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

SC 54/2018
[2018] NZSC Trans 15

BETWEEN	**MATHIAS ORTMANN** First Applicant
	BRAM VAN DER KOLK Second Applicant
	FINN HABIB BATATO Third Applicant
AND	**UNITED STATES OF AMERICA** First Respondent
	DISTRICT COURT AT NORTH SHORE Second Respondent

SC 55/2018

BETWEEN	**FINN HABIB BATATO** Applicant
AND	**UNITED STATES OF AMERICA** Respondent

SC 56/2018

BETWEEN **MATHIAS ORTMANN**
First Applicant

BRAM VAN DER KOLK
Second Applicant

AND **UNITED STATES OF AMERICA**
Respondent

SC 57/2018

BETWEEN **KIM DOTCOM**
Applicant

AND **UNITED STATES OF AMERICA**
Respondent

SC 58/2018

BETWEEN **KIM DOTCOM**
Applicant

AND **UNITED STATES OF AMERICA**
First Respondent

DISTRICT COURT AT NORTH SHORE
Second Respondent

Hearing: 5 December 2018

Coram: Elias CJ
William Young J
Glazebrook J
O'Regan J
Ellen France J

Appearances: G M Illingworth QC, P J K Spring and A K Hyde for Messrs Ortmann and van der Kolk

A G V Rogers for the Mr Batato

R M Mansfield and S L Cogan for Mr Dotcom

D J Boldt and F Sinclair for the United States of America

District Court at North Shore (abiding)

ORAL HEARING – JURISDICTION

MR ILLINGWORTH QC:
If the Court pleases, I appear and with me Mr Spring and Ms Hyde for Mr Ortmann and Mr van der Kolk.

ELIAS CJ:
Thank you Mr Illingworth, Mr Spring, Ms Hyde.

MR MANSFIELD:
May it please the Court, counsel's name is Mansfield. I appear together with Mr Cogan for Mr Dotcom.

ELIAS CJ:
Thank you, Mr Mansfield, Mr Cogan.

MR ROGERS:
May it please the Court, I appear for Mr Batato.

ELIAS CJ:
Thank you, Mr Rogers.

MR BOLDT:
May it please Your Honours, Boldt and Sinclair for the United States.

ELIAS CJ:
Thank you, Mr Boldt, Mr Sinclair. Yes, are you to start, Mr Illingworth?

MR ILLINGWORTH QC:
No, Your Honour. We have agreed that Mr Boldt should go first if the Court is happy with that.

ELIAS CJ:
Yes, that's absolutely fine. We have, of course, read the helpful submissions so you can speak to them, emphasising the …

MR BOLDT:
Of course, Your Honour. Thank you, Your Honour, and I hope not to detain Your Honours long this morning.

Today's argument arises because when these proceedings commenced back in 2012 neither the Extradition Act 1999 nor the Supreme Court Act contained a provision conferring jurisdiction on this Court to hear a third appeal in an eligibility case. It is our case that the absence of an express appeal right at the relevant time is decisive because eligibility determinations are criminal proceedings and for there to be jurisdiction for this Court to hear another appeal, jurisdiction had to be expressly conferred by one of the provisions contained in section 10.

These particular extradition proceedings commenced in January 2012, so the changes which came into force the following year in the Criminal Procedure Act 2011 do not

apply and that means the issue is whether back in 2012 the Extradition Act via the Summary Proceedings Act 1957 conferred jurisdiction on this Court.

The way the Supreme Court Act 2003 when it first came into force, although the position is not that different now under the Senior Courts Act 2016, but the way the Supreme Court Act created criminal jurisdiction is really the key to the argument today, in our respectful submission, because whereas in civil cases section 7, which I'll take Your Honours to shortly as we go through in more detail, whereas section 7 provided there was jurisdiction in civil proceedings unless there was an express provision to say there was not, the position was reserved, the presumption was reversed in the case of criminal matters and section 10 provided there should be criminal jurisdiction only where one of those three provisions expressly said there was.

Now in this case the only provision which might have applied to confer jurisdiction is section 144A of the Summary Proceedings Act which is referred to in section 10(b) of the Supreme Court Act, and that might have been the relevant provision to apply because some provisions in the Summary Proceedings Act were incorporated into the Extradition Act, but the problem which arises in this case, we say, is that section 144A was not among them. Section 144A was not at the material time incorporated into the Summary Proceedings Act and accordingly did not confer jurisdiction on this Court. The Summary Proceedings Act gave jurisdiction to the Court of Appeal to hear a second appeal in an eligibility case but we say it went no further.

So given the need for jurisdiction to be expressly conferred under section 10, the fact section 144A was not incorporated into the Extradition Act should, at least in our respectful submission, be the end of the matter. But the applicants say in this case there actually is jurisdiction despite the lack of a provision which affirmatively says there is and it's that submission which requires us to have a look at section 144A in a bit more detail.

Now, Your Honours, I've set out in my submission an outline of the history of section 144A and how it came into being in the form it took when the Act finally came into force. It's important to note, as I do in my submissions, that criminal jurisdiction, at least when this Court first came into existence, was conferred far more sparingly than it

is now. Even the explanatory note to the Supreme Court Bill when it was first introduced noted that provision was made for certain criminal appeals expressly authorised and Your Honours can see that provision behind tab 24 of the applicant's bundle at page 294 of the bundle. So we're looking there at – this is the very first iteration of the Supreme Court Bill which was introduced into Parliament in late 2002 and at 294 you'll note, Your Honours, section 7 gives the Supreme Court jurisdiction to hear and determine appeals by parties to a civil proceeding against any decision unless some enactment steps in to say there is no jurisdiction. Clause 10 on the other hand gives the Supreme Court jurisdiction to hear and determine certain criminal appeals expressly authorised by the Crimes Act 1961, the Summary Proceedings Act or the Court Martial Appeals Act 1953. So very different presumptions in terms of criminal and civil proceedings.

And, as I've noted in the submissions, there were in fact quite a range of criminal appeals which in the early days of this Court didn't get to come here by virtue of that provision and, for example, most notably pre-trial indictable appeals didn't attract jurisdiction to come to this Court until 2008 and this Court's decision in *R v Clark* [2005] NZSC 23, [2005] 2 NZLR 747 in 2004 confirmed there simply was nothing in the statute capable of conferring jurisdiction on this Court to hear a second appeal although appeals could come here by way of the leapfrog provision, and then similarly in the *Jones v R* [2014] NZSC 85, [2014] 1 NZLR 838 matter in 2013 the Court confirmed that despite some improvements being made to the jurisdiction in the pre-trial area as a result of the amendment in 2008, there were still a number of pre-trial criminal appeals for which there was no jurisdiction expressly conferred and therefore jurisdiction doesn't, didn't exist, and that's why in my submissions I make the proposition which I don't think is a –

ELIAS CJ:

In *Jones* wasn't the point reserved, the jurisdictional point reserved?

MR BOLDT:

No, Ma'am.

ELIAS CJ:

It was determined, wasn't it? I thought –

MR BOLDT:

Yes. Yes, it was, Ma'am.

ELIAS CJ:

I thought it was reserved but there was a footnote reference to earlier authority.

MR BOLDT:

We may be talking about different *Joneses*, Ma'am, and if I can take Your Honour to the decision though. The *Jones* case on which I am relying is behind tab 15 of my learned friend's submissions. I don't know if you remember that case, Ma'am. It involved the infamous Red Devils.

ELIAS CJ:

Yes, I do remember but…

MR BOLDT:

And so it's behind tab 15 of the applicant's bundle and…

ELIAS CJ:

This was the – yes, I see.

MR BOLDT:

Yes, and so at paragraph 26, "It follows this Court has no jurisdiction to give the applicants leave, and so their applications for leave must be dismissed".

ELIAS CJ:

Yes, I was looking at the other *Jones*.

MR BOLDT:

So the proposition, which, as I say, I don't think is a controversial one, it's reflected in the cases but it's also really simply a reflection of the way the statute is constructed, is that where there is a right of appeal to the Court of Appeal and then silence as to

whether there is a further appeal right to this Court, if the case is civil then clearly there is jurisdiction because there is nothing there ousting it. On the other hand, in a criminal case if there is jurisdiction to appeal to the Court of Appeal and silence, there is no jurisdiction because there is nothing expressly conferring jurisdiction via one of the provisions in section 10.

So it's against that background we turn to what happened with section 144. Section 144 is, of course, well, its main role was to confer jurisdiction in summary prosecutions. Summary prosecutions obviously were determined in the District Court and there was an appeal as of right to the High Court. There was then an appeal only by leave to the Court of Appeal or, failing that, there was the opportunity to obtain special leave, but there was also a provision in the old section 144(5) which provided that the Court of Appeal's decision was final and there were various attempts over the years to try and get around that provision and still take cases to the Privy Council but they always failed.

So the pre-Supreme Court Act status quo was there was an appeal right by leave to the Court of Appeal but then no further appeal to the Privy Council.

In the Extradition Act the position was that prior to 1999 there was in fact no appeal right at all. Eligibility arguments were treated very much like committal hearings which, of course, had never attracted any kind of an appeal right, and that meant there was no express facility to challenge an eligibility determination even by way of appeal to the High Court although, of course, at the following stage, the surrender stage, judicial review remained available as a remedy.

Now that position was significantly improved in 1999 when during the Select Committee stage of the Extradition Act 1999 there was a decision that there should in fact be appeals only on a point of law and that the section 144 architecture should be adopted, and so section 69(1)(p) of the Extradition Act cross-referred to section 144 of the Summary Proceedings Act, and so we had a situation where you could appeal to the Court of Appeal but you could go no further. Again, people tried to go further. They tried to do it, for example, by re-characterising their proceeding as a judicial

review but once again they always failed and the decision of the Court of Appeal was final.

And so we come to the Supreme Court Bill in 2002. In that first iteration of the Bill section 144 was expanded to bundle up, along with the existing right of appeal to the Court of Appeal, a further right of appeal to this Court and the proposed draft of section 144 had a new section 144(2) which would provide a third appeal to this Court and section 10 in its original form, or clause 10 as it was then, listed section 144 of the Summary Proceedings Act as one of the three provisions which would get you jurisdiction via section or clause 10.

So the matter went off to the justice and electoral select committee and it was there that the very significant change which has led to the argument we're having today occurred. The Bill was referred to the select committee in early 2003 and there was very little attention paid to this particular issue under the Summary Proceedings Act and there was, I have to say, as far as we can tell through pretty exhaustive research, no attention whatsoever paid to the express question of extradition.

So section 144 didn't attract much attention but it did attract some. The Law Society in April 2003 made a couple of submissions about, in fact, the Legal Services Act 2000 which was one of the provisions that tapped into the architecture of section 144 and which was expressly referred to in the Supreme Court Bill. The Law Society's submission was you need to tidy up the Legal Services Act a little bit by making it clear that the reference to the Court of Appeal now includes a reference to the Supreme Court. That would have been section 60 of the –

WILLIAM YOUNG J:

Just pausing there. It was always clear, wasn't it, that appeals under the Legal Services Act were intended to go the Supreme Court?

MR BOLDT:

Yes.

WILLIAM YOUNG J:

So this was a tidying up?

MR BOLDT:

That's right. That submission was a tidying up and in fact the Law Society then suggested that section 61 of the Legal Services Act should be amended to make it clear there was an appeal right to this Court.

We can see the way the Ministry of Justice responded to that submission and the response to that submission is at tab 25 of the –

ELIAS CJ:

What use are you asking us to put this material to?

MR BOLDT:

Well, Your Honour, the issue, as I understand it anyway today, is how did we get to where we've got to.

ELIAS CJ:

We don't normally receive departmental reports.

MR BOLDT:

No.

ELIAS CJ:

In fact, I don't think we ever have.

MR BOLDT:

The drafting history is important, Your Honour, and because there was a significant change in the select committee and the question is what was the intention behind that change? Why did that change get made? Now we don't have much evidence to go on but we do have a little bit and this provides it.

GLAZEBROOK J:

But you're asking us to infer from what are really not public documents which we – I know they are available if you get your librarian or have the wherewithal to find them yourself but that's more of a public information thing rather than intended to be a drafting aid. My difficulty is we don't have any explanation for why these changes were made. We're being asked to infer various things.

MR BOLDT:

Well, you are, Ma'am, and –

GLAZEBROOK J:

Even on your argument we're being asked to infer.

MR BOLDT:

And our argument basically is we don't know but we have a few clues. My friends have argued, look, the change that came, and which I'll describe in a moment, wasn't made for any substantive reason at all. It was made to make what in our submission was an already relatively straightforward provision easier to read by chopping up or separating the Court of Appeal appeal right from the Supreme Court appeal right. Now I guess our argument is there's simply no evidence at all which would allow that inference to be drawn.

WILLIAM YOUNG J:

So the inference of mistake. The inference of mistake.

MR BOLDT:

Yes, yes, or the inference that this was somehow done for ease of reading and that there were a host of unintended consequences.

WILLIAM YOUNG J:

But, Mr Boldt, can you just answer something for me, that section 144 as proposed and the Bill was quite similar in structure in a generic sense to section 385(1) of the Crimes Act as it emerged in that it folded into one section appeal rights to both the Court of Appeal and the Supreme Court.

MR BOLDT:
Yes.

WILLIAM YOUNG J:
So, I mean a point in your favour is that they didn't, the Parliamentary Counsel, didn't see the need to split up section 385, but just as a matter of interest why is there such – sorry. In the – Part 1 of the schedule to the Supreme Court Bill has different, sets out – it's the Summary Proceedings Act provision.

GLAZEBROOK J:
Can we just – sorry, can we…

WILLIAM YOUNG J:
It's tab 24.

GLAZEBROOK J:
Tab 24, thank you.

WILLIAM YOUNG J:
So there are substantive amendments in Part 1 of Schedule 1.

GLAZEBROOK J:
Sorry, where are you? What page?

WILLIAM YOUNG J:
On page 311. And that includes the Summary Proceedings Act at page 314. And then what seem to be equally substantive amendments are made to the Crimes Act but there are just treated as consequential. They start at 315, and then the Crimes Act provisions and there are Bail Act 2000 provisions that are quite significant.

MR BOLDT:
Indeed.

WILLIAM YOUNG J:

Is there a logic to that? I mean, if there's logic it's escaped me so far but that's not uncommon.

MR BOLDT:

I've tried to discern a pattern to all of this and haven't been able to, Your Honour, and what it appears to be doing, though, is to isolate the types of appeal that ought to be able to come to this Court in the criminal context and to make the amendments, the express amendments to those statutes necessary to allow that to occur. But beyond that, I don't know that I can take it very much further, Sir. But –

GLAZEBROOK J:

Maybe it was just taking out finality was more substantive than the Crimes Act provisions thought it to be.

MR BOLDT:

And it's certainly correct, Your Honour, that a lot of the civil jurisdiction this Court attracted was able to be achieved simply by repealing finality provisions in civil statutes because the moment that the bar goes, the statutory ouster goes, then the appeals come here automatically by way of section 7. And, look, I do –

GLAZEBROOK J:

Did they do these? Were they consequential or…

ELIAS CJ:

Sorry, what?

GLAZEBROOK J:

Yes, I think these, those ones seem to have been treated as consequential, because a lot of those civil statutes seem to be under consequential and then…

MR BOLDT:

Yes.

WILLIAM YOUNG J:

I just can't see a difference between section 385(1), section 385 of the Crimes Act and section 144 of the Summary Proceedings Act, but anyway, as to why they'd be dealt with separately because they're both quite substantive.

MR BOLDT:

I simply couldn't see any pattern that emerged as to whether they should be in Part 1 or Part 2 of the schedule, and they all did the same job, of course.

But in any event, the overall pattern the legislature was working to is clear enough, namely that where an appeal right was intended in the criminal jurisdiction there was an amendment expressly providing for it, but that, of course, wasn't necessary in most cases in the civil area. And I do take Your Honour Justice Glazebrook's point and indeed Your Honour the Chief Justice's point and I think all of us are on the same page in terms of simply trying to give Your Honours as much information as we can about what brought this change about. All of this is in the applicant's submissions and they very fairly put up material which actually, at least in my submission, tends to indicate this was a far more deliberate change than they are suggesting it is. But I can understand –

ELIAS CJ:

But you can make that submission on the basis of the known legislative history and sequence.

MR BOLDT:

Yes.

ELIAS CJ:

I'm not sure that we can take the view of the report writer.

MR BOLDT:

No.

ELIAS CJ:
I don't think that adds to the force of the submission you make.

MR BOLDT:
No, and in fact the committee didn't adopt what the report writer suggested either. The report writer effectively was saying leave section 144 alone. There will be some consequences in terms of tribunals but describe those as minor exceptions to the general rule that tribunal matters would be considered at a later date by the Law Commission. In other words, the way I read that second report was, look, you don't need to worry about changing 144 because those areas where there will be, if you like, an unintended appeal right created are pretty minor and insignificant so you don't need to worry, but instead the committee made the change, and it really, as I say, we are being asked by my friends at least to infer that this change was made really for no substantive reason at all other than to make the statute more accessible and more easily readable. Now we say, well, actually there was a little bit of activity around section 144 prior to the change and a better inference might be that the committee was looking to draw a more careful line between those cases where there would be an appeal right to this Court and those where statute by statute consideration would be required.

WILLIAM YOUNG J:
Can I just ask, there's no definition. Is there a definition of criminal proceedings in the Supreme Court Act?

MR BOLDT:
Yes. No, there's not, Sir. There's a definition of civil proceedings which is everything except criminal proceedings. But there's, as I understand it, there's no definition of criminal proceedings.

WILLIAM YOUNG J:
So just why is it that this is a criminal proceeding?

MR BOLDT:
Why is extradition a criminal proceeding?

WILLIAM YOUNG J:

Yes. Well, it just is?

MR BOLDT:

I could run through the various criminal aspects of it.

WILLIAM YOUNG J:

No, of course you can, no, no, but I've got a – I'm just sort of – what I'm –

ELIAS CJ:

What authority?

WILLIAM YOUNG J:

It's not a criminal proceeding the sense that it's a prosecution for a crime in New Zealand.

MR BOLDT:

Of course. No, well, Your Honour asks what authority. I think maybe the best authority that springs to mind is Your Honour's judgment when this case was here in 2013 and I could even – it's not in the bundle, Your Honour, but it was – it'll take a moment to find the authority, but Your Honour described extradition proceedings as criminal proceedings, albeit of a very special kind. They arise in the context of criminal proceedings in another country. They are preceded by an arrest in New Zealand. People are brought before the Court. The eligibility hearing has all the trappings of a committal hearing where there's evidence to determine whether there's a prima facie case or not. People are admitted to bail or detained without bail. So, and the ultimate result is, albeit in a far more drawn-out process than a committal hearing, that someone is sent off to another country to stand trial. So everything about an extradition proceeding is criminal in nature, and the passage I was looking at from Your Honour's judgment is paragraphs 83 and 84 of the *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 judgment on disclosure and that was citing *R (Government of the United States of America) v Bow Street Magistrates' Court* [2006] EWHC 2256 (Admin), [2007] 1 WLR 1157. So –

GLAZEBROOK J:

Is that, sorry, I can't remember, is that a majority judgment?

ELIAS CJ:

No, it's a –

GLAZEBROOK J:

I didn't think it was which is why I asked.

MR BOLDT:

No, indeed, it was Your Honour the Chief Justice's dissenting judgment, but I didn't –

ELIAS CJ:

No, but you've actually answered the point by saying that I cited the *Bow Street Magistrates* case which probably is sufficient authority.

MR BOLDT:

Indeed, and I don't think Your Honour was in the minority on that point.

ELIAS CJ:

No, although it may not have been covered by the –

MR BOLDT:

No, but – and in fact if we needed to drill on this in more detail, I could take Your Honours through all the judgments where the close analogies with committal proceedings were emphasised throughout. But in any event, I don't understand there to be any suggestion this is anything other than a criminal proceeding.

So, and as I say, I take Your Honour's point about perhaps not being able to rely too much on the departmental communications which occurred prior to the change. What we do know, though, was there was some activity which pointed out perhaps some unintended consequences of bundling 144 or, sorry, bundling the Court of Appeal right and the Supreme Court appeal right together in one section and then in that final month prior to the Bill being reported back there was a change and so section 144

went from being a provision which conferred both a Court of Appeal appeal right and a right of appeal to this Court to then split up into the three. 144 remained a provision which only conferred a right of appeal to the Court of Appeal, 144A gave rise to an appeal to this Court and 144B gave rise – just contained some mechanical provisions common to both sorts of appeal.

So there were two other developments –

ELIAS CJ:
It's very strange, isn't it, because they all appear – did they amend the – they didn't even amend the heading which was "Appeal to Court of Appeal" even though they have a separate "Appeal to Supreme Court" under that heading.

MR BOLDT:
Indeed, and that was the Law Society's, well, at least in the context of the Legal Services Act, that was the Law Society's point is that there might need to be some tidying up of the headings. There would need to be a tidying up of the heading in the Legal Services Act, presumably also in the Summary Proceedings Act and the Law Society made the point there could well be a whole lot of other statutes which tap into this architecture for which those sorts of changes are going to be required as well. And for whatever reason, as I say this division then occurred.

And then there were two more changes after the Bill came back to the House which are relevant. The first is that section 10(b) was amended. In the original Bill, as I've already noted, it provided that section, that the appeal right needed to be conferred via section 144. It was changed in the reporting back rather strangely to say either section 144 or 144A but then during the final range of supplementary order papers the reference to section 144 was dropped and so section 10(b) required jurisdiction to be conferred by section 144A.

Now the Extradition Act was never touched. Indeed, it was never spoken of at any point during the journey of the Supreme Court Bill through the House and that's why I've said in my written outline that the fate of section 69(1)(p) of the Extradition Act,

along with all the other statutes that happened to tap into section 144, turned on whether, on the way section 144 itself was treated in the course of the –

WILLIAM YOUNG J:

Also it might have turned a bit on whether the other statutes were criminal in nature.

MR BOLDT:

Yes.

WILLIAM YOUNG J:

If they weren't criminal in nature then the finality provision took out the bar on appeal which I think is what the *C v Wellington District Court* [1996] 2 NZLR 395 case says.

MR BOLDT:

Exactly. That's right, Sir, and I think that provides the answer to, for example, why there still was jurisdiction in this Court in the *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 case which was a Resource Management Act 1991 proceeding that taps into section 144. That came to this Court and there was a full argument but, of course, Resource Management Act proceedings are civil and so the removal of the finality provision is sufficient to have allowed jurisdiction in this Court.

WILLIAM YOUNG J:

Wouldn't that mean that virtually all statutes that tap into section 144 would be affected by the revocation of the finality provision?

MR BOLDT:

Yes, most of them. There are about four or so that could properly be construed as criminal statutes.

WILLIAM YOUNG J:

Such as?

MR BOLDT:

Such as the International Crimes and International Criminal Court Act 2002. That uses section 144. There is the criminal contempt provision in the District Court Act 1947.

WILLIAM YOUNG J:

Have we got those provisions, a list of those statutes?

MR BOLDT:

I don’t know that you have, Your Honour, but the…

ELLEN FRANCE J:

So what were they, Mr Boldt? The International Criminal Court Act.

O’REGAN J:

I think it was in one of the early submissions.

MR BOLDT:

If you – my friend’s handing this to me. The Extradition Act. There was the Criminal Disclosure Act 2008 which was interesting because that came in post the Supreme Court Act and it still stopped at section 144. There’s the District Court Act’s criminal contempt provision which provided for an appeal only.

O’REGAN J:

There’s a list of Acts in footnote 18 of the USA’s original submission.

MR BOLDT:

If I can just find that, Your Honour, I’ll have a quick look at that.

O’REGAN J:

But I’m not sure if that’s the same. That’s of other provisions adopting section 144.

ELIAS CJ:

Sorry, where is it in the submission?

O'REGAN J:

It's in the original USA submission at footnote 18.

MR BOLDT:

Yes.

O'REGAN J:

The 20th of September submission.

MR BOLDT:

I'm not sure this an entirely exhaustive list, Your Honour, but it's a pretty good survey of the types of statute that were taken.

GLAZEBROOK J:

Yes, so what footnote was it, sorry?

O'REGAN J:

Footnote 18.

MR BOLDT:

It's footnote 18 which is on page 6 of our original submissions, Your Honour. I'm not sure, Your Honour, whether that list, for example, includes the International Crimes and International Criminal Court Act 2002 which is definitely in that category. The others though – and then there's the Juries Act 1981 which again stops at section 144 and it's the –

GLAZEBROOK J:

Perhaps if we could get a full list of the statutes it would be useful.

MR BOLDT:

Thank you, Your Honour. I think we can provide that.

GLAZEBROOK J:

Because most of these look like civil, a lot of these look like civil ones in which case unless there was a finality provision in those statutes there wasn't actually an issue.

MR BOLDT:
That's right and they nearly all were civil statutes.

WILLIAM YOUNG J:
But what happens with a post-2003 statute that refers only to section 144 but not 144A? Presumably would you – you would accept that that's civil so the absence of finality means there's a right of appeal?

MR BOLDT:
As long as it's – if it's a civil proceeding then definitely it can come here by section 7. But if it's criminal again, if you have a criminal proceeding to which section 10 applies then there's not going to be jurisdiction without an express provision.

GLAZEBROOK J:
Are you sure that's right because there's an express provision now?

MR BOLDT:
Yes.

GLAZEBROOK J:
So I think the question was if they only refer to section 144 now, does the express provision, just referring more generally to the Part 8 or whatever it is, override that? I would have thought it probably does.

MR BOLDT:
It does and as far as I can tell, Your Honour, all of these statutes have –

GLAZEBROOK J:
Somebody's tidied them up.

MR BOLDT:
They have all been tidied up and they all now refer to the Criminal Disclosure Act as providing the mechanism –

GLAZEBROOK J:

Right. Well, yes, and if they refer just to the Criminal Disclosure – that's probably fine.

MR BOLDT:

Yes, and I don't –

GLAZEBROOK J:

Criminal Procedure Act is what you – yes.

MR BOLDT:

I'm sorry, did I say Criminal Disclosure? I meant Criminal Procedure, of course. And that being the case, I don't think there's an issue any more. If there were any statutes that only referred to section 144 you might have an interesting issue about section 22(2).

GLAZEBROOK J:

An update, well, you'd have an update or – an updating argument, presumably?

MR BOLDT:

Yes, I think that's where section 22(2) would come into its own.

O'REGAN J:

It is a bit odd, though, if, what, our civil appeals adopt the procedure of the Criminal Procedure Act, isn't it?

MR BOLDT:

Yes.

O'REGAN J:

Why do they do that?

MR BOLDT:

Well, I think the answer, Your Honour, is because the way the Summary Proceedings Act was originally constructed just provided a really good ready-made mechanism to confine appeals to the High Court to questions of law and also containing a built-in

provision for appeal to the Court of Appeal only by leave or with special leave, and so that was a useful statutory framework which other statutes wanted to tap into whether they were criminal or civil statutes. So, in other words, rather than re-inventing the wheel they were able to just to tap into that and, of course, prior to the Supreme Court Act and the distinction between criminal and civil matters that didn't matter and, of course, they –

O'REGAN J:

Well, it did matter because the Court of Appeal had different civil and criminal jurisdiction. Different divisional Courts dealt with the cases whether they were criminal or civil. I mean it does seem very odd that they didn't just adopt a civil appeal on point of law procedure and then refer to that in all these civil statutes.

MR BOLDT:

That's true, Your Honour, and what's interesting though is that all of these civil statutes still to this day refer to the Criminal Procedure Act even though they are not criminal statutes and, as I say, I suspect it was just because there was this ready-made appeal on point of law procedure available.

ELIAS CJ:

But is that because it's a, yes, a ready-made – it is an Act about procedure. Why in terms of a substantive right of appeal, why is it necessary to invoke section 69 of the Extradition Act at all? Why is not the combination of section 10 of the Supreme Court Act and section 144A sufficient to give jurisdiction?

MR BOLDT:

Because section 144A is not part of the Extradition Act. That's…

ELIAS CJ:

But why does it have to be? If we're simply dealing with a right of appeal it doesn't purport to be limited by any other substantive legislation.

MR BOLDT:

Well, I think, Your Honour, with respect to criminal appeals it is limited. It's limited to the need to provide for an express appeal right in this type of situation. Now obviously there is an appeal right in summary matters but extradition matters aren't summary matters. They are criminal proceedings very much in a field of their own and governed by their own legislation. What the Extradition Act does is it incorporates large chunks of the Summary Proceedings Act but again just for procedural convenience. So, for example…

ELIAS CJ:

But for procedural matters, and getting it on track, one could see why that is so. But once you end up with a Court of Appeal decision in that proceeding, why is not the substantive source of a further appeal section 10 of the Supreme Court Act which specifically refers to section 144A?

MR BOLDT:

Because the Extradition Act does not refer to section 144A.

ELIAS CJ:

But why does it have to?

MR BOLDT:

Well, if we imagine what happens when a statute incorporates a provision from another statute, and I mean section 69 of the Extradition Act provides us with a very good example of that. It begins by saying application to appeal of certain provisions of Summary Proceedings Act and Bail Act. So in other words, it's –

ELIAS CJ:

But the substantive text is that the following provisions apply as if it were an appeal under Part 4 of that Act. So it really is concerned with procedure, isn't it?

MR BOLDT:

That's right but, Ma'am, in my submission, the operative words are the first three in the subsection, the following provisions apply.

WILLIAM YOUNG J:

But isn't it a case, and this is probably the point I think the Chief Justice was driving at, is section 144A gives a right of appeal against any decision of the Court of Appeal on an appeal under section 144(1). Right? Now you can look at that narrowly and say section 144(1) applies only to an appeal against a determination of the High Court on a case stated under section 107 or the determination by the High Court of a general appeal. So that's presumably your argument. The alternative argument is that it incorporates any appeal which by statute is to be dealt with as if it were under section 144(1).

MR BOLDT:

Yes, and I do understand that to be the argument my friend is making.

WILLIAM YOUNG J:

But that is the key argument, isn't it?

MR BOLDT:

Yes, and my response to that is let's – what happens when a statute incorporates another provision from another statute is that rather than having a very, very long section 69 in the Extradition Act where they laboriously cut and paste sections 107, 108, 109, as part of the Extradition Act, what they do is they cross-refer. But that is the substance of what happens when a statute cross-refers to another statute. It's as though you pick up that provision from that other statute and put it into the statute you're reading. Now if you perform that exercise in this case, you get down to section 144 which says there is a right of appeal to the Court of Appeal, but then you stop, and what we say is you can't incorporate into section 69 a provision Parliament has not incorporated into section 69.

GLAZEBROOK J:

No, but isn't the argument rather that the Chief Justice is putting to you, you don't need to incorporate it because section 10(b) gives you that?

ELIAS CJ:
And the policy being acted on there is that if you have a decision of the Court of Appeal properly constituted under section 69 in this case, there ought to be, with leave of the Supreme Court, an avenue for further consideration.

MR BOLDT:
And, Your Honour, well, I understand the submission but section 144A of the Summary Proceedings Act is concerned firstly with appeals under the Summary Proceedings Act and also with appeals from statutes that cross, that incorporate it by cross-reference.

GLAZEBROOK J:
Perhaps we can look at it and see whether that is the case. Have we got the – can you just – sorry, I just don't have the thing in front of me and I can't remember where it is, so…

ELIAS CJ:
What are we looking at?

GLAZEBROOK J:
Just the provision that he says – he's making a submission about 144A and I don't have it in front of me at the moment. I just wanted to know where it was.

ELIAS CJ:
Tab 6.

MR BOLDT:
Well, you can find section 144A, Your Honour, and let me just find that, in the authorities, in the bundle of authorities. It's page 68, my learned friend helpfully tells me, which is under tab 6, yes.

GLAZEBROOK J:
Sorry, I'm just finding it easier to understand the submission if…

WILLIAM YOUNG J:

Well, the point I was making is it turns on what's at page 69. Is it right in this case to treat the decision of the Court of Appeal under challenge as a decision on an appeal under section 144(1)? Now it's not an appeal under section 144(1) in one sense but it's an appeal that was dealt with as if it were under section 144(1).

MR BOLDT:

That's right. It's actually an appeal under section 69(1)(p) of the Extradition Act which adopts the architecture of section 144 which…

ELIAS CJ:

Well, I'm not sure that that's right, actually. I would want to be convinced of that, that it's section 69(1)(p) that is the…

MR BOLDT:

Well…

ELIAS CJ:

I mean it is the provision that sets out appeal to the Court of Appeal.

MR BOLDT:

No, no, I agree with that, Your Honour.

ELIAS CJ:

And it's to be treated as if an appeal under Part 4 of the Summary Proceedings Act but really does section 69 take you any further than that? Doesn't it stop at that point, as you said, it stops? But why does section 10 not then apply?

MR BOLDT:

Well, Your Honour, the answer is that section 10 applies to appeal rights expressly conferred via section 144A. That's – now as I say this is not, an appeal under section 69 is not an appeal under the Summary Proceedings Act.

ELIAS CJ:

No, but you've got to the end of that process.

MR BOLDT:

Yes, that's right.

ELIAS CJ:

You've got a decision of the Court of Appeal. Why is not the appeal to the Supreme Court dealt with in 144A? Why is that jurisdiction not provided by section 10 which refers to 144A?

MR BOLDT:

Because for whatever reason the legislature did not, at least until 2013, see fit to incorporate a right of appeal to this Court into the Extradition Act. What it did –

ELIAS CJ:

Maybe it didn't need to.

MR BOLDT:

Well, the…

GLAZEBROOK J:

Well, as if it were an appeal – I mean really isn't that saying to all intents and purposes it effectively uses all the mechanisms in that part of the Act and it becomes effectively like an appeal under that Act, because the whole point – because then you don't have to repeat provisions. It doesn't remain an appeal under that Act. It becomes effectively a section 144 appeal, and in fact colloquially that's what people would say, I think.

MR BOLDT:

Mmm, well…

GLAZEBROOK J:

You know, in the same way that they have deeming provisions so it's deemed to be an appeal under that even if it's not at all and, of course, it's not at all an appeal under that Act in many of those civil proceedings at all.

MR BOLDT:

No, no, no, and look I understand Your Honour's point on that, but, as I say, if we look at the provisions, the selected provisions from Part 4 which were incorporated into section 69, they stop with the appeal to the Court of Appeal. Now they could have gone on –

GLAZEBROOK J:

Well, of course they do because they would have had to have amended it because that was all that was there at the time of the Extradition Act, wasn't it?

MR BOLDT:

At the time of the Supreme Court Act.

GLAZEBROOK J:

Yes.

MR BOLDT:

Yes. What I can say though is that, for example, following the change we have been discussing to section 144 where it was divided into three, Parliament was alive to the need to make different provisions in cross-referencing statutes because the Legal Services Act as ultimately enacted no longer referred simply to section 144 but referred – but provided for appeals in accordance with section 144 to 144B.

GLAZEBROOK J:

Yes, although as you've said that was in response to a specific submission on that and actually probably wasn't even necessary.

MR BOLDT:

No, but it does give an indication that at least those who were responsible for the change did not think that section 144 still provided the appeal right and that a further right of appeal would be necessary. The switch from section 144 to 144 –

GLAZEBROOK J:

But they must have been wrong because section 7 provided that, didn't it, once you take the finality provision out, so they must have been wrong?

MR BOLDT:

And –

GLAZEBROOK J:

So they can't – so if they were thinking that, they were totally mistaken.

MR BOLDT:

And I think that's correct, Your Honour, and I think that's probably why we refer to parliamentary intention rather than what Parliament actually achieves.

GLAZEBROOK J:

Well, no, because –

ELIAS CJ:

Some of us don't actually. Purpose, perhaps.

GLAZEBROOK J:

But Parliament was, I mean, they were responding. The select committee was responding to a submission by the Law Society that this needed tidying up, and so it was a submission that said there is some sloppy drafting here, and they were tidying up sloppy drafting.

MR BOLDT:

Perhaps. Although in my submission the more likely catalyst for the change was the reference to these other statutes which would incidentally have an appeal right created for them in spite of there being a Cabinet decision that there –

GLAZEBROOK J:

Well, I don't think you can draw that inference because, one, the departmental report didn't identify any of those statutes and, secondly, said they were trivial.

MR BOLDT:

Well, it did identify five statutes, Your Honour. It noted, and I think this is an important provision because – and it's behind tab 26.

GLAZEBROOK J:

Well, I haven't read it because I don't think we should be reading it. So…

MR BOLDT:

Well, as I say, my –

ELIAS CJ:

I really don't think we should be getting into this level of opinion.

GLAZEBROOK J:

Yes, I'm sorry, I just didn't think it was admissible and therefore have not read it. I've read the submissions on it but not the…

MR BOLDT:

Well, you understand, Your Honours, and this is I think we're all guilty of the same thing here because –

GLAZEBROOK J:

Sorry, I'm not making that as a criticism at all because I understand why it was put in but…

MR BOLDT:

And we are really simply trying to figure out what could have motivated this pretty significant change to this provision, and it's certainly our submission at least that when the committee was confronted with advice that there has been a Cabinet decision that these particular statutes are the subject of Law Commission consideration and that Cabinet has determined decisions about appeal rights for them should be deferred to another day and that a change is then made which has the effect, or at least where it appears the intention was to have the effect to exclude those statutes, then we are

close, closer to an explanation than we are, if we are simply speculating that there might have been –

ELIAS CJ:
Are those all statutes that take you to the point of getting a Court of Appeal decision in any event?

MR BOLDT:
Yes.

ELIAS CJ:
Yes?

MR BOLDT:
They were all statutes which created a right of appeal to the Court of Appeal but where it was – where prior to the Act it had been final.

ELIAS CJ:
There was to be further consideration of whether there would be further appeal, and what – so I can't find the list. You're going to put in a list of this, are you?

MR BOLDT:
Yes, we can do that, and I think that list at footnote 18 is just about comprehensive but I have noticed at least one statute that's not there, so what I can undertake to do, Your Honours, is to put in a brief memorandum just setting out any other statutes that mention 144 which aren't there. But –

ELLEN FRANCE J:
Sorry, could I just ask, Mr Boldt, in terms of Part 8 of the Extradition Act the right of appeal, it is the right initially set out in section 68, isn't it?

MR BOLDT:
Yes, Your Honour.

ELLEN FRANCE J:

So that's what makes it an appeal on a point of law?

MR BOLDT:

Yes.

ELLEN FRANCE J:

And the argument presumably that you make is, well, if you look at section 69 in light of that it is then, you would say that is then providing the associated architecture?

MR BOLDT:

Yes.

ELLEN FRANCE J:

And I see that that's broadly the approach followed now under the current Extradition Act?

MR BOLDT:

Yes, it is, Your Honour. But, of course, it taps into the Criminal Procedure Act –

ELLEN FRANCE J:

But with the Criminal Procedure.

MR BOLDT:

– and it adds therefore a right of appeal by leave to this Court. But at the time it simply didn't and it is our submission that an appeal under section 69 uses the section 144 mechanism but it isn't an appeal under section 144 to which section 144A can apply. There is simply no intersection between the Extradition Act on the one hand and the Summary Proceedings Act or section 144 of the Summary Proceedings Act on the other and we need section 144 before we can have a right of appeal to this Court. Now, and that I think, Your Honours, too is consistent with the explanatory note which referred to certain criminal appeals expressly conferred, so the statutory policy at least at the time was where there is a criminal appeal it should be identified and included expressly rather than to be created by a side wind or by way of a presumption, and this

clearly was a criminal appeal to which Parliament didn't turn its mind and in light of that strong presumption, in light of that presumption that there isn't an appeal unless it's expressly provided for, in my submission the lack of an express provision simply means jurisdiction doesn't exist and –

ELIAS CJ:
Just remind me, that presumption, in relation, is that a general presumption in relation to appeals or are you saying that it's a specific presumption in relation to appeals to this Court?

MR BOLDT:
It's specific presumption in relation to criminal appeals to this Court.

ELIAS CJ:
And what's the authority again you rely on for that?

MR BOLDT:
Well, I first of all rely on the text of section 10.

ELIAS CJ:
Yes.

MR BOLDT:
But also the way Your Honours have applied that text first of all in the *Clark* case in 2004 and also in the *Jones* case which we've already discussed which is to say, look, we're not prepared to accept that something has simply fallen through the cracks here because it's not mentioned. If it's not mentioned we are simply unable to say we have jurisdiction. And that, of course, can be contrasted with *Guo v Minister of Immigration* [2015] NZSC 76, [2015] 1 NZLR 732 and the host of cases in the civil jurisdiction where silence nonetheless gives right to a right of appeal under section 7.

So, Your Honours, look, I think I have set the scene and I am conscious of the time and that this is to be a relatively short hearing. I hope I might have the chance to address

Your Honours briefly in reply if anything unexpected crops up but for the time being, unless Your Honours have any further questions, those are my submissions.

ELIAS CJ:
Thank you, Mr Boldt. And the order, Mr Illingworth, you're first, are you?

MR ILLINGWORTH QC:
Yes, the order we've agreed on is myself first, Mr Mansfield and then Mr Rogers if he has any further points.

ELIAS CJ:
Thank you.

MR ILLINGWORTH QC:
If I can take Your Honours initially to tab 10, which is the case of *Dr C v A Complaints Assessment Committee* [2005] NZSC 56. It's a leave application. Their Honours, Justices Tipping and McGrath, dealt with that application.

ELIAS CJ:
You know we flirt from time to time with the idea of putting out a practice note that no leave judgments are to be cited in this Court. So we feel a little uncomfortable about the authority of leave decisions just to –

GLAZEBROOK J:
Although jurisdictional leave decisions we'd have to exclude.

ELIAS CJ:
This is a jurisdictional one?

GLAZEBROOK J:
That is a jurisdictional one.

ELIAS CJ:
All right, okay.

MR ILLINGWORTH QC:

Yes, it's the jurisdiction point that I'm dealing with, Your Honour.

ELIAS CJ:

Yes, I'm sorry. Yes, okay. It still would be better if it weren't two Judges.

GLAZEBROOK J:

Yes.

ELLEN FRANCE J:

I was going to say it is two Judges rather than five.

MR ILLINGWORTH QC:

I'm not suggesting that this Court has to follow that decision.

ELIAS CJ:

No.

MR ILLINGWORTH QC:

I'm simply using, pointing to the fact that in that leave decision Their Honours were dealing with this unfortunate lack of a synchronicity between the civil cases and criminal cases.

ELIAS CJ:

Yes.

MR ILLINGWORTH QC:

And so you see on page 149 Mr Lange, who appeared for the respondent, argued that 144A does not give this Court jurisdiction to hear an appeal against the Court of Appeal's judgment in this case. "His argument in essence is that an appeal under the Medical Practitioners Act is brought against a judgment in a civil proceeding, and must accordingly be brought under section 7 of the Supreme Court Act, rather than section 10, which Mr Lange says is exclusively concerned with criminal proceedings. Section 10 provides that the Court can hear and determine appeals authorised by section 144A but not, according to the argument, if they are civil proceedings," and

then there's reference to section 67 of the Judicature Act 1908 which had a bar which Mr Lange was wanting to rely upon. And so Their Honours say, in paragraph 6, "The question has arisen because of the inconsistency between the statutory scheme of the Supreme Court Act 2003, which distinguishes between appeals against decisions in civil proceedings and criminal proceedings (including proceedings under the Summary Proceedings Act) on the one hand, and appeals under statutes such as the Medical Practitioners Act, which incorporate provisions for appeals on questions of law that are applicable in the summary jurisdiction on the other," and so Their Honours are focusing on this lack of sync between the civil and criminal provisions and they say, "We are however satisfied that in the context of a statute with a purpose that includes improvement of access to justice and providing generally for the Supreme Court's jurisdiction, section 10 when read together with section 144A, authorises appeals in circumstances such as the present, as if the appeals concerned were brought in criminal proceedings."

GLAZEBROOK J:
Do we know exactly what the Medical Practitioners Act 1995 said at that time? Did it have a specific reference to 144 or did it just, as might be thought from paragraph 2, just refer to Part 4 of the Summary Proceedings Act?

MR ILLINGWORTH QC:
It referred to Part 4, Your Honour. It wasn't –

GLAZEBROOK J:
With a sort of as modified, as necessary to modify?

MR ILLINGWORTH QC:
Correct, Your Honour. That is in contrast to the Resource Management Act which had a bare reference to section 144 and we know from the *Waitakere* case that Resource Management, at least one Resource Management case came to this Court via section 144 during the era before the Criminal Proceedings Act came into force. We'll come back to that in a moment but I just thought given the debate that had occurred earlier it might be helpful just to draw attention to the fact that Justices Tipping and McGrath had actually looked at that issue.

So it's common ground that the Court's Appellate jurisdiction is a creature of statute and whether the Court has jurisdiction to grant leave is purely a matter of statutory interpretation so the fundamental issue is what did Parliament intend, and we know that the Court will apply the usual *Fonterra* principles of text, context and purpose. There is, however, a slightly unusual aspect to the matter in this case because the question of parliamentary intention can be considered at two stages. The first issue is what was Parliament's original intention in enacting Part 8 of the Extradition Act in 1999 and then, secondly, what was Parliament's later intention in enacting sections 10 and 47 and the relevant parts of the First Schedule to the Supreme Court Act in 2003.

In our submission, going back to the Extradition Act, the appropriate starting point is to read sections 68 and 69 as a whole and we emphasise the introductory words of section 69 which Your Honour, the Chief Justice, has already referred to. "The following provisions of the Summary Proceedings Act apply with any necessary modifications to an appeal under this Part as if it were an appeal under Part 4 of that Act." That is very close to a deeming provision. It is asking the Court to treat the appeal under the Extradition Act as if it were an appeal under Part 4 of the Summary Proceedings Act, and although section 69 does refer, as Mr Boldt has emphasised, to the following provisions, it in fact lists all of the provisions of Part 4 of the Summary Proceedings Act that could possibly be relevant to extradition appeals and requires those provisions to be read with any necessary modifications as if it were an appeal under Part 4, and we have in our main submissions given an overview of the Summary Proceedings Act provisions that are not included in section 69 and we've shown why they are irrelevant to extradition appeals.

So we say that when sections 68 and 69 are read together along with the original version of Part 4 of the Summary Proceedings Act, the statutory text, when read as a whole, meant that extradition appeals were to be treated as far as possible as if they were appeals under Part 4. It was effectively a deeming provision to that effect, and all of the relevant components of Part 4 of the Summary Proceedings Act were to apply to extradition cases.

Now as soon as you say, as Mr Boldt does, that section 144A doesn't apply, then you are really saying we're stopping treating the appeal as a Part 4 appeal and that, we say, is contrary to the intention of Parliament. In our submission Parliament intended to adopt a pre-existing, standardised approach to appeal procedures using Summary Proceedings appeals as the model appeal process.

Now Mr Boldt has already mentioned the fact that under the old Extradition Act, the 1965 Act, defendants in extradition cases had no rights of appeal. For reasons which are not clear, the need to include a right of appeal in the 1999 Act wasn't recognised until the select committee stage, but it was recognised and the –

ELIAS CJ:
That's the right to appeal to the High Court –

WILLIAM YOUNG J:
So it's Court of Appeal.

ELIAS CJ:
– to the Court of Appeal, or both?

MR ILLINGWORTH QC:
No, no, the right to appeal at all?

ELIAS CJ:
Yes.

MR ILLINGWORTH QC:
There was no previous right to appeal.

ELIAS CJ:
So it was a right – so there was no appeal from the District Court?

MR ILLINGWORTH QC:
That's correct, Your Honour.

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
It was dealt with by habeas corpus or judicial review.

ELIAS CJ:
Yes.

MR ILLINGWORTH QC:
Habeas corpus or judicial review and – but there was no right to appeal on questions of law, and that –

WILLIAM YOUNG J:
On question...

MR ILLINGWORTH QC:
– and that wasn't in the original 1998 Extradition Bill. But at the select committee stage, and we can give you a reference to that…

ELIAS CJ:
No, that's fine. I don't think we do.

MR ILLINGWORTH QC:
In any event, no right of appeal. In the earlier case, in *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439 (CA) the Court of Appeal had noted the fact that most democracies have a right of appeal for extradition cases. So there was already an anomaly identified and that anomaly, we say, was corrected at select committee stage in relation to the 1999 Act. Parliament obviously accepted the select committee's recommendation and the new right of appeal was duly carried into law as Part 8, and that's volume 2 at page 14.

So our submission is that by adding a right of appeal for parties to extradition proceedings Parliament corrected what was actually quite a serious anomaly. In

summary cases, a right of appeal by way of case stated on questions on law had existed under the Summary Proceedings Act since 1957. Those rights were also available in peace bond cases which could arise in very trivial circumstances. So that is sections 186 and 187 of the Summary Proceedings Act as originally drafted. Those provisions were there from the start, but not, no right of appeal on a question of law in extradition cases. Extradition obviously has far more serious consequences than summary proceedings and peace bond cases in many situations.

So the 1999 Extradition Act included an important and entirely appropriate reform. From that point on parties to extradition appeals would be afforded the same rights of appeal on questions of law as had been available under the Summary Proceedings Act for over 40 years.

We then have the Bill of Rights dimension. The 1999 Act is enacted obviously in the first decade of the Bill of Rights regime and section 18(4) of the New Zealand Bill of Rights Act 1990 contains a special reference to involuntary removal from New Zealand. It says, “No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.” So there’s a special requirement of a prescribed by law process for removal from New Zealand, and that’s part of the context in which the 1999 Extradition Act was enacted.

We say that section 18(4) was designed to promote full compliance with the rule of law in relation to the removal of lawful inhabitants and all of the extradition defendants in the present case fall into that category. So as well as removing an anomaly, by enacting the appeal provisions Parliament was at the same time ensuring that the requirements of section 18(4) were able to be more effectively met in relation to extradition cases. So seen in that broad context, the opening words of section 69 of the Extradition Act delivered an important message to the Courts. In relation to questions of law from now on extradition defendants are to have the same appeal rights as parties to summary proceedings and that, we say, is an important message, and section 6 of the Bill of Rights requires the Extradition Act to be read in harmony with that substantive right.

ELIAS CJ:
So which substantive right?

MR ILLINGWORTH QC:
The right not to be removed from New Zealand except under provisions prescribed by law.

ELIAS CJ:
I see.

MR ILLINGWORTH QC:
So in this present case there is a contest, as we have had demonstrated moments ago, over the text of section 69 of the Extradition Act. The US argues that only certain specified provisions of Part 4 were incorporated by reference. The correct conclusion, they say, is that only those provisions and nothing more were to apply and the only way to create a right of appeal for extradition cases was for Parliament to amend section 69. We say the US has adopted a blinkered approach and section 69 must be read as a whole.

When the provisions that have been mentioned specifically in section 69 are analysed it can be seen that all relevant provisions have been included and all irrelevant provisions have been excluded. In other words, quite a surgical approach. Parliament also required those provisions to be applied with any necessary modifications to an appeal under this part as if it were an appeal under Part 4A. In other words, Parliament is telling the Court, “Treat this as a 144 situation,” and the textual analysis therefore leads to the reasonable conclusion that all relevant components of Part 4 were incorporated with the intention that the new right of appeal should apply just as if it were an appeal under Part 4.

We then submit that by incorporating the Summary Proceedings Act procedure an established standard was adopted, and Mr Boldt has effectively said the same thing, but also equivalent appeal rights were created. There was an equivalence being created between the Extradition Act and the Summary Proceedings Act which was perfectly deliberate.

If Parliament was correcting an anomaly by adopting a standardised appeal procedure with equivalent appeal rights, it makes sense to conclude that Parliament would have intended that appeal rights for extradition defendants would remain equivalent thereafter. It follows that Parliament must have intended the incorporation by reference to the ambulatory rather than static. Now that just –

WILLIAM YOUNG J:

Incorporation by reference to what? Incorporation of what by reference? You mean section 144?

MR ILLINGWORTH QC:

Yes. Now the –

WILLIAM YOUNG J:

Parliament, sorry, Parliament when?

O'REGAN J:

Effectively you're saying that a reference to section 144 has to be read as a reference to section 144 and section 144A?

MR ILLINGWORTH QC:

Section 144 as updated from time to time rather than –

WILLIAM YOUNG J:

Sorry, but –

O'REGAN J:

But it hasn't been updated. There's a new section, section 144A.

MR ILLINGWORTH QC:

Well, yes, I'll come to that in a moment, Sir, but what we're saying is the reference in 2 Part 4 is not a static reference. It's not read Part 4 as at this particular date. It –

O'REGAN J:

Well, if that was so why would they set out all the sections? They didn't in other Acts.

MR ILLINGWORTH QC:

I'm sorry, Sir?

O'REGAN J:

Why did they list all the sections out? I mean, many other Acts just refer to Part 4 full stop.

MR ILLINGWORTH QC:

Because they were being exceptionally careful in the Extradition Act to specify the relevant provisions and to eliminate the irrelevant provisions.

O'REGAN J:

And section 144A is a relevant provision and it's not specified.

MR ILLINGWORTH QC:

Well, because 144A wasn't in existence at that time.

WILLIAM YOUNG J:

So are we interpreting the Extradition Act or the Summary Proceedings Act? It seems to me it's pretty hard to interpret –

O'REGAN J:

Or the Supreme Court Act.

WILLIAM YOUNG J:

Or the Supreme Court Act. I mean, I suspect that to get there you've really got to get section 144A applying directly because this is an appeal under section 144(1).

MR ILLINGWORTH QC:

That's right.

WILLIAM YOUNG J:

So that would be an interpretation of the Summary Proceedings Act. If that's right then everything else follows for you. If it's wrong then nothing I think follows for you.

MR ILLINGWORTH QC:

Well, the first point, Sir, is what was Parliament's purpose in enacting Part 8 to of the Extradition Act? Was it the narrow, blinkered approach that my friend has put forward or is it a broader proposition, and we say –

WILLIAM YOUNG J:

Well, I suppose, I mean I would have thought here the purpose is to be discerned from the language and the purpose in 1999 was to incorporate an appeal under section 144 which at that time was final.

MR ILLINGWORTH QC:

Yes.

WILLIAM YOUNG J:

Now, but I think you've got to move on. For myself I find it hard to see how you can get the results you want by interpreting the Extradition Act. It seems to me to succeed you really have to persuade us that section 144A, in referring to an appeal under section 144(1), sweeps up cases heard, that are directed to be heard as if appeals under section 144(1).

MR ILLINGWORTH QC:

And that's the next step. That's why we – that's the next step in the logic.

GLAZEBROOK J:

Although you have to interpret the – because what you say that it is a deeming provision that effectively deems it to be an appeal under.

MR ILLINGWORTH QC:

Yes, that's right.

GLAZEBROOK J:

So you do have to interpret the Extradition Act to say it deems it to be an appeal under section 144. As soon as it's an appeal under section 144, section 10(b) of the Supreme Court Act gives the right of appeal to this Court.

MR ILLINGWORTH QC:

That's exactly our position, Your Honour.

GLAZEBROOK J:

Is that…

MR ILLINGWORTH QC:

And that's why I've referred to Part 8 in a little bit more detail than might appear necessary. It is a deeming provision or it's a –

WILLIAM YOUNG J:

But it's not really a deeming provision.

MR ILLINGWORTH QC:

Well, it's very close –

WILLIAM YOUNG J:

It says as if.

MR ILLINGWORTH QC:

It says you treat this as if it was an appeal under 144. Now that is –

ELIAS CJ:

It's less than a deeming provision.

MR ILLINGWORTH QC:

It's less than a deeming provision but very close thereto. I agree with that, Your Honour.

And as soon as you stop treating the appeal as if it were a 144 situation then you've failed to follow Parliament's direction, and that is really the key to this whole provision. Either that proposition is right or it's wrong. If it's right then section 10 kicks in.

ELIAS CJ:

Are *Clark* and *Jones* right?

MR ILLINGWORTH QC:

In relation to – I have to acknowledge, Your Honour, I haven't focused on *Clark* but I have focused on *Jones*. *Jones* dealt with the situation where the issue in question was whether there was a right to appeal in relation to pre-trial applications, and looking at the provisions that applied there was no authority that conferred jurisdiction on this Court in that case. Now we don't argue with that. We're not saying that *Jones* was decided wrongly. It's simply a different issue and it dealt with a different aspect of section 10. If we look at section 10 in relation to criminal proceedings, there are three separate possibilities in terms of the authority. Page 72 of the bundle under tab 7, section 10 says, "The Supreme Court can hear and determine appeals authorised by," and the "authorised by" is important, "Part 13 or section 406A of the Crimes Act." Now that's the subparagraph that was in issue in *Jones*. It was not (b), section 144A of the Summary Proceedings Act. What we're dealing with here is a different issue and the sole question for this Court to decide is whether that reference, 144A, covers the case that we're dealing with here. If we go back to 144A we know that that applies to decisions made by the Court of Appeal under section 144 of the Summary Proceedings Act. Was the judgment given in this case made under the authority of that Act? We say clearly yes, and that's the –

ELIAS CJ:

I can't remember but under the – I can't remember what Acts there are now. Is it still the Summary Offences Act 1981, say, an offence under that, what authority is there for appeal to the Supreme Court?

MR ILLINGWORTH QC:

That would be a decision made by the District Court.

ELIAS CJ:
Yes.

MR ILLINGWORTH QC:
Therefore it’s covered by section 107 of the Summary Proceedings Act. So if we turn to that.

ELIAS CJ:
Where’s that?

MR ILLINGWORTH QC:
I’ll just find that. So we’re looking at the version as at June 2013 which is under tab 6, page 33, section 107.

WILLIAM YOUNG J:
It’s section 107, 110, or 115? Was it…

ELLEN FRANCE J:
I thought it was 115.

MR ILLINGWORTH QC:
Section 107. It’s at page 33 of the bundle.

WILLIAM YOUNG J:
But that’s a case stated. That’s on a point of law, and section 115 was the general appeal.

MR ILLINGWORTH QC:
Yes. So the District Court has two provisions but the one we’re concerned with is section 107.

WILLIAM YOUNG J:
Because that’s effectively mimicked in the Extradition Act?

MR ILLINGWORTH QC:

Correct. The parallel provision in the Extradition Act is section 68.

ELIAS CJ:

So a determination that goes on appeal under this, under the general right of appeal, to the High Court or on case stated under 107 or I thought, think you said, appeal to the Court of Appeal is pursuant to 144.

MR ILLINGWORTH QC:

Certainly under 107 that's the case, Your Honour. If you put your finger on page 33 and then flick over to page 67, you can see the link.

ELIAS CJ:

And then any appeal to the Supreme Court has to be 144A?

MR ILLINGWORTH QC:

That's correct, Your Honour.

ELIAS CJ:

So it's the same structure as in the Extradition Act?

MR ILLINGWORTH QC:

Yes, Your Honour. We say sections 68 and 69 get you to the Court of Appeal.

ELIAS CJ:

Yes.

MR ILLINGWORTH QC:

And, as Your Honour put to my friend, Mr Boldt, earlier, 144A gets you to the Supreme Court.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

But it is a simple – I mean, it's not necessarily a simple, it's a confined interpretative issue. It's – the United States says, well, section 144(1) doesn't apply because the decision of the Court of Appeal was not on a determination by the High Court of a section 107 or section 115 appeal, therefore, your, you, section 144A doesn't apply, you say, but the Extradition Act says "as if it were" and that's enough for section 144A.

MR ILLINGWORTH QC:

And there's a little bit more to it than that, Your Honour, because section 69 requires 144 to be read with any necessary modifications. Those necessary modifications mean you read out, you delete, for the Extradition Act purposes, you delete section 107 and read in section 68 of the Extradition Act. So 144A, sorry, 144 is modified in relation to the Extradition Act to have Extradition Act provisions read into it and that is exactly why we are in a 144 situation.

ELIAS CJ:

But the structure does seem to me to be exactly the same because section 68 is the one that gets you onto the Appellate ladder and then section 69(p), (1)(p) gets you to the Court of Appeal.

MR ILLINGWORTH QC:

Yes.

ELIAS CJ:

And then 144A gets you to the Supreme Court.

MR ILLINGWORTH QC:

That's exactly our argument, Your Honour.

ELIAS CJ:

Yes, thank you.

MR ILLINGWORTH QC:

So I think I can perhaps skip over some of what we've just covered, but if I can just say this. The US argument ignores the Human Rights, Bill of Rights, rule of law dimension of the Part 8 reform under the Extradition Act and approaches the interpretation of section 69 on the basis of a narrow technical and semantic approach. It also seems to be based on a false premise. In paragraph 8 of their original submissions the US submitted that section 69(p) of the Extradition Act limited the right of further appeal, that is from the High Court, to that provided in section 144 of the Summary Proceedings Act. But section 69(p) is not a limiting provision. It confers a benefit. It simply provides for a second right of appeal from the High Court to the Court of Appeal via Part 4. At the time the Extradition Act was originally passed the only limitation was contained in the Summary Proceedings Act, not the Extradition Act. So the finality provision in 144(5) was the limiting provision but that was removed when the Supreme Court Act was passed four years later.

So that is all I need to say about the Extradition Act. We say it needs to be read a bit more broadly than my friends have argued.

So far as the Supreme Court Act is concerned, when the Bill was introduced a right to seek leave to the Supreme Court was to be included in section 144, and we know that section 144 was originally drafted to be an omnibus provision, I suppose you could call it. If we look at tab 24, page 314, we can see how 144 was originally drafted. Now with all due respect to whoever drafted 144, it is a bit of a messy provision in…

WILLIAM YOUNG J:

It is quite similar to section 385 of the Crimes Act, though, isn't it?

MR ILLINGWORTH QC:

Yes, it is, Your Honour.

WILLIAM YOUNG J:

It's the same generic structure.

MR ILLINGWORTH QC:
Yes. But when you read through it, it's not, it doesn't make easy reading and we're not here to say that we can tell you why the select committee abandoned that form and chose another form, but it is a messy provision and they may just have simply said, "We want to make this clearer and make it more readable." If that's the case then the change to, the split into three sections is really a matter of form, not substance, and shouldn't be determinative of how this current jurisdictional argument ends up.

There is no other explanation. There is no report. There is no policy change that was signalled by anyone. There is no submission that we have been able to identify, and the only reason that we referred to the departmental report was simply to show that. That there was nothing there to indicate why the select committee might have made that change. In our submission, it would simply be wrong to treat that change as determinative and as substantive when really there's no evidence of that being the case.

ELIAS CJ:
And when. The legislation as enacted deals with both appeal to the Court of Appeal and the Supreme Court in its own terms, so it may not have dealt with it compendiously. Sorry, that's just the point you were making.

MR ILLINGWORTH QC:
Yes, the fact that it's spread now over three sections instead of all being included in one slightly messy section should make no difference to the way this Court looks at it if we're focusing on the purpose and intention of the legislature.

Now clearly, and I don't think my friends contend otherwise, if section 144 had been enacted in its original form we wouldn't be having this argument today. It's only because 144 was split into three parts that we're even arguing about the matter.

Now what we do know without any shadow of doubt is that at the time of the enactment section 144(5) was repealed. That was the finality provision.

WILLIAM YOUNG J:

It had to be though.

MR ILLINGWORTH QC:

It had to be. Of course, it had to be. But that –

WILLIAM YOUNG J:

Just looking at it in a summary proceedings lens, it had to go.

MR ILLINGWORTH QC:

Yes, it had to go. But the cross-reference from the Extradition Act now refers to a section that has no finality provision. What do we draw from that? If Parliament didn't intend section, the new provisions to be read in relation to statutes that incorporated 144 by reference, then it simply wouldn't have been done that way. It would have been a very clumsy way of doing things if that's what Parliament really intended and we say that could not have been the intention of Parliament. By deleting the finality provision, Parliament must have been inviting the Courts to infer at least that the new appeal right would apply to all of the provisions that incorporated 144 by reference.

So we come back to the fact that at the same time as the finality provision was removed, in the same legislative breath a new benefit is conferred which on its face related to all decisions made under the authority of section 144. The old restriction having been removed, a new right having been created, Parliament has at least given the appearance that the new right of appeal should apply in respect of all decision made under the authority of 144.

And given that the primary purpose of the legislation was to allow all significant Court decisions to be able to reach the Supreme Court by leave, and we know that from the advisory report and so on, where is the evidence that Parliament intended to create a distinction between summary proceedings and other proceedings that incorporated Part 4 or section 144? And why would Parliament have wanted to create such a distinction given the known objectives of the Supreme Court Act? If Parliament had intended the Supreme Court to invoke section 144A in situations in which the Court of Appeal had made a decision in the summary proceedings context only, Parliament

could easily have said so in a few simple words. Splitting the proposed new version of section 144 into three parts would be an extremely odd way of expressing that intention.

O'REGAN J:

But just as it could also have made it very clear by cross-referring to section 144A in the Extradition Act and other Acts, couldn't it?

MR ILLINGWORTH QC:

Yes, that could have happened but it does seem that there was some resistance to doing a wholesale review of all of the statutes that incorporated section 144 by reference. I agree with that.

ELIAS CJ:

Well, it could also have done it by simply making these subsections of section 144.

MR ILLINGWORTH QC:

Yes. Well, that was the original plan.

O'REGAN J:

Yes, or it could have just said all decisions of the Court of Appeal are subject to appeal to the Supreme Court. That would have made it easy for everybody.

GLAZEBROOK J:

Well, there's no doubt that the whole Appellate structure and the way it's dealt with is exceedingly odd and it would be much easier if somebody just scrapped the lot and started again, but…

MR ILLINGWORTH QC:

Well, in a way they did that in 2011 but…

GLAZEBROOK J:

Still retaining rather odd provisions, though.

MR ILLINGWORTH QC:
Yes, but –

GLAZEBROOK J:
In terms of civil and criminal being mixed up when…

ELIAS CJ:
Mr Illingworth, we should probably take the morning adjournment. Now have you really concluded your argument?

MR ILLINGWORTH QC:
Not – I would like to take maybe another 15 minutes, Your Honour.

ELIAS CJ:
All right, although I think we probably have traversed the main points.

MR ILLINGWORTH QC:
Well, I'll just consider the position over the break and come back with a very short edition.

ELIAS CJ:
Yes, that's fine, Mr Illingworth. I'm not trying to press you on it. Thank you.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.47 AM

ELIAS CJ:
Yes, thank you, Mr Illingworth.

MR ILLINGWORTH QC:
Yes, I think I can conclude in five minutes, if that's acceptable.

ELIAS CJ:
Thank you.

MR ILLINGWORTH QC:

So just to conclude on the primary argument of Parliament's intention, if it was accepted the US argument would mean that by enacting the Supreme Court Act in 2003 Parliament was subverting the harmonisation that it had created only four years previously in the Extradition Act and the cross-reference to Part 4. Parliament had thereby revoked the standardised or unitary approach they had made, and had made that significant policy change without recording anywhere the change of policy or the need for it, and then in 2011 with the enactment of the Criminal Proceedings Act Parliament changed its mind again and gave effect to that change by reinstating the standardised approach through the enactment of sub-part 8 of Part 6 of the Criminal Procedure Act and its adoption in section 69 of the Extradition Act. So Parliament is vacillating or changing its mind according to the US argument. We say no, there was a consistent approach right throughout, and in relation to the 2011 statute there was absolutely no suggestion that Parliament was creating any new rights by amending the Extradition Act to coincide with the Criminal Proceedings Act. In our submission, the Court should be reluctant to attribute error, vacillation or incompetence to Parliament and its agencies unless it is very clear that a mistake was actually made. And so we say the purposive approach should apply, Parliament's intention was made clear and that intention should be given effect.

We draw attention to the fact that in a number of cases in the relevant period before the Criminal Proceedings Act came into force matters have come to this Court via section 144 without any question, and we've drawn attention to the *Dr C* case that went to a full hearing in 2006, the *Waitakere City Council* case which was given leave by Justices Blanchard, Tipping and McGrath in 2006 and was heard in full later, came via section 308 of the Resource Management Act which said –

O'REGAN J:

But it was a civil appeal though so section 7 would have given jurisdiction for it, wouldn't it?

MR ILLINGWORTH QC:

But the appeal provision is section 144 of the Summary Proceedings Act, Sir.

O'REGAN J:

I know, but it's not a criminal appeal, so in terms of the Supreme Court Act shouldn't section 7 apply to it?

MR ILLINGWORTH QC:

Well, I can see that there is an argument to that effect but that's not the way Justices Tipping and McGrath saw it in the *Dr C* case. They said that because the appeal right was under section 144 it was being treated as if it was a criminal appeal and that they relied on section 10.

WILLIAM YOUNG J:

Well, I can't recall what section 67 of the Judicature Act said but it was a limiting provision and I think, just reading the judgment, they seemed to think that it was treated as a civil case.

MR ILLINGWORTH QC:

Yes.

WILLIAM YOUNG J:

There was a limiting provision from section 67 –

MR ILLINGWORTH QC:

That's correct, Your Honour, that is correct, yes.

WILLIAM YOUNG J:

– which was to do with interlocutory decisions, I think.

MR ILLINGWORTH QC:

Yes, Your Honour is right about that. Section 67 would have kept it out and by treating it as a 144 and section 10 situation the pathway to this Court was clear.

And so there have been other cases, a number of other cases, but I accept what Your Honour, Justice O'Regan, says, which is that they could all be viewed as civil. So there's a case called *Arbuthnot v Chief Executive of the Department of Work and*

Income [2007] NZSC 55, [2008] 1 NZLR 13, and another case called *Wyeth (NZ) Ltd* v *Ancare New Zealand Limited* [2010] NZSC 46, [2010] 3 NZLR 569 which was to do with hazardous chemicals. Both of those are Tribunal decisions. Well, if Tribunal decisions can get here, why should the Court adopt a stringent approach to extradition which is far more serious and affects human rights in a fundamental way?

So that's it on the primary argument and then I'll just very briefly touch on section 22(2) of the Interpretation Act 1999. So we rely upon that section in the alternative. It's under tab 4 at page 21 of the bundle. The US argues that the effect of the incorporation by reference in section 69 is that the provisions to which the Extradition Act refers are read into the Extradition Act as if they had been inserted into the Extradition Act, so they just become part of the Extradition Act. That, in our submission, overlooks the need to read the updated version and we say that the argument fails because section 22(2) of the Interpretation Act requires the Court to incorporate into the Extradition Act the updated version of Part 4 including the new right of appeal in section 144A, and you can see –

ELIAS CJ:
But if it is a new right of appeal, it's not a substituted provision as section 22 envisages, is it?

MR ILLINGWORTH QC:
We see it, we submit that it is, Your Honour, because the new provisions says – the old provision says everything stops at the Court of Appeal and the new provision says everything stops at the Court of Appeal unless the Supreme Court grants leave. So it's a modification and modifications are covered by section 22(2). And I accept it's a question of degree.

ELIAS CJ:
Yes.

MR ILLINGWORTH QC:
It's a question of how far section 22(2) operates, and we submit that section 22(2) can be seen as a codification of the ambulatory approach which is described in *Bennion on*

Statutory Interpretation and Bennion, there's a quote from Bennion which is to the effect that if Parliament has incorporated a provision by reference that can often be viewed as an intention to read the incorporated provision in an ambulatory way rather than a static way, and I can give you the – that's the current version of Bennion at page 467. "Ambulatory or static references. Where provisions are incorporated by reference, questions may arise as to whether the reference is intended to be ambulatory in the sense of incorporating later amendments. Particular issues may arise in the context of delegated legislation. In the absence of a clear indication in the enabling Act a power is unlikely to be capable of being used to incorporate a document as it exists from time to time as opposed to an existing document. A statute is not so restricted. The fact that Parliament has chosen to legislate referentially may often be taken as an indication that an ambulatory construction is intended." So we say section 22(2) of the Interpretation Act is effectively a codification of that principle but, as I've just acknowledged, it's a question of degree as to how far you can take that principle.

Beckham v R [2015] NZSC 98, [2016] 1 NZLR 505, my friends rely on *Beckham* in their submissions. In *Beckham* the Court refused to rely upon section 22(2) to import a whole part of the Evidence Act because that was simply taking the substitution principle too far, the replacement principle too far, and a more nuanced approach was adopted and that's, *Beckham*, is under tab 8 and the page reference is 110, and the Court read section 22 as referring to parts of an enactment, not necessarily as a global, always as a global provision. In our submission, even if the Court was to apply the more nuanced approach that found favour in *Beckham* section 22(2) can still apply without difficulty in the present case.

Now, so on that point we submit that the ambulatory construction is entirely apposite while the static approach manifestly fails to give effect to the intention of the legislature and we draw attention to the fact that in the US submissions they have acknowledged that section 144B applies as part of the incorporation by reference but not 144A. So they accept, as we understand it, that 144B which deals with the powers of the Court and the Supreme Court on appeal can be read into the Extradition Act as part of the –

WILLIAM YOUNG J:

They'd probably only if pushed accept it only as far as it refers to the Court of Appeal, I suspect.

MR ILLINGWORTH QC:

Well, true, but it's still part of the mix.

WILLIAM YOUNG J:

But it does provide you with some assistance because it's a bit odd that you incorporated section 144 and section 144B but not section 144A.

MR ILLINGWORTH QC:

Exactly, exactly, Your Honour. So our final point is if the split in 144 that occurred at the select committee stage was made without thinking through the consequences, in other words the select committee simply thought that that wouldn't have a substantive effect or if it was thought that the effect would only be to eliminate the troublesome Tribunal decisions which had been referred to by the Ministry of Justice, then that was a mistake because clearly some Court decisions, including the Extradition Act, would be affected if the US argument is correct. If that was in error then we say that it's an error that is capable of correction under the rectification principle in *Inco Europe Ltd v First Choice Distribution (a firm) & Ors* [2000] 1 WLR 586 (HL) and we refer to tab 13 at page 166 for Lord Nicholls description of the requirements of the rectification principle where the draftsperson has made a mistake or, as he put it there, where Homer nodded.

And unless I can assist the Court any further, those are our submissions.

ELIAS CJ:

Thank you, Mr Illingworth. Mr Mansfield.

MR MANSFIELD:

May it please the Court, the frustration for counsel is being left with very little to add and I would submit that I have very little to add to the argument advanced by my

learned friend, Mr Illingworth QC. Unless the Court needs to hear from me, I would simply support his submissions.

ELIAS CJ:
Thank you, Mr Mansfield.

MR MANSFIELD:
May it please the Court.

MR ROGERS:
And I support Mr Illingworth's submissions as well.

ELIAS CJ:
Yes, thank you, Mr Rogers. Was there anything that arose from that, Mr Boldt?

MR BOLDT:
A little, Your Honour, and I won't be more than five minutes.

The first point I'd like to raise in reply to my learned friend comes from his discussion with Your Honour's about this concept of necessary modification which is referred to in section 69(1). Important – and my friend asked Your Honours what does necessary modification mean in this context and offered the answer, for example, what you would do is you would cross out section 107 as the appeal right and you would write in section 68 of the Extradition Act instead. So in other words, this is not any longer an appeal under the Summary Proceedings Act. It is now an appeal under section 68 of the Extradition Act, and on that point my learned friend, in my submission, is absolutely right, that is exactly what you do, and this appeal ever since it was filed in the High Court has been an appeal under section 68 of the Summary Proceedings Act. But that also, in my submission –

GLAZEBROOK J:
You mean the Extradition Act.

MR BOLDT:

Sorry, the Extradition Act, as being an appeal under section 68 of the Extradition Act which gains its procedural framework from section 69. So then the question is how, if we accept that modification has been made, does the appeal make its way to this Court? You can get to the Court of Appeal under section 144 because the necessary modification is read in and an appeal under section 68 can go to the Supreme Court. But –

GLAZEBROOK J:

Court of Appeal.

MR BOLDT:

Goodness me, I'm so sorry, Your Honours. You're quite right.

GLAZEBROOK J:

No, no, no, that's fine. It's just for the record I thought we probably should make it clear.

MR BOLDT:

It can go to the Court of Appeal. But how then do we take the further step of bringing the case to this Court, and the answer in my respectful submission is you can't because section 144A falls outside that necessary modification framework. It is not included in section 69(1) which allows the necessary modifications to be made in order to fit it in to the Extradition Act framework. All you have in section 144A is a provision saying that appeals under section 107 of the Summary Proceedings Act may be the subject of an appeal to this Court. This, as my friend put it to Your Honours and as I accept, is not an appeal under section 107. It is an appeal under section 68.

GLAZEBROOK J:

But it doesn't say that, does it? Doesn't it just refer to 144(1), and I know what your argument on that would be but it's not explicitly – it just refers to 144(1), doesn't it, from memory, and I haven't got it in front of me again because I've lost it.

MR BOLDT:

No, no. No, you're quite right, Your Honour. It's 144(1)(a) refers to section 107. 144(1)(c) refers to a decision of the Court of Appeal under section 144(1). But that's what it provides. So unless it's an appeal under section 107 of the Summary Proceedings Act or a decision of the Court of Appeal under section 144 of the Summary Proceedings Act then there isn't the necessary facility to modify it in order to fit it back in to that Extradition Act framework, and that's why obviously if the Act had been amended to incorporate section 144A we wouldn't be having this discussion if they'd done the same thing they did with the Legal Services Act, for example, the point would not arise. But that's because that would have provided the facility to treat an appeal under the Extradition Act as an appeal under the Summary Proceedings Act and without that, in my submission, it's simply – there is simply a lack of intersection between the two sections. 144A is not part of the Extradition Act and 144A isn't therefore able to modify provisions in the Extradition Act to become applicable.

Now a couple of other very quick points. My friend has made something of needing to interpret this legislation in light of the Bill of Rights Act and the right to be free from being sent from New Zealand arbitrarily. Jurisdiction, in my submission, is completely neutral from a Bill of Rights Act perspective. You are just as likely to find a requesting country coming to this Court seeking leave to appeal from an adverse decision in the Court of Appeal as you are to see a requested person coming to this Court asking for relief. It could just as easily cut both ways and if it was the United States asking Your Honours for leave because we had lost in the Court of Appeal would the submission regarding the Bill of Rights Act be to the opposite effect? So in my submission it's entirely neutral.

GLAZEBROOK J:

Well, I'm not sure really. It's just that you're only allowed to go if it's in accordance with law. If the US appealed and it turned out to be in accordance with law then it would accord with the Bill of Rights as well. So it's…

MR BOLDT:

Well, that's true, Your Honour. In my submission, though, it's a neutral point. It doesn't favour requested persons to the exclusion of those seeking their extradition.

My friend talked a lot about harmonisation. My simple response to that is that harmonisation, once the Supreme Court Act was passed, gave way to a different legislative imperative which was emphasised by this Court in both *Clark* and *Jones*, a legislative imperative which has diminished in importance over time and is now regarded as far less important in light of the Criminal Procedure Act. But that was to speed matters along at a pre-trial stage. Now we are very much at a pre-trial stage here.

GLAZEBROOK J:
Well, we're not really. It's this is the end of this jurisdiction. I wouldn't see it as a pre-trial stage because it's nothing to do with New Zealand from then on and it can be as slow as or as expeditious as it needs to be when and if it gets to the other jurisdiction.

MR BOLDT:
Well, I'm – it would be great if that –

GLAZEBROOK J:
One can understand the submission from the Crown that extradition is supposed to be a quick process and that – but that's, that doesn't say much about whether an appeal was intended or not intended.

MR BOLDT:
Well, no, Ma'am, except that this isn't the end even if Your Honours don't give leave on this application because we still, of course, have the entire surrender phase ahead of us.

GLAZEBROOK J:
Yes, yes.

MR BOLDT:
So it's pre-trial in the sense that it's occurring before the trial but, secondly, it's – all the effect of this Court declining jurisdiction would be, would be for the matter to be able to

go to the Minister for the Minister to look at it, and then, of course, there's an entire suite of procedural remedies from there. So –

ELIAS CJ:
But if leave is given and if you're not successful, then on the, whether it's an extraditable offence, then that's the end of the matter, isn't it?

MR BOLDT:
Of course, and my point in answer to Her Honour, Justice Glazebrook, was it is still nonetheless definitely not the end of the point, of the matter, if this Court dismisses the appeal.

GLAZEBROOK J:
It's the end of the matter for the Courts on this particular aspect of it.

MR BOLDT:
That's right, Your Honour, but there is still much more to come.

GLAZEBROOK J:
I understand.

MR BOLDT:
After seven years we might almost be at half-time but that is just the way this particular case has gone.

Finally it's my submission in response to my friend saying, look, it really must have been simply for ease of reading, there is nothing particularly complicated about the original section 144. As Your Honour, Justice Young, has pointed out, it really is very similar in many respects to the way 385 was treated. There was no need, not seen to be any need to carve that up for simplicity or ease of reading. It is our submission clearly there was a more substantive purpose and in our submission at least a likely substantive purpose was to ensure that a reference to section 144 did not by itself create a right of appeal to this Court but rather that other statutes would then need to

be amended if that was regarded as appropriate in order to create that further right of appeal.

ELIAS CJ:
So your submission has to be to apply across the board you say 144A is, only confers the ability to seek leave to appeal to this Court under the Summary Proceedings Act?

MR BOLDT:
Or pursuant to any other provision which refers to section 144A.

ELIAS CJ:
Yes, yes, I understand that.

MR BOLDT:
Which the Legal Services Act did in the course of this very legislative process, and also as the statute in *Dr C's* case did because that incorporated Part 4 wholesale which meant, of course, section 144 was a mechanism which could be relied on in that case. Section 144 as part of Part 4 created the right of appeal.

ELIAS CJ:
And 144A.

MR BOLDT:
And 144A. 144A became part of it.

ELIAS CJ:
Yes, so if there's – post-2016 your argument couldn't succeed?

MR BOLDT:
Oh, post-2013 our argument couldn't –

ELIAS CJ:
2013, yes.

MR BOLDT:

– succeed, Ma'am, no, because it all was swept up.

ELIAS CJ:

Well, I think it was 2016, wasn't it?

WILLIAM YOUNG J:

No, it's the Criminal Procedure Act.

ELIAS CJ:

Criminal Procedure.

WILLIAM YOUNG J:

It's the Criminal Procedure Act that knocks it out.

ELIAS CJ:

No, but that's the specific legislation but the – isn't the reference to the part, doesn't that come in 2016?

MR BOLDT:

2016 I think is when the Senior Courts Act replaced the Supreme Court Act.

ELIAS CJ:

I see.

MR BOLDT:

But the reference to the part of the Criminal Procedure Act which now governs this statute and a vast swathe of other statutes, including statutes that have nothing at all to do with the criminal law, comes via the Criminal Procedure Act, and would confer jurisdiction on this Court today which, of course, was exactly the situation the Court had in front of it in *Jones*. By the time *Jones* was argued the Criminal Procedure Act had come into force, but there was no express jurisdiction conferred in that situation prior to it.

So those were the only matters I wanted to raise for Your Honours unless there's anything else I can assist with.

ELIAS CJ:
No, thank you, Mr Boldt. Thank you, counsel. We'll reserve our decision in this matter but thank you for your help. We'll adjourn.

COURT ADJOURNS: 12.12 PM