for this case.

I think Justice Williams might be referring to the difference between hospital level secure care and community level secure care.

**WILLIAMS J:**
Yes, that's exactly – that's it precisely.

**MR LA HOOD:**
And I probably can't do better than Ms Daysh's brief at paragraph 37 where she sets out the requirements for hospital level secure care and then carries on to talk about community, as my learned friend Mr McKillop was taking you to, community (inaudible 14:55:51). So –

**WINKELMANN CJ:**
But these aren't different things in terms of the statute, are they? They're not reflected in the statute, the difference between hospital –

**MR LA HOOD:**
The statute itself just talks about secure facility.

**WINKELMANN CJ:**
Yes, okay, that's all we need to know really.

**MR LA HOOD:**
So the difference between these two types of care have been created by the community services so that they can practically manage their clients –

**WILLIAMS J:**
So they're therapeutic, not any other form of constraint?

**MR LA HOOD:**
No, Sir, if you look at those there are different forms of constraint. If you're in hospital level care you'll be in the Mason Clinic which is like – it's a facility that has locked doors. It's an institutional facility, whereas community, a secure facility can be a house –

**WILLIAMS J:**

I see.

**MR LA HOOD:**

– with locked doors, having full-time staffing, and if you're at secure level you'll have more staffing than if you're at supervised level. So yes, there's manifestly some differences but they are both detention. But one's in a house in the community with locked doors and alarms. One's in a hospital setting.

**WILLIAMS J:**

Right, but in any event the expiry of the half-sentence period makes no difference to either of these things? They are unrelated?

**MR LA HOOD:**

So once the direction is made by the Attorney-General under section 31(4) then you go from a special to care recipient who's in secure care, so in this case it made no difference because he remained in the Mason Clinic hospital. But potentially the ability, because of the practical way of looking at it, potentially practically he'd become a non-special and might consider you for community care, but that was never the case here, but in terms of the Act itself there's no difference. So secure, in terms of the legislation, simply means secure facility. That can be either in a hospital or the community. So legally it makes no difference. Practically, because of the way they administer the Act, it could in this case be different.

**WILLIAMS J:**

But it's not driven by the legislative language?

**MR LA HOOD:**

No.

**WILLIAMS J:**

So what's the point in the change?

**MR LA HOOD**

Well, no, because once you become a non-special then you become a care recipient and then you must be reviewed as to whether – first of all you must be reviewed as soon as possible as to whether detention –

**WILLIAMS J:**

Right, so it's those procedural rights? That's the only difference?

**O'REGAN J:**

No, it's also you're not liable to be called back to face trial.

**WILLIAMS J:**

And that. We've – yes.

**WINKELMANN CJ:**

It's a different legislative –

**MR LA HOOD:**

(inaudible 14:58:39) first part of – and, of course, first part of the –

**WINKELMANN CJ:**

It's a difference legislative framework now applies to you, doesn't it?

**MR LA HOOD:**

Absolutely, yes. So you're no longer under the criminal justice framework. You're now under the – purely under the ID framework rather than a hybrid of being under both the ID and CPR framework.

**WINKELMANN CJ:**

All right. Carry on, Mr McKillop. Have you finished all these other questions that were asked after the question I asked?

**MR McKILLOP:**

I think so, yes.

**WINKELMANN CJ:**

Just going back to my question because when I look at the scheme of this legislation it appears to me that what it's doing is setting up a chain of authorities to detain this person. That becomes even more clear, I think, when you look at section 94 of the IDDCR…

**MR McKILLOP:**

IDCCR?

**WINKELMANN CJ:**

Yes, IDCCR legislation. So given that, why can one not read section 31(4) as permitting a prospective authorisation in anticipation because it's pretty clear by the last day, say, or the last five days, this is not going to happen. So it's actually because since it – what it does is create continuity of orders which give a proper legal basis for detention, why could you not do it prospectively?

**MR McKILLOP:**

I'm going to, so that's really the only thing I want to address now.

**WINKELMANN CJ:**

Good.

**MR McKILLOP:**

The question could the Attorney-General have made an in advance inchoate direction under s 31(4) which crystallised when all the conditions were met.

**WINKELMANN CJ:**

Or conditional.

**MR McKILLOP:**

A conditional, a conditional with direction. I would say that the answer to that is yes, that is a permitted way of interpreting section 31(4). The next question of relevance to this appeal would be must the section be interpreted in a way which only permits the power of the Attorney-General's duty of direction to be

exercised in that way. So must it be exercised in a way that provides that continuity. In my submission the answer to that question is no. It's, firstly it's Parliament's intention is clear, that detention will continue before and after – sorry. Detention will continue after the maximum detention date of the special care recipient is reached and it would be contrary to Parliament's intent to require the provision to be interpreted in a way that means you have to do these conditional orders, when what Parliament has said should be done during that period is these other kinds of decisions. Decisions about whether or not someone is fit to stand trial and what the impact of that ought to be, and treating the maximum, as I explained earlier, treating the maximum detention date as a hard stop on detention as a special care recipient would have an impact on the ability to make considered decisions under section 31(2). So if there's been a fit to stand trial clinical certificate then there ought to be an ability for the Attorney-General to fully consider, in light of the passage of time, the availability of witnesses, public interest, other relevant considerations, whether or not it is appropriate or – and impacts on victims, the public safety interest.

**WINKELMANN CJ:**

What are you saying? That it would impact the Attorney-General's ability to bring an open mind to these issues or…

**MR McKILLOP:**

Well it would, if such a direction were issued very close to the end of the period it would require a very rapid decision to be made by the Attorney-General.

**WILLIAMS J:**

Which would require him or her, if they change, then to get started earlier?

**WINKELMANN CJ:**

And on your own submissions it's not really much of a decision. It's the vestigial decision after you think, well, as you come towards the end of the period, is this person fit to stand trial, not they remain unfit to stand trial, so

we're not going to issue the section 31, or whatever, sorry, I may have got the wrong line, section 31(3). Yes. So you then move onto the making sure that after it extends by the maximum period they still have authority for detention. It seems a logical way of reading the legislation.

**MR McKILLOP:**
I was talking about the situation where a certificate that someone is fit to stand trial.

**WINKELMANN CJ:**
Yes.

**MR McKILLOP:**
Is issued quite late in the process, and that triggers the decision maker, that expressly excludes the ability to make a direction under section 31(4) because 31(4) –

**WINKELMANN CJ:**
Well, yes.

**MR McKILLOP:**
– says that it must be the case that no certificate has been issued.

**WINKELMANN CJ:**
But thinking about this operationally, what I'm suggesting seems better that he process that you're doing in a way at the moment which is you've got reports some way in advance and they're sent over, whereas a process which basically has its time from towards the end where you make your final decision as you come towards the maximum date, is this person going to be fit to stand trial in this period, you can make it in the last week of the period, and then you move in an orderly fashion to say, well, no they're not going to be fit to stand trial so you then issue your prospective certificate, and then you have the legal authorities.

**MR McKILLOP:**

It's not dependent on the decision of the Attorney-General as to whether a person is fit to stand trial. That finding is made by the specialist assessor and that is forwarded to the Attorney-General.

**WINKELMANN CJ:**

Yes, I know. But the Attorney-General making the direction is dependent on the fact –

**O'REGAN J:**

The direction as to whether there should be a trial is quite complicated because it would depend on, you know, whether witnesses were available and what victims thought and all that sort of thing.

**WINKELMANN CJ:**

It's a decision under section 31(3) is the critical one, about whether or not they're fit to stand trial.

**O'REGAN J:**

31(2).

**MR McKILLOP:**

Section 31(2) is the section your Honour is thinking of.

**WINKELMANN CJ:**

Yes, but also (2) or (3), so no direction is given under either of those. Why can't they give these prospectively. It would be a far more coherent scheme then having the sort of – why does it have to wait until after the period?

**MR McKILLOP:**

Because a clinical review can still occur up until the end of that period –

**WINKELMANN CJ:**

Up until midnight.

**MR McKILLOP:**

Yes, but I mean I'm not –

**WINKELMANN CJ:**

And then –

**MR McKILLOP:**

(inaudible 15:06:46) if anything that's –

**WINKELMANN CJ:**

So you would just make –

**MR McKILLOP:**

(inaudible 15:06:48) going to happen –

**WINKELMANN CJ:**

Yes, but you'd just make it prospectively and say and if it hasn't occurred then they carry on.

**MR McKILLOP:**

Yes, and I'm saying that that is, I am conceding that that is –

**WINKELMANN CJ:**

Okay, right.

**MR McKILLOP:**

– I'm conceding that that is an available way of exercising the power. Where I'm taking issue is that it's the only permissible way of exercising the power, my submission is it is not, and there are, obviously the starting point, that's what I say is Parliament's clear intention (inaudible 15:07:20) after the maximum detention (inaudible 15:07:22) of the special care recipient. Then we have the other powers which Parliament has anticipated will be exercised within the period and Parliament has not expressly anticipated that this one will be exercised within the period.

**WINKELMANN CJ:**

Because when you look at section 94 it looks, from section 94, as if it is the Attorney-General's certificate which gives the direction that gives the ongoing power to detain.

**MR McKILLOP:**

From the day that the direction –

**WINKELMANN CJ:**

Yes.

**MR McKILLOP:**

– is given, yes.

**WINKELMANN CJ:**

So that's the authority. It becomes on the date it is given. A compulsory care order.

**MR McKILLOP:**

Yes. So the other part of this interpretive question is whether this issue must be interpreted in a way that, where there's conditional directions must be made, is to take account of the Bill of Rights interests which will influence the interpretation of this section. The general interest in liberty perhaps reflected in the freedom of movement or other rights we saw.

**WILLIAMS J:**

Is this your issue 3?

**MR McKILLOP:**

Yes, and then it's combined with the issue that Chief Justice has raised. This, it's certainly the case that the Criminal Procedure (Mentally Impaired Persons) Act is a limit on liberty, there's no doubt about that whatsoever, and as an expression of Parliament's intention that the detention continue after the expiry of the maximum detention date. Section 31(4) is – sorry, well,

sections 30 and 31, I suppose, reading the whole, are limits on that liberty interest. But in my submission it is a justified limit on that interest. It is both the only tenable reading that that liberty will be limited through this process, and it is an important measure because it reflects Parliament's consideration that community safety interests in these circumstances outweigh the liberty interests of the care recipient, and a more precise balancing of whether or not – when the liberty interests of a care recipient begin to outweigh that community safety risk represented in the alleged offending, that is safe to be done through the civil process under the IDCCR Act, through the process of clinical reviews, through the process of the Family Court regularly considering the issue and only making extension orders in the event that the safety interest continues to override that liberty interest and that's the approach that the Court of Appeal took in the *VM* judgment which I think the Court has. I'm not proposing to go to it but it's now well settled that that's the way that such decisions will be made under the ID Act.

So that, in my submission, deals with the Bill of Rights issue that the liberty interest itself raises, whether or not someone should be detained. There's then the issue of arbitrary detention. So obviously it's inherent in arbitrary detention that someone is detained and simply…

**WINKELMANN CJ:**
Without lawful authority?

**MR McKILLOP:**
Yes, exactly, and so if Parliament's clear intention in constructing an Act such as this is that detention will continue, then that is not arbitrary detention. It is detention but the right is aimed at preventing both procedural and substantive issues from arising which would make the detention become arbitrary.

So it's conceivably a problem if this delay had led to the appellant being detained for longer than he ought to have been. It would have been a problem if the Attorney-General had delayed making an order and that had prevented there being a consideration of whether this status should continue,

and if the appellant should properly have been released it would raise a real question as to should this all have happened earlier, was this delay that was caused by the lack of a direction by the Attorney-General, something which has made this detention arbitrary.

**WINKELMANN CJ:**

So what about the delay implications that Mr Ellis pointed out where, for instance, section 94(3), it doesn't start the six-month period for review under section 77 until the direction is given?

**MR McKILLOP:**

Yes. So that's exactly what I'm talking about, Ma'am. So it's the trigger for there to be a clinical review of whether or not someone needs to be cared for any more as a care recipient, and so if that had happened, say, three weeks earlier, sorry, three weeks later than it should have because of a delay in the Attorney-General's direction and the decision had been to release the appellant, then that would raise a real question as to why he was detained for that extra three weeks.

**ELLEN FRANCE J:**

Could the Attorney ask for the review to be undertaken at an earlier point in time?

**MR McKILLOP:**

The review under section 94(3)?

**ELLEN FRANCE J:**

Yes. On the basis that 94 was setting out what must happen as opposed to what might happen.

**MR McKILLOP:**

The problem is that that would be that the mandatory review under section 77, it follows a different pathway depending on what the status of the person is.

So the form of the certificate – so, sorry, let me step through it. Section 77 is the regular review power.

**WILLIAMS J:**
Well, it says "not more than six months," yes. 77(2)(b).

**MR McKILLOP:**
Yes, and so that arises every six months while someone is a special care recipient or a care recipient. And then under section 79 there's an obligation to issue a certificate with the results of that review. The kind of certificate that has to be issued is dictated by subsection (3). If someone is no longer subject to the criminal justice system they get a certificate which leads you into a Family Court process and it's not about fitness or unfitness. It's about simply whether or not the Act ought to continue to apply.

**WINKELMANN CJ:**
In any case, can I just – have you finished answering that question?

**MR McKILLOP:**
No.

**WINKELMANN CJ:**
Carry on.

**MR McKILLOP:**
And there are different processes for people who continue to be special care recipients. So that's section 89 in this case, and so the specialist assessor would be obliged to do a section 89 style assessment which leads into the questions in 31(4) – sorry, in 31(2) or (3), not the issue in – not simply the end of the period or – yes, whether or not the care recipient status needs to be…

**WINKELMANN CJ:**
So have you finished answering that question now?

**MR McKILLOP:**

Exactly. Yes, now I have, yes.

**WINKELMANN CJ:**

So can I take you back to your answer to my question because you said if, in terms of section 94(3), if that assessment happened three weeks later than it should have and resulted in the person's release, and that was three weeks later than it should have because of a delay on the part of the Attorney-General, then that would raise a real question. What would it raise a real question as to?

**MR McKILLOP:**

Whether or not the person's detention in that three-week period was arbitrary.

**WILLIAM YOUNG J:**

What? The last three weeks or the first three weeks?

**MR McKILLOP:**

Well, the…

**WINKELMANN CJ:**

It would have to be the first, wouldn't it?

**WILLIAMS J:**

The three-week interregnum.

**WILLIAM YOUNG J:**

I think you're saying the last three weeks. I think the Chief Justice might think it's the first three weeks.

**MR McKILLOP:**

I'm talking about the first – well…

**WILLIAM YOUNG J:**

Well, thinking about the first three weeks doesn't help your argument.

**MR McKILLOP:**

The points –

**WINKELMANN CJ:**

And it could only be the last three weeks if it was the first three weeks. So, I mean, it just seems to me to expose the difficulty with your argument. But we probably will go around in circles and, yes, and I don't know that it would get us anywhere.

**MR McKILLOP:**

Well, I mean, I suppose the point is should there have been a first three weeks.

**WINKELMANN CJ:**

Well, it does bring me to a case that I tried to mention to Mr Ellis and he had no recollection of it and neither did his junior, Mr Edgeler, even though Mr Edgeler appeared as counsel in it, which is *R v The Chief Executive*, and that was a case where an interim order had not been sought in the relevant time period under the public safety order regime and the Court of Appeal held that the timeframe was the timeframe and it said there were – and that's all very irrelevant in the sense it's a public safety order, but when looking at the policy behind the legislation they said yes, there was a policy of public safety behind the legislation but there was also a policy of good public administration behind the legislation and that brings to mind here. It's not just about public safety. These timeframes are for good public administration because to the extent – and that's the interest of the person being weighed that timeframes are complied with, are met, they are not allowed to slip forever.

**MR McKILLOP:**

Yes, and I certainly agree that slipping forever would be a real concern.

**WINKELMANN CJ:**

Well, 14 days might be thought to be quite a long time for some people.

**MR McKILLOP:**

Well, in my submission not if the detention, if Parliament has intended the detention to continue and if the nature of the detention is identical both before and after. It has no substantive impact on the appellant and there was no prejudice to him in this delay in the scheme of his treatment because he was, even after the six-month order which the Attorney-General –

**WINKELMANN CJ:**

Yes.

**MR McKILLOP:**

– (inaudible 15:22:09) takes effect as –

**WINKELMANN CJ:**

But you're taking the statutory interpretation back to the individual but the legislation has to speak for all purposes.

**MR McKILLOP:**

Yes.

**WINKELMANN CJ:**

So if we're looking at how it's interpreted, we interpret it for all purposes, not just for the appellant.

**MR McKILLOP:**

Yes, and, well, then that brings me back to my arbitrary detention submission which is that because detention is the background condition, I suppose, it's what Parliament's intention clearly is once the special, the end of special status comes, there's no need to look at that section and say that this – something isn't arbitrary because it's detention. It requires a level of non-compliance with procedure or substantive purpose and looking at the scheme of the Criminal Procedure (Mentally Impaired Persons) Act and the associated Mental Health and Intellectual Disability Acts as one coherent

whole, there are protections built into those Acts which prevent arbitrary detention from emerging.

**WINKELMANN CJ:**

Continuing. You would say prevent arbitrary detention continuing, not emerging. How is it prevented emerging?

**MR McKILLOP:**

Well, the Court order, in my submission, the original Court order, sustains lawful detention until the Attorney-General's direction replaces that order and at all times, both before and after that direction, the person remains under the supervision of the Court and that is evidenced by the High Court inquiry jurisdiction which exists within both the Mental Health and Intellectual Disability Acts. That jurisdiction allows at any time a detained person or any other interested person to apply for an inquiry and the High Court may order any sort of evidential inquiries or examinations it sees fit and then exercise any of the powers of the Attorney-General under section 31. It can also do an additional thing, which is to release the person from detention altogether.

**WINKELMANN CJ:**

What sections are those, Mr McKillop?

**MR McKILLOP:**

In the Intellectual – so there are – it's separately provided for in both the ID and the Mental Health Acts. In the IDCCR Act it's section 102 to section 105 – I'm sorry, to section 106, 7, 8. So keep scrolling. The relevant sections for unfitness to stand trial, special care recipients, is section 102 and 105, and –

**WILLIAMS J:**

And in the Mental Health?

**MR McKILLOP:**

Section 75.

**WILLIAMS J:**
75.

**MR McKILLOP:**
And that, in my submission, is the mechanism which prevents arbitrary detention from emerging. There's also, of course, all of the other processes and protections that are built into the mental health intellectual disability regimes: the regular statutory clinical reviews which are required at least every six months under both schemes, as well as the District Inspectors who are (inaudible 15:27:01) barristers appointed to receive copies of all those reviews, go into these facilities whenever they see fit, receive complaints, investigate them and require the manager of the facility to put things right if they find that there's been – if there has been sort of issue.

So we are obviously looking at this Act. We are obviously looking at hypotheticals as your Honour puts it. We are looking at interpreting the Act for all purposes. But, in my submission, that all purposes interpretation has to be done by looking at the scheme as a whole, not disconnecting sections 30 and 31 of the Criminal Procedure (Mentally Impaired Persons) Act from the entire system that it sits within, and those protections within that system are ample by way of avoiding arbitrary detention.

That really was my third and final point and unless there's any further questions…

**WINKELMANN CJ:**
Thank you, Mr McKillop. Mr La Hood, did you wish to make submissions?

**MR LA HOOD:**
No, I don't think I do unless there are any particular questions that you have (inaudible 15:28:44) the DHB involvement.

**MR LA HOOD:**
I think there's no questions, thanks, Mr La Hood. Mr Ellis.

**MR ELLIS:**

I will be very brief, I hope. There's just a couple of minor – not necessarily minor, but the Mental Health Act provision for a judicial inquiry is not section 76 but section 84.

**WINKELMANN CJ:**

Sorry, what section was it? 84?

**MR ELLIS:**

84. The comment by the Chief Justice that her Honour asked me about a case that me or Mr Edgeley didn't remember. I think you must have not heard me. I did reply that Mr Edgeley told me it was *Rutherford*.

**WINKELMANN CJ:**

Okay, I'm sorry, I didn't hear it. My apologies.

**MR ELLIS:**

And two other points in that frame, the Mental Health Review Tribunal, which Justice Williams asked me that I didn't know the answer to this morning, I've looked it up and as far as I can see jurisprudent – jurisdiction for a Tribunal would exist if it (inaudible 15:30:55) and just in terms of the Tribunal, it's a three-person Tribunal, a lawyer who chairs it, a psychiatrist and a third person, and the jurisprudence on it, and I think Professor Dawson had a chapter (inaudible 15:31:17) mental health book quite recently (inaudible 15:31:23) ought to do with what the psychiatrist think, and there's not to my knowledge any case that engages with the Bill of Rights at that level, and the Chief Justice's comment about legal aid, when you're asked for – age stops the processes from being as fast as they were – I have reflected on what happened there and I did speak orally to the legal aid officer about whether or not, given that leave wasn't granted on one point, that there should be a third application for it and she said, well, you can't guarantee anything. You can make an application if you wish. But there's an opportunity cost. Having spent (inaudible 15:32:17) it, I've got to the stage where (inaudible 15:32:21) talk, don't we, is there any point in doing a civil legal aid

form? And so I didn't make a formal application but I did discuss it. So that was the catch part. The point my learned friend, Mr McKillop, made was I still don't really understand how the Bill of Rights is a procedural or substantial gap filler. Don't see that at all. In fact it isn't. It's there to affirm, protect and promote human rights and to give meaning to the International Covenant on Civil and Personal Rights, and in terms of the scheme of the Act and the coming to an end of the, at half time, the criminal justice system moving on from the civil system, there must be an argument that this is double punishment or double treatment (inaudible 15:33:34) section 9 of the Bill of Rights, disproportionately severe treatment, punishment or treatment, because you're now being detained, nothing to do with the criminal justice system, you are now being detained under the civil system and that must be – that has elements of a double punishment, depending on definition of punishment, but most certainly it's disproportionately severe treatment, in my submission.

**WINKELMANN CJ:**

Well, it can't be punishment because the person hasn't been convicted.

**MR ELLIS:**

Well, no, that doesn't necessarily follow. If the treatment you receive regardless of whether you've been convicted or if you've been kept detained for 10 years and then you're detained for a further number of years so it's an indefinite detention, if you were to ask the client whether they were being punished surely they would tell you "yes", as would most of society, and it would indeed shock society –

**WINKELMANN CJ:**

Yes, I know it would be perceived as punishment but it can't be a legitimate objective of it.

**MR ELLIS:**

No, but it could legally be punishment. But we don't need to take down that argument because it's treatment. Disproportionately severe punishment or treatment.

**WINKELMANN CJ:**

Were you going to address the point I raised with Mr McKillop about reading section 31(4) as allowing prospective issue of a certificate?

**MR ELLIS:**

Well, yes, it was, I was going to say, that – well, section 31(4), I was going to… I was going to agree with where your Honour was coming from and also say that was has to happen here is you've immediately got to invoke some other Bill of Right rights under section 23, I think, that you immediately go back to court after the Attorney's made his decision. You've got to take him back to court and I think the discussion went along the lines of, well, that might not happen. Well, it ought to happen and judges visit the Mason Clinic to hold hearings and that should've happened, he should've immediately had a judicial hearing because it's a breach of another, and that took me to, your Honour, – going to have to filter but it doesn't matter because I haven't got a lot to say – onto the languishing point, and a day, a week, a month, or as we have here, not two weeks, 25 days' extra detention or languishing, and I'd be hard pressed to say that a day is languishing, but certainly when we get to a week, that's languishing, as is a month and (inaudible 15:38:32), and I haven't got the name of it quite yet but I know there's a case which I can provide at short notice if we require it, the European Court of Human Rights, where the discussion was could you be detained for a psychiatric examination. It was either eight days or two weeks, and under our section 38 of the CP (MIP) Act which we all use as the acronym, CP (MIP), Criminal (Mentally Impaired Person) Procedure Act, it is common for a person to be detained in a mental hospital for 14 days for a psychiatric examination, and European Courts said no, that's an arbitrary detention. You can't detain somebody for eight days or 14 days for an hour's psychiatric examination, and when the examination is completed and the psychiatrist, particularly, they decide you're not mentally ill,

they should immediately be brought back to court and be released. So the conceptualisation of a week, or eight days or two weeks, is important. You can't languish in secure care but that is entirely – that is arbitrary.

I'll go back to where I was. The Saturday before Xmas argument, should you be released. In the penal system there is provision for you to be released on the Wednesday before the Saturday so you get out for Christmas (inaudible 15:38:31) what was the word, the pre-conditional proposition, so that you do it first, and not worry about the (inaudible 15:38:43). The potentially (inaudible 15:38:46) during the maximum period my friend says is at maximum detention plus 25 days, it really comes down to that. In my case there's no maximum period, it's maximum period plus or minus (inaudible 15:39:04) you can't add 25 days, one day or 10 years.

Section 79 of the Mental Health Act has got the Mental Health Tribunal hearing a case within 21 days, and if they haven't, they've got the power to extend the detention for seven days. Section 79(5)(b) sets out the statutory formulation (inaudible 15:39:44) for the Attorney, and then I think possibly the last submission I'll make, the last point, in the case of *Miller & Carroll* in New Zealand, which I have mentioned before, will no doubt be well (inaudible 15:40:17) by Justice Chambers, I think, Justice Ellen, who were the Court of Appeal and then this court refused to give leave and the Human Rights Committee decided it was a case of such importance that it was the first, and still is, the only case where they've accepted oral submissions, and that case determined that once you arrived at the end of your preventative detention minimum non-parole period, then you should no longer be held, if it could be avoided, in detention at all and that the emphasis should be on rehabilitation, and when we arrive at the end of our 10-year period there should be a change in condition, very much so, and there should be further emphasis, if there isn't already, on rehabilitation, but we found that the Crown tell us that there's no change in conditions. Well, it must be an arbitrary detention at that moment in time on the basis of the *Miller & Carroll v New Zealand Parole Board* proposition which did find there was an arbitrary detention of both Mr Miller and Mr Carroll on two different levels. He was also

arbitrarily detained because he'd been released on parole and then re-detained. So that's a powerful decision to say that this process is wrong after the half-time 10-year period.

Unless there are any questions, that is my reply.

**WINKELMANN CJ:**
Thank you, Mr Ellis. Thank all counsel –

**MR LA HOOD:**
Sorry, your Honour, before Court adjourns, just as Mr McKillop and I both sat down we realised there was – there's one step per provision and one authority that we intended to draw to your attention during oral argument that we haven't and I wonder if I could just have the indulgence, unless Mr Ellis objects, of just telling you what those are and of course he can –

**WINKELMANN CJ:**
I don't think that Mr Ellis will object and then you can have a reply if there's any point, Mr Ellis.

**MR ELLIS:**
Yes, that will be fine, Ma'am.

**MR LA HOOD**
Apologies. The first point is the statutory provision.

**WINKELMANN CJ:**
You can come forward, Mr La Hood.

**MR LA HOOD**
Very good, Ma'am. So the first point is statutory provision. It relates to the arguments around whether the delay here was reasonable, if you think you need to engage in that issue, and that's the Criminal Procedure Act 2011 which technically didn't apply at the time but in terms of that Christmas and

New Year provide that provides a modern take in terms of criminal procedure, working days over that period, so the definition of "working day" in section 5 of the Criminal Procedure Act expressly excludes the period from Christmas Day until the 15th of January.

**WINKELMANN CJ:**
Yes, I don't think that will be much help though, will it?

**MR LA HOOD**
It may not be much help. There's also the Interpretation Act. It takes five days out in terms of –

**WILLIAMS J:**
Even the statutes get a holiday.

**MR LA HOOD**
So that's just – I just wanted to draw that to your attention.

**WINKELMANN CJ:**
Yes, and the other?

**MR LA HOOD**
And the other thing is in terms of we talked in the written submissions about the *Sestan* principles and giving you the Court of Appeal authorities, but there is one authority from this Court where that same line of English cases is discussed. I sent an email to Mr Greenhow with the case. I'll give you the reference now but the actual case been emailed to Mr Registrar which can be provided to you. It's a different context. It's *The Commissioner of Inland Revenue v Tannadyce* and it's discussed by Justice Tipping from paragraph 74 onwards where he talks about those line of cases. So that relates to if you felt the need, and I know there's been argument about this, to read into section 31(4) something like "within a reasonable time", then the question will be if there's been non-compliance with whatever you might read into that, and that's of course what our primary argument –

**WILLIAM YOUNG J:**

Well, is it directory or mandatory?

**MR LA HOOD**

Exactly, and of course Justice Tipping talks about that those labels are no longer a relevant consideration in determining whether subsequent actions were validated. It's not about the labels so much as looking at the nature of the provision and the prejudice that's been caused by it and the expectations of the statutory scheme. So I just wanted to draw to your attention that these have been discussed, these principles, at the Supreme Court level, and to say nothing really more about unless you have any questions of me in relation to it.

**WINKELMANN CJ:**

Thank you, Mr La Hood. You didn't have anything to say, did you, Mr Ellis?

**MR ELLIS:**

Without having read the case (inaudible 15:45:30) this, I would simply say that if it's the Crown's position that they are relying upon a case which is involving the Inland Revenue to make an equation with liberty then no doubt I'll win the case.

**WINKELMANN CJ:**

On that note, I'd like to thank counsel for their submissions. We'll take some time to consider our decision and we will now retire.

**COURT ADJOURNS: 3.46 PM**