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

SC 75/2025  
[2026] NZSC Trans 10

**BETWEEN**

**SAMANTHA JOYCE WOLFE  
CLIFFORD MORGAN ROYAL AND TE TEPU  
O TE WAKAMINENGA O NGA HAPŪ O  
NU TIRENI**  
Applicants

**AND**

**GOVERNOR-GENERAL OF NEW ZEALAND  
AUCKLAND HIGH COURT  
MINISTER OF IMMIGRATION  
ASSOCIATE MINISTER OF IMMIGRATION  
MINISTER OF FINANCE  
CHIEF EXECUTIVE OF THE MINISTRY OF  
BUSINESS, INNOVATION AND EMPLOYMENT  
COMMISSIONER OF POLICE  
CHIEF EXECUTIVE OF THE DEPARTMENT OF  
CORRECTIONS  
BRITISH HIGH COMMISSIONER TO  
NEW ZEALAND**  
Respondents

Hearing:

07 May 2026

Court: Winkelmann CJ  
Ellen France J  
Williams J  
Kós J  
Cooke J

Counsel: Applicants in person  
N M Pender and A W M Britton for the Respondents  
M S Smith KC as counsel assisting the Court

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**CIVIL ORAL LEAVE HEARING**

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**WINKELMANN CJ:**

Mr Royal, are you here to assist Ms Wolfe?

**MR ROYAL:**

5 Yes, we are co-applicants.

**WINKELMANN CJ:**

Oh, right, and so will you be speaking today on her behalf?

**MR ROYAL:**

Yes.

10 **WINKELMANN CJ:**

Right, thank you. Well, I acknowledge your presence.

**MR ROYAL:**

Thank you. I thought we had clarified that, so –

**WINKELMANN CJ:**

Yes, tēnā koe. We're just doing this part of our proceeding where we just take appearances. You're not familiar with our rituals, so I'm now going to move – so you can sit back down and I'm now going to move on to the other side.

**5 MS PENDER:**

E ngā Kaiwhakawā, tēnā koutou. Ko Ms Pender tōku ingoa. Kei konei māua ko Mr Britton mō te Karauna. May it please the Court, counsel's name is Ms Pender, and I appear with Mr Britton for the Crown.

**WINKELMANN CJ:**

10 Tēnā kōrua.

**MR SMITH KC:**

E ngā Kaiwhakawā, tēnā koutou. If it please the Court, Smith is counsel assisting.

**WINKELMANN CJ:**

15 Tēnā koe, Mr Smith. So, Mr Royal, the floor is yours. You'll probably want to stand in the middle podium there.

**MR ROYAL:**

Yes. Ngā mihi ana e ngā Kaiwhakawā o Te Kōti tēnei. Anō hoki, ki tō tautoko te kaupapa mō ōku applicants.

**20 WILLIAMS J:**

Tēnā koe.

**MR ROYAL:**

Anō hoki ki te CFA, Matthew, ngā mihi ana. Anō hoki, te ture tangata o te Karauna, ngā mihi kōrua. Anō hoki, ngā tangata katoa o te Kōti tēnei.

25

Just before we start, I have a very brief procedural note, if the Court would permit me just to raise it, because it's in relation to the respondents'

representation. The applicants note that the record does not confirm whether Crown Law holds instructions for all named respondents. Crown Law's own filed submissions acknowledge that certain respondents were not served and played no role in prior proceedings. The applicants acknowledge that service  
 5 was not fully regularised, and that the registry's approach contributed to that uncertainty. However, we raise this briefly for this Court's record and seek direction on how it should be addressed going forward.

**WINKELMANN CJ:**

Thank you. Ms Pender will address that.

10 **MR ROYAL:**

Thank you. So, e Te Koti, may it please the Court, I appear for the applicants, Te Tepu Ote Wakaminenga O Nga Hapu O Nu Tireni. My name is Clifford Morgan ko te whānau Royal, and also on behalf of Samantha Joyce te whānau Wolfe. The question before this Court today resolves to a single  
 15 proposition. A registrar made three substantive legal determinations outside the authority given to registrars. A judge endorsed those determinations without asking whether the authority existed. Enforcement followed within hours of a re-determination, and the Crown's own law office has identified every step of that sequence as an error. That identification is on the record. It has  
 20 never been withdrawn. This Court is not being asked to find a miscarriage of justice. It's being asked to act on one that has already been found.

In terms of jurisdiction and the matter of section 69(c), the applicants state that section 69(c) is not engaged for the following reasons.

25 1010

Ground A, in regards to rule 2, paragraph 11, subparagraph 5, which is Parliament's own characterisation of that rule. I begin with the provision the Crown did not address in its February 2026 submissions. Rule 2.11(5) of the  
 30 High Court Rules 2016 provides in plain terms: "An application for review under this rule is not a stay of proceeding or a step in the proceeding, unless a Judge, or a Registrar acting under rule 2.5, so directs." The Crown's entire

section 69(c) argument depends on characterising the rule 2.11 review as an interlocutory application made within a proceeding. Parliament's own rule removes it from that category because the statutory definition is even reached. The rule that creates and governs the review, expressly exclusive from the category of interlocutory steps that bar was designed to cover, the Crown has no answer that does not require it to contradict Parliament's own words, that is the beginning, and we say, the applicants, the end of the Crown's absolute bar argument.

Further, ground B, section 65 of the Supreme Court Act – Senior Courts Act 2016, sorry. There are two errors at law. The four limbs and none are satisfied. Before turning to the four limbs, one prior point. Section 65 of the Senior Courts Act defines decision to include a determination. The Crown's own February 2026 submissions at paragraph 5, describe what is being appealed as "the decision of Lang J". There is no dispute that something constituting a decision within section 65 is the subject of this appeal. What was made here were two determinations, one by the registrar, one by Lang J. Both are decisions within section 65, and the next question is, were those determinations made on an interlocutory application within the statutory definition. That is where the text decides the matter and where two errors at law are identified by the Crown itself means section 69(c) simply has no valid subject matter on which to operate.

In terms of error 1, the registrar's determination was made outside mandate. The Crown confirmed at September 2025 submissions, paragraph 4.7, that both registrars exceed their powers by making substantive legal conclusions about the reviewability of section 61 ministerial discretion. The registrar's authority was confined to form. What was decided was not form. That is not the applicants' characterisation. It is the Crown's own.

Error 2, Lang J examined the reasonableness of the registrar's conclusion but not its lawfulness. Crown September submissions 2025, paragraph 4.8. He endorsed the registrar's conclusions without asking whether the authority existed to make them. A judicial act that adopts rather than corrects an act, made outside mandate, does not create the legal foundation that was absent

from the start. It compounds the error. Two determinations, both identified as errors by the Crown itself, and by the way, neither withdrawn, meaning it's still on the record.

- 5 Against that foundation, the four limbs of section 65 are as follows. Limb (a)(i) requires: "an order ... relating to ... procedure". What the registrar made were substantive legal rulings on justiciability, not procedural directions. A determination that administrative mandate on substance cannot satisfy a limb requiring procedural subject matter, (a)(i) is not satisfied. Limb (a)(ii) requires  
10 relief ancillary to claims in a civil proceeding. There was no proceeding on the court record. Nothing had been accepted for filing. There were no pleaded claims. There was no proceeding in which ancillary relief could exist. Limb (a)(ii) is not satisfied. Limb (b) "application for a new trial" is plainly not engaged, and limb (c) is circular and collapses on these facts. It requires a  
15 review of a decision made on an interlocutory application which requires the registrar's foundational act to itself satisfy limbs (a) or (b). It cannot.

The Crown confirmed the registrar acted outside mandate. An act made outside that authority has no lawful character on which the section 65 definition  
20 can operate. The chain breaks at its first link, using the Crown's own words, to break it. Section 69(c) is simply not engaged on these facts.

Moving forward, ground C, no valid foundation. Section 69(c) has no subject matter. Ground C brings the two areas together as a structural proposition.  
25 Section 69(c) presupposes a valid decision made on a valid interlocutory application. Both elements must be present for the bar to operate. Neither is present here.

The first element, a valid decision is absent because the registrar's foundational  
30 act was made outside the authority given to registrars. The Crown confirmed that at paragraph 4.7 of its September 2025 submissions, and it's never withdrawn it, Lang J's endorsement built on a foundation the Crown itself identified is outside the authority given to registrars. Cannot supply the validity that was absent from the start.

And the second element, a valid interlocutory application is absent for the reasons just given. None of the four limbs of section 65 are satisfied on the text, and rule 2.11(5) independently removes this review from the category of steps within a proceeding before the limbs are even reached.

The constitutional consequence is this. The Crown identified the unlawful act at paragraphs, and this is the September submissions 2025, 1.3, 4.7 and 4.8 of its submissions, it has never withdrawn those findings. Its February 2026 submissions at paragraph 2 expressly confirmed the September merits findings stand as findings on the record before this Court today. Section 69(c) was enacted to bar appeals from routine procedural steps within live proceedings. Not to immunise from any curial examination an identified lawful act that the responding party named recorded in writing and never withdrew.

Parliament does not enact permanent immunity for acts made outside mandate by implication. No such intent appears in the text. The Crown cannot simultaneously identify that an unlawful act occurred, name it, record it to this Court, never withdraw it, and then maintain that section 69(c) gives that act permanent immunity. Parliament did not intend that result. No constitutional court should give effect to it.

1020

Ground D, rule 1.4(2)(b) High Court rule, and this is really important. The label cannot travel. The fourth ground arises from a provision filed in the applicant's memorandum of the 6<sup>th</sup> of May 2026, quite recently. Rule 1.4(2)(b) of the High Court Rules provides expressly that these rules do not apply to appeals to the Supreme Court, this Court. The interlocutory classification that generates the Crown's absolute bar is derived entirely from a regime Parliament has expressly excluded from this Court's jurisdiction.

The section 69(c) analysis must therefore be conducted under the Senior Courts Act on its own terms through section 65 of the Senior Courts Act. When it is conducted that way, as the applicants just demonstrated, none of the

four limbs are satisfied. The Crown's argument requires importing a label from a regime that does not apply here. To determine what this Court can do, the applicants say, that proposition is self-defeating. The label cannot travel. On every reading of the statutory framework the text of section 65, the four  
 5 limbs, rule 2.11(5), rule 1.4(2)(b). Section 69(c) is not engaged. This Court has jurisdiction.

So this leads us, before leaving the question of jurisdiction, there are three observations about the Crown's own filings that the Court would have noted.  
 10 The applicants raise them proactively.

A fourth observation on interpretative method, the Crown's February 2026 submissions at paragraph 10.4 rely on the *Matthews Corp Ltd v Edward Lumley & Sons (NZ) Ltd* (1994) 7 PRNZ 591 (CA) majority. The form test. To support  
 15 the absolute bar under section 69(c) paragraph 25.3 of the same document accepts that Fisher J's dissent, and this is the nature and effect test, now governs for section 56(4). The Crown applies irreconcilable interpretative methodologies to the same classification question depending on which answer this argument requires. The doctrine of approbation and reprobation does not  
 20 permit that. A party that files considered submissions to this Court identifying errors, recommending correction and then argues this Court is constitutionally barred from examining them has produced the paradigm case for which the doctrine exists. The applicants ask the Court to note those positions. Section 69(c) is simply not engaged on these facts.

25

So in bridging from jurisdiction to leave, the Court has resolved the jurisdictional question. Whether it found jurisdiction on the textual argument, the purpose of argument or both, what that analysis confirms is this. The question of how section 69(c) applies or does not apply to a threshold refusal of an originating  
 30 filing outside administrative mandate is a question of law that has never been authoritatively determined. It goes to the corrective framework for every genuine attempt for accessing the Court. It is itself a question of general and public importance and the applicants now turn to why leave must be granted,

and on that note I cite in the bundles to support that, bundle 4, 5 and 6 respectively.

The applicants rely on three grounds for leave. Each is independently sufficient.

5 Together they are overwhelming.

Ground 1: substantial miscarriage of justice within section 74 of the Senior Courts Act. The issue is the question for this ground is not whether a miscarriage of justice occurred. The Crown answered that question in  
10 September 2025 and never withdrew the answer. The question is what this Court is required to do about it.

Section 74 of the Senior Courts Act provides that leave may be granted where a substantial miscarriage of justice has occurred or may occur. The test has  
15 two limbs, past miscarriage and prospective miscarriage. This case satisfies both. A past miscarriage is established where the absence of correction has produced an outcome the law cannot tolerate, documented, irreversible, and confirmed by counsel for the respondent. A prospective miscarriage arises where, without this Court's intervention, the structural conditions that produce  
20 the harm remain in place and capable of repetition against future applicants seeking to have their claim heard, and it is worthy of note, after 18 months we still do not have an accepted originating filing.

Section 74 requires a substantial miscarriage of justice, and the applicants do  
25 not need to establish that one occurred. The Crown established it, September 2025, at paragraph 1.3 "the High Court does appear to have erred in refusing to accept documents for filing". Paragraph 4.7: " ... both officers appear to have exceeded their powers by refusing to file the proceeding on substantive grounds." Paragraph 4.8, "Lang J considered the reasonableness  
30 of the first decision but not its lawfulness". February 2026 at paragraph 2. This is Crown submissions. The Crown "does not revisit" those submissions. Those findings are expressly confirmed as standing on the record, as mentioned before in this Court today.

**WINKELMANN CJ:**

So, I think you have us with you on the fact that there was an error in the refusal, and your next point is that this raises a structural issue which goes to access to justice, because it's preventing proceedings being filed, so that's your first  
5 two grounds, and I think you said you had three.

**MR ROYAL:**

Yes.

**WINKELMANN CJ:**

And I might say you have in your support on that second ground section 27 of  
10 the New Zealand Bill of Rights Act 1990.

**MR ROYAL:**

Yes. Yes, and that's leading to the next point, if I may continue.

**WINKELMANN CJ:**

Yes.

15 **MR ROYAL:**

Right, to pick up, those findings are expressly confirmed as standing on the record, that's mentioned, so they are not a historical position. They are findings on the record by the responding party confirming in writing, never withdrawn, the harm was not theoretical. A registrar refused an originating filing on  
20 substantive legal grounds outside the authority given to registrars. A judge endorsed that refusal without asking whether the authority existed. Enforcement followed each closure, and by meaning each closure, within 24 hours of the registrar's decision and on the same day as Lang J's determination, and what followed was detention of our whāngai.  
25 Physical restraint on ancestral lands. Deportation. Not one of those steps was properly examined by any Court before it was taken, and this has been our cause from day one, was simply to have our day in court to fight this issue.

The prospective limb is independently engaged because the structural gap that you alluded to that produced this outcome remains open. The Crown's absolute bar proposition operates without curial examination and can produce the same outcome for, as I had mentioned, the next claimants, and this is going to cause  
 5 issues. There will be difficulties at the initial filing stage, and so in conclusion, ground 1 is established. The Crown identified the miscarriage in writing and never withdrew that identification. The harm is irreversible. The prospective limb is independently engaged. Ground 1 is sufficient alone to satisfy section 74.

10 1030

Ground 2 raises three questions of general and public importance, in reference, your Honour. Each is independent. Any one of them satisfies this limb. Section 74 provides that leave may be granted where the case involves a  
 15 matter of general or public importance, and the test is not whether the question is novel. It is whether the question's answer has significance beyond these parties. The applicants state it it absolutely does, whether it will govern the rights of future claimants accessing the courts, constrain the powers of public bodies or resolve a legal uncertainty, whose continuation produces systemic  
 20 consequences. Section 74(3) provides a specific parliamentary determination: "... a significant ... Treaty of Waitangi [issue is deemed to be] a matter of general or public importance." This Court is not required to assess whether that criterion is met. It is required only to identify that the issue arises.

25 The question is, is the corrective mechanism this Court has just examined in the jurisdiction argument whether and how section 69(c) applies to a threshold refusal of an originating filing outside administrative mandate is a question of law that has never been, as mentioned, authoritatively determined. Its answer governs every future litigant in that position. It goes to the threshold of access  
 30 to justice and currently access to justice delayed is access to justice denied.

The second question is whether broadly framed ministerial discretion, here section 61 of the Immigration Act 2009, but the principle extends to any statutory discretion can be treated by an administrative officer as placing

executive action entirely beyond judicial examination as to process, namely curial oversight. The registrar treated that question as settled. It is not. The Minister's November 2023 briefing (with emphasis) acknowledged that no administrative decision-making is absolute. That acknowledgement contradicts  
 5 the proposition the registrar applied, and the agents involved.

The third question is whether tikanga relationships and hapū authority are legally required considerations for statutory decision-makers and this is very important to us because from the outset on every filing, tikanga, hapū tautoko, the tautoko of ko Te Wakaminenga O Nga Hapū O Nu Tireni has been evident  
 10 from the outset. On that question, Parliament has answered. Section 74(3) of this Act deems a significant Treaty of Waitangi issue to be of general and public importance. Te Tepu Ote Wakaminenga's hapū authority grounded in He Whakaputanga 1835, as mentioned, was visible on the face of our filing, on  
 15 every notice served on every act in the chain. The *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 case opened the door to some of these questions. Here, today, we continue the kōrero.

Ground 3, exceptional circumstances, and this is in relation to section 75 of the Senior Courts Act. The third and final ground is the exceptional circumstances  
 20 under section 75. The applicants identify six features of this case that individually and cumulatively place this matter in the exceptional category. Grounds 1, 2, and 3, are independently sufficient. Together, they are overwhelming. Leave should be granted.

25 **WINKELMANN CJ:**

If just run through those quickly, because you are running out of time.

**MR ROYAL:**

Yes. Well, there's, if I may, I will also lead into that if I may continue. I do note and with the Court's indulgence, that we were given a road map this morning,  
 30 if I may briefly speak to that, that would be appreciated.

**WINKELMANN CJ:**

Yes. So are those, right, okay, carry on.

**MR ROYAL:**

Sorry, your Honour?

5 **WINKELMANN CJ:**

No, it's fine. Carry on.

**MR ROYAL:**

We want to acknowledge the road map provided by counsel assisting and really everything will be laid out by the counsel assisting. We support it with one  
10 distinction in terms of section 65 and also that in terms of remittal to a lower court for the reasons stated we say that this Court is the right venue.

**WINKELMANN CJ:**

Can I ask you, what relief – what outcome do you want on the appeal?

**MR ROYAL:**

15 That the section 69(c) be removed from the respondents, that the Court determines the matters before it today but also the broader issues that stem from this case, and that the Court provide leave to appeal to the applicants –

**WINKELMANN CJ:**

And if we do give leave to appeal what I'm saying is what remedy do you want  
20 on the appeal?

**MR ROYAL:**

That we go to a full merits-based application to be determined here.

**WINKELMANN CJ:**

So the Court would not have jurisdiction to do that because a proceeding hasn't  
25 yet been filed in the High Court, so no one's had an opportunity to file submissions, et cetera. But, if we were to grant leave on the procedural matter would you be asking us to treat the earlier proceeding as – direct that it be

received for filing, or would it be a better course that you file a new proceeding which is a judicial review proceeding, because you will have read material suggesting that this really – what you’re trying to do is judicially review the Minister’s decision.

5 **MR ROYAL:**

We rely on the prior clause 1.4(2)(b).

**WINKELMANN CJ:**

Yes.

**MR ROYAL:**

10 Which categorically states in the statutory text that the Supreme Court has jurisdiction to hear this appeal. Does that...

**WINKELMANN CJ:**

Right. Yes, thank you.

**WILLIAMS J:**

15 So the question is – start this way, you were not allowed to file your proceeding in relation to Ms Wolfe in the High Court, correct?

**MR ROYAL:**

Yes and it – yes it – sorry, your Honour.

**WILLIAMS J:**

20 You want to file your proceeding in the High Court in relation to Ms Wolfe and have that proceeding resolved on its merits.

**MR ROYAL:**

We would prefer that matter to be here – this isn’t about –

**WILLIAMS J:**

25 Yes, let’s just assume the law doesn’t allow us to do that –

**MR ROYAL:**

Right.

**WILLIAMS J:**

– because you have to hear from the other side, the Crown has to file a  
5 statement of defence, so on and so forth, there will have to be a hearing and  
perhaps even evidence, certainly affidavits. None of that's been done yet.

**MR ROYAL:**

Granted.

**WILLIAMS J:**

10 So, we're not ready to go. So the remedy, what you want is to be able to have  
your case heard in front of a judge.

**MR ROYAL:**

Yes, it's a question of –

**WILLIAMS J:**

15 Assuming – trust me on this – these five judges can't hear it.

**MR ROYAL:**

Yes, yes.

**WILLIAMS J:**

Because it's not ready to be heard. So the outcome you want is to have this  
20 thing heard in front of a judge on its merits.

**MR ROYAL:**

Yes. In terms of the disposal route –

**WILLIAMS J:**

That's right.

**MR ROYAL:**

– does this Court have the jurisdiction to hear an originating application given that it's been 18 months. We have gone through eight refusals, five in the High Court, three in this Court, and we have –

5 **WILLIAMS J:**

We have no originating jurisdiction.

**MR ROYAL:**

Right.

**WINKELMANN CJ:**

10 We understand your frustration. All right, your submissions have been very helpful thank you. Is there anything else you wish to say?

**MR ROYAL:**

Yes well I believe I've got a closing opportunity after counsel for assist and the Crown.

15 **WINKELMANN CJ:**

Yes, you have a right of reply. Yes, just a few minutes, but that's to reply to any new points that come up.

**MR ROYAL:**

Yes, we do acknowledge the counsel's assisting recommendation to remit.

20 This is basically what we're talking about.

**WINKELMANN CJ:**

Yes.

**MR ROYAL:**

25 And the applicants acknowledge that as a legitimate position and do not say remittal is beyond this Court's power.

**WINKELMANN CJ:**

Thank you.

**MR ROYAL:**

But two things have changed since the court for assist –

5 **WILLIAMS J:**

Mr Royal, your time's up.

**MR ROYAL:**

Oh, okay.

**WILLIAMS J:**

10 So you need to – you've got a sentence left.

**MR ROYAL:**

Yes.

**WILLIAMS J:**

And then we have to give counsel assisting an opportunity to make their  
15 submissions and then Ms Pender for the Governor-General.

**MR ROYAL:**

Yes. Yes, certainly, thank you your Honour. Just in this section the Crown's  
February 2026 pivot to the absolute bar position could not have been  
anticipated. That's the point we're making for the counsel for assist in the later  
20 submissions.

1040

**WINKELMANN CJ:**

Yes.

**MR ROYAL:**

25 So, thank you, your Honours. That is the applicants' statement today.

**WINKELMANN CJ:**

Thank you, Mr Royal.

**MR SMITH KC:**

If the Court pleases, my intention was just to talk to the two main topics that are  
 5 set out in the road map that seem to me to be perhaps critical, certainly from the jurisdictional point of view, topics. The first –

**WINKELMANN CJ:**

Is this the issue of proceeding, is the first one?

**MR SMITH KC:**

10 Yes, and secondly, the meaning of “interlocutory application”. It’s not clear to me to what extent there is a locking of heads, so to speak, with the Crown on the meaning of “proceeding”.

**WINKELMANN CJ:**

Yes, I don’t think there’s any issue between you and the Crown on the matter  
 15 of “proceeding”. Mr Royal has argued that it’s not a proceeding, although that gives him the difficulty under section 69, which is something that he may not have appreciated, given the labyrinth-like provisions we have in our statutes. Yes, I can indicate you probably don’t need to spend much time on the “proceeding” point.

20 **MR SMITH KC:**

With that helpful indication, I’d just make the point, the further point that, as an undefined term in the Senior Courts Act, the approach that this Court takes to the concept of a proceeding perhaps applies to the leave filter through section 56 to get to the Court of Appeal as well, and one of the considerations  
 25 for your Honours might be to what extent that is influential to the approach that you take to proceedings and the breadth or narrowness, as the case might be, but otherwise I’ve set out the position in paragraphs 3 and 4 of the road map, just noting the point that there’s been, since the written submissions were filed,

there's been an amendment to the High Court Rules, so rules 5.35A through C have come and gone, those provisions.

**WINKELMANN CJ:**

So, what do you say about 5.35A going? Because it did create quite a nice  
5 delineation for the registry, that if it complied with form, they were not to reject.

**MR SMITH KC:**

Which seems, if one stands back, a sensible approach, particularly when you bear in mind that there's that discretion at rule 5.2 to, even if you don't comply with form, to nonetheless receive documents for filing, and there certainly, in  
10 my career there have been cases where pleadings that I've had to address have been filed in manners, by prisoners or otherwise, that don't comply with form but clearly raise issues that are appropriately adjudicated and one of the ways of looking at that issue is we shouldn't be, as a matter of the policy of the law, too hard on the approach that we take to proceeding as a gateway for  
15 getting into, ultimately, for engaging the jurisdiction of the Court, because there are better filters within the scheme or arrangement of powers available to weed out matters that shouldn't even get to the starting blocks in the first place.

**WINKELMANN CJ:**

Well, if you did treat proceedings as excluding this, you would be left – what  
20 really would there be for this scenario?

**MR SMITH KC:**

That's the problem, because if it's not included here, you would not only have no potential for a leap-frog appeal to this Court, but by necessary implication, no appeal for – no prospect of an appeal to the Court of Appeal through section  
25 56 as well, on the basis of by parity of reasoning. You wouldn't have a proceeding that engaged that gateway for leave to appeal as well, and that, if your Honours come at it through the constitutional lens of access to justice and the rule of law, doesn't seem particularly attractive, constitutionally or in the scheme of the law, for that to be the position, particularly where we've got better

tools to filter out matters that shouldn't even get to the starting gate in the first place.

**KÓS J:**

You can take an in rem approach to it, really, and say what should have  
5 happened, and if it should have been filed, should have been received, then it is a proceeding.

**MR SMITH KC:**

Yes. There – I was thinking last night, there's – one of the issues that practically  
arises is what do you do when you've got proceedings that have got the kernel  
10 of something that is legitimately the subject of adjudication but has got scandalous or otherwise material in it? Now the better approach it would seem to me to address that would be not necessarily to require it to be refiled on the basis there was no proceeding in the first place but perhaps for case management to at an early stage ensure that the proceeding is appropriately  
15 focused and honed through steps and initial conferences for the Judge to exclude, by order if it can't be done by consent and case management processes, scandalous material.

**COOKE J:**

Isn't that what the old rule 5.35B and now the section 164A really capture?

20 **MR SMITH KC:**

Yes, and the question perhaps underlying your Honour's point and going to the Chief Justice's point before that is is there in substance a difference between what section 164A of the Senior Courts Act is now getting at and what it's replaced which is rule 5.35A through C.

25 **COOKE J:**

Yes. Well, I mean one of the issues is whether in a pure jurisdictional problem it's appropriate to apply section 164A or whether the registrar takes the papers to a judge and follows a process by analogy to what section 164A contemplates,

because it might be said it's – there might be some proceedings that are plainly abusive that have jurisdictional problems, there frequently are overlapping...

**MR SMITH KC:**

Yes.

5 **COOKE J:**

But there might be some which are pure errors of pleading, for example, this case which should have been a judicial review, not an appeal. But the appropriate approach was the Judge should have said this should be treated as a judicial review or the applicant should be given the opportunity to refile it as a judicial review. Would you agree with all that?

**MR SMITH KC:**

Yes, I would.

**COOKE J:**

And ultimately, what is the right answer? Should there be a process by analogy to section 164A or as it should be dealt with within that section?

**MR SMITH KC:**

Well, it – reluctant to give a general and abstract for all times answer to that question to the extent that section 164A wouldn't provide the necessary vehicle for dealing with a particular case. One would think, well, you might be able to fall back on the inherent jurisdiction of the Court to manage its own procedure and that will be almost certainly informed by the scope of section 164A but not necessarily constrained by it.

**COOKE J:**

Yes, and the problem with section 164A now is it's got the automatic restraint problems with it, like a three-strikes regime. So in a true error by a litigant in person, maybe this case has got an example of it. You may not treat it under section 164A. You might just deal with it under the inherent jurisdiction.

**MR SMITH KC:**

Yes, and one of the things that your Honours might consider in your judgment is to the extent to which it might assist registrars and ultimately judges dealing with these kinds of applications in the future to highlight the continued existence  
 5 of the inherent jurisdiction to enable sensible case management in addressing of these jurisdictional issues even when section 164A doesn't apply.

**KÓS J:**

One small problem with section 164A is it assumes the registrar has accepted the documents for filing and then refers them to the Judge, so you have to read  
 10 this alongside rule 5A of the Court of Appeal (Civil) Rules 2005 which is the one that says the registrars may refuse to accept for filing a document that's either plainly abusive or if a Court lacks jurisdiction. So in that situation section 164A doesn't apply and there's no reference to the Judge because there's no receipt of the papers at all.

15 **MR SMITH KC:**

Yes.

**WINKELMANN CJ:**

You would say this case doesn't come within that definition anyway because it plainly lacks jurisdiction. It's quite a sophisticated thing to say there's no appeal.  
 20 Just seems strange to me for the registry to be dealing with that, although they did then refer it to a judge.

**MR SMITH KC:**

Yes.

**WINKELMANN CJ:**

25 Leaving to one side whether the appropriate course is just simply to say it should be treated as an application for judicial review.

**MR SMITH KC:**

Yes, and particularly where it is a binary decision that has that practical implication. If it's not a proceeding then you don't get into the judiciary at all.

**COOKE J:**

- 5 There will be some cases that are self-evidently not within the jurisdiction, you know, if you try and file an appeal from an Employment Court decision in the High Court, and maybe the registrar can just reject that.

**MR SMITH KC:**

- 10 Yes, perhaps. I wouldn't want to say that you can't conceivably come up with those situations although the reason I'm pausing is, and it's obviously relevant to judicial review, is the proper procedural form here is if one applies the *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) principle then even very strong criminal clauses in theory wouldn't necessarily negate the jurisdiction of at least the supervisory jurisdiction of judicial review,  
15 and in a – one of the very interesting –  
1050

**WILLIAMS J:**

- 20 It probably wouldn't work there though because there is a pathway to the Court of Appeal so no one's losing any rights by applying the privative clause.

**WINKELMANN CJ:**

But that's – well, but it's not applied by the registry.

**MR SMITH KC:**

Yes.

25 **WILLIAMS J:**

Well that's true, yes, quite.

**MR SMITH KC:**

One of the, it's perhaps a segue into an interesting piece of research that I found in preparing for this is a New Zealand version of *Anisminic* that I wasn't aware of prior to yesterday which is the *Matua* (1908) NZPCC 522 decision of the  
 5 Privy Council which I've referred to in paragraph 9 of my road map and there it was – it is relevant to the next issue, but the issue there was whether or not the Privy Council had jurisdiction to hear an appeal directly from the Native Appellate Court.

**WILLIAMS J:**

10 Yes.

**MR SMITH KC:**

That was in circumstances where the relevant Native Land Court Act 1894 provided that decisions of that Court were final and conclusive and it's a very short but very strong *Anisminic*-like judgment to the effect that it's not clear  
 15 enough words to ask the prerogative jurisdiction that the Privy Council ultimately exercises and not for the registrar accepting issue, but generally for the constitutional matrix that is relevant here, I thought that was relevant to highlight even though it wasn't, it's not. It's an example of the Privy Council having a leap-frog jurisdiction earlier but it's not a case which I think could fairly  
 20 be characterised as an interlocutory application because he had a final decision there in respect of availability of probate which one would say is not an interlocutory but rather a substantive matter.

**KÓS J:**

But if the filing's clearly offensive to Parliament's intent by a clear jurisdictional  
 25 bar, then the registrar should be able to refuse it, I think. But if there's a question of contestability then that's a matter where the papers should be accepted, perhaps referred to a judge, or else dealt with by case management, or else dealt with by a strike out brought by the respondent.

**MR SMITH KC:**

30 Yes.

**KÓS J:**

All of those are available pathways.

**WILLIAMS J:**

5 The question is whether the registrar is in a position to know about contestability.

**WINKELMANN CJ:**

Yes.

**KÓS J:**

I'm not suggesting the registrar should determine it where it's contestable.

10 **WILLIAMS J:**

But will the registrar know that it's contestable.

**KÓS J:**

No, well my point is –

**WINKELMANN CJ:**

15 We might ask Mr Smith some of these questions.

**KÓS J:**

That's –

**MR SMITH KC:**

I'm more than happy to hear your Honours answers to the questions.

20 **KÓS J:**

That, I think, is what we've done, in fact.

**MR SMITH KC:**

Yes.

**KÓS J:**

So your response to my proposition?

**WINKELMANN CJ:**

Can you – it's a question of those you wish to answer and then – I mean, we've  
 5 been grappling with that because there seem to have been a little bit of legal  
 research by the registrar in this case.

**MR SMITH KC:**

Yes.

**WINKELMANN CJ:**

10 Then I had toyed with the idea, well perhaps it is appropriate to say where it's  
 the structural courts legislation and it says, there's no appeal against a court's  
 refusal of special leave or whatever, perhaps that is the sort of the thing the  
 registry should apply but not something like this where they're forming a view  
 about whether there's an appeal right, saying there's no appeal right, as  
 15 opposed to dealing with something which is an explicit Court-directed  
 framework. But it's a very hard line to draw.

**MR SMITH KC:**

Yes and it's a very hard topic to give general and abstract guidance on and that,  
 if anything, that seems to me that that would be the greatest danger, that you  
 20 painted with too broad brush and empowered or not registrars to make – to  
 perform a gatekeeping function that was more or less appropriate, given the full  
 range of jurisdictional screening issues that might come before registrars in  
 circumstances where the reality with the perhaps ease and pace with which we  
 legislate in New Zealand is that it's not inconceivable that Parliament will come  
 25 up with more or less creative and novel techniques for limiting or ousting judicial  
 oversight.

**WINKELMANN CJ:**

Is there possibly just clear, straightforward appellate pathway issues which are  
 the regular bread and butter of the registry. Appellate pathway issues is

something, but once it gets into specialist legislation construing that, it's a different thing, isn't it?

**MR SMITH KC:**

Yes, it can be. It's all – I hesitate again, because of *Anisminic*.

5 **WINKELMANN CJ:**

I'm just thinking there are – appellate pathways are clear pathways between courts.

**MR SMITH KC:**

Yes.

10 **KOS J:**

You don't want in that situation the Court to have to deal with something that plainly offends that pathway. But, as I say, if it's not, then that's what I call contestable.

**MR SMITH KC:**

15 Yes.

**KÓS J:**

Then that's really where a judge should deal with it, papers should be received, a judge should deal with it. A judge may say, we do nothing, and the respondent at that point may leap up and say, right, a strike-out application.

20 **MR SMITH KC:**

Yes, and I agree that that is the principal line in the sand, it's just how you articulate the placement of that line and with what implications.

**KÓS J:**

With great clarity, I think.

25 **MR SMITH KC:**

Yes.

**COOKE J:**

What you're saying is, whatever we say is the correct approach, it's got to accommodate all sorts of different scenarios, not all of which we may have thought of.

5 **MR SMITH KC:**

Precisely.

**COOKE J:**

It's got to be a correct principle that applies to all comers.

**MR SMITH KC:**

10 Yes. Unless your Honours wish to explore that issue of the scope of "proceeding" –

**WINKELMANN CJ:**

No, I think we've exhausted that. Well, we haven't come to an answer, but we're all exhausted by it.

15 **MR SMITH KC:**

Which brings us to the perhaps less exhausting issue of the meaning of "interlocutory application".

**WINKELMANN CJ:**

Yes.

20 **MR SMITH KC:**

And what I've sought to do in the road map there is break it down in terms of how one might think of, approach it through the lens of section 10(1) of the Legislation Act 2019, text, purpose, context.

**WINKELMANN CJ:**

25 Yes. Can I say then, I just ask, in your written submissions you come to the conclusion, I think, that the fact that the High Court Rules says it has to be made by way of interlocutory application is definitive?

**MR SMITH KC:**

I'm – I plump in the written submissions for a purposive construction.

**WINKELMANN CJ:**

Right, so that would be, you do not treat it as an interlocutory application, then?

5 **MR SMITH KC:**

The focus is on the substance of what's decided rather than the form of the application.

**WINKELMANN CJ:**

10 And so you would say there'd be a right of appeal to the Court of Appeal without leave on it?

**MR SMITH KC:**

In this case, yes.

**WINKELMANN CJ:**

Yes.

15 **MR SMITH KC:**

And that's – so one of the issues that the Crown does lock horns with me on is the question of lacuna, whether or not there is a lacuna that justifies ensuring that, or not, that there is some ability to leap-frog to this Court, where it is accepted that as a matter of interpretation, section 56 would give you a leave  
20 pathway, even on matters like this that, in substance, prevent a proceeding progressing, where there is the right to get as a right to the Court of Appeal on that.

25 And that's one of, it seems to me that's one of the big issues, and perhaps the issue that I grappled most with in preparing the submissions and preparing for this hearing is, my instinct is, never say never. It would be, it's more dangerous to close categorically the possibility of a leap-frog appeal on interlocutory decisions that have the effect of dispositively resolving things, but what I found

difficult is coming up with practical situations where reasonable minds might not differ as to whether or not this Court should hear a matter immediately and bypassing the Court of Appeal, and the most obvious ones are obviously strikeouts, summary judgment, and in my submission, the reasoning of the

5 Privy Council in the *Strathmore Group Ltd v Fraser* [1992] 3 NZLR 385 (PC) case that I've referred to under paragraph 6 is also persuasive on split trials and determinations that are reached through split trials that would undermine the split trial procedure as a procedure, if you couldn't appeal the outcome of them, even though that would hold up stage 2 of the trial that's been held back.

10 **COOKE J:**

Well, the Lands case was an interim injunction case, wasn't it? So that might be the sort of case that this Court might want to take directly as a leap-frog.

**MR SMITH KC:**

Yes, the issue of the Lands case, though, is that it was commenced in the

15 High Court, immediately transferred to the Court of Appeal and that heard it as a matter of first instance.

**WINKELMANN CJ:**

But that kind of order of magnitude, if we –

**KÓS J:**

20 Plus urgency, otherwise, we'd want to know what the Court of Appeal thought about the issue.

**MR SMITH KC:**

Yes, precisely, and it probably would be a Treaty case where, most obviously, where the issue was the retention of land or other Article 2 protected taonga

25 interests to ensure that they remain at the end of the proceeding for recognition, return, confirmation of the mana whakahaere holdings of an iwi or hapū group to that particular land in circumstances where the – if the case was being brought that if it wasn't successful, for instance, if it was struck out at the outset, you would have a situation where you might lose the land or the water, so in

that sense, your Honour, Justice Cooke's example of the Lands case is the most obvious example.

5 The other situation would be where the Court of Appeal would be inevitably bound to reach a particular outcome based on binding authority of a Privy Council decision or of a decision of this Court, and the one that is perhaps referred to most at the moment is any cause of action giving direct effect to Article 2 of the Treaty itself. Some say, well, the Privy Council's resolved that generally and as a matter of abstract law in the *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC) decision and it requires  
10 a decision of this Court to overturn it, so any claim based on giving direct effect to the Treaty, a cause of action sounding in Article 2 itself would be almost certainly doomed to fail in the Court of Appeal for that reason, justifying perhaps the case coming to this Court directly.

15 1100

**WILLIAMS J:**

You sound like you've thought about the shape of this case.

**WINKELMANN CJ:**

We won't take it further.

20 **MR SMITH KC:**

Well it, in a way the closest, and I loathe to but I will because it's front of mind, otherwise one situation where this might arise is, and it's a matter that's subject of an application for leave to this Court, is as a result of a Court of Appeal decision, the principle of indefeasibility of title has been found to trump  
25 customary title rights as a matter of law including the interface between Te Ture Whenua Māori Act 1993 and the Land Transfer Act 2017 and the Court of Appeal in that regard disagreed with a decision of his Honour Justice Cooke at the High Court on that.

30 And as a result of that decision one might say that if the Crown was intending for instance as part of a significant national interest infrastructure project to raise

titles for itself for presently untitled riverbed land, mindful of this Court's second *Whakatōhea* judgment recognising that navigability, as well as *ad medium filum* through the *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 decision have gone as justifications in and of themselves for the Crown to

5 assert title to riverbed land, then the effect of that Court of Appeal judgment would be that if you were to bring as a hapū claiming ownership of riverbed land that is presently untitled that the Crown needed for a large infrastructure project for a new hydro dam for instance, the Court of Appeal would probably be bound to follow the *Kearns* decision and, as a result, if there was urgency, going

10 through the Court of Appeal would perhaps lead to an inevitable result that that decision was correct and needs to be followed again and you'd slow down with potential prejudice to the underlying Article 2 grounded rights, a case that would ultimately need to be resolved in this Court.

**COOKE J:**

15 The sort of things you've just been talking about may suggest it would be better for us not to answer this question and leave it for a case of that character.

**WINKELMANN CJ:**

Other than confirm our purposive approach, which is already pre-existing.

**MR SMITH KC:**

20 Yes, yes, and that's a – it does strike – and it's much like the preceding question on the powers of – and the scope to which registrars might of their own initiative prevent a proceeding getting to the starting gates. Perhaps through this example there are situations one can envisage where it might well be the case that you need urgently, on a matter of significant constitutional importance, to

25 come directly to this Court on a strike out or a summary judgment application and the effect of the Crown's argument for the interpretation of section 69(c) would better close that door categorically, and the issue really for your Honours is whether or not that is something that prudentially should be done now and in – by necessary implication in my submission –

**DISCUSSION – TECHNICAL DIFFICULTIES (11:03:32)****MR SMITH KC:**

Just two final points subject to any further matters your Honours want –

**WINKELMANN CJ:**

5 Well I think we just pause for a moment because she is the applicant so we'll...

**WILLIAMS J:**

While we're in this break have you got the citation for the *Matua* case?

**MR SMITH KC:**

10 It's in paragraph 9 of my road map, so it's just there at the end of the second line, (1908) NZPCC 522.

**KÓS J:**

We're all going off to look at it.

**MR SMITH KC:**

Yes. I have hard copies with me, it's only three pages, if that would assist.

15 **WINKELMANN CJ:**

Yes please.

**COOKE J:**

Yes.

**WILLIAMS J:**

20 I think that was the case relied on by Ngāti Toa to prevent the northern boundary of the Ngāi Tahu settlement from applying by going straight to the Privy Council after, I think, a Māori Appellate Court decision in the late '80s, early '90s, so it has been invoked in relatively modern times.

**MR SMITH KC:**

Okay. It's not referred to in the road map but another document, I didn't refer to it but just found it interesting, by way of background as to the Privy Council's jurisdiction, is the Law Commission did a report in 1989 called *The Structure of the Courts* and the commissioners included Sir Owen Woodhouse, the former Chief Justice of this Court, Jack Hodder, and Sir Ken Keith, and one of the things that it sets out, and it's in appendix H, is it just lists all of the Privy Council appeals from New Zealand to that point, and I hadn't seen them listed in a single place before, so that's in appendix H. And it notes in appendix B at paragraph 46 that Privy Council appeals from the Native Land Court had directly been brought in the past, and it doesn't refer to any –

**WILLIAMS J:**

By prerogative.

**MR SMITH KC:**

Yes, and that's one of the two points that –

**DISCUSSION – TECHNICAL DIFFICULTIES (11:06:24)****MR SMITH KC:**

The two final points that I wanted to make, subject to any further matters your Honour wanted to explore, is firstly, what was the jurisdictional reach of the Privy Council prior to the creation of this Court? And they, as the *Matua* case illustrates, and that's referred to in the Lord Mance text that's amongst the joint bundle of authorities as well, the Privy Council, as a matter of the statutory jurisdiction it has under, relevantly, the 1844 statute, has the ability to hear appeals directly from what would be the equivalent of the High Court nowadays.

25

What I couldn't find when looking is any examples where they had heard direct or leap-frog appeals on interlocutory issues. The commentary at paragraph 3.45, which I won't take you to, of Lord Mance's text suggests that it would, in principle at least, be open, although unlikely to happen in practice much, if at all. As I read section 1 of the 1844 Act and clause 28 of schedule 1

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to the 1973 Privy Council order, that – it's really clause 28 of that that codified the full extent of the prerogative origin of that appeal jurisdiction and, in principle, it would have been wide enough to enable the Privy Council to give, to grant special leave to a leap-frog appeal in respect of an interlocutory  
 5 decision, but I can't refer your Honours to any examples where that happened.

**WINKELMANN CJ:**

Right, well, I mean there weren't many appeals to the Privy Council across the entire history of New Zealand anyway, so –

**MR SMITH KC:**

10 Yes.

**WINKELMANN CJ:**

– it's not necessarily statistically significant that there aren't any.

1110

**MR SMITH KC:**

15 No. The reason for highlighting it is that there's a suggestion in the Crown's submissions that the law in New Zealand had been very settled prior to the enactment of the Supreme Court Act and then transfer over that into the Senior Courts Act, that jurisdiction, but really it's pushing back on that, that the law arguably wasn't very settled at all and the major cases concerned the  
 20 jurisdiction of the Court of Appeal under its 1955 Rules and they were very much creatures of unique aspects of those rules in the three-month versus 28-day timeframes that respectively differentially applied to one category of appeal rather than another, and then, and this is the second bullet point under paragraph 9 of my road map, the *Matthews Corporation* case also identifies that  
 25 one of the things driving that approach to what qualified as an interlocutory decision was a concern that if strike outs did not fall into that category it would be depriving then High Court Masters, obviously Associate Judges now, of a significant jurisdiction that they were thought to have and needed to exercise in order to discharge the proper performance of that role.

**WINKELMANN CJ:**

Can I ask you a question about the relief? Say we were to grant leave to appeal, would there be much advantage to Ms Wolfe in that in that we cannot hear the substantive proceeding, cannot deal with the substantive proceeding at this level? What I'm asking myself is the relief we could grant, the best relief we could probably grant is directing that documents be received for filing. Would that be what you would think?

**MR SMITH KC:**

That would be my recommendation, that they – and your Honours might consider whether or not it would be worth indicating that this might be a matter that could be conceived of perhaps more naturally as a judicial review and raising issues accordingly as to the scope of the privative clause, the absolute discretion, power of Ministers, that sits behind the decision that was made here. But there is, I agree with the point that was raised by your Honour, Justice Williams, amongst others from memory, earlier, that there is an obvious natural justice problem here in that there's been no statement of defence, there's been no evidence, and those would naturally need to take place as steps before there could be a substantive adjudication of the underlying issues, and that –

**20 COOKE J:**

Bearing in mind that, even if we were to decline leave, we could indicate in the judgment that the most sensible course now is for a fresh filing of judicial review to be received in the High Court, because that's what should happen.

**MR SMITH KC:**

25 Yes. So one form of judgment that your Honours might write would be finding that as a matter of statutory interpretation interlocutory applications that are dispositive of outcome are not barred from leap-frog appeals to this Court through section 69(c) but in the discretion in that you have under section 74 and 75 it's not an appropriate case to grant leave to appeal on the facts and that the matter is –

30

**COOKE J:**

Well, the matter could be appealed to the Court of Appeal but the most appropriate course is for it to be received and dealt with on its merits in the High Court.

5 **MR SMITH KC:**

Yes.

**WINKELMANN CJ:**

I'm just wondering, in those circumstances, why we wouldn't just grant leave and then deal with matters substantively because we're arguing everything that  
10 is needed.

**MR SMITH KC:**

Yes, that's another option.

**WINKELMANN CJ:**

That's one possibility, because it wouldn't need to have another hearing to deal  
15 with it in that manner.

**MR SMITH KC:**

Yes, and that would be the –

**WINKELMANN CJ:**

That's something I can ask Ms Pender too.

20 **MR SMITH KC:**

That will be the remittal that was the Crown's initial position. That's been emphasised in the earlier submissions, the power of this Court to remit back to the High Court with a direction that the registrar accept for filing.

25 And then the final point that I wanted to make is, and it's the point at paragraph 7 of the road map with reference to the *E* [2025] NZCA 544 decision that your Honours distributed through the registry yesterday, and it's really just to

highlight that if you do a word search through the High Court Rules, and to a lesser extent the Senior Courts Act, Judges have a lot of own initiative powers now and I've referred to two of them in the bullet point under paragraph 7. Perhaps the most significant one to flag is rule 7.43 of the High Court Rules which enables a High Court Judge to make interlocutory orders on their own initiative. If the approach taken to interlocutory applications is based on the form rather than the substance of the outcome, you don't there have an interlocutory application that's led to the interlocutory decision, so there would be no screening that was done that would prevent decisions of that kind from getting to the Court of Appeal or to this Court in principle through the leap-frog pathway, and that, it seems to me, is a weighty consideration against the –

**WINKELMANN CJ:**

Can you just re-state that submission, Mr Smith, because I think I failed to follow it. You say if you do a search through the High Court Rules, judges have a lot of own motion powers.

**MR SMITH KC:**

Yes. So if you do a word search for "own initiative" as a phrase –

**WINKELMANN CJ:**

Really.

**MR SMITH KC:**

Yes.

**WINKELMANN CJ:**

How did that get in there?

**MR SMITH KC:**

There's quite a lot of them.

**WINKELMANN CJ:**

We don't want judges showing initiative, do we.

**COOKE J:**

Let alone their own.

**MR SMITH KC:**

5 The Crown's arguments would have implications for interlocutory decisions that were made through that pathway, that is to say without an application, because they're done on the judge's own initiative.

**WINKELMANN CJ:**

Right.

**MR SMITH KC:**

10 Unless your Honours had any final questions, those are the issues that I wanted to raise and explore.

**WINKELMANN CJ:**

15 That point is dealt with in your written submissions, isn't it, I think? That one about their own pathways. It shouldn't matter whether it's had to be dealt with by interlocutory application or the judge doing it on their own initiative.

**MR SMITH KC:**

Yes.

**WINKELMANN CJ:**

Thank you very much, Mr Smith.

20 **MS PENDER:**

May it please the Court. I was nodding, I anticipated the written submissions have been read, so I'm really here to respond –

**WINKELMANN CJ:**

Yes, they have been.

**MS PENDER:**

– to the discussion already that's been had and perhaps address a couple of points just for clarity. The Crown was never served because of the way of the process that was followed. The matter was not – the proceedings were not  
 5 accepted for filing and so they never got to the point where the respondents were served so the Crown respondents have been served with the application for leave. We've received all the documents that have been filed in this Court. The actual proceedings themselves, we have not received a copy and have not sought to chase that on the basis that it may be slightly distracting and more of  
 10 a hindrance given the nature of the issues.

**WINKELMANN CJ:**

Mr Royal asked who are you actually instructed to appear for?

**MS PENDER:**

We are – in our 15 September submissions, we did flag that as a bit of a  
 15 question mark because we hadn't been served in the High Court, but we had been served in this Court and we're really here to assist but obviously reserve all positions on the substantive proceeding, if it does proceed in the High Court, given the Crown has not had an opportunity to –

**WINKELMANN CJ:**

20 So you are really appearing for whom?

**MS PENDER:**

Well, we –

**WILLIAMS J:**

In Māori you said the Governor-General.

25 **MS PENDER:**

Did we say the Governor-General?

**WILLIAMS J:**

Yes, you did.

**MS PENDER:**

Sorry, the Crown. Did I?

5 **WILLIAMS J:**

You said the Governor, but I added the General, myself.

**MS PENDER:**

It may have been my pronunciation. I meant to say just the Crown generally.

**WILLIAMS J:**

10 Sorry.

**MS PENDER:**

We're being fairly generic here in terms of the respondents are all Crown, generally Crown, the respondents.

**KÓS J:**

15 You're presumably not here for the British High Commission.

**MS PENDER:**

We're not, not specifically, no. We're here probably for the Attorney-General or the proper –

**ELLEN FRANCE J:**

20 Presumably it is the Auckland High Court.

**MS PENDER:**

Yes. In the High Court, if these proceedings were filed, the proper respondent would be the Minister of Immigration because that's the decision which would be under review, if it becomes a judicial review. So all of that would be sorted  
25 in the normal course of things in the High Court.

**WINKELMANN CJ:**

That's a good tip.

**MS PENDER:**

Just in terms of the question about it being a judicial review, there is just one  
 5 little fly in the ointment here and that is that under section 247 of the Immigration  
 Act there is a requirement that judicial review proceedings be filed within 28  
 days.

**WILLIAMS J:**

Give me that section again.

10 **MS PENDER:**

Section 247. Now the more recent decision that we refer to in the memorandum  
 that was filed last week is the *Ochibulu v Immigration and Protection Tribunal*  
 [2021] NZCA 269, [2021] NZAR 392 case. It is one of those sorts of cases  
 where they were having to apply for leave to file a judicial review proceeding.

15 **WINKELMANN CJ:**

So there is a leave provision past, that is not a – it doesn't purport to be an  
 absolute bar, does it?

**MS PENDER:**

It's an extension of time is required. So they have to be filed within 28 days.

20 **KÓS J:**

Was this proceeding filed?

**MS PENDER:**

The appeal proceeding that the applicants attempted to file was filed within time  
 but by the time it was rejected, it was outside.

25 1120

**KÓS J:**

Well, another way of dealing with this would be to direct that that be treated as a judicial review proceeding, as is its permissible intent and that it be amended.

**MS PENDER:**

- 5 Yes, and in our 15 September submissions, we made the point that there is usually some latitude given for litigants in person for those documents to be formatted properly, and in the normal course of things that would probably happen at case management so that the documents would be filed but it would be corrected, in which case they would not have that problem of being out of  
10 time, so that was just an issue just to be raised there which just caused that complication.

**WINKELMANN CJ:**

No, thank you for identifying that.

**MS PENDER:**

- 15 Coming to perhaps the point about my learned friend's point about "never say never" and whether or not section 69(c) can be interpreted widely enough to allow for interlocutory applications even where the effect is to dispose of a proceeding, and it may not be fashionable to be advocating for an absolute bar, but that really is the interpretation, it's at a principled level, which is that under  
20 section 69(c), just given the interpretation, given the way that appeals have been dealt with before this Court was established, I take my learned friend's point that the empowering Act was wide enough to encompass all appeals, but the 1973 notice which had the same effect for longer than that, that clearly excluded – I'll put it another way. It only allowed appeals directly from the  
25 High Court on final judgments, and "final judgment" had been interpreted to exclude interlocutories, including strike outs, and that was the decision in *Re Chase (No 2)* [1989] 1 NZLR 345 (CA) looked at that.

- The key time was the *Matthews Corporation v Edward Lumley* decision in 1994  
30 where the Court of Appeal did look at this issue and was sympathetic to the fact that there is a difference between interlocutory decisions that effectively

dispose of a proceeding and those that are directed to preliminary matters, but found that the definition of “interlocutory application” in that regard, and what was interlocutory and what was final, was well settled and required legislative change of some kind. This is in the Court of Appeal.

5

There were then two opportunities, two key opportunities for that to happen. One was when this Court was set up, and in our submissions, our second set of submissions in February, we looked at the discussion around that, and it seems quite clear that it was intended that the same jurisdiction that applied for appeals, leap-frog appeals to the Privy Council, would continue to apply here and it would not apply to interlocutory applications as they had been defined, but that there would obviously be a right of appeal or to apply for leave to appeal to this Court against a Court of Appeal decision, so there was a right to go to the Court of Appeal.

15

The second opportunity was in the Senior Courts Act, with the consolidation, and this is where we got to the point where the Court of Appeal’s jurisdiction was looked at more closely, and as this Court knows from its decision in the *Siemer* case, the Court of Appeal struggled before that with almost the opposite approach, which was that there were too many appeals from the interlocutory applications in the High Court, but under the Judicature Act 1908, leave wasn’t required for any decisions from the High Court, and it itself had been trying to read restrictions into that general right of appeal to just manage that so that it only really applied to substantive decisions, interlocutory decisions, and this Court found that that was not something that was open to them. It could be managed, perhaps, at a procedural level through rules but there wasn’t a general right of appeal.

30

And so, section 56, which is now the Court of Appeal’s jurisdiction, was then amended to require leave for interlocutory decisions, or decisions made on an interlocutory application. That’s the wording, that’s the consistent wording. Decisions made on an interlocutory application from the High Court require, the default position is that they require leave from the Court of Appeal, but then, and this was a change that came in through the Select Committee process at

the advocacy of senior judges, we've got subsection (4), which then distinguishes between types of interlocutory applications, and interlocutory applications or where the decision has the effect of disposing of a proceeding, strike out summary judgment or dismissal, leave is not required. So they are  
 5 treated like a final judgment is where leave is not required, also under section 56(1). But, importantly here, we don't have that distinction when it comes to the jurisdiction point under section 69(c) for this Court, that it refers to decisions on interlocutory applications globally.

**WINKELMANN CJ:**

10 But we nevertheless do have jurisprudence which says that it is appropriate to take a purposive approach to the definition of interlocutory application.

**MS PENDER:**

The difficulty though is that it runs the risk of getting a different interpretation under the same Act. Even though it is a different interpretation section it's  
 15 materially the same in the way it defines interlocutory application.

**WINKELMANN CJ:**

Sorry, under the – in what circumstances? Different application, do an interpretation.

**MS PENDER:**

20 Or different definition. So the wording is a decision on an interlocutory application and that wording is consistent under section 69(c) and it's also under section 56(3).

**WINKELMANN CJ:**

So you're talking about the Court of Appeal's jurisdiction, yes.

25 **MS PENDER:**

I'm talking about the general interpretation under the single Act now, so it's about the context of the whole Act.

**WILLIAMS J:**

So your point is section 69 gave effect to the 1990s jurisprudence, *Chase* and *Re Fidow* [1991] 2 NZLR 602 (HC) and so on.

**MS PENDER:**

5 Yes.

**WILLIAMS J:**

And that section 56 was a departure from that that can't be implied into section 69.

**MS PENDER:**

10 Section 69(c). Well section 56, yes, that's right. Well, section 56 is around the Court of Appeal's jurisdiction and that enables an appeal from a High Court interlocutory decision to the Court of Appeal. Ordinarily leave was imposed, it didn't use to be a requirement, it is for procedural matters, but for where the decision finally disposes of the proceeding or has the effect of doing so, leave  
15 is not required. So that's that exception but it's still an interlocutory application, it's still defined as an interlocutory application.

**COOKE J:**

It doesn't say that in subsection (4) though actually, it doesn't say when the interlocutory application is dispositive, leave is not required. It just says if an  
20 order of the Court is dispositive it may be directly appealed. Doesn't use the words "interlocutory application" in the rule, does it?

**MS PENDER:**

Well, I apologise, section 56(3) says subject to section 56(4), so: "No appeal, except an appeal under subsection (4), lies from any order or decision ... made  
25 on an interlocutory application ...", and then (4) then goes on to state – define that exception.

**WINKELMANN CJ:**

Is your fundamental point though that if we make this – say this is not an interlocutory application that would allow a right of appeal as of – give a right of appeal without leave to the Court of Appeal which would inundate them with  
5 filing decisions, is that your point?

**MS PENDER:**

No, the point is that there is a right of appeal to the Court of Appeal if this is effectively – it disposes of it but if this had got – if this had been appealed –

**WINKELMANN CJ:**

10 But requires leave if it's an interlocutory application.

**MS PENDER:**

Well, subject to subsection (4). It does not require leave if the decision strikes out or dismisses the whole or part of the proceeding. So had this been an appeal to the Court of Appeal –

15 **COOKE J:**

It would appeal if it – the –

**MS PENDER:**

– in our submission subsection (4) would've applied and leave would not have been required.

20 **COOKE J:**

Right.

**WINKELMANN CJ:**

Right, okay, so what's the difficult – so that's consistent with us giving a purposive interpretation and just saying it's not caught by the bar on  
25 interlocutory applications, I think.

**MS PENDER:**

The point is that it is a decision made on an interlocutory application and rule 2.11 says that but it is, even for the purposes of interpreting it, so this is a decision made on an interlocutory application. If the Court of Appeal was  
5 looking at it there would be a right of appeal despite the –

**WINKELMANN CJ:**

Without leave.

**MS PENDER:**

Without leave.

10 **WINKELMANN CJ:**

Okay, so I'm just not seeing why there's a difficulty of different meanings within different provisions, because that's effectively having the same effect, that it gives a right of appeal without leave to the Court of Appeal.

**MS PENDER:**

15 Yes.

**WINKELMANN CJ:**

Whether it comes in under subsection (4) or whether it comes in because we say it's not an interlocutory application, it's still a right to appeal without leave.

**MS PENDER:**

20 Yes, to the Court of Appeal.

**WINKELMANN CJ:**

To the Court – but –

**MS PENDER:**

But to this Court, section 69(c) states that this Court's jurisdiction does not  
25 include where the decision – this Court's jurisdiction to hear a leap-frog appeal directly from the High Court does not include where the decision is made on an interlocutory application.

1130

**WINKELMANN CJ:**

Ms Pender, I think you're actually doing an inconsistent application because what the gravamen of section 56(3) and (4) is, is that really subsection (4) is a  
 5 carve out from subsection (3) so it's saying, these are interlocutory applications but in the case of these, we're not – we're going to allow you to come without leave to this Court. So we're going to say it's not in substance an interlocutory application because it doesn't need leave, and we're saying, well it's not in substance an interlocutory application. It can have a leap-frog appeal.

10 **MS PENDER:**

Our interpretation would be they are interlocutory applications. They start off as an interlocutory application. The decision can go one way or another. If it's, for instance, with a strike out, if the strike out is successful, it has the effect of disposing of the proceeding, but if the strike out is not successful, then the  
 15 proceeding continues. It goes on proceeding. So the outcome could be different depending on which way the decision goes but the application is an interlocutory application.

**ELLEN FRANCE J:**

As I understand it, you're saying that if you wanted to take an approach – if this  
 20 Court wanted to take an approach in terms of section 69(c) saying, if it's dispositive then we have jurisdiction, you needed to have the wording that you have in section 56, that is, section 56(4), and it has to be clear that the other part is subject to the equivalent of section 56(4).

**MS PENDER:**

25 Yes, exactly, so an interlocutory application includes procedural – decisions that are procedural in nature and decisions that are dispositive in nature. All interlocutory applications. Under the Court of Appeal's jurisdiction, they've separated those out in terms of whether leave is required. So they've actually got two subsets, but the same thing hasn't happened under section 69(c), so it

bars leap-frog appeals directly from the High Court under any decisions that are made on an interlocutory application, irrespective –

**WINKELMANN CJ:**

So that's a statutory interpretation point. You're saying that really, you'd expect  
5 to see words something like section 56(4).

**MS PENDER:**

Yes, and that was an opportunity to do that.

**WINKELMANN CJ:**

We'll take the morning adjournment.

10 **COURT ADJOURNS: 11.32 AM**

**COURT RESUMES: 11.49 AM**

**MS PENDER:**

Thank you, your Honours. Just before the break, just to confirm that point about section 69(c) generically refers to decisions made on an interlocutory  
15 application and states that this Court does not have jurisdiction to hear appeals directly from the High Court, but to be clear, we accept that there is an appeal, there would have been an appeal to the Court of Appeal, so that does not deprive the applicants of a right of appeal. It simply deprives them of a right to bypass the Court of Appeal, and that's really the intent around this too, is to  
20 ensure that there's not an opportunity, or the doors are not open widely, for the ability for applicants to bypass the Court of Appeal and come here and attempt to have this Court hear appeals directly.

So, the interpretation issue, which is set out in more detail in the written  
25 submissions, is based on the plain wording of section 69(c) when contrasted with the wording of section 56, which clearly has a sort of asymmetric elegance, if you like, where it treats some, the decisions that are made on an interlocutory application, differently depending on their outcome. So, leave's required if it is

procedural or preliminary. Leave's not required if it disposes of the appeal, but the point being that that is not, that same distinction is not provided for under section 69(c), nor is it provided for under the definition of interlocutory application, which has had a long-standing meaning and, as the Courts found, particularly in that *Matthews* case, the meaning has always been based on form rather than substance.

The interpretation therefore is history, context, and plain wording, and also bearing in mind, as a Court, given this Court is not one of general jurisdiction, it does very much become a proper statutory interpretation exercise in that regard.

The second point is around, does this leave a lacuna? And in our submissions, we said no. I take the point that my learned friend Mr Smith made, drawing out the scenario where, for example, strike out on a matter of law in the High Court. If it goes to the Court of Appeal, the outcome is perhaps known, either because the Court of Appeal is bound by Privy Council or perhaps an earlier decision of this Court, or perhaps there may be contrasting decisions in the Court of Appeal so that, again, it's not going to be particularly useful to go to the Court of Appeal, and there is a policy reason why it would be useful to come straight to this Court.

In our submission, that's not so much – that's not in the interests of justice. There's still a right of appeal, it's just more an efficiency. It's an architectural problem and it may be an architectural problem that exists within the statute itself, and it's certainly worth pointing out, but whether that then provides an opportunity to read words into section 69(c) that aren't there, in our submission we would say no. We would say, certainly pointed out that that may end up being a lacuna. The case hasn't happened yet, and in the 22 years, the history of this Court, there have only been two leap-frog appeals and they've both been on final, substantive matters and they've both involved matters of national significance, so it was the *New Zealand Māori Council v Attorney-General* case in 2013 and the *Environment Defence Society Inc* in the following year. One involved a national aquaculture system and the other was for the sale of state assets. Both of those were –

**COOKE J:**

*Wairarapa Moana* was a leap-frog, wasn't it?

**WILLIAMS J:**

Yes, it was.

5 **MS PENDER:**

Which one, sorry?

**COOKE J:**

*Wairarapa Moana*, where this Court overturned me.

**WILLIAMS J:**

10 Very reluctantly.

**MS PENDER:**

That escaped my search, I apologise, yes, yes, but again, that was a final judgment.

**COOKE J:**

15 Yes.

**MS PENDER:**

As opposed to a strike out, so there's only been two – three in the history and they've been final, so we're talking about the possibility of a possibility, so we're carving out something that could happen. It may happen, it may be a problem,  
 20 but it may be something to identify as an architectural problem that the legislation needs to address, and it may be that the solution would not necessarily be an interpretation of section 69(c) or even around the definition of "interlocutory application". The solution may be giving power to the Court of Appeal, perhaps, to refer matters to this Court in those sorts of  
 25 scenarios, but it may – it's something that's much more high-level and should really be dealt with at that level.

**COOKE J:**

What do you say to the idea that we don't have to decide that question because of, you know, it would be better decided in a case that does raise these issues?

**MS PENDER:**

- 5 The problem with – the difficulty with that is we still come back to this definition of “interlocutory application” and is there room, is there relativity in this definition that means – because if it's not an absolute bar, my learned friend says, well, it can still be filtered under the criteria under section 74 and 75, but the problem with that is that means that that's in every case. So that means that if there's a
- 10 gap in there, it can only be filtered out. So a leave application has to be accepted, and it has to be determined. The beauty of an absolute bar, which applies – presumably it applies relatively regularly if there is an attempt to appeal an obvious interlocutory decision, one on a procedural point, is that it doesn't get past –

15 **KÓS J:**

The registrars.

**MS PENDER:**

- The registry. Now I know that raises an issue that was raised earlier. Does the registrar have the power and presumably the registrar identifies that there's a
- 20 decision of the Court that affirms that and perhaps it's confirmed by a minute of a judge that this doesn't have jurisdiction, but it doesn't start, then there's efficiency in that.

**WILLIAMS J:**

- Isn't there just as much efficiency in a registrar finding, for example, that this is
- 25 a judgment without final effect on the proceeding or it's not a judgment with final effect on the proceeding. One gets through, the other doesn't. It's just as black and white.

**MS PENDER:**

Just, as I understand –

**WILLIAMS J:**

You're talking about needing a clear line.

**MS PENDER:**

Yes.

5 **WILLIAMS J:**

If section 69(c) were read in a manner that's consistent with section 56(3) and (4), so that finality is your line, that's just as clear.

**MS PENDER:**

Yes.

10 **WILLIAMS J:**

It doesn't leave fudge. It's just a different line.

**MS PENDER:**

That would require to read into that –

**WILLIAMS J:**

15 Correct, because that's a different point.

**MS PENDER:**

Yes.

**WILLIAMS J:**

20 Clarity is not the problem here. It's architectural history and its effect on section 69(c).

**MS PENDER:**

Yes, and that would, certainly if there was a concern there, that there was no other right of appeal but, in our submission, there is a right of appeal, and it is to the Court of Appeal.

**WILLIAMS J:**

To the Court of Appeal.

**MS PENDER:**

In section 69(c), the purpose of that is to avoid the ability to bypass or to very  
 5 much limit the ability to bypass the Court of Appeal. So it's to – if there's an  
 absolute bar on jurisdiction, the matter goes straight – it gets directed to the  
 Court of Appeal at that point.

**WINKELMANN CJ:**

On your interpretation, where section 56 really does shape how we read  
 10 section 69(c), that would mean that this Court could never allow a leap-frog on  
 a strike out or a summary judgment, because that is an interlocutory application.

**MS PENDER:**

Yes.

**WINKELMANN CJ:**

15 The Court of Appeal is given jurisdiction to hear it but the Supreme Court is not  
 allowed to deal with it on a leap-frog.

**MS PENDER:**

Yes. That would be our interpretation of section 69(c) and that was the  
 Court of Appeal's decision in *Re Chase (No 2)* under the Privy Council, the  
 20 same leap-frog, where it said that you could only apply for leave on final  
 judgments.

**WILLIAMS J:**

Yes. Don't read this as saying I disagree with you, because I don't necessarily  
 disagree with you at all actually.

25 **MS PENDER:**

Yes.

**WILLIAMS J:**

But given there's only three examples, and none of them interlocutory, is it a problem that doesn't need fixing?

**MS PENDER:**

- 5 I think we're saying the same thing. The point is that if it's not – allowing an application for leave and then determining it on applying leave criteria, when probably nine times out of 10, maybe even more, the leave is not going to be granted because it's too high.

**WILLIAMS J:**

- 10 Probably 99 times out of 100.

**MS PENDER:**

- 999 times out of 1,000, and so – but that's the handling of that. Once the leave application is accepted, it has to be determined. There's submissions. It's not costless in terms of time, in terms of money. It also perhaps exposes a litigant, particularly a litigant in person, to adverse costs awarded against them, and also it means that really, the efficiency of saying, I'm sorry, not here, down the road, up the road, Molesworth Street, go to that registry. It's let's make sure that this is efficiently dealt with because there is a right of appeal.
- 15

**COOKE J:**

- 20 I think Justice Williams' point is that there are so few leap-frog applications even, that the Court wouldn't be bombarded with further applications, and with so few cases to worry about.

**MS PENDER:**

So far, yes, possibly.

- 25 **KÓS J:**

That really cuts both ways.

**WILLIAMS J:**

Yes, I suppose so, except for the case where it really matters.

**COOKE J:**

Yes.

5 **KÓS J:**

In which event, one outcome would be for the parties to ask the Court of Appeal to simply determine the appeal adversely and move on.

**COOKE J:**

Yes.

10 **MS PENDER:**

Then that –

**KÓS J:**

We recognise that you're going to dismiss this appeal, please do so and let us appeal to the Supreme Court.

15 **MS PENDER:**

Yes, it could be dealt with that way.

**KÓS J:**

That's the sort of thing George Barton would've done.

**MS PENDER:**

20 Yes.

**WILLIAMS J:**

Yes. There's not many of those around now.

1200

25 **MS PENDER:**...about, a sort of a precedent that's going to work against them, you'd like to think you might have sensible counsel on both sides who might do

that by consent and arrange that, if the architecture's not changed, if there wasn't an ability for the Court of Appeal themselves to identify that.

But that's an efficiency – but what we're talking about here is the right to appeal,  
 5 and there is a right to appeal, there's a right to appeal to the Court of Appeal, and that's really where it should be and what section 69(c) is designed to do is to prevent traffic coming to this Court unnecessarily and if you're required, if this Court's required to accept an application for leave and then determine it knowing probably almost certainly it's going to be declined but you've still got  
 10 to go through that process, in our submission there are downsides to that and the absolute bar by accepting a bar on all interlocutory applications under section 69(c) is efficient and is a positive thing to do.

**WINKELMANN CJ:**

Ms Pender, if we did grant leave would there be – is there any reason why we  
 15 couldn't just decide the appeal on the basis of today's argument?

**MS PENDER:**

In the Crown's first set of submissions on the 15<sup>th</sup> of September where we did not address the jurisdiction point and we were dealing with the two decisions there, that's where we identified the potential error and suggested that if this,  
 20 you know, the proper relief is remitting it back to the High Court that's what all the applicants can really expect, that's the high level of the outcome of having an appeal and it would be sensible and pragmatic to do that.

**WINKELMANN CJ:**

And if we didn't grant leave what do you think the Court should say to the  
 25 High Court about this?

**MS PENDER:**

Well if the Court, in determining the jurisdiction point, was to determine that section 69(c) prevented this Court from even considering leave, an application for leave for entertaining anything, it could perhaps observe the difficulties in  
 30 this and that this should have gone to the Court of Appeal. It's a matter that if

this was before the Court of Appeal the Court of Appeal would then be able to certainly grant relief.

**WINKELMANN CJ:**

I was thinking we might speak more directly about what should happen about  
5 the proceeding.

**ELLEN FRANCE J:**

In the High Court.

**WINKELMANN CJ:**

In the High Court.

10 **MS PENDER:**

In the High Court. Some sort of guidance, even if it is obiter, would be useful. It has identified an issue here. Just on the point about the rule 5.35A to C which has been revoked because it's now reflected in almost identical language in the Senior Courts Act and that applies to all the – all the courts now have that same  
15 power, but of course there is, as your Honour Justice Cooke identified, there's this extra consequence that goes with that which pretty much reinforces where the Court of Appeal had landed in terms of the scope of the ability to strike out, but it was genuinely abusive in its narrow form and didn't extend to normal strike out grounds. That would almost seem to be without question now given the  
20 consequences.

But, on that, and this is the point around own initiative, that is a pre-emptive decision, it's not one made on an interlocutory application, in which case that, in our submission, section 69(c) would not necessarily apply. It might be  
25 interlocutory but it's not one made on an interlocutory application, it's one that is the Court's own initiative and –

**WINKELMANN CJ:**

So there would be ability to leap-frog that?

**MS PENDER:**

Section 69(c) would not preclude that on our reading.

**KÓS J:**

On the question of obiter, it wouldn't need to be obiter. The Court of Appeal's  
5 not seized of anything here, the Court of Appeal's never had this case.

**MS PENDER:**

No.

**KÓS J:**

So if we were to decline to grant leave, the matter would still be in the High Court  
10 and we could speak to the High Court in our judgment and that may require for  
instance in that the High Court, which is still seized of the proceeding, to deal  
with it in a different way.

**MS PENDER:**

Yes, well the error that was made in the High Court could be identified, that's  
15 right.

**KÓS J:**

That's right.

**WINKELMANN CJ:**

Can I just take you back to what you just said, which is to take you to what  
20 Mr Smith said, which is that when a judge does it on their own initiative they  
can have it – the unsuccessful filing party has a right to seek leave direct from  
this Court, leap-frog, but when they make the mistake of – but if it's – if they  
apply for review they can't and Mr Smith says that seems perverse, because  
they've brought an interlocutory application.

25 **MS PENDER:**

Oh, for that, for the filing. Well, the facts of this case are very unusual.  
There would be review of decisions that are made on matters of form, so that

where the registrar has rejected documents or a proceeding for filing on a matter of form, as the registrar has the power to do so, in which case those reviews, you'd make –

**WINKELMANN CJ:**

- 5 But Mr Smith's point is that it's an appellate pathway turning on something which is quite apparently inconsequential, and it seems wrong for that.

**MS PENDER:**

- The "own initiative", though, is done without reference to the parties. It's referred to by the registrar straight to a judge, so it's not exactly the same,  
10 whereas in this particular case the applicants applied for review and were able to make submissions to Justice Lang.

**COOKE J:**

- The Court of Appeal has adopted a different approach to that. It said that the rule 5.35A is an interlocutory decision even though there's no formal  
15 application. So, for example, if there's a decision requiring an amended pleading under rules 5.35A and B, the Court of Appeal has said you need leave to appeal that decision.

**MS PENDER:**

Even when the proceedings are disposed of, effectively?

- 20 **COOKE J:**

Well, if they're disposed of, then it comes within subsection (4).

**MS PENDER:**

Subsection (4), but the point is, they see it as an interlocutory at the – made on –

- 25 **COOKE J:**

So the Court of Appeal said it doesn't really matter whether you've got a piece of paper called an application.

**MS PENDER:**

Okay.

**COOKE J:**

It's the type of order made, that can be made on interlocutory application.

5 **MS PENDER:**

All right, so – and that may be the way to do that, to look at that consistently, and it wouldn't matter so much in the Court of Appeal because you have that sort of asymmetry, and maybe somebody could argue successfully that it has the effect of dismissing the proceedings. Certainly, if it strikes them out it would  
10 be a strike out.

**COOKE J:**

What do you say about proceedings that are filed that are not plainly abusive on their face but may not be within jurisdiction of the High Court? Do you apply the kind of process that rule 5.35A and B used to have, what now section 164  
15 has, by analogy? Does the registrar take the proceeding to a judge for determination?

**MS PENDER:**

Well, jurisdiction is a – stands alone, I mean, what we're dealing with here. The question is whether the registrar has the power to reject it. We say possibly  
20 not, that the registrar's ability to reject documents, they seem to be for matters of form or for filing fees.

**COOKE J:**

What if you file in the High Court an appeal from the Employment Court?

**MS PENDER:**

25 Then it could be referred to a judge on their own – in the High Court, of course, it has general jurisdiction and could do that, but a judge could issue a minute saying that this Court has no jurisdiction to receive this.

**COOKE J:**

So it's a judge, not a registrar?

**MS PENDER:**

That would – that would seem to be the proper course. It is a – it's a matter of  
 5 substance, and the registrar has many powers but they do seem to be far more  
 intended to be far more administrative, and so the registrar may flag it but need  
 to take it to a judge and get a judge to issue some sort of minute.

**COOKE J:**

And this is all done in the inherent jurisdiction?

10 **MS PENDER:**

Of the High Court, yes. There may be procedures under the rules, nothing I  
 can put my – it would be inherent jurisdiction, which of course the High Court  
 has, which the appellate Courts have some jurisdiction for their own process,  
 but on jurisdictional points, it would come down to the jurisdiction that is given  
 15 it under the statute.

**WINKELMANN CJ:**

Right, well, thank you, Ms Pender. Now I have one more question for you –

**MS PENDER:**

Yes?

20 **WINKELMANN CJ:**

Which is costs. You wouldn't – grant of leave or no grant of leave, jurisdiction  
 or not, the Crown would not be seeking costs, would it?

**MS PENDER:**

No, no, I – this case has taken on its own, you know, the issues have morphed  
 25 into larger than the facts of this case, so it would be very unfair, I think, to –

**WINKELMANN CJ:**

Well, I mean, and the Crown concedes there's been –

**MS PENDER:**

Yes.

**WINKELMANN CJ:**

Things have gone wrong in the High Court.

5 **MS PENDER:**

Yes.

**ELLEN FRANCE J:**

Just one question. In terms of your previous point about inherent jurisdiction and so on, this Court has said we do have inherent powers in relation to  
10 supervision of the registry.

**MS PENDER:**

Registrar, yes, I'd accept that, yes.

**ELLEN FRANCE J:**

Or registrar.

15 **MS PENDER:**

Certainly.

**ELLEN FRANCE J:**

Which would presumably enable some of what we've been talking about.

**MS PENDER:**

20 Certainly, in terms of if the registrar was going to reject –

**ELLEN FRANCE J:**

Yes.

**MS PENDER:**

– documents for jurisdiction, this Court could do it, but in terms of interpreting what this Court's jurisdiction is, that's bestowed. The jurisdiction is a statutory jurisdiction.

5 1210

Just one small point that I just wanted, that wasn't in our submissions. It's something that I picked up preparing for this. It's just a little bit more of an error in the decision of his Honour Justice Lang. The registrar in refusing the proceedings said, it's an appeal. There's no right of appeal. You need a judicial review. Justice Lang actually went one step further in paragraph 3 of the minute and said, there's no right of review either, so that was an error, on the face of it, as well.

10

**COOKE J:**

15 But was he talking about judicial review or was he –

**MS PENDER:**

Under Part 7 of the Immigration Act, I –

**WINKELMANN CJ:**

Was he talking about judicial review?

20 **COOKE J:**

I see he does say "appeal or review".

**MS PENDER:**

Yes. But against the decision of a Minister under section 61, which is expressed in absolute, and the point we make here is we're not here to argue the substance of the proceeding. We haven't seen it. We don't know what the grounds are. We do make the point that it is a very high threshold for success, judicial review against a decision under section 61, but that's for the applicants to consider themselves. If there's nothing further.

25

**WINKELMANN CJ:**

Thank you, Ms Pender.

**MS PENDER:**

Thank you.

5 **WINKELMANN CJ:**

Mr Royal, you have a right of reply but it's only to points that have been made that haven't already been covered in submissions by you, things that counsel have said that you wish to respond to.

**MR ROYAL:**

10 The Crown has relied on the interlocutory label and that the mechanism – the only mechanism that we had to review the registrar's decision was rule 2.11, and that in terms of Lang J's decision, sorry – in terms of the registrar's decision, and we seek the Court's guidance on this, the very first rule is for the registrar to accept the actual application without a predetermination – making a  
15 predetermination. If there was an issue, then the registrar would formally, and this enters the interlocutory appellate pathway, would refer it to a judge. That did not happen. Then with respect to Lang J, we agree, in terms of section 56 and carve outs, that his decision was judicial in character only. It only met one of the limbs. The rest failed. I just wanted to bring that to your attention  
20 because Crown law brought that up.

**WINKELMANN CJ:**

So your point is if it had gone through the proper pathway, it would've been a decision by the judge without an interlocutory application because the registrar would've referred it to the judge and you shouldn't have had to have applied  
25 with an interlocutory application to review, is that your point?

**MR ROYAL:**

Well, unless I'm wrong, there's steps, there's procedures, there's rules, and they weren't met and it's because of that, that we're here today and also there has been the mention of the strike out. Well, that wasn't engaged. It wasn't

applicable to our position in our circumstances, and so while the Crown states that there was an appellate pathway, no lacuna, that is theoretical. In actuality, in the reality, was that normally after a decision like the one that Lang J made, we would've had a 20-day right of reply. The very same day, enforcement was

5 undertaken by Crown officers. So that took away literally, because we had to deal with that when it was happening, we had no right of 20-day reply. In fact, the Crown already pre-empted and made an operative, final determination that there was no filing or proceeding, and that's why they advanced. So we do seek clarity on these issues because as your Honour Joe mentioned, the

10 architectural history, even from a self-representative, it feels unsettled, it's not clear, and we've suffered the consequences because of that, and in terms of the rule 5A(3) that was also mentioned, there was no pleading. We never even got the chance to plead, so once again, there's issues and we rely on the powers under section 65 of this Court. We concur and thank you, sorry Judge,

15 with the Supreme Court supervision of the registrar. Absolutely, something's got to be done.

And just before I close, section 61, even as I mentioned by way of the Ministry, Minister's briefing categorically states that section 61 is not absolute. It is not

20 absolute, and that was the reason, the very – if we go right back to the beginning, that was the very reason why the registrar made that operative determination, which was final, in effect.

And so, lastly, the applicants ask this Court to grant leave and answer the

25 questions of law, and ensure that, as the Crown has identified, those errors do not achieve permanence by remaining unexamined. So, with that, we close our submissions, thank you.

**WINKELMANN CJ:**

And you would seek costs, wouldn't you, under the new costs regimes that allow

30 costs to unrepresented parties?

**MR ROYAL:**

If that is granted by the Court, yes.

**WINKELMANN CJ:**

All right, thank you. Thank you, counsel, and thank you, Mr Royal, for exceptionally helpful submissions, and we will reserve our decision. We'll now retire.

**5 COURT ADJOURNS: 12.17 PM**