IN THE SUPREME COURT OF NEW ZEALAND SC CIV 13/2005

IN THE MATTER of a Civil Appeal

BETWEEN **KENNETH CHRISTOPHER MORGAN**

Appellant

AND **THE SUPERINTENDENT, RIMUTAKA PRISON**

Respondents

Hearing 14 April 2005

Coram Elias CJ
Gault J
Blanchard J
Tipping J
Henry J

Counsel Appellant in person
A S Butler and B Keith for Respondent

CIVIL APPEAL

10.03 am

Elias CJ Thank you. Yes Mr Morgan, you're appearing for yourself.

Morgan Yes.

Butler Butler and Keith for the respondent Your Honour.

Elias CJ Thank you Mr Butler, Mr Keith. Yes Mr Morgan. Mr Morgan, what we have is the submissions that you gave in the Court of Appeal which we've read and would you like to start and enlarge upon those submissions in any way you wish to do. Thank you.

Morgan Thank you Your Honour. I appreciate the opportunity to appear before the Court today. I have over the last few weeks, in preparation for the hearing of this appeal, spent a great deal of time writing and rewriting what I expected would be convincing submissions to this Court. However, when I received the Crown's submission yesterday that has been presented to this Court, I realised that in fact what I had been writing is nothing more than what I have read in the various decisions of the lower Court that we have been using thus far in this matter. And I don't think it's appropriate for me, a non-lawyer, to come before this august body and quote your words back to you. So instead what I propose to do is to talk about why I believe I am being held unlawfully at present at Rimutaka Prison. I'm conscious of the fact that the onus is on the Crown to prove that my incarceration is lawful and according to the oral Judgment of Justice Ronald Young of 1 February this year, where he said the onus of proving valid incarceration is on the Crown and the standard proof is beyond reasonable doubt. I have no reason to doubt that and a Decision of the Court of Appeal that was a two to one decision must in my view raise reasonable doubt.

Elias CJ Mr Morgan can you just help us and tell us what Decision of Justice Ronald Young you were referring to.

Morgan The number?

Elias CJ Yes the number.

Morgan The number I refer to is CIV 2004-454-036.

Elias CJ Thank you.

Morgan Hearing of 1 February at Wellington, Judgment 1 February oral Judgment.

Elias CJ Thank you.

Morgan Now I might not need to take it any further because clearly we have a split Decision, I had a split Decision with the Court of Appeal. But that doesn't actually resolve the core issue that this case is really about. This case is about whether or not I should have been released after serving two-thirds of my sentence. I committed an offence when the Criminal Justice Act applied when I was entitled to be released after two-thirds of serving my sentence. The Crown suggest that somehow or other this case is to do with parole. I don't follow that. I've looked very closely, I've looked very closely at the authorities that they provide to this Court to support their argument that this is about parole. And they make interesting reading but in fact this case is not about parole. Under the Criminal.

Tipping J You say do you that this case is essentially about release date?

Morgan It's about a release date, correct. A release date under the Criminal Justice Act at two-thirds of a sentence was not an option that the Parole Board at that time, it was not within their area of, it was no choice.

Elias CJ It was a mandatory release.

Morgan It was a statutory scheme that applied at that time to all inmates serving a long term determinate sentence. And the change of legislation in June of 02 took away that entitlement when the retrospective legislation was passed and enacted on 30 June 2002, this Act which I was ultimately sentenced under, for there was no other Act of Parliament under which to sentence me at that time, I accept that. I also accept that for administration purposes I'm covered by the Parole Act. The only question is whether or not being required to serve a 50 percent longer term of incarceration is in the nature of an increased penalty. The sentencing Act 4(2) says for the purpose of this Act an offender is subject to a sentence of imprisonment until the sentence expires. Section 5, subject to various sections which I'll talk about in a moment, this Act applies to offences committed before or after the commencement date which was the 30th of June 02.

Subject to ss.148 to 160 that are referred to in s.5 of this Act, are the transitional provisions. Ss.148 to 160, transitional and savings provisions. They allow for this retrospective legislation to not impact in a detrimental fashion against a number of different types of offenders ranging from murder which, 154 which states s.104 does not apply to a murder committed before commencement date.

148, this section applies if an offender is sentenced on or after the commencement date for an offence committed before that date. So we have a variety of different transitional and savings provisions. Unfortunately I didn't fall into any of those categories. When I came to be sentenced, a sentence that was imposed amounted to a 50 percent larger penalty than that that would have been imposed under the Criminal Justice Act.

Blanchard J Was it ever pointed out to the sentencing Judge or to the Court of Appeal on your appeal to them the first time round that there was this effect?

Morgan No Your Honour. I have in the last week studied the Sentencing Judge's Notes and the Decision from the Court of Appeal where I appealed against sentence and conviction and in both cases there was no mention of this difficulty that has in my mind just recently arisen.

Blanchard J Has it been pointed out to the Parole Board on any of the hearings before them?

Morgan No it hasn't but I have been aware throughout the time of my sentence that under the new law I'm going to be required to serve the full time unless I'm granted parole.

Tipping J Just following up on that Mr Morgan, to get the same practical result from the point of view of release date, the sentence would have had to have been two years under the new regime would it not, which would have been the equivalent of a three year sentence in practice terms under the old regime? Is that as you see it.

Morgan Correct but that in itself raises difficulties of course.

Tipping J Indeed.

Morgan In that a two year sentence now means serving half, one year.

Tipping J Quite.

Morgan You see two year sentence under the old law meant serving of two thirds. One year and four months. A two year sentence under the new law is a serving of one year.

Tipping J You're in effect in that awkward, that's one of the reasons I raised the issue.

Morgan Yes.

Tipping J Yes and you've seen it immediately, yes.

Morgan I'm definitely in that awkward position where I fall in the middle. For offenders who commit an offence after 30 June, they know what the law is at that time. The new law is you are going to do your full time whatever your sentence, you will spend that in prison unless you are granted the privilege of parole. But for those offenders who committed an offence prior to 30 June 02 who were ultimately sentenced under the Sentencing Act to a period of incarceration of longer than two years, a long term determinate sentence, those people have been disadvantaged by this change to the law.

I raised in my earlier submissions the question of attainder. I'm not a lawyer, I'm not going to debate what a Bill of Attainder is. I know what I know from the comments in the earlier Decision of the Court of Appeal. But it seems to me that there is a group of people that are disadvantaged and that their disadvantage is not a disadvantage that's been imposed by a sentencing Judge but rather by an Act of Parliament. And it is for that reason that I believe that s.6 of the Sentencing Act should apply to myself.

So we look at all of these Decisions that the Crown advance that support their contention that this is to do with the granting of parole. I

say that's not right. I had an entitlement under the old law that I lost under a new law. And the penalty has been increased by 50 percent. Now.

Tipping J It all depends on what you mean by penalty. That seems to me Mr Morgan, if it's of any help, to be a crucial issue.

Morgan Yes. And I will cover that in just a moment Your Honour. But let me just comment that penalty, I endorse the comments of Justice Hammond from the lower Court when he talks about the variety of different penalties. But I also wish to refer to a case that was presented to the Court of Appeal by the, I'm having trouble following things, I had the wrong glasses on, excuse me, here we go. I thought it was nervousness that I couldn't read my words and it's not. I refer to the House of Lords, sorry the Lords' Decision, **Uttley** and at the bottom of page 2285 paragraph 28 (**R v Secretary of State for the Home Dept, ex p Uttley** [2004] 1 WLR 2278). Now of course **Uttley** is a case that's very similar to **Fulcher** (**Fulcher v Parole Bd** (1997) 15 CRNZ 222). It is about somebody having served two-thirds of their time and then being entitled to be released from prison and then they are concerned about the length of conditions and the harshness of conditions that are imposed upon their release. And in this case the Lords found that in a similar way to our Court of Appeal found in **Fulcher** that in fact that was not an increase in penalty. But at paragraph 28, the release of a prisoner on licence, this Lord Phillips, albeit subject to onerous conditions, mitigates rather than augments the severity of the sentence of imprisonment which would otherwise be served. Now if I include in their next sentence the numbers that apply to my sentence, it makes a little more sense. A sentence of 3 years' imprisonment with release on licence, or in our case parole, after serving two-thirds is a less heavy penalty than a sentence of 3 years imprisonment all of which has to be served. Clearly the reverse then is the case. If I'm required to serve three years imprisonment, that is clearly a harsher penalty than being required to serve 2 years with release on licence.

Blanchard J Isn't the comparison being made there though with a life, with imprisonment for life?

Morgan Correct. And I refer you now Your Honour to page 2290 of the same Judgment, paragraph [43] line G. Lord Rodger says, of course if legislation passed after the offences were to say for instance that a sentence of imprisonment was to become a sentence of imprisonment with hard labour then issues would arise as to whether the article, in their case 71, was engaged even where the maximum sentence had been life imprisonment at the time of the offences.

And I refer you most importantly to the following page of 2291 paragraph [46]. Where Baroness Hail refers to the European Court of

Human Rights decision where she says it is clear from that Court's Decision in **Welch v United Kingdom** (1995) 20 EHRR 247. that Article 7 is not limited to the sentences prescribed by the law which creates the offence. It can also apply to additional penalties applied to that offence by other legislation. The concept of a penalty is an autonomous conviction concept.

I go on to next sentence. There may be changes in the essential quality or character of such a sentence which make it unquestionably more severe than any sentence which might have been imposed at the time of the offence. Examples might be the reintroduction of hard labour with every sentence of imprisonment or the automatic conversion of a sentence of imprisonment into a sentence of transportation. And I think we can include in there an actual example that has occurred where an entitlement has been removed by the legislature which has the same effect of creating a demonstrably harsher penalty.

You see I knew at the time of my arrest that I was facing for the charge of cultivation a maximum penalty of seven years. I also knew that if I received that penalty I would be released after serving two-thirds and then that I would then serve the balance of one-third as a free man albeit subject to conditions imposed by a Parole Board. If I had received a sentence of seven years under the new law, I would serve that full seven years. Now in both cases, under the old law.

Tipping J Not necessarily.

Morgan I beg your pardon?

Tipping J Not necessarily.

Morgan I accept that under the old law and under the new law I was entitled to be considered for parole having served one-third of my sentence. However the granting of parole has been long found to be not a right. The granting of parole is a privilege. And I'm.

Henry J Isn't the right, the right to be considered for parole, isn't that a statutory right?

Morgan It is a statutory right to be considered, that is correct. But it's not a right to be granted parole. That is a decision that the Parole Board make. That is not, the decision to be released at two-thirds under the old law was not a decision that the Parole Board made.

Henry J Yes.

Morgan That was a statutory right. And that's the difference between the old law and the new law. If parole was not granted then that is a debate or a discussion or even a form of action of some kind that is between the inmate and the Parole Board. That's exactly what the case was with

Fulcher. **Fulcher** didn't like the extended time of the conditions. Nor the quality or the type of conditions. He considered that to be an additional penalty and sought to have that reduced by the appeal. The Court, rightly in my view, found that whilst he was entitled to be released, the conditions that are imposed upon him after his release are nothing more than a supervisory or a perhaps in some cases a harsher type of penalty, beg your pardon, a harsher type of supervision that might be available to a prison. The key fact is that Mr Fulcher and in this United Kingdom case, **Uttley**, were released by statute at their two-thirds. And that all the arguments that have been presented about the parole and the right of parole and such like in my view have nothing to do with the case that I bring before you today. It is about the penalty.

25G is limited to the determination of the charge. Section 6 of the Sentence Act however does not have such a limitation. So when we have a look at the **Uttley** case, and on page 2285 is a brief summary of the **Welch** case that I mentioned to you and I think provided to the Court today, has been a full copy of the European Court of Human Rights in the **Welch** case, where it found that in fact that Court found that a confiscation order did constitute a penalty and that in consequence Article 7.1 had been infringed.

Now I want to talk about how we came to have s.6 in the Sentencing Act according to the Court of Appeal Decision that I am appealing today. The Court of Appeal outlined the legislative process or the time line if you will from the Commission of Human Rights, the Article 15.1 and how that has been reflected in the different legislation since that time. And that as 15.1 has been found to be, or in 25G and 6 therefore must be limited to the judicial sentencing process, it's clear that in the UK that 7.1, which is identical wording to our 15, Article 15, that in fact it is possible through separate legislation to create an additional penalty. It therefore follows that the penalty that's referred to in s.6 of the Sentencing Act, if it is limited only to the judicial sentencing process, then it would be open to a wide variety of different penalties to be imposed that don't interfere with a sentencing Judge's right to impose a sentence based on the facts before him or her.

Henry J Mr Morgan, what would be the reason for changing the old s.4 of the 1985 Act which was directed to the power of a sentencer to s.6 which you say is not so directed?

Morgan Section 6 of the Sentencing Act?

Henry J Yes.

Morgan Is not, I understand the question. I guess there has been a development in the thinking processes.

Henry J Is that evident from any material which we can look at?

Morgan I think that's evident from the **Welch** case where the European Court of Human Rights has acknowledged and has accepted in that particular case that different legislation can create a different penalty. It's not just the sentencing judge that can impose that penalty.

Henry J I understand that. I was interested to know though whether there was anything leading up to s.6 of the 2002 Act indicating that there was a change in policy from what had previously adhered since 1985.

Morgan Not that I'm aware of Your Honour. I mean I'm familiar with the 25G.

Henry J Yes.

Morgan Section 6 of course reflects that exactly. Except the preamble is different and therefore I think s.6 has a wider application.

Henry J Does it have a wider meaning in the Bill of Rights Act as well then?

Morgan I think it has more teeth in the Bill of Rights, yes. And that is reflected I think in the discussion in the New Zealand Bill of Rights with Rishworth, Huscroft, Optican and Mahoney pages 706 to 713 that are included in the Crown's authorities, last page. (*"The New Zealand Bill of Rights"* (Oxford 2003) 706-713). Now in there, page 707, the comment here is the protection against retrospective penalty increases is arguably less under 25G of the Bill of Rights than it is under s.1 of the Sentencing Act 02. This is because s.6 of the Sentencing Act affirms both the right against retrospective penalty increases and in 6(2) provides that the right is to apply notwithstanding any enactment or rule of law to the contrary.

Henry J Is there any difference in substance between 25G and 6?

Morgan Only to the extent that s.6 applies despite any other enactment or rule of law.

Henry J That's subs (2)?

Morgan In subs (2), correct.

Henry J But subs (1), is that effectively the same as 25G?

Morgan Yes it is, same words.

Henry J So how do we interpret 25G?

Morgan Well 25G is limited of course to the determination of the charge, which section 6 is not. I'm suggesting that s.6 in fact should be given a wider. If s.6 is not given a wider meaning than 25G has been accorded in the past, then there will be no limit to the penalties that can be

imposed which have nothing to do with sentencing Courts. And that's the major concern. Legislation that is passed that imposes a penalty, and of course it's to be determined whether a penalty has been imposed under any legislation, I accept that, but the Lords talk about hard labour as being an additional penalty. If s.6 is limited only to the same meaning that has been provided by 25G in the past to the sentencer's actions, then the next time we have a different mood in the community and a different Parliament we may have hard labour introduced as an additional penalty.

Henry J Does that mean 25G and 6(1) have to be read in the same way?

Morgan Read in the same way but with s.6, having the rule of law to support it, needs to be expanded because when it applies to a penal enactment then there should not be a retrospective effect. Look if Parliament passes a law and says from this date forth anybody convicted of cultivating cannabis will be taken out and flogged in public, fine. As long as I know that that's the penalty before I commit the offence. But if that becomes the penalty after I've committed the offence and I'm being charged under an old law, where that penalty hasn't changed, but the Parliament decides that there will be additional penalties imposed, then that's unfair. I didn't know about those penalties, I didn't know at the time that I committed my offence that whatever sentence I received, I would be required under the law to serve the full term, unless I received the privilege of parole, I accept that. But as I said earlier, this is not about the granting of parole. This is about what the legislature lay down as the penalty.

Tipping J Mr Morgan, could I just build on part of the discussion you've had with my brother Henry. I'm interested in the contrast in the language between s.4(2) of the old Criminal Justice Act and s.6(2) of the Sentencing Act. And you're probably familiar with that difference. The old Act prohibited any Court, no Court shall impose any sentence or make any order in the nature of a penalty that it could not have imposed when the offence occurred. So the focus there was on the Court imposing a sentence or making an order.

Morgan Correct.

Tipping J The focus under the Sentencing Act s.6(1) is not so much on the Court but, as it seems to me arguably anyway, on the overall penalty produced by what the Court does and what Parliament says is the effect in practical terms of that Act by the Court. Now that may be said to be building too much out of a change of language. But it is something that you may or may not wish to consider.

Morgan Your Honour I agree entirely with you. That's really in my non-lawyer like way trying to demonstrate to this Court today that clearly the changes are for a purpose. That I believe that s.5, if it's going to be retrospective and there's no question about that, it applies to offences

committed before the commencement date, that those offenders should not be disadvantaged by this new law and so ss.148 to 160 allow for that as an interim measure. But if there's anybody been missed, if there are different penalties that are imposed by something that we've missed, s.6 covers that. And clearly there are additional penalties that are imposed.

Tipping J In a sense, if I may try and encapsulate that aspect of your argument, and don't think I'm necessarily agreeing with you.

Morgan I understand.

Tipping J I'm just trying to tease it out.

Morgan Yes.

Tipping J In a sense it's a catch-all of a transitional kind. The fact that it shan't work more partially. If people aren't excluded specifically, this is a residual category of people who are not to be disadvantaged by the new law. Is that one say of putting it?

Morgan Yes but I think it goes further than that.

Tipping J Yes I imagine you do.

Morgan It's not just a transitional provision.

Tipping J No, no.

Morgan As long as this Sentencing Act applies any new legislation that might be of a penal nature.

Tipping J But in a sense you see it is transitional because it talks about a variation doesn't it? It talks about a variation of penalty. Therefore it's premised on the basis that at date A when the person does it there's one penalty and date B when he comes up for sentence there's another and harsher penal regime.

Morgan Yes.

Tipping J So it's designed to stop people. How far it goes is another matter but its purpose surely is to stop people being disadvantaged in penal terms from a change.

Morgan Correct. And not just during the transition of this new Act coming into force but any new penal enactment that creates a harsher penalty.

Tipping J Oh it's general in application.

Morgan It will protect from that. Correct. So if today I was to offend and tomorrow the Government decides that that offence will have the addition of hard labour attached to it, then clearly s.6 should protect me from a penalty that includes hard labour, as it didn't apply at the time of my offence. So yes.

Tipping J One point, if I may continue. One point that does trouble me a little is how does one disapply the clear intent of the Parole Act. It's as clear as a bell that it's intended that its regime will apply to you. Do you disapply it through the vehicle of s.6(2), saying that if this creates a penalty of a harsher kind, 6(2) has the effect of disapplying it? Is that the method by which you would suggest that the clear terms of the Parole Act? No-one could argue that that's what Parliament was intending to achieve, but somehow or other you've got to show us how we disapply it.

Morgan I understand the point you're making and that's probably the hardest and I guess that's why you're there. That's the hard decision. That's the one that you have to deal with. I come to you with the problem. I'm a citizen. I say I'm being disadvantaged by the Action of my Government and I need some protection from that. And s.6, I say, gives me that. How it affects it is.

Tipping J Well I have suggested an argument which is that the intent of Parliament or the meaning of Parliament is that if we find that some aspect of the Parole Act clashes with the retrospectivity principle, 6(2) is an instruction to the Court to disapply it because it is a what you might call, it applies despite any other enactment.

Morgan Correct.

Tipping J And it is premised on the basis, 6(2) is, that there is going to be a clash between one enactment and another. Because unless there is, it's not invoked.

Morgan Yes.

Tipping J I'm not wanting to argue your case but I'm just wanting to suggest to you a possible argument.

Morgan Well it seems to me that if you find that a harsher penalty has been imposed upon me where s.6 may apply, that is it is retrospective, and accept that a penalty can be the result of legislation other than the, in my case the Drugs Act penalty, it comes back to the Department of Corrections, a Government department, who made the policy decision when the new law came into effect that as from 1 July they would no longer give inmates an FRD, a Final Release Date. A final release date, and on the papers you'll find that I filed in the High Court action as an exhibit, provide for the various dates that will apply and I will be able to quote you the various dates. But there is a parole eligibility

date, a final release date, a sentence end date and a statutory release date. Now as from 1 July the Department of Corrections no longer apply a, final release dates only applied for those that were subject to a long term determinate sentence. So if you find that the penalty has been increased in my case and that I am entitled to the relief that I seek, a writ of habeas corpus, the Department will be able to overcome that problem by applying a final release date to those offences that applied before or that were committed prior to 30 June 02. What the statutory grounds for doing such a thing, I'm not sure. I don't know.

Henry J Mr Morgan, is the effect of your argument really that s.86(2) of the Parole Act, which is the release date provision, may be, or is inconsistent in some circumstances with s.6 of the Sentencing Act?

Morgan Yes that is correct. Section 4(2) of the Sentencing Act.

Henry J Section 4.

Morgan 4(2) of the Sentencing Act is what actually confirms within the Sentencing Act how long I'm subject to a sentence of imprisonment. I am subject to a sentence of imprisonment until the sentence expires in accordance with sections 82 which is what applies to me.

Henry J Yes. Does that not mean that Parliament has passed two Acts on the same day which are inherently inconsistent?

Morgan I believe that this Act of course commenced as a combined Bill.

Henry J Yes.

Morgan I am assuming that the reason for splitting it was because of the thickness and the bulk of the, lots of trees were taken to print such a large document.

Henry J Would the alternative to inconsistency on the Part of the legislation be that they gave a meaning to s.6 of the Sentencing Act which was consistent with the old 1985 Act? In other words it was directed to the powers of the sentencer.

Morgan I don't believe s.6 is limited to the same restrictions as the old Act. I think that for transitional purposes here's a new Act. I've read the transcript of Hansard from the three readings. I don't see anything other than a desire to improve what appeared to be somewhat of a hotchpotch of a variety of different amendments affecting the Criminal Justice Act over a number of years. And I think to a large extent that Parliament has achieved that. I think that what actually has been missed is that when this was being put together, there were a class of inmates under the old law who, when they were coming up to their two-thirds and their entitled release, an application could be made to the Parole Board as it was then constituted in order to keep that inmate

in prison for a longer time for a variety of reasons – they haven't learnt their lesson, they've misbehaved in prison. A variety of reasons. And I assume that it was changed in the current way so that in fact the Parole Board don't have to have an application made to them. They simply look at a prisoner's or an inmate's record and say, yes you are now ready for release. And that can happen any time after one-third unless of course a sentencer imposes a minimum, I understand that.

So it seems from an administrative point of view to be an easier way of dealing with offenders that are incarcerated than under the old law. When people are ready for release, the Parole Board will take care of it. But of course that leaves us with that anomalous situation that if the Parole Board, according to the rules and policies that they have at that time, do not allow that privilege of an early release, then offenders under the Sentencing Act will be required to serve their full time, it's as simple as that.

And that's the harshness, that's the additional penalty, the additional penalty that has been imposed on those people that have been caught up such as myself.

I'm well aware of course of the ramifications of this Court finding that I am being held unlawfully and that a writ of habeas corpus should be issued. But that would be nothing more than in fact a number of people like myself that fit the same criteria will have been kept longer than in fact what was intended. I believe that s.6 was intended to protect people such as myself from a harsher penal regime than that that applied previously. It says it in the title that these enactments are not to have their retrospective effect to the disadvantage of the offender. Section 5, which applies to offences committed before the commencement date, it says it's subject to s.6. Section 6 clearly in my view gives me the protection that if I demonstrate to a Court of competent jurisdiction that I have a harsher penalty, a harsher penalty as opposed to an administration matter such as has been dealt with in **Fulcher**, and all of the cases that the Crown rely on to support their argument (**Fulcher v Parole Board** (1997) 15 CRNZ 222). That's not what this case is about. It's not about parole. Okay.

Elias CJ Thank you Mr Morgan.

Morgan Thank you.

Elias CJ You will have an opportunity to reply as well.

Morgan Thank you.

10.53 am

Elias CJ Yes Mr Butler.

Butler I just need a moment Ma'am.

Elias CJ Yes. Mr Butler to me, for the application of the new provisions, you really rely on 8(2) in particular do you?

Butler Yes, of the Parole Act.

Elias CJ Well I have a preliminary question for you which is why, if the applicant is right, and he had an entitlement to a statutory release date as a matter, that's a matter of interpretation perhaps we can explore, but why any decision gets made under the Parole Act?

Butler So Ma'am, if I understand the argument, it would be that s.8 subs (2) refers to the word, uses the word "decision".

Elias CJ Yes.

Butler And so therefore if there's a right to be released.

Elias CJ Yes.

Butler Then that's not a decision that has to be made in terms of s.8 subs (2).

Elias CJ Yes, yes. Because on one argument the applicant had a statutory right to release. You have the impact of section, what is it, 27, I get all those muddled up with the Bill of Rights Act.

Butler Section 25G.

Elias CJ 25, you have the interpretation provisions of the Interpretation Act as to the repeal of an enactment not affecting existing rights. Is s.8(2) sufficient?

Butler I just need to have a moment just to think that through.

Elias CJ Yes. Perhaps you'd like to then carry on with what you wanted to put to us and come back to that.

Butler Yes Ma'am, exactly, I might do that. I would just say preliminarily that there is of course subs (1) of 8 which says the Part applies to all offenders who are subject to a sentence of imprisonment on the commencement, including offenders who on the commencement date are subject to a preceding sentence. So that's another way of looking at the way in which the Part applies to an offender in the position such as Mr Morgan.

Elias CJ Yes but there's an argument really that the transitional provisions, including the transitional provisions provided in the Interpretation Act, would have the preceding regime, the entitlement to the statutory release continue.

Butler I'll certainly need to think about that argument Ma'am.

Tipping J Could I add another dimension to that?

Butler Please.

Tipping J It may not be as powerful as the Chief Justice's point with respect. The words, "unless specifically provided otherwise".

Butler Yes.

Tipping J And the proposition or possibility that s.6(2) is a specific provision otherwise.

Elias CJ And as another sort of part in that, I note that in **Pora** (**R v Pora** [2001] 2 NZLR 37) it's recorded in the judgments that the Solicitor General conceded that a minimum non-parole period was a penalty for the purposes of these sort of provisions.

Butler Yes Ma'am.

Elias CJ Here effectively on one argument you have the withdrawal of a statutory entitlement to release and that seems to me to be similarly arguably a penalty. For the same sort of reasons.

Butler For the reasons outlined later in the submissions, that's certainly not a position that the Crown would adopt in this particular case.

Elias CJ No.

Butler I think I can provide you with some clarity in terms of the Crown's position at least on that point.

Elias CJ Yes.

Butler At this preliminary stage the Crown would say there's a clear distinction between the type of sentencing power, and it was a sentencing power that was at stake and under discussion in both **Pora 's** case and **Poumako** (**R v Poumako** [2000] 2 NZLR 695). Both orders of the Sentencing Court. And that is a distinction with a difference to the, that makes them different from the situation involved here.

Elias CJ Well that.

Butler I mean I understand the.

Elias CJ Well you put that argument then solely on who exercises the power.

Butler Yes that certainly is a strong feature of the argument under that head.

Elias CJ Mm.

Butler Thank you Ma'am. Now Your Honours, you do have a copy of the written submissions that have been filed in advance which obviously have been filed without full knowledge of the nature of the argument that might be made this morning by Mr Morgan, but really, based on the nature of the argument traversed in the Courts below. And I'm more than happy to delve into wider issues. It may mean however that I'll need to have some time to look over the lunch break or indeed the morning adjournment if there's some of these wider issues that have arisen, just to be able to consider them and provide the Court with something helpful.

Elias CJ Yes.

Butler Rather than something off the top of the head. I don't think that's necessarily helpful to Your Honours.

Elias CJ Yes.

Butler If there were other matters which need to be pursued. I don't need to cover the background to the case because Your Honours are familiar with that. Mr Morgan hasn't addressed the issue of leave. The Crown has made some submissions on whether leave ought to be granted. I don't know that I need to particularly refer Your Honours to that unless you'd like me to address them.

Elias CJ No.

Butler Thank you Ma'am. In turning to the substantive submissions, again it might be worth just going through the arguments in relation to the Parole Act and why it is that the Crown says that the Parole Act is clear. In terms of the structure of the Act, the purpose of the Act is to reform the law relating to the release from detention of offenders serving sentences of imprisonment and to replace the provisions of Part 4 and 6 of the Criminal Justice Act 1985. It would seem perhaps useful Your Honours, just in terms of scene-setting for the arguments which come, to refer to some of observations of His Honour Justice Henry in the **Fulcher** case, if I may refer the Court to a relevant passage. It's that featuring at page 231 of the report. 231.

Now Your Honours, just one administrative matter I suppose, just the casebook which the Crown prepared had a number of pages missing unfortunately which I apologise for and I do gather that the Registry has been able to provide the missing pages to Your Honours.

Elias CJ Yes.

Tipping J Is this missing from **Fulcher** or missing from **Uttley**?

Butler Yes unfortunately.

Tipping J I had a great chunk missing from **Uttley**.

Elias CJ Both.

Butler Yes, I know Sir, the pages came back from the Court of Appeal and were incomplete and I gather that the copy that you received equally from the Court of Appeal was incomplete.

Elias CJ Yes, I don't think we were given the missing pages in **Fulcher** were we? You have and filed them out of order then.

Tipping J **Fulcher**'s in full in the Court of Appeal casebook with the red tags.

Butler That's what I was going to say Sir.

Tipping J Right.

Butler And my understanding is that in the version that went to the Court of Appeal, they were set out in full though Mr Morgan says that in his version of the Court of Appeal they're not complete. So I don't understand what happened.

Elias CJ They're not complete in my version from the Court of Appeal. Perhaps you could just read out what you're relying on.

Butler Yes, I'm sorry Ma'am, I do apologise for that. The passage Your Honours begins at line 25 of the Judgment of His Honour Justice Henry. I mention finally the question of retrospective legislation. I doubt whether the principles of retro-activity have any present application. Part 6 is concerned with the administration of prison sentences, not with their imposition. For example I think it is clear that an offender would be subject to parole and release conditions which came into force after commission of the offence but before sentence. I can see no objection in principle to such a result and doubt whether the principles of the doctrine would be offended if provisions of this nature are altered while a prison sentence is being served. And His Honour then gives a specific example which is quite an interesting one I think in the context of this case.

Another example of s.105 which empowers the Board, if pre-requisites are satisfied, to require an offender to serve substantially the full term of the sentence notwithstanding the final release provisions of s.90, its origin is in the 1987 amendments to the 1985 Act and I see no reason why it could not be invoked for an offender whose offence occurred prior to enactment and for one who is sentenced after enactment.

When enacted the 1985 legislation applied Part 6 to offenders undergoing imprisonment who had not been released from probation etc etc. The 1954 Act had a corresponding provision, s.58(2) of the 1993 Amendment is in similar terms and effects a similar result but with the reservation the other provisions expressed as negating the new parole and release provisions will be an exception to the general rule. The concept of applying new administrative provisions to existing inmates is well established.

Indeed that's a point that comes through in a number of the other New Zealand authorities, for example the **Norton-Bennett** High Court decision (**Norton-Bennett v Attorney-General** [1995] 3 NZLR 712 (HC)) and equally that of **Palmer** (**Palmer v Superintendent, Akld Maximum Security Prison** [1991] 3 NZLR 315 (HC)).

Elias CJ Can you let me know what s.105 provided for? Was that a disciplinary provision or something like that?

Butler No, that was where an application could be made by the Department of Corrections to make sure that an inmate served the full term of the sentence.

Elias CJ On what grounds?

Butler So beyond the two-thirds that it was.

Tipping J That didn't apply to every offence did it Mr Butler?

Butler No. No it didn't apply to every offence, that's right. There was particular types of offenders.

Tipping J It didn't apply to cultivating cannabis for example?

Butler No, for example.

Tipping J So it doesn't really provide a perfect or full analogy with the present case.

Butler Well I'm not sure that's right Sir. In my submission what it indicates is that something which may involve the extension of time which an inmate may serve is not something which necessarily.

Tipping J It was primarily directed to public safety wasn't it?

Butler Yes.

Tipping J At least so far as its administration was concerned.

Butler Yes as indeed are the provisions of the Parole Act 2002.

Tipping J Yes.

Butler I think that's something which we may well come back to in the exchanges that we will have. But what the basis is upon which the Parole Act 2002 works, because the 2002 Act is premised in terms of the guiding principles.

Tipping J But a person committing the offence of cultivating cannabis pre-this legislation, even under the old legislation, would know that s.105 couldn't apply to them if they performed the mental calculations which Mr Morgan so eloquently pressed upon us.

Butler Certainly Sir, no that's quite right. But an offender of the type in respect of whom an application could be made in terms of s.105 would not have. Which is the point that Justice Henry was making in his judgment as I take it.

Tipping J I think my brother Henry was making the point, and happily he's here, that this was in general terms an indication that such a provision was not regarded as part of the penalty but was part of the administration.

Butler And equally I say that it's illustrative of the general approach of the Courts in this area in terms of the distinction between the sentence and the parole, the administration of the sentence through the parole system.

Tipping J If you invoke it as an example of a general distinction I'm not particularly troubled. But you can't invoke it as something to which Mr Morgan would have been subject.

Butler No I'm not. I'm not invoking it in that, no Sir, sorry, certainly I hope that wasn't, no, no, no, no. I wasn't invoking it for that. I was just invoking it as an illustration of the sorts of things that were had in mind as being entirely compatible or not inconsistent with the principle against non-retroactivity. It was just for the purposes of illustration as to how far in terms that might go.

Tipping J I understand Mr Butler, I understand perfectly.

Butler And again, I did regard it just as a scene setting statement in terms of the approach to this distinction between sentence and parole. Now it's the Crown's submission.

Elias CJ Not a distinction however maintained by the Crown in **Pora**.

Butler No because there.

Elias CJ You would say because it's the Judge who sets a minimum non-parole period in that case.

Butler Yes and again perhaps one way of addressing that argument at this stage Your Honour in outline is this. Is that the sorts of reasons which a Judge was to look at in terms of entering, of making the minimum non-parole period in a case like **Pora** or **Poumako** was looking at the nature of the offence which brought the offender before the Court. So it was classically a sentencing matter. Whereas when one's looking at parole, one's not looking at the offence as such, one's looking at the offender. Of course the offence gets factored into the Parole Board's approach.

Elias CJ Well yes, I was going to ask you about that. What's the section with the matters the Parole Board has to consider?

Butler That's s. 7 I think of the Act, which sets out the guiding principles. I've taken some copies of that as it happens.

Elias CJ Oh, thank you. Is the second page something we're not permitted to see or it just irrelevant?

Butler Oh it's irrelevant. So I mean I'm happy, I just didn't, too much paper for the Court.

Elias CJ Thank you.

Butler The second sheet just contains extracts from the Sentencing Act as they were a few days ago. But those provisions have been changed. They're now different from what they were at the relevant time. The guiding principles are there Ma'am. Subsection (1) of 7. When making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Board in every case is the safety of the community. And again I would say, well there's again a distinction with substance there in terms of the Court's approach to what a penalty is in this type of case and certainly the way in which the sentencing regime and the parole regime run parallel in a sense but distinct and separate.

Elias CJ Well not entirely distinct and separate.

Butler Not entirely, not entirely.

Elias CJ And there is really an issue as to whether this combined regime now results in a two-step process. A two-step sentencing process. I hope that's not a matter we'll need to get into today.

Butler Thank you Ma'am. Well hopefully the general point in terms of the perspective from the Crown's position is relatively clear. The reason why we'd say that the imposition of a minimum non-parole period is different from parole is that it's about the offence. And if one looks at the relevant provisions of the Sentencing Act, again its emphasis is on

the nature of the, was very much on the nature of the offence at the relevant period, s.86 subs (2) of the Sentencing Act.

Tipping J The minimum non-parole is focused discretely on the concept of parole. The withdrawal of entitlement to release, as the Chief Justice put it, or you put it, I can't remember, as the dichotomy.

Butler Yes.

Tipping J Is focused on the Act of release. And the Parole Act is slightly misleadingly named. It should really be the Parole and Release Act. And it's concerned just as much with entitlement to release as with parole. Parole is a form of release.

Butler Yes that's a fair, that's a fair comment. And interestingly the sub-Part 2 in which the guiding principles appear, the sub-Part heading is "release".

Tipping J Oh is it?

Butler Yes.

Tipping J Oh right.

Butler And you'll see that the heading to Part 1 of the Parole Act reads, "parole and other release from detention".

Tipping J So you're either released on parole conceptually, or you're released. I mean there are two types of release, release on parole and release if you like subject to conditions.

Butler Well there's not because of course there's home detention for example which is referred to and if you look at s.6 of the Act which gives an overview of release.

Tipping J Yes.

Butler Is how it refers to it. You'll see there's three types of early release from a penal institution, one of which is parole, one of which is home detention.

Tipping J Well that's a useful concept, early release.

Butler Yes.

Tipping J Early release is release before your entitlement to release.

Butler Right.

Tipping J Is that a fair way of analysing it?

Butler Yes certainly in the context of this legislation, that would be right. Because your entitlement to release arises at the end of your sentence. And the submission that I would make to Your Honours, just following on from the exchange that we've had and building on the point of the passage from His Honour Justice Henry's decision in **Fulcher**, is that in the Crown's submission it is legitimate and open for the legislature to look at the way in which the parole system, or the release system to use that phrase, is working. And to say this is not producing the sort of outcomes which we wish, having an automatic release after two-thirds of the serving of one's sentence subject, it should be said at that stage, to one not having any disciplinary charges against oneself because that was a very, that was part and parcel of how one calculated the two-thirds period. And it was legitimate on the Crown's submission for the Parliament to say that's just not working appropriately, we want to change the way in which the sentence that has been imposed by the Court is going to work.

Elias CJ No-one's checking the legitimacy Mr Butler.

Butler Oh quite.

Elias CJ Of the policy change.

Butler Mm.

Elias CJ It's just a question of its application.

Butler Yes. And what I'm saying Ma'am, and I'm not suggesting that there is any questioning of that, it was in terms of timing. And consequential on the argument I was making is that it's equally open to the Parliament to say, well we're not happy, even for the current cohort of inmates or offenders, for the system as it was to continue to apply to them. Because parole is about making people, getting people to the right place upon their release into the community.

Elias CJ Mm, then you have to demonstrate that that is what is provided for in the legislation. And that the transitional provisions clearly exclude the operation of the pre-existing entitlement.

Butler Alright, well I'll probably need some more time then over the adjournment to look into some of those matters which have arisen Ma'am since I've not prepared on those particular points as will be clear.

Elias CJ Yes.

Butler I will need some time to go over those and that might be something we can touch on when we come closer to the adjournment if that would be in order.

Turning then to paragraph 18 and 19 of the Crown's submissions and putting for one moment to one side the question around the interpretation of s.8(2) Ma'am and the terms that I understand it to be.

Elias CJ Yes.

Butler The argument for the Crown proceeds as currently framed on the basis of s.8(2) and the fact that it's clear in the Crown's submission that Part 1 of the Parole Act is the Part, and does indeed apply to offenders in the position such as Mr Morgan. And a decision, if a decision has to be made, could be seen in terms of the decision of the superintendent to release an offender from the prison. When one traces through the Parole Act, as I address at paragraph 19, in my submission that Act makes a basic distinction between sentences which are imposed after the commencement of the Act which are to be administered entirely under it and under the new scheme, which establishes and so-called pre-CD which are pre-commencement date sentences to which some provisions of the old legislation continue to apply. And again, a pre-CD sentence is defined as meaning a sentence of imprisonment that is imposed before the commencement date of the Act. In my submission that manifests in an intention and appreciation of the fact that this new regime is going to apply to persons who had a sentence imposed before the commencement date of the Act and they are going to have a separate regime, they are in the pre-CD regime. But all others are to be treated under the Act in the same way. It's a basic distinction in my submission which the Act draws and which is carried through sub-paragraph (2) dealing with release and Part 1 generally.

That's clear and I think there's no argument that Mr Morgan is somebody who's not detained under a pre-CD sentence. In my submission that makes it clear that he's to be governed by the general rules established by the Parole Act.

I want if I may just to address some of the issues dealing with the principle of non-retrospectivity. In the Crown's submission, New Zealand cases have consistently emphasised, and I'm at paragraph 24 of the submission, the distinction between the imposition of a sentence and the administration of that sentence. And that's a distinction which is referred to for example in the **Fulcher** case which is referred to in the **Poumako** case and **Pora**, again in one sense by the by since the concession had been made by the Crown there and in that particular case the comments indicate why it is that the Court feels that the concession was properly made, because of the fact that it was a sentencing Judge who was imposing the minimum non-parole period.

Elias CJ It seems a very formalistic argument. Surely one would have to look at the substance of what was accomplished rather than who accomplished it.

Butler I think in terms of the way in which the legislation, sorry s.25G is cast, it does suggest, as the New Zealand case law suggests, a focus on the sentencing Judge. Now a number of examples were offered by Mr Morgan in argument earlier this morning which might suggest and need not to be completely black and white on that focus.

Henry J That appears to be the way in which Article 7.1 and Article 15.1 are then applied.

Butler Exactly. And I was going to make that point.

Henry J General terms … what s.4 of the Criminal Justice Act expressly says.

Butler Quite Sir.

Henry J So we've got something of a dramatic change if one's giving s.6 a different meaning.

Butler Yes and I'm not sure that one necessarily needs to give s.6 a different meaning for the sorts of reasons outlined by Your Honour in the exchange with Mr Morgan. Because it seems to me if you've got the two Acts which are going through the Parliament at the same time, which are being worked together at the same time, one doesn't strive to achieve an inconsistency between those two pieces of legislation. One strives for an interpretation which makes them consistent and gives room for both to operate. It seems to me Parliament clearly looked at and treated offenders in the position of Mr Morgan as it has consistently done in other amendments to the parole features of the criminal justice system in a consistent manner which is that the important date is the date of the imposition of the sentence. That's the crucial date.

Tipping J Isn't there a risk of begging the question that if you say you must construe penalty in accordance with what they have done in the Parole Act, even if the true meaning of penalty is something else, I understand the point in general terms, that you don't strive to set up inconsistencies?

Butler Mm.

Tipping J But if, as a matter of fair and ordinary construction, the word penalty is apt to include what Mr Morgan complains about, to read it down in order to avoid an inconsistency would seem to me to be defeating the purpose of the provision. It's designed to operate when there is an inconsistency.

Butler Yes, yes, I'll accept that. I certainly accept that. To some extent obviously it contemplates that there may well be situations in which there will be an inconsistency between the principle outlined in s.6 of the Act and some other piece of legislation. All I'm saying here is that

in this particular claimed example of inconsistency, the proper approach that the Court should take to understanding the concept of penalty must be informed by the companion piece of legislation which went through the Parliament at the same time. That must be the case. That's not saying that in the future your approach to penalty might be different. But at least in this case it must be clear that Parliament, when passing s.6 of the Sentencing Act, did not contemplate that penalty was going to immediately nullify the approach that it had signalled in the Parole Act 2002, the companion piece of legislation. So that's why I accept the proposition Your Honour outlines to a certain degree. But I think this is a relatively clear case where one will, the Courts should and ought to strive to interpret the two statutes consistently. You're not depriving wiggle room so as to speak for the future in terms of what penalty might mean by holding that, at least in this claimed clash, penalty does not embrace the argument advanced by Mr Morgan, does not embrace the removal of the release at two-thirds-plus whatever disciplinary offences might have been committed and replacing that with a regime which says you're still eligible for parole after one-third of serving of your sentence but you've got to convince the Parole Board that you're somebody who should be released.

Gault J That's not what it's about, eligibility for parole is it? It's about what the sentence was. And the sentence was a term of 3 years in respect of which there was a statutory termination point which has been changed. Nothing about eligibility for parole.

Butler No, it's not about eligibility for parole. But what it's doing is it's changing the way in which the parole regime worked.

Gault J Well it's changing the nature of the particular penalty isn't it? Where you've got a statutory penalty of 3 years imprisonment, which effectively means two-thirds of three years imprisonment, changed to a statutory penalty of 3 years imprisonment which means 3 years imprisonment.

Butler I don't accept that Your Honour.

Elias CJ And indeed I agree with your submission that these two pieces of legislation, which after all started off in the same Bill, have to be construed together but I'm not sure that that helps your argument. Because I had understood you to be taking a very blinkered approach. Sentencing is sentencing and the Parole Act is parole. One is penalty, one is administration. But it seems to me that for the reasons you discussed with Justice Tipping, that the determination of the sentence is actually contained in the Parole Board but to complete what the penalty is, you have to look to that. So you do have to read the two Acts together. And whether this very blinkered approach between sentencing and parole or the legislation can be maintained is I think questionable.

Butler I'm not prepared to go with Your Honour on that. I think there's a relatively clear distinction which is reflected in the New Zealand case law to date which certainly seems to be reflected in many of the overseas authorities which are put before the Court where that distinction is maintained and understood and applied.

Blanchard J Well isn't perhaps the significant thing that there's been a change between sentencing and penalty from the Criminal Justice Act to the Sentencing Act? But arguably that's been done to harmonise with the word in the Bill of Rights s.25G and that's come from the International Covenant.

Butler Yes.

Blanchard J And the European Convention. So shouldn't we be influenced by the approach which has been taken by Courts which have been looking at the application of the word in this context in those convictions?

Butler Yes, I think that's fair.

Blanchard J Well, where does that take you?

Butler In my submission Sir, that would support the consistent line that is evident I say in the New Zealand case law thus far which does identify.

Blanchard J Well forgetting the New Zealand case law. What about the international case law?

Butler In terms of decisions for example of the Human Rights Committee on this particular point, I've not been able to find anything which is directly on point. The best I was able to find was a decision of the Human Rights Committee on the retroactive application of mandatory supervision provisions, conditions, on an inmate when those were not in place at the date of the offending, a case called **ARS v Canada**. And if Your Honours would like a copy of that, I'm sure I can arrange for that to be made available. But in terms of something that's a bit closer to this scenario that we've got, I haven't found anything directly on point.

Tipping J You see **Uttley** doesn't deal with this precise problem does it? There's a case called **Flynn** in the Privy Council which comes closer but there are a variety of dicta in those judgments.

Butler Yes.

Tipping J Which I wouldn't have thought you could say reasonably that the conviction jurisprudence so clearly beds in this very sharp sentence administration distinction that you're espousing on behalf of the Crown. Are you able to refer to a conviction case which does that?

Butler Yes.

Blanchard J You've got one that involves Italy but regrettably the report's in French.

Butler French, yes, exactly. I do have a.

Blanchard J And my schoolboy French simply isn't up to it.

Butler Yes I did feel a little bit sheepish about putting that authority before Your Honours. But there is an authority before it which is the **Hogben** case which is a decision of the Commission (**Hogben v United Kingdom** (1986) 46 DR 231).

Elias CJ What tab is that?

Butler That's at tab 20 Ma'am. The facts of that particular case in a nutshell are that in 1969 the applicant, I'm referring to the person as the applicant, the accused, was sentenced to life imprisonment for murder in the course of a robbery. The sentence was life imprisonment, mandatory at that stage. And in 1982 what happened was that the applicant was transferred from a closed prison to an open prison. And that would have been understood at the time, I'm at page 1, and the description of what it means is carried over onto page 2 of the report, that it was a very strong expectation that he was on the road to release within a short period of time. Going to an open prison for somebody like him was preparation for release. What happened was that there was a change of Government policy. The Government decided no, not happy with murderers being released so soon after, in the eyes of the Government, conviction. They should serve a minimum 20 years imprisonment unless there were wholly exceptional circumstances in the case of an offender which justified earlier release. And the argument that was made on behalf of the applicant in that case was that this change in policy was improper.

Tipping J When was this case decided?

Butler March 1986 Sir, it's at the top of the front page.

Tipping J Oh thank you.

Butler Now the discussion of the law Your Honours begins at page 4 of the decision. You'll see that the applicant's claim was that there was a sudden change in parole policy which effectively increased his sentence from that applicable at the time his offence was committed from that imposed at his trial. In other words the way in which the system worked he said had been changed by Government policy.

Tipping J But the key feature here presumably is that this was a life sentence for which there was no entitlement to release at any stage. Is that a fair comment?

Butler Yes there was no entitlement, there was no entitlement for release but the system indicated that once you progressed through.

Tipping J You might have an expectation, I think was the word used, but you don't have an entitlement.

Butler Yes that's right. But equally I say, and perhaps this might help Your Honours, what I say is that while Mr Morgan might have had an expectation that the release date outlined in the Criminal Justice Act would be one that would apply to him throughout his sentence would be the case, there was no, he had no right to expect that would be the case in terms of what the penalty would be.

Tipping J Well, how can you say that Mr Butler? How can you possibly say that? The law was when he did it that he had an unconditional right according to the crime he committed to release after two-thirds.

Butler That was not part, I would say that's not part of his sentence, nor part of his.

Tipping J No, no never mind whether it's part of the sentence, but as a matter of reality he had an unconditional right to release after two-thirds. That was the story when he did it. How can you say he didn't have a, you say he only had an expectation?

Butler Yes and his expectation was that that system that was outlined in terms of how his sentence would be administered would not change.

Elias CJ Well is it convenient to take?

Butler Sorry Ma'am, I haven't seen the time.

Elias CJ Is it convenient to take the adjournment now?

Butler Yes Ma'am. I'm just conscious of time and so on and one or two of the new points that have been raised. I don't know whether I should ask for a longer adjournment to give me time to address those or whether I should just ask to be able to address those by written submissions or perhaps. I'm not sure how long you envisage going for.

Elias CJ We would like to complete this hearing today if at all possible.

Butler Mm.

Elias CJ Because the Court is in some difficulty after today. And indeed we have a statutory injunction to.

Butler Yes Ma'am, I understand that.

Elias CJ Deal with this matter. So when would you like, how long would you like Mr Butler?

Butler To look at the Interpretation Act provisions again. If I had something like 45 minutes or something like that to be able to undertake the researches, would that be in order? And I can try and do my very best to address some of these issues which have arisen. Is that in order?

Elias CJ Alright. Well we'll, yes, we'll resume at quarter past 12 then, thank you.

Butler Thank you Your Honours.

Court adjourns 11.36 am
Court resumes 12.22 pm

Elias CJ Thank you Mr Butler.

Butler Thank you Your Honours for the long adjournment. I've been able to take matters somewhat further in terms of the researches and being able to answer to some of the questions that have arisen in the interchange this morning. I've not been able to progress all of them. We'll see how many are still on the table so as to speak and see where we take those by the luncheon adjournment.

Tipping J Sorry, I'm not hearing you Mr Butler.

Butler I'm sorry Sir, we'll see where we can take them, how far we can progress with those in terms of the luncheon adjournment.

So Ma'am before the adjournment we were talking about the **Hogben** case. The point that I had wished to make.

Elias CJ Sorry, which tab is that?

Butler Sorry Ma'am, that's tab 20.

Elias CJ Thank you.

Butler And the point I just wanted to make in relation to that case is the one that's recorded at paragraph 4 of the Commission's reasoning. And Your Honours will see why. Because the argument.

Tipping J I'm not sure I'm at the right place with this.

Butler Sorry, page 5 of the Commission's reasoning and then there's paragraph 4 which is at the top of that page.

Tipping J Oh right, thank you.

Butler Sorry it's an odd numbering system they have. The point that the Commission is making in terms of the support I draw on it is that the argument that Mr Morgan advanced of saying, well in effect I'm being treated more harshly than I might have thought or expected to be treated at the date of offending. And the thrust of the Commissioners say, well that might be so from your perspective, but at the end of the day the penalty is that which was imposed upon you by the Judge. That's what the focus of the word penalty is in terms of Article 7.1.

Elias CJ So it's maximum, the maximum penalty?

Butler Exactly, the maximum penalty.

Tipping J Maximum or mandatory?

Butler Or, and I was just, or mandatory minimum.

Tipping J Yes.

Butler Which is the **Pora** type scenario, Sir. And that language of maximum or minimum is to be found in the judgment of Justice Wiley in the **Palmer** case as well. First High Court case to consider s.25G. (**Palmer v Superintendent, Auckland Maximum Security Prison** [1991] 3 NZLR 315 (HC).

Tipping J I suppose there is some support for that submission at p.3 of 6 at the top where reference is made to what Lord Scarman said in whatever the case was. The sentence of the Court is in law the punishment.

Butler Yes.

Tipping J Now he didn't use the word penalty. But it's to the same general tenor.

Butler Yes.

Blanchard J Well he does use the word penalty.

Tipping J Does he?

Blanchard J Line 4.

Tipping J For penalty, I see yes.

Butler And of course that feature of Article 7.1 was a strong feature of the reasoning of the House of Lords in the **Uttley** case where Their Lordships concentrated on that feature of Article 7.1 and the fact that it's really about maxima.

Tipping J The particular passages that one should note in that respect Mr Butler?

Butler There are a number. I think the passage of some relevance in terms of overall thinking around the approach to penalty and the right that we're talking about here is that of Lord Rodger of Earlsbury at paragraph [40] of the Judgment. I think the purport of that paragraph again is quite clear in terms of focusing on what is the mischief that the right is aimed at. Clearly, as Lord Rodger indicates, the mischief is interference with the maximum or the mandatory minimum.

Blanchard J Have we got a copy of this **Coey v Belgium**?

Butler I can arrange for that Your Honour. That case was about the application of a limitation statute to the prosecution of criminal offending and the issue was whether or not an alteration in the Limitation Act statute which would allow.

Blanchard J Oh so this, is this just a stray dictum that's being picked up and quoted here?

Butler Um.

Blanchard J Because that dictum seemed right on point.

Butler The dictum is right on point and that type of language is the type of language I say that you see in the **Hogben** case that I referred to and equally though in French in the **Grava v Italy** decision which is under. (**Grava c Italie** Requête n° 43522/98, 10/7/03).

Blanchard J What was **Grava v Italy** about?

Butler **Grava** was a case about somebody who'd been sentenced for various acts of fraud to 6 years. Had their sentence reduced to four years. There was initially at the time, and I'm sure there still is as there is in France often, the issuance of Presidential Decrees which grant what we would refer to as amnesties or at least partial remissions in favour of offenders who are currently serving a period of imprisonment or will reduce a fine. This gentleman came to be tried and sentenced some time in 1994 or 1995 and the Court that sentenced him didn't take into account the Presidential Decree in terms of determining what the sentence was that he should serve. And his argument was, well that sentence therefore was wrong because I've been sentenced to more than what I ought to have been.

Tipping J Wasn't this view though substantially mandated by the word "applicable", as Lord Carswell has noted at the bottom of p.2289 in **Flynn** as having emphasised?

Butler Yes there was certainly focus in the judgment in **Uttley** on the word, on the meaning of the word "applicable".

Tipping J But Lord Rodger carries the dictum in **Coey v Belgium** into his own speech.

Butler Yes.

Tipping J But then goes on to support it by what Lord Carswell says in **Flynn**.

Butler Yes.

Tipping J And where the emphasis was clearly on the presence of the word "applicable".

Butler Yes, in **Flynn** two of Their Lordships had expressed the view that the word "applicable" in that case was the issue upon which the decision should turn.

Tipping J Quite.

Gault J And that's the very word that's in Article 15 of the International Covenant which underlies our Bill of Rights provision.

Butler Exactly, and my submission would be that that word "applicable" is inherent in s.25G in terms of one's approach to that. Thank you Sir.

Tipping J Anything else in **Uttley** Mr Butler that one should?

Butler The basic ratio of the case I think is apparent in the paragraph, that paragraph that Your Honour just referred to, paragraph [41] and it's carried through in the subsequent paragraphs. And then there's an explication as to what it means and that emphasis on the maximum. So once you're within the allowable maximum then Article 7.1 protections fall away.

Tipping J So if you would have got three years under the old act, meaning two, albeit the maximum was seven.

Butler Yes.

Tipping J If you get, under whatever process, six under the new system, too bad.

Butler Yes that seems to be, that's the rationale.

Tipping J Putting it colloquially.

Butler Yeah.

Elias CJ Is that the submission that Crown makes here?

Butler I rely on **Uttley** to indicate the thrust of the protection, the limited scope of the protection which is offered by Article 7.1. And therefore I say s.25G through Article 15 of the ICCPR.

Elias CJ So it's only concerned with maximum penalties?

Butler Maximum penalties and mandatory minima. Mandatory minimum penalties and I'm not sure that we have any of those left in New Zealand.

Tipping J Another way of putting it Mr Butler is that it's only concerned with what one is liable to?

Butler Correct, yes that's a good way of putting it, yes exactly.

Tipping J At the time of the committing of the offence. And anything up to and including that liability is okay under the new.

Butler Yes, yes exactly. And again I would say that that type of approach is consistent with the view that the Crown takes of the distinction between sentence and sentence administration.

Elias CJ But I don't see why then you say a minimum non-parole period is different. Because on your argument it too is not something that is subject to the protection of Article 7, it seems to me.

Butler Well it indicates a mandatory minimum depending on the nature of the order as it was in **Pora** and **Poumako**. One was talking about a mandatory minimum. Once it's shown the home invasion had occurred, then it was a mandatory minimum sentence that had to be imposed.

Elias CJ Here arguably we have a mandatory maximum in terms of service of the sentence. It does seem to me to be comparable.

Butler The Crown's submission is to the contrary to say that it might appear comparable on one perspective but it's not because the focus is different. It's not about penalising the offender as such. It's about saying we have a view about how it was that we could use the parole system to rehabilitate you and release you into the community. We're not happy that that system works by releasing you after two-thirds plus whatever prison disciplinary offences you might have committed during your time in prison. We need to rethink how it is that we manage your ability to be released into the community. And so it's therefore not a penalty. I think that's a different focus.

Elias CJ Well, why is the mandatory minimum non-parole period a penalty?

Butler Because in that particular case the reason for imposing it is one which is related to the offending, to the particular criminal act. So that's why arguably in that case one is saying there's a difference there.

Again I just reiterate the sort of point made by Lord Rodger in his opinion in the **Uttley** case which emphasises his view as to the purpose of the principle of non-retroactivity, and therefore the care with which one needs to approach the application of the principle in any individual or any particular case or class of cases.

Just responding to Your Honour's invitation to refer the Court to other aspects, other paragraphs in the **Uttley** decision, I just want to make sure I've not missed anything that might assist Your Honours. But I think the paragraphs that I've touched on in Lord Rodger's judgment are helpful. I know Lord Carswell in his judgment returned to that which, his views that he'd expressed in **Flynn**. And they're of a piece with those of Lord Rodger. And in particular if Your Honours turn to pages 2296 and 2297 of His Lordship's opinion you'll see where that's set out.

Tipping J Is something quite helpful to be derived from paragraph [61] where Lord Carswell cites from what Lord Rodger had said in **Flynn** was it, where he makes the point the appellants were liable to be required to serve a longer period than would have been likely but not a longer period than would have been competent.

Butler Competent.

Tipping J That's very much the kernel of the issue isn't it?

Butler Yes that's right. And that goes back to that point that Your Honour, that word that Your Honour helpfully used which is "liable" to which again you will see is repeated in that quoted passage from **Flynn**.

Tipping J Again it all drives off applicable really but your answer to my brother Gault was that that should be in effect regarded as implicit in our legislation.

Butler Yes, yes. Again Baroness Hail in her opinion Sir touches on this point if I might refer Your Honours to paragraph [45] of Her Ladyship's judgment.

Tipping J Unfortunately that's one of the pages missing in mine.

Butler Oh I'm very apologetic.

Tipping J But no carry on, just tell us what it's about.

Butler Yes, it just says at the opening two sentences, it's quite clear that the words penalty applicable in Article 7.1 refer to the penalty or penalties

prescribed by law for the offence in question at the time when it was committed. It does not refer to the actual penalty which would probably have been imposed upon the individual offender had he been caught and convicted shortly after he committed the offence. Which again just emphasises that point of liability. It's a relatively limited protection. And again she returns to that theme at paragraph [48]. Have Your Honours paragraph 48?

Tipping J Yes, happily yes.

Butler Baroness Hail's, in this case we're concerned with … and I'm persuaded that a change in the arrangements for determining how much of that time is actually spent in prison and how much in the community does not make the penalty heavier than it previously was. A longer term of imprisonment was always available.

I think Your Honours I hadn't quite completed the point I was making in relation to the **Grava** case, that's the one against Italy.

Elias CJ Sorry, which paragraph from Lady Hail's Judgment were you referring to?

Butler That was paragraph [48] Ma'am.

Elias CJ Paragraph [48], yes.

Butler The reason for including the **Grava** case Your Honours was just to indicate the endorsement of the European Court of the decision that was made in the **Hogben** case and that's at paragraph [51] of the Court's judgment. The Court just returns to the point, well what's a penalty. A penalty is that which is imposed by the Court on the offender. And says again, if I can take the liberty of the translation in paragraph [51] second paragraph, in effect the question of the grant of remission of the penalty by the Presidential Decree concerned the execution of the penalty and not the penalty itself.

Tipping J Could I, if it's not inconvenient Mr Butler, just ask you to go back to the actual terms of s.6 of the Sentencing Act?

Butler Sentencing Act, certainly.

Tipping J From which most of this derives. An offender has the right if convicted of an offence in respect of which the penalty has been varied the key phrase is, an offence in respect of which the penalty has been varied. Now you're inviting a reading which reads the word offence as the generic offence.

Butler Yes.

Tipping J Not the actual offence.

Butler Yes.

Tipping J And as this is general legislation, I suppose that proposition has some cogency. Is that another way of.

Butler Yes

Tipping J As it were articulating the point you're making?

Butler Yes it's another way of articulating the point.

Tipping J From the very source of the supposed difficulty.

Butler Yes.

Tipping J But the construct, the way s.6(1) is worded you say, strongly suggests that Parliament is talking about offences generically.

Butler Generically.

Tipping J I.e. rape or.

Butler Yes.

Tipping J Whatever it be.

Butler Yes.

Tipping J Cultivation of cannabis.

Butler Yes.

Tipping J In generic terms.

Butler Yes.

Tipping J Not in specific individual-by-individual terms.

Butler Individual-by-individual, absolutely that's right.

Elias CJ That's what Baroness Hail doesn't agree with, does she? Because she says you're not looking just simply at the penalty prescribed in the provision creating the offence.

Butler Yes I think she leaves open the possibility that penalties might come about through other means other than the very specific provision that attaches the penalty in say, let's say the Crimes Act in our environment. That's true.

Tipping J But it's very difficult it seems to me, once this point is focused on in this way, to reconcile that view with the actual words of this provision. It talks about an offence in respect of which the penalty has been varied. It just does seem to have quite a sort of what you might call generic connotation. Because it's very unlikely that Parliament would have been signalling a comparison between what was actually going to be done in the individual case and what the consequence of. And I'm not putting this very well Mr Butler but I'm just thinking aloud really.

Butler Yes, no, no it's helpful for me to get an understanding as to where there might be some points of difference or difficulty.

Tipping J This, if anything, is a point in your favour.

Butler Yes.

Blanchard J Well Baroness Hail actually says of Article 7.1, this is in paragraph [45].

Butler [45].

Blanchard J The Court does not have to make a comparison between the sentence he would have received then and the sentence which the Court is minded to impose now.

Tipping J Yes. That puts it much more neatly.

Butler That was my point of reading that particular passage.

Tipping J Yes that was what I was struggling to say.

Butler Yes.

Elias CJ Yes that could apply to development in sentencing as through the tariff guidelines or something like that.

Butler For example.

Elias CJ I thought in paragraph [45] she had made it clear that the source didn't have to be the provision creating the offence itself, which is what you're contending for here.

Butler What I was referring to when I responded to your question Ma'am was that part of her judgment at paragraph [46].

Elias CJ Yes.

Butler Which I think she was making a slightly different point which I was prepared to acknowledge.

Elias CJ Yes.

Butler Where she said, however it's clear from the Court's decision in **Welch**, which Mr Morgan relied upon, that Article 7 is not limited to the sentence as prescribed by the law which creates the offence. It can also apply to additional penalties.

Elias CJ Yes, sorry, that's the provision I was thinking of.

Butler Yes, yes.

Elias CJ Mm.

Tipping J And there's no conviction jurisprudence case that you're aware of Mr Butler that trenches upon this point directly?

Butler I've really searched in the time that's been available obviously.

Tipping J Quite, quite.

Butler And I've not come up with anything. I've tried to be fair, obviously I've put in the American authorities which are in one sense against me.

Elias CJ Are there any Canadian authorities?

Butler I would say there are. Which reflect the same principle that the Crown has adopted and that's those two cases of **Berenstein** and the **Caruana** case. (**Berenstein v Canada** (NPB) (1996) 111 FTR 231 (FCTD); **Caruana v Bath Institution** (2002) 48 CR (5th) 285 (Ont SCJ)). And I've found an authority which went the other way and I've obviously put that before the Court too, the **Abel** decision (**Abel v Edmonton Institution for Women** (2000) 149 CCC (3rd) 401 (AlbQC)) in there towards the end of the casebook. Now would Your Honours like me to tell you what those cases were about?

Tipping J Yes, I would find that helpful yes. Because the argument's really between the genericists and the particularists.

Butler Could be an interesting argument. If we turn to the **Berenstein** case which is the first one. That's under tab 16.

Elias CJ First of all, there are no decisions of the Supreme Court of Canada on this?

Butler No, no there's not. And I should say Your Honour that there a number of authorities, quite a number of authorities, from Canada which deal with what I would say is the different situation of a court-imposed penalty. There is quite a number of those cases. I've not put any of those in front of Your Honours. I didn't want to snow you down, snow you under with some many of those authorities. If you would like

them, I can make them available to the Court but they are about court-imposed penalties.

Tipping J Well if you said they weren't in, then the section would have no work to do at all.

Butler Yes.

Tipping J So the question is which camp this one's in.

Butler Yes, yes.

Elias CJ We're interested in any statement of general principle, however.

Butler Principle. And I thought that's why these cases might be useful as ways of working through in terms of the significance of some of the general statements.

Elias CJ Yes.

Butler So the first case is the **Berenstein** case under tab 16. That's a decision of the Federal Court of Canada Trial Division, Justice Rulou. Now what had happened in that case Your Honours was that the inmate had committed an offence in 1991. At the date of the commission of the offence the relevant statute was the Parole Act. In 1992 we have a new statute introduced called the Corrections and Conditional Release Act. In 1995 the offender is tried and sentenced. Now the significance of the case I say is that under the Parole Act at the date of offending Mr Berenstein would have been eligible for what is called accelerated day parole or day parole after serving one-sixth of the sentence. But by the time. He was sentenced to six years. By the time he was obviously sentenced and incarcerated the new legislation had come into force and that was the legislation which was applied by the superintendent. And the question was, well is that right or not? His argument was that he should have been eligible for consideration for parole at this one-sixth stage rather than having to wait for a year less a period for that matter to be considered. And his argument was, well effectively at the date upon which I committed the offence I had a chance of release after a year. And I've been denied that. Sections 11.1 of the Charter is therefore infringed.

Blanchard J What does that say?

Butler Section 11 is set out at paragraph, it's in terms similar to ours, set out at paragraph [14] of the Judgment, page 5 of the printout.

Blanchard J Oh yes, thank you.

Tipping J Ours is identical except penalty is used instead of punishment.

Butler Punishment yes.

Gault J That must be generic in that context.

Butler Mm. And I've set out in my submission Your Honours at page 10 extracts from the judgment. It's paragraph [17] to [19] which are the kernel of the reasoning. And at paragraph [17] what happens is the Judge notes other cases, earlier cases including **Lambert** for example which is cited at paragraph [16]. And **Lambert** has become an important decision in terms of thinking around s.11.1 of the Charter. But it was a case of judicial, of a judicial order. That was a case about, **Lambert** was a case where the Judge was permitted to impose, incidental to the sentence, a minimum period of detention before application for parole could be made. That was held to be a punishment just as the Crown conceded in **Pora** and **Poumako** that a similar provision in relation to the home invasion legislation was a punishment. But on the other hand, what happened once you were inside the institution and up to the end of your sentence, that's a matter that's quite separate and different.

Elias CJ So this is not an endorsement of the steer by the maximum penalty provision. It simply maintains the distinction that you urge between penalties imposed at sentencing and which follow later. Is that right?

Butler Yes, yes. It adopts that distinction between the sentence and the parole for the period within sentence and says issues related to parole simply are not touched upon by s.11.1 of the Charter.

Elias CJ Yes.

Butler The next authority is **Abel** which is under tab 17. I'm sorry, the submissions describe it as being under tab 16, it's not, it's tab 17. In that particular case, offences had taken place in 1995. In 1996 the CCRA, that's the Corrections and Conditional Release Act, was amended to delete from the list of offences in respect of which accelerated day parole was available a number of offences including some of those which Ms Abel had been charged and convicted on, she having been convicted in 1998. And the argument for her was again reliant on s.11.1 of the Charter. And found, having cited **Berenstein** but not discussing **Berenstein**, finds in favour of the inmate. And says that the issue of day parole should be determined from the one-sixth period. I.e. she should be considered to be eligible for accelerated day parole.

Elias CJ Sorry, which paragraph are you referring to?

Blanchard J 16.

Butler 16 yes.

Elias CJ 16.

Blanchard J So this Judge didn't accept the distinction?

Butler That's correct and said that parole is part of the punishment.

Tipping J Well that's even higher ground than Mr Morgan needs.

Butler Yes. And then the last authority in terms of what I could find useful from Canada was the **Caruana** decision which is under tab 18. Again deals with a similar sort of situation. Here you've got an accused, an offender, who committed offences between 1996 and 1998. Criminal organisation offences. The CCRA is amended in 1999 to delete such offences from the relevant schedule which make you eligible for accelerated day parole. Is convicted in 2000 and argues, I should have the benefit of the previous system. And Justice Cunningham, in the Ontario Superior Court of Justice, rejects that argument. And this is a fuller discussion in the sense of the case law, in the sense that in paragraph [5] of the judgment reference is made to **Abel**. The approach taken in **Abel** is disagreed with quite strongly. Reference is made to the judgment of Chief Justice Lamar in a case called **R v M** which again talks about the nature of what parole is about.

Blanchard J Is that case **R v M** of any assistance to us?

Butler I have looked at it myself and it's of assistance in terms of describing the overall purpose of parole and what makes, what the focus of parole is about, and why one can have changes in relation to the way in which parole is administered to accommodate changes in policies and views surrounding release. If Your Honour would like me to obtain that authority I can. It's not short.

Blanchard J Mm.

Butler From memory. And again I was trying to be a bit choosy about what I put before the Court, not to be for or against myself so as to speak but rather just being conscious of the fact that a paper dump isn't always appreciated. And rightly so.

Elias CJ I think when we're dealing with points of principle, it's very useful to have the materials provided Mr Butler.

Butler Certainly Your Honour.

Elias CJ Because the discussion often sheds light, even if the cases aren't directly in point.

Butler If there's any of these authorities that Your Honours would like to have made available, I will of course organise that as expeditiously as possible.

Elias CJ Thank you. Well I think in fact we would if you were able to get it to us.

Butler Yes.

Elias CJ I certainly would like to see the **M** decision.

Butler Certainly.

Elias CJ And really, any subsequent decisions of the Supreme Court.

Butler Supreme Court, certainly.

Elias CJ Perhaps discussing **M**.

Butler That might take just a little bit of time Your Honour. I'm not sure whether I'll have them straight after the lunch break or not but I'll certainly endeavour to Ma'am. Again, being totally conscious of the need for expedition in these sorts of cases. Ma'am I see we've come to two minutes past one.

Elias CJ Yes.

Butler Shall we take the adjournment?

Elias CJ We'll take the adjournment now.

Butler Thank you.

Elias CJ Do you have any, can you give us any indication of how much longer you wish to be Mr Butler?

Butler I shouldn't have thought I'd be more than half an hour.

Elias CJ Yes.

Butler To 40 minutes maximum I should have thought. But there are a few points to be developed further.

Elias CJ Thank you. We'll take the adjournment now.

Court adjourns 1.00 pm
Court resumes 2.21 pm

Elias CJ Yes, thank you.

Butler Thank you Your Honour. I was able, over the luncheon adjournment, to obtain a copy of that **M** decision which I'll hand up and I've provided a copy to Mr Morgan.

Elias CJ Thank you.

Butler As I indicated to Your Honours before lunch, the utility of the case is in its description and focus on what the purpose of the parole system is. The particular case concerned the inter-relationship between sentencing and parole, or parole eligibility more particularly, and the extent to which rules around parole eligibility or ineligibility affected or ought to affect the decision of a sentencing judge when sentencing. And that caused the Supreme Court to consider what the parole system is about. Which it does at paragraphs [57] for example, which is the paragraph which is referred to in the **Caruana** decision.

Blanchard J Sorry, which paragraph?

Butler Paragraph [57] which Your Honour is at page 18 of the internet copy that I've been able to obtain. Then follows Your Honours a description of the history of the parole system in Canada. And at paragraph [62] the Court makes the point that the history, structure and existing practice of conditional release system collectively indicates that a grant of parole represents a change in the conditions under which a judicial sentence must be served rather than a reduction of the judicial sentence itself.

It makes the point further down that paragraph, though the conditions of incarceration are subject to change through a grant of parole to the offender's benefit, the offender's sentence continues in full effect. And the point that was being drawn from the decision in the **Caruana** decision is the basic one that I've been emphasising throughout the submission, about the different focus one has under a parole system. And one does, when one's trying to penalise somebody, punish somebody in the language of s.11.1 of the Canadian Charter. Changing the way in which the sentence is administered through the parole system. It's not varying the penalty. It's altering the way in which the sentence is to be administered.

Elias CJ Is this describing a discretionary parole system?

Butler There was a combination of discretion and mandatory parole and ineligibility periods.

Elias CJ Right.

Butler I don't know that it's valuable for me to take you through the complexities of the system involved there.

Elias CJ No, that's fine.

Butler Your Honours, earlier today during the helpful interchanges that we've been having, there was some discussion around transitional

arrangements and so on and I thought it might be helpful to touch on some of the provisions of the Parole Act, the Criminal Justice Act and the relationship between those measures which really haven't been addressed in my written submissions but which.

Elias CJ Yes I'd be grateful if you'd do that. And I wonder whether you could, it seemed to me over lunchtime when I was looking at the Criminal Justice Act, that it had a three-step or three possibilities. It had the discretionary release.

Butler Yes.

Elias CJ It had the final release date which was not in fact a final release date because it was a release subject to conditions and the person remained liable to recall.

Butler Correct, exactly.

Elias CJ And then there was the, I guess the expiry of the, sentence expiry.

Butler Sentence expiry date. And there were further possibilities that you might end up serving your full term so as to speak.

Elias CJ Yes.

Butler Which was that s.105 which Your Honour referred to in the **Fulcher** case.

Elias CJ Yes. That's right.

Butler So I'm happy to talk about those.

Elias CJ And then just in terms of what it's been replaced with. It seems to me that it's been replaced with a discretionary regime and a release date which is defined to mean a date when you're not subject to recall. So in other words it's a sentence expiry date.

Butler Yes that's.

Elias CJ And that's so for short sentences by virtue of the Act because they serve half and then they're not subject conditions on release. The statute unconditionally releases them.

Butler Yes.

Elias CJ And the final release, and the longer sentences where it's the expiry date of the sentence which is the release date.

Butler Correct.

Henry J Expiry date is the full term I think.

Butler Yes.

Elias CJ Yes that's what I mean. The expiry date of the sentence.

Henry J The same as the Criminal Justice Act.

Elias CJ Yes, yes.

Butler I'll take Your Honours to the extent that I can through those sorts of provisions. Because the point that Your Honour has mentioned is one I did want to return to in terms of the nature of the release which Mr Morgan would have been entitled to, using his language under s.91(1)(b) of the Criminal Justice Act. Because I think it's important to realise it wasn't unconditional release, it clearly was conditional, conditional release.

Elias CJ But if the definition in the Criminal Justice Act is simply, as a release date, is simply concerned with expiry date when you're not subject to recall, is there any impediment in the current legislation, the Parole Act.

Butler Yes.

Elias CJ To giving effect to the Criminal Justice Act provision for conditional release?

Butler I would say.

Elias CJ I mean are we falling between stalls here.

Butler I think if I understand your question properly, I think there is no falling between the stalls and that's why I just wanted to trace through the relationship between this new Act and the old Act.

Elias CJ Yes thank you.

Butler And as I said, not all of those have been touched on in my written submissions. I thought it might be just helpful to just trace through those and perhaps through that process we can identify, I can identify better for myself so I can help Your Honours with understanding exactly where there might be some problems lying in that regard.

Elias CJ Yes, thank you.

Butler I think the first point to make Your Honours, I'm not sure whether Your Honours have a copy of the two, the statute book. I'm making the assumption that.

Tipping J The Parole Act?

Butler Exactly the Parole Act. There'll need to be some reference equally Your Honour to the Sentencing Act too. Just for one, great. I think a useful place to depart from is section 166 of the Sentencing Act. Section 166 paragraph A. So the Criminal Justice Act is amended by repealing Part 6. Part 6 is gone as of from the date of commencement of the Sentencing Act, which is the same day as the Parole Act, which is 30 June 2002. If one's looking for a regime which is going to apply in terms of criminal justice matters, it's clear that what's happened is the Criminal Justice Act has been taken out of the picture and I say the Parole Act 2002 now governs the field as and from 30 June 2002. So when one reads s.8 subs (1) of the Parole Act 2002.

Gault J Which section?

Butler Section, sorry Sir, section 8 subs (1).

Gault J Thank you.

Butler It says this part applies to all offenders who are subject to a sentence of imprisonment. And it goes on to further define more specifically some more people including this list of people. My proposition relying on s.8 subs (1) is that it means what it says. This Part applies to all offenders who are subject to a sentence of imprisonment, which Mr Morgan clearly is. And having scooped up all persons who are subject to a sentence of imprisonment as and from the commencement date, it then proceeds to make distinctions throughout the Part 1, I say distinguishing between those who are a pre-CD sentence and those who are not.

Now in my written submissions I've centred on subs (2) of 8. My thinking there had been that decisions have to be made about calculating key days as the statute refers to them. So the various sentence commencement date, the non-parole period, what's that period, when is your sentence expiry date, when is your parole eligibility date and such like. It seems to me in terms of making the broad proposition that the Parole Act is the Act that governs s.8(1) makes that clear, combined with the repeal of the Criminal Justice Act Part 6, which was the old administration of sentence part in the Criminal Justice Act.

Blanchard J And do you say that s.8(3) is dealing with decisions which have been made under the Criminal Justice Act before the commencement of the Parole Act?

Butler Yes I do.

Elias CJ Because there could be people who are released conditionally?

Butler Yes, exactly.

Elias CJ But still subject to a sentence of imprisonment?

Butler Yes but Your Honour has put the finger on the nub, who are released.

Elias CJ Yes.

Butler Which is a point I'm going to come on to. Because it seems to me that in terms of the inter-relationship between the Acts at the relevant date, Mr Morgan was not subject to a sentence of imprisonment in terms of s.90(1)(b) of the Criminal Justice Act. One looks, and one's talking about a language of rights, was used earlier, to describe the application of s.90 (1)(b) in his favour. But it seems to me it's not a right that he had because the right, it's not expressed in terms of right, it's expressed in terms that he should be released on, if subject to a sentence of imprisonment, again used in the present tense to describe the language I say of s.90(1)(b) of the Criminal Justice Act indicates that it too is referring to people who are actually in the system. And so subs (3) of s.8 in the Parole Act is referring to people who have been through the system.

Tipping J Well it doesn't undo what's already been done as at the date of commencement.

Butler Exactly, exactly, exactly. And then later parts of the Parole Act which deal with the transitional arrangements in relation to pre-CD offenders and sentences emphasised that, so that's sub-part 4 of Part 1 of the Parole Act. Transitional arrangements for offenders subject to pre-CD sentences. And then there's a range of rules which are set out dealing with those sorts of offenders.

Blanchard J So are you saying that all the decisions that need to be made about people who are already in prison at the date of commencement of the parole legislation are made under the Parole Act and made, where it's a Parole Board matter, by this new body, the New Zealand Parole Board?

Butler Parole Board.

Blanchard J Which is a different body from the Parole Authority under the Criminal Justice Act which is gone.

Butler Which is gone, that's right. And again some of those issues are dealt with in the transitional provisions.

Elias CJ And does that apply to those who are not only still in prison but still liable to recall?

Butler Yeah, there are certain provisions. I'd better make sure I've got the right provisions in relation to that scenario. It could even be in the Sentencing Act.

Blanchard J Yeah, it's section 97.

Butler That's the general. I was looking for that general. That's the general.

Blanchard J It's the first of the general rules.

Butler Exactly.

Elias CJ Oh yes I can find it.

Butler Thank you Sir.

Elias CJ Yes.

Butler Again it's very specific in terms of what should happen to those sorts of people who are subject to that type of sentence.

Elias CJ Yes.

Butler And again it hinges on being a pre-CD offence. A pre-CD sentence. A person who's subject to a pre-CD sentence. And if you're not, then these provisions are largely not relevant to your situation. So for example my learned Junior is just pointing to s.107 for example. Just as another example of how the statute tries to deal transitionally with people already in the system.

Elias CJ 107?

Butler 107. The order that an offender not be released. Leading with a determinate pre-CD sentence for a specified offence.

Gault J Just looking in the definitions. Section 4, there's a definition of final release date which is determined in the case of a pre-CD sentence under the Criminal Justice Act. What is the significance under the Parole Act of final release date?

Butler Final release date. That refers to the FRD, that's the provision. It's section.

Tipping J I think it has effect for the purposes at least of s.107.

Butler 7 yeah.

Gault J 103 it seems to me where it starts.

Tipping J Mm.

Butler Yes.

Blanchard J That simply relates to transitional matters.

Butler That's again, that's what, I mean my basic point is exactly that, it's trying to deal with those that are already in the system. And by in the system I mean subject to a sentence that's been imposed pre the commencement of the Act.

Gault J It really relates to long-term pre-CD sentences.

Butler Yes.

Elias CJ So if Mr Morgan had been arrested and sentenced immediately, he would be in that category and he would be subject to the final release date calculated in accordance with the Criminal Justice Act.

Butler That would be the result of the transitionals as I understand it, yes.

Elias CJ What's the policy in terms of not applying that regime to someone in his position?

Butler The policy?

Elias CJ I mean I know the position is that it's just not done.

Butler Yes.

Elias CJ But.

Butler I suppose a judgement call's been made as to the point in terms of identifying those offenders who are going to have these transitional arrangements made about them. And those others not.

Elias CJ Presumably it must have been envisaged then that the sentence would take place under the altered regime. But there's no suggestion of any change in approach to sentencing and indeed it would be contrary to the tradition that sentencing judges haven't taken account of what happens after sentence.

Butler That's right. I suppose that's one of the points that I've made in terms of when I was talking earlier in the day about the sentencing and parole being twin tracks. And Your Honour I think is making the point that sometimes there can be a bleed. Some of the, in some cases yes that can occur. But generally speaking the two are quite separate and that's been a point that the Court of Appeal certainly has been at pains to emphasise in relation to sentencing matters.

Elias CJ Why does the legislation then not apply to the pre-CD sentenced prisoners under the new regime.

Butler Sorry, just one moment Ma'am. In terms, just considering something that's come from my learned Junior. In terms of picking a date, I think it's one of those things where one says, well one needs to be able to draw a relatively clear line in terms of determining how the new regime is going to, a new regime is going to apply. And one says, well once you, if you've not come within the system so as to speak, then it's fair to apply the new system to you. This new system to you. If, however, you have come within the scheme, perhaps even if it's not a requirement of the Bill of Rights, I'd made that particular point that you be transitioned in a particular way, you've come within the system and we would rather treat you under the way in which issues around your parole might have been approached at the date at which sentence had been imposed.

Blanchard J It's very uncomfortable though isn't it? Because assume that Mr Morgan had had a co-offender just as culpable as Mr Morgan and that person had pleaded guilty on the day before the Parole Act came into force, and Mr Morgan was ill that day so his sentencing was postponed until the day after, and you get vastly different consequences and yet it appears that the Parole Board are not taking that kind of thing into account.

Elias CJ And nor are sentencing judges.

Butler Neither of those two points, I mean I know this was raised earlier in exchanges with Mr Morgan, neither of those two points are ones which this respondent can deal with at the end of the day. The respondent holds Mr Morgan's subject to a warrant of commitment.

Blanchard J Yes. The Parole Board's not a party.

Butler The Parole Board's not a party. And this respondent says that they have lawful authority to be detaining Mr Morgan at present. And that seems to me at the end of the day, that's what this case is about in that regard. I was going to touch on …

Blanchard J I wouldn't want to be suggesting that if the Parole Board were to be the subject of the proceeding, that habeas corpus would be the appropriate relief anyway.

Butler No quite, and as I said that was something since the issue's come up now, I was going to say that was something which I was going to touch on towards the end of my submissions if that was necessary to touch on.

Tipping J But the whole problem derives doesn't it from the fact that for whatever reason and rightly or wrongly, the powers that be decided that the fulcrum was not to be the date of commission.

Butler Yes.

Tipping J But the date of sentence.

Butler Yes, yes that's right Sir.

Tipping J And it's as simple as that really.

Butler That's exactly, that's.

Tipping J Now whether that's a good idea or a bad idea or whatever sort of idea it is, that is the reality.

Butler That is the reality. That is the reality. That is the date that has been chosen.

Tipping J And it all really, I have to say this, all really comes down in my mind to whether or not Mr Morgan can get himself within the terms of s.6 of the Sentencing Act. If it's a penalty in the specific rather than the generic sense that's there mentioned, then I think he's got wind in his sails. But if it isn't, he's in the doldrums.

Butler And I don't demur from that. That means analysing it on the basis that I say that.

Henry J He's in irons.

Tipping J My brother Henry has a much better metaphor. He's in irons. Instead of doldrums, in irons.

Butler I mean just bringing us back to the point that Your Honour had made, that's right. The fulcrum, the choice has been made and that's the date that's been chosen.

Tipping J This sole issue with respect for me is whether or not s.6 is invoked by what's happened.

Butler Just before we move to that, if we can.

Tipping J I'm not wanting to divert you from your line of argument.

Butler No, no, not at all.

Tipping J But that for me is I think at the moment the ultimate target.

Butler One of the points I think that's made in some of the authorities, for example I know it was the point that was made for example in the **Palmer** decision towards the end of the decision. I don't know whether it might be helpful to take you to that. (**Palmer v Superintendent, Auckland Maximum Security Prison** [1991] 3 NZLR 315 (HC)). And also in some of the other material that I've been reading in preparation for today indicates that this whole area, when one's moving from one type of parole regime to another, can be quite fraught with difficulties in terms of potential anomalies and mixing and matching different types of parole regime and the difficulties that are associated with that, having parallel types of parole regimes. And at some point one just has to choose a date. A fulcrum point, to use the word that Your Honour, the phrase Your Honour used earlier. And that point is clear on the face of the statute it seems to me. And that's the commencement date. And that's been chosen for good or for ill.

Tipping J And everything's built around that.

Butler Built around that.

Tipping J Some people are given partial relief.

Butler Yes.

Tipping J Some aren't.

Butler And I say there's nothing about the Bill of Rights which dictates that outcome.

Tipping J Well it does if it's a penalty that's involved. But not if it isn't.

Butler Yes and I say it's not a penalty and therefore.

Elias CJ And even if it doesn't dictate the outcome, it's not consistent with the principles. It's an arbitrary result.

Butler Yes because it seems in one sense it's at the date of the sentence that you really know what it is that you're facing. I mean up until the point of sentencing all you know is, here's a sentence. And in a sense I say all that the Bill of Rights promises you is you know what the sentence is, in that sense the penalty is, that's going to be imposed upon you.

Blanchard J What in this case the promise is simply it won't be more than 7 years.

Butler Yes that's right in terms of the explanation and explication and the application. That's right, yes.

Elias CJ But that wasn't the point that you were addressing actually. You were saying that there's no expectation arising until you get your sentence.

But the concern there is that the sentencing Judge, that there is no modification of sentencing approach because of this blinkered view of a difference between sentencing and parole which is thought to be administrative. But here, in looking at the different impact this would have had if Mr Morgan had been sentenced the day before the Act came into effect, we see a different outcome.

Butler Well I don't know the extent to which I can help Your Honour any further on that. I really don't. I can't.

Elias CJ No, well it's been helpful thank you.

Butler I can't brace that. All I can say is that in my view that in terms of, it's rational to say that as at the sentence date you've got some expectation of what's going to occur to you within the system once you've entered it. Before you've had a sentence imposed, that's just not the case.

Tipping J I've just had a thought Mr Butler. It may be one of my wild wayward thoughts. But going back again to s.6(1) of the Sentencing Act which talks about an offence in respect of which the penalty's been varied between the commission of the offence and the sentencing. It can't really be referring to the particular sentence. Because that hasn't been varied between the commission of the offence and the sentencing because you don't know what it is until the sentence is imposed.

Butler Thank you Sir, yes that's right. That's right. That's why I say it's absolutely implicit in the language of s.25G and s.6(1) of the Sentencing Act equally that it must, one must be talking at that generic level, the applicable.

Tipping J I knew there was something niggling away at me and I think it was that.

Butler Yeah.

Elias CJ Well I.

Tipping J It may not be sound but at least it's one reading of it.

Butler Yes, because I think one of the points, sorry Ma'am if I'm not cutting across, but just while the point has arisen. In her judgment, can I just have one minute just to look back to **Uttley** where this, I think there's something that might just make that point a little bit more strongly. If I could just have a moment to make sure I'm remembering it properly. Yes I think this might be helpful in terms of the thinking. At least when I read it I thought it might be. In paragraph [45]. Remember we went through that paragraph before lunch of Baroness Hail. And I really relied on the first two sentences of that paragraph.

Tipping J [65]?

Butler [45], I'm sorry Sir. [45]. In the extract she reminds herself and us of what it was that she'd said in **Flynn**. And she said **Flynn**, I did not accept the argument that it did in terms of the actual sentence she said. I said at paragraph [100], my conclusion does not cast doubt upon the validity of sentencing guidelines which may indicate that the existing applicable sentence is to be applied in a more severe way than had been the previous practice. Again another example of saying, well if we've got sentencing guidelines then we can apply those so long as the outcome is that the penalty actually imposed on you is within the framework of the penalties set out in the statute, then the fact that if you were unlucky, you came in front of a Court of Appeal which the day before it goes back to the arbitrariness point, you're the offender who comes before the Court of Appeal the day before sentencing guidelines are changed and you get the benefit of that. And you come afterwards and the new sentencing guidelines can apply to you perfectly compatibly with Article 7.1 of the Convention. So I'm talking about. The reason I see that as helpful is that it indicates to me the focus is on the generic level and not on the particular or actual level.

Tipping J And the key point here is that the generic maximum, even if one took that as the effective generic maximum of seven, two-thirds of seven, he's still within that.

Butler Yes that's right.

Tipping J I don't think we have to go into that difference because it doesn't matter in this case. Whether one takes the nominal maximum or the effective maximum.

Butler Yes, yes. And there's just one point I will come back to at one stage about this two-thirds idea that's going around. Because every time I've referred to the two-thirds I've qualified it in the way in which the Criminal Justice Act qualified it. Which was it's entirely subject to not having any prison disciplinary.

Tipping J Yes of course, yes.

Butler Loss of remission. It was actually, everybody refers to it as LOR, loss of remission but in fact the technical term is postponement of release date. And that was a regime that was in place and I haven't the provisions with me but if it would be helpful to the Court.

Tipping J Well it's well known. If you misbehave, you have your release date postponed.

Butler Exactly. But the extent to which the number of charges and the penalties, they were cumulative, so that in fact you could get pretty much your sentence expiry date through having had lots of

misconducts proven against you. I won't make any matters specific to Mr Morgan's case because there's no evidence before the Court. It's not, there's nothing theoretical. There are many inmates who have had many of these.

Blanchard J Well we looked at it in **Drew** didn't we?

Butler We did, yes exactly. And indeed one reason in **Drew** for saying that maybe we want to give the right to cancel there is because he can have the postponement of final release date added on there.

Blanchard J Yes.

Butler And so they can be for very substantial amounts of time.

Tipping J You can effectively be sentenced for another month.

Butler Yes that's right.

Tipping J If you.

Butler For three months under one of them.

Tipping J Well three is the maximum, yes.

Butler Yes exactly. Yes, I remember that case.

Henry J Mr Butler, just looking for a moment at the position of the pre-CD offenders.

Butler Yes.

Henry J Under the Parole Act are there any provisions which protect the Criminal Justice Act provisions for those people other than s.20 which concerns eligibility for parole I think of short term offenders in s.86 which is the release provision and s.89 which deals with the commencement of the calculation of the term?

Butler Section 70, oh where's it gone, 76(2) I think it mentions there.

Henry J 76. Start date.

Butler Yes.

Henry J Thank you.

Butler I'm not sure whether there are any other references to the Criminal Justice Act in that.

Henry J And under both regimes the expiry date is similar.

Butler That's my understanding, yes Sir. That's right. Can I just return to one other, before I depart from the debate that I was having with Justice Tipping about applicable and maximum. There was a comment that's worth, or an observation worth drawing attention to in the judgment of Lord Rodger, paragraph [42]. It starts halfway down the paragraph.

Tipping J Is this **Flynn** or **Uttley**?

Butler Sorry, **Uttley**, sorry Sir.

Tipping J **Uttley**.

Henry J You have to read it out Mr Butler.

Butler Oh I'm sorry Sir, I'm sorry. As Lord Carswell shows, this is halfway down paragraph [42] Your Honours, as Lord Carswell shows, there are obvious difficulties in any attempt to interpret applicable as referring to the penalty that the Court could in practice have been expected to impose for an offence at the time it was committed. The decision of the European Court demonstrates, however, that Article 7.1 does not envisage such speculative excursions into the realm of the counter-factual.

Tipping J Counter-factual doesn't help us.

Butler Yes I'm sure the Court's more than familiar with the difficulties counter-facts will show. Not just in this area. Its purpose is not to ensure that the offender is punished in exactly the same way as he would have been punished at the time of the offence but to ensure that he's not punished more heavily than the relevant law passed by the legislature would have permitted at that time.

Henry J If that weren't correct you could never change the tariff or starting point, however you'd like to describe a sentence, could you?

Butler Yes that's right.

Henry J For example in I think it was in **Clark**'s case, the Court of Appeal increased a starting point for rape to 6 years which had been well under that previously.

Butler Yes.

Henry J And it was that principle which allowed that to be done. Otherwise you'd never be able to increase a tariff.

Butler That's right. And again, I just use that as an example Sir of coming back to the alleged arbitrariness in terms of choosing a date. The Court equally is faced with a similar problem. I mean the Court must say,

well what about the chap we had last week. We didn't revisit, we didn't think that was an appropriate case to revisit the tariff though had we done that, that person might have, you know, why should we treat Mr Clark differently from the offender we had last week in that sense? It just seems to me decisions have to be made, things move across and one chooses a fulcrum point and some people may benefit and some people may feel that they've not done as well out of it as they might have done. One chooses a point and moves on.

Just one point while we're at the transitional, stage of transitions and so on. I think Your Honour the Chief Justice this morning made reference to the Interpretation Act and the fact that that might have something to bear in the question that we're faced with here. I've gone through the Interpretation Act obviously over lunchtime just to try and see what might be the relevant provision in that regard. And I'm not quite sure exactly what Your Honour might have had in mind.

Elias CJ It only bites if the interpretation is open.

Butler Yes.

Elias CJ But I was thinking of the provisions which provide that repeals of enactments don't.

Butler Affect existing rights perhaps, was that the one?

Elias CJ Yes, yes.

Butler I thought that might be the case which was s.17. That was the closest one I think that might be relevant there. Section 17 subs (1) paragraph (b) which says the repeal of an enactment does not affect an existing right.

Elias CJ Yes.

Butler Interest, entitlement, immunity or duty. And my view on that is that to use that as a way of interpreting the Parole Act here and preserving the Criminal Justice Act provisions would not be appropriate because when one actually looks at the detail of s.90 subs (1)(b) and who it is that gets the final release date, it is somebody who's an offender who is subject to a sentence of imprisonment. Well Mr Morgan never was a person who was subject to a sentence of imprisonment in terms of s.90(1)(b) when the Criminal Justice Act was in force. He just never was. He accrued no rights under the Criminal Justice Act 1985. That would be my simple answer to that. So again I say you're thrown back to saying the only way in which you can object to, how the respondent is dealt with, Mr Morgan, is by finding some other source. So I don't know whether that meets the point Ma'am but that would be. If that was.

Elias CJ It all comes back to interpretation of the Parole Act.

Butler Yes. Yes.

Elias CJ And the Sentencing Act.

Butler And the Sentencing Act. Now Your Honours I think this might be an opportune point just to go to s.90(1)(b) of the Criminal Justice Act again. That should be in the materials. And that just sets out how it is that one calculates the final release in respect of particular offenders. And obviously as Your Honours will be familiar with from before today, there's several different classes or categories of offender. What is important to remember though, and this is the point I said I would be returning to and I just wanted to make sure it's made, is that release was not unconditional release. The relevant.

Elias CJ I'm sorry, what was that?

Butler The relevant provisions in terms of indicating what conditions somebody was subject to. And the point I'm trying to make I suppose is that while Mr Morgan might try, while one might try and conceive of it, this as this is your day of freedom, in a sense it's not really about a day of freedom. It's about a different way of managing your sentence. Which is the point that was made by the Supreme Court in **R v M** at that paragraph that I took Your Honours to, paragraph [62]. That's been the point I suppose I've been consistently making here before you today. That parole and issues around that are about the management of a person who's had a sentence, a penalty, imposed upon them. The purpose of the parole is trying to manage how best do we deal with this offender in terms of their rehabilitation. How they're going to get on in the community when they're ultimately released and so on.

Henry J Release may also be subject to discretionary conditions I think too.

Butler Correct, so-called special conditions. So under the old Act there were two types of conditions.

Henry J Standard and.

Butler There were the standard and then there were the discretionary ones which could be made by the Parole Board if an application had been made to have those. The way, as I understand it, was that you'd come before the Parole Board if that was considered necessary. That would have been s.107(c) of the old Act allowed the District Prisons Board or the Parole Board to impose special conditions to protect the public or any person or class of persons.

Henry J And s.105 still applied?

Butler And s.105 still applied, exactly, in terms of.

Henry J And the right to recall in certain situations also applied.

Butler Yes that's right.

Tipping J Did it apply to people sentenced for cultivating cannabis, 105? I rather had the thought that that wouldn't qualify.

Henry J I wasn't suggesting it applied to that, it only applies to specified offences.

Butler Specified offences exactly.

Henry J But it's the general principle we're concerned with.

Tipping J Oh yeah, yeah.

Butler Exactly Sir, that's right.

Blanchard J The right to recall.

Butler I'm still at that point of general principles. I'm not particularly, in relation to that, I'm not talking about Mr Morgan.

Tipping J I understand Mr Butler. I made that mistake.

Blanchard J But the right to recall certainly applied.

Butler Yes. So what I'm trying to emphasise here is that when Your Honours are looking at this question of penalty and so on, I think a factor you've got to take into account in terms of considering whether the alteration, the way in which an offender is being managed as and from the commencement date of this legislation, is to look at it from that particular perspective. The offender might see it as, way hey, I'm out. I'm free. But that's not really what it was about. It was about putting you out into the community and making you subject to recall and special conditions that might be necessary and a whole raft of other measures that might have been applied in respect of you, depending on the nature, on who it was that you were. So it's really hard in my submission to characterise that type of regime that you were under as being, changes to that type of regime, being ones which really go to penalty as such. It's just not penalty. It's managing you in the community. Remember that in terms of his parole eligibility date, that was open, there was no change there. So Mr Morgan was eligible for release on parole at the same point under both the Criminal Justice Act and under the Parole Act. But the Parole Board has not seen it as appropriate to release him. … feel that the relevant criteria set out in the Parole Act have been met. Remember, looking back again to what the Parole Act says in terms of the guiding principles for the parole authorities under the Act, there is the statement at subs (2) of paragraph

A – Section 7(2)(a), that other principles, the paramount consideration was for safety of the community. Paragraph (a) of subs (2) says other principles that must guide the Board's decisions are that offenders must not be detained any longer than is consistent with the safety of the community etc. So again, when looking at this regime of change and saying, well are we satisfied that those things are being met?

Tipping J Is another way of putting your argument that one must not confuse in relation to what actually might physically be happening, i.e. the opening of the prison gates.

Butler Yes.

Tipping J The difference between a final release date and a sentence expiry date?

Butler Thank you Sir, yes that's right exactly. You've put it much more crisply than I was able to put it. Because I wasn't sure that I'd really communicated this morning that particular point, so I just wanted to be a little bit, that's it.

Tipping J The opening of the prison gates is a seductive.

Butler Yes, yes.

Tipping J Concept but structurally under this legislation it's the sentence expiry date that marks the true end of the penalty.

Butler Yes, yes.

Tipping J Not the final release date.

Butler Yes, correct. And again I say you look at that paragraph [62] of the **M** decision and that is all of a piece. It's all of a piece. And I know it's, can I use Your Honour's word, I know it's seductive to look at it in a sense from the offender's perspective and say well, two-thirds of the way plus whatever else, whatever other naughty things I might have gotten up to, add that on and I'm out. But it's not really out. It's subject to recall. There's a whole range of.

Blanchard J It might just feel out.

Butler Exactly. And part, and can I pick up, and part of the policy may be exactly that. Let's see how you can get on subject to supervision, let's see how you manage now that you're back in the community. So that's a policy choice that's made. It's not about, withdrawing that from you isn't about penalising you, it's just saying, maybe it hasn't worked. Maybe doing it that way doesn't work. Maybe we need more assurance be given by the Parole Board and you satisfy the Board before you're out on the street. Now how is that penalising, I say

again, how is that penalising the offender. It's just not a penalty. It's about differently managing the offender.

Blanchard J What was the name of that case do you remember Mr Butler? Where I think my brother Henry and I and I think it was Justice Thomas had to deal with. Hugely intricate case involving the inter-relationship between all these dates. Do you happen to remember?

Butler This isn't the **Manga** case is it?

Blanchard J **Manga**, that was it. Thank you. That sort of set it all out in turgid detail didn't it?

Butler Yes that's right it did, yes. And I know Your Honours have laboured with the Criminal Justice Act before and that was certainly one of those difficult, an example of some of the difficulties associated with that. Obviously I'm familiar with the case because I dealt with the compensation end of things. The outflow from that, that's why I remember the case well, that's right, **Manga**.

Blanchard J I was referring to it just for the terminology and the inter-relationship between all these.

Butler Yes exactly, yes that's right. Just for a moment I just want to make sure, I don't want to prolong the hearing unnecessarily, so if I might have a moment, I just wanted to make sure I've got most things covered so I can give Mr Morgan an opportunity to reply. I think I've talked about transitionals. In terms of the point that Your Honour made about penalty and what that means for s.6 of the Sentencing Act, I don't know whether there's anything more I can say to assist the Court on that. And I really don't want to sound like a broken record. I think I've laid out the Crown's position on that.

Tipping J You can leave that role for me Mr Butler.

Butler So long as it delivers the same message, I'm more than happy Sir. But in essence I say Mr Morgan I think earlier today talked about s.6 perhaps in the exchange with the Bench as perhaps being a mop-up provision. I don't think it's a mop-up provision in that kind of way dealing with eventualities that haven't been perceived. I think it's very clear what Parliament had in mind here when it was dealing with the regime that it wanted to apply, the new regime it had established, who was it that was going to be subjected to that. The fulcrum point is the commencement date. And that's it. And s.6 of the Sentencing Act really sends a statement of principle, a statement of principle that's got to be understood in terms of s.25G of the Bill of Rights, the international antecedents. And I say that those antecedents clearly indicate that it does not come down to the actuality, particularist approach, to use that language which perhaps Mr Morgan needs to favour to succeed before Your Honours today.

There was one point I'd indicated that I would return to if it was considered necessary, which was that of remedies. So I don't know whether I need to. Do I need to address Your Honours on that particular point? I mean the only point I particularly wanted to make in relation to that, as far as I understand today we're dealing with an application for habeas corpus, i.e. the letting go of this gentleman. Obviously the Court knows that if there's no authority in the respondent to detain the person, that's what happens. In terms of some of the issues that have arisen, the reason I raise remedies in a way is that it's not necessarily the case that some of the concerns that might be expressed, even if one was of the view let's say that s.25G imposed some problems for the Parole Act 2002 and the way in which the superintendent has operated it, that that therefore means that somehow the warrant of commitment is bad or doesn't provide authority for the detention. What I'm getting at for example is if the Court was thinking that this, it's very clear what the Parole Act says but say the Court doesn't like it. Well one response would be obviously to think about declarations of inconsistency. And I know that's a whole other ball game that the Crown has in relation to it. But all I'm saying in that regard is, as I understand it, today's hearing is about habeas corpus. That's a relatively narrow focus in terms of what the remedies are. I'm not going to deal with any of the other ways in which, well the sorts of remedies that the Court might have available in respect of any concerns it might have. But it seems to me they might be things around which consideration may need to be given and I don't know whether I can assist Your Honours on that now or in some other way.

Elias CJ Well, you're right that the only matter we have before us is the habeas corpus application. So in terms of any other formal remedy, there's nothing that we would be dealing with as part of this hearing.

Butler Yes, yes, exactly. So I just wanted to be quite clear about that.

Elias CJ Yes, which doesn't mean to say that the reasoning might not need to consider compliance with the Bill of Rights Act.

Butler I accept that.

Elias CJ But you've covered your argument on that haven't you?

Butler Yes, I feel I have Ma'am. May I just check with my Junior that I've covered everything that I had in mind.

Elias CJ Yes.

Butler I think that's all of my submissions today. Thank you very much Your Honours for the hearing.

Elias CJ Thank you. Yes Mr Morgan, do you want to be heard in reply?

Morgan Thank you Your Honour. I'll try and put this into some semblance of order but if I might start with the very last point that Counsel made. And that is that Parliament was very clear about what it wanted to achieve with the Sentencing and Parole Act. The Sentencing and Parole Reform Bill 2001 was introduced on 14 August and the Minister of Justice said, amongst other things, the nonsense of an arbitrary release at two-thirds of the sentence for serious violent offenders ignoring the risk or indeed the absence of risk posed by the offender is scrapped. So it's very clear that as part of the purpose of the Sentencing and Parole Reform Bill it was intended that the two-thirds release date be removed. During the in-committee stages on 17 April of 2002 on pages 17, 18, 25 and 27 of the transcript that I have provided to the Court, individual Members of Parliament.

Elias CJ I'm sorry, which is the transcript?

Morgan From Hansard. It was provided to the Court of Appeal. I understand that is part of the Court of Appeal papers that you have before you.

Blanchard J Yes, I've seen it somewhere. Yes here it is. It's attached to something that looks like that.

Elias CJ Oh right. Is that given a tab number?

Blanchard J No. It's just about the last document.

Tipping J Attached to what?

Blanchard J It's attached to the Notice of Appeal in the Court of Appeal.

Tipping J Yes thank you.

Elias CJ I don't have an attachment to that. Or it may be in the casebook is it? Is it in the casebook?

Blanchard J No.

Morgan Your Honour, it wasn't part of the casebook. It was handed up to the Court of Appeal separately from the casebook.

Blanchard J Which page were we looking at?

Morgan Page 17 is the first page of the in-committee discussions of 17 April. That first quotation was from the first reading at the introduction on 14 August.

Blanchard J Is that from Mr Franks?

Morgan Yes, Mr Franks is the front page. That's page 17, it says at the bottom there. Now it may not be marked on your pages. But the purpose of showing these earlier pages of the in-committee discussion was there were three, perhaps four passing references by Members of Parliament to retrospective legislation. And then on the last page which you have before you, it's number 28, in answer to these various Members of Parliament mentioning retrospective, the Minister of Justice says, the information given to the Committee by that Member was quite simply wrong. This legislation is not retrospective in terms of people who have already committed crimes. The fact is that Parliament was told at a time when I was charged with an offence, had not yet been convicted nor sentenced, that the introduction of this particular legislation was not retrospective in terms of people who have already committed crimes.

Tipping J Are you suggesting that that would lead people to think that the fulcrum was the commission date rather than the sentencing date?

Morgan I believe that I should be treated according to the legislation as it applied at the time that I committed the offence. That is a long-standing principle of law. The fact that Parliament chose to pass this legislation in a way where the Sentencing Act applies from the date of sentence, that that's where it all flows from, that that's the fulcrum, requires various transitional provisions to protect people from being disadvantaged by retrospective legislation. And that in fact they did do that in a number of cases. It is clear from **Pora** and **Poumako** that the decisions of the Court of Appeal very clearly showed an increase in penalty, sorry a penalty was imposed by an increase in the minimum period, non-parole period. And that was reflected in the Sentencing Act which increased for certain types of murder the penalty to a minimum of 17 years. But if that murder occurred before the commencement date, that particular section did not apply under, I think it was, 154.

So various steps were taken within the Sentencing Act to ensure that people were not disadvantaged. In fact some people were advantaged by the introduction of the Sentencing Act. A person sentenced under the old law to two years imprisonment would serve one year and four months, and two years under the new law would only serve 12 months. That's clearly an advantage. That's a benefit of the retrospective legislation. But there are a group where it did affect. But whether the Government intended it or not, I'm not suggesting that the comments of the Minister of Justice before Parliament should take precedent over the final legislation that's passed. I'm not suggesting that for a moment. But I believe it's an indication of what it was that Parliament intended. If that's what Parliament believed that they were passing, then perhaps s.6 in the minds of the Parliamentarians passing that law might have had a different effect in order to protect those from retrospective legislation and increase in penalties.

There are a number of issues that have been raised, and I might say that in those pages that I have given to the Court, are just a few pages from a total of 215 pages of the mostly interesting conversation of our members of Parliament and those are the only references to the question of retrospective legislation but it clearly is of course retrospective by the terms of s.5.

There are a number of issues that have been raised by the Crown that I need to address. I will try and put these into some semblance of order. The main one was regarding **Uttley** and I will come back to that one in a moment. But Your Honour Chief Justice, you mentioned short term sentence, that there are no conditions upon release of serving half of the sentence. My understanding is that there are standard conditions apply to all persons when they are released from a term of incarceration including short term sentences. Now I may be wrong and I'm not trying to correct anybody here but I believe that that's the case.

With regard to policy decision, sentencing judges would not look at what occurs after sentencing. That of course is one of the problems that we have. Whereas in **Uttley**, one of the things that worked against the appellant or against Mr Uttley at that time was in fact the Clause 15 on page 2282 which was a practice statement drawing. And he outlined, Lord Taylor of Gosworth, outlined the repercussions of the new law. That was then used by Mr Pannick that it must have been taken into account, this change of regime must have been taken into account by the sentencing judge when dealing with this particular Mr Uttley. That of course did not happen in New Zealand. Whether it should have or not, it's not my place to say. It simply just did not.

The Crown were asked if there were any specific cases that were on point. Difficult to come up with such a case. I did come up with such a case Your Honour and that is **Welch**. **Welch** in my view is the only case that has been presented to the Court that's directly on point. It is referred to in **Uttley** but in fact a copy of the full judgment has been presented to the Court this morning. This is a case where first of all it was put before the Human Rights Commission which, in a seven all vote, were tied into their, tied on their decision and the Acting President cast the decisive vote determining that there had been no violation of Article 7 of the Convention. The Court of Human Rights, however, held unanimously that there had been a violation of Article 7.1 of the Convention and ordered the UK to pay certain moneys and costs and such like. The point really on **Welch v UK** which can be read in context with the Baroness Hale comments that I mentioned earlier this morning in clause 46, paragraph [46], the main point here is that **Welch** had a separate discrete penalty applied in the form of a financial penalty and, in the absence of payment of such, a further two years. The Court determined that to render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts

in substance to a penalty within the meaning of this provision. To achieve that the wording of Article 7.1 second sentence, which of course is the same second sentence as our Article 15.1 from which we say 25G and 6 of the Sentencing Act have flowed, the second sentence indicates that the starting point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a criminal offence. And other factors may be taken into account, the nature and purpose of the measure in question, its characterisation under the law, the procedure involved in the making and implementation of the measure and its severity. All of these things I would suggest are things that this Court should properly consider when considering whether or not a penalty has been imposed that would invoke s.6 to assist me in this matter.

Tipping J Was this a penalty, to use that word neutrally, that was not available at the time of the commission of the offence?

Morgan Correct. Correct. Mr Welch was convicted and sentenced to I think it was 18 or 22 years. It was 18 or 22 years. It was 22 years.

Blanchard J Oh yes, you're right.

Morgan And the dates are given here in the decision. The confiscation order was pursuant to the Drug Trafficking Offences Act of '86 which came into effect on 12 January '87. But the confiscation order related to a period of time that was prior to him being convicted.

Tipping J Your problem, if it is a problem Mr Morgan, is that in your case it is said that the ultimate length of imprisonment which you're going to serve, or so it appears, was available at the time you committed the offence. If the sentence, so-called sentence or extra or whatever it was in **Welch** wasn't even available, then that's a rather different case isn't it?

Morgan Well the difference here is if we're talking about a sentence that was applicable. And the definition of the word "applicable" that applied in the European Commission, the European Court of Human Rights to Article 7.1 would be exactly the same, I would suggest, to the International Covenant that we are parties to. The word "applicable" in this instance, we should look at it in the context of the case. This is a case where Mr Uttley, in the same way as **Fulcher**, was released at two-thirds and it was only the question of the length, the quality, the severity of the conditions imposed upon that release that were under review in this instance. And it was determined that that was not a penalty. But I think Lord Rodger said that even if this applicant had received a life penalty, and I'm looking now at [43], paragraph [43], of course if legislation passed after the offences were to say for instance that a sentence of imprisonment was to become a sentence of imprisonment with hard labour, then issues would arise as to whether the Article was engaged even where the maximum sentence had been

life imprisonment at the time of the offences. In my submission it's not a question of the sentence that would be imposed. In this instance I knew in September of '01 when I was charged that the maximum penalty was 7 years. That by statute would impose a sentence of imprisonment, a portion of imprisonment of 4 years and 8 months and the balance of the seven year term would be spent released into the community on conditions. And I understand that it was not a walk free from prison situation. There would be conditions applying. I understand that. But release on conditions is a less severe penalty than having to serve that time in prison. I mentioned to you the paragraph [28] where Lord Phillips said the release of a prisoner on licence, albeit subject to onerous conditions, mitigates rather than augments the severity of the sentence of imprisonment which would otherwise be served. A sentence of 12 years imprisonment with release on licence after serving two-thirds is a less heavy penalty than a sentence of 12 years imprisonment all of which has to be served.

So it is clear that a sentence requiring me to serve all of the term no matter what period of time, this legislation, the Sentencing Act, did away with my entitlement to a two-thirds release as at the time of my committing the offence. It didn't matter that I hadn't been processed at that time. The process of the justice system, is this a question of justice delayed, justice denied? The Court process followed its natural course and I neither hindered nor helped. I was just told when the next hearing would be. We processed through to trial, sentencing in the normal course of events. To be caught up in a 50 percent longer term of imprisonment based on a sentence that was imposed without reference to the severity or the changes to the regime of sentencing in my view amounts to a penalty that I would not have faced if dealt with under the Criminal Justice Act that was in force at the time that I was charged with the offence.

There are matters relating to the parole and day parole cases and such like. I would suggest in most instances, as we've talked about parole cases, that the best quotation I can tell you about, the matters of parole would be, well it doesn't matter which it is but I will just read this, it's very quick. In **Palmer**, Justice Wiley says, eligibility for parole or remission is a statutory right to be considered for a concession or amelioration of penalty. I agree with that absolutely. I have no difficulty with that. My concern however is that, as we have started talking about parole in my instance, the question must be raised in the Court's mind about why I haven't received parole. That's a whole different matter. Because this is not a case about parole.

Tipping J Am I right in taking the view that that's completely irrelevant to our present inquiry?

Morgan Parole is irrelevant to the current situation. Whether I had received parole or not is beside the point when we're talking about have I received a heavier sentence than I would have at the time of my

offence. Because that's what it comes down to. 25G and s.6 that has flowed from 15.1 of the Article, which is identical to Article 7.1 of the European for which **Welch** has clearly shown that there can be additional penalties added by separate legislation. That to me shows that the Sentencing Act, by removing an entitlement, can impose a separate and distinct penalty quite separate and distinct from the actual offence of seven years of which I was ultimately sentenced for. The Sentencing Act in itself repealed Part 6 of the Criminal Justice Act and replaced it with a requirement for me to serve the full three-thirds of the sentence without any automatic right to ameliorate that particular sentence. So the only way, short of that sentence, to be released from imprisonment is through the parole process. And that's not what this case is about. There are separate proceedings that I have commenced in a lower Court with regard to that matter and that is not in my view something that should be taken into account by this Court. Whether or not I have been eligible for parole or not, it is not the issue.

Thank you Your Honours. Any other questions?

Elias CJ No thank you Mr Morgan.

Morgan Thank you.

Elias CJ We're conscious of the fact that we must try and get a result in this matter soon. But there are very important issues that have been raised so we are going to have to take time to consider what our decision will be. But we hope to get a result out shortly. It may be that reasons will have to follow a bit later but we'll hope to … that. Thank you.

Morgan May it please the Court.

Elias CJ Thank you all for your assistance.

Morgan Thank you very much.

Court adjourns 3.44 pm