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IN THE SUPREME COURT OF NEW ZEALAND SC 26/2022

I TE KŌTI MANA NUI O AOTEAROA [2022] NZSC Trans 23

BETWEEN **ATTORNEY-GENERAL**

First Appellant

CHIEF EXECUTIVE, ARA POUTAMA AOTEAROA

DEPARTMENT OF CORRECTIONS

Second Appellant

AND **MARK DAVID CHISNALL**

Respondent

Hearing:	17 & 18 October 2022
Court:	Winkelmann CJ Glazebrook J O'Regan J Williams J Kós J
Counsel:	U R Jagose KC, M J McKillop and T Li for the Appellants A J Ellis, B J R Keith, G K Edgeler and A C Singleton for the Respondent

CIVIL APPEAL

SOLICITOR-GENERAL:

E ngā Kaiwhakawā, tēnā koutou. Kei kōnei mātou ko Mr McKillop, ko Ms Li, mō te Karauna.

WINKELMANN CJ:

Tēnā koutou.

MR ELLIS:

Yes, may it please the Court, Ellis, Keith, Edgeler and Singleton for Mr Chisnall.

WINKELMANN CJ:

Tēnā koutou. Ms Jagose, have you had a chance to discuss with counsel for the other side how you're going to organise yourselves or is it all pretty straightforward in terms of timing?

SOLICITOR-GENERAL:

We were just starting that discussion just before. In large measure, of course, your Honours, we're in your hands. We thought that, we might not, we didn't think the Crown needed very long to outline our case on the appeal. This afternoon might be sufficient. It depends, of course, on your Honours. I will explain to you how Mr McKillop and I are going to share the argument. Mr Keith, I think I'm saying accurately, that you think that your cross-appeal is probably able to be dealt with quite promptly?

MR KEITH:

Yes.

WINKELMANN CJ:

Right, so appeal, response to appeal, reply and then cross-appeal, response to cross-appeal, and reply?

SOLICITOR-GENERAL:

Well, I had wondered, although I hadn't actually said this to anybody before your Honours came in, whether it might make sense to say appeal, response, cross-appeal, response and any reply.

WINKELMANN CJ:

Cross-appeal, response and then reply, sounds like a good idea to me. We agree, yes, that sounds like a good idea. Mr Ellis, are you happy with that?

MR ELLIS:

Yes, that would fine, Ma'am.

WINKELMANN CJ:

Thank you.

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SOLICITOR-GENERAL:

Your Honours, Mr McKillop and I are going to share the argument, and I'll just outline very briefly how we propose to go at that, and Ms Li is helping greatly by operating the ClickShare system which, on the basis that you can't teach an old dog new tricks too quickly, I'm very grateful to her for that. So I'll begin by addressing, of course, the appellant's submissions really starting off with some propositions that I think is a useful way for the Crown's case to be kind of framed. Then addressing declarations of inconsistency and their nature and their applicability here, assessed on those propositions. I want to highlight some aspects of the ESO and PPO regimes, if I can call extended supervision orders and public protection orders, ESOs and PPOs for convenience.

WINKELMANN CJ:

That would certainly shorten the whole hearing process, I think.

SOLICITOR-GENERAL:

Indeed. I'll then come to explain why it is that we submit that the Court of Appeal went wrong in its declaration that it made. Once the Crown has accepted, as it

has, that PPOs are also a penalty, that section 26(2) of the Bill of Rights Act 1990, the second penalty, is engaged, we say there's nothing else in the statute that requires or authorises a Bill of Rights inconsistent decision. But there's one aspect that that doesn't hold for, which is the retrospective application of the regimes in terms of the eligibility criteria, and Mr McKillop will take your Honours through that part of the argument. To the extent that the cross-appeal requires much from us, Mr McKillop will also address your Honours on that.

WINKELMANN CJ:

Sorry, what is Mr McKillop addressing? Can you just…

SOLICITOR-GENERAL:

He's addressing the retrospective application of the regimes. They apply, as your Honours will know, the eligibility criteria has backwards reach. We say that is the one aspect of the regimes that is fit for and capable of a *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, *R v Oakes* [1986] 1 SCR 103 approach to it and the Court can, the DOI court can expect the Crown to bring its justification for that provision, or those provisions. Also, Ma'am Chief Justice, he will lead on the cross-appeal.

WINKELMANN CJ:

Yes.

SOLICITOR-GENERAL:

So I said I'd start with some propositions and the Attorney's appeal really rests on the central proposition, or propositions, which in my submission are uncontroversial, that enactments are presumed to be rights-consistent unless it, interpreted according to the Legislation Act 2012, and consistent with the Bill of Rights Act, unless it excludes that possibility. So enactments are presumed to be rights-consistent unless –

WINKELMANN CJ:

You mean are interpreted?

SOLICITOR-GENERAL:
Yes.

WINKELMANN CJ:
Yes.

SOLICITOR-GENERAL:
Unless the interpretation of the enactment precludes that possibility then we can presume that they are rights-consistent. The second proposition is that where an enactment confers a discretionary power or authority, true discretion which we might come to, that discretion is to be exercised lawfully, and those are propositions that, in my submission, ground our case to say that the Court below was wrong to issue a declaration that the regimes were inconsistent with section 26(2) of the Bill of Rights Act without undertaking any assessment of whether such orders could be made in a justified and, therefore, lawful way. The Court below did accept that 26(2), the right against second penalty, was capable of reasonable limits and so, in my submission, the ESO and PPO regimes do confer true discretion on judges guided by the statutory tests and the statutory process to allow orders to be made that will inevitably limit rights. 26(2), as in this appeal but also in the cross-appeal some other rights are asserted as being limited.

That is a true discretion that the Courts have, that the PPO and ESO court has and, subject to the point about retrospectivity, nothing in the enactments requires the decision-maker to impose limiting measures without an assessment of reasonable limits. So, the ESO and PPO court must exercise that discretion lawfully, may only impose limit orders that limit rights that can be demonstrably justified, and it is that court, and not the DOI court, that will have the substantial evidence to demonstrate whether the order sought is justified in section 5 terms.

You will recall the Court below was critical that there was no substantial showing by appropriate affidavit evidence that the regimes were justified as a minimum and necessary response. That is so. The DOI court did not have that because

in our submission that is what the ESO or PPO court will have in order to exercise its discretion lawfully. So that one exception I've mentioned, the retrospective application in relation to eligibility of the regimes. That is, in our and what I suspect is the Crown's own terminology, a self-executing provision. The Court, the ESO or PPO court can't do anything to ameliorate or effect that retrospective eligibility criteria. So that is capable of the *Hansen* and *Oakes* analysis which Mr McKillop will take you through.

I think I have already said this point in summary but once it was clear to the Court of Appeal that ESOs and PPOs are penalties, and to be clear the Crown argued before that Court that PPOs were not penalties, so there was a lot of – the argument and the decision on that question. But once it was clear that they are both penalties, the right against second penalties is engaged, and that right is capable of reasonable limits. In my submission the Court should have refused the declaration on the basis that the regime only authorises the lawful exercise of a discretion.

GLAZEBROOK J:

How would you put the exercise that the Court has to do in individual cases, and that's assuming that you're right, that it's sufficient to look at individual cases, and that it's not – and that we're not required to look at it as the Court of Appeal did in the systemic basis, but what do you say the Court, who's exercising it lawfully has to do – what test are you saying that we graft onto the statute, or is the test in the statute somehow.

SOLICITOR-GENERAL:

Well to answer that question I'd say that certainly the threshold tests are in the statute, of course, the very high threshold test in both enactments about the risk that the respondent offers, and their behavioural conditions or attributes that make that risk a reality. So certainly those statutory tests are in the enactment. But then the Court still has to be satisfied that the imposition of those orders is proportionate to that risk, and that is, and to answer your question Justice Glazebrook specifically, you know, do we graft on another test, in my submission that's not necessary because the enactments themselves

incorporate the proportionality, or the minimum impairment aspect that is needed at that point. So the PPO, the Public Safety Act (Public Protection Orders) Act 2014 has a principle at 5(b) that the order is "only be imposed if the magnitude of the risk posed… justifies the imposition of the order." I mean I have to accept that meeting of the statutory test is likely to be in large measure a proportionate response, but the Court does still have to make sure it's only imposing that order if the magnitude of the risk justifies the imposition.

WILLIAMS J:

There is an assumption there that the risk is a static phenomenon.

SOLICITOR-GENERAL:

Sorry your Honour, can you expand on that point? Do you mean over time?

WILLIAMS J:

Over time. So let's say the risk does justify it in the particular context of the case, your argument seems to assume the risk stays at that level and doesn't change.

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SOLICITOR-GENERAL:

No, I wouldn't say that that was the Crown's argument. So for PPOs the risk has to be imminent. So really without the detention that is offered under that order, the person will offend, a very high threshold base presently, but then that order is not subject to any time constraint and so I think, am I understanding your Honour's challenge correctly, which is to say, so then what. If the Court wishes to we can go through them, but when we go through an ESO, or I'll start with PPO, when you go through a PPO court deciding how to go about that question, the Court is looking at evidence for Corrections, and frequently the evidence for the respondent, about that question, and is often also asking, the Court below had this point, what is the likely treatment or conditions within which this person will be held. The Court below made that point in relation to ESOs asking what will happen. But just if I can finish the point, because your Honour might want to test me further on this, on ESOs the limit of the time is 10 years,

but the Court, the ESO court can, of course, impose a time period suitable to the risk, presenting risk.

WINKELMANN CJ:

What is said against you is that does it matter that the Judge does all of this. The fundamental nature of the scheme is the problematic aspect that it's got, it doesn't have the liberty-promoting features. For instance the PPO you're only entitled to rehabilitation if someone is satisfied that it might reduce your risk. There is nothing, there are fundamental aspects of it which are disproportionate and bringing in Mr Ellis and probably Mr Keith, bring in the European Court of Human Rights and the German Constitutional Courts decisions, and it's said that, you know, it doesn't matter how careful a judge is, these are the things that are fundamental characteristics and so it's more, it's not the decision-making that you probably need to address as on, so much as that point which is said against you, which is that it's a fundamental character of the regime, and that's why the Court of Appeal was right to deal with it in the systemic way that it did.

SOLICITOR-GENERAL:

Yes, I can address that. I mean one of the things that we submit the Court of Appeal got wrong was to approach the whole thing as a regime, because, and I had just started touching on, we can come back to them, although they're in the written submissions, the provisions which themselves require proportionate and least rights infringing to manage the risk presenting orders.

GLAZEBROOK J:

You probably have to go further back. Are these regimes justified at all, and at the moment I don't really see that the Crown has put that evidence forward, because proportionate to the risk, that could mean very high risk, therefore it has to be contained, but is – what is the justification for containing it in the first place when it's effectively punishing yet again.

SOLICITOR-GENERAL:

I agree with your Honour –

GLAZEBROOK J:

Step back, because in fact you're saying, as I understood you, you weren't engrafting anything on in the individual case, so basically you were saying as soon as you have a high risk, you're entitled to detain to the extent that it's necessary to do something about that, necessary and proportionate for that risk, but there's a step back from that. Is this actually justified at all.

SOLICITOR-GENERAL:

And my submission is that the Crown doesn't have to step back and say "is this regime justified at all" because it makes, with respect, no sense to do so when the orders themselves are capable of rights-consistent application –

GLAZEBROOK J:

Well, no, but they're only capable of rights-consistent if you are allowed to lock people up when they've already done their time and been punished.

SOLICITOR-GENERAL:

Well that comes to a question, in my submission, as to whether section 26(2) contains a limitable right.

GLAZEBROOK J:

No it doesn't because you might be able to do a whole pile of other things but you may not be able to lock them up in these sort of conditions, that just might not be justified at all.

SOLICITOR-GENERAL:

But when your Honour says "lock them up in these conditions" this is why I was just starting to get to the point about looking at this matter as a regime ignores that the orders might be that the person is subject to regular reporting requirements from their home under an ESO. They might be subject to restrictions to not be a certain distance within a school, or they might be in a PPO detained behind the wire, if I can use the colloquial expression, in a prison ground but not in a prison. And if your Honours have looked at, and I'd invite you to look at, the Court of Appeal decision in Mr Chisnall's case, not the one

on appeal here but the PPO decision, you'll see that in fact what that detention is includes, as the Act requires, dignity to the person. It includes in Mr Chisnall's case, I recall, more than 100 supervised outings to help with his reintegration and ultimate rehabilitation. So I'm resisting you Honour's suggestion that there is something, some sort of lock them up type approach that is being enacted here.

WINKELMANN CJ:

Can I just say, the difficultly I have with the analysis you're putting forward, which I understand, but a declaration of inconsistency, as effectively has happened in the German cases, can just say this regime is inconsistent because of the following features. In order to give – so, for instance, if we were satisfied that the failure to have a therapeutic focus, as is urged upon us for Mr Chisnall, meant that it was inconsistent we wouldn't have to hold back, would we, from giving a declaration of inconsistency which says that because of these features it's inconsistent? But the approach you're urging upon us would be that we should just allow courts to deal with it in that scenario, having reached a view to say that aspect of it is inconsistent, but basically tell them but don't impose those aspects of it. So that would be effectively disapplying part of a legislative scheme, which would seem to be problematic from a section 4 point of view.

SOLICITOR-GENERAL:

Can I go to the start of your Honour's question there about, and I think your Honour was referring to the German cases. I mean those – the Europe approach can't just be imported, in my submission.

WINKELMANN CJ:

No, quite.

SOLICITOR-GENERAL:

Because the European Court of Human Rights equivalent of 26(2) is quite different and it says that you could be detained for, by preventive detention if there is a strong enough link to the conviction, or for treatment. So the question

that has arisen in some of the cases that my friends rely on is this regime treatment, so doesn't engage the second penalty issue, or is it a penalty?

WINKELMANN CJ:

Okay. So, yes, it would be very helpful if you addressed us on the European cases. I think there are factual differences, I accept that, but that still doesn't really go to my point, though, which is the fact that there's a broad discretion, you're saying some orders would be capable of being rights-inconsistent and some would be capable of being rights-consistent, but what say we thought that there were features, which is what's urged upon us, of the regime which are rights-inconsistent? Would that stop us issuing a declaration of inconsistency on the basis – because we thought, well, a judge who's dealing with this could just make sure they don't make those kind of orders, and we'd make that clear that they shouldn't. That would seem to me to be problematic. There does seem to me to be something somewhere between what you're saying and just a blanket inconsistent.

SOLICITOR-GENERAL:

May I help perhaps with a submission, which is that if there is something in the enactments that doesn't provide a true discretion to the PPO or ESO court, to ensure that they are only making orders that can be justified, so that they're proportionate and they're the least infringing order that can be imposed in order to meet the risk, if there is something in the legislative scheme that requires that result, then yes, that is the stuff of DOIs, in my submission.

GLAZEBROOK J:

I suppose my problem is, I'm not sure what the justification the Crown is putting forward and the proportionality and that's the fundamental level of the regime generally.

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SOLICITOR-GENERAL:

Yes, can I come to that point then, which is to say that in my submission Mr Chisnall is quite wrong to come to the DOI court and say, there is a different

pressing social objective that Parliament should have chosen, and that would be to treat people who offer this risk to society because of their characteristics as set out in the legislation, and when you start the question from that proposition, and I can see why your Honours are saying to me, but how can you justify this, and I say the Crown doesn't have to justify the regime –

GLAZEBROOK J:

Well I think you do so can you try –

SOLICITOR-GENERAL:

Your Honour I'll come to that –

GLAZEBROOK J:

Because otherwise –

WINKELMANN CJ:

Ms Jagose just wishes to make her point, which I think is dealing with the European case law, that it's not simply a case of – it has to be therapeutically focused to be rights-consistent, but Justice Glazebrook is asking you quite a separate question which is she says you accept that this is a – if it's a penalty then there has to be, quite apart from that issue that Mr Ellis raises, there does have to be a justification. So those are two different issues, I think, perhaps related, but they're still two different things to be addressed.

SOLICITOR-GENERAL:

Before I go to that answer, which is how do you justify the regimes, sorry your Honour, but can I ask you Justice Glazebrook, you mean the second penalty aspect of the regime? Do you mean that it includes a detention in a prison environment, which is only PPOs.

GLAZEBROOK J:

Well it's probably more fundamental than that. It's what the justification for the regimes in the first place, because you can't work out whether something is justified and proportionate in respect of one particular person without knowing

what the systemic justification is, and I just am not understanding, because you say the justification isn't that it's treatment and they were wrong to say that's the only justification, but I'm not sure what the Crown says the justification for the regime is if – if it's just containment of risk, is that the submission?

SOLICITOR-GENERAL:

Well as the Court below found, that there is a social, sorry, a pressing social objective in here, and it's in the legislation in both cases the purpose of the enactments and I doubt that your Honours need to be taken to those purposes, but they are in the statute, protecting –

GLAZEBROOK J:

But those are the justifications and you say those are rights-consistent justifications?

SOLICITOR-GENERAL:

I'm saying that is the purpose of the legislation and then if one was to think, well, is the regime that has been enacted related to that matter of, in my submission, high public policy interest, that that government has chosen as its objective, to protect the public from the almost certain harm of further serious sexual or violent offending, does the regime provide tools to meet that objective, yes. Why I'm –

KÓS J:

That can't be the rest. I mean this is penal. Say prima facie it departs from the Bill of Rights. To meet *Hansen* your departure has to be the least reasonable departure possible.

WINKELMANN CJ:

Least restrictive.

KÓS J:

Least restrictive, and in that situation to say, well, the scheme with judicial discretion is quite a good one, doesn't actually meet the least restrictive

requirement. That's what we're looking for your response on. That's a system issue, not an individual one, it's a system issue.

SOLICITOR-GENERAL:

And your Honour is referring to 26(2) as the objectionable aspect.

KÓS J:

Absolutely.

SOLICITOR-GENERAL:

Which of course –

KÓS J:

Which you concede.

SOLICITOR-GENERAL:

Yes indeed, as the Court below said, you know, this is a marked departure from the legal order and we need affidavit evidence to show that this is a minimum and necessary response.

KÓS J:

Correct.

SOLICITOR-GENERAL:

I can take your Honours through the material that went to the Cabinet about addressing options and alternatives, which led them to promote this model, and I will come to that. But I do resist it to some extent, which is to say that if 26(2) is a limitable right, a second penalty maybe imposed where that is justified. The justification has to be done in the exercise of the power otherwise the enactment would say, where this threshold is met, the Court must impose these orders. Then I would say your Honours can put to the Attorney what is the justification for that? But that's not what the statute does, and my friend's approach to say, there is a less limiting regime, and it's to say we will treat these

people is to choose Parliament's policy objective for it, which I say Mr Chisnall can't do and with respect I say this Court can't do either.

WINKELMANN CJ:

Well, that might not be so because it could be that that is the only justification that you could have in a free and democratic society. If you're not going to be warehousing people you must be holding them for a reason so that at some point they can be released, and one imagines that the reason is rehabilitation or else it really, you might say in a free and democratic society, it's wrong to impose what is a second penalty onto someone with no pathway out of it.

SOLICITOR-GENERAL:

Yes.

WINKELMANN CJ:

That's, looking at the commentary, I don't think it's just the European courts that have come up with that kind of model because the Human Rights Committee's commentary on article 9 says a similar thing.

SOLICITOR-GENERAL:

And in response sometimes to regimes where the response is preventive detention regimes, where the person is imprisoned again or imprisoned, these regimes, in my submission, for PPO entitles the person to rehabilitation to the extent that that is likely, sorry, I've forgotten the words –

WINKELMANN CJ:

If they're satisfied it might help them. Yes.

SOLICITOR-GENERAL:

Yes, which is actually a stronger test, in my submission, than that which is, applies to prisoners generally of rehabilitation.

WINKELMANN CJ:

Yes, but these are people who have served their time.

SOLICITOR-GENERAL:

Yes.

WINKELMANN CJ:

They should otherwise be free citizens. Wouldn't you expect the State to have an obligation to do all it can to return them to a free state as opposed to place upon them the onus to show that they, that the rehabilitation will help them? I mean, shouldn't the State be coming up with a programme to improve – to rehabilitate them?

SOLICITOR-GENERAL:

And through Ms Leota's evidence, which I accept only goes so far, you'll see that the State does, in fact, when it's applying for one of these orders, take a process of working out what will be required for this person with this risk and behavioural characteristics before they apply. The Court, the PPO and ESO court expects to see how will this person be managed if I make one of these orders. It might be useful, and I don't have it right at my fingertips, but I can do this, to produce for your Honours some examples of PPO and ESO courts asking that very question, questioning the witnesses about how is this going to work?

GLAZEBROOK J:

I suppose if the justification is you can impose a second penalty if somebody is bad enough and poses enough risk, and that's all you need to ask, and then it might be the argument is, that is the justification in itself. But against you is the view that the only justification, and the only proper justification, can be not just containment of risk, but something more than that.

SOLICITOR-GENERAL:

And your Honour's challenged me, is it, sorry, may I just check, is it that because –

GLAZEBROOK J:

I just want to know what the Crown would say the justification for the regimes were. It was actually a relatively simple question.

SOLICITOR-GENERAL:

Well, I say several – well, except that I'm resisting the idea that the Attorney has to justify a whole regime which, in itself, requires proportionate responses, and to that your challenge is to say –

GLAZEBROOK J:

But it's proportionate responses to what?

SOLICITOR-GENERAL:

It's a proportional response –

WINKELMANN CJ:

Can I just pause, Ms Jagose. I think, Mr Ellis, you've got your speaker still on live, and you moving your papers are causing –

MR ELLIS:

I do apologise. I didn't realise.

WINKELMANN CJ:

That's all right. Creating a cacophony, that's okay. If you can mute it and we'll tell you when you're on, thanks. Go ahead, Ms Jagose.

SOLICITOR-GENERAL:

Proportionate to what, your Honour Justice Glazebrook, asked me?

GLAZEBROOK J:

Well, you say it's a proportionate response to the risk, and that's the justification?

SOLICITOR-GENERAL:

In order to meet the objective that is set by Parliament.

GLAZEBROOK J:

Well, so and what's that?

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SOLICITOR-GENERAL:

Well, in ESOs, it's set out in the legislation. In ESOs it's in section 107(i): "The purpose of an ESO is to protect members of the community from those who, following receipt of a determinate sentence, pose a real or on-going risk of committing serious sexual or violent offences." And in PPOs it's in section 4 of the Public Safety Act, similar terms.

GLAZEBROOK J:

So, really the answer is, a justification – it is sufficient as the only justification to say you're protecting from risk.

SOLICITOR-GENERAL:

That is the objective against which the justification has to be measured, yes.

GLAZEBROOK J:

So if you are protecting from risk it's justified?

SOLICITOR-GENERAL:

No, I wouldn't make that submission. I would say that if your objective is to protect the public from very real risk or high risk or imminent risk of violent or sexual offending, at the end of the person's finite sentence, then there is, there are options to the PSO and ESO, sorry, PPO and ESO court to impose limits on a person's rights in pursuit of that objective only to the extent that they can be justified and that person's presenting circumstances against the objective.

GLAZEBROOK J:

I just wanted the objective, so it's to protect the public from risk and whatever level of risk –

WINKELMANN CJ:
As it's set out in the statute, yes.

SOLICITOR-GENERAL:
It's in the statute.

WINKELMANN CJ:
Yes.

SOLICITOR-GENERAL:
And so it's not any level of risk, it's from either the almost certain harm that will be inflicted by the commission of serious sexual or violent offences in the Public Safety Act.

GLAZEBROOK J:
Yes, I don't need the –

SOLICITOR-GENERAL:
Okay.

GLAZEBROOK J:
I just wanted to know whether that was what the justification was.

KÓS J:
And then what I want to know is how that mechanism is the least restrictive one that Parliament could've imposed.

GLAZEBROOK J:
Yes.

KÓS J:
Which seems to me to require a degree of digging into evidence which I'm not sure is really in front of us.

SOLICITOR-GENERAL:

Yes. It is in front of you. What is there is in the Cabinet, Cabinet papers assessment of options and choices. So we can go there now, if that's convenient?

WILLIAMS J:

Don't they cover different things? I'm interested in pursuit of your argument in knowing what is there in the shape and structure of the legislation that gets you to your point? The abstract, trust the Judge because they will apply reasonable justifications in a free and democratic society is too intangible. If, for example, as the European cases suggest, and we might suggest here, that a system like this might be justified if its focus was care, whether that's rehabilitation or to reintegration and so forth, that's that ethos of care for a person who has either personality or illness-based issues, then you might be able to construct an argument in support of that, but it's not going to be found in the Cabinet papers. It's in the contours of the legislation and what you say a High Court judge should treat as the threshold beyond which you cannot go. Can you help us with that?

SOLICITOR-GENERAL:

Yes, I can and I have started that approach through the regimes by – I won't go back to the clear pressing social objectives and the higher thresholds because I've just done that in response to Justice Glazebrook. I had started, I think, the PPO principle: "That that order can only be imposed if the magnitude of the risk pose justifies the imposition of the order." So that is another test for the Judge.

WILLIAMS J:

Yes, we accept the high-risk point. The question is really, is that enough? I'm sure you're not arguing that. High risk plus. The justification, the limitation because of high risk must be by reference to principles or prospective outcomes within the contours of the legislation that can be justified, and it would be better if they weren't penal.

SOLICITOR-GENERAL:

I have the response to that last point your Honour to say they are penalties.

WILLIAMS J:

No the limitations, the contours of the legislation, the way the Germans deal with this is to say well if it's care, if it's therapeutic, then perhaps so. It seems – and you say the German situation is different, but the idea that the ameliorating effect of therapeutic response might be seen to stop this being a warehousing of problematic individuals regime, which most people would say was in theory distasteful. So what's your answer to that, how does the High Court judge ameliorate that very distasteful, that otherwise very distasteful regime?

SOLICITOR-GENERAL:

And you must only be talking about PPOs, is that right Sir?

WILLIAMS J:

I am, yes. That's where the fight is, it seems.

WINKELMANN CJ:

Well, I don't know about that.

WILLIAMS J:

Well I understood Mr Ellis to say that an ESO alone is not opposed.

SOLICITOR-GENERAL:

Well Mr Chisnall is content to consent to an ESO.

WILLIAMS J:

And one can see why given the difference in the two regimes.

WINKELMANN CJ:

But he still maintains, does he not, that the declaration of inconsistency should stand in respect of both of them, so I think the fight is in respect of both of them. I'm wondering, just in terms of –

WILLIAMS J:

Can I just get an answer?

WINKELMANN CJ:

Sorry, carry on, but I was going to say, before you do answer, we've peppered you with lots of questions. It might be, once you've answered Justice Williams', that we give you a chance to make your submissions with those points in mind, which will have helped you, go ahead and answer Justice Williams.

WILLIAMS J:

The point of my question was, this was my first question, risk is not static.

SOLICITOR-GENERAL:

Mmm.

WILLIAMS J:

It can be treated, it can be managed, it can be cared for. How much of that is in this regime, and how much control over it does a judge have, because that might help you.

SOLICITOR-GENERAL:

Yes. So to go back to answering your Honour Justice Williams' questions, I've mentioned that principle. I've also – I haven't yet touched on, but the principle in 5(c) that a public protection order shouldn't be imposed on a person for whom the Mental Health and Intellectual Disability Compulsory treatment enactments should be – sorry, who is eligible to be detained under those.

WILLIAMS J:

Yes, they should be somewhere else.

SOLICITOR-GENERAL:

So that's another aspect guiding the Judge's assessment. The orders are kept under review by a review panel. Not by the Judge, but by a review panel. The Court can be asked to review – sorry, the Court must be asked to review the order by the Chief Executive within five years of it being made, or within five years after first review. That's section 16. The person who is subject to the order may, at any time, with leave, apply for a review of the order, and on

review, section 18, "… the court must be provided with all reports… may call for any further… reports…" in order to assess is the person still "… a very high risk of imminent serious sexual or violent offending".

So that's the statutory framework for the establishment of the order, and the keeping it under review, whether at a regular time interval or by the respondent's own application. When that review is done the Court must also review the management plan to make sure it continues to be an appropriate one, and can make any – this is section 19 – can make any recommendations to the manager of the residence in which the respondent, or resident as the Act calls him, must stay.

WINKELMANN CJ:

Do they have the power to direct or insist upon a therapeutic programme?

SOLICITOR-GENERAL:

May make recommendations, so no.

WINKELMANN CJ:

So they can't make, no.

SOLICITOR-GENERAL:

The question though, this is a review, well I mean I have to answer the question as I have, but it can't be mandated, but it will be a question about whether or not a protection order should remain in place or should be set aside.

1500

GLAZEBROOK J:

Sorry, just trying to get something up and it doesn't seem to want to come.

SOLICITOR-GENERAL:

Is it in the materials, your Honour?

GLAZEBROOK J:

No, no. I can get it up here but I just wanted to get it up on my iPad because it's easier to scroll through.

WINKELMANN CJ:

Have you finished answering Justice Williams – no?

SOLICITOR-GENERAL:

Well, but then part 3, subpart 3, goes through and your Honours might want me not to go through this because Justice Williams' question to me was, what does the Judge, the PPO Judge get to control? But the legislation then does make provision for the status of those residents and they are in the custody of the Chief Executive of Corrections. They can be subject to legal orders. They can be transferred. But this enactment –

WINKELMANN CJ:

They can be transferred to prison, can't they?

SOLICITOR-GENERAL:

They can be transferred between residences.

WINKELMANN CJ:

They can't be transferred to prison? I thought they could.

WILLIAMS J:

They can if they breach.

SOLICITOR-GENERAL:

I might have to come back to your Honours on that.

GLAZEBROOK J:

Well, I mean, that would be relatively normal.

SOLICITOR-GENERAL:

Whether they are transferred to prison having committed an offence and –

WINKELMANN CJ:

I thought they could be transferred to prison –

WILLIAMS J:

For failure to comply.

WINKELMANN CJ:

Where prison was necessary to manage them, but perhaps I'm thinking that from another case.

WILLIAMS J:

No, that's correct.

WINKELMANN CJ:

It is correct?

SOLICITOR-GENERAL:

Subpart 6, my friend – we'll get there because I do want to go through these provisions. To answer Justice Williams' question: "What is in the fabric here of the PPO Act that says that this is an acceptable response?" I've touched on section 35, right to medical treatment and health care appropriate to their condition, related, I think. Section 36: "Entitled to receive rehabilitative treatment if the treatment has a reasonable prospect of reducing the risk." Thank you, Ms Li has just put this upon the screen. And your Honours were critical, I think, of that section 36 right being constrained in that way or being sort of conditional in that way, but in my submissions to that, I'd say that's a pretty low threshold: "A reasonable prospect of reducing the risk to public safety". A person – coming to section 41, as soon as they first stay in a residence they must have their needs assessed including at sub (2)(e): "Steps to be taken to facilitate their rehabilitation and reintegration into the community." Must have a management plan, at 42 and you'll recall that I said earlier when the Judge is reviewing any order, the management plan is the thing that the Judge will want to see. "The needs of the person, the extent to which that can be managed or met," sorry. "A personalised management programme for the

goals that they've got that will contribute to their eventual release and reintegration into the community." I'm not reading them all out. This is evidence but I'm just touching on the points that your Honour has put at me which is, what is here that tells us there is something else in this restrictive regime that is actually about the person –

WINKELMANN CJ:

Not that much, it has to be said.

SOLICITOR-GENERAL:

Well, with respect, your Honour, I don't agree. Once the person is detained, they must have a management plan that is assessing, among other things, how they will be eventually released into the community.

WINKELMANN CJ:

So you have a problem with the purposes said to be management of risk, not rehabilitation?

SOLICITOR-GENERAL:

Well, I don't, in my submission, it is not as binary as that. Yes, it is about risk, that is the primary driver. But given that in both enactments, but we're currently in the public safety one, with PPOs, there is a framing and a thinking about how do we – how does the State work towards understanding this person's needs and their reintegration steps and meeting them in a management plan says that my submission that it's not binary is a reasonable one.

WINKELMANN CJ:

So before we stop asking questions and let you have a run at things, there's just one other thing I'd like you to take into account when you're thinking about how you structure your submissions, which is the point about arbitrariness which seems to me to be relevant to the proportionality because for Mr Chisnall the point's made that it's arbitrary because it's only people who qualify for the regime by virtue of having a conviction are in prison which excludes a whole lot of people who may have worse or equivalent risk profiles. So that's a notion of

arbitrariness and so what is said against you is that shows it's really, it's not proportional, this isn't an accurate assessment of risk because you're just picking on a few people. There are lots of people out there in society who, a free and democratic society doesn't require that we apparently manage in this way, and that's something else. I don't see that as a separate point, I see it as related to the proportionality point, which I don't think it's addressed in that way in your submissions.

SOLICITOR-GENERAL:

No, it isn't, I agree with that.

WINKELMANN CJ:

So we'll let you have a go without us interrupting you non-stop Ms Jagose.

SOLICITOR-GENERAL:

I'm just going to have a moment to think about…

WINKELMANN CJ:

How you proceed.

SOLICITOR-GENERAL:

Whether I keep going through the legislation.

GLAZEBROOK J:

Was there anything else on rehabilitation that you were going to point to in the – so it's really looking at section 41, because 42…

WINKELMANN CJ:

If we could have that back up again please.

GLAZEBROOK J:

It really looks at managing them while they are under the regime, rather than managing them out, would you agree?

SOLICITOR-GENERAL:

Well 42(3)(c) is about reintegration.

WINKELMANN CJ:

42(3)(c)?

SOLICITOR-GENERAL:

Yes. "A personalised management programme for the goals of the resident that will contribute towards… eventual release… and integration into the community." Those are the points that I wanted to draw your attention, in relation to that. I don't want it to be left that I haven't drawn to your attention the point my friend helped with before about when the person might be withdrawn – sorry, reviewed, recalled to prison.

GLAZEBROOK J:

Actually just to double check, you weren't really able to point to anything that said that the Judge would be able to say – well because the needs assessment is done once the order is made, not beforehand.

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

So you weren't able to point to anything that would enable the Judge to say this doesn't have a rehabilitative focus, I'm not going to make the order.

SOLICITOR-GENERAL:

Not in the statute, no. But in my submission when a judge is faced with a PPO they will also be thinking, is the risk that is presented – assuming that the risk is play – is the risk here able to be managed in a less infringing way, which would be by thinking about an ESO. To that end the Judge is capable, I mean is able to, ask Corrections for what might be, what might an ESO, not to attend to an ESO application, but to ask, how will this person be managed here, how might they be managed there, in order for the Judge to make that assessment.

KÓS J:

That's the binary paradigm you've thrust us into. What about a third option? In other words, where is the alternative mechanism which the legislature could have designed, which was less restrictive than either of those?

SOLICITOR-GENERAL:

And I will come to, perhaps now, the policy papers that are in the materials that show that assessment. But I do also need to make the submission that that is where the – your Honours don't like it – where the Parliament makes its assessment, this is the choice we make having thought about others and finding them not capable of meeting our needs, our objective, that policy question isn't re-examined in the assessment of what is a proportionate response, in my submission.

WINKELMANN CJ:

Can I just ask you to make that submission again, I was just trying to – I think you made it in writing as well, but it's an important submission I think, if you could just state it again.

GLAZEBROOK J:

Well only if it's in with the range of alternatives, isn't it, that's within the –

WINKELMANN CJ:

I didn't get it at all.

GLAZEBROOK J:

The ability of –

WILLIAMS J:

We don't get to rewrite Parliament's objective.

WINKELMANN CJ:

Yes, but I still ask for Ms Jagose to restate her submission.

SOLICITOR-GENERAL:

Justice Williams has the measure of it.

WINKELMANN CJ:

I don't know that I follow it then.

SOLICITOR-GENERAL:

That the policy question – it is a policy question. How is this policy – sorry, how is this public, this pressing social objective that we have, how is that met. That policy question is for Parliament, in my submission, and importantly related to the proposition that I started with, if in doing so it enacts a regime that doesn't require orders to be made that cannot be justified on the risk profile of the individual, then that matter isn't one for the court.

1510

The declaration of inconsistency jurisdiction, in my submission, is not a mechanism to mark Parliament's homework about how it has gone about its policy choices, but rather to assess what it has done against the framework of lawfulness. Now, that brings me to your Honour the Chief Justice's question about, well, as part of the lawfulness assessment that there is a – that there might be a regime that treats the individual as opposed to restrains or details or limits the individual, and the European cases, in particular, the case that my friends rely on *Ilnseher v Germany* [2018] ECHR 991 (Grand Chamber), perhaps is how it's said, I'm not certain that I know. Germany have been falling into –

WINKELMANN CJ:

Can we put that up on the screen?

SOLICITOR-GENERAL:

The case?

WINKELMANN CJ:

Yes, thanks. I didn't recognise it the way you said it, but I now do.

SOLICITOR-GENERAL:

I beg your pardon. Yes. Sorry, your Honour. I was just going to say that the article 5 gap that Germany faced was because it had been imposing effectively preventive detention through a separate process some years following a conviction, and the Court had found that there wasn't a sufficiently strong link to the conviction to justify a second penalty. Instead, the Court found if the regime was more health-focused it might be able to be a justified detention because there is another way into a lawful detention which is, under the European rules, which is to detain a person of unsound mind –

WINKELMANN CJ:

I think, I actually think you may be wrong in your characterisation of all of that because I think the decisions earlier were old decisions where it was okay, but then later ones was that the connection between a conviction and the regime was the problem, not the lack of conviction, lack of connection and that you needed, the language they use is something like, relevant distance or something, between them and that's why Germany came up with they're required of a mental health diagnosis as the cause as opposed to the fact of a conviction. That's my reading of the case, I may have it wrong, but Mr Keith would know, but – which is why Germany ended up with a different regime because they put in an intervening condition, so it wasn't simply the conviction that was leading to this treatment, leading to it.

SOLICITOR-GENERAL:

Sure, so they were on the treatment not the – I mean the argument there in that case.

WINKELMANN CJ:

And when you look at the commentary to article 9 of the ICCPR, which is in the materials I believe, I don't know that we have these cases, but interestingly enough, the ones that they're just footnotes for them are Australian and New Zealand cases. It says: "The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society,"

which is dealing with the situation which is not like *Ilnseher* where there's an intervening mental health condition, but more with the kind of situation we have here, which is it's a post-release regime. And still they make the point that it has to be a treatment regime, rehabilitation and treatment regime. I don't know if we've got those cases.

GLAZEBROOK J:

I suppose the point is, is a mere risk a justification for giving someone what is effectively a second penalty and especially a second – especially the aspects of the regime that are totally restrictive of liberty as against possibly slight inconveniences of reporting requirements and not living in certain areas, which of course can be seen to have a sort of rehabilitative focus because you don't – if you are tempted in certain circumstances to be required to keep away from them, can actually be seen as aging in rehabilitation to an extent. And I think your submission is that protecting from risk, just in itself, is a sufficient justification, as long as the risk is at the sort of level that we're looking at in the legislation, and whatever the response to that risk is proportionate and the least restrictive.

SOLICITOR-GENERAL:

Yes, that is the case.

GLAZEBROOK J:

And the European cases would say, no, that's not enough.

SOLICITOR-GENERAL:

Mhm.

GLAZEBROOK J:

You have to have something more and rehabilitation – a total focus on rehabilitation, well a total focus –

WINKELMANN CJ:

Not a total but a predominant focus.

GLAZEBROOK J:

Yes, the focus on rehabilitation and you point to section 41 as providing at least requirements for consideration of rehabilitation –

SOLICITOR-GENERAL:

And 35 and 36, but yes.

GLAZEBROOK J:

– and a management plan that takes that into account.

SOLICITOR-GENERAL:

And a right to rehabilitative treatment.

GLAZEBROOK J:

Yes.

SOLICITOR-GENERAL:

Subject to a condition, I accept. On that point your Honour was just addressing me on, the reason that the argument goes in Europe, is this treatment-led or not, is to avoid it being a penalty.

WILLIAMS J:

It's not necessarily binary though, because you've conceded it's a penalty, but not every penalty is worth the same price, and if what's happening here, while a penalty, has certain positive attributes for the benefit of the person otherwise being penalised. In other words the State is helping, then that's got to be relevant to whether what's going on is reasonably justified. That's why I'm asking you these questions, and the more you help me, I suspect the more you help yourself.

SOLICITOR-GENERAL:

No doubt Sir. Can we go to the Court of Appeal's PPO judgment, because that will allow us to ground this question in the reality of Mr Chisnall's case.

KÓS J:

Which tab is that?

SOLICITOR-GENERAL:

I'm sorry your Honour, I'm just trying to find that. Yes, it's on the screen, but it is 401.228 *[sic]*. So this is the decision just from earlier this year, I think last month, anyway in August this year, where the PPO that was imposed by the High Court is set aside. So just to get into it I'll just draw your attention to some of these aspects, but I come to it for the particular point your Honour Justice Williams is raising. So at paragraph 4 and 5 the Court recounts that the preconditions had been met, went back to the High Court. That was consistent with this Court in an interim orders matter in relation to Mr Chisnall saying that the least intrusive means needed to be imposed.

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So at paragraph 26 of the judgment the Court gives this overview saying that in allowing the first appeal the Court identified the High Court's error, then is citing its own earlier judgment. "In considering that question the Judge reasoned that while Mr Chisnall was prepared to agree to an ESO the condition would have a maximum duration… there was no doubt Mr Chisnall required further and ongoing intensive supervision and monitoring if his risk was to be monitored. There could be no guarantee he would respond to any treatment… he had not responded in the past and the Judge could not be confident he would make sufficient progress, even with intensive treatment, during the period that the monitoring was in place." Sorry, your Honours, let me just get where I'm actually wanting to take you to.

WILLIAMS J:

What you just said in the quoted part or?

WINKELMANN CJ:

I'm not sure if that helps us.

SOLICITOR-GENERAL:

I did, but it didn't, it wasn't the point that I wanted to raise, I'm sorry.

WILLIAMS J:

Right.

SOLICITOR-GENERAL:

It's at 57 and 58, is the piece that I want to draw your attention to. "We have," says the Court of Appeal: "the benefit of the detailed updating evidence provided by the Chief Executive of the actual way in which the PPO and ESO regimes are applied and residents are managed in both the PPO residence, Matawhāiti, and the ESO residence, Tōruatanga. Whilst as a matter of fact the presence of an electrified fence, and the controls it provides, continue to distinguish the regimes applied in each of the residences, the conclusion we take from that evidence is that in practice the significance of that distinction is less apparent than it might in theory appear."

It goes on to say: "The risk presented by Mr Chisnall himself, in our view the evidence establishes the ability of a modified regime, less restrictive than the one in theory available under a PPO is capable of managing his personal risk." But they go on, and this is point that I wanted to get to, he's described as: "Compliant, a positive member of the Matawhāiti and Tōruatanga communities, someone who has growing in self-awareness of his problems and someone who is positively engaging with work opportunities provided to him. In this context, the evidence that he has successful taken part in over 100 outings, supervised by two staff members but with the possibility of outings supervised by one in the near future which is of some significance. Moreover, the modifications made to the regime and Mr Chisnall's response to those modifications suggest any impact of a transfer from the PPO residence to the ESO residence on his routine and treatment gains can be appropriately managed."

Now the point of raising all of that is say that the Court is able to ask and see that even in the PPO regime the person is given – is managed in a way that is

looking towards their eventual rehabilitation, if that is possible, and I'm wanting to make that point clearly in order to resist any suggestion that, as my friends might have painted, PPO detention is a dumping ground for people with intellectual disabilities. That is not Mr Chisnall's evidence. Sorry, there is not the evidence in relation to Mr Chisnall and it can't be assumed to be how the PPO residences run.

There's also a reference, just prior to that, 43 and on where the Court has looked at the Review Panel's conclusions. 45, one of the managers notes that: "In the previous year, Mr Chisnall had responded positively to two developments in the administration of Matawhāiti: first the development of a framework for resident support outings and secondly, collaboration between the two residences, which had expanded the social network available to him… He had displayed a strong work ethic, undertaking responsibility for the maintenance of the residence's grounds and had responded well to his daily structured routines. He has readily engaged with all volunteers and professional visitors, and had made significant progress in his relationships both with other residents and with staff—in particular with female staff. He had been generally compliant, save for two relatively minor incidents when he initially displayed anger but then used a planned calming technique." There's the evidence there at 47 about the point of the outings "outside the wire" focusing on making him more comfortable in busy crowds.

I want to draw your attention to paragraph 50 in which the Court observes that the Panel had been limited in Mr Chisnall's decision to maintain confidentiality in the materials that were provided to the psychologist for their comprehensive assessment and the Panel, not being able to get that, they thought they were at a "significant disadvantage" in formulating a management plan. I'm adding those words, but that is what the Panel's job was. They were at a "significant disadvantage" there, not being able to see that.

Then they review the management plan, has 10 parts. "Nine address life skills and one addresses rehabilitation and integration." Identifying Mr Chisnall's expert treatment required focusing on contextual factors. "The Panel endorsed

the recommendations for the future implementation of the management plan…continued resident outings, including increased contact with members of the community, the use of public transport." Now none of that, to answer your question Justice Williams directly, is visible on the face of the statute – or not none of it, but it is in those references that I've taken you to, rehabilitated treatment, management plans that are focused on, amongst other things, rehabilitation and reintegration.

WILLIAMS J:

I take it Mr Chisnall, perhaps I will be corrected in due course if I'm wrong, but Mr Chisnall would agree with these assessments? They seem pretty positive on his part.

SOLICITOR-GENERAL:

I don't know the actual answer to that, Sir.

WILLIAMS J:

Is there anything in the judgment that says Mr Chisnall thought this was completely incorrect?

SOLICITOR-GENERAL:

No, what the judgment, I'll be corrected too, but what the judgment, as I understand it, says at 54 is Mr Chisnall maintains the position that while he does meet the high risk of serious sexual re-offending, he doesn't constitute a very high risk of imminent offending so he disagrees with the psychologist's assessments to that extent. In fact, the Court agrees. In this decision the Court sets aside the PPO and Mr Chisnall accepts intensive monitoring ESO. That's as much as I know as what Mr Chisnall says about that.

WINKELMANN CJ:

Now, it's 3.30, I'm conscious you have a long way to go, I think you have. So, shall we let you go?

SOLICITOR-GENERAL:

Sure, and you don't mean let me go do you, you mean make me stay here.

WINKELMANN CJ:

Yes, you're not really asking though, are you?

SOLICITOR-GENERAL:

No, because I'd like to get on to – I think what I should spend my time with until 4 o'clock, am I right about that?

WINKELMANN CJ:

Yes.

SOLICITOR-GENERAL:

Is the material where the alternatives were – how we got to where we got to in terms of what Cabinet decisions were.

WINKELMANN CJ:

If you're referring us to anything that you think there are parliamentary privileges issues in respect of them, can you highlight those?

SOLICITOR-GENERAL:

Mmm. So perhaps I'll start at 301.0002 and I might be stealing some of Mr McKillop's thunder by touching on the retrospectivity aspects because they are much entwined in these papers. In that paper Cabinet identifies that the retrospective application to those sentenced before the 2002 reforms is likely to be contentious. I don't think I should spend my time on the retrospective aspect because I think that is a separate, that is a separate part of the Crown's argument and we'll come back to it. So if I look at 301.0024 which is the –

WINKELMANN CJ:

301.0?

SOLICITOR-GENERAL:

301.0024.

WINKELMANN CJ:

Right.

KÓS J:

It's page 18 of the same paper.

WINKELMANN CJ:

Okay, same document.

1530

SOLICITOR-GENERAL:

Which will be the Regulatory Impact Statement. At the top of the screen: "The intent of policy work for the active management of child sex offenders is to manage the long term risk of re-offending presented by offenders assessed as having a medium-high to high risk of re-offending." And the reason for those offenders to be targeted is actually back a page, there in the middle-ish of the page: "Research indicates that a minority of child sexual offenders post a high risk of re-offending and unlike rates of re-offending for other offenders recidivism rates among child sex offenders do not decline over time. Improvements in the treatment of child sex offenders and research into patterns of re-offending have led to the view that long term management and support is required to reduce the risks posed by child sex offenders to the community. improvements in risk assessment tools means that resources can be effectively targeted and provide a substantiated basis on which to identify offenders who require extended monitoring and supervision."

Then at page .0035: "The regime is aimed at managing the long term risks posed by child sex offenders, and reducing their risk of re-offending, by allowing monitoring of relevant offenders for up to 10 years…" This is the ESO regime of course.

WINKELMANN CJ:

That's at 301.0035?

SOLICITOR-GENERAL:

Yes. So that was the 2004 amendments. In 2013 when both the enhanced or altered ESO regime was put in place, and the PPO regime, at 301.0047, and go to paragraph 61 in that document. So it's at page .0057. "When an application is made by the Department… for a public protection order, practice would be for the Department to also make a contingent application for an extended supervision order. Legislation would ensure that the same presiding Judge considers, on application… the risk posed by a sexual or violent offender at the end of a finite term… and decide on their most appropriate form of post-sentence management.. the court would have… four options."

A PPO, very high risk or imminent risk. An extended supervision order, although your Honours can see those four options there.

KÓS J:

It's not really a rights analysis though, is it. It's an options analysis?

SOLICITOR-GENERAL:

It's an options analysis, yes.

KÓS J:

Without really looking at what would be the most consistent option with the Bill of Rights legislation and section 26. In other words the least restrictive analysis. That would involve there being some sort of best designed, best rights-consistent design analysis, which I don't see in here.

SOLICITOR-GENERAL:

Well I will take you through the options of the design that is here, and you might still have that same criticism of it.

GLAZEBROOK J:

Is there any research that you can point to as to the efficacy of these regimes and indeed – if you were looking at Mr Belcher, who was probably one of the – the group that he belonged to only had something like a 40% recidivism rate,

compared to some of those violent offenders where recidivism rates for the group, because it's not an individual assessment and can't be particularly sophisticated assessment of risk, but it's a relatively low risk.

SOLICITOR-GENERAL:

And you're asking me is there any research as to the efficacy of the options?

GLAZEBROOK J:

Well it's really – these are assertions and assertions about research but we haven't got the research, and we certainly haven't got the updated research, and as I say those recidivism rates for those sexual offenders, and I realise there are issues with those in the extent of reporting et cetera, but – and obviously the harm is very high in respect of sexual offending, there's no doubt, and especially for children, but it's again coming back to that whole justification for the regime, is risk enough when – well Mr Belcher was high risk of re-offending from memory. I think it was something like, his group was something like 40%, which as I say is much, much less than for many of those violent offenders. And then the extent to which a supervision regime, obviously a regime that locks them up in the same way that they would be imprisoned or similar to it, is likely to – well would stop re-offending in that period just because there's no opportunity…

WINKELMANN CJ:

But you don't have that do you?

SOLICITOR-GENERAL:

Not – I'm just thinking that there isn't anything in the materials in this Court, that is research to that point.

GLAZEBROOK J:

That's my point really.

WINKELMANN CJ:

So do you want to take us back to the materials? You don't have the – I'm sorry to sound like I'm rushing you along, but it's 3.40.

GLAZEBROOK J:

No, I was just –

WINKELMANN CJ:

No, no, that's a fair enough point, and I think Justice Glazebrook has made an important point.

SOLICITOR-GENERAL:

And I'm unable to point to any research that is in the materials, because the Cabinet paper, to the extent the Cabinet paper, to the extent that they say –

GLAZEBROOK J:

Well they earlier referred to research.

SOLICITOR-GENERAL:

Yes, but they don't produce the research, and that is not in the materials.

WINKELMANN CJ:

And neither does Ms Leota.

SOLICITOR-GENERAL:

No.

GLAZEBROOK J:

I just looked at this long ago so my knowledge of the research if very antiquated but at the time I did look at it, it didn't seem to support the view that was expressed as to very high risk of re-offending. At least compared to some of the other recidivism rates. Now obviously the harm is something that you would also take into account if you're looking at justification, or the level of harm, because we have to have a victim-focus in terms of victims' rights as well.

WINKELMANN CJ:

And you would say, I suppose Ms Jagose, that the Act does give them that, though, it asks you about the individual risk. I suppose that's the only response you have because you don't have the research.

GLAZEBROOK J:

Yes.

SOLICITOR-GENERAL:

Mmm. I mean I'm just thinking that if I'm right I think the real challenge here, from your Honours at least, is the PPO regime, perhaps not so much the ESO regime.

WINKELMANN CJ:

No. I'm not prepared to be – I'm interested to hear you on both and I know that – and why I say that is because that's very much the case you're meeting, which attacks both regimes. But you're right, there is a difference.

SOLICITOR-GENERAL:

Mmm.

GLAZEBROOK J:

Well I think the extent to which the ESO regime has a detention aspect, there are certainly similarities.

WINKELMANN CJ:

And they're both, the purposes both play predominantly management of risk it doesn't have as a purpose, rehabilitation and reintegration, although that's one of the methodologies that no doubt (inaudible 15:39:44) be used.

SOLICITOR-GENERAL:

Yes, agree with that. I'm just going to have a moment, if I may, just to think where is best to take you to because I suspect that –

WINKELMANN CJ:

Well, you were taking us through the Cabinet papers and that was very helpful.

GLAZEBROOK J:

The choices, I think, that was certainly something that Justice Kós was interested, and I think we all would be.

WINKELMANN CJ:

Yes. So he asked you: "Where is the best rights-consistent in our system in this material and you said: "Well, I don't know that it's going to meet that but I'll take you to what else we've got," so that was where we were.

GLAZEBROOK J:

And sorry, I started another hare.

SOLICITOR-GENERAL:

No, that's quite all right, but I do wonder if going through these papers is what is required because I think what your Honours will say is that what we see is the assessment of this is the risk and these are the options that we think about to manage that risk.

GLAZEBROOK J:

But we can't say much more about the risks, so the options are still – so as to the risk, if a risk is sufficient then a consideration of alternatives to find the least restrictive way of managing that risk is, which you say is in this paper?

SOLICITOR-GENERAL:

Well, it certainly is there for PPOs, but –

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

Well, let's have a look at that. Let's look at it.

WILLIAMS J:

Let's deal with that.

SOLICITOR-GENERAL:

I'm finding it a bit challenging on ESOs because by their nature they are release with standard terms and special terms, sorry, special conditions, standard conditions, and special conditions might be imposed by the Parole Board on such a range of different approaches to the person that in my –

WINKELMANN CJ:

Well you see, it would be quite interesting, I'd be quite interested to see what the standard conditions are, for instance, but we can come to that later. Let's deal with the papers that you wanted to show us because I think we're interested to see those. It does really assist us.

SOLICITOR-GENERAL:

Yes, okay. Okay, could you bring that up on to the screen so we'll go through it because it is the Regulatory Impact Statement that I confess that I thought I had up earlier, but don't seem to have. 304.0831.

WINKELMANN CJ:

What date is this? Ah, 2012. So in terms of the legislative history, this is at the time that they're enlarging it.

WILLIAMS J:

The PPO?

WINKELMANN CJ:

To the PPO regime, is it?

SOLICITOR-GENERAL:

It's the PPO, yes.

GLAZEBROOK J:

I don't think we're quite on the right one, are we?

WINKELMANN CJ:

Yes, I think we are.

SOLICITOR-GENERAL:

304.0831, it should be Regulatory Impact Statement, dated 20 March 2012.

WILLIAMS J:

Yes, we've got that.

KÓS J:

It's several pages.

O'REGAN J:

It's on the ClickShare screen.

SOLICITOR-GENERAL:

That is the document, yes. So the Regulatory Impact Statement, this is – so it's in two stages. First is about the additional second page of this material, sorry. Stage 2 is focused on the development of an additional civil detention option of creating public protection orders. So it goes on to identify the risk. At paragraph 4: "International practices have been reviewed and the mechanisms used for dealing with these very high risk offenders in other jurisdictions, including civil commitment, have been examined. The options selected and our analysis of those options has been informed by international practice. Five options have been identified for the management of offenders…" and there they are there. "A strengthened version of the ESOs… expansion of the scope of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003… A new civil detention order under which people (including offenders) would be detained in a secure facility until their risk is reduced. A continuing detention order under which offenders would be detailed in prison until their risk is reduced. A new form of civil detention using public protection orders."

And they say: "Civil detention orders are more likely to be able to be structured to comply with New Zealand's international obligations and the New Zealand

Bill of Rights Act 1990 (BORA). Designing legislation that did not reference previous offending and did not detain a larger group than the target group would be difficult." So trying to be not too broad. Perhaps answering your question, Chief Justice, earlier about an aspect of, is it an aspect of arbitrariness here because the regimes only pick up on people who have been convicted, and I think there the Cabinet paper, or at least the Regulatory Impact Statement, is saying we can design, or can we design a civil detention order that – because "designing legislation that did not reference previous offending and did not detain a larger group than the target group would be difficult… likely to provide less public safety.

GLAZEBROOK J:

What paragraph are you reading from now, I can't immediately see?

SOLICITOR-GENERAL:

Paragraph 7 and over the page onto 8.

GLAZEBROOK J:

Okay. So the target group is those who've been, otherwise would be released from prison after finishing their sentence?

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

It probably makes the Chief Justice's point.

WINKELMANN CJ:

Mmm, because we know how they designed it ultimately in Germany after a bit of kōrero with the constitutional court, don't we, which is that they added in the mental health requirement, which would look more like the second option there, which is really what you're aiming at is capturing people with borderline intellectual disability. But that was not carried forward?

SOLICITOR-GENERAL:

No, I think we can probably skip forward to page .0840 – sorry, just .0839, looking at international practice. Paragraph 32: "In other similar jurisdictions there are two ways of protecting the public." The first is indeterminate sentences. So they go through referring to the way different places deal with preventive, equivalent of preventive detention. The second way is to protect – sorry, to protect the public from higher risk offenders through an order to be imposed at the end, or close to the end, of the finite sentence. Observing, at 35, that those measures are "more problematic from a rights perspective and have the potential to be found to breach BORA and international obligations. The options being considered in this paper would be imposed at the end of the sentence." So identifying the problem, potential problem.

KÓS J:

I don't want to rush you ahead, but there's a very helpful table at paragraph 70 which compares these things, including the rights issues.

WINKELMANN CJ:

And so there is.

SOLICITOR-GENERAL:

Just before we get to that, your Honour, there's a point to be made at 42. "Civil commitment is very expensive, between four and eight times as expensive as detaining offenders in prison. there is no evidence that the treatments provided work. The conditions under which offenders are held," so this is talking about the United States, "are considered not to be conducive to rehabilitation," that's being held in a prison. "Few offenders are released and most of those who are, are released for reasons other than having been successfully treated."

WINKELMANN CJ:

That's a rather unusual analysis, isn't it? While it'd be less likely to work if it's a civil commitment rather than it's a criminal commitment if it's the same treatment.

SOLICITOR-GENERAL:

I took that to be saying rather – even if you can design a civil regime to – a civil regime that affects a preventive detention, the conditions on which that detention occurs are less conducive to the treatment's being provided.

WINKELMANN CJ:

Yes, in America, mmm.

GLAZEBROOK J:

Because I thought actually the assessments of the prison treatments here in relation to sexual offending have been very positive. One of the few treatments – well actually I think the psychopath treatment has had some positive assessments too in the medium and short-term. It might be just they don't do very good treatments in the United States.

SOLICITOR-GENERAL:

So Justice Kós has drawn us to paragraph 70, because the four options are described in words in the paragraphs prior to this, but here this table identifies the options and their rights impact, or rights issues.

1550

KÓS J:

Bearing in mind that what was gone for was option 3 to some extent, I think.

GLAZEBROOK J:

It was option 5, wasn't it, can we go down the page?

WINKELMANN CJ:

They say at 72 that it wouldn't work for, put the treatment model wouldn't work effectively because they'd have to – it wouldn't necessarily target the problem group. And also, expanding the definition could make the legislation unworkable.

SOLICITOR-GENERAL:

Sorry, are you on the table, your Honour?

WINKELMANN CJ:

72 and 73, below the table. They're talking about why they don't like the IDCCR Act, which is option 2.

SOLICITOR-GENERAL:

And your Honour, Justice Glazebrook, when you said option 5, option 3 was –

GLAZEBROOK J:

No, earlier I said option 5 but they obviously haven't…

WILLIAMS J:

The public protection order is a kind of variation on option 3 I think, isn't it?

GLAZEBROOK J:

I think it must be.

WINKELMANN CJ:

So, in this Regulatory Impact Statement they basically look ahead and say, well, look if we go the PPO way, it's likely to be found to be inconsistent with New Zealand's international commitments, and civil detention might give us a better chance of being human rights…

SOLICITOR-GENERAL:

Yes, to do both things, to meet public safety and to be humans rights compliant. And there were some other paragraphs I suppose is the right word, that think about that question Justice Kós, that you've asked about where is the rights analysis at 87, now going with this, a civil detention or continuing detention would have to make it clear that it applies to prisoners serving sentences for serious sexual violent offences. So, limiting who it applies to. Thank you, Mr Keith is helping me with option 5.

WILLIAMS J:

Yes, so it ends on paragraph 7, page 304.0851.

SOLICITOR-GENERAL:

And following that table is paragraphs 8 and 9, risk that this could be seen as criminal rather than civil, which we are here at that point, despite a civil regime having been attempted. "The proposal may be found to infringe the rights to not be subjected to retroactive penalties or double jeopardy in section 26." So: "Limiting the orders solely to offenders," this is your question to me, Chief Justice: "risks the detention being found to be arbitrary, whether or not it's civil or criminal…It is difficult to argue that, as a matter of principle it is necessary to detain offenders who pose this level or risk when those who have not offended but who pose the same risk cannot be detained."

WINKELMANN CJ:

And there's no parliamentary privilege of us referring to the Regulatory Impact Statement?

SOLICITOR-GENERAL:

No. So having thought about those risks and the options at 15 and 16 and 17, identifying that there are risks from a human rights perspective, they conclude that that option 5 is the best one to meet policy objectives, to address the very small number of high risk offenders although observing that the rights issues are the same, not very different under a civil regime.

I might come back tomorrow with a different answer to this, but I think that is probably the high point of the assessment of we're doing something here that engages rights. I mean, this is one that's necessary to achieve the public protection purpose.

WINKELMANN CJ:

But there was nothing, was there, to stop them coming off the regime which was rehabilitation-focused?

SOLICITOR-GENERAL:

As opposed to detention?

WINKELMANN CJ:

Yes, so if you read the German cases, I think they have this quite interesting way of framing the regime that they see as being rights compliant which is that it's a regime that starts from liberty, a liberty starting point. So it's not a detention starting point, it must be framed around maximising liberty and maximising the prospect for liberty even though it's managing risk, that's it's framing.

SOLICITOR-GENERAL:

And I would say that what we have in this, in the Public Safety Act, and the PPO regime, is a recognition or, you know, yes, a recognition that where the risk is imminent further violent or sexual crimes committed that does justify further detention. That is plain from the statute and from this paper, that at some point, and that is a very high threshold, Ms Leota's evidence is that there were three people subject to the PPO at the time her evidence was filed. That very high threshold unless detained that person will commit further offending of a serious nature. That is where the justification is found.

WILLIAMS J:

The New Zealand based treatment programmes, I think, are known to achieve world leading reductions in recidivism for adult child sex offenders, aren't they?

SOLICITOR-GENERAL:

I don't know, I'm sure you're right, Sir.

WILLIAMS J:

Yes, what's troubling is that the Executive didn't seem to know that either.

WINKELMANN CJ:

Well, if it's true.

WILLIAMS J:

Well, I'm just looking at something now, reduction from 21% recidivism rate untreated to a 5.47 recidivism rate under Kia Marama and Te Piriti which are still programmes that are running now.

SOLICITOR-GENERAL:

There is something in the material, I might not be able to put my hands on it immediately now, but I will come to it, which does identify that the reason for waiting until the end of the finite sentence before seeing if these regimes are even applicable is to determine whether those treatments have worked.

WILLIAMS J:

Whether they worked. Well, as best one can.

SOLICITOR-GENERAL:

As best one can, indeed, yes. But that is, it might be in –

GLAZEBROOK J:

No worry, I can understand that submission because it says, well, if you're looking at risk at the beginning of a 10- or 15-year sentence, it is particularly unfair because, of course, they are going to pose a high risk of recidivism before being treated.

SOLICITOR-GENERAL:

Well, risk isn't static, as Justice Williams pointed out right at the beginning.

GLAZEBROOK J:

I think that was the point you were making, wasn't it, so that a comparison between the ones that have been said to be okay, but in fact could be much more unfair.

SOLICITOR-GENERAL:

So just because we're almost at time, this paper shows that for the most restrictive option, PPOs, the Cabinet, sorry, the development of the regimes

was thinking about how do we manage this risk with rights, and my submission is that we see the result of that in the statute. A very high threshold for the point at which such a regime is imposed. That, in my submission, is justification such that might be needed at this point. When a DOI court looks at this question it doesn't, I don't want to be taken to be saying that then the PPO judge need not think about that point again, they are also required by the statute to think, is this the least infringing and proportionate response to you the person.

1600

KÓS J:

The DOI court has to work out whether this is the least restrictive mechanism that departs from the Bill of Rights legislation, and this is fairly thin material for this Court to make an assessment on.

SOLICITOR-GENERAL:

With respect I'd say what this Court has to do is to say well – actually my submission that I know your Honours don't like is that you don't, the regime isn't capable of being DOI, if I can use it, make that into a verb. But it might be that it is said, at this stage, to achieve the objective, to achieve Parliament's objective is there something that is least infringing and as effective and that is what, in my submission, the paper shows. That to achieve the objective of stopping imminent risk if not detained in a detention order, admittedly drafted as a civil order, which was one of the attempts to avoid the second penalty, it is the response.

WINKELMANN CJ:

For my part I doubt that it's as simply dichotomous as you suggest because – which is the point I put to you at the beginning, which it seems to me that there is the evil that you're actually asking the Court to disapply aspects of the regime. So say we thought that it's flat out punitive and not justified to put someone in prison, who really served their sentence, say that. And then what we would say, well, then how would a sentencing judge, how would a judge facing a PPO application deal with that? So, it could be that a declaration of inconsistency

could say that it's inconsistent for X, Y and Z reasons because of these features of the regime, and it could be more targeted.

SOLICITOR-GENERAL:

Well, certainly, as our written submission says, if this Court is intending to make a DOI, then a targeted one is what we would encourage.

WINKELMANN CJ:

Well, it might be more helpful, mightn't it, actually.

SOLICITOR-GENERAL:

Indeed.

KÓS J:

Do you mean more targeted than the Court of Appeal's declarations which seem to be the result of some measure of consensus?

SOLICITOR-GENERAL:

Well, the consensus with the parties?

KÓS J:

Between counsel.

SOLICITOR-GENERAL:

But having got to the decision that the regimes are a marked departure from the legal order reflected in 26(2), the Court there says the restrictions might include indefinite detention, but that's not necessarily the thing that drove them to say that can't be justified. Because by the same token, as I've already submitted, the same regime might result in an order in which a person is at home with some reporting requirements. So precision, with respect, would be needed if there was to be a DOI.

WINKELMANN CJ:

And when we come back tomorrow, I'm interested, for instance, there are some indispensable aspects of the scheme, and we went through them a little bit on

the PPO but for instance, an indispensable aspect of the ESO scheme is the standard conditions, so I'm just interested in you addressing those kind of baked in aspects. The core parts, you're already effectively saying to us if we were satisfied those core parts were inconsistent that we should just invite courts to supply them, which I don't think would be consistent with the rights regime. So that's the, going back to the point again. Right. We'll take the adjournment.

COURT ADJOURNS: 4.04 PM

COURT RESUMES ON TUESDAY 18 OCTOBER 2022 AT 10.04 AM

SOLICITOR-GENERAL:

Mōrena e ngā Kaiwhakawā.

WINKELMANN CJ:

Mōrena.

SOLICITOR-GENERAL:

Your Honours, we've regrouped somewhat in the intervening period. We're grateful for the clarity from yesterday's discussion as to what we're facing. I propose, and I think my friend Mr Keith is in agreement with this approach, I would like to have the opportunity to complete the Crown's case on appeal, which I haven't managed to finish yet. I think that should take me 30 minutes. That might require a fair wind, but we'll see how we go. Then Mr McKillop will address your Honours. We anticipate that we would be finished by the morning adjournment, certainly not later, and Mr McKillop will address, in doing so, he will address some of the issues that your Honours were raising yesterday relating to arbitrary detention and minimal impairment, the European cases and, of course, the Bill of Rights Act. If it pleases your Honours, that's how we will progress.

When we finished yesterday, your Honours, it was clear that we are somewhat at odds with respect to what the Attorney-General says the DOI court should do when it is approaching an enactment on an originating application for a DOI, and that point is important because we're not here faced with an interpretative instant case with facts before you to determine, is this a Bill of Rights breach and, if so, do we declare as the remedy? So your Honours are saying to me, how does the Attorney justify the regime chosen, imposing a second penalty, despite 26(2) of BORA, when there's another one, there's another option that would be treatment focused, that would be less rights infringing and, with respect, my submission is to say that is the wrong question. The DOI court has to grapple with what is in front of it and undertake the interpretative process to determine whether the Act requires or authorises unjustified limits, and in our

BORA jurisprudence to date the minimal impairment analysis, the *Oakes* analysis, it remains grounded in Parliament's actual objective. Here that is the enabling of an order that is a second penalty contrary to the right against second penalties. But unless your Honours are to find that second penalties are never able to be justified, so that's section 26(2) is not capable of a limit, then the Act can be applied in a rights-consistent way. Indeed my submission is that it must be applied in a rights-consistent way.

WINKELMANN CJ:

Well, arguably, the cases suggest that, and this is a point that Justice Glazebrook made, which suggests that a penalty can't be justified, a second penalty can't be justified, which is why the international jurisprudence says it has to be treatment focused. Rehabilitation and reintegration focused.

SOLICITOR-GENERAL:

And if that's the case –

KÓS J:

And my point is that if it can be justified then the mechanism has to be the least intrusive. The least restrictive on rights despite the fact that it involves the most fundamental invasion in a second penalty. So there are two different themes running at you.

SOLICITOR-GENERAL:

Yes –

GLAZEBROOK J:

And can I also say, that I just don't accept that the Crown can come and say, you just, to a DOI court, you just come and do it without actually evidence, both on the systemic issues and possibly on individual cases if, like here, it arises in an individual case. Because there probably is quite a lot of systemic evidence that can be given in respect of people for whom everything has been done that can possibly be done, although I'm not sure about that. But, in any event -

SOLICITOR-GENERAL:

I can answer both that question and Justice Kós' question in one to say the mechanism chosen is to give a regime to judges to choose, if they impose a condition, sorry, an order, to make sure that they impose an order that is the least limiting in order to meet the objective, with a range of process options for the Court to understand fully what it has before it. So, to answer Justice Glazebrook's point, yes, a PPO and ESO court will and does, if you read the judgments –

GLAZEBROOK J:

No, no, the DOI court needs to have – my point is that at the moment we have absolutely nothing in front of us, apart from possibly material we can't look at and question because of the Privileges Act, about the reason or the objective or the level of risk that certain people pose and therefore the possibly justified limit on risk alone.

SOLICITOR-GENERAL:

Well, with respect, your Honour, I agree with that. This is the difficulty with a DOI application that is brought separate from its factual foundations, so if –

GLAZEBROOK J:

Well, of course, we have told them they have to bring these separate applications. That's what happened in a number of cases that – so Mr Ellis will be jumping up and down in his seat because he's doing exactly what the Courts told them and what previous Crown submissions have been has to happen.

1010

SOLICITOR-GENERAL:

And so when that happens, when there is a DOI that is a – originating application, my submission is that the statute comes as the statute comes and we, the Attorney, must show that there is a purpose here being pursued. In my submission that is plain on the face of the statutes, but we have taken you to material yesterday that isn't, in my submission, caught in any parliamentary privileges. We've taken you to executive material for the Cabinet's

consideration. Then the question and actually response from a plaintiff or an applicant is to say: "Here, I can show you that this Act leads to or authorises orders that can't be justified." Like this Court approached the question about fluoridation in water by councils, the question wasn't: "Yes, in every case fluoridation is authorised." The question was, sorry, the answer from the majority was to say the power exists. To the extent that it is possible to exercise it in a lawful fashion, then the power can be exercised.

WINKELMANN CJ:

So there was a preliminary threshold finding that it could be justified, that basic scheme could be justified in a free and democratic society, but here –

GLAZEBROOK J:

And there was evidence in front of the Court, quite extensive evidence, as to why it can be justified.

WINKELMANN CJ:

But here the –

SOLICITOR-GENERAL:

There was evidence, that's true, yes. Because the plaintiffs there were saying the Court, sorry, the Council has no power to fluoridate water. It can't force medical treatment on people. So it brought the evidence –

WINKELMANN CJ:

But if I may finish my sentence.

SOLICITOR-GENERAL:

Yes, sorry, your Honour.

WINKELMANN CJ:

But here the case against you is that the scheme of this legislation can't be justified. So you can't say, well, look a judge can navigate their way around the bad bits and make an order which is non-complying. The case you have to

answer is that the scheme of the legislation is non-complying because it is a second penalty. It doesn't thread the needle that has been threaded in the international case law, and I think you really need to help us with the international case law, and also I'm also interested in how with, you know, how – what you say – well, these are quite fundamental questions about the methodology which we seem to be dealing with on the trot really. Anyway, carry on.

SOLICITOR-GENERAL:

Sorry, your Honour. How do you mean "on the trot"? I mean this has been our response to this appeal to say what is it about the enactment that causes the imposition of rights infringing orders, and you say to that it's its scheme because it imposes a second penalty.

WINKELMANN CJ:

So this issue must have arisen in many more cases than the Canadian cases cite where it's a discretionary regime, or is it not in other countries?

SOLICITOR-GENERAL:

With respect, I think the answer to that is that what we're missing here is the interpretive process that we would expect to see – the Court below didn't undertake it – to say this is where we object to the legislation, because if we're not at that point, in my submission, the Court is being invited to take quite an unprecedented general inquiry into Parliament's choice of enactment. How it has chosen to meet its objective is with a second penalty.

GLAZEBROOK J:

Well, I'm actually back at the first stage. I want the objective of Parliament justified. I don't want to say – because if the objective of Parliament isn't justified on risk alone, and I realise we've got section 41 so I'm not putting that out of the mind, but in fact, as I understand the Attorney's submission, that is that risk alone justifies a second penalty, and there's obviously a question as to level of risk and how you choose the penalty among them, and I quite take the point that if the level of risk – that if that is justified then the legislation does

allow, both legislation allows that to be tailored to the particular individual. But it's the step back.

SOLICITOR-GENERAL:

And the step back, you say, is to say Attorney-General has to justify why Parliament came to the conclusion that a second penalty, with all of the mechanisms and tools and processes in the enactments to ameliorate just the straight imposition of a second penalty, the Attorney's case is that we disagree that that is what this Court does.

WINKELMANN CJ:

What does it do under section 5 if it doesn't do that?

SOLICITOR-GENERAL:

It takes the enactment and it says what is, I agree with your Honour, it is the Bill of Rights analysis to the enactment. This Court told us in *Hansen* that the *Oakes* analysis is grounded in the parliamentary objective. We don't need evidence on that. That is clear on the face of the legislation.

GLAZEBROOK J:

Well you need evidence that the parliamentary objective is justified. I would say. If it is merely this person is a risk and therefore needs – and I think you could probably put that evidence, it's just we don't have it.

WINKELMANN CJ:

For myself I'm not sure it is granted in the parliamentary objective anyway.

GLAZEBROOK J:

Well no –

WINKELMANN CJ:

I think it's simply, the question is whether the restriction is justified in a free and democratic society.

SOLICITOR-GENERAL:

And the Attorney's case is to say that can't be determined absent of the facts, because the question might be, can it be justified that a person is under an order that has them staying at home and reporting, you know, I accept that's a very benevolent view of an order, but it is an order that's available. Is that justified, or, is it justified to impose a PPO on a person and have them detained and subject to the Chief Executive of Corrections control with all of the management in that person's plan, those questions can't be decided, in my submission, at this type of court. I absolutely accept justification can be done, but it is done in –

WINKELMANN CJ:

Don't you have a problem with that submission, though, because you've conceded it's a penalty?

SOLICITOR-GENERAL:

Yes.

WINKELMANN CJ:

Don't you have a problem with that submission in that scenario?

SOLICITOR-GENERAL:

Only if this Court, only if the Court comes to the view, which the Court of Appeal didn't come to, that second penalties aren't capable of lawful application, or justified application.

GLAZEBROOK J:

Well at the moment I don't have anything to base any view that it is justified because there's nothing in front of us to say so.

SOLICITOR-GENERAL:

And with respect I think that's where we talked past each other, and I'm happy to leave that point, because that is the Crown's case.

GLAZEBROOK J:

Well we probably do, it's just –

WINKELMANN CJ:

Yes, I think we've gone around that many times.

SOLICITOR-GENERAL:

Yes, because the Crown's case is –

WILLIAMS J:

I think the two issues do, and this is the problem, phase into one another, otherwise you have to accept euthanising blue-eyed babies as a statutory purpose, and then work out whether it could be reasonably justified, it does seem to me appropriate to say is there, is the purpose rational, and what is its basis, otherwise how can you work out what a justified limitation is? You have to know what the nature of the beast is to know what a justified limitation for it would be. So I think it's probably artificial to try and divide the two at some level.

SOLICITOR-GENERAL:

And to which my response to that is to say, on the face of the statutes you can see the objective, imposition of an order that would be a second penalty.

WILLIAMS J:

So this is self-evidently sound, you say?

SOLICITOR-GENERAL:

And you can see what, when a court is enabled to consider making such an order, such a very high threshold, yes focused on risk, but as, I think is clear, not, you know, in the legislation not only about risk, but that's the focus of the enactments.

WILLIAMS J:

Right, yes, I get that, but isn't your answer to Justice Glazebrook is that this purpose is self-evidently sound? Can you really say, just accept it, move on please, because the potential statutory purposes are legion. We're dealing with this one of course, but you're suggesting this as a way of approaching any BORA analysis, and I wonder whether that's sound.

WINKELMANN CJ:

So long as there's a discretion in there.

SOLICITOR-GENERAL:

Well I see the problem with that point, and I am not saying that in any exercise the Court should look away just because the statute says "may" not "must". That is not my submission. But I do say it is evident on the face of the statutes, not sure about self-evident, but certainly evident on the face of the analysis of the statutes, maybe it's the same thing, that the objective is sound when the target for imposing that order is so very finely and closely defined at a very high level of risk to the community. That would be a sufficient high level, I suppose, justification, not removing from the ESO and PPO court the real work of ensuring that the person's facts and their meeting of the thresholds continue to be a justified measure. So it can't – I come back to this Court in *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948, and the conclusion that with a high level look at, is there a power and can it be justified. I mean this Court concluded by saying it can be justified so long as it will be justified. I'm sorry, the Court, of course, said it in a much better way than I've just put that.

1020

WINKELMANN CJ:

That the threshold…

SOLICITOR-GENERAL:

The provisions limit the right "only to the extent that is demonstrably justified in a free and democratic society".

WINKELMANN CJ:

What paragraph are you at?

SOLICITOR-GENERAL:

144. That was the judgment of Justice O'Regan and Justice France.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

Yes, I'm not entirely – I can't remember what the actual majority was but I certainly didn't analyse it in that way.

WINKELMANN CJ:

No.

SOLICITOR-GENERAL:

Well, your Honour, you took the approach that a section 5 approach wasn't the one to be taken, that where the enactment authorised only lawful acts then the enactment was taken to be lawful. At paragraphs 175 and 176 of your Honour's judgment.

GLAZEBROOK J:

Yes, it's just I don't think you can say that was the analysis. If you're including me in that, that wasn't my analysis.

SOLICITOR-GENERAL:

No, you took a different approach but with respect to the same end at 175 to 176. "There is a principle of interpretation that any general power is assumed to be subject to the Bill of Rights Act. Local authorities," et cetera. This means that local authorities can fluoridate water only if the prior consent of all consumers is sought and obtained or if fluoridation in the particular district without consent is, in terms of section 5, demonstrably justified. "Whether section 5 is satisfied may depend on local conditions."

WINKELMANN CJ:

That's the part of the judgment that's most – which I'm not saying it is supportive of your analysis, but that's the one you'd want to rely on, wouldn't it, not Justice France or Justice O'Regan's?

SOLICITOR-GENERAL:

Well, the way that I read those two judgments they come to the same point, that there was something of Justice O'Regan's judgment does go through the *Oakes* steps but not to say this is always an authorised step to get to the conclusion that I just came to. On a, with respect, sort of high-level approach, yes, there is enough here to say that fluoridation is an effective way to meet the objective of preventing dental decay and that to the extent that that can be exercised lawfully then it may be. I see the two judgments as coming to the same point.

WINKELMANN CJ:

So your submission is that basically that on the face of it it carries over a basic threshold of justifiability, it can be, the scheme itself –

SOLICITOR-GENERAL:

Yes, yes, examination of the – yes, excuse me.

WINKELMANN CJ:

– crosses that threshold that was recognised in *New Health* and then it's at the particular decision that there is proportionality, that the proportionality analysis is carried out to make sure that there's no overreach. So it's kind of like the Sentencing Act which is a basically lawful regime, but in each particular sentencing exercise there's the necessary proportionality exercise to ensure that it is imposed in a rights-compliant way.

So the point, that takes us back to the point which is whether a second penalty can ever be exercised and in what circumstance, and do you have authority to assist us with that, because when I look at the commentaries I'm not sure that they support you on the proposition, but you might say otherwise.

SOLICITOR-GENERAL:

Well, it's certainly, in the ICCPR sense, not an article that is said to be non-derogable. Well, actually –

WINKELMANN CJ:

Well, it's a little bit confusing on that really, isn't it?

SOLICITOR-GENERAL:

Well, it's not on its face on the ICCPR something that can't be derogated from.

WINKELMANN CJ:

Because when we look at that commentary, and I say it's a bit confusing, it's because the question that Justice Glazebrook's raised is – if you have that document there which is the General Comment number 35 and page 7.

O'REGAN J:

Has it got a page number?

WINKELMANN CJ:

I don't know actually. I printed it out. It's the ICCPR commentary, general comment on Article 9. I could find it but I'm sure your junior can find it more quickly. Paragraph 21.

SOLICITOR-GENERAL:

This does – it might be more useful to your Honours if Mr McKillop addresses you. This is precisely the issue that he is going to address your Honours on.

WINKELMANN CJ:

Okay, that's fantastic.

SOLICITOR-GENERAL:

He doesn't seem to be disagreeing with that proposition, that is so, so can I just leave that there and just check my outline, because it might in fact be that my case which in your summary, Chief Justice, was put better than I have to date, the summary on what the Crown's case is.

WINKELMANN CJ:

Yes.

SOLICITOR-GENERAL:

You've just put it as well as I could hope to be understood, and I'm content with that. In the five minutes might I just touch on a few points that arise out of your question to me yesterday, that you'd like to go through the ESO regime and have a look at it, and in the time available I don't want to actually take your Honours to it, but can I just mention the points that I'd like to highlight, that I haven't already mentioned.

The process for applying for an ESO is at section 107, sets out what the Chief Executive has to bring and provide to the offender, and they are also entitled to respond. The standard ESO condition, we're at 107JA, and I particularly point out JA(h), which is a standard condition that the offender must take part in a rehabilitative and reintegration needs assessment if and when directed to do so by a probation officer, and I connect that to Ms Leota's evidence, it's at 201.001, where she sets out the process for prior to applying for an ESO, how the Department thinks about what the person needs, how their particular risks and how their particular needs will be addressed, which go into the process of deciding whether to apply for an ESO.

I don't know that I mentioned yesterday, now I'll turn to the Public Safety Act, section 18(4), where if the court is satisfied that a person no longer meets the PPO test, they impose a protective supervision order and can put in place a number of conditions including, at section 94.

GLAZEBROOK J:

Sorry, section 94?

SOLICITOR-GENERAL:

94: "The court may include in any protective supervision order… any requirements that the court considers necessary to… reduce the risk of

reoffending… facilitate or promote the rehabilitation and reintegration into the community…".

I draw your Honours attention, I don't want to take you to it, to the Court below setting out, actually I may have already mentioned this yesterday, at section – paragraph sorry, 129, page 101.0175, observing the Court of Appeal in *Moeke v Chief Executive of the Department of Corrections* [2010] NZCA 60 saying that through judicial application of the enactment, rather than from the enactment itself, the Court has determined over time the sorts of things a judge will need in order to make the decisions including management of risk and the management plan, that's probably not the right word, in place.

So that is why the Crown submits here that these enactments themselves can be analysed for identification that, yes, the application of a second penalty, which is a right, we say, is capable of being limited, and Mr McKillop will come to that, but the enactment itself produces the analysis needed to say that on its face the legislation isn't rights-inconsistent. It doesn't drive or require an inconsistent response. If this Court says, no, well you're wrong, and there can never be a second penalty, that can never be justified. As this Court has, in a different case obviously, in *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551, saying despite the very clear and in our framework of thinking, self-executing provisions in the three strikes legislation, section 9 can never be limited, therefore this doesn't go that far. That interpretive approach –

WINKELMANN CJ:

Well, the law is that section 9 is a limitable right, yes.

1030

SOLICITOR-GENERAL:

So I would accept at that point that a DOI might issue, but again that is not the case we're facing. It isn't a case that has been argued nor, in fact, what the Court determined below, that 26(2) is limitable.

Our written submissions set out – I think it's in footnote 67 – a number of other places in the statute book where there are second penalties imposed.

WINKELMANN CJ:

I should say that I myself find the international jurisprudence, which is gone over and over and over, some of these areas really, really helpful, just as an indication for future cases that come along from the Crown's point of view. I think a lot of the thinking has been done through the constitutional courts in Europe and through the European Court of Human Rights and through United Nations.

SOLICITOR-GENERAL:

And so that lens comes into what have we enacted in the Bill of Rights Act which leads me perfectly, if your Honours have got no questions for me just now, to Mr McKillop's address.

WINKELMANN CJ:

Great. Good morning.

MR MCKILLOP:

Good morning, your Honour. I will start then as the Solicitor-General left off, by starting with the arbitrary detention right in New Zealand and the arbitrary detention right in the ICCPR and the European Convention because that's the basis for a lot of the case law that your Honour has been mentioning.

The New Zealand expression of this right in the Bill of Rights Act in section 22, my submission is it creates a bare right to freedom from arbitrary arrest or detention following the model in Canada in very similar terms to section 9 of the Charter, and obviously a detention in common law is rather a broad concept and the requirement is that they be authorised by law in such a way that they're free of irrationality or disproportionality and that they commence and can be brought to an end –

WINKELMANN CJ:

Is this in your written submissions?

MR MCKILLOP:

Not really.

GLAZEBROOK J:

So free from irrationality and what was the second one, sorry?

MR MCKILLOP:

Disproportionality. This is the sort of stuff that the Court is referred to in *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA), the leading statement on arbitrary detention in New Zealand, the Court of Appeal I should say, and they commence and can be brought to an end by reference to predictable criteria and timely mechanisms.

Avoiding arbitrariness is exactly why Parliament doesn't confer bare discretions on judges. Guided decision-making, when the population targeted and the statutory tests are closely set out, leads to non-arbitrary outcomes, and I want to just point out –

WINKELMANN CJ:

It's nice to know that's why Parliament does that.

MR MCKILLOP:

Well, I'm saying that not just in the abstract but by reference to her Honour, Justice Gordon's, judgment in the second PPO application, which has appeared before us, and why her Honour said that this was not an arbitrary detention in response to my learned friend, Mr Ellis', submissions as set out there at paragraph 131. That reflects an orthodox approach to the arbitrary detention right in New Zealand. A process is prescribed, the test is clearly defined. There are procedures for obtaining the relevant evidence. It's considered in a court hearing where the subject of the application can be represented, bring his or her own evidence. "A fully reasoned decision is

required." We have an identifiable risk set out in law arising from people who are, well, unable, the Judge said, of limited ability to address the causes of their serious offending, would probably be a better way to put it, and finally there are clear mechanisms, her Honour says, in place at regular intervals to identify change of circumstances which would permit detention to end.

So that's the New Zealand to arbitrary detention, and very orthodox, in my submission, and section 22 enacts the second sentence of Article 9.1 of the ICCPR, which reads: "No one shall be subjected to arbitrary arrest or detention." That's a purposefully narrow enactment which reflects a common law understanding. The New Zealand approach doesn't set some sort of standard for identifying suspect grounds for detention. It doesn't outline exhaustively, unlike the European approach we're about to come to, the permissible grounds of detention. Instead it's focused more on process, logic and proportionality. The, I'll just, I won't take you to the particular authority, because there's an extract from the *Nowak* book in the respondent's authorities at tab 60, page 249, where it's noted that in the travaux, I'm mangling the French there, for Article 9, there was a proposition that the grounds for detention be exhaustively set out, and the particular way that it ended up being approach was instead to say, to have the more bare right against arbitrary arrest or detention, which was put forward by a representative from a common law country, being Australia.

WILLIAMS J:
Sorry, page 169?

MR MCKILLOP:
Page 249 of the *Nowak* extracts, at paragraph 28.

WINKELMANN CJ:
Sorry what page, I'm sorry to ask you to repeat it again, but can you repeat it again?

MR MCKILLOP:

Page 249. I didn't think it was important enough to go to. It'll be in the transcript. The Human Rights Committee, as we see in the judgment, in the decision that my friend's reference of *Fardon v Australia* CCPR 1629/2007, takes a broader approach where the committee says that limitations aren't permissible if the grounds themselves for commencing that detention are themselves either arbitrary or unreasonably or unnecessarily destructive of the right. So that's a reaching into grounds which I say isn't something that is part of New Zealand's section 22 arbitrary detention right.

WINKELMANN CJ:

It seems unlikely doesn't it? I mean the provisions must work together, mustn't they?

MR MCKILLOP:

Well, no, I'm going to go on and – well again I've noted that only a particular part of section – of Article 9.1 has been enacted in New Zealand. It's a bare right reflecting our common law tradition, and not one which invites the Court to delve into grounds, and it also was enacted when the European Convention was there to be picked at, if we so chose, and that is –

WINKELMANN CJ:

Well what do you make of the long title which says that it affirms New Zealand's commitment to the ICCPR? Which I've never understood us to be qualifying that, our commitment to that Article?

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MR MCKILLOP:

Well it doesn't – there are, and I can't put my finger on the exact Court of Appeal authority I'm thinking of, but the ICCPR finds its expression in New Zealand law in many ways and New Zealand's political tradition as well as our Bill of Rights Act and our general respect for human rights norms helps to give effect to the ICCPR. I am, however, submitting that section 22 is a limited incorporation of Article 9 into New Zealand law and –

GLAZEBROOK J:

Well, the grounds for detention are you're blue-eyed. Are you saying that you just accept that those are fine as long as that's in law and there's a process for getting out of detention if you get coloured contact lenses?

MR MCKILLOP:

No, I'm just not saying that it's an arbitrary detention issue.

GLAZEBROOK J:

Okay, right.

MR MCKILLOP:

It might be a section 9 –

GLAZEBROOK J:

That's an interesting submission. I just don't see that…

WILLIAMS J:

Don't you just – whatever limitations there are must be justified, demonstrably justified. Are you suggesting that that phrase "demonstrably justified" doesn't allow you to look at the purpose?

MR MCKILLOP:

Sorry, you – it cut out at the end. It doesn't?

WILLIAMS J:

Doesn't allow you to look at the statutory purpose for whether it is sufficiently important, sufficiently rational, sufficiently urgent, to meet the test, because that would be to read down "justified limitations" pretty sharply.

MR MCKILLOP:

No, no. Yes, so, of course I accept that, and I'm not suggesting that on the approach that I'm putting forward about section 22 of the Bill of Rights that that would leave the Blue-Eyed Babies Act to be untouched by some other right.

WINKELMANN CJ:

You've got us on a journey at the moment so perhaps you might like to tell us when you're going to take – what's the destination of your journey because we're all –

MR MCKILLOP:

The destination is to now talk about *Ilnseher* which is the case which my friends rely on heavily. So I want to turn to Article 5 of the European Convention which is the nearest equivalent to arbitrary detention in that regime.

WINKELMANN CJ:

So you don't think that *Ilnseher* is about second penalty?

MR MCKILLOP:

It is but the question of whether or not it's a treatment regime arises under Article 5 and my submission will be that *Ilnseher* doesn't represent a different substantive scheme to the PPO approach. It instead represents a different judicial outcome as a result of a different set of – a different way that the rights are expressed and the idea of penalty is interpreted in the European jurisprudence.

WINKELMANN CJ:

But at the moment we're on arbitrary detention.

MR MCKILLOP:

Yes. I'm going to cover both things.

WINKELMANN CJ:

Okay, right, so you're taking us through arbitrary detention, then you're going to take us to the second penalty, and then we're going to *Ilnseher*, and will you also take us to authorities which say, the international cases, which you say that *Ilnseher* is effectively distinguishable? Will you take us to authorities which justify your approach?

MR MCKILLOP:

Yes. I wanted to take you to some Canadian authorities as well.

WINKELMANN CJ:

Good.

MR MCKILLOP:

Article 5 of the European Convention sets out exhaustively the six circumstances in which a deprivation of liberty can lawfully occur. The two of relevance to this European jurisprudence are Article 5.1(a) which authorises "lawful detention of a person after conviction by a competent court", and Article 5.1(e) which authorises "the lawful detention of persons for the prevention of the spreading of infectious diseases of persons of unsound mind, alcoholics or drug addicts or vagrants".

So I wanted to first actually go to the *M v Germany* [2009] ECHR 2017, (2010) 51 EHRR 41 case, which preceded *Ilnseher*, and as I mentioned your Honour concerns two rights, Article 5 and Article 7 of the European Convention, which is the equivalent of, it's a kind of wrapped up version of our section 25(g) and 26(1) about non-retrospectivity in criminal punishment, or in defining crimes. So the European court there was deciding whether Germany's post-sentence preventive detention scheme was authorised by law, and under Article 5.1(a) the Court's jurisprudence is that you can't continue to impose fresh penalties forever based on a conviction that has receded into the past, because the link between your conviction and your detention is, over time, broken, and so that means, and if we could bring up paragraph 88, which explains that, the word "after" as in after conviction, doesn't simply mean it has to follow, it means that there must be a sufficient link, and with the passage of time the link gradually becomes less strong.

WINKELMANN CJ:

Whose authorities is this case in?

MR MCKILLOP:

This is in tab 37 of the respondent's authorities. It should be on your Honour's screen.

WINKELMANN CJ:

Yes.

MR MCKILLOP:

If we go to paragraph 97. So the question there was that the Court needed to examine is whether detention imposed a new judicial process 10 years after the conviction and original sentence still had a causal connection. So the Court concluded that it did not and that meant that there was no ability to rely on Article 5.1(a) for a lawful detention. So that's the background to *Ilnseher* which we'll go to next, because the result of this reasoning was that the German state looked for a way to positively justify this deprivation of liberty under Article 5, and it's very important to understand that as the background to *Ilnseher* because it had been told by the European court that what you'd done so far it's linked to conviction so – but not strongly enough so it is not authorised under 5.1(a), and it also said it's not, it doesn't sufficiently find that – you didn't sufficiently find that Mr M had, was a person of unsound mind, and the detention wasn't related to that, and so it also wasn't justified under Article 5.1(e).

So *Ilnseher* – establishing a treatment focus under, a sufficient treatment focus, was a way to assert that Mr Ilnseher's preventive detention was lawful.

WINKELMANN CJ:

Yes, but doesn't lie at the heart of this, that you can't oppose a second sentence, you can't impose a second penalty? So they came up with the mental health as the – to give the required distance?

MR MCKILLOP:

Yes, yes.

WINKELMANN CJ:

I can't remember the expression but they've got an expression, don't they, something to do with distance.

MR MCKILLOP:

Yes, yes, and –

GLAZEBROOK J:

Can we have the case up please? Thank you.

MR MCKILLOP:

So yes and – but the first point I just want to make is that that relates – the finding in *Ilnseher* relates to Article 7, which is the equivalent of 25(g) and 26(1). It's not the equivalent of section 26(2). Section 26(2)…

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WINKELMANN CJ:

Can you just give us some memory prompts from those other sections you're speaking to?

MR MCKILLOP:

25(g) is the same thing we have in section 6 of the Sentencing Act which says that you can't –

WINKELMANN CJ:

Okay, in retrospect, non-retrospectivity.

MR MCKILLOP:

– after – between committing an offence and sentencing, increase the penalty.

WINKELMANN CJ:

Right, benefit of the…

MR MCKILLOP:

Benefit of the lesser penalty. Exactly. And 26(1) is about not retrospectively criminalising some act or omission which was not criminal, so creating an offence out of a previously permissible act.

So those things can't have derogation from them, and so it was important to avoid that.

The right that's the equivalent of section 26(2) is found in something like Protocol 7, Article 4. I can't quite remember where, but it's a right which is capable of some limitation, even in the European law, for reasons of second trials being ordered, for example, if there's been new evidence or some miscarriage of justice reason that would lead, for the purposes of justice, to a limit on that, the equivalent of our, I think, section 151 and 154 of the Criminal Procedure Act.

So this was dealing with the illimitable right in Europe, not the limitable one, not the equivalent of 26(2).

I wanted to first come to paragraph 133 which explains this "unsound mind" ground. This is the ground on which a deprivation of liberty is positively authorised.

WILLIAMS J:

Give me the paragraph number again?

MR MCKILLOP:

133. It should be at the bottom of your screen on the ClickShare screen.

WILLIAMS J:

This is of *Ilnseher*?

MR MCKILLOP:

Ilnseher, yes. That should be up. Sorry, *Ilnseher* is respondent's authorities tab 36 if –

WILLIAMS J:

Yes, I know, I have *Ilnseher* but I don't have a 133. I must have a page missing.

WINKELMANN CJ:

It's on page 36.

WILLIAMS J:

I've got a hard copy of it. There's no 133 in mine. Oh dear, I must have the wrong one. Okay, keep going.

MR MCKILLOP:

It's on the screen. The point that I want to make is that the Court's jurisprudence, the point from 133, is that the Court's jurisprudence is such that the "unsound mind" ground can be relied upon to justify deprivation of liberty in a broad range of circumstances. Having treatment needs is noted there but also, as the Court notes near the end of that paragraph, "also where the person needs control and supervision to prevent him from, for example, causing harm to himself or other persons". So treatment isn't seen as an integral part of justifying detention under the "unsound mind" ground. Obviously, treatment is going to be important for other reasons, but I'm just trying to make that point.

So after the *M v Germany* case that I just took you to, the Germans reformed their preventive detention law with the express goal of compliance with Article 5.1(e), this "unsound mind" ground, and in *Ilnseher* they were successful in convincing the European Court that the unsound mind ground was now applicable. Mr Ilnseher had received a diagnosis of a mental disorder which was described as sexual sadism which was established before the Court that made the preventive detention order. There was assessment of future risk at the point of making the order and the order would be brought to an end through periodic review if this mental disorder no longer existed or the high risk resulting

from it no longer existed, and it would take a long time to go through those paragraphs but I'll just say that those are – I'm relying on paragraphs 151 to 159 of this lengthy judgment for those points.

1055

WINKELMANN CJ:

So *M v Germany* had found that the extension of the maximum period of 10 years applicable at the time beyond that 10-year period in *M* had breached both Article 5 and Article 7?

MR MCKILLOP:

Yes.

WINKELMANN CJ:

And so how was the Article 5 concern met then?

MR MCKILLOP:

The Article 5, so this was how the Article 5 concern was met, through the reliance on the "unsound mind" ground, Article 5.1(e).

WILLIAMS J:

And your point is that "unsound mind" included preventive as well as treatment outcomes?

MR MCKILLOP:

Yes.

WILLIAMS J:

Doesn't that all come down to the focus of the legislation is care, not incarceration?

MR MCKILLOP:

Well, it's – yes, well –

WILLIAMS J:

That incarceration may well be ancillary but the focus is care?

MR MCKILLOP:

I'm saying that the focus can be containment for the purpose of care or risk. Risk.

WILLIAMS J:

Well, no, care, I'm – care is not just treatment. There is an element care in the idea of protecting someone from breaching the law in this violent or sexual way. That's a care issue, it seems to me. At least it can be framed that way.

MR MCKILLOP:

To an extent, yes. But the broader point I'm going to come to is that when we look at the details of the scheme that the *Ilnseher* Court was assessing, they're very similar to the PPO regime.

WILLIAMS J:

Right. Is this covered in 151 to 159 or is this more that you're going to take us to?

MR MCKILLOP:

There's more. So, and I'll just note that under the Article 7 which is the retrospective penalty issues, similar factors that led to the success of the "unsound mind" ground also meant the Court concluded that it wasn't a second penalty.

WINKELMANN CJ:

Sorry, they concluded, because it was related to the "unsound mind", they concluded it wasn't a second penalty?

MR MCKILLOP:

They concluded for similar reasons. So they didn't say it was directly because we found it was Article – they assessed it on their own jurisprudence of what a

penalty is, which is a narrower jurisprudence, I would note, than that we have in New Zealand and in –

WINKELMANN CJ:

Okay, so which Article is their equivalent of section 26(2)?

MR MCKILLOP:

It's – I forget this but I think it's not in the original Convention. I think it's found in Protocol 7. Protocol 7, Article 4. So the right not to be tried or punished twice.

KÓS J:

Could we see that, please?

WINKELMANN CJ:

So is the conclusion in *Ilnseher* then that because it's a treatment-focused thing it's not a penalty?

MR MCKILLOP:

In the broadest sense, yes, but they assess the measures on the basis of their own jurisprudence about what a penalty is and I – the point that –

WINKELMANN CJ:

And you say that's distinguishable?

MR MCKILLOP:

Yes, I mean I want to say –

WINKELMANN CJ:

So what do you say about the case, I suppose, is what I'm trying to – big picture?

1100

MR MCKILLOP:

I'd prefer to go back into *Ilnseher* rather than bring up the Protocol but we can look at it if your Honour prefers.

WINKELMANN CJ:

Well, we can do both. We can multi-task. If it's up there, we can – you can still carry on talking to us about –

MR MCKILLOP:

Yes, well, okay, I think I'll focus on *Ilnseher*, if we can bring up *Ilnseher*, and if we go to – my point here is we're not trying to avoid a finding that the regime is a penalty. We've accepted that. There's a broader approach in New Zealand law compared to the European law, for example, where something like the sex offender registration which was found in *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213, to be a penalty, the equivalent case law in the UK wouldn't find it to be such.

We've accepted the approach the Canadian Supreme Court set out in *R v KRJ* [2016] 1 SCR 906 that it was sufficient that there was an express link to the previous criminal conviction and that the substantive treatment that is resulting from that can severely restrict a person's freedoms for there to be a penalty, and, of course, we accept this Court's judgment in *D v New Zealand Police*. So that's a more generous formulation of penalty than the European approach.

The point I really want to make, finally, is that *Ilnseher* doesn't disclose a very radically different system to the PPO regime, and I want to come to paragraph 200.

WINKELMANN CJ:

Is that your fundamental point about *Ilnseher*, that it doesn't actually disclose a different regime than the PPO regime?

MR MCKILLOP:

Firstly, that it reflects a different jurisprudential tradition where there is a need for a positive authorisation for a deprivation of liberty which includes this "unsound mind" ground and all of that stuff about treatment focus, et cetera, that has to be viewed through the lens of the particular European jurisprudence. That's the first point. But the second point –

WINKELMANN CJ:

So it's to do with the fact that the European Convention particularises grounds for detention, you say?

MR MCKILLOP:

Yes, but –

WINKELMANN CJ:

And one of the particularised grounds is mental unwellness?

MR MCKILLOP:

Yes, which is what made it so important to be proving that it was a scheme aimed at that, whereas here we have a penalty scheme and we've accepted that.

The second point, though, is that looking at the details that *Ilnseher* discloses, this is not a particularly different scheme to the PPO regime, and it's characterised, I think, by an intervener who's hostile to the scheme, but in paragraph 200 there, as being "only applicable to persons convicted of criminal offences", "ordered by criminal courts", "aimed at prolonging the detention after convicted offenders had served their sentence", "executed in centres located on the premises of prison" and being of "potentially unlimited duration". Those factors are all the same as the PPO regime, and as we have…

KÓS J:

Well, that describes the outer bounds of it but the focus of the scheme may be quite different in relation to its focus on health.

WINKELMANN CJ:

Well, then they found that it was, didn't they? The German Court. They found it had been formulated with a liberty framework and that had been its fundamental architecture.

MR MCKILLOP:

Yes, but – yes, a framework which only is applicable to people post-sentence which involves detention on the site of a prison.

WINKELMANN CJ:

Can I ask you though a question about this which you say here we have a penalty scheme? Is part, however, of the reasoning in *Ilnseher* that it's not a second penalty because it's a health treatment-driven response and because of the intervening finding of mental health? There's the language that they use, you might be able to help me with, if I can find the case, which is something to do with a distance that the intervening finding of mental health gives you sufficient relevant distance or something like that. So it's really going back to Justice Glazebrook's point: is intrinsic in the *Ilnseher* approach that it's not a second penalty if it's treatment and rehabilitation and reintegration focused?

MR MCKILLOP:

So my learned friend has helped me find the paragraph that would be, I think your Honours are referring to, at paragraph 236 which I was now up on the screen, and the second sentence there does support what your Honour has said: preventive detention was imposed because of and with a view to the need to treat mental disorder, having regard to criminal history. The nature and purpose of preventive detention was substantially different from those of ordinary preventive detention executed irrespective of a mental disorder, which, the Court concludes, led to the punitive element of preventive detention being erased.

So we argued in the Court of Appeal in this case that the lack of a punitive element to the PPO regime, or the ESO regime, was relevant to the question of whether or not this is a penalty, and ultimately our Court went a different way

from this. We took a more generous view of what is a penalty. We took a view that aligns with that in the Canadian jurisprudence, and…

WINKELMANN CJ:

So you say the Courts in New Zealand take a different approach to what's a penalty, it's more generous, so we just have to look at this with a little bit of caution? That's your essential submissions?

MR MCKILLOP:

Yes. Well, it enlivens rights protections better to accept that something is a penalty and then tackle the issue through justification, in my submission, and that's the approach that we see in Canada is that – and we see this in *KRJ* which is the leading case which your Honours have probably read, but also another that I'll take you to shortly – that even the equivalent of section 25(g) is seen as being subject to the potential for reasonable limitation under section 1 of the Charter in Canada, and…

WINKELMANN CJ:

In those Regulatory Impact Statements didn't it say that Canada didn't have a similar scheme to this? Or perhaps they've acquired one since then?

MR MCKILLOP:

Canada tends to – I don't think Canada does in my –

WINKELMANN CJ:

Does? It manages it through policing, I think it said.

MR MCKILLOP:

And also they've introduced things at the sentencing stage, very long-term orders that judges can make at the sentencing stage which is sort of like preventive detention – sorry – ESO conditions.

WINKELMANN CJ:

Okay, well, you might want to take us on to the Canadian cases.

MR MCKILLOP:

Well, the one I thought was worth going to is called *R v Simmonds* 2018 BCCA 205, which I just wanted to refer to briefly to give an example of this sort of reasoning and the case is about an amendment to what they called – sorry, it's on the screen. It's not in any of your bundles. So if you're looking for that you won't find it, I'm sorry. It is in the digital case on appeal now though in the authorities folder. It was about an amendment to what was called the "faint hope regime" of the Canadian Criminal Code and this was a regime that allowed people sentenced to a 25-year non-parole period on a life imprisonment sentence to apply after 15 years to reduce that period to apply to the Court. Parliament amended the scheme with retrospective effect to introduce a screening step where a judge could refuse the person's ability to bring such an application, and that didn't exist when Mr Simmonds, the appellant here, committed a murder.

1110

So this was held by the British Columbia Court of Appeal to be an increase in penalty that was retrospective in effect and the question was whether or not that was a justified one.

If we could go to paragraph 97, which summarises the Crown case, I'm taking you to the summary of the Crown case because the Crown case was entirely accepted by the Court. The objective was a pressing and substantial one, regardless of when an offence was committed; the retrospective application of that new screening step was rationally connected to the objective of preventing re-victimisation, meritless re-victimisation of victims' families, and given the nature of the amendment it impaired as little as was reasonably possible.

And just because of its alignment with what we're saying about retrospectivity, I also just wanted to go to paragraph 105 which gives an example of the Court grappling with, well, was it legitimate for Parliament to act to allow this change to stretch back to murders that were committed in the past, and the Court applied the same sort of reasoning that we argue for here, that unless judicial screening could be applied retrospectively, the families of murder victims would

continue to be exposed to this re-victimisation in all cases pre-dating the amendment. So at the minimal impairment stage the Court remained grounded in the retrospective intent of Parliament. It didn't seek to say, well, you could have just done this prospectively, or anything like that. At that point the Court remained grounded in that retrospective intention, the intention to immediately realise the benefit of the Act, not to eventually realise the benefit of the Act.

WINKELMANN CJ:

Well, they were actually addressing whether or not – because that was the limitation in question, wasn't it?

MR MCKILLOP:

Yes, yes, exactly.

WINKELMANN CJ:

So they assumed it intended retrospective application, but you still have to see whether that's a justified limitation.

MR MCKILLOP:

Yes.

WINKELMANN CJ:

Does that give us anything?

MR MCKILLOP:

Yes, well, my point is that it is that the reasoning about the impact on rights and the achievement of the benefit is best done at the last proportionality stage. This is really me just finding something to support that point.

WINKELMANN CJ:

Well, so that's best done by the sentencing Judge? Or are you accepting that the Court could have looked at that in the situation and said: "Okay, well, Parliament intended it to have retrospective application. Now we have to consider whether it's a justified limitation"?

MR MCKILLOP:

So in this case – I'm sorry, I've launched into this Canadian case law without framing it around our retrospectivity submissions but –

WINKELMANN CJ:

So this Canadian case law is about the retrospectivity point? It's not about second penalty?

MR MCKILLOP:

It's about both. This is a – well, it's an increase in penalty, the Court finds –

WINKELMANN CJ:

Well, it's not actually an increase. Is it an – I suppose it's a slight procedural increase.

MR MCKILLOP:

The Court regards it as being such and…

WILLIAMS J:

It's because it's harder to get an outcome, that you would otherwise have qualified for?

MR MCKILLOP:

Yes.

WINKELMANN CJ:

It's just making, putting another procedural block in the road for a process but – yes.

MR MCKILLOP:

Yes, for a potential release from prison 10 years sooner, so it's a – I wouldn't say it's insubstantial but the – what we've said in our submissions is that the discretion that judges have is somewhat – well, it's limited – let me start that sentence again. The discretion that judges have to make or not make a PPO or ESO is not a complete discretion. It is limited by the retrospectivity provisions

which make eligible for this scheme any offender regardless of the date of their offending as long as it's the right kind of offending. And our submission on that is that, as my learned friend has been urging on the Court, everything else can be dealt with in the instant case in light of –

WINKELMANN CJ:
So are you saying the Court can waive the retrospectivity aspect in deciding whether to make the, no?

MR MCKILLOP:
No.

WINKELMANN CJ:
Good.

MR MCKILLOP:
No. No. No.

WINKELMANN CJ:
So I'm not understanding what you're saying then.

MR MCKILLOP:
So that was what I was worried perhaps that your Honour was focused on yesterday when your Honour suggested that our approach was getting to disapplication of the Act.

WINKELMANN CJ:
No. That was not what I was focused on.

MR MCKILLOP:
Okay. Well, I guess this is responding to a point that you weren't worried about then. But what we're saying on retrospectivity is that weighing that aspect in the balance would effectively disapply an aspect of the Act which is not to be taken back into account.

WINKELMANN CJ:

Okay, because that's certainly what the Crown submission was in the *D* case as well.

MR MCKILLOP:

Sorry, to come back to my point on that, this is something which – and this is just how your Honour and Justice O'Regan in the *D* case reasoned, that there was no ability to take this back into account again. It was, at that stage, something that once that had been reached, the Court had to reason in a rights-consistent way to the extent it could, but this particular thing, retrospectivity, could not be taken back into account again. And we say precisely the same approach holds here. But –

GLAZEBROOK J:

I'm sorry, I really don't understand the submission. So maybe you can just talk through it again because I just have absolutely no idea, I'm afraid, what the submission is.

MR MCKILLOP:

My learned friend the Solicitor-General has been submitting that this is a – the power to make a PPO or an ESO is a discretionary power that can be exercised consistently with the Bill of Rights Act. However, we acknowledge that these regimes have a retrospectivity aspect in the eligibility criteria and we say that it's not open to the Court to take into account the date of offending solely to avoid retrospective second penalty when it comes to exercising that discretion.

GLAZEBROOK J:

So do you accept you have to justify retrospectivity?

MR MCKILLOP:

Yes, we have to justify –

GLAZEBROOK J:

Is that all you're saying?

MR MCKILLOP:

Yes, which is why we set out the notes analysis on retrospectivity in the written submissions on the appeal.

WINKELMANN CJ:

Would you say that it's different in the other cases, in the other breach area?

MR MCKILLOP:

Sorry?

WINKELMANN CJ:

You say it's, that's a different framework, that's the only area in which you say that the judicial discretion doesn't fix the problem?

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MR MCKILLOP:

Yes. But we say that it's justified given the nature of the harm being avoided and its impacts and, as we've seen in the *Simmonds* case, that there is a necessity for retrospectivity to give full effect to Parliament's intention and to realise the benefits of the scheme from the date of its enactment instead of eventually. And the avoidance of that severe harm from the date of enactment outweighs the retrospective limit on section 26(2), we say.

So that deals with – that was all I wanted to add about PPO retrospectivity analysis. I wanted to mention, we've got 10 minutes, mention the ESO scheme. The focus of both parties as –

WINKELMANN CJ:

Are you going to take us to any cases that support your argument the second penalty has been viewed as being reasonably justified in the, say the, well, that deal with the UN jurisprudence that I've referred to a number of times, which seems to suggest that such a scheme should rehabilitative and reintegration focused and do you have anything to say about that? I mean, are you saying that it is rehabilitation and reintegration focused? Or are you saying that that's

not the appropriate test and what other international jurisprudence are you taking us to on that point?

MR MCKILLOP:

I'm taking you to no more international jurisprudence, but I'm saying that the PPO scheme in its duty to assess a person's needs, and the right to receive rehabilitation that has any reasonable prospect of success, are sufficiently rehabilitative to ensure that the scheme isn't pointlessly penal, it doesn't treat someone worse than is necessary to achieve –

WINKELMANN CJ:

To constrain the risk?

MR MCKILLOP:

To constrain the risk.

KÓS J:

The pointless finality is not the issue if we follow the approach taken in *New Health*, the question, the one I keep asking about, is why this is the least restrictive design?

MR MCKILLOP:

Yes, and it's, I don't want to –

KÓS J:

How, in *New Health* you had a bucket load of evidence from experts on options and effects and we just don't have that here. We have a rather thin Cabinet paper.

MR MCKILLOP:

Yes, well part of the answer is, of course, that the ability to make such orders has been reposed and judges who are the people trusted with the ability to make risk assessment decisions and to impose penalties, or things that have the effect of penalties, that are proportionate to risk.

KÓS J:

But they, for instance, have no power to impose particular therapeutic responses?

MR MCKILLOP:

No, but they, which pose –

KÓS J:

Which could part of a less restrictive scheme design?

MR MCKILLOP:

Well, my submission is that the ordering of therapeutic responses directly by the Court isn't necessary and the micro-management of rehabilitation by the Court is not the normal approach taken. It's certainly isn't the approach taken under the Mental Health (Compulsory Assessment and Treatment) Act 1992, for example, where the question is whether or not to make an order how that is implemented is up to the treating –

GLAZEBROOK J:

Well, there is quite a lot of criticism in a human rights sense for the mental health and the other regimes and quite a lot of jurisprudence that put forward to say those aren't justified, and that's where you do actually have a mental disorder or an intellectual disability.

MR MCKILLOP:

Yes, yes.

KÓS J:

And what is more, in the context of making a compulsory treatment order, a judge knows that the response to it is going to be therapeutic in some form. They don't have that assurance in relation to the PPO.

MR MCKILLOP:

They do, in my submission. They do because there is a duty to assess needs and a right to receive treatment which has any reasonable prospect of success.

WILLIAMS J:

You do get the sense in the shape of the legislation that this, I guess, there is a flavour of what you say in the legislation that's undeniable. It's not the point and you're really inviting a court, this one or another one on a particular case, to rebalance the Act to put that material front and centre, aren't you? Because it's not obviously so in the construction of the legislation.

MR MCKILLOP:

I'm saying that it's sufficiently so to be a justified limitation and the, this isn't a scheme about eliminating all risk of this kind.

WILLIAMS J:

Risk? Risk of?

MR MCKILLOP:

Well it's about –

WILLIAMS J:

Risk of breach you mean?

MR MCKILLOP:

It's about addressing the – a high or –

WILLIAMS J:

Yes, the abstract consistency, is that what you mean?

MR MCKILLOP:

No, no, I'm saying the scheme is focused only on people at the end of a sentence who have a high risk, or up to an eminent risk – the schemes I should say – despite all of the availability of treatment during the course of the sentence, such is the schemes that your Honour was referring to yesterday,

and this isn't a scheme of that general nature, which is designed to identify all risky people who might commit offences and lead to their detention. It's about – it's grounded in realised risk in the past, which continues to be present at the end of a determinate sentence. The –

WILLIAMS J:

That's a different, you're eliding two points. One is the risk, the other is the response, and the one I'm wanting you to focus on is the response, and aren't you arguing that accepting that there is a risk that would in any regime like this be an absolute precondition anyway, and then you, assuming that that's justifiable, then you have to find reasonably justified, demonstrably reasonably justified limitations, so in order to do that you're suggesting that the treatment based care based elements of the Act be the subject of emphasis and particular focus when a judge deals with this in order to get it over the line because it is capable of being abused and producing bad, unfair or arbitrary results. Unless a judge does their job right.

MR MCKILLOP:

I mean I'm not sure I could accept that any existing statutory power is capable of leading to unfair or arbitrary results, because those would be not within –

WILLIAMS J:

Well, rights breaching results, which would be, by definition, unfair and perhaps arbitrary, that would depend.

MR MCKILLOP:

Well, but those things would be unlawful on their facts.

WILLIAMS J:

Right so that requires you to leave to the Judge the closing of the gap that is in the legislation. That's what, I mean, that's essentially your argument. Trust the system please, the judges can close the gaps.

MR MCKILLOP:

All legislation is capable –

WILLIAMS J:

Yes, it's not a radical proposition.

MR MCKILLOP:

No.

WILLIAMS J:

Right, so that requires you to – requires the Judge to read down the structure of the Act in order to get it to the reasonably justified limitation point, case by case.

MR MCKILLOP:

So I just don't accept that there's anything about the Act that needs reading down.

WILLIAMS J:

But your whole case is founded on the idea that, to the extent that there are any problems with rights breach, the judges will fix them.

MR MCKILLOP:

Not that judges will fix them, but that rights breach will be avoided by judges –

WILLIAMS J:

Because a judge will exercise a discretion.

MR MCKILLOP:

Yes.

WILLIAMS J:

Right, now, in order for you to make that submission, you have to start from the proposition that there is danger in the legislation. Otherwise why would you be pointing to this safety valve?

MR MCKILLOP:

All legislation has the same safety valve and the same sorts of –

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WILLIAMS J:

Not all legislation has BORA problems, this one has BORA problems, you agree, it's a double penalty, and so the justified limitations are not written into the legislation, they are left to the discretion of the Judge to search for, find and guide the process through.

MR MCKILLOP:

Yes, sure, but that's –

WILLIAMS J:

So the European cases anyway suggest the more treatment and care oriented, the more likely it is to get on the right side of that line. This legislation doesn't put that front and centre. You're suggesting, aren't you, that a judge should?

MR MCKILLOP:

I say that in the PPO legislation it is front and centre of how the scheme has to be administered.

WILLIAMS J:

Okay.

MR MCKILLOP:

I say that in the ESO legislation the practice of the Courts which we have referred to in our written submissions, particularly in the cross-response submissions, is that judges have, as the jurisprudence under the ESO scheme is developed, called for more about the necessary length of the order in light of the prospects for treatment and what is intended to be done under that order, and then the length of the order is set by reference to that information.

WILLIAMS J:

Right.

MR MCKILLOP:

That's what the Court of Appeal has said is required, the case is *Moeke*, I think *Moeke* which is referred to in the judgment below, so I don't – I say that this is, apart from the retrospectivity aspect that we've identified, that this is a discretion like any other, and that's the approach that the Court ought to take.

WINKELMANN CJ:

We'll take the morning adjournment now.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.50 AM

WINKELMANN CJ:

Now, before we begin, Ms Jagose, I just thought I should mention that we've been having a chat about how we're going with this and Mr Ellis might feel justified in saying I told you so, we're concerned about two things. One is the rate at which we're going, whether we're going to have adequate time for the respondents. The second thing is that it seems to us this appeal raises some pretty fundamental issues about the declaration of inconsistency jurisdiction and we're surprised for that reason not to have the Human Rights Commission intervening, and we were wondering about whether we should, so we've been contemplating the possibility of adjourning part-heard to invite – to allow more time and to invite the Human Rights Commissioner's intervention. But we're not going to ask you to respond on that because it's a little bit of a small hand grenade to throw into discussions. But rather than just – if you could all have a think about it over the luncheon adjournment, perhaps a chat between counsel. We certainly have not decided on that course of action but we're raising it as a possibility.

SOLICITOR-GENERAL:

The first point you raise, I was only standing up to say that we're happy to rest here. You understand the Crown's case, it seems to me. We've put what we needed to. I've just put up on the screen one thing to point out about the point that we make. It's at 108 there in (d), this Court saying: "Once the Judge has determined that the threshold is met, then they have to decide whether that risk is sufficient to warrant making the order. Involve balancing of the protective objectives of the registration order, protective of children from sex offenders, with the level of intrusion." And that's what we say is to be done here. Not wanting to get back into the discussion about why you disagree with that, but that is where we source that point.

So unless your Honours want to speak to me further, I'm happy to leave the appeal for the Crown there.

WINKELMANN CJ:

Thank you, Ms Jagose.

SOLICITOR-GENERAL:

Thank you, your Honours.

WINKELMANN CJ:

Mr Ellis. You're on mute because we made you mute yourself.

MR ELLIS:

Can you hear me now?

WINKELMANN CJ:

We sure can.

MR ELLIS:

Thank you, Ma'am. I have a one page opening but I had intended to take you through three things on the international scene because I think they represent a pretty good summary of our case. So that's part of *Fardon v Australia*, I'm

doing this in chronological order as they occurred, General Comment 35, and *Miller & Carroll v New Zealand* CCPR/C/121/D/2502/2014 which post-dates the general comment and is the most up to date jurisprudence on certainly the issue of arbitrary detention, and I suppose one starts by saying that one has to remember that Article 10 of the Covenant doesn't have a mirror image anywhere else. But that says that the penitentiary system main purpose is reformation and social rehabilitation so within that context the HRC jurisprudence has developed. But before I get to that, I'll say I will be 10, 15 minutes. The main arguments on the appeal will be addressed by Mr Keith. Mr Edgeler is going to be dealing with the statutory regimes and practical aspects. I will do the cross-appeal and that really arose because when the case started I left the argument to Mr Keith and Mr Edgeler in the High Court as I was overseas on sabbatical so it took it's advance from there and I suppose interestingly enough, or interesting to me, the professor who was the director of my Human Rights course at Harvard was the Special Rapporteur who had care of writing General Comment 35. That was a useful time away. Anyway, I started off trying to get a bit closer to inconsistency back in 1998, so this is an important day, to actually finally arrive in the Supreme Court trying to get one. Of course I was unfortunately beaten by Mr Taylor, but, you know, life has its tough breaks. Anyway, *R v Leitch* [1998] 1 NZLR 420 (CA), was my first go at preventive detention in 1998, and I have a vision, which I still have, I don't know if anybody shares it, but I've always thought that a finding of a breach by the Human Rights Committee or Committee Against Torture is really a form of declaration of inconsistency (inaudible 11:56:22) but they say, look, New Zealand law –

WINKELMANN CJ:

Now Mr Ellis, you're breaking up a little bit. If you lean forward a little bit, you might be just fading in and out a bit with the speaker.

MR ELLIS:

I'll move my computer forward.

WINKELMANN CJ:

That's better.

MR ELLIS:

So that was 1998. The Court of Appeal chickened out on the international elements in *Leitch* and found you shouldn't get preventive detention, I was a bought disappointed in that, so I brought *Rameka et al v New Zealand* CCPOR/C/79/D/1090/2002 (2003) in the – well Privy Council first, and then the Human Rights Committee in 1999, and it was determined in 2002, and that was the first case before the UN on preventive detention of which PPO is a form of, and *Fardon* came along, or *Dean v New Zealand* CCPR/C/95/D/1512/2006, which was handed up, Mr Keith filed it with the registry yesterday or this morning, *Miller & Carroll* and *Dean*. *Dean* is not, as the Chief Justice said yesterday, the cases in the footnotes are New Zealand and Australia. Well, the ones of significance in New Zealand are really *Miller & Carroll*. I wouldn't ask you to read *Dean* because *Dean* was overtaken really by *Fardon* in Australia. *Dean* was in one session. I'd asked the Committee to reconsider *Rameka* because it was a 7/6 decision. They didn't, and when I asked Mr Lallah, the Mauritius Chief Justice why he didn't, he was (inaudible 11:58:30) in *Rameka*, at least I wasn't there, and Madam Chanet said, well, we're going to be considering *M v Germany* in this session – there were an excess of three sessions a year on the UN, so this is 2010 in New York – and they determined *Fardon* in Australia, which is when I get, where I'll be starting shortly. But that was followed by *Miller & Carroll* in 2017 and the government had made a response in respect of the findings of preventive detention in *Miller* by referring it to a Law Commission and after discussions with them they included in their terms of reference public protection orders and extended supervision orders. So there's a parallel play going on somewhere.

Hopefully, knowing how long these things take, hopefully I'll still be alive by the time we get to the end of that development that, you know, but given that this is your court's second discussion overly of this topic, leave was unusually not opposed, given the importance of the topic, and obviously I will discuss with my colleagues your comment about the Human Rights Commission but bearing in

mind the approach we've taken we don't oppose leave. We think this is important. You can imagine what our answer is likely to be.
1200

It's not just that this topic is important; it is internationally topical as well. On the 22nd of December the House of Commons UK Justice Committee reported on imprisonment for public protection sentences which was in the bundle. It was sent on – I don't know when it was sent, recently anyway. Can we get it up on the screen? In the summary on page 3 of that it says: "Our primary recommendation is that the Government conducts a resentencing exercise for all IPP-sentenced individuals (except for those who have successfully had their licence terminated). In attempting to deal comprehensively with this issue, the process for resentencing must be guided by three key principles: (1) balancing protection of the public with justice for the individual offender; (2) recognising and protecting the independence of the judiciary; and (3) ensuring that no harsher sentence is imposed retrospectively." So I'm pleased to see that somebody else thinks that judicial independence is important in this context too.

Now in the other point that –

GLAZEBROOK J:
When they say – can you just explain what they were saying in terms of resentencing, why were they saying that, sorry?

MR ELLIS:
Because there are some 8,000 people sentenced and I think 3,000 people are still on it. "608 prisoners are at least 10 years over their original tariff," so it's been a huge problem for British. Now I suppose it's a little bit like the (inaudible 12:02:45) Committee in Canada who originally had some, I think, hundreds of people on preventive detention and they whittled it down to 40.

Anyway, so I was just trying to explain the topicality of the issue. So if I could go to the three things I was going to – unfortunately, we've lost *Fardon*. Put *Fardon* up on the screen, please, and the page number will be 8, and

Fardon v Australia was the case involving the Dangerous Persons *[sic]* (Sexual Offenders) Act in, I think, Queensland (inaudible 12:03:49) –

WINKELMANN CJ:

Now you're fading in a bit and out a bit, Mr Ellis. Maybe if you just lean forward in your chair. I know your chair is not actually all that good for making you sit forward, is it?

GLAZEBROOK J:

And can we make this a bit bigger because it's just about impossible to read?

MR ELLIS:

Yes, and I've lost my…

WILLIAMS J:

Not Mr Ellis, the document.

MR ELLIS:

No, I feel big enough already.

KÓS J:

It's tab 30 of the respondent's submissions, authorities.

MR ELLIS:

Yes, that's better. Yes, I must admit I've just got a copy which is bigger because I can't read – I haven't been able to follow the things up on screen all morning. Anyway, so we've got the right page, have we, yes? 7 point what?

WINKELMANN CJ:

7.3.

MR ELLIS:

Yes, 7.3. Right, so the Committee observes that Article 9.1 recognises the right to liberty. The Article provides for some limitations, and then we've got the mental health grounds in there, which has been the matter of some discussion.

7.4, the question currently before the Committee is whether the applications of the DPSOA under which the author is detained at the conclusion of his 14-year term is arbitrary. It is for a number of reasons. One: "The author has served his 14-year term and yet he continued… to be subjected to imprisonment… which characterises his continued incarceration under the same prison regime as detention." It is in substance a fresh term of imprisonment. It "is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law" which is one of the cross-appeal grounds. Imprisonment is penal in nature can only be imposed for an offence in the same proceedings at which the offence is tried. The author's further term 14 years after his conviction in respect of predicted future criminal conduct which has its basis in the very offence for which he's already served his sentence. The new sentence was the result of fresh proceedings, though nominally characterised as civil, fall within the prohibition of Article 15.1. In this regard the DPSOA was enacted in 2003 shortly before the expiry of the author's sentence for an offence he committed in 1989. The DPSOA was applied retrospectively. This also falls within Article 15.1. The Committee, therefore, considers the detention is incompatible with Article 15 and is necessarily arbitrary with the meaning of 9.1.

Three: "The DPSOA prescribed a particular procedure to obtain the relevant Court orders. This particular procedure, as the State Party conceded, was designed to be civil in character. It did not, therefore, meet the due process requirements of Article 14 of the Covenant for a fair trial in which a penal sentence is imposed."

Four, which is the last one: "The 'detention' of the author as a 'prisoner'… was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation." The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. The DPSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness, but on the other hand, requires the Court to make a finding of

fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise. To avoid arbitrariness… the State Party should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State Party had a continuing obligation under Article 10.3 of the Covenant to adopt meaningful measures for the reformation, if indeed it was needed, of the author throughout the 14 years…" and then in light of that, the breaches are found and the same for the sister case in *Tillman v Australia* CCPR/C/98/D/1635/2007. So that's really summed up a lot of what we had.

The Chief Justice had mentioned General Comment 35 which is, I think, in our bundle, I think it's 37. Yes, at paragraph 21 of that bundle is the important one. Page 7, I think. I do have a hard copy of my indexes.

WINKELMANN CJ:
31, tab 31.

MR ELLIS:
31.

KÓS J:
It's *Tillman*.

WINKELMANN CJ:
That's *Tillman*.

MR ELLIS:
Is it? No, it's –
1210

WINKELMANN CJ:

Tab 26.

MR ELLIS:

Yes, the first of the international decisions.

WINKELMANN CJ:

Yes, you were no help on that, Mr Keith.

MR ELLIS:

So when I – sorry, paragraph 21. We haven't got it yet but I'll…

WINKELMANN CJ:

I think we're moving on our way there.

MR ELLIS:

I'll start reading it. "When a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals, then once the punitive term has been served, to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society. If a prisoner has fully served the sentence imposed at the time of conviction, Articles 9 and 15 prohibit a retrospective increase in sentence and a State party may not circumvent the prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention."

So the scheme that Parliament has enacted was deliberately intended to try and be covenant compliant, but it lamentably failed as the Australian case demonstrates. So that's the – and then when I find *Miller & Carroll*, which is the last thing I need to do and I've lost it. *Miller & Carroll*. So that was sent to the Court yesterday.

WINKELMANN CJ:
Now if we can get that up on the screen too and that's at…

KÓS J:
68.

O'REGAN J:
Tab 68.

MR ELLIS:
Yes, I've got one. Paragraph 8.3 on page 13, please. So there's two people including Mr Carroll here but it doesn't really matter. Committee notes that Mr Carroll has been preventively detained since 1988, 19 years. Seven or eight lines down: "The Committee recalls its general comment No. 35," and then there's a definition of "arbitrariness" there which you're familiar with. "In the same comment, the Committee highlighted that preventive detention must be subjected to specific limitations in order to meet the requirements of Article 9. Namely, preventive detention following a punitive term must, in order to avoid arbitrariness, be justified by compelling reasons," regular reviews. States must only use it as a last resort, and must exercise caution and provide appropriate guarantees in evaluating the future danger. Must be distinct from the treatment of convicted prisoners and aimed at the detainees' rehabilitation and reintegration. The Committee considers it raises serious concerns as to whether reasonableness, necessity, proportionality, and continued justification that are contained in General Comment 35 have been met.

In 8.5, the Committee considers as the length increases, "the State party bears an increasingly heavy burden to justify continued detention". As a result, a level

of risk which might reasonably justify a short-term detention, may not necessarily justify a longer period. The State party also failed to show that no other, less restrictive means were available for protecting the public from the authors which would not require further depriving them of their liberty.

8.6, the Committee further recalls that Article 9 of the Covenant requires that preventive conditions be distinct. I don't think we need to worry about the rest of that paragraph, and, ultimately, they find, in paragraph 8.9, that he's been held for 14 years longer, and that decision, as I said, finally got some response. The process is supposed to be the government responds in 180 days, which they didn't, which is not uncommon for various countries, and by some endless niggling since the government has finally referred it to the Law Commission to do something about. So we do have the importance of reintegration and reformation, a point that Justice Williams, I think, was interested in, and possibly Justice Kós. We do have it should be a sentence of last resort, and this is a form, this is the worst form of preventive detention and preventative detention proper, but it's not a last resort and it ought to be.

That's a short trip through the international authorities, and I perhaps could finally say, or two things, my learned friend, the Solicitor, said there's no evidence this is a dumping ground for the intellectually disabled. Well, if one consults the various case law, Mr Chisnall was at one stage intellectually disabled. He's one of those rare persons who ceased to be intellectually disabled because (inaudible 12:17:51) adaptive functioning.

GLAZEBROOK J:

I'm sorry, we're losing you again.

WINKELMANN CJ:

You're leaning back a bit and getting a bit – yes.

MR ELLIS:

I do apologise. He was intellectually disabled. He became unintellectually disabled because he no longer met the second test in the ID Act of deficits in

adaptive functioning. Because of his prison term, he actually improved. Mr R, who is pending before you all as well on another matter (inaudible 12:18:29) being of note, he is currently held in intellectual disability care. A Mr McCaw – I've forgotten what his name is – Mr Lithgow's client, McCaw, and Dale I think his name was, or something like that. Mr Edgeler probably remembers. He was the third one of the four that were being held. He was intellectually disabled. So three out of four people held in there at the relevant time were intellectually disabled so that, I think, speaks for itself.

Finally, I would like to say that Mr Chisnall was, of course, granted parole before the series of cases started, ie, he was not an undue risk. But following a PPO application his parole was revoked. Doesn't give you a great deal of confidence in the people who find risk.

Anyway, I will surrender my spot to Mr Keith to deal with the legal issues.

WINKELMANN CJ:

Thank you, Mr Ellis, and if you could mute yourself now that'd be great.

1220

MR ELLIS:

Perhaps I should say to Mr Keith, as I took longer than I anticipated, you can have some of my cross-appeal time, so don't worry that I've cut you short.

WINKELMANN CJ:

And now if you can mute yourself.

MR KEITH:

I'll get over the being startled too. E ngā mana, e ngā rau rangatira mā, tēnā koutou, may it please the Court. It's my privilege to follow my learned friend Mr Ellis, who, as he explained, in rather modest terms, has been grappling with these issues for almost as long as I've been in practice. This is an important case and I will, as Mr Ellis said, speak to our appeal submissions, and we'll come back after the adjournment about the Court's enquiry. We say it is

important, we also say it is a simple case, for all the wide-ranging discussion, and I think your Honour the Chief Justice is probably concerned by the possibility that quite important doctrinal questions about declarations of inconsistency might be dealt with almost on the fly, or on the side. The case itself before the Court is straightforward.

I won't go in any detail to our written submissions, your Honours have them, I will rather look to develop those in light of your Honour's questions to my learned friends and to Mr Ellis as he's just given. But I do want to start with page 2 of our written submissions. That is just to focus on just how repugnant breach of the double jeopardy principle is. So if we can scroll back a page. Now at paragraph 1 in the quote we have the section 26(2) right, and there is an interesting, or to me anyway, interesting question about whether that's derogable under any circumstances other than, for example, a fresh trial where there's compelling new evidence. That's certainly the only exception accepted in the European Convention system, and I'll come to that in the course of the submission.

But the simple point and the starting point for our case throughout this proceeding, from Justice Whata onwards, is really two very basic principles. One, is what section 26(2), and the immense common law and human rights case law and principle that stands behind it, I think it goes back about a far as Blackstone at least, is, and this Court has placed considerable stress on these matters, including in matters I've had the honour to be involved in, such as *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1, considerable stress on its very basic proposition, a person sentenced by a sentencing court serves that sentence, and having served it, is free. That's that. There isn't any second-guessing. There isn't, consistent with this right, a chance to do something more, and as you can see – as your Honours can see in the excerpt we have Justice Kirby dissenting in *Fardon* and I can explain why he was in dissent, and why he was later upheld by the UN Human Rights Committee, and that's in the footnote. It's to do with the vagaries of the Australian Constitution and it's lack of a rights instrument. But as Justice Kirby said, it is a debasing process. The Courts being charged with these two Acts,

with the ESOs and PPOs, are being asked to go back and say, someone received a finite sentence in accordance with the then applicable law, taking account of risk and all the other factors under the Sentencing Act, but is then subjected to a second penalty, and it's now conceded, having been opposed in the two courts below, that these two regimes are second penalties. And as I say, that concession makes for a very simply case in our submission. So that is the first basic proposition we rely upon.

The second is more basic too, and humane principle, which is that if we are to detain or restrict people who pose a danger to themselves or others because of a disorder, that detention cannot be penal, it must be oriented, as the Court has already canvased with my friends with reference to the European and UN materials, it must be conducted with a view to the greatest possible liberty and towards, I think your Honour the Chief Justice put it yesterday, the State making every effort to rehabilitate and release, not some conditional right. Not a right, for example, as there is under the PPO legislation to health care equivalent to the general community, but every effort and we can see that that works.

I'll come to how we say the Bill of Rights standards under section 4, which is very important, as the Chief Justice I think noted yesterday, but also 5 and 6 are engaged here. But I also just want to note in passing, and I will come back to them, several further propositions that have evolved in the course of the Crown submissions on appeal. The first which we'd already noted and addressed, and I'll come to it, is the proposition that an *Oakes* or *Hansen* standard a question of looking at an object, looking at whether there are less restrictive or non-rights restrictive means of meeting that objective can be met. The Crown says that approach is wrong because there is a discretion here, but that pushes discretion too far. Of course, the Court must look at whether the public object can be met by less restrictive means, that is what this who jurisdiction is about. That is what happened in *Hansen*, as your Honours will recall Hansen was concerned with the reverse onus provision in the Misuse of Drugs Act 1975 and the Court relied upon the point that evidential onus, a compliant onus, would suffice.

The second and third, and I'll then get to the body of what we have to do because we don't have that much time. The second is the object of these two Acts has been recast over night by my learned friends. Yesterday, and in the written submissions at 84 and 85, these Acts are directed at public safety, that is the object and purpose that the Attorney-General contended for. This morning the submission has been made, no, the object and purpose is to impose a second penalty and that –

WINKELMANN CJ:

I don't think –

MR KEITH:

It was put in those terms, Ma'am.

WINKELMANN CJ:

Is to impose a second penalty?

MR KEITH:

Yes, Ma'am.

WINKELMANN CJ:

I thought they rewrote the, if there was any rewriting, and I'm not saying there was, it was to say that the object and purpose was to rehabilitate and reintegrate.

MR KEITH:

It depended on which bit of the submissions you were – so the two, there are two distinct propositions. One was it was being put that Parliament had chosen to impose a second penalty and the Court should not be second-guessing that. That was –

WILLIAMS J:

Those two propositions aren't inconsistent though, are they?

MR KEITH:

They're not, I think they are –

WINKELMANN CJ:

Well, yes, they – no, they aren't –

WILLIAMS J:

Public safety amounts to a second penalty is still a second penalty.

MR KEITH:

Well, Sir, that – no, no, I'd have to disagree, that they amount to the same thing, Sir.

WILLIAMS J:

I didn't say the same thing, but they're not mutually exclusive ideas.

MR KEITH:

They're not incompatible. No, one could try and protect public safety by imposing a second penalty, but that begs the question of why on earth you would when you don't have to. You can have a non-penal regime. You're absolutely right Sir, that a second penalty has that effect.

WINKELMANN CJ:

I don't know that that was the Crown submission.

MR KEITH:

I'm sorry, Ma'am, if I'm overstating it. It's just the thing that your Honours were being told you could not second-guess was the premise of imposing a second penalty.

GLAZEBROOK J:

Well, no, I think it was imposing, well, my understanding was we couldn't second-guess imposing a second penalty when public safety was involved, so risk was sufficient to the extent the risk was at the high level that was in the

PPO Act, that was my understanding of it and that was so self-evident it didn't need any justification.

1230

WINKELMANN CJ:

I still think it's a little bit unfair the way you've constructed their argument. I don't think they were saying we can't second…

MR KEITH:

I will be guided by the Court as to what your Honours have understood. The important point is not so much how it's been put, is the question that your Honours have, and the question that your Honours have in terms of second penalty is the Court has been told, and I think I'm clear about this, that it cannot look, and it's in the written submissions for the Crown, it cannot look at, for example, a treatment oriented regime, and I can find the reference in the Crown, if need be. But it cannot look at that as a less restrictive alternative because Parliament has set upon this. My point, and I think the only important point is, the object must be framed as, if you like, an objective or factual object, the protection of the public. One can't engage in a circular exercise of saying, well, the legislation does what Parliament set out to do, and that is itself the object. One must look at what its practical purpose is. I think that's an uncontroversial starting point. Whether I have misheard or misunderstood, I don't think is important –

WINKELMANN CJ:

So what's your response to that submission? Can you just restate that, thanks, Mr Keith?

MR KEITH:

So the simple point is, if public safety is the object, then it is for the Crown to show that this is the least restrictive means by which that object can be met, and we say the Crown has not shown that because, as we point to from the comparative international material, the very basic yardstick. If you're going to

detain disordered people, you detain disordered people in order to care for them, treat them and, if at all possible, release them.

WINKELMANN CJ:

Haven't you got a prior response to the Crown submission, which is that it's the very exercise, the thing they say we cannot do is actually the very exercise the Court's required to do under section 5 effectively, to see if there was another less restrictive, less rights-restrictive pathway?

MR KEITH:

If one steps through the five or so steps of the *Hansen* or *Oakes* test, identifying the objective is one step in that process. Determining whether there is a less restrictive means of meeting that is a subsequent step. So no one is doubting here, or at least we are not doubting here, the protection of the public as a proper objective, that it is rational and compelling. The point is there are less restrictive, in fact, rights-compliant measures for dealing with that risk and that is what this case is about and has been from the outset.

WILLIAMS J:

I think the Crown says it will be necessary in some cases, that will be a factual analysis, and a judge will make that decision with a rights-compliant frame of mind.

MR KEITH:

Yes.

WILLIAMS J:

So we can leave it to legislation that itself is capable of, when applied, striking the necessary balance.

MR KEITH:

Yes, Sir.

WILLIAMS J:

Because it won't always follow that it's restrictive in the way that you're assuming.

MR KEITH:

Well, except it will always follow, Sir, and our answer to the Crown is this. It's in two parts. One is it is accepted for the Crown that these are punitive regimes. That they breach section 26(2) and the only question is whether it's justifiable, and we are saying that because of the standard of care, treatment, release, a penalty, a second penalty, is never needed for that purpose.

WILLIAMS J:

It depends on what you mean by "penalty".

MR KEITH:

Well, what we have from *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA), what we have from the other cases, is if it has the hallmarks of a sanction, if it has these attributes of his, if it is as accepted in this case, that both Acts are administered as offshoots of the prison system and the criminal process, then they are penalties. That is the Crown concession that 26(2) is engaged.

WINKELMANN CJ:

So just to clarify, your submissions is that in a sense the Crown pretty much gave up the game on this, or gave up the case in this case when they conceded a penalty?

MR KEITH:

Yes, Ma'am.

WINKELMANN CJ:

A penalty can't be justified?

GLAZEBROOK J:

Well, the only way it can be justified is if it is – I'm suggesting, I'm asking you whether this is the argument. The only way it can be justified is when it's for care, treatment and relief, is that…

MR KEITH:

Well, by definition, Ma'am, we say that if something is for care, treatment and eventual release, it's not going to be a penalty. There are non-penal regimes.

WILLIAMS J:

Well, that depends on what the care and treatment is.

WINKELMANN CJ:

No, but that is the submission. The submission is that that's what those cases are about. If it's care and treatment, it's not a penalty.

MR KEITH:

That you can do all of those things, so without needing a penal regime.

WILLIAMS J:

But doesn't *Ilnseher* say that you can attach it to a prison as long as you're care focused and treatment focused?

MR KEITH:

Ilnseher says you must have a separation between the sentence and –

WILLIAMS J:

That's the sentence, but I'm talking about the place.

MR KEITH:

Yes. Well, maybe it would be a good idea to go to *Ilnseher* because I'm conscious I've been propounding to you without written material for a bit, because there are a useful series of steps in that decision. Just one moment.

O'REGAN J:

While you're doing that can you – as I read *Ilnseher* it was dealing, it was starting from the proposition that the person was mentally disordered and therefore was subject – was someone who could be treated. Does that necessarily follow for everyone who's a public risk?

MR KEITH:

One must, in order to qualify for an order under either of these Acts, have a behavioural disorder. That's one of the threshold conditions.

O'REGAN J:

But that doesn't necessarily mean it's treatable, does it?

MR KEITH:

The question of whether it's treatable is – that is a practical question for working out. One can't presume people aren't. So…

O'REGAN J:

But what if they aren't, though?

MR KEITH:

Well, what if they aren't? They end up like someone like Mr Ilnseher, I think, in the instant case, the German government pointed out, and one can understand this, he had consistently rejected therapeutic interventions. So whether at a technical, clinical level he was treatable or not, I don't know, but at least in the instant case he wasn't being treated because he was resisting all of that. The European Court upheld this regime saying: "Look, you're making the effort; you are trying," and I suppose that is the point, that you have a separation and then you have these efforts on the part of the State. If they aren't working, you keep trying or you continue to review whether you can do something.

O'REGAN J:

Well, the PPO regime says you're entitled to treatment or rehabilitation, if there's some prospect of success. So do you accept that if there's no prospect of success then a PPO would be appropriate without rehabilitative treatment?

MR KEITH:

Well, there are two points there, Sir. One is the comparative cases, including *Ilnseher*, say that it's on the State to continue to try, and they are also saying if, whether because of it's clinically just impossible or because the person won't co-operate, if that is not taking place, well, that is not the State's problem. But where I do say these Acts cut in is rather than putting people into a therapeutic environment and so on where all of that is the focus, we don't get there under these Acts because of the much more qualified provision that is made for that kind of care and clinical-led treatment, or clinical-led care, I suppose, is the short word.

WINKELMANN CJ:

Can I ask you about *Ilnseher*? There are two aspects to the decision, aren't there? There is – and are they related? Are they both necessary to the finding that this isn't a second penalty, and is that the finding? The first thing is that the diagnosis of mental illness made at the end of the sentence is a necessary break in connection between the original offence for which the sentence was and the later order, and the second thing is the nature of the detention that's ordered which is liberty framed, as they say, rehabilitative treatment, reintegration focused. So we're just trying to get some assistance with how those things relate.

MR KEITH:

Yes, and short answer to your Honour's question, yes, that's exactly right. So there is the first criterion of how one happens to come under this restrictive scheme and the need for separation. I think the language of distance is in the German Constitutional Court, but there is still that same principle of a break between the original offence and sentence and this new fact of detention is

required. One has to find new grounds, or it has to be justified on new grounds that are quite separate.

1240

So that's, if you like, how one gets into the scheme. Then looking to whether the scheme is penal, that is when, that goes to both Article 5, the right against arbitrary detention, and Article 7, the right against retrospective penalty because, and the measure is not penal in character. So it is caught by both rights.

KÓS J:

Although in practice it may end up being so because if the deeply dangerous detainee won't co-operate in a therapeutic programme, then the function, in practical terms, is purely penal. It serves no other purpose. It simply keeps him off the street without doing anything for him, and that might be the justifiable circumstance because the public risk, has this got the – and the State is willing to treat, but the respondent is not willing to accept it.

MR KEITH:

I think, Sir, it points to a substantive constraint on basically what can be done for an individual in these circumstances.

WINKELMANN CJ:

Your point is simply that the State's obligation is to be prepared and provide everything to treat?

MR KEITH:

Well that, but also in terms of some of Justice Kós' questions too, the – as Justice Williams was saying, it all depends on what a penalty is. I think it's very hard to say in this Court, well in any juris, in terms of the Bill of Rights Act, it's very hard to say that the object of a compulsory order can make it into a penalty no matter how framed, how – by virtue of their own conduct. I don't think it can be that subjectively driven. If objectively the State has a protective purpose, and has a commitment to doing everything it can for itself to care, treat,

rehabilitate, release, then the fact that the individual doesn't co-operate, doesn't then make, doesn't then cross the 26(2) bar, otherwise one could say all sorts of things, I suppose, are penal.

WILLIAMS J:

Isn't the Crown's argument exactly the same as yours, and that the authority for ensuring that the State does all it can to achieve reintegration and release, rests with the judge case by case?

MR KEITH:

The Crown certainly say that judicial discretion is the cure here, or at least it is the reason why no Bill of Rights inconsistent step, order can be made, they say, but the two problems from our case with that, one is to come back to the point I've already canvassed. That is a non-penal regime would achieve the same object, then these two acts are incapable of being applied in a non-penal way.

WILLIAMS J:

That's an abstract argument because it all depends on what you mean by penal. If you restrict rights, as you must if you're compulsorily treating, then you have to restrict those rights to that extent. Maybe you'd call that penal generally? But you might call it much, much less penal if the focus of such restriction is treatment reintegration, and in the case of the incorrigible care, and what the Crown says is all of that is capable of fitting within the infrastructure of this legislation.

MR KEITH:

And that is the very – well that is the question that we have in the courts below. I don't think we have it here because of the Crown concession, to take the Chief Justice's point. If we are saying, and I can refer your Honour to the table, just as an illustration of how the statute bears this out, how the two statutes bear this out, the table at the end of the cross-appellant's submissions comparing these two Acts with the compulsory treatment legislation, for example, what we see is these two Acts are not framed in those terms. A proposal to include rehabilitation as an object of the PPO legislation was not

followed through on, but more than that, and as you can see from all of the working out, and all of the discussion, one is still under the care and management of the Department of Corrections. One can be pulled back into prison and so on. Those characteristics are what led the Court in *Belcher* to say that ESO's were penal, punitive in character. It's what led the Court below to make the same finding about both of the Acts we have here.

I think where I agree with your Honour that the practical effect on an individual of the two regimes could conceivably be not that much different. If we had Justice Kós' example of a person who does not want to engage with any form of treatment or care, they can be as obstinate in a prison or in an almost-prison like Matawhāiti or in a hospital that their subjective experience may be no different. But the focus here is on what I think your Honour used yesterday, the phrase "the contours of the legislation". The contour of the legislation, the text, and what any judge applying these Acts is obliged to follow because of section 4 of the Bill of Rights Act is that these are not clinically led regimes and they do lack a whole lot of the infrastructure, a whole of the rights entitlement safeguards that, for example, the Mental Health Act has.

GLAZEBROOK J:

So you say once it's a penalty, it's really game over?

MR KEITH:

Well, just on a conceptual level, and I'm leery of Justice Williams' word "abstract" here, but we know because we see these human rights standards and we see the European decisions, we know that it is possible to run treatment and, ultimately, humane confinement or humane prevention but still within a clinical context. It is possible to run and legislate for a non-punitive regime to do exactly these things, to serve the public purpose of protection, and once you've got that, well, when is the hammer of a penalty any –

WINKELMANN CJ:

So if we link it to *Ilnseher*, *Ilnseher* had both the severance of the new grounds, mental illness, and the treatment. So you're conceding that you might have a

situation where you don't have, you know, the new ground of mental illness, which is said is the causal connection, but if it's sufficiently – is your position that if it's sufficiently treatment, rehabilitative, reintegration focused, as opposed to, well, I mean this – if it's not that then it will be punitive, so it's hard to see why a concession of a penalty on your analysis isn't game over.

MR KEITH:
It is, Ma'am.

WINKELMANN CJ:
Yes, okay, yes.

MR KEITH:
Sorry, I was just going to explain why that was.

WINKELMANN CJ:
Okay, right, good. So yes, so the answer to my question quite some time ago was, yes, it is.

MR KEITH:
Sorry, Ma'am. Yes, it was.

O'REGAN J:
Also, you said the Crown had said that in each case the Court can deal with the rights implications, and you said there were two problems with that. The first one was that a non-penal regime can do the same thing and, therefore, that's the least restrictive option.

MR KEITH:
Yes.

O'REGAN J:
What was the second one?

MR KEITH:

The second is, thank you for bringing me back to that Sir, the second is, my learned friend, Ms Jagose, the Solicitor, did point to a couple of provisions, but Justice Glazebrook asked yesterday "what could you graft on", or possibly "what could you prune out", or something, "of these Acts to make them work in that way", and our point is simply one, this 26(2) breach runs through the whole of both Acts and there's no justification for that. But the second point that I was going to make is, we've had no exposition of how, what you read in, what you read out. The best you can do, the best a court administrating these Acts can do, as I think a member of the Court pointed out this morning, the Court can't order treatment, I think there was a question about that. It can't change the nature of these regimes. It couldn't, for example, use these regimes to say, well this person clearly needs to be in a clinical environment, because you can't reconcile, there aren't the powers, you can't interpret it that way.

WINKELMANN CJ:

So, can I ask you the question also, just read me his follow-up question? Mr McKillop submitted, well, when we look at these cases that say it's penal, it's game over because it's, you know, it's penal because it's non-treatment, non-rehabilitative focused, it's not got the liberty focus that the German Constitutional Court says it…

1250

MR KEITH:

Yes.

WINKELMANN CJ:

They are operating with a different definition of what's penal so we have to proceed with those cases with some caution. It's Mr McKillop's pathway through.

MR KEITH:

Yes, Ma'am. The first point is, we are not really dealing with the parameters of a penalty or not in this case. Both of these Acts involve significant interference

with liberty and with other rights, and they're also backed by sanctions that can result in, or measures that can result in even greater restrictions. So before anyone has too positive a sense, for example, of an ESO being a minor thing, a breach of an ESO is an offence but it could also trigger Public Safety Act proceedings, so someone could go from being in a house under conditions to being in the public protection order facility under one of those orders by not complying. So we really are, for all of these steps, not too troubled by whether they're penalties because they are – I don't think one can say any of these things are into the penumbra, are into the grey area of what a penalty might be.

WINKELMANN CJ:

And is it relevant that in each of them, I think in each of them if you breach it you're actually committing a criminal offence?

MR KEITH:

Certainly escape is an offence.

WINKELMANN CJ:

Okay.

MR KEITH:

And I think non-compliance with conditions, I'd have to check. But I think it at least can be.

GLAZEBROOK J:

There'd usually be some consequences, otherwise, well…

WINKELMANN CJ:

I think the Court of Appeal went through that.

O'REGAN J:

So you're saying it's a penalty however you define it?

MR KEITH:

Well, there are lots of learned things about, you know, whether, for an example, having to pay back tax you've legally avoided or having to pay interest on the tax as a penalty and there's European case law about the point at which you leave the penal regime, but we just don't need to get into that, in my submission. The Canadian case law, the *KRJ* case that your Honour's been referred to, so this was retrospectively changing sentencing law so that someone convicted of certain offences had retrospectively conditions of, I think it was, not being allowed to use the internet ever and not being allowed to be anywhere near young people. Those the Supreme Court of Canada had no difficulty in saying, those are penalties over and above the sentence and so on. But I do say, we don't really get there on either of these Acts.

KÓS J:

Is the practical consequence of your argument, that the section 26 right is effectively a non-derogable one?

MR KEITH:

So the 26(1) right is separate, that is the retrospective criminal law, and we do need to get to that later because the Crown now suggests that can be derogated from too, which is not what this Court has said before. But 26(2), to answer your Honour's question, there's a clear exception to second trials and penalties, which is most countries have some kind of ne bis in idem exception for compelling new evidence, or some kind of gross miscarriage of the original proceeding. That's accepted as a limit to that right but, and I'll just find your Honours the reference, but it's in our written submissions, I think for the respondent, as respondent. That's really the only exception anyone ever points to, and the Europeans have gone as far as saying in their – it's a protocol to the European Convention from 1980 that that's the only exception, the right is otherwise non-derogable.

But I think, I do accept, I should observe that the premise that the right against retrospective changes in criminal law, the 26(1) right, being non-derogable as said by this Court in *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145, rather a long

time ago, that the reasoning for that being non-derogable is simpler. The ICCPR says that there are certain rights that cannot be derogated from even in time of public emergency, and it lists that right, the ne bis in idem right is not protected in that way, it's not made non-derogable in that way. But I think your Honour is right that our practical point is that it's, there isn't anything else, and whether that arises by looking to the ICCPR commentary and looking to the European instrument to inform what that right actually amounts to, or whether it's just common sense, that you never need a second penalty. There's never a proper reason for one short of the miscarriage of justice or whatever sort of example.

WINKELMANN CJ:

Which is why these schemes have to be therapeutic as opposed to penal.

MR KEITH:

Yes.

WILLIAMS J:

What's the bright line between therapeutic and penal?

MR KEITH:

So the standard, and this is what was applied by the Court below, is to look at whether or not the measures under an Act have the attributes of a penal regime. Do they apply to sentenced persons only –

WILLIAMS J:

Well most of these sort of difficult cases are going to have the attributes of both. That's the problem. Even treatment regimes for people with these sorts of problems, who need care for their own benefit, in terms of not being in a position to compulsive commit crimes that are going to get them back in jail, probably for preventive detention.

MR KEITH:

Yes.

WILLIAMS J:

Unless the system in some kind of caring way protects them both from themselves – protects from themselves, and protects the community from them, you're going to have some restrictions, even in a treatment-based regimes, some often quite sharp restrictions, and some exceptions, go back to jail, if the compulsion is so strong that the person's needs, and the communities' needs are just too great.

MR KEITH:

I'll unpack that step by step if your Honour wouldn't mind.

WILLIAMS J:

Yes, there was quite a bit in that.

MR KEITH:

So first the distinction that's important to draw is between coercive or restrictive means on the one hand, as a global set, and punitive measures as a subset within those. We would not say that someone who is, say, a compulsory mental health patient who is being punished –

WILLIAMS J:

They might think so.

MR KEITH:

They might think so, and they might, from their subjective experience it might seem little different, and we have all dealt with people in those circumstances. But from a statutory point of view they are not being punished. From a human rights point of view –

WILLIAMS J:

Yes, yes, that's the conclusion. I'm testing the content.

MR KEITH:

Yes, so the content, Sir, is – and we can go into the detail of this, but the line drawing exercise has been to say there are attributes that go with penalties to do with retribution and punishment, predominantly, I'm simplifying, but those are the key attributes. If we have those in place then it is a penal regime. If we don't it can still, as your Honour says, be very restrictive of rights. It can be very unpleasant for the person concerned. It maybe violently opposed by that person. By they are not objectively speaking being subject to retribution, sanction, denunciation.

WILLIAMS J:

Yes, I can see how in the abstract that proposition can be put.

MR KEITH:

Yes.

WILLIAMS J:

It's just on facts it's quite hard to find that line.

WINKELMANN CJ:

May I ask a question? In *Ilnseher* they make it a little bit more rich than you've just suggested, Mr Keith, which is really they say you look at the whole scheme really to see what it's trying to achieve. Is it simply, so simply detaining someone without a therapeutic or treatment focus, without a reintegration therapeutic treatment focus, could be penal, even though it doesn't necessarily have a retribution and punishment focus?

MR KEITH:

No.

WINKELMANN CJ:

So I would – I'm not quite sure you're right in how you've just answered that question?

MR KEITH:

Sorry, I was thinking of the test that the Court of Appeal had applied, and the Canadian courts, for example, have applied in looking for those hallmarks of retribution and punishment. That's –

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GLAZEBROOK J:

But our penal regime has quite a focus on rehabilitation, both –

MR KEITH:

As well, Ma'am.

GLAZEBROOK J:

Well, I understand, but some would say it should have more of a focus on it, but even imprisonment, that's not only for containment.

MR KEITH:

No, but when I say "not only", one can have a care and treatment regime that doesn't have public – I'm trying to remember the words in the Sentencing Act, Ma'am – but it doesn't have –

WILLIAMS J:

A deterrent and denunciation effect?

MR KEITH:

Yes, that does not have those attributes. You can have all the other things going on, so there are those common elements, but as soon as you have the denunciation and so forth.

WILLIAMS J:

So would you say that it may be a matter of degree case-by-case but treatment, rehabilitation or reintegration must predominate or it's game over?

MR KEITH:

I say as soon as you have retribution and denunciation as part of it, it's game over, but equally for the reasons that the Chief Justice has just given, if you're not doing those other things, or at least making the best effort to do those other things, it's also game over because you're just locking people up.

WILLIAMS J:

I don't think you'd say the PPO regime is retributive or denunciative.

WINKELMANN CJ:

Can I just ask a follow-up question because I didn't get to ask my follow-up question? So the point that's made in *Ilnseher* is that you'll find a better question is what is the architecture of the scheme, and they say that it has to be you look at the architecture and is this architecture predominantly rehabilitative and reintegrative, or is it predominantly just containment? I mean their focus is more containment rather than punishment, isn't it, I think?

MR KEITH:

Well, in terms of the Article 5 analysis it is because –

WINKELMANN CJ:

The warehousing notion.

MR KEITH:

In terms of the Article 5, the arbitrary detention analysis here, yes, that's true, because just warehousing is not a proper basis for detention, full stop. One doesn't even have to say it's penal. So if one had mental health legislation which simply said that he would be committed, and nothing more, that would be arbitrary.

WINKELMANN CJ:

Isn't the point that what lies at the heart of that analysis is that if you're just containing people without treating them, you are effectively punishing them?

MR KEITH:

It's sort of which right do you breach first, Ma'am? One of the bugbears in this area is, as I think your Honour said yesterday about arbitrariness, you can look at a scheme such as a PPO and say it's a penalty imposed without a criminal trial, so it's a section – this is the cross-appeal and we won't get to that yet – but it's a penalty imposed without a trial. You can say it's arbitrary detention because it doesn't serve the stated purpose. You can say it's a second penalty, can say for an awful lot of these people it's also a retrospective penalty because the relevant legislation wasn't in force at the time that the people committed their index offence. All of those things are probably true. One thing one sees, for example – I'm thinking particularly of the UN decisions that Mr Ellis took your Honours to earlier – the Court gets to simply saying: "Well, it's arbitrary detention, breach of Article 9, and it's also got a retrospective element in it, Article 15.1. We don't need to look at anything more than that. We don't need to look at whether it's a second penalty because it's already bad." But they do make those two – that complex finding. Likewise, here in *Ilnseher* one has both Article 5 and Article 7 engaged.

WINKELMANN CJ:

Okay, well, we're going to take the lunchtime adjournment and when we come back, perhaps after all this discussion, when we come back perhaps you can just tell us again what you say after the discussion, what's the difference between penal and non-penal.

MR KEITH:

Certainly, Ma'am.

GLAZEBROOK J:

And just remembering that these regimes are public protection and risk focused. They're not retribution focused.

MR KEITH:

I'll bear that in mind, Ma'am, thank you.

WINKELMANN CJ:

Yes, which was, of course, the case in *D*.

MR KEITH:

Yes, Ma'am.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.18 PM

MR KEITH:

May it please your Honours, we've had an opportunity over the adjournment to discuss the question raised by the Chief Justice about adjourning part-heard and while some of us would very much like the appeal to be finished, we'd also like it to be heard solidly and the Court to have as much assistance as it wishes. What we propose, particularly given the time of day and some of the –

WINKELMANN CJ:

Are you agreeing that we should adjourn? So there are two issues. It's getting part-heard –

MR KEITH:

Well, there's adjourning part-heard and there's also your Honour's questions about intervening and the like. So we have a couple of, I think, thoughts which we agree upon but the Court may not, in that direction. One is on the adjournment part-heard, we are conscious that for a whole lot of reasons the cross-appeal is being crammed rather. If we were going to adjourn to address wider issues, that would also afford an opportunity to do the cross-appeal slightly less quickly. So it would be a two-parter.

WINKELMANN CJ:

Yes.

MR KEITH:

On the wider issues, as we understand it wider issues that the Court is concerned with are broadly around the operation of sections 4, 5 and 6 in the context of declarations of inconsistency.

WINKELMANN CJ:

And in the context of a discretion.

MR KEITH:

And in the context of a discretion, yes, so –

WINKELMANN CJ:

And also in the nature of the burden the Crown, the justificatory burden the Crown bears which I think is, you know, the Solicitor-General will be interested to know for future purposes.

SOLICITOR-GENERAL:

And, like I say, an originating application for DOI to, you know, that's, primarily the question around that –

WINKELMANN CJ:

Yes, which is the situation we've set up because there might actually be some process issues as well, court process issues.

MR KEITH:

Yes. So, we don't, I think neither party wants to revisit the specifics in terms of this particular case about the evidence adduced. It would more be arguing that as general propositions because then we might end up remitting and this has been going on for a while as it is. But we would be happy to address those wider questions.

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WINKELMANN CJ:

Yes, so there's no suggestion in our minds the Crown would be granted leave to file evidence or anything like that, we're not suggesting that. We're simply suggesting on a principled basis –

MR KEITH:

Yes.

WINKELMANN CJ:

And we had thought that if we were going to do that, but you can tell us if this is not a good idea, that we would stop after we'd heard you on the appeal, because the natural point of intervention would probably be before the reply, so…

MR KEITH:

I think we're all happy with that, Ma'am. There are a couple of other things. Your Honour had asked about an invitation to the Human Rights Commission.

WINKELMANN CJ:

Mmm.

MR KEITH:

We obviously had no objection to that. One thing with that, and we only mention this, the party concerned, or only one of the parties concerned is here, conscious that the Court has reserved before it the Make It 16 appeal and it may be that those, that that party has a view on some of these systemic issues. Obviously, that's a question for them to make an application about. We can't speak for them, but I did, or we did feel it was important to flag that that might be somewhere in the process.

WINKELMANN CJ:

The Human Right Commission intervened on that one, did it?

SOLICITOR-GENERAL:

No.

WINKELMANN CJ:

No?

MR KEITH:

I was more thinking of the Make It 16 plaintiffs themselves.

WINKELMANN CJ:

I know. No, I was thinking that they might be able to do double duty then.

MR KEITH:

They might, I read the transcript of that hearing. Mr Edgeler was there, I don't think the Commission was, no. No. Sorry, you, of course, were all there.

O'REGAN J:

It's a slightly different case though.

WINKELMANN CJ:

It is a different case.

MR KEITH:

It is a different case, I'm just – some of the questions that –

WINKELMANN CJ:

Well, it's quite a different case.

MR KEITH:

It's for them to –

WINKELMANN CJ:

Yes, it is quite a different case. Yes. Yes.

MR KEITH:

Some of those concepts like onus did, from my reading of the transcript, get bandied about, and obviously this is all hypothetical. It's a question for them and the Court to decide –

WINKELMANN CJ:

And the question would be how we, you know, I think we should probably have a go at writing down the issues we think we need some further assistance with, and we let you have a look at them and then go from there, issue a minute.

MR KEITH:

We'd be very pleased with that approach.

SOLICITOR-GENERAL:

Might I just say something?

WINKELMANN CJ:

You can come to the lectern.

SOLICITOR-GENERAL:

Thank you, your Honour. I'm just going to add to that, yes, if the questions could be framed either by counsel with submission to your Honours to look at, or the other way. I don't object –

WINKELMANN CJ:

No, actually, it would be good if you did the work. I was thinking, why am I volunteering us.

SOLICITOR-GENERAL:

In any event, it does all rest with you, but the parties that might be invited to intervene, or other people that might be invited to intervene, might include the Speaker. If a question comes up about the nature of the parliamentary privileges, which is sort of only coming up here in a sort of slight way, but that might be a question –

WINKELMANN CJ:

But I did ask you that question, didn't I?

SOLICITOR-GENERAL:

You did.

WINKELMANN CJ:

Because I had in my mind that that piece of legislation is quite restricted by what the Court can do with materials that are produced in Parliament in this context, so.

SOLICITOR-GENERAL:

So I'm not sure if that opens an entire Pandora's box to ask that question, but it just occurred to me over the break thinking about that might be another party that might be invited to intervene, if the question is formulated to cover that question, then the Speaker might also be invited. That was all I had to say on that point. I'm content with, I've had a chat with my friend, Mr Keith.

WINKELMANN CJ:

Right.

GLAZEBROOK J:

And then I was just thinking, just in terms of what we were saying that obviously I would've thought the respondent might want to have some opportunity to say something about the submissions of any intervening party. So it wouldn't just be a reply, it would –

WINKELMANN CJ:

Yes, so what, you'll have to have a chat about the process.

GLAZEBROOK J:

How that worked.

WINKELMANN CJ:

Yes. Of course, we don't know that the Human Rights Commissioner will chose to intervene.

SOLICITOR-GENERAL:

Shall we file a memo that – I'm sure they will. Shall we do a memo?

KÓS J:

It was a fairly imperative invitation, I would've thought.

SOLICITOR-GENERAL:

It's hard to resist this Court's invitation.

KÓS J:

I mean, we'll be assisted by them in this case more than we would be in Make It 16, I think.

SOLICITOR-GENERAL:

Shall we write in the memo, which sets out what we think the process should follow and attach this set of issues and get that to your Honours?

WINKELMANN CJ:

Yes, and then we will issue a minute which is very encouraging of the Human Rights Commissioner.

SOLICITOR-GENERAL:

Will do.

MR KEITH:

Thank you, your Honours. I should also have said, of course, as part of closing, our part of the submissions this afternoon, Mr Edgeler and I have both things left to do, I think.

WINKELMANN CJ:

Yes.

MR KEITH:

But then we'd stop at that point. I think, I'm grateful to your Honours both for the encouragement, if that's the word of the moment, to re-read *D* which I had read, but of course is the significant authority now on the definition of a penalty. So I thought I would address that question of whether something is a penalty or not now. I should prefix that by saying, of course, it isn't – I can understand the Court's interest and I can understand how it feeds into these further questions, but I would be leery of opening any suggestion that the case as we've put it in this Court, proceeding from Crown acceptance of the Court of Appeal finding, that the two Acts are penal in nature, they give rise to penalties.

WINKELMANN CJ:

I don't think I was suggesting that it wasn't penal but rather Mr McKillop's point was that when you approach whether – what derogation should be allowed from section 26(2), you should bear in mind that New Zealand's definition of "penal" is very broad.

MR KEITH:

Yes, Ma'am. So in terms of that, I'll just work in, and there's no particular magic to this order, the *D* decision of this Court, and then the relevant passages from *Ilnseher*, and I'll also go to the Canadian decision *KRJ*. I'm conscious that I'm telling the Bench about judgments that it itself wrote, but…

KÓS J:

Not me, Mr Keith.

MR KEITH:

No, no, Sir.

WILLIAMS J:

Nor me. You can address your comments to the far left and the far right.

GLAZEBROOK J:

And also remembering that even when we've written the judgments we don't necessarily remember them in amazing detail.

MR KEITH:

I'm sure better than my poor efforts, Ma'am. So *D* we can bring up. It's tab 22 in our bundle, and the relevant passage starts at paragraph 55.

So as all of you will know, this was to do with registration as a sex offender and whether that was a penalty, and this is the judgment of your Honour, the Chief Justice, and Justice O'Regan, and following *Belcher*, following also *Bell v R* [2017] NZCA 90, that protective impetus or a label is not important. Then if we can go across to paragraph 57 and a comparison with ESOs, leading the Court, these two members of the Court, to the conclusion that this is a penalty, and the same conclusions reached by your Honour, Justice Glazebrook, at paragraph 161. We don't need to go to it, I think, unless the Court wishes, and 278 of Justice William Young. I don't think Justice France actually expressed an opinion. The head note suggests she did but I don't think so.

WINKELMANN CJ:

I think she concurred with Justice O'Regan and my judgment on most things apart from the exercise required of the sentencing Judge.

MR KEITH:

Yes.

WINKELMANN CJ:

Of the Judge, rather.

MR KEITH:

So that – I don't know if I would agree with the characterisation of it as wide or comparatively wide. One is looking to –

GLAZEBROOK J:

You mean the term "penalty", sorry?

MR KEITH:

Sorry?

GLAZEBROOK J:

The term "penalty".

MR KEITH:

The term "penalty". The definition. But I don't – the New Zealand definition Mr McKillop mentioned, I don't see as particularly broad. The main thing, and your Honours will see this in the two comparative cases that I'll come to, is very much a focus on substance over form, that the label on something or even the stated object of something is not the criterion. What it does is the criterion.

I'll give your Honours too, and I can go to it if your Honours wish, at page 101.0131 of the case on appeal is the Court below in this case, from paragraphs 111 onwards, performing much the same assessment of whether these two Acts are penalties. It's a fair summary, I think, to say in respect of ESOs the Court essentially pointed to the findings of another full Bench of that Court. In *Belcher*, the fact that – actually, it might be useful to go to that.

WILLIAMS J:

Belcher, or the decision below?

MR KEITH:

The decision of the Court here because it deals with both Acts. So that's 101.0131.

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WINKELMANN CJ:

What paragraph?

MR KEITH:

So the discussion starts at paragraph 111 of the Court of Appeal decision. The substantive analysis really begins two pages down at paragraph 115. So this list here, which goes over the page, is the list that led the Court in *Belcher* to find that ESOs amounted to a punishment. I think it would be fair to say, and I know it is not dispositive, but fair to say that both judgments, both the original *Belcher* judgment and this which adopts the same conclusions, may have been influenced by the same concept, not necessarily the same authorities but the same concept of separation that we see in the European cases, that the degree of close connection here, as you see if your Honours work through those paragraphs (a) through (n), very much that this is an extension of the criminal process, that it's triggered by a conviction. It has these various attributes of criminal process as well as the consequences.

KÓS J:

It's curious, isn't it, because he could design a legislative scheme in which the conviction was a background fact but what was really important was a propensity to behave in a way that caused danger. The difficulty here is the design of the scheme puts the conviction as the triggering event. It is hard not to see that as then a punishment of the same event.

MR KEITH:

Yes, Sir. I mean there might be the other objection which we've also raised to a scheme which used the conviction as the threshold, that you are targeting only ex-offender, or finitely sentenced offenders, and not other similarly dangerous people, and it's accepted there are similarly dangerous people. But yes, one could do that, and I think if it – it mightn't – well, clearly, the fact that someone has a conviction as a triggering event or as a background event isn't somehow disqualifying you. You can, as your Honour says, run a scheme.

WINKELMANN CJ:

But those two concepts are quite similar to *Ilnseher*. I can't remember the name of the case now. *Ilnseher*. They're quite similar to *Ilnseher*, aren't they?

MR KEITH:

Well, there is a common – I mean I think your Honour, the Chief Justice, made the comment that the virtue of the UN and European stuff is not only that, of course, when it comes to the UN Human Rights Committee in particular, it is a body of high-standing and significant interpretative authorities, our Courts and also the ICJ among others, but there is also the point just that these are problems everyone grapples with. There's a vast literature which I think, her Honour, Justice Glazebrook, is part of, about what actuarial risk prediction over the last 30 years has done to criminal processes and para-criminal processes. Suddenly, we can say this person is or isn't likely to offend according to some statistical metric, and countries have been dealing with that. I mean some of the things that Ms Jagose was taking you to, the Scottish Serious Offenders system, which was briefly mentioned, is about what you do if you have someone coming to the end of a sentence, can in their systems be a sentence of quite a minor offence, but you have detected in the process of either the criminal process or sentence administration that they have some deep behavioural disorder which is very dangerous or they may have committed a dangerous act while in prison. What do you do with that information?

So these sorts of questions have been coming up, and as a subset of the wider issue I think I touched on, that the question of when, say, a fine or interest on a penalty payment or something like that become – or interest on a tax repayment or something – when that attracts criminal process protections, is quite an old one. But your Honour is right that there is that connection.

Briefly then I'll go to *Ilnseher*, which I'm sure I'm mangling as well, and the particular passages there begin at paragraph 178, so this is tab 37 of our bundle. So, we – the European Court has evolved its own criteria. It has been very careful to say that the concept of punishment is an autonomous concept, it's not a function of how the national law characterises it for the same reason that the Human Rights Committee was concerned in *Fardon*. So just because it's got civil in the name of the Act, doesn't make it Human Rights compliant. And as we go on, 203, if we could scroll down, so here is the autonomous

concept of penalty, it must go beyond appearances and further down, over to the next page, that one is looking at the severity of the measure, nature and process, implementation and so on. Then it says: "Impact on the individual is not in itself decisive," and this is much more clearly put than I think I managed with in my discussion with Justice Williams, that the subjective experience of the person subject to restriction is not the – it is significant but it is not the criterion.

Your Honours also have, but I won't unless your Honours wish, go to the *M v Germany* case, it's at tab 37 in the respondent bundle. It's cited earlier in *Ilnseher* as giving the Courts particular approach and there are –

WILLIAMS J:
Which one, sorry? Which?

MR KEITH:
M v Germany.

WILLIAMS J:
M, yes. Thank you.

MR KEITH:
Tab 37. And one sees also in *Ilnseher* the sort of working out of why they, in this case, and this came as the Court's aware at the end of a long evolution of German practice, to try and comply with the European Convention, why they say this not, and this is coming back to a point which I think the Chief Justice had made, which is, it is quite difficult to disentangle the question of whether a penalty, which is what the Court is concerned with in these passages because it's concerned with the Article 7 right against retrospective penalty, quite difficult to disentangle the steps needed or the attributes needed for something not to be penal for Article 7 purposes from the steps needed not to be arbitrary for Article 5 purposes. So our section 26(2) and our 26 and section 22, they do reflect similar values. I would say the difference about Article 7 and our section 26 is that there is very much a focus not only on detention, this obviously applies

to measures other than detention, but also on that criminal character, so there are lots of reasons someone might be detained or restricted. This is particularly targeting penal measures which can be legitimately imposed for criminal purposes or penal purpose, criminal purposes is better, but not, for example, for rehabilitation or mental health or whatever.

WILLIAMS J:

It does seem to be a spectrum of factors. This is not a bright line, is it?

MR KEITH:

No, no, your Honour's quite right.

WILLIAMS J:

And yet the impact is, at least on your submission?

MR KEITH:

I'm sorry, Sir, the impact on the individual?

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WILLIAMS J:

No, on the analysis.

MR KEITH:

On the analysis? Sooner or later you –

WILLIAMS J:

Once you've convinced someone that this is one and not the other, that's a fundamental shift in the way you think about it.

MR KEITH:

Yes. Yes, because if you look at it, if your Honour thinks about it in terms of the grouping of rights under the Bill of Rights Act, you have rights that apply to detention generally, section 22 and section 23(5), and those apply to a mental health compulsory patient just as much as to a criminal offender, just as much as to someone awaiting deportation, for example.

WILLIAMS J:

Well, maybe that suggests that it's appropriate to take a broad view of the idea of penalty and let reasonable limitations do a lot of the lifting because it's a spectrum.

MR KEITH:

Well, what I was going to come to next, Sir, is, though, in terms of if one can speak of the contours of the Bill of Rights Act and of the ICCPR rights, as soon as one enters the criminal sphere, and that line, as your Honour says, requires some assessment in some cases, I don't think it's hard in this case but in some cases it really does, the tax interest one is quite a good example, as soon as one approaches that, we're into does the presumption of – or there is a whole set of rights that apply to presumption of innocence and fair trial and so on. It's quite different.

So I don't think – well, certainly the way that each of these cases has approached it is to make a threshold finding of whether or not something is penal and then a whole lot of things follow from that, including the retrospective point. There could be no complaint, I think, partly because it – well, if, for example, someone had been committed as a compulsory patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992, and that Act were repealed and replaced tomorrow, someone's status could be continued under the new legislation and reconsidered under the new legislation and they couldn't say: "Well, that's somehow retrospectively applying law to my circumstances," whereas an offender can't be re-sentenced, can't be re-assessed under a new regime.

WINKELMANN CJ:

If you have a look at paragraph 208 which may be relevant to some of the arguments being addressed on behalf of the Crown, the Attorney-General, which is to do with the dynamic nature of the assessment about rights compliance, which I think is making the point that we'd more or less arrived at, which is some aspects of the regime will be static and others will be dynamic in terms of whether or not they're rights compliant.

MR KEITH:

I think that must be right, although I think that may be particularly directed at the fact that Mr Ilnseher had been, I think, detained under a series of regimes and the question was, you know, does he have a case now? But I think your Honour is right that – well, I think in the mid – about six lines and to the point that there are some attributes which are structural and some attributes – and this is where the Court's evidence about – the evidence for Germany, rather that, you know, there are these things being offered and so on, that we are running a different scheme than the one that was previously criticised by the Court, I think that does enter in.

The last, and perhaps, unless the Court wishes, I'll just give your Honours the reference, the *KRJ* case which is in the appellant's bundle at tab 39, when I was talking about retribution and denunciation and those sorts of things, that was very much taken from – I had in mind the Canadian approach. So the particular reference is paragraphs 28 and following of *KRJ*, so 2016 decision of the Supreme Court of Canada, and this was, as I've mentioned, holding that new sentencing requirements, that is that people sentenced for certain offences could not access the internet and could not be in a place where children were, did amount to penalties. But I'll just leave your Honours to look at that.

I suppose it could be said that the – my reading of them is that they are different means to the same end, that the Canadian language is really to say does this look like something a – or does this look like a part of the criminal law, or how much does it? So it may be a little more structured but I don't think it's wider or narrower.

Now I think I can go fairly rapidly, of course subject to the Court's questions which are very helpful and I don't want to stymie in any way at all. I think I can really just go back to the written submissions and touch on a quite small number of points. There are a couple of side issues that have come up in the course of argument but I'll touch on those as we come to them.

The starting point, and this is at page 7, paragraphs 11 and following of the respondent's submissions, is that we still don't have an interpretation of these Acts that addresses the penal character and we say that can't actually be done, and your Honours have already heard me on that.

The critical passage is over the page at 15.1, and this is the point again that your Honours have spent a great deal of time on, both with me and with the Solicitor. What we have is that if the objective is public safety, it could be served no less well and probably better by a clinically directed regime that doesn't involve a second penalty. It could be that an answer to that concern, the end of 15.1, is Justice Kós' proposition, that you might be able to have a regime that admits people who have committed certain offences but only as a threshold question, not as an evaluative factor, but that does then run into the *A v Home Secretary (No 1)* [2004] UKHL 56, [2005] 2 AC 68 objection that one is imposing very significant, or the legislation imposes very significant restrictions on some people who are dangerous while leaving others at large.

KÓS J:

I mean it's not inconceivable that you might have a second penalty, but the design is more focused on other aspects, such as the therapeutic response. Nonetheless, there is, to some extent, a second penalty, but that is the only effective design that can be made and that might be a justified limitation. You don't have to completely obliterate penality conceivably. But it's the fact of penalty that requires justification.

MR KEITH:

Well, if there is scope to justify that. I just query how that would ever arise. If one is putting protective measures around a person, taking Justice Williams' point that they may well feel nothing has changed, but from a statutory and law enforcement or Court point of view, if it is committal and it is therapeutically administered, there's no penal quality to it anymore, and I think that's what the *Ilnseher* judgment is very much angling at, that one has something. So you may be identified for consideration by virtue of having committed a heinous

offence but you do the time for the heinous offence. You may then be subject to some sort of committal.

WINKELMANN CJ:

This brings us back, the question that Justice Kós just asked, brings us back to the point could it be, could you, do you accept that it couldn't, that it could avoid being categorised as a penalty even though, as Justice Kós says, you get admitted to it because you've committed this previous offence and other factors, but it is purely, it has a therapeutic framework?

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MR KEITH:

Well, the European Court would say that, and I think I have to follow that.

WINKELMANN CJ:

You see, I'm not sure that the European Court does say that because it has the two things, doesn't it? It had the break with a conviction as well.

MR KEITH:

It has the break with the conviction, but it didn't say – this may be where the Court can, the judgment can only tell us so much. As I understood the Germans, the description of the German scheme and its background in Germany, the premise was altogether that people weren't being – the only people being considered for this were people towards the end of a sentence because it was coming against the background of something like a preventive detention sentence.

WINKELMANN CJ:

It does say the assessment any mental illness has to be towards the end of the sentence.

GLAZEBROOK J:

The other point about that is that most of the risk measure, actuarial risk measures actually relate to or have as an element the criminal convictions

because the fact that you've done it before is a predictor of whether you'll do it again, whether it's a strong predictor or –

WILLIAMS J:

Well, you've got proof that it was done before, incontrovertible proof that it was done before.

GLAZEBROOK J:

Well, some of them take into account accusations as well, but actuarially, they are, most of the actuarial statistics come from whether people have, after having either been accused of or convicted of something, have offended again and that's how the risk elements are worked out, along with other factors such as dynamic – because those are the static risks, yes. That's if it's still done the same way and I, I haven't seen anything to suggest that it's not.

MR KEITH:

I mean, I think I have to take that from your Honour. I have some familiarity with some of these things, I've done some of these cases, but I'm conscious too that one of the themes in the literature about dangerousness is that people are sometimes identified as having personality disorders through some unrelated set of offending or through a pattern of minor offending that is nonetheless bound to disclose, you know, a total lack of empathy or something like that. I'm getting beyond my technical knowledge on this, but it is a –

WINKELMANN CJ:

So can I just press you a little bit harder, I'm not trying to nail you down in a negative way, I'm just trying to get clear what your submission is. So would that mean that if we have this present model of admission to the scheme, but the scheme as constructed was a therapeutic treatment driven scheme, then you would say that that is not penal?

MR KEITH:

It's not penal. It might give rise to an arbitrariness objection in terms of the *A v Home Secretary* decision, but if the State is justifying the measure as

detention, for example, because of the dangerousness of the group of people and, as the policy history here records, the Solicitor took you to the paper, the Cabinet paper yesterday, there are people with personality disorders who are not – dangerous personality disorders who are not caught, there might still be a section 22 objection, an arbitrariness objection. But it wouldn't be penal in terms of 26(2).

WINKELMANN CJ:

What was the case you said?

MR KEITH:

A v Home Secretary is the –

WILLIAMS J:

Why would that not be penal?

MR KEITH:

It wouldn't be penal because you could, on the Chief Justice's construction, have a regime which used the criminal offence only as a qualifying fact, as an initial threshold factor, not as an evaluative factor. Everything that happens after that is about safe management of that person in care, if possible.

WILLIAMS J:

Well, yes. And that's – you see your argument is, you can't derogate from double penalty because the only reasonable derogation is clinical and that by definition is not penal, so, whoop, you go into a rather, rather elegant loop. The catch is that second part of paragraph 133 in *Ilnseher*.

MR KEITH:

Yes.

WILLIAMS J:

And the point that's just been discussed, I think, which is what about the incorrigible dangerous for whom it's hard to say this, in the absence of

treatment, is not penal unless you frame it as protective. But would it be any different in substance even if you did? In other words, you have to lock them up and control them and supervise them because they're incorrigibly dangerous and treatment won't work or isn't even worth trying.

MR KEITH:

Sorry, your Honour, it's a good question. I'll just go to 133 of *Ilnseher* so I know that I'm speaking from the same starting point, if your Honour doesn't mind.

WILLIAMS J:

Just towards the end of the paragraph there.

GLAZEBROOK J:

Of course, we don't know there are any people who are incorrigibly dangerous or that can't be managed in other ways.

MR KEITH:

No, and I mean the closest we got to that was some scholarly writing by Corrections Department psychologists saying there's this popular myth that you cannot treat psychopathy, but part of that is we haven't really tried and we're now trying. But in answer to –

KÓS J:

I also wonder whether the focus on the word "penalty" is slightly misleading. The protected right in 26(2) is a right not to be punished again for an offence which you've already been convicted of. So the question, I think, is what the detention amounts to. Is it motivated or is it moved by the convicted offending, or is it instead motivated by the condition the person currently is in, including the incorrigibility, and that's really what *Ilnseher* is saying at paragraph 236, which we haven't looked at before, but that's really the conclusion of the judgment.

MR KEITH:

Yes.

KÓS J:

And that's where they say that the preventive detention was imposed because of the need to treat the present mental disorder, having regard to his criminal history. That's the point I was making before. The criminal history reverts to a background consideration, but it's the current mental condition that requires the action.

MR KEITH:

Yes.

KÓS J:

And they go on to say: "The punitive element of the preventive detention and its connection with the criminal offence committed by the applicant was erased to such an extent in these circumstances the measure was no longer a penalty." In other words, there was no longer a punishment for that former criminal offending.

MR KEITH:

Yes. If I can just answer Justice Williams' question first, I think. I think the answer to the incorrigible person is the same as any committal process. The committal occurs because of the risk and the prospect of treatability. One wouldn't say that someone who poses a risk by reason of a behavioural disorder, who can't at present be treated or who currently refuses to be treated or whatever the scenario is, one wouldn't then say, well, that person can't be restricted or detained at all.

WILLIAMS J:

Quite. That's really the essence of my question. Now how do you apply a BORA analysis to that that gets you to the answer that I think we probably would all agree is the correct answer, without undermining your argument?

MR KEITH:

I think what –

WINKELMANN CJ:

Well, I don't know what the correct answer is.

MR KEITH:

I think what I would say in that scenario is, and what the cases say in that scenario, is if you are committing because of risk arising from a personality disorder or other condition, then that committal must be clinical in character. The fact that it's not able at the time to attain a therapeutic objective is only – is, one, has to be for want of trying but, two, at least then one has complied with the requirements for confining a person for that reason, if –

WILLIAMS J:

So you have to keep trying and you have to keep trying in a clinical context?

MR KEITH:

You have to hold in a clinical context because that is the humane –

WINKELMANN CJ:

And a therapeutic context is a –

MR KEITH:

In a, yes, therapeutic context.

WINKELMANN CJ:

– you know, which is a non-punitive context.

MR KEITH:

Yes, and you have to keep trying, and that's how it's not then arbitrary. I think that must follow.

In answer to Justice Kós' question, the short answer, which may not do the question quite justice, is that the concept of punishment for an offence, I think your Honour's analysis is right. The only clarification, which is probably needless, is as long as it's a factor, even if it is a contributing factor, *Ilnseher*

would say you are still tied up with an additional punishment. If it's a threshold and then there is a new erased or severed assessment of present risk, then one is no longer being punished for that offence.

1500

KÓS J:

Well, it could also retreat. I mean if it was no longer a dominant consideration, but simply a peripheral consideration, then justifiability might be more easily achieved by the Crown because there is this greater purpose associated with their current disordered condition requiring response.

MR KEITH:

But I think that comes back to the – I think I agree with Justice Williams that there is a sort of cute circularity here, but it's not because the thing is artificial; it's because you can look at these questions from different rights perspectives. If the criminal conviction of the offence is weighing in the balance at all, you are still acquiring an additional penalty that a person without that criminal conviction may not.

WILLIAMS J:

So you can't treat it as actuarial, merely actuarial?

MR KEITH:

Well, this doesn't seem to – I'm conscious of Justice Glazebrook's observation, but this language of erasing the conviction as a factor in *Ilnseher* suggests no, you look at what the behaviour is.

GLAZEBROOK J:

Well, then, most of the actuarial tools are not going to work.

WINKELMANN CJ:

So in *Ilnseher*, *Ilnseher*…

WILLIAMS J:

Just call it *I*.

MR KEITH:

The *I* case.

WINKELMANN CJ:

Yes, in the *I* case, the – now I've forgotten what I was going to say. Yes, I won't say it.

MR KEITH:

I just go to paragraph 147 of the *I* case – which I'm much happier with too – which is you have someone being diagnosed with a sexual preference disorder, namely sexual sadism, and then there's a substantive risk assessment.

GLAZEBROOK J:

I'd be astonished if they weren't diagnosed, partly. I mean in some ways this case is because you have to put them into mental disorder because otherwise you can't possibly put – because of the list of factors, and protection of the public isn't one of those factors, they had to say – it was unsound mind, was it? I can't remember what the…

MR KEITH:

Well, there is a protection of the public but it's about imminent risk, that the – so…

WINKELMANN CJ:

So what I was going to say, now I remember, in the *I* case, the pool in which this scheme can operate is selected by the conviction but it's got the intervening factor which is the mental health diagnosis, and you're saying that you could take the same approach to this one, that the pool of potential people subject to it are those with these convictions, but the assessment that is undertaken either is currently or, I'm not quite sure if you were saying is currently, or could be

constructed in a way which is sufficiently distinct so it still complies so long as it's a therapeutic model that attaches.

MR KEITH:

Yes. I think in terms of your Honour, Justice Glazebrook's, question, the concept of mentally disordered under Article 5.1 of the European Convention is given a wide compass. So it is more than something that would count as a mental health condition or the like.

GLAZEBROOK J:

Yes, I realise that.

MR KEITH:

But where we say we're on all fours here, and this is, for example, because of section 13(2) of the Public Safety Act, one has to have a severe disturbance in behavioural functioning. It is using that criterion. We're just saying that under the European Convention that criterion is the entry into this sort of scheme.

WINKELMANN CJ:

Could you – if you give away the first point that I've just said, if you say that there is a sufficient disjunct by virtue of the risk assessment, are you making a concession the other way which is as similarly bad for your case as the Crown makes when they make a concession it's a penalty, because then it's not caught by section 26(2)?

MR KEITH:

If you had a sufficient disjunct.

WINKELMANN CJ:

Okay, so you're not saying it is sufficient disjunct? You're –

MR KEITH:

No, no, definitely not. No, no.

WINKELMANN CJ:

Okay. It could be constructed so it isn't – yes.

MR KEITH:

It could be constructed. That's our counterfactual.

WILLIAMS J:

So you say the trigger is fatal; forget everything else?

MR KEITH:

No, I say the scheme has many fatal aspects.

WILLIAMS J:

I know but – yes, of course, I understand that, but on your argument the fact that a conviction is the trigger is itself fatal.

MR KEITH:

In terms of section 26(2), which is what we are talking about now, no.

WILLIAMS J:

On –

MR KEITH:

Because you have to have a conviction in the mix, yes, but it's also all these other attributes. The scenario that Justice Kós was talking about of a therapeutic regime, which like in, as on the facts in *Ilnseher*, is triggered, follows a conviction and sentence. For 26(2) purposes you could have a non-penal regime. It's just these aren't.

WILLIAMS J:

Right. So you're not following *Ilnseher*?

MR KEITH:

I am following *Ilnseher*.

WILLIAMS J:

I thought you said *Ilnseher* said that the reliance on conviction on the prior criminal process in any part of the system was going to make it breaching.

MR KEITH:

If it's a – the Court upheld the scheme and the scheme was a scheme applied to former offenders.

WILLIAMS J:

I'm not talking about whether they are former offenders. Whether the offence, the prior offence, is a qualifying factor.

MR KEITH:

If the offence is a factor in the continued detention, then it is, continues to be a penalty.

WILLIAMS J:

Correct, and…

MR KEITH:

If it's not a factor but it may get you into the pool, to take, I think, the Chief Justice's term, then *Ilnseher* does not say, notwithstanding all of the erasure, the separation, the distancing, I think was another Court's term, notwithstanding all of those things, they don't then say: "Oh, but this is still a penalty because Mr Ilnseher is only qualified in the first place, only qualified for consideration, because of an offence." We can't – it's not possible, or there's not authority to say that this right is engaged by a scheme of the kind that Justice Kós has described.

WINKELMANN CJ:

But your point is that it could still fall foul of arbitrariness requirements.

MR KEITH:

Yes.

WINKELMANN CJ:

So in order to survive the second penalty and the arbitrariness challenge, you need the feature of disjunct and therapeutic?

MR KEITH:

Yes.

WINKELMANN CJ:

Right.

KÓS J:

And if it is still penal because it's weighed in the balance, well, then you have the section 5 analysis. It could still be justifiable inasmuch as it may not be a dominant consideration. It may simply be, as it were, a passenger in a process which is intended to deal with a public risk and to rectify as far as possible the disorder that the respondent suffers.

MR KEITH:

I just don't think the right would be engaged at that point.

WILLIAMS J:

You say there's always a reasonable alternative, therapy, and therefore that scenario is impossible. That's what your argument is.

MR KEITH:

I can't think of a scenario in which your response to someone who is presenting as disordered and dangerous – let's – it's probably taking a very serious matter too lightly – but if they are disordered and if there is evidence of public risk, there's been no – I can't think of a scenario, the Crown certainly hasn't put one forward, in which the necessary measure is punitive.

WINKELMANN CJ:

So your fundamental submission is that there's no justification for the imposition of a second penalty? It's non-derogable unless it's in that rare case where it's flying out from a second trial?

MR KEITH:

Yes, I think that's the – I…

WILLIAMS J:

That's peculiar to the facts in this, isn't it, because there will be other cases perhaps where that is possible, but here your logic hinges on the idea that there's always a reasonable, non-penal response to this particular problem.

MR KEITH:

Yes.

WINKELMANN CJ:

No, I think your answer is "no". You're saying it's a general proposition that there's a –

MR KEITH:

Sorry, I was saying "yes" as a –

WILLIAMS J:

That's what – yes.

MR KEITH:

I think it depends on what I –

WILLIAMS J:

You're agreeing with me, aren't you?

WINKELMANN CJ:

No.

MR KEITH:

What's this – if I can do the unforgiveable thing of asking a Judge a question, Sir…

WILLIAMS J:

No.

MR KEITH:

Oh, okay.

WILLIAMS J:

I'm joking. Go ahead.

MR KEITH:

When does that happen? When is a penal response the only response? Can – because we haven't thought of one.

WILLIAMS J:

Well, in this context or more generally, because I haven't thought about it more generally, but your comfort is in the idea that in this particular case, where you've got people with disorders of various kinds, corrigible and incorrigible, care will always be a reasonable and, therefore, preferable response.

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MR KEITH:

Yes. That's, sorry, that was the general context I was taking from the Judge's question –

WILLIAMS J:

Yes.

WINKELMANN CJ:

Yes, so your essential submission to us is, don't go saying that section 26(2) right, is derogable beyond the second trial kind of scenario because this is not the case to decide it as because it's clearly avoidable? Because you really want

us – your submission is really that section 26(2) right, so far as you can see, is non-derogable outside the second trial scenario.

MR KEITH:

It's either non-derogable or you can't find a justified limitation on it as a matter –

WINKELMANN CJ:

Whichever way, yes.

GLAZEBROOK J:

Both, same side. Different sides of the same coin.

MR KEITH:

Those are two ways of saying exactly the same thing except one, yes, well you can either say this is an absolute right and there is no going against it. It's like torture, it's like retrospective criminal law. Or you can say, well, we just – it's common sense that you can never be in this scenario.

O'REGAN J:

What's the practical difference between the situation Mr Ilnseher is in and the situation that a person under a PPO in New Zealand is under?

MR KEITH:

Because Mr Ilnseher is in a discrete institution and it's clinically run. That's the difference.

O'REGAN J:

He's in a premises which is still part of a prison, isn't he? Or at least adjoining it?

MR KEITH:

So, someone under a PPO which was the previous prospect, there is a Corrections facility, I think it's inside what's called the energized fence. Then there are other Correction – so that's for public protection orders, and that's required. It must be a secure facility run by the Department and I think

the Act may say it has to be on prison grounds but separate from the prison. Then –

O'REGAN J:

That's the same as *Ilnseher*, isn't it? He's in premises that are adjacent to but not part of the prison?

MR KEITH:

But run as a therapeutic environment and therapeutically run. That's the difference that in order to get out –

O'REGAN J:

But a PPO person will be getting treatment if there is some prospect of them being treated, won't they?

MR KEITH:

I think the best illustration, and I, we only have the sort of general description of *Ilnseher*, there is a description of how he's under the care of the psychiatrist, he's doing this, he's doing that. But in terms of what a statute can say, and this is our criticism of the two Acts in the New Zealand context and this is at the back of the cross-appeal submissions, when one holds up therapeutically administered regimes for people who are a danger to themselves or others, the MHCAT and the Intellectual Disability Act, these two Acts do not have those attributes, they are not clinically led. They do not have the review processes and so on that –

O'REGAN J:

PPOs do.

MR KEITH:

PPOs have some of those things but the difference – I'll just grab it. The difference if one looks – so can we bring up the cross-appeal submissions? Right. So, this is the difference on the face of the statutes, getting – so if we look at –

O'REGAN J:

I'm not really looking at the – I'm just asking you the practical difference. I mean, are we just dancing on the head of pin here or is there a real practical difference to someone in the position of a potential PPO designated person and Mr Ilnseher in terms of being detained in an environment which is at least adjacent to a penal institution and subject to whatever treatment is realistic. In his case, he's mentally ill so it has well-recognised treatments. But in a lot of PPO cases that won't be the case, will it?

MR KEITH:

Well, in his case he's got a behavioural disorder and it's important to be –

O'REGAN J:

Well, it's described in the judgment as a mental disorder.

MR KEITH:

But not, we're getting to the limits of what I can be confident about. It is a different thing from a mental illness, a description of someone, but I – to answer your Honour's question anyway –

O'REGAN J:

Well, if you look at 147, it talks about "the mental disorder".

MR KEITH:

Yes. Yes. Psychopathy is a mental disorder, for example, it's not a mental illness. The reason why someone is subject to a PPO in New Zealand, because they have a propensity to commit particular offences, because they have psychopathic tendencies, for example, and they are not under the Mental Health Act, is they don't fit the clinical criteria for Mental Health Act, and our whole premise here is that one could have a civil regime with a wider compass that, as with Mr Ilnseher, treated, or confined people, in a therapeutic environment with personality disorders. We don't have one of those.

O'REGAN J:

So if the premises adjacent to the prison for PPO people was run by a psychiatrist and not by a Corrections official, that would be okay?

MR KEITH:

And if the entry path were the same sort of process as under the Mental Health Act and the rights and the entitlements to care, the fact that it is a regime focused upon treatment and rehabilitation of that individual as the primary objective, rather than here as something that's to be done so far as can be managed around the institution and so on, then yes, it would be completely different. It would be Mr Ilnseher.

O'REGAN J:

Well, it has to be done here if it's got a practical chance of success, doesn't it? It's more than just whether Corrections feel that they're up to it.

MR KEITH:

It's if there's a realistic prospect of, realistic possibility of reducing the risk to the public, but when one compares the status of a patient versus the status of some sort of protected detainee, I, as a patient, have all sorts of entitlements. These entitlements under these two Acts are far more curtailed and that's the difference, in our submission.

WINKELMANN CJ:

Can I say, you were starting to tell Justice O'Regan, well, look at the scheme and this scheme looks like this whereas a clinically led scheme might look like that.

MR KEITH:

Yes.

WINKELMANN CJ:

Did you want to say anything more about that?

MR KEITH:

Well, I'd gone to the table just – your Honours can go through it, but essentially that is the difference and it is not just a question of where the building is or whatever. It's all of these attributes.

WINKELMANN CJ:

Where's the table again?

MR KEITH:

So the table –

O'REGAN J:

At the end of the cross-appeal submissions.

MR KEITH:

So it's at the tail end, page 21 and following.

O'REGAN J:

The submissions that we're not going to deal with today?

MR KEITH:

No, no, but we do refer to this table in our respondent's submissions. Essentially, what we say, and I mean it's why the Court below found the regime to be punitive, these two Acts look, and are, very much extensions of the Corrections and criminal justice system, tied to the original offence, administered like the original offence. I mean PPO is probably the – well, ESO, it's a slightly – if one looks at it, and this is again a point make, and that Mr Edgeler will come to too, the fact that someone on an ESO is under conditions that are essentially equivalent to parole, or if they're under intensively monitored ESOs they're under I think it's home detention, although Mr Edgeler can correct me on that, but taking that penalty analysis that we've spent some time on, the attributes of these two statutes track very closely the Corrections Act, for example, track very closely the Parole Act. So one is, I don't doubt, and we can see in the cases judges, and I suspect defence counsel

and I suspect the respondents themselves, trying very hard to get access to regimes or programmes or whatever, but it doesn't change the fundamental nature of it in terms of the statute. You're still grafting onto a criminal or punitive process these sort of positive attributes that the – the mechanism and the entitlements particularly are quite different, less.

1520

I think we've already covered much of what's on up to page 11 and 12 of the written submissions for the respondent, and at the foot of page 12, paragraph 25, this is again going to the penal character and – well, to the penal character. First, so, we have various of the *Mist* decisions in the bundle but the Court of Appeal's decision in that case held that making extended supervision orders was a factor for a sentencing court to consider in imposing preventive detention or not. But as it says at footnote 36 on that page, the Public Safety Act actually prohibits a sentencing court from doing that. One can't say I will not impose preventive detention in this case because I'm comforted that a PPO is available down the track. So this really is a second bite at it. Is it imposing something that couldn't have been imposed or wasn't imposed in the first place but it also springs back the other way, it doesn't ameliorate the use of preventive detention.

Sorry, that's the second point on that page and the other is, at 25.1, and this was the Supreme Court's holding in *Mist*, and again going to the penal and unjustifiable character of this, so Mr Mist and some other people commit their index offence before the age of 18, it remains that preventive detention cannot be imposed on a person under that age and yet one object of this scheme is to target those people. So it is imposing an effective penalty that the sentencing court by law could not have imposed, that this Court, in fact, said could not be imposed.

O'REGAN J:

I mean, if the Crown's accepted it's a penalty, why do I need to deal with it?

MR KEITH:

The language is that there is acceptance of a penalty but that it could be justified in particular cases. I'm just wishing to undermine – underline, rather –

WINKELMANN CJ:

No doubt undermine as well.

MR KEITH:

Freudian slip at this point in the day, underline the point that this – that is it's not – as one of my children is fond of saying, it's a feature not a bug. It's having a second go at a sentence because we couldn't get a big enough sentence the first time or we didn't. That's all, it goes to this premise that this is a justifiable regime.

I have touched on already, and this is at paragraph 26, have no evidence to justify the breach, in fact, to the contrary, we saw in the legislative history there was advice in the Regulatory Impact Statement that my learned friend, the Solicitor, took you too late yesterday. That legislation will likely offend the section 26 and section 22 rights and yet there was no consideration of something like what the Europeans were working up or - there was reference to the English and Scottish regimes. There was, I think, passing reference maybe to the Canadians, none of whom have this, and yet none of that was explored.

Then at 26.3, and this is also the point that I think Justice Williams made, that the omission of other people from a dangerous person scheme is because have conduct proven beyond reasonable doubt. The problem is that then puts the offence and the sentence front and centre, and it also presumes that the offender, at the time of sentencing, is the same person, presents the same risk as they did before. May have no relationship by the time what are often quite long finite sentences have been served.

I don't think the Court was particularly taken with the premise, and it sounds like we might be arguing it more on another day, that there's a different approach

to discretionary powers. All I'll say for the moment is what was said in the written submissions which is, we say that the discretion can't be exercised. The Crown has not said how the discretion can be exercised to the Court will the Bill of Rights Act. So the discretionary powers exercise as per *D,* as per *Drew* or *New Health* or whatever, just doesn't enter into it.

There's a useful point at the head of page 16, paragraph 33, so the Crown had referred to the *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, case at one point. This was whether or not adherence of the Hutterite sect could be exempted from having photographic driver's licences. It wasn't quite a graven image prohibition but it was something very similar to that. But what the Court did, other than finding the photographic driver's licence rule to be justifiable under the Charter, they also said that the macro question is whether or not the Charter infringement is justifiable, not whether a particular claimant might be able to do something better. So the Court does have to. Of course, in Canada they could have struck down the law. Here, the Court must make the same wide assessment, we say, of the Acts as they stand.

We've already dealt with the foot of 16, 17, how one can interpret the Act, and at page 18, paragraph 41 onwards, just make the pretty simple point that there's been no explanation of how the Court can resolve the difficulty, and there is some unattractiveness, I think, in saying, well, a Judge will only do, will make it all better, if I can – that's a little bit glib but I'm – and I think a little bit – without explaining how that could be, and, of course, this Court has had very recent experience in *Fitzgerald* of cutting off the exceptional case that wasn't intended to be caught, or in the *R v Pora* [2001] 2 NZLR 37 (CA) case of what was termed legislative misfire. One could, adopting Crown submission actually in that case, read the offending provision out. We haven't had anything like that and we couldn't, and the reason, to come back to a point that the Chief Justice made yesterday to my learned friend, this is at the top of page 20, section 4 precludes it. At the end of the day the Judge administering the Act must administer the Act. One can't make it ineffectual. You might be able to graft or you might be able to prune, may be able to, as in *Fitzgerald*, or to read in a – to

rein in a widely expressed power, like the Health Act 1956, a new health. But that's not what we have here.

WINKELMANN CJ:

To use the language of *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, if you read things in here to make it rights compliant, it would be going against the grain of the legislation so it would cross over the section 4 boundary.

MR KEITH:

Yes. I think one of the Judges in that case, say it was either judicial legislation or, if you like, judicial vandalism.

WINKELMANN CJ:

Also, this is a scheme. It's not like *Fitzgerald*.

MR KEITH:

No.

WINKELMANN CJ:

Where it's one sentence. Yes, one sentence. This section – this is a scheme…

MR KEITH:

So that's what we had to say about the interpretive discretion, and I think again the one question, and I'll just mention it because it sounds as though we may be talking about it on another day, is the privilege point that your Honour, the Chief Justice – this is at the top of page 21 – that the only privilege issue any of us had thought of in this case so far was we did take exception to taking various Honourable Members expositions of what the problem was and why this was necessary because we did see that as in breach of privilege and that was then withdrawn at trial, this is para 50 of the submissions, so not relied upon, and I don't think it's in the bundle.

In any case, the other question which did occur to us, thinking about this hearing, is we do point to successive Attorney-General reports and so on.

The Parliamentary Privilege Act, and we can talk about it perhaps another day rather than my take the time that Mr Edgeler needs, does permit interpretative use of parliamentary history, of course, and this Court did that, I think, in *D* and other cases where I think Justice Glazebrook may have said one thing to bear in mind in interpreting the registration legislation was that Parliament had gone ahead. It was told what the legislation did.

1530

But there is a question, just to – well, there may be a question, we can talk about it another day, of whether one can say, well, Parliament was told there were alternative schemes by the Attorney-General. Can we – there were alternative schemes raised in other parts of the policy history but is it proper, is it part of the section 7 function for a court using its declaration of inconsistency jurisdiction to say, well, the Attorney-General told Parliament there was a problem and it didn't react, or is that precluded? But I won't go into that because we don't have time and we have another day. But we give the example of the Legislation Advisory Committee at the top of page 22.

Also on page 22, and this is a further reference in the policy history, this was to do with – so the ESO regime was brought in 2003/2004 and by amendment to the Parole Act. Initially, it just targeted serious sex offenders. Child sex offenders, Mr Edgeler reminds me. It was then broadened and broadened and broadened which is why there are quite so many Attorney-General reports, aside from anything else, but there was a question from the select committee. Departmental response was that there was a substantial piece of work requiring a wide range of issues, if you wanted to come up with a civil regime instead of ESOs, and that work just wasn't done. So we don't have an explanation, to answer Justice Kós' question asked a number of times, of why a – it's not just a least restrictive, it's, in our submission, a rights-compliant regime. Wouldn't have exactly the same salutary effect, and I think I said we have a sort of counterfactual, which I've already referred to, what would happen under such a regime.

WINKELMANN CJ:

I suppose that's a critical point in your arguing that the Crown has not discharged its justificatory obligation, that the need for policy work was identified and not done, and the work wasn't done.

MR KEITH:

Yes. So we have, well, we have two limbs to it. One is we can point to these comparative schemes and this comparative international human rights and supernational human rights case law and say, well, why not this? But equally the policy history itself records that, that these things were being kicked around and didn't go anywhere.

I think at that point, unless the Court has questions, I will hand over to Mr Edgeler who has been very patient. I think he's better able to explain the point that we make in written submissions at 57 to 62 that these two statutes are not all things to all people. They are, in fact, quite prescriptive and they are quite prescriptive in a way that imposes on each person, both under ESO and under PPO, penal sanctions and does not impose a therapeutic regime.

But if your Honours have any questions, I'm very happy to…

WINKELMANN CJ:

Thank you, Mr Keith. You can take your mask off if you like Mr Edgeler.

MR EDGELER:

I did test negative this morning. Naturally careful I think.

WINKELMANN CJ:

Admirable.

MR EDGELER:

Thank you. A fair bit of some of the things I was to discuss have been discussed already, so I may not need to take as long as I otherwise might have, but I think

that there's a few things that I can usefully add with perhaps some experience in how these cases work in practice and what the regimes actually involve.

But a point I think I would start with would be just a brief description of what the various types of orders are and what they involved. I think the Court is clear a public protection order is essentially a term of – is equivalent to a term of imprisonment. The facilities are a nice prison but they are effectively a prison. They're on prison grounds, it's – if you did not know it was any difference, and you drive through the front gate and up the driveway at Christchurch Men's Prison, you would think, ah, that's a part of the prison, and reasonably so.

Extended supervision orders are a lot more amorphous, they can encompass a lot of things, and so when we get to the cross-appeal the questions might be around, you know, what parts of the Act are actually in breach of what rights? Not all extended supervision orders, for example, in fact most extended supervision orders, are not to detentions, so could not, you know – not all extended supervision orders could ever amount to an arbitrary detention if they don't even detain someone. Whereas we would say all public protection orders are arbitrary detentions because all public protection orders detain people. An extended supervision order has been compared to parole. What I quite like to compare it to, I think, is intensive supervision, the sentence that you can get under the Sentencing Act.

If my friend can bring up, I think it's possibly useful to compare, to bring up section 107JA of the Parole Act 2002 and 54F of the, if you scroll down a little so they're about the same, of the Sentencing Act 2002. For what the standard conditions – extended supervision on the left and intensive supervision on the right. They are not identical but they are very, very similar. You know, you must report to your probation officer within 72 hours. You need permission if you want to move address. You must provide biometric information. You must, even at a lot of stages, (a) corresponds with (a) and (ea) with (ga) and they are fundamentally identical. Intensive supervision is a sort of a relatively serious community sentence, certainly at effectively the same level as community detention which I think is probably the next level of ESO. ESO which is

intensive supervision, the reason I use intensive supervision and not a sentence of supervision is that a sentence of intensive supervision has the additional ones, for example, you can't leave the country without permission, which is not the case for supervision. And also, bring it up, make sure I get the right one, electronic monitoring is not available under a sentence of supervision, but is available under a sentence of intensive supervision and is also available under and extended supervision order. And that's certainly a lot more common. Many people under extended supervision orders are electronically monitored to their whereabouts and some potentially also electronically monitored for compliance with alcohol conditions.

So the next level up from an extended supervision order with just the standard conditions are the special conditions which 107K, scrolling down a little, for the Parole Act, that can include, as I say, electronic monitoring which makes it again, very like a sentence and very like parole. It can also include residential restrictions, and so that's the next step up. Part-time residential restrictions would make an extended supervision order essential community detention, another sentence under the Sentencing Act. Full-time residential conditions make it home detention and, in fact, a slightly stronger form of home detention than the sentence because a sentence of home detention you can tell the Court or your probation officer in the circumstances, here's the address I've found, I want to move it, can I have your permission. And it's – you serve it at home, and that's possible for an extended supervision order but for the extended supervision orders of the type that was applied for against Mr Chisnall and anyone else where we're talking about whether there was an application for a public protection order, they're not just home detention at home, it's home detention at a facility outside the wire on a prison grounds.

So that's residential restrictions is more home detention than home detention, or at least more serious than home detention because it will often, there is a requirement not just to, well, we have to approve the address, you know, look see is there a telephone wire, see if everyone in the house agrees that you can stay there, it goes beyond that with residential conditions particularly if they are full-time residential conditions. It is quite common for it to be ordered to be

served at a place like Tōruatanga which is the ESO facility on the grounds of, but in this case, outside the wire at Christchurch Men's Prison.
1540

A step up again to the next step, and what Mr Chisnall is effectively currently under, although at the moment on an interim basis, is intensive monitoring. Intensive monitoring will always come with a residential restriction which will be a 24-hour curfew, you are home detention, and at any time during that you are required to allow a member, or someone appointed by the Chief Executive or your parole officer, you have to be with them at all times, as a matter – as a question of fact, if they are on the grounds of a place like Tōruatanga, they may not always be within sight. They can always be within sight. It's a decision, sort of, how much do we need to bother? We saw them go into their house. We know the windows are locked and we'll see them if they come out the front door. But they can be within sight at all times. And so again, that's you're a lot more home detention. It's not prison because you can get up and walk out the gate and the Corrections staff will follow you down the road but won't actually stop you. They'll call the police to come and arrest you.

But it is again a very serious imposition on you and something, you know, a reason why we say it's a penalty, although, of course, your detention does not necessarily have to be a penalty as the discussion earlier of the Mental Health (Compulsory Assessment) Act or the Intellectual Disability Act which we would say are two ways that the New Zealand government, at least in theory if not always necessarily in practice, has been able to craft less restrictive or non-restrictive alternatives to things that we would say.

Sometimes, you know, as applied, they might be penalties, but I don't think we could succeed in a declaration of inconsistency case on the basis that they are always penalties, which is, of course, the argument, the extended supervision orders and public protection orders. This isn't something that a court can cure by exercising its discretion when making it because any time a court exercises its discretion to make it, it is imposing a penalty, which may sometimes be the case with an Intellectual Disability or a Mental Health order if the system goes

wrong, but I don't think we could say it's always the case which we have to say if we're going to succeed in a declaration of inconsistency because if this did go to a court and if one could ever be justified under the current statute, you know, not in the theory of what alternatives could be justified but could there ever be an order under the public protection order, Public Safety Act, or Part 1 of the Parole Act, imposing extended supervision, particularly with intensive monitoring and residential restrictions, could there ever be an order which wasn't a punishment? We say not, just as the Acts are written, and, in fact, it's not necessarily one of the questions. Your Honour, Justice Kós, was asking about what is the less restrictive alternative or perhaps the non-restrictive alternative, and there are some that we come to when we look at the scheme of the Act and how the legislation has changed over the years. The non-restrictive alternative, something that is not a penalty at all, and that would be it's not less restrictive, in the sense it's not restrictive at all, because you don't engage with section 26(2) although, of course, you might engage with others, but less restrictive is another possibility, and so – and I give two particular cases in a footnote.

We'll start with the case at tab 9, if my friend can bring that up, which is *Deputy Chief Executive, Dept of Corrections v McCorkindale* [2017] NZHC 2536. So Mr McCorkindale, and the other case as well, Mr R, *Chief Executive of the Department of Corrections v R (suppressed)* [2018] NZHC 3106 & [2018] NZHC 3455, which will be document 10 in our bundle. Mr McCorkindale was on an extended supervision order. He was one of the early people first put on an extended supervision order when it was created in 2003/2004. He was on one relatively early. He got one ultimately for 10 years at that point, I think, and after sort of – and comes up to be renewed, and during that 10 years he was on it he had what was not then called but what was effectively intensive monitoring. He had a programme condition which could, in the facts as applied, see him have to be somewhere for 24 hours a day, and so that was enough for him to be detained for that whole 10 years under an extended supervision order, and I don't know – assumption being he wasn't arrested during that time. He gets to the end of that 10-year period. The initial Parole Act, or the initial Part 1A of the Parole Act, allowed a maximum duration of 10 years, and we got to the end

of that and so 2013 and 2014, Department of Corrections comes to Parliament and says: "Well, actually, we thought 10 years would be enough. There are a bunch of people who have been on these orders for 10 years and we need to be able to renew them and we need alternatives," and so they didn't start but the Public Safety Bill and the Extended Supervision Order (something), I can't remember quite what it was, Amendment Bill, which updated Part 1A of the Parole Act to allow for repeated, beyond 10 years, extended supervision orders. Put in place some different things that changed the eligibility, expended it from just child sex offenders to all sex offenders as well as violent offenders with various different, new requirements, high or very high, very high in the case of violence, high in the case of sexual offence for them. But also restricted intensive monitoring and of the type of the programme conditions that Mr McCorkindale and also Mr R were under, 14 years, and said the maximum is one year, and this is a case where the Chief Executive knew there was a less restrictive alternative available, less restrictive in the sense of still a punishment, but restrictive in the sense of intensive monitoring is less restrictive than a public protection order, and so it got to court with the application. We got to the end of – he could get a new ESO for one year with intensive monitoring, but after that it would have to stop, and that was particularly the case for Mr R in document 10.

It was, if we could keep with the intensive monitoring, if that could stay in place, you could be in the community. But we can't because the Act does not now allow it. The situation you've been in for the last, in Mr R's case, I think 13 or 14 years, because there were a number of periods of interim detention or interim supervision orders which don't count towards the 10 year limit. We were happy with it. We would be happy for you to stay in the community as you were at the house you were at, and have been at without offending in a serious way, "serious" as defined for 11, 12, 13 years, but the law does not now allow it because Parliament said we can't, and that less restrictive alternative in Mr R's case, particularly, and also in Mr McCorkindale's, of let's just continue with an ESO, but have extended supervision orders.

WINKELMANN CJ:

So how did Parliament say they couldn't?

MR EDGELER:

When the 2014 amendments to the Parole Act came into force, they formalised what is now called intensive monitoring that had been worked into the system in the past. It's now a specific thing that the High Court can order for the first year of your extended supervision order, is intensive monitoring. But there is a maximum of one year under an extended supervision order on intensive monitoring, and if you get to the end of that year and you are not so safe that you could be on an extended supervision order without intensive monitoring, the legal alternative that is available for you, the options are a public protection order or no intensive monitoring, and that's now clear on the statute and everyone agrees that's the case now. There's an argument, unnecessary for this case, whether that perhaps was always the case, but it's a restrictive alternative, that is less restrictive than a public protection order, and it's one that the Government is clearly aware of because it has people it was administering under a law which arguably allowed that at the time.

The section, the next section of the Parole Act, being section 107IAC(3), the maximum 12 months for an extended supervision order.

WINKELMANN CJ:

What section, sorry?

MR EDGELER:

107IAC(3). So that is sort of a very specific example of one of the alternatives that was not available and it speaks to how in practise the exercise of the discretion in the High Court when considering a public protection order or an extended supervision order does not consider, in the way the Attorney-General suggests it does, is this detention justified? And it could be justified if, well, there's no less restrictive alternatives, and factually in law there might not be because the law prohibits one that was in place for 14 years and is now not in place. Where one less restrictive alternative that a High Court judge is

forbidden from considering is intensive monitoring for more than one year, and so it's –

WILLIAMS J:

Do you say intensive monitoring is penal?

MR EDGELER:

Yes.

WILLIAMS J:

But you'd be prepared to live with that form of penal?

MR EDGELER:

There's a, I guess the difference between "live with", we would say, and we are asking for a declaration that it is inconsistent with the right for double punishment, but for someone like Mr Chisnall, someone like Mr R, someone like Mr McCorkindale, it's –

WILLIAMS J:

You don't have to live at prison?

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MR EDGELER:

Yes, you don't have to live at prison. It's better, you're in the community. You can go for a walk, and two people will follow you when you do, and, you know, all your outings will be supervised but I think it's true, everyone for whom a public protection order application has been made for whom a backup application for an extended supervision order with intensive monitoring has been made, has said: "I'll agree to an extended supervision order with intensive monitoring."

KÓS J:

So, are you saying it's –

MR EDGELER:

Realistic, yes.

KÓS J:

Potentially, demonstrably justifiable then, despite its breach of the affirmed right?

MR EDGELER:

No. I don't think we're saying it's –

WILLIAMS J:

It's just more justifiable.

MR EDGELER:

It's less restrictive. If courts really had the discretion and exercised the discretion that the Attorney-General says they exercise when considering these questions, that would be something a court could do, and it would be less restrictive, not non-restrictive, it would still be restrictive. We would say it would still be not demonstrably justifiably so because it's not, for all the impact we've discussed for the last day and a half, it's not therapeutic and all those sorts of things. And so yet another alternative would be one that was –

GLAZEBROOK J:

You could design something like that to be therapeutic.

MR EDGELER:

I think you could. That would again be, you know, there's a slight difference. I guess, the bit I'm dealing with, is what – how do these work in practice and how does that show the problem versus what's the alternative.

WINKELMANN CJ:

So you're not conceding anything?

MR EDGELER:

No.

WINKELMANN CJ:

You're just saying, this is how it works in practise, but you're also making the point that an ESO with intensive monitoring order is a nice alternative to a PPO. Actually the ability to have that runs out after a year, so they end up in a PPO regime.

MR EDGELER:

Yes, which was in Mr Chisnall's case, the first hearing was public protection order, was the reason why the Judge did not – made the public protection order as I think you would be safe in the community with intensive monitoring, but I don't think you will improve enough over the year that that is possible to, at the end of that year be out and given that, I make a public protection order. That was the basis on which that first decision was overturned by the Court of Appeal. It went back for the rehearing early last year and again, we had the new appeal in August. The decision where he is now on an interim supervision order awaiting the matter to go back before the High Court to make essentially by consent an extended supervision order with intensive monitoring. Would he prefer, I guess, not to have anything? He's realistic of what the law currently allow and he does say that an extended supervision order with intensive monitoring is an unreasonable limit, but he knows the Court is required to make one because of the circumstances he is in and the evidence that has been placed before it, and so he was realistic about that and as I think everyone in his position has been to date.

Another, and I think something that I was looking up, I don't think I quite have all the High Court decisions on public protection orders on my computer. There are possibly one or two that I've missed, but I was doing a search while the matter was being discussed earlier as to how the discretion is actually exercised and whether High Court judges in making, or deciding whether to make public protection orders actually consider section 26(2). The one decision I could find of a High Court judge ruling or not ruling in favour of, or the making a public protection order which actually mentions section 26(2), was the first *Chisnall* decision, where at paragraph 3 the Judge said: "Mr Chisnall has made an application for declaration of inconsistency in respect of 26(2)." The High Court

judges, and it might be one of the differences between a case like this, where the Attorney-General is on the other side, and the factual cases in the High Court where it's not the Attorney-General, it's the Chief Executive intending to be represented by Crown solicitors rather than Crown counsel. The approach just as a matter of fact, and obvious from Mr Chisnall's case, and the other High Court decisions on public protection orders, and I haven't looked at all of the ESO ones because there are quite a few more of those, the High Court does not consider and does not ask itself the question –

WILLIAMS J:

Well that takes out a few of the players in that process.

MR EDGELER:

Certainly.

WILLIAMS J:

The lawyers don't ask the High Court, or tell the High Court, or require the High Court to consider that.

MR EDGELER:

Yes, and that would be –

WINKELMANN CJ:

Your point is that consideration of the case law doesn't show a rights analysis.

MR EDGELER:

Correct, and that's –

WILLIAMS J:

But that's flexible, isn't it? Some appellate court should say, there should be a rights analysis when these decisions are made.

MR EDGELER:

That would fix the absence of a rights analysis, I don't know that it would fix the absence – because the less restrictive alternative –

WILLIAMS J:

Well it doesn't deal with Mr Keith's issues, no.

MR EDGELER:

Yes. The less restrictive alternative would be, you know, you would never have a case, and it would be great for someone like Mr Chisnall. "Well, the current PPO regime is too restrictive of my liberty," given he's been a well-behaved prisoner. Essentially, his entire time in prison he had excellent, you know, did not get in trouble, did not get disciplinary things – I don't know if there was one very early on – but had been a model prisoner and a model detainee at the public protection order facility throughout. He is an easy person for Corrections staff to manage. His risk, they just – he does not have an internal risk. He has what they concern is an external risk. He is someone whom other prisoners can safely be around and no one is concerned about. If he was able to say: "Well, here are all the restrictions in the Public Safety Act that would apply to me just by dint of the making of a public protection order," if you have a look at the Public Safety Act and compare it to the Corrections Act, all the restrictions around searches and access to mail and visitors, you know, not all of them word-for-word but you look at a section, what does a management plan in the Corrections Act look like versus what does a management plan and a needs assessment in the Public Safety Act? They're functionally identical. It's – we need to look at, and might be able to bring that up, the Public –

WILLIAMS J:

The Corrections Act management plan?

MR EDGELER:

Yes, the – where are we? Make sure I get the right one – so section 49 to 51 of the Corrections Act compared to section 41 and 42 of the Public Safety Act. You do the needs – when a – in the Corrections Act –

WINKELMANN CJ:

What sections of the Public Safety Act?

MR EDGELER:

Public Safety Act, needs assessment is section 41, management plan is section 42. Corrections Act, needs assessment is section 49, management plan is section 51, and another example of how this is a penal institution, because they operate like one.

WILLIAMS J:

It doesn't seem to have any treatment-based –

MR EDGELER:

If you – indeed, I would say if you have a look at the management –

WILLIAMS J:

Is that in 52, is it?

MR EDGELER:

Management plans for – 51(4)(d) of the Corrections Act you have a management plan where "outline how the prisoner may be prepared for eventual release" and "successful reintegration into the community". So that's in the Corrections Act. You compare it to the one in the Public Safety Act. It doesn't even have that. So this is one of the several ways, and we've got a few, I think it's footnote 50, where we contrast a number of the places where the Corrections Act is more open and more therapeutically, not therapeutic, but more care based than the Public Safety Act, or at least on the face of the statute.

I'm getting close to the end. I think I have mostly done. But. Yes, so the exercise of discretion in High Court Judges, and so one of the things that would be of immense benefit to someone like Mr Chisnall would be able to come along and say: "Yes, I can see why the Department of Corrections is concerned that if I was released with no restrictions at all I wouldn't be safe," and so – but I could, if I was subject to a statutory regime which didn't have, you know, take out half a dozen of the restrictive sections in the Public Safety Act, you know, what possessions he's allowed, there's a rule against pets, which you can understand why that's the case but why can't he have a goldfish or something,

and there are a lot of rules around prohibited items which are very similar between, you know, you can't have tobacco, very similar rules between the Public Safety Act and –

WILLIAMS J:

You can't have tobacco?

MR EDGELER:

No.

WILLIAMS J:

If you're subject to a PPO?

MR EDGELER:

Yes, Sir.

WILLIAMS J:

Really?

MR EDGELER:

I'm not sure about ESOs, but yes, it's a –

GLAZEBROOK J:

Well, that'll be because of the facility and the inability –

WILLIAMS J:

It's in the prison.

GLAZEBROOK J:

Yes. I assume.

MR EDGELER:

Something that might be – there is a large outside. Everyone's got their own little, sort of, "tiny house" isn't quite it, but tiny house, you know, one room with your own bathroom, and you could obviously have rules like we have

everywhere. You can't smoke in this building but you can walk outside and smoke. Everyone's got their own little house. It's not locked. You know, you can lock yourself in. It is not a prison cell, but you could walk out and they ask you not to make noise after 10 o'clock at night and those sorts of things. But why not be able to smoke, and the same reasons that you don't want it in prisons, I guess, of standovers and whatever else. But again, it's just one way it's restrictive in a way that would not be necessary, and could he point to that and say: "Look, this is too restrictive. I would be banned from possessing tobacco. If you had a restriction which allowed me to possess tobacco," he's never smoked and doesn't drink and never has drunk, I believe, "that would be a more reasonable limit," and so therefore you can't make the order, and it's obviously just not how this works.

The Courts look at this and say: "Have you met the test?" They don't look at: "Is this justified in the circumstances?" Their discretion is really being exercised as: "Well, should I decide to make a PPO or will an ESO be enough, and if I make an ESO does it come with residential restrictions and does it come with intensive monitoring, and after that intensive monitoring ends what restrictions can we still have in place," maybe not 24/seven but it's quite common to have a curfew for 12 hours and most of the rest of the time you have to be at a programme for eight hours and your actual time by yourself is limited and is that enough, and that's the discretion Courts are actually exercising. They're not describing and not thinking about and not being invited to think about by the Crown making the applications of is this a justified limit on the 26(2) right? Corrections doesn't mention it, so Judges don't mention it, and so it's not a realistic alternative to say the discretion is with the High Court and that's what solves it, because it can't because the problem is the Act and the problem is when we make the order these are the consequences and the consequences are penal, and they can't not be.

WINKELMANN CJ:

Right, I think we've got that.

MR EDGELER:

I think so too, and I think that's where I was finishing unless I can assist your Honours with anything more.

WINKELMANN CJ:

Excellent, and lo and behold, it's 4.01.

MR EDGELER:

Perfect.

WINKELMANN CJ:

Okay, so in terms of how we proceed from here, will counsel confer with, and what do you think your timing would be on that?

MR EDGELER:

Yes, we will confer.

WINKELMANN CJ:

Right, excellent, and file a memorandum?

UNIDENTIFIED SPEAKER:

I think if we could file a memorandum by next Wednesday, would that be all right? I have a commitment for the second half of this week but…

WINKELMANN CJ:

I think that would be extremely timely. Is that realistic?

SOLICITOR-GENERAL:

Monday is a public holiday.

WINKELMANN CJ:

Shall we make it by next Friday, I think, because realistically more care, less speed, possibly, because it's quite important.

UNIDENTIFIED SPEAKER:

Yes, Ma'am.

WINKELMANN CJ:

Thank you. Okay, so if you file a memorandum which we have agreed what the contents will be, so I won't repeat it so as to make it worse, our discussion, and otherwise I think we'll retire.

COURT ADJOURNS: 4.02 PM