IN THE SUPREME COURT OF NEW ZEALAND SC 47/2013

[2013] NZSC Trans 25

BETWEEN **NICHOLAS PAUL ALFRED REEKIE**

Appellant

AND **ATTORNEY-GENERAL**

DISTRICT COURT AT WAITAKERE

Respondents

Hearing:	27 November 2013
Court:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	Appellant appears in Person (via videolink) supported by Ruth Wood A S Butler and O C Gascoigne as Amicus Curiae C R Gwyn and J Foster for the Respondents

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CIVIL APPEAL

IN THE SUPREME COURT OF NEW ZEALAND SC 102/2013

BETWEEN **NICHOLAS PAUL ALFRED REEKIE**
Appellant

AND **DEPARTMENT OF CORRECTIONS**

VISITING JUSTICE TO SPRING HILL CORRECTIONAL FACILITY

Respondents

Hearing:	27 November 2013
Court:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	Appellant appears in Person (via videolink) supported by Ruth Wood. A S Butler and O C Gascoigne as Amicus Curiae C R Gwyn and J Foster for the Respondents

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CIVIL APPEAL

Heading page 2/2

ELIAS CJ:

Thank you, Mr Reekie. You are appearing for yourself. I will take the other appearances, so you can sit down.

MR REEKIE:
(inaudible 10:02:35)

ELIAS CJ:
Yes, thank you.

MR REEKIE:
(inaudible 10:02:45)

ELIAS CJ:
Thank you, Mr Reekie. That's excellent. You may take a seat and I will get the other counsel to make their appearances. You may sit. Thanks.

MS GWYN:
May it please the Court, Gwyn. I appear with Ms Foster for the respondents in both matters.

ELIAS CJ:
Thank you Ms Gwyn, Ms Foster.

MR BUTLER:
Good morning, Your Honours. Andrew Butler and Oliver Gascoigne appearing as Amicus in relation to both matters.

ELIAS CJ:
Thank you Mr Butler, Mr Gascoigne. Right, now, Mr Reekie, we have read your submissions. Normally we'd ask you to speak to those and to emphasise anything in particular that you want to emphasise in those. We've also read, of course, your responses, both to the Crown and to the Amicus. So you can proceed on the basis that we've read those, but we would like to hear anything further that you want to add. You'll get an opportunity to be heard in reply, as well.

MR BUTLER:

Ma'am, could I just raise a minor point, not wishing to cut across. I've had an opportunity to have a quick discussion with my learned friend Ms Gwyn about order as to when you want to hear from me. My suggestion had been in light of the way this case has evolved. It would probably make most sense to hear from Mr Reekie, then my learned friends from the Crown, then me. I'd have my one shot, so to speak, and then each of the other parties would have an opportunity to reply. But I'm entirely in your hands.

ELIAS CJ:
That's the order that I had expected although, of course, if there's anything that comes out of yours that Ms Gwyn wants to respond to I'm sure she'll get that opportunity as well and Mr Reekie will get the opportunity to reply.

All right, Mr Reekie, so we're going to hear you, then Ms Gwyn for the Crown, then Mr Butler as Amicus, and then you'll have an opportunity to be heard in reply. I think it's probably best if you address us sitting down because I notice when you stood up your head was cut off, so if you're happy with doing that we'll proceed.

MR REEKIE:
(inaudible 10:05:25)

ELIAS CJ:
We can understand. I think we can understand there may be some impediment, but hold on just a moment because the sound is not very good.

MR REEKIE:
The first point that I'd just like to make, which isn't exactly in the submissions but it's a submission I'd like to make to start with, Your Honours, is in regards to the definition of justice in Butterworth's Law Dictionary 6th Edition where it states justice at the third reading, a concept equated with fairness or rightness. Justice may be divided into three parts, procedure justice concerned with fair methods of making decisions and settling disputes, disputed justice, concerns with the fair distribution of benefits and burdens of society, corrective justice, concerned with correcting roles and harm through compensation or retribution, natural justice, procedural fairness, and substantial merit. So I believe that's important because I believe that's at the centre of my application to this Court, is that I'm seeking justice to what occurred to me back in 2002, and it has been a long road for me.

Now, just before I go any further in regards to that, I understand what you said in regards to the – who will get what turn and in what order and a right to reply. Now, I'm just curious about the timeframes in regards to speaking and so forth, Your Honours, because I need to try and pace myself to some degree.

ELIAS CJ:
How long do you think you wanted to be, Mr Reekie? Because we'd be – normally we would expect that – we only have the day and we have to stop at 4 o'clock this afternoon and we have read your submissions so I have been hoping that you will be able to address us orally for perhaps half an hour. But if you need longer, of course you can take it.

MR REEKIE:
Yes, Ma'am, thank you very much for that. That's most helpful.

Okay, as I said, Ma'am, the issue of justice is of the utmost importance to me and I don't believe justice should be based upon who has the biggest guns or is the most educated. Justice is about what's right and what's fair, which is reflected in the definition at law, Ma'am.

I know what occurred to me in 2002 and I have fought very hard to have that corrected, Ma'am. I applied to be legally represented in the case before Justice Wylie. I made – I took an application of the review of the Legal Aid Service Agency, as it was then, to the LARP, Legal Aid Review Panel. I done that application myself. That was basically – I was told I could make another application. When I made that application I have an interim grant of legal aid granted. It was withdrawn about two weeks before the matter. There was two cases that I sought legal aid on. One was in front of Justice Andrews and the other one was in front of Justice Wylie. That legal aid was withdrawn two weeks before the Justice Andrews case. I then proceeded on that matter to the judicial review of LARP's decision. In LARP's decision, Your Honours, they stated that while it is understandable that the, that myself would pursue these matters if I could, they, they still went on to decline me legal aid to be represented in both the Wylie hearing and the Justice Andrews hearing.

Now, that's of importance in this matter because the test case that was applied in that was in –

ELIAS CJ:

Mr Reekie, can I interrupt you for a moment? We are concerned with whether the security for costs should have been waived in the Court of Appeal. Why do you say that the history of the legal aid grant is relevant to that?

MR REEKIE:

Two aspects to that, Your Honour. Firstly, in the decision-making that reached, that was reached, that saw me having to represent myself to bring that case in front of Justice Wylie and secondly, which is of importance 'cos there's similarities to the case before, in the approach that was used in the *Timmins v Legal Aid Review Panel* [2004] 1 NZLR 708 (HC) decision, which is, which deals with impecuniosity in itself which I will refer to briefly.

I think that's important, Your Honour, because as I said, there's a similarity there between the decisions being made here today and the decision that was made back then, and the fact that I was forced into representing myself. It wasn't a case of, that I wanted to. It was a case that I was forced into defending myself in this matter, which wasn't ideal, and I still am not happy that I was forced into that situation, but I certainly feel justified to some extent already by the findings that were found by Justice Wylie, even albeit I don't believe they go far enough. But the test in the *Timmins* case, Your Honour, which was heard before Justice Wild, the test that's referred to in there is what would an average citizen do if they were paying the expenses out of their own pocket? Would they still proceed and take the case? The simple answer is yes, Your Honours. I would still take this case if I could afford to do so. That was reflected in the decision of LARP where they said it was understandable that Mr Reekie would take this case if he could, and that was the premise that I had the decision reviewed upon. It is similar in this matter, Ma'am, that security for costs would not be a barrier to me if I could afford to take that case myself. As it is, Your Honours, if I am denied waiver for security today in your decision I will be forced to go back to legal aid and seek legal funding to be represented and enable me to take this appeal. There's no guarantees that that will be granted a second time, given that it was already turned down despite the merits there, Your Honours. So that's of concern there. It's not like I can fall back to the decision of, I'm going to get legal aid as a default. Hence the importance of this waivering of security for costs for me today. Hence the relevance, Ma'am, that I bring that point.

Now, I would like to turn to paragraph 6 of my submissions as a starting point. The evidence of the Department of Corrections' investigation into the allegations of torture was delegated to the very officer alleged to commit the torture is uncontested. That is also qualified in a sense where, at paragraph 10, I made application to Associate Judge Robinson, which was then reviewed by Justice Harrison in regards to having that very officer, Mr Manning, give his evidence before he died. Now, that was critical. My witness also was denied the ability to give evidence about the omissions that Mr Manning made in regards to his conduct on the day, that's the 8th of July 2002. So I was prevented on both counts of bringing direct evidence, be it hearsay or direct evidence, from the abuser themselves, alleged abuser, to the Court. Now, I struggled with that, Your Honours, but I believe that I did overcome it. I believe I can prove that that torture did occur through the records, the factual records, of the date itself. In regards to the fact that the Crown does not contest that the investigation was carried out by the abuser, there is clear evidence that was given by numerous witnesses which I'd just like to refer Your Honours to in the bundles that were brought before you. This is the authorities of the appellant.

ELIAS CJ:

These are the ones that we've had through today, are they, that we've had photocopied?

MR REEKIE:

Yes. I'm sorry about that, Your Honours.

ELIAS CJ:

That's all right. We've got them. We just haven't read them.

MR REEKIE:

What I'll do is I'll try to bring you through these matters as quickly as I can, given the timeframes involved. If I can just bring you firstly to page 1 at roughly paragraph 25, and I'll just read it out. There's authorities of the applicant and there's appellant's index of authorities. It's in the first one, Your Honours.

ELIAS CJ:

There's authorities of the appellant and there's appellant's index of authorities. Is that what we should have?

MR REEKIE:

Yes. The appellant's index of authorities relates to 102 that I seek leave for.

ELIAS CJ:

I see, thank you. So you wanted us at page 1.

MR REEKIE:

Page 1, approximately paragraph 25.

ELIAS CJ:

I don't have a paragraph 25. It's an index, page 1.

ARNOLD J:

Are you talking about a page with a number 160 at the top and 25 in the left-hand side?

MR REEKIE:

That's correct.

ELIAS CJ:

Is this the transcript of evidence, Mr Reekie?

MR REEKIE:

This particular one is the transcript evidence of Mr Moore, the regional prison inspector at the time, Ma'am, in 2002. If I can, he records a conversation with a prison manager about when he saw the report and Mr Manning conducting an investigation and was assured, as mentioned in the report, that they were observers. This is further elaborated on page 2, Your Honours, at approximately paragraph 10, using the left-hand reference again, just for convenience, where it states, "I was told they were not involved in the use of force. They were mainly observers. They were not directly involved in the use of force." That undertaking was given to me after I seen the report and I'd made some enquiries with the prison manager. So an assurance was given to the prison inspector that Mr Manning had not used force, but as you'll see, and I will allude to in the further documents as we go in, that Mr Manning did, in fact, use force.

I would also just – while we're on that page and this will tie in, Your Honours, read further, "You would expect that officers would know who used force on the day?" "That is correct. It is policy that those who used force have to write up a use of force report. They are required to write incident reports."

Then down at paragraph 25, that's just reinforced, "And the rest of the officers involved would do incident reports?" "That's the requirement." That's the answer from Mr Moore. So there's the assurance and then there's the reference to who does incident reports, which will become quite important as we come in through these references.

Coming to page 3, Your Honours, and approximately at paragraph 5 where it reads, "I would have an issue with all these issues if we were an inspector monitoring the local investigation." That will hold importance as we come in, too, Your Honours, because the inspector is now saying that he will have issues with all the issues that I was raising to him about the report done by Carl Manning.

ELIAS CJ:
Can I ask you, Mr Reekie, because I'm trying to get some shape of where we're going with this, this is directed at your contention that the Court of Appeal was wrong to say that the appeal that you proposed to bring was not capable of succeeding. Is that why you're taking us to this material?

MR REEKIE:
That is correct, because even in the Amicus report, what he says there is some merit or arguability in my cases in regards to the unlawful detention which I can further back up and support that contention of the Amicus. He does not really mention the strength of the case on appeal of the torture matter, which is of utmost importance to me. Really in these proceedings the – as you already realised, Your Honours, the difficulty that I had was being refused to have the person who assaulted me give evidence prior to his death and the hearsay evidence of Ms Wood was not allowed in regards to the omissions that he made about the conduct that he performed upon me. So as you will note, I make reference to the observation forms of the state which support the torture taking place and the conditions upon which I was held, Your Honours, I have actually provided those in the bundles here, which I will just jump to and then come back to where we were. The observation forms can be observed at page 61 to 64.

ELIAS CJ:

We don't, I think, have numbers.

MR REEKIE:

My understanding – my assistant had a discussion with Gordon Thatcher this morning, Your Honours. Due to some difficulties because of my situation I was unable to number them before they went through but we were given assurance that they would be numbered.

ELIAS CJ:

Well, they're not numbered, probably because there wasn't time, but it is the document that at the bottom has 1172 on it?

MR REEKIE:

That's correct, Your Honour. That page that you referred to, Your Honour, as you'll see it starts with the date 7th of the 7th '02, and then on the right-hand side of the page at the top it's got 8th of the 7th '02. That's just showing that it's, like, an overnight reading of what's occurring because these jobs are 24 hours. Then if you go over to the following page, Your Honours, you'll note at the time of 1300 hours, these are my observation forms, by the way, you'll see, "I am pacing."

GLAZEBROOK J:

Is that the next page?

MR REEKIE:

That's just the next page over, which would be 1173 going off the reference page used from the first page, Your Honour.

McGRATH J:

Is that about five lines from the bottom of 1173, that reference?

MR REEKIE:

That's correct.

McGRATH J:

The word you've identified is hard to read, but it's next to 1300, and what is that word, again?

MR REEKIE:
"Pacing", which just means I'm walking up and down in the cell. The next one there refers to "banging grill", which is the, what was used as the basis for placing me on the tie-down bed. Then you have reference to the tie-down bed.

ELIAS CJ:
"Banging grill"?

McGRATH J:
That's underneath "pacing"?

MR REEKIE:
Yes, that's underneath "pacing", just slightly to the right and underneath.

McGRATH J:
Is that at 1330 hours?

MR REEKIE:
That's correct, Your Honour.

GLAZEBROOK J:
That reads "bang grill", is it? We can't really – there's some matters crossed out.

MR REEKIE:
Sorry, Your Honours, it could be just "banging". It's not my handwriting.

ELIAS CJ:
It could be "banging", I suppose.

MR REEKIE:
It could be. The next reference at 1400 hours, Your Honour, states "tied down". I contest the tying down actually occurred at – this is just when the next observation is taken, and if I can just bring you over the next page, which would be 1174, the order, Your Honours, just so you can observe these all came out of the same observation

sheet and sequence, you'll note in regards to all the times on this page every single one refers to the prisoner being tied down. There is no interruption to that sequence. There's no food, no medical treatment, no blankets, no toilet, no reference to anything, and if we can just bring you over to the next page, when you're satisfied to that one, Your Honours, is 1175. You'll note all the way down to 11.00 am there is – sorry, I'll rephrase that, all the way down to, all the way down there's only reference to talking, to talking and talking to Baker, I believe it reads. I'm still on the tie-down bed. You'll see there's no food, no toilet, no nothing as well in that sequence, Your Honours.

At 11.00 am, there's a reference to I was shifted. That would be shifted from the tie-down bed, Your Honours.

So coming back to the relevance to what I've just shown you, Your Honours, is that the states own records clearly show that I was on the tie down bed and that there was no food, no toilet, no nothing over that period of time. Now that's the circumstances in which the torture occurred, Your Honours. Those treatments and conditions are clearly a breach to section 23(5) of the New Zealand Bill of Rights, Your Honour. If not, go on to be an act of torture themselves to leave a prisoner in that condition.

As for the exact conditions, they are also referenced elsewhere in regards to the gown being up around the middle of the waist, Your Honours, but I won't go into the semantics of that at this time. So there we have the conditions in which I was left for a period of nearly 24 hours.

Now If I can just bring you back to the page 3 Your Honours but they haven't got page numberings.

ELIAS CJ:
At the top of the page it's 164.

MR REEKIE:
Yes, Your Honour, thank you. Now I bring you down to the reference at paragraph 10 on the left-hand side where is reads, "Mr Amour, if the prison was aware Carl Manning had been involved in the use of force of all the allegation was made against him, would you expect to be informed of that or from him to be removed from the

investigation?" The answer to that is, "I wouldn't say 'expect to be informed' because they actually referred the complaint to management to deal with but I expect the prison manager to actually to ensure and exercise and transparency and independence in the local investigation, yes."

Then coming down to paragraph 25 on that same page, okay, I'll read it as best I can. "CEO recording maltreatment from unit manager, Carl Manning. State, had lump on wrist from a handcuff being too tight, something or other, but other words the significance there are recorded of maltreatment from unit manager, Carl Manning. So there's been a complaint made and it's been recorded of maltreatment? Yes according to that record. I'm still not sure what."

Coming over to the very next page, Your Honours, well, maltreatment can be interpretated in quite a number of ways but I think, by the looks of the records, if it's what you're reading now, it's quite hard to read. What it's written there, and then I agree that somebody was made aware of that situation and according to the records, it's clinical records, so it would be a nurse, "Yes, but any allegations of maltreatment or assault would be reported upon wouldn't you expect, whether it be to a nurse or yourself or anyone else?" "Mmm, I agree, it has to be reported. In this situation it should have been brought to the attention of the prison manager given the allegation, the person the allegation is against." "Yes I agree. Do you have any concerns about the length of time it took you to receive this report?"

Now I just crossed over into a separate section there but in regards to the allegation, it was made at a local level that there had been maltreatment by unit manager, Carl Manning. Now that's of importance that somewhere, someone somewhere in the system knew that there had been a complaint against Carl Manning, who is named.

Coming down to paragraph 25 on that same page, it reads, "Yes you may find that I sent a reminder by email and that was basically wanting to actually close my involvement in the complaint." So that's in relation to that last question where he had concerns about the length of time for this report to be completed.

Coming over to page 5, Your Honours.

ELIAS CJ:

Page 180 at the top is it?

MR REEKIE:

Yes, sorry. I forget you haven't got my numbering.

ELIAS CJ:

That's all right.

MR REEKIE:

Paragraph 10, "Did you ever send me a copy of the report after looking at your files?" "No because I couldn't find it." This is from the inspector again, Your Honours. Now I'll just halt there from reading. I asked Mr Amour about six times over the period of eight years for a copy of the reports. These included in the weeks and months afterwards, including, there was an interview form on record showing that I clearly was asking for an interview with him so I could ascertain what the outcome to this report was, Your Honours. In regards to his obligations, they are clearly stated in the Penal Institutions –

ELIAS CJ:

Mr Reekie, hold on just a moment because we can't, in this hearing, which is concerned simply with the security of costs matter, we can't really –

MR REEKIE:

Yes that's what I believe.

ELIAS CJ:

– look at all of the evidence. What is it – what is the point that you're trying to make in relation to this? Is it that there was evidence that the Judge didn't consider or – and that, therefore, you had an arguable point of appeal? What's the point that you're putting to us?

MR REEKIE:

Absolutely. If I can cut to the chase, and without referring to the documents which are plainly in front of you here today, unfortunately because of the numbering and the timing that they'd been brought in is – and I just refer you back to the index and I'll speak to them and if you'd like to make notes and look at them at your leisure at some other time, that might be more convenient for the Court –

ELIAS CJ:

Yes, I don't want to stop you. It's just that I want to be sure what it's directed at.

MR REEKIE:

Oh, absolutely. Well, I'm hoping to pull all the strings together because there is but the focus is, as I said, I've shown you the observation forms, Your Honours, in regards to the conditions in which the act of torture took place, which are supported by the factual records, and they have been admitted by the Crown's own witnesses as being fairly detailed and accurate. So, and there's no dispute in those. Now what I'm alluding yous to, Your Honour in regards to – I had the difficulty in proving the torture occurred, yet Mr Manning and Mr Fallon all basically denied using force, didn't – sorry, denied using force against me. Mr Fallon was clearly stating he could not remember that he used force against me, yet he had quite clear recollections about the events on the 8th of July.

Now Mr Amour said he would expect the officers involved using force to know who used force. Not it was the evidence of Mr Query and I just point out that's at number 8 in the index there, Your Honours. The brief of evidence of Mr Query was that Mr Mannering did use force against me. He was unequivocal in that statement.

Now in the transcript evidence of Mr Query, which is at number 2, I put the question to him was he aware that Mr Mannering was conducting the investigation into the use of force against me, the allegation of torture, and his answer was yes, he was aware. So management, and they are a team, management at any prison, we aware that he was involved in the use of force and he was delegated by Mr Fallon who had also used force, because we have his incident report, which the inspector has said, "Those who use force must fill out an incident report," which is a requirement. So we have both Mr Fallon, who was initially tasked with investigating this matter, having used force who then delegated it, and it's actually in the email trail which can be found at number 13, I believe. I'll just double check that with my references here, Your Honours. Yes, can be found – no that's not the one. Sorry, Your Honours.

ELIAS CJ:

Is it at – it's hard to explain, really. This is from Mr Amour to Mr Manning, is it, with a copy?

MR REEKIE:

No, I believe that's – oh, sorry, page 45. It is in that bundle. The one you referred to, Manning to Amour, it's the next page over, and you'll see there, these emails actually read backwards as the chain goes, the matter was –

ELIAS CJ:

It's about two-thirds of the way through the bundle. Is the date of the email 12 July 2002?

MR REEKIE:

Yes. There's two on that page, Your Honours. 526, at the bottom of the page. If I can start at the second email, this is from Kelly Potawa, the prison manager at the time, or the assisting prison manager. He has delegated the investigation to Peter Fallon to investigate. Then if you go up to the first email, Your Honour, you'll see that Peter Fallon has then delegated the investigation to Carl Manning. Now, it was a bit peculiar and Justice Wylie actually queried Peter Fallon in regards to hierarchy and rank and who was what rank at the time, because here we have an acting unit manager delegating to a substantial unit manager a case that he was delegated from the prison manager to investigate. Now, these are both officers that can be proven to have used force against me. It is no wonder that Mr Fallon has passed it off to Mr Carl Manning, even though he shouldn't have, knowing full well that he had used force.

Now, I don't want to bore Your Honours with too much information, but the relevance of that is quite significant in the point that here are these officers passing around this hot potato in amongst themselves and it's been handed back to the very person the allegation was made against, basically to say, "Here, you tidy up your own mess."

Now, I'm coming back to the matter in question, Your Honours. Now, that's only in regards to the merit of the case on appeal on the point of torture and that's only one snippet of the evidence that has just been totally swept under the carpet in this matter. It's, you know, the report just goes on and on in regards to the failings and the absurdity of it in regards to the cover-up that's occurred as to the act of torture. Of course, none of these officers are going to pot themselves. Even implication under the Crimes Act, they are committing a criminal offence by being a party to what took place, so Mr Query and Mr Fallon is not going to admit what Mr Manning done to me. But the fact that they're carried on in this matter and how they're dealt with

the matter investigated it, now, this was a serious matter of allegation because if you look further in those email chains you'll see –

ELIAS CJ:
What is your complaint about the way the Judge dealt with this evidence?

MR REEKIE:
Well, this was factual evidence, Your Honour. This was not speculation or my evidence. This is factual evidence that's in front of him. It was submitted upon by me to him and it's just been totally ignored, and that cuts to the heart of the matter in regards to my appeal on this particular point, that he has totally failed to ascertain the significance of factual evidence. I gave truthful evidence, Your Honour. The only point that I was muddled on was in regards to the dates, and I clearly – at one point Justice Wylie said to me the dates were not important because he realised I didn't have access to a calendar, not to mention my mental state, Your Honours.

I think just in regards to that email, Your Honours, if I can just bring you over to the – just to clarify that, this complaint to the inspector was one of torture and punishment, which is on your page reference number 527 in that email sequence that we were just referring to at the third bullet point down. So it was clearly stated, the complaint was clearly stated as an act of torture.

The Court actually asked Mr Amour a question about the category of complaints and the reporting of such matters and how they were investigated. Now, I think that's worthwhile just touching on briefly to ascertain what's sort of gone on in that area, and again this hasn't been reported upon by Justice Wylie in this judgment. I've got it on the top of page 211 in the evidence of Mr Amour. It's in the same bundle right at the front about eight or nine pages from the front. Right at the bottom, 211, at paragraph 30 and this, as you'll note, are questions from Court, so this is directly from Justice Wylie and I'll just read it. It does go over to the next page but I'll read through it. "Directly to our national office line, one category of complaints is allegations of assault that is reported. The prison manager's responsibility is to report it directly to national office." This was not done, I might interject. "As a result of that notification coming out, then the chief inspector would then assign an inspector to monitor the local investigation and examine all the documents when they come through." The category of unlawful use of force, I think they're required to be reported, and that's why my initial email refers to the prison manager. He or she has

the judgement call to report that under their guidelines for the prison system. Now, this was not reported to national office. Mr Amour gives that evidence as well, that it was not reported. Hence, they did not conduct a monitoring of the local investigation. That's of significance in the fact that this complaint, a serious complaint of torture, was not monitored by the inspectors, despite a complaint being made to them. It was not reported to national office as it should have been. It was basically shut down.

ELIAS CJ:
Does that mean it was just locally investigated in this process that you're complaining about?

MR REEKIE:
That is all, Your Honour.

ELIAS CJ:
So it was Mr Manning's investigation only? Is that the position?

MR REEKIE:
That's correct. That's the only investigation that took place. If you'll see on page 207, just about eight pages in from the front, Your Honours, you'll see that being the case there. I'll just read through from paragraph 5. "And I believe your job you state was – one of your jobs was to investigate complaints by prisoners?" The answer by Mr Amour, "Yes." "Is it true that you didn't investigate either of these complaints?" That's in reference to unlawful detention and the tie-down bed complaint, Your Honours. Mr Amour, "In relation to the tie-down bed incident that I complained to you about or the unlawful detention, the complaint was referred to management to investigate as part of, um, our consideration of the complaint. That's one aspect of it." "Okay. The question, Mr Amour, and I'd just like a yes or no answer, basically is did you investigate either of these complaints yourself?" "No," is the answer. So that answers your question in regards to that, Your Honour.

Now, there is further evidence in regards to where he goes on to when, about local investigations and so on, but I don't think I need to go into that further.

Now, I really – the unfortunateness of this whole scenario – I hear the Crown, and I know this is switching over into a response, I saying that these matters are now moved, they were under the Penal Institutions Act 1954 and the unit is not in use any

more, but it was the evidence of Peter Fallon that unit was still in use in 2012. There was a prisoner in there when Justice Wylie done his site inspection. Now, given that they didn't take this complaint seriously, the unfortunate truth of the matter is the death of Tony Dixon – and I did allude to this in my application for leave and the submissions in my application for leave to this Court – is that Tony Dixon died unnecessarily. Some of the complaints that I raised in my claim were re-occurring in the coroner's report. The coroner report, Gary Evans, that was released on April 22nd 2013 in regards to the failings that occurred, not in the old high care unit but the new high care unit. The unit might have changed but the culture did not. The staff involved have risen to ranks that they really do not deserve to obtain. They should have been dismissed because of their actions in both what occurred and the cover-up that occurred in relation to those actions of torture and mistreatment of prisoners. Those same abuses occurred. The –

ELIAS CJ:

So this is relevant to the point that all of this is moot, is it? This submission is directed at that?

MR REEKIE:

It is, absolutely, Your Honour. The lessons were not learned. If the complaint was taken seriously when it was made and investigated properly and transparently and not by the person who I alleged tortured me, Mr Dixon could very well be alive today. The finding of Mr – now, it was –

ELIAS CJ:

I'm not sure that we need to go into that. We need to understand your argument here. Your argument is that it's not right to say that these questions are moot because dealing with them is necessary to deal with the culture?

MR REEKIE:

Yes, I believe so, Your Honour, because, like, there was dispute around the restraints used on the tie-down bed in 2002 and there was denials and that, but in the Tony Dixon case the coroner found that illegal restraints were used on Mr Dixon as well, which shows the lesson was not learned in that regard. There was other aspects that I won't go into. There was review of the service operations manual, which was also dealt with in my case. There was failings in the recordings. It just goes on, Your Honour. So, you know, it's an unfortunate situation but the merit to

this case is clearly there. Unfortunately, they weren't dealt with properly by Justice Wylie and that could be in some part through my being a lay litigant.

Now, as I said, I tried to be represented and this case was very emotional for me. I broke down in front of Justice Wylie and I struggled to carry on but I did because of the importance. I broke down in the witness box when recalling the abuse that I saw other prisoners being subjected to, you know. Now, the two other long-stay prisoners in that unit at the time were George Baker and Mark Manukau. Now, if you want to know about the harm that was done to them, George Baker was –

ELIAS CJ:
I don't think we can go into the harm that was done to them. We understand the submission that you're making, that it's wrong to characterise the matter that you sought to bring forward as moot. Does that really cover the factual matters relating to your case that you wanted to draw our attention to?

MR REEKIE:
Well, the remedy aspect, Your Honour, in regards to the effects of the remedy, and I believe you dealt with remedy in the *Chapman v R* [2011] NZSC 124 decision yourself in regards to a breach without remedy is a vain thing indeed. I believe without quoting you verbatim, Your Honour, but, you know, given – I tried to have psychological reports done for the Courts in this case but it just wasn't possible for a number of reasons, Your Honour, and my impecuniosity would certainly be one of them. But that's why I raised the harm done to other prisoners that is clearly visible by what happened to the other two. There was only three of us, and the other two went on to have horrendous histories after they left that unit. Now, I still suffer from effects from what I was subjected to. It's listed in my submissions to Justice Wylie at 2.5D of my submissions. It's subclause 3. "The plaintiff before you still suffers flashbacks and psychological trauma from the effects of that period and continues to struggle with what occurred to him over that period when he was unwell and needed care, understanding, and a safe environment but got abuse and torture instead by those employed to provide such services." That was my submission to Justice Wylie after I detailed what happened to the other two long-stay prisoners. You know, now, to say that declarations would suffice might be cutting it short just a little bit.

Now, I come back to this security for costs issue, because I am consciously aware that that's why we're here today, Your Honours. Now, because there are other

issues that I want to deal with but they can be dealt with in response so I want to move along and given that conscious that yous have read the submissions, now, what I should touch on – sorry, before I come back to that I just need to touch on an issue of the, like, the Amicus did find some merit, possible merit in the appeal of the unlawful detention matter but in regards to the judgment of Justice Wylie on the point of unlawful detention in regards to the Court records as to whether I'd been remanded in custody or not, at paragraph 41 of his judgment, that's Justice Wylie's judgment, Your Honours, where it states there, "While it is clear an order was made remanding Mr Reekie in custody," which I will bring you back to shortly, that particular comment, "The balance of the narration on the Court's record in some respects is unclear." There was speculation, if you, and I'm sure Your Honours will read down further into that paragraph, there was speculation from Ms Foster and Justice Wylie said there was no evidence on the point. Now I did give evidence on that point. I made clear evidence and points on it.

Now I'd just like to refer you to those documents so you can ascertain for yourself the merit in them. If we can – in that same bundle we're referring to, authorities of the appellant, right at the very back we have the two warrants that relate to this matter. So I just come back one, two, three four, five, six. Now I just come back six pages from the very back, Your Honours, and I'll start there.

The top reference, these are the criminal records from the bundle of the records at Waitakere District Court, 22nd of July 2002, remanded in custody 7th of the 10th '02, "Defendant excused one week. Signature," I think it looks like. These are the unclear comments, the unclear Court records, Justice Wylie is referring to. Now I submitted to Justice Wylie that, "Defendant excused one week," was because I was seeking to be brought back at the end of my, at the end of my recall to prison to make an application for bail. I had been charged with some of the offences but not all of the offences that I faced at my criminal trial, Your Honours. So I was still hopeful, given that there was going to be substantial security put forward, to enable me to have bail over that period.

Now that was the submission and to support that submission the defendant was excused one week and I was supposed to be brought back on the 29th of July, I referred Justice Wylie to the other comment here and I just ask Your Honours to turn over the page, which will be 376, just coming forward there a little bit, and towards the bottom where it's got, "Warrant details," you'll see that I appeared on the 15th of

July 2002, remanded in custody till the 22nd of July 2002, which is the one we looked at on the previous page. There was a one week remand the week before for the same purpose because we were still arranging for depositions and for the correct date to coincide with my end of my recall sentence so a bail application could be made.

Now in regards to who was in Court and what orders were made in Court on that particular day, I just ask you to come over the next page one more, which has got a reference of 77 at the bottom, which is "Pre-Deposition Hearing Sheet". At the top right you'll notice the names of the two counsel involved. You had prosecutor, Ms Gray and Mr Roberts was my trial lawyer. You'll note down there, there's, it says in comments directions and I just refer to, "Police advise doctor away three weeks," so on and so on. The significance of that, Your Honour, is Justice Thorburn is not being advised by counsel or the prosecutor. He's being advised by the police. That's because counsel and the prosecutor are not in Court, Your Honour, and to support that submission that I made to Justice Wylie that counsel weren't in Court was, on the back of that document, if I can bring you over to the next page, seven, seven eight, it's referenced, is there's the cellphone numbers for Ms Gray and Mr Roberts to show that they weren't in Court and they were being contacted by way of cellphone to get their position on what was happening in Court when the Judge was being advised by the police. There's no reference in there that I'm being remanded in custody. The only reference is that I've been remanded in custody for one week which was on the criminal records document, a one week remand because no consent was given beyond the eight days under the Summary Proceedings Act. So there's the evidence that counsel weren't in Court and the remand was only for one week.

Now if I just bring you over again to the warrants, because these are of significance too in this f it's an administrative error that's been corrected. Now Justice Rota signed this warrant on the 11th of September at the request of Auckland Central Remand Prison, which is quite significant in itself because there's evidence, there's actually in the report which I won't take you to, Your Honours but it is in here, in regards to – they accepted me from Auckland Prison on an OTP, which is a no-no. And they never reported it to national office until I complained to the inspectorate, which is quite significant.

Now, if Justice Rota was merely fixing an administrative error, why didn't he backdate it till the 22nd of July like Justice Johnson did on the next warrant. Merely, he – my ascertation, Your Honours, was Justice Rota was merely fulfilling a request from Auckland Central Remand Prison because here they had this prisoner with no, with no warrant. He didn't know about the – whether there was an order made in Court or not. There's no record of one being made. All it has is the defendant was excused for one week.

Now coming back to the point that I made there is if he was fixing an administrative error, why didn't he do what Justice Johnson done? Now this report, this order from – is retrospective from Justice Johnson, and it was made again after the request of a – of Auckland Prison after they had already reported that they had a case of unlawful detention, which is also in these bundles when Your Honours go through them if yous want to ascertain all of that. So I leave that there on the matter of unlawful detention and, as I said, I'd like to come back to the issue at hand, the waiver of security for costs, Your Honour.

Now I believe I put forward, last touch on that, is I believe I put forward a very comprehensive case that there was a conspiracy to cover up that unlawful detention. Now I won't go into that now because I don't believe that's important. Now that's an appeal matter directly, I think, showing that there is merit and arguability in the appeal is important, and I just wanted to cover that off right from the get go so I can move on from that.

Now given that you have read these submissions, I touch on in regard to the – in my submissions in regards to the relationship between myself and the Crown in this matter, Your Honours. That's quite important. There was an obligation here that gives the state power of attorney over my care. It's the equivalent of. We have legislation here that has incorporated the standard minimum rules for the treatment of prisoners entirely into its Act, it's legislated for. Now given if it wasn't legislated for it wouldn't be important but it is, and there was actually a report from Warren from the Law Commission. His name escapes me. I do have it here –

ELIAS CJ:
Young.

MR REEKIE:

- but I won't – in regards to that, they wanted the Corrections Act to be consistent with the minimum standard rules for treatment of prisoners which is why it was incorporated in an entirety into it. Now the obligation on the Chief Executive to enquire into the treatment of prisoners and complaints made to him and the conduct of staff. They've all been failed. They've failed miserably. And now they're seeking to have security of a cost to stop a Court from enquiring and auditing the complaints system which let me down so badly? I am a self-represented person. I am doing the best I can. I try to make plain points. I refer to evidence to back up my contentions or the contentions that back up my complaints. I don't know how best or any other way that I can do that, you know.

The evidence in regards to my impecuniosity is plain. The registrar accepted my fee waiver for just over $1000 because I couldn't afford to file for this appeal if I didn't have that fee waiver and they think I can pay more than that, $5880? I don't know where they get that idea from. That's a declaration of my impecuniosity. Justice Miller looked into my Court records, my criminal records – they weren't before him – to see that I was a prisoner and how long I was sentenced to. I've been in prison for over my life. Those same records contain probation reports and pre-sentence reports going back years, you know, stating that I'm a person of little means, of no fixed abode and so on. This information is well before the Courts either in fee waiver form or declaration or criminal records, which the Court has access to.

ELIAS CJ:

Do we have a copy here of your application – I haven't seen it – of security for costs? Is there a letter or application?

MR REEKIE:

There's a form that the ...

ELIAS CJ:

Do we have the letter that the registrar was responding to? Does anyone know?

MR REEKIE:

I will have a look.

ELIAS CJ:

Mr Reekie, I'll ask Ms Gwyn for the Crown because she might have it at her fingertips.

MS GWYN:

I don't have it quite at my fingertips but I can provide it at the lunch adjournment.

ELIAS CJ:

The registrar seems to have taken the view that it was for the applicant to demonstrate impecuniosity. I'm just wondering what the registrar had to go on. I think we'll need to see that.

MS GWYN:

If it assists, certainly Justice White and Justice Miller proceeded on the basis of impecuniosity being assumed. So it doesn't figure – the question of whether Mr Reekie was impecunious or not doesn't figure to that extent in their decisions.

MR REEKIE:

I'm not quite so convinced of that, Your Honour. I believe in one case the registrar accepted that I was impecunious and I believe Justice Miller went on that approach that I was, on that assumption, even though he said he had no evidence before him. Yet he had full access – and did access my criminal records during the course of his judgment, but in the other matter, Your Honour, I do not believe that it actually states that it was accepted by the registrar or Justice White. That's my understanding of that particular side of it.

ELIAS CJ:

My recollection is that there had been an issue as to whether you had demonstrate impecuniosity but I can't remember why I got that impression.

GLAZEBROOK J:

I thought Justice White said something to that effect.

ELIAS CJ:

Yes. Never mind, Mr Reekie. We'll get to the bottom of that.

MR REEKIE:

I had the judgments of White and Miller in front of me.

ELIAS CJ:

It's just been drawn to my attention that it was Justice White and he did say that you'd provided no evidence of your impecuniosity. But don't worry. I wanted to try and understand what we're talking about and what the functions of everybody are but you can carry on with your submissions.

GLAZEBROOK J:

I was just wondering if you sought to have the fee waiver application as well, because presumably the security for cost waiver application was made either in knowledge of that.

MS GWYN:

The Crown doesn't have a copy of the fee waiver application, Your Honour.

GLAZEBROOK J:

I thought it might be relevant because it will have some information, presumably, on it.

MS GWYN:

You're right, Your Honour. Justice White says at paragraph 5 that the registrar noted that the only ground for the application was that previous fee waiver grants have been made in the proceeding, and so I assume, Your Honour, that that was the only document she had in front of her, but the Crown doesn't have the fee waiver application. We will be able to provide a copy of the application to the registrar, though.

GLAZEBROOK J:

Why wouldn't you be able to provide the fee waiver application as well?

MS GWYN:

We can ask the Court of Appeal.

GLAZEBROOK J:

Do you have the application of security for cost waiver, is that right?

MS GWYN:

Yes, I do.

ELIAS CJ:

Ms Gwyn, impecuniosity is not an issue, is it?

MS GWYN:

No, Your Honour, in the sense that both Justice White and Justice Miller, having noted that there was no specific evidence on the point, proceeded on the basis that impecuniosity was assumed and then applied the normal test.

ELIAS CJ:

All right, thank you. It may be, Mr Reekie, that it doesn't matter in the wash, but we can move on with your submissions.

MR REEKIE:

Thank you, Your Honour.

ELIAS CJ:

We'll be taking a break at 11.30 and I'd really like an indication of how much longer you expect to be by then, and perhaps some indication of what you want to say to us.

MR REEKIE:

Okay. Now, in regards to – sorry, Your Honour, this will help me answer that question, is I've just been dealing predominantly with case 47 at the moment. I haven't really touched on 102. That in itself is a different kettle of fish because it's a leave application. I did have some issues to raise on that but it's certainly not at the forefront of me in comparison to 47, for obvious reasons. So I'm really in your hands to how much leeway you'll give me in that regard but I'll persevere on the premise of 47 and maybe halt and if we can deal with 102 separately, so to speak. That way we don't end up crossing over too much.

ELIAS CJ:

Yes, that's fine, take it sequentially but the issue in 102 is whether we should give leave – well, they're tied up together, really, Mr Reekie. I think that's why we bundled them up in one hearing. So I'm not sure that you need to specifically deal with 102 if you succeed in persuading us in relation to the matter on which leave has been granted.

MR REEKIE:

In that respect, why I raise that, I was just – in regards to the comments of the Amicus in regards to the parties raising issue of merits in regards to that case, Your Honour, and I was just a bit concerned that while I wasn't expecting that I did prepare some documents and some arguments in regards to the merit and whether that case of moot and the importance for me in that particular case and arguability of it going forward. That's why I raise that because I can, again, similar to what I've done in this case, put forward very comprehensive arguments and evidence as to why that is not as it's being portrayed, either, Your Honour. For me in regards to the misconduct charges – and I know they pale into insignificance with this – but those allegations against me are serious and potentially put me in jail for another three to five years once I hit the Parole Board, and to me that's an injustice that I can't accept. If it wasn't for that, I could have just about, you know, let the rest go because it's not like I don't have better things to do with my time.

So in saying that, I'm hoping, if we're taking the break now, Your Honour –

ELIAS CJ:

No, we'll take the break in five minutes. I just wanted to let you know where we'd be going with it. What do you want to tell us in relation to the 47 matter?

MR REEKIE:

Okay. Well, if I can start off in regards to some case law on that particular point in regards to the fee waiver, and I bring you to *Fava v Zaghloul* [2007] NZCA 498, (2008) PRNZ 943. In particular, I bring Your Honours to paragraph 9 to start with.

MR BUTLER:

That's in the Crown bundle at tab 11.

MR REEKIE:

Now, this is a precursor to going into paragraph 9. I believe my application for waiver, Your Honour, goes further than impecuniosity because here it is. "Impecuniosity does not necessary justify waiver for security." By that statement, it includes that it could very well in itself justify waiver for security. While Your Honours have indicated that it's not substantially an issue in this particular case for a number of reasons put forward and alluded to, it reads, "Equally, the rules do allow for waiver,

so it would not be right if there was an effective policy that waiver would never be granted. An assessment must be made in the circumstances of each individual case." Then it goes on to say, "That said, dispensing with the security of costs likely to be exceptional" – that's the end of the paragraph.

Now, in regards to that, I'm not aware of any other case in case law where, other than *Fava v Zaghloul* where security for costs have been waivered. I don't have access to case law, and I've been kindly provided with the case law I do have, but I have it on reasonably good authority that this is the only case. Yet in this – at paragraph 9 it says, "Equally, it would not be right if there was an effective policy that waiver never be granted." These came into effect in 2005 by way of the Court of Appeal's Rules, so since that time, which is now some eight, nine years, there's only been one waiver. I struggle to think that people would come to this level, go to all this bother, in cases that don't have merit, that wouldn't justify a waiver. In effect, you could say that there has been or is it as I've demonstrated in my – and has been touched on by the Amicus – is the threshold being applied too great, too high?

ARNOLD J:
There have been a number of cases, though, where the amount of security has been significantly reduced, which is an alternative to waiver.

MR REEKIE:
Yes, Your Honour. I have noted that also in exceptional cases that is true. Now, depending upon the level of impecuniosity it would be interesting to see how many people have actually still proceeded in cases where waiver, security for costs have been reduced. Certainly in my case, and as I said I believe certainly in regards to my special relationship with the Crown, that the reduction of costs would just not get me over the line in regards to enabling me to pursue this appeal regardless of merit or arguability to it, or principle, or any other – and I believe there is substantial principles, importance, public interest, I think it cuts across the board, this case. You know, we are outraged as New Zealanders when abuses occur overseas. And here we let this one slip under the radar.

The Amicus pointed out, and he was right to point out, that Justice Wylie said that if this abuse has occurred the way that I have put it, it would trigger a breach of section 9 of the New Zealand Bill of Rights and he was right to acknowledge that and I believe I can prove it.

ELIAS CJ:

No, you're going back into the merits, which I thought I had moved on from. So we really do need to concentrate on the security for costs aspect.

MR REEKIE:

So in saying that, if we look at paragraph 10 of *Fava v Zaghloul*, if we go into that, and I don't want to read through it all. I'm sure yous are vaguely familiar with it. Your Honour did not have any evidence into impecuniosity in front of him. The application of the well-established or settled principles did not seem to apply and went out the window, and the only case where waiver has been granted. It does leave someone a little bit perplexed as to how reliably those well-settled principles are applied, and to what level they are applied. It just seems off-kilter and not quite right. Now, I'm not sure if Your Honours agree or not, and I guess I'll find out, because I do ask the question in this case. Whether I'm a prisoner or not a prisoner, it's an important issue that just shouldn't be left because it denies people that most basic right to fairness and the concept of justice that I referred to in my beginning statement as to what is defined as justice.

So coming forward, again, just referring to some other case law, I'm aware in *Hart v ANZ Bank* [2013] NACA 9 and –

ELIAS CJ:

Mr Reekie, I think you might want to consider, when we take the adjournment, whether you think it is necessary to take us into all of these cases. That is because you have dealt with them in some detail in your submissions and because we are familiar with them. So it may not be necessary to do more than say if there's anything additional which is not in your submissions you want to draw our attention to.

MR REEKIE:

I take your point on that, Your Honour. I will not persevere with the case law matters. It's a fair comment to make, too, Your Honour.

ELIAS CJ:

If there's anything additional – but you have put your point pretty effectively in your submissions and I think we do understand those submissions. If there's anything

additional, of course raise them with us, but otherwise you can accept that we do understand the submission.

MR REEKIE:
I think there's maybe only one other in the case law that I'd really like to touch on, Your Honour. I'd like to refer to it. It's in regard to a comment by the Judge in a particular matter.

ELIAS CJ:
We'll take the adjournment now because it's 11.30 so you can find it then, but I'd be grateful, Mr Reekie, if you could conclude your submissions before midday so that we can let the Crown respond and the Amicus have a go and then you'll be able to reply on any matter.

MR REEKIE:
Absolutely, Your Honour.

ELIAS CJ:
Thank you. We'll take the adjournment now.

COURT ADJOURNS 11.30 AM

COURT RESUMES: 11.49 AM

ELIAS CJ:
Okay. We can resume. Thank you Mr Reekie.

MR REEKIE:
(inaudible 11:49:25). Our screen is frozen at this end. We, we think it might be your end.

ELIAS CJ:
We can see you. Can you hear us? But you just can't see us?

MR REEKIE:

Yes. Yes. It's frozen. We haven't touched anything here Your Honour, so we...

ELIAS CJ:

All right. We'll have to get a technician to see it. What's the story, Madam Registrar? Mr Hemara, can you hear me? Mr Hemara, what's the position with the screen?

MR HEMARA:

The screens are frozen.

ELIAS CJ:

They are frozen?

MR HEMARA:

(inaudible11:50:12).

REGISTRAR:

We could disconnect and reconnect.

ELIAS CJ:

Yes, we'll disconnect and try and reconnect. Do you want us to stay Madam Registrar? Is it going to take a while?

REGISTRAR:

I'm not sure.

ELIAS CJ:

Okay. We'll, we'll take a short adjournment. Can you come get us when you've tested it? That would be great. Thank you, counsel.

COURT ADJOURNS: 11.50 AM

COURT RESUMES: 11.54 AM

ELIAS CJ:

Good. Okay Mr Reekie, thank you.

MR REEKIE:

Thank you Your Honour. Am I okay to sit?

ELIAS CJ:

Yes please. Thank you.

MR REEKIE:

Okay. Thank you. Right, Your Honour. I did have it at my fingertips. Coming back to – as I said, I'd just like to touch on this case law. It's the last one I, that I will. It's *Patterson v Commissioner of Inland Revenue* [2013] NZCA 153, (2013) 26 NZTC 21-015, a judgment of Stevens, Justice Stevens.

ELIAS CJ:

And do we have that in the... Have we got *Patterson* in the... Is this in the material that came through today?

MR REEKIE:

We, we're just looking for it too, too Your Honour. Sorry, it may, it may have been left out Your Honour unfortunately. We, we're just having a look. It's, it says Court of Appeal 870/2011.

ELIAS CJ:

Okay. It's an unreported judgment. What's the date of the judgment?

MR REEKIE:

14th of May 2013 given at 3.00 pm.

ELIAS CJ:

Right. And what's the reference number again?

MR REEKIE:

It's got Court of Appeal 870/2011. And then after that it's got [2013] NZCA 153, if that's of assistance Your Honour.

ELIAS CJ:

Thank you. Yes, we'll be able to get that. So what's the point you want to make from it?

MR REEKIE:

Thank you. At paragraph 12 of that judgment it states, “This Court is also required to consider the interests of justice. The relevant factors include whether appeal rights would be rendered nugatory, the merits of the appeal and”, and this is the part that I’d like to touch on, this, this next piece, is, “whether the respondent should be put to the expense of arguing a meritless appeal without protection provided by security for costs.”

Now, that’s, that’s one of the issues that the Court said it was requirement to consider in the interests of justice. Now, given that I have touched on the merits of the appeal and that I was partially successful in the appeal, in the matter before Justice Wylie and the special relationship that exists between me and the Crown, my impecuniosity and everything else that I believe comes into play and I’ve met the criteria of or reached the threshold of, whatever that threshold may be I guess it’s for Your Honours to consider and determine, but I believe within myself that I have met a threshold of such a level that would justify a waiver of security. This particular comment raises the issue of, should the respondents be put to the expense?

Now, given in my submissions, Your Honour, that I state that in this case the Chief Executive or the state should not be asking for a fee waiver or security for – sorry, for security for costs because of its special relationship with me, I believe that’s reinforced by this particular argument here at paragraph 12. And, and given there are serious issues and there are significant breaches of the New Zealand Bill of Rights that have occurred and have been acknowledged by Justice Wylie already, I believe the respondents in this case should be put to the expense of arguing appeal that does have merit, as in this case he talks in this case about an appeal without merit. Well in this case this, this case does have merit and they should be put to the expense. That, that is my submission on that and the relevance of that case law that I referred you to.

I just have a couple of little things and I’m going to be very, very quick here, very quick indeed. The amicus in his, in his report states that there was some force in my submission on the special relationship between myself and the state, but unfortunately he doesn't go further into that and actually detail what that force is. I take it in regards to the force o the submission that he’s saying that I make that I am correct in my contentions and I’m correct at law in regards to what those merits are. That’s the only reading that I can take from that particular statement that he makes.

So I believe that's all I should and could add at this stage in regards to my submissions per se, Your Honours. I'm aware, as you said, that I get a right of response, so I don't feel there's any need for me to raise anything further for you. As you said, you've read it and you've got the materials so I end my submissions on that particular point there, Your Honours.

ELIAS CJ:
Thank you very much, Mr Reekie. Yes, Ms Gwyn.

MS GWYN:
Thank you, Your Honour. There were just a couple of points that I wanted to respond to arising from Mr Reekie's submissions before I go to the main body of the Crown's submissions.

The first is in relation to the question of legal aid. Mr Reekie has referred to circumstances in which he applied for legal aid, was given an interim grant, and that was withdrawn two weeks before the hearing of the matter before Justice Andrews. As the Crown understands it, the matter, the LARP decision, relates to the Justice Andrews matter. It doesn't relate to this matter, but if it would assist the Court the Crown could, of course, find out the full details of those applications.

ELIAS CJ:
Well, it's not in contention that he hasn't got legal aid. Is it in contention whether he applied for legal aid, Ms Gwyn?

MS GWYN:
I think there's some lack of clarity about whether he applied for legal aid in relation to the substantive hearing before Justice Wylie, but my main point, Your Honour, is that for the purposes of this proposed appeal to the Court of Appeal there is no legal aid, and no legal aid has been sought.

The second matter that I wanted to touch on briefly arising from Mr Reekie's submissions is that –

ELIAS CJ:

Well, I think that's acknowledged because Mr Reekie says that if he fails here he'll have to apply for legal aid, presumably on the basis that then automatically the security for costs gets waived.

MS GWYN:
That's right. So it may be, Your Honour, that that background material is not of significance to this Court, but I simply wanted to clarify that so far as I am aware the LARP review decision does not relate to legal aid in respect of the Wylie J matter.

The second point that I wanted to touch on briefly arising from Mr Reekie's submissions relates to the portions of the transcript that Mr Reekie took you to. As Your Honours will have observed, they are selected excerpts from the transcript only. But the point I wanted to make is what those submissions, in fact, demonstrate is that in the proposed appeal here what Mr Reekie is seeking to challenge is findings of fact and findings of credibility by His Honour Justice Wylie, and that's something I'll come back to later in relation to the merits of the appeal.

But if I could refer Your Honours very briefly to the relevant passages of His Honour Justice Wylie's judgment that relate to the points raised, and they are paragraphs 109 and 110, and in those portions of the judgment His Honour dealt with the issue of credibility, both Mr Reekie and at 110 Mr Baker, who was called to give evidence in support of Mr Reekie, and His Honour notes at 109 that he didn't consider Mr Reekie to be a particularly truthful or reliable witness and four lines down, "It was my very clear impression that Mr Reekie has become obsessed about the way in which he considers he's been dealt with. He is now unable to see matters in any rational way. He very much exaggerated what occurred when he gave evidence before me." He goes on to note that on the following page, "Not to say that all aspects of Mr Reekie's incarceration were appropriate. I was left with the overwhelming impression that Mr Reekie was, and still is, wallowing in a slough of self-pity." Then at 110, His Honour finds, "I did not consider Mr Baker to be a reliable witness either." So those findings of credibility are really what's being challenged in the proposed appeal.

Then over at 134, on the particular issue that Mr Reekie took Your Honours to in the transcript about the role of Mr Manning, that's dealt with in particular at 134 and following where His Honour Justice Wylie clearly has considered this issue and made findings of fact and credibility in relation to it.

So my point there generally is that I don't wish to respond to the detail of what Mr Reekie has said in relation to the transcript but to make that general point that it serves to emphasise that what this appeal is about, is about challenging the detailed findings of fact and credibility made by Justice Wylie.

If I could turn then, Your Honours, to the Crown's substantive submissions and what the Court should have is the initial submissions dated 8 November and then some submissions in reply to the Amicus dated 25 November. I won't work through the submissions systematically but I will, at points, speak to them.

The first point I wanted to make is in relation to the purpose of security for costs. Security for costs in an appellant context serve two functions. The first is that security protects a respondent from being faced with an irrecoverable bill for legal costs if the appellant is unsuccessful. But the second and equally important purpose is that the security for costs requirement governs or filters appeals, so it controls unmeritorious appeals where, in other circumstances, the control afforded by potential cost liability is absent. So it serves to ensure that appeals are brought and conducted responsibly, and in doing so it facilitates the broader administration of justice by, in effect, freeing up the Court's time and resources for other appeals.

ELIAS CJ:
It doesn't filter appeals from those who have the money to pay security for costs.

MS GWYN:
That's true, Your Honour. It doesn't.

ELIAS CJ:
So it operates unequally.

GLAZEBROOK J:
Although isn't your argument that that's still the discipline because they stand to lose that money?

MS GWYN:
Exactly, Your Honour, the two limbs of the purpose, if you like, sit side-by-side so those who have money have to put up the security but stand to lose it if they're ultimately unsuccessful and the respondent thus has a protection. For those who

can't afford it, there's no – and I'll come to the way the rule operates in practice but there's no blanket rule that if you're impecunious you must pay security for costs. The rule allows for exceptions, of course.

The point that's relevant here, and it comes up again, is that there is a distinction between access to justice at first instance and access to justice at an appellant level. And the case of *Marriage of Brown* (1991) 105 FLR 329 that's referred to in footnote 9 captures the point. "The general rule is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's courts, and so an insolvent party is not excluded from the courts, but only prevented, if he cannot find security, from dragging his opponent from one court to another."

And –

GLAZEBROOK J:
Given the right of appeal, is that a justifiable distinction now?

MS GWYN:
I think it is, Your Honour, that in New Zealand the Court of, in the Court of Appeal where we have an appeal as of right in very broad terms under section 66 of the Judicature Act 1908 that, that it is important and useful to have a kind of filter on appeals that ultimately proceed, and that could be contrasted with this Court, for example, where security for costs becomes an issue only after the filter, if you like, of section 14 of the Supreme Court Act 2003 has been applied, so...

ELIAS CJ:
But it the legislature hasn't imposed a filter what's the justification?

MS GWYN:
Well it has – in my submission it has imposed a filter in that, in that it's, it's set in place ruling dealing with security for costs which have that effect.

WILLIAM YOUNG J:
The right of appeal is subject to compliance with the rules expressed in those terms I think, isn't it?

ELIAS CJ:

Yes it is. Section 66.

MS GWYN:

Yes. And I think that same point is made in some of the UK authorities which I'll come to, some of which precede the most recent changes to the rules in the UK and which have introduced a filter.

ELIAS CJ:

Yes, a filter, a leave provision. Are they in the context of costs, of security for costs which are set as opposed to being a default position?

MS GWYN:

I think they're in the context of costs that are set, Your Honour. They may vary somewhat but I, but I will take you to a couple of those cases, so...

ELIAS CJ:

Are there other jurisdictions that have the form of the rule in that the Court of Appeal has adopted?

MS GWYN:

I don't think there are any that are exactly the same but there are certainly other jurisdictions, such as Australia, where the requirement varies somewhat but there are on, at appellate level, a requirement for security for costs to be met.

ELIAS CJ:

As the default position? Or as –

McGRATH J:

Presumptive position.

MS GWYN:

The presumptive. I'm not sure Your Honour. I'll come back to, come back to that question.

The argument that's, that's put in some of the cases but also in general terms in, in the way that the case is advanced here is that a requirement for security might impair the right to a fair and public hearing and that's obviously a hearing that's guaranteed by article 14 of the International Covenant on Civil and Political Rights, article 6 of the European Convention and, in less specific terms, section 27 of the, the Bill of Rights Act. But, and, and this is the point I made earlier, that the authorities are clear that that right of access to the Courts isn't absolute and may be subject to limits.

And the first case that I wanted to is the *Ashingdane v United Kingdom* (1985) 7 EHRR 528 (ECHR), and this is at tab 6 of the respondent's authorities, and this is a decision of the European Court of Human Rights. And at page 546 of the judgment, paragraph 57, the Court notes, and this was in relation to an alleged violation of article 6 which provides the right –

WILLIAM YOUNG J:
Sorry, page 546 did you say?

MS GWYN:
546 Your Honour, paragraph 57. And, and it's the second paragraph under 57. "Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access 'by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals'".

And then the last paragraph at the bottom of that page, "Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired".

And then another decision of the European Court of Human Rights at tab 21. This is *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 42 (ECHR).

GLAZEBROOK J:
But the previous one, I didn't think it involved an appeal did it? I was only looking quickly at it.

MS GWYN:
Ashingdane, yes it did Your Honour.

GLAZEBROOK J:

No, the first one, did it? So there's been a – so that was in the context of an appeal, was it? And was it the context of security or what? Yes, I thought it was – that looked as though they were first – oh.

MS GWYN:

It is in the context of an appeal. Page 533, "The applicant appealed against both orders."

ELIAS CJ:

Or is that the Mental Health Review Tribunal? Did it go to the Courts? Oh I see, yes it did. Yes.

MS GWYN:

So it was in the context of an appeal Your Honour. And, and what it's, but what it's relied on is, is the, the general statement that I've taken Your Honours to, that –

ELIAS CJ:

Isn't it a leave, isn't leave an issue here?

MS GWYN:

The, the point I'm relying on it for, Your Honour, is, is around –

ELIAS CJ:

The statement of principle –

MS GWYN:

The statement of principle.

ELIAS CJ:

– that is, that you can regulate access as long as you don't cut it off.

MS GWYN:

Yes, so long as you don't so impair the access that it's, that it becomes meaningless. And that, and my point is simply that –

ELIAS CJ:

But what was the access that was – well what was –

GLAZEBROOK J:

That's what I – it's very difficult to work out.

ELIAS CJ:

– the right, what was the right that was said to be impaired?

MS GWYN:

He had High Court proceedings challenging his detention at Broadmore, I think, and the proceedings were stayed and then he sought to appeal that order.

ELIAS CJ:

It's just we really need to tie it into a right to be heard or a right of appeal, don't we? To make it relevant.

MS GWYN:

Yes Your Honour. I'll, I'll find the relevant passage. It, it is, in my submission, a case at appellate level, but I will find a particular reference and –

ELIAS CJ:

Well is – it was violation of article 5 –

MS GWYN:

And of article 6, Your Honour.

ELIAS CJ:

Oh. Yes.

MS GWYN:

So, so the passage I've taken Your Honours to is under the heading, "Alleged violation of article 6".

ELIAS CJ:

Well that's just the fair and public hearing within a reasonable time.

MS GWYN:

Yes, Your Honour, and, and as I mentioned, the, the essential point of this judgment is the point that Your Honour's already alluded to, that it says the right of access to the Courts isn't absolute, can be subject to limitations provided that those limitations don't reduce or restrict the access in such a way as to, to make the right meaningless.

ARNOLD J:

Well the next case you were going to take us to, I think, implies that principle on the appellate context, doesn't it?

MS GWYN:

It, it does Your Honour. That's the *Tolstoy* case at tab 21. And the relevant – and this is again a decision of the European Court of Human Rights, so concerned with compliance with Article I again. It's at tab 21 starting at page 475 of the report. At paragraph 59 the Court reiterates that point of principle from the *Ashingdane.* Then over the page, and we are concerned here with a requirement to pay security for costs for an appeal.

At paragraph 60, the applicant was saying that the requirement to pay it amounted to a total bar on his access to the Court. Then at 61 on page 476, the Court considers that the security of costs order clearly pursued a legitimate aim, namely, to protect Lord Aldington from being faced with an irrecoverable bill for legal costs if the applicant were unsuccessful in the appeal. It's not disputed. Further, since regard was also had the lack of prospects of success of the applicant's appeal, the requirement could also, as argued by the Government, be said to have been imposed in the interests of a fair administration of justice.

62, Court unable to share the applicant's view that the security for costs order impaired the very essence of this right of access to Court and was disproportionate for the purposes of Article VI.

ELIAS CJ:

But the defendant in this had applied for an order for security for costs, had he?

MS GWYN:

Yes, he had, Ma'am. It's at paragraph 14 on page 452.

The other general references that I wanted to take the Court to in relation to the point that the right of access to the Courts isn't absolute, the comments of the United Nations Human Rights Committee at tab 23 and the relevant paragraphs are 7, 11 and 12. Certainly at 11, the imposition on fees on the parties that would de facto prevent their access to justice might give rise to issues under Article XIV, in particular, a rigid duty under law to award costs without consideration of the implications.

Then at 12, the right of equal access to a Court embodied in Article XIV paragraph 1 concerns access to first instance procedures. It does not address the issue of the right to appeal or other remedies.

Then finally on that –

ELIAS CJ:
On the other hand, given a right of appeal, however, a requirement of equal treatment would require equal access. I mean, this is extrapolating out from a slightly different context, isn't it, Ms Gwyn, in the emphasis on first instance procedures, because it's not concerned with – or is it concerned with – a case where there was a right of appeal?

MS GWYN:
It's a statement in general terms, Your Honour. It's not concerned with a particular case. So it's a general comment of the Human Rights Committee.

ELIAS CJ:
This is a general statement. It isn't about England?

MS GWYN:
No, it's a general statement relating to Article XIV, which says, "All persons shall be equal before the Courts and Tribunals."

GLAZEBROOK J:
Well, they certainly say that there's no difficulty with having a leave to appeal system.

MS GWYN:

That's it, Your Honour, and I do rely on it for that general proposition. It's not in a particular context.

ELIAS CJ:

Well, I don't have any difficulty with that. It's just we don't have a leave to appeal system and one would have thought that the system we do have has to be equal as between appellants subject only to what is a reasonable restriction. So I'm not sure that this general statement which does permit the use of leave mechanisms is necessarily of a help here.

MS GWYN:

I think it probably goes – well, in my submission it goes somewhat broader than talking about leave mechanisms, Your Honour. It's framed slightly more broader than that.

ELIAS CJ:

Well, in paragraph 13, "The same procedural rights are to be provided unless distinctions are based on law and can be justified on objective and reasonable grounds not entailing actual disadvantage." So that's the issue, really, whether the distinction here can be justified on objective and reasonable grounds.

MS GWYN:

Yes, Your Honour, and I will, of course, take you to the particular rule. Just finally on that, the more general introductory point, there is a decision of this Court in *Siemer v Solicitor-General* [2012] NZSC 37 which is at tab 18 of the bundle. In this case, Mr Siemer – and this is summarised at paragraph 2 of the judgment – had asserted that rule 35 was impermissibly broad and uncertain in its application and therefore inconsistent with the Bill of Rights Act and Article XIV because it restricts access to justice. The Court there says, well, to the extent that's an argument that the rule is ultra vires, the rule-making power deals with that question and then at paragraph 3 notes that there are long-established principles in accordance with which security for costs is fixed or dispensed with under the particular rule. The words of the rule don't stand by themselves and the rule which is of a kind commonly find in comparable jurisdictions is plainly a reasonable limit in terms of section 5 of the Bill of Rights Act and refers, as the Court has already mentioned, section 66 of the Act which expressly provides for the making of rules under it for regulating the terms and conditions on which appeals are allowed.

ELIAS CJ:

Well, that's all in issue here, isn't it? It's not enough to cite this as authority. You're going to have to deal with the merits of that determination.

MS GWYN:

That the rule is properly made, Your Honour?

ELIAS CJ:

Yes, that it's reasonable, if it has the effect contended for.

GLAZEBROOK J:

Would your argument be on that that it's nothing to do with the human rights, it's nothing to do with the International Covenant or the Bill of Rights in the sense that you can have differential views that restrict appeals but – so it must be looked at in terms of the New Zealand legislation with the right of appeal but with no background of the Bill of Rights apart from equal procedural treatment?

MS GWYN:

That's right, Your Honour.

GLAZEBROOK J:

And here there's equal procedural treatment because everybody has to provide security?

MS GWYN:

That's it, Your Honour, and I will come to that in more detail, but it seems to me the question is whether the relevant rule impairs the very essence of the right of access to the Court and is disproportionate in the way that it was put in *Tolstoy Miloslavsky v United Kingdom* at tab 21 and in *Ashingdane* which said not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

In *Ashingdane*, as I've taken Your Honours to the Court, attach great weight to the fact that the appellant had enjoyed full access to the Court at first instance.

GLAZEBROOK J:

I still have some difficulty in seeing how, if you stop someone coming because they can't pay security, then you're not restricting the right of access, so the argument would have to be that that's okay on appeal but it's not okay at first instance.

MS GWYN:

The argument, I think, is more complex than that, Your Honour, because the way that rule 35 operates – and I'll get to the rule shortly – is not to prevent access simply or automatically on the basis that the would-be appellant can't pay security. The test is more nuanced. There is an opportunity.

GLAZEBROOK J:

But anyone who can't pay security and who doesn't manage to meet the more nuanced test is deprived of access to the Court, so the fact is – why is the fact that there's a more nuanced test help those who don't meet that nuanced test?

MS GWYN:

Because it's the nature of the test, the various aspects that the cases set out that are relevant to an evaluation under rule 35, so what's the substance of the appeal? Does it have merit on its face? Is there an arguable case that it will succeed on appeal? Is there a matter of public interest or public importance discernible in the appeal? So those are critical factors in weighing whether someone should be able to proceed with their appeal, notwithstanding that they can't put up security for costs. So the money is not an automatic barrier, it's a filter. The security for costs provision is a filter rather than an automatic bar.

Before I come directly to rule 35, I'm just wanting to make two further general points, and that is that the two purposes of a security for costs rule that I've mentioned, so protection for the potential respondent and the imposing a discipline on the conduct of the appeal and facilitating the administration of justice, those two rationale apply equally in cases that deal with human rights issues. This is dealt with in the written submissions. They also apply equally to the Crown as to other litigants. So there's no, in my submission, and ought to be no assumption that where the claim is based on a breach of human rights and orders against the Crown that security for costs should be waived.

As we note in the written submissions, it may well be that on the facts of particular cases, those are the kinds of cases that raise issues of public interest and general importance that warrant a waiver but that oughtn't to be an automatic starting point.

Likewise, where the Crown is the potential respondent, we say that the security for costs rules apply equally to the Crown as to other litigants.

McGRATH J:
The fact that the respondent is the Crown can, however, be a circumstance that weighs in favour of waiving security for costs. Is that what you are acknowledging?

MS GWYN:
What I'm acknowledging, Sir, is that in the kinds of cases where – and mostly they will be cases against the Crown – breaches of human rights are alleged or cases such as this one about treatment of prisoners, that on the facts of each case they may be more likely to result in a waiver of security. But we're not saying there is any presumption.

McGRATH J:
So for you it's not just the fact it's the Crown, it's the fact it's the Crown and a human rights breach context. That can be a relevant factor, is that what you're saying, is it?

MS GWYN:
I'm not putting it quite like that, Sir. I'm simply saying that in both those cases, a human rights case which may or may not involve the Crown, and the case where the respondent is the Crown, that in either of those situations the starting point shouldn't be any different that in relation to other litigants in other kinds of claims, that rule 35 on its face presumptively requires security.

McGRATH J:
Well, I think that just for me the presumptive status is in the regulation, in the Court of Appeal Rules, so I understand that. But it can be displaced, and I would have thought the fact that the Crown was a respondent and the case was one in which the Court was asked to monitor compliance with human rights by the Crown was a sort of factor that could be very relevant towards whether or not the presumptive status was displaced.

MS GWYN:

It may, Sir, on an examination of the facts of the case.

McGRATH J:

Well, just inherently.

MS GWYN:

Well, it may in the sense that the Court will look in practice more closely at what, for example, are the merits of the proposed appeal. But in my submission, Your Honour, it doesn't of itself displace the presumption that's expressed in rule 35.

GLAZEBROOK J:

But rule 35 in the dispensations by the registrar, the registrar, apart from, obviously, frivolous cases is not going to be looking at the merits of the appeal, or shouldn't be, and in many cases wouldn't be capable of doing so as certainly if not legally qualified. That's a judicial act, I would have thought, rather than an administrative one in any event.

MS GWYN:

I think that's correct, Your Honour. The decisions of the registrar that are in issue here do briefly refer to the proposed appeals and the nature of the proposed appeals, so certainly it appears it was a factor that the registrar had regard to, but clearly it's at the stage when the Court of Appeal Judge was reviewing those decisions that it becomes a more crucial question.

ELIAS CJ:

Why should that be so if it is a review? One would have thought that the criteria would be the same, the approach would be the same. It's just a second look, but really I think you're acknowledging that the considerations that are going to weigh with the Judge are going to be different from that applied by the registrar.

MS GWYN:

I think that the principles to be applied are well established. They're not set out in the rule but they are well established by the case law. The decisions of the two registrars in this case do –

ELIAS CJ:

Do you mean the case law since adoption of the rule or are you talking more generally?

MS GWYN:
Case law in relation to the rule, Your Honour.

WILLIAM YOUNG J:
I take it the rule goes back to the rules that were in the third schedule to the Judicature Act when it enacted and presumably goes back to the Supreme Court Act 1882.

MS GWYN:
Yes. The rules are very longstanding in one form or another, Your Honour.

ELIAS CJ:
In what form, though?

MS GWYN:
We originally had in our submissions – I think the presumptive form, Your Honour, and they have been carried over and I think we did originally have in our submissions the history of the rules but that may have fallen out. Paragraph 18, a rule that presumptively requires security for costs in the Court of Appeal but also provides the ability for it to be dispensed with has been in existence in New Zealand since 1882. It does set out that history.

So although all of the cases – I think all of the cases refer to – post-dated the 2005 Rules.

ELIAS CJ:
I wondered whether there had been anything further.

MS GWYN:
The point I was making is that that case law does set out the principles clearly and it's apparent from the decisions of the registrars here that they had regard to those principles. Now, I think Your Honour Justice Glazebrook that in a practical, pragmatic sense the registrar is going to be less able to delve into the merits of the proposed appeal than, perhaps, the reviewing Judge. But that does raise a question

which I will come back to in the context of Mr Butler's submissions, which is to what extent is it appropriate for either the registrar or the reviewing Judge to go beyond the face of the proposed appeal. I mean, unless there's patent error is it the role of the reviewing Judge to delve into the proposed appeal, seek for other possible grounds of appeal, and that is something that I'll come back to in response to Mr Butler.

ARNOLD J:

It may be that originally registrars were legally qualified so it was assumed that they had the ability to make some assessment of merit, but it's certainly no longer the case.

MS GWYN:

No. I just wanted to find one of the passages. For example, in Justice White's judgment, and I think that's in the bundle of pleadings and decisions that Your Honours should have received either late yesterday or this morning at tab 1, at paragraph 5 of his judgment. His Honour refers to the registrar's decision. The registrar noted the only ground for the application previously waived grants had been made. Then on the next page, the registrar then noted the requirement that it must be in the interests of justice for security to be waived, therefore there must be exceptional circumstances to justify waiver. The registrar noted she could not comment on the merits.

ELIAS CJ:

Yes. The exceptional circumstances, is there case law before the adoption of the latest Rules which adopts that approach? I suppose if there's a presumption any waiver is an exception to the presumption, but is there any case law that's dealt with it pre these Rules?

MS GWYN:

Not that's before the Court, Your Honour. We can investigate whether there is.

ELIAS CJ:

I was just interested. You don't happen to have one of the earlier manifestations of the Rules, preferably the earliest one, do you?

MS GWYN:

Not with me, Your Honour, but I can provide one to the Court.

ELIAS CJ:

I can get that.

GLAZEBROOK J:

It would be useful to have the reviewing process as well so if it was presumptive who was the application made to under the previous manifestations. It may be that it's just exactly the same.

MS GWYN:

Yes, we'll certainly provide those and provide them, Your Honour.

ELIAS CJ:

I would doubt that because, of course, the permanent Court wasn't around so –

GLAZEBROOK J:

No, it may well have been – I was imagining it may well have been the registrar.

MS GWYN:

The point at paragraph 5 of Justice White's judgment is really responding to Your Honour Justice Glazebrook. The registrar noted that she could not comment on the merits of the appeal but that the circumstances couldn't be considered exceptional. There's nothing in the appeal of public importance or significance so the registrar has turned her mind to the various tests that are set out in the case law.

McGRATH J:

This "no exceptional circumstances" proposition, it's not really what was said in *Fava*, is it? *Fava* just said that it was talking about what the outcome might be exceptional, but is there a general acceptance in the authorities to date that there have to be exceptional circumstances?

MS GWYN:

I think the point in *Fava*, Your Honour, was impecuniosity in itself isn't enough. The rules do allow for waiver, so you do have to have a policy that's not inflexible. You can't say that there'll never be a waiver. You have to make an assessment on the facts of each individual case and what it said in *Fava* was dispensing with security is likely to be exceptional.

McGRATH J:

That's really looking at the outcome, isn't it, rather than a comment on what the – it's not going to happen that often, if you like. That case is a proposition for a rule or a principle that there must be exceptional circumstances, I would have thought.

MS GWYN:

I think the way the Courts have approached it is that when you look at the tests that have developed, so looking at an assessment of the prospects of success of the appeal and whether it raises a question of public interest or more general importance, you apply those criteria then it will be an exceptional case, so maybe it is in the sense that it's been used in *Fava*, Sir, that the outcome will be an exceptional one. It'll be an exceptional case where all of those circumstances result in a waiver being granted.

ELIAS CJ:

Where are you taking us to, Ms Gwyn? What's the direction?

MS GWYN:

The point we were discussing, Your Honour, was just my submission that the two rationale that sit behind the rule apply. The presumptive rule applies, even in cases against the Crown and even in cases that involve human rights claims. Now I wanted to take Your Honours to the rules themselves.

ELIAS CJ:

I don't think it's really covered in your submissions. I can't think what the answer is, why the exception for legally-aided claimants, is it because there is a filter in that mechanism?

WILLIAM YOUNG J:

Costs can't be awarded against them unless in exceptional circumstances.

ELIAS CJ:

I know that, but what's the rationale, what's the policy behind the exception?

MS GWYN:

I think it is as His Honour Justice Young put it that costs, where the appellant's legally aided costs can't be awarded.

WILLIAM YOUNG J:
Because costs won't be awarded, there's no need to require security for them.

ELIAS CJ:
But what is the policy behind that? It is simply to save the public purse or is it because that process is seen as providing the sort of benefit that is secured by security for costs in other cases?

MS GWYN:
I'm not sure of the answer to that, Your Honour. I suspect it could be both in that the application for legal aid itself involves an assessment and a filter.

ELIAS CJ:
It's just that if it isn't, and if it wasn't thought of as that, it's another potential discrimination that if you –

McGRATH J:
But is there not a provision in the legal aid provision for the legal aid fund to have to pay costs at the end of the day if in terms of the sum judgment that is appropriate. In other words, if a legal aid for an appeal is permitted is lost then the Court can order that legal aid pay costs, so there is a – if you like within the structure it's built in.

ELIAS CJ:
Yes, that's probably the answer to that.

MS GWYN:
If I can take the Court to rule 35, and it's in the Crown's bundle of authorities at tab 1, and as we've already discussed, the wording of the rule is presumptive, so 35.1, "This rule applies to every appeal," and then it sets out certain exceptions. So a presumptive requirement that security will be paid, but then the effect of section 35(1)(a) combined with rule 36 is that a legally-aided appellant doesn't have to pay security and then 35(1)(b), an appeal where the Court restricts security for costs under rule 27, and that's where the Court has imposed conditions –

ELIAS CJ:
On leave.

MS GWYN:
Yes, Your Honour, conditions about security when granting leave.

Then if an appellant isn't legally aided but is impecunious, he or she has the ability to seek a reduction or a waiver of security under rule 35(6) over the page. As we've discussed, that decision is initially made, or the application is made to the registrar of the Court of Appeal and is reviewable by a single Judge of –

ELIAS CJ:
You say if the person is impecunious, but impecuniosity doesn't – isn't specifically referred to in the rule.

MS GWYN:
No, it's not, Your Honour, no, and you're right, I've put a gloss on it because in this case we're dealing with impecuniosity but indeed any appellant could seek a reduction or waiver under rule 35(6).

ELIAS CJ:
Or increase.

MS GWYN:
Yes, a respondent could seek an increase or a deferral by which it must be paid. That decision, obviously, is made by the registrar but it's reviewable by a Judge of the Court of Appeal. There are two relevant provisions. The first is section 61A of the Judicature Act. I'm sorry, Your Honours, this isn't in the bundle. Section 61A(3), "Any Judge of the Court of Appeal may review a decision of the registrar made within the civil jurisdiction of the Court under a power conferred on the registrar by any rule of Court and may modify – may confirm, modify or revoke that decision as he thinks fit." Then in the rules themselves, rule 7(2), "A Judge may, on application, review any decision of the registrar under these rules."

Those particular provisions were scrutinised by this Court in another of the *Siemer* cases, *Siemer v Stiassny* [2013] NZSC 11, where the Court looked at that power for

a single Judge to review the decision and noted that there isn't a power for the Court as a whole to review decisions made by that single Judge.

ELIAS CJ:

I should indicate that – and it is flagged in the appellant's submissions – that I would be assisted by argument on that because that's a leave decision. The Court hasn't had an opportunity to consider whether to adhere to that.

MS GWYN:

I'll come back to that point, then, Your Honour. If I can address Your Honour's specific question on that after the lunch adjournment.

ELIAS CJ:

Yes. My specific question is whether section 61A(1) doesn't apply to a review by a single Judge under section 61A(3), because there's something rather odd about an appeal to this Court from the decision of a single Judge in the Court of Appeal and whether it's a determination of the Court, I suppose, is the question I'm raising.

MS GWYN:

Whether the determination of the single Judge?

ELIAS CJ:

Well, there are two points. One is whether the appeal is properly constituted but more importantly – and really hanging off it – whether section 61A(1) isn't apt to cover a decision of a single Judge so that the correct procedure should have been to seek review by the Court.

MS GWYN:

By the Court of Appeal?

ELIAS CJ:

Yes.

GLAZEBROOK J:

There have been earlier decisions of the Court saying there is jurisdiction, as I understand it.

ELIAS CJ:

Yes, all leave decisions, no full Court decision.

GLAZEBROOK J:

I understand that. I was just saying that there have been decisions on that, too, which I don't think are in the bundle.

ELIAS CJ:

Yes, the principal decision, I think, is another *Siemer* one.

GLAZEBROOK J:

I can't remember. I was just saying that I don't think those decisions are in the bundle that say that, because one assumes that if there is a right of review by three Judges of the Court of Appeal then there is no right on the *Harrison v Auckland District Health Board* [2013] NZSC 98 principles for an appeal here before that decision of three Judges.

MS GWYN:

That must be the Siemer v Heron [2012] NZSC 56 case, Your Honour.

ELIAS CJ:

I think it is, yes.

GLAZEBROOK J:

I can't immediately recall.

ELIAS CJ:

I think it is, yes.

MS GWYN:

Perhaps if I could come back to that. It might be an appropriate time, though.

ELIAS CJ:

How much longer do you want to be, Ms Gwyn? We're not making wonderful progress.

MS GWYN:

Most of what I wanted to say, Your Honour, is covered in the written submissions so perhaps 45 minutes.

ELIAS CJ:
Yes, that's fine, thank you. We'll take the adjournment now.

COURT ADJOURNS 12.59 PM

COURT RESUMES: 2.19 PM

ELIAS CJ:
Thank you Mr Reekie.

MR REEKIE:
Thank you Your Honour.

MS GWYN:
Your Honour, if I could start by handing up or asking Madam Registrar if we could hand up copies of the documents that we've obtained from the Court of Appeal in relation to the applications –

ELIAS CJ:
Yes, thank you.

MS GWYN:
– for fee waiver. For each of the appeals there, there are a small bundle of documents that cover both the application for fee waiver and then the application for dispensation from the obligation to pay security. And as I understand it, what Mr Reekie is relying on in relation to the application for waiver of security for costs is the initial document he filed which is the, seeking a waiver of fees in which he's stated that he can't afford to pay the fees and so he relies on that application for waiver of fees effectively for both applications.

So it doesn't – although in both Justice White and Justice Miller were prepared to assume impecuniosity, they both make the point that there is no evidence directed specifically to the point of whether or not Mr Reekie is impecunious. The application for fee waiver doesn't actually containing any detailed information about...

ELIAS CJ:

The application form doesn't seem to require it though, does it?

MS GWYN:

No. No, so there isn't – on the form there certainly isn't –on the application for waiver of fees form there isn't a space to say, “Here are my means,” or, or nor not.

GLAZEBROOK J:

Well it says, “Use this form if you have previously been granted a waiver, if you receive a benefit, legal aid...”

ELIAS CJ:

Sorry, where’s that on the...

GLAZEBROOK J:

That’s the next page.

ELIAS CJ:

I see. Previous waiver. “Occupation: prisoner.” So...

MS GWYN:

So...

ELIAS CJ:

Okay, thank you.

MS GWYN:

Those pages are there for completeness but I, I’m not sure that they assist much, Your Honour, in terms of showing concrete evidence before the Court as to impecuniosity, but as I’ve noted, both Justice White at paragraph 11 of his judgment and Justice Miller at 10 assume impecuniosity for the purposes of considering the application for waiver of security.

GLAZEBROOK J:

Is there another application form if you're applying for a waiver for the first time? Because one can assume that you wouldn't have to give financial information more than once.

MS GWYN:
For a waiver of fees.

GLAZEBROOK J:
And then one assumes that if you're on a benefit then you've already been assessed as not having means, although that's only means tested, not asset tested.

MS GWYN:
I don't know the answer to that question Your Honour. In the normal course the Crown isn't advised of an application for waiver of fees.

GLAZEBROOK J:
No. No, absolutely.

MS GWYN:
But we were able to obtain these documents from the registrar.

Before I come back to the jurisdictional question there were a couple of other matters that I undertook to follow up on. The first –

ELIAS CJ:
Thank you for getting those.

MS GWYN:
The first is Your Honour Chief Justice's request for cases under the previous rules relating to security, and we don't yet have those but we'll file them promptly Your Honour.

WILLIAM YOUNG J:
I had a look myself up until a point. I didn't quite get round to identifying – security was fixed by the registrar of the Court appealed from subject to review by a Judge of that Court. And there are cases on this up till at least 1994 on that basis, one involving *Robert Jones Investments Limited v Gardner (No 2)* (1993) 6 NZCLC

68,514. And the effect of the rule was that if security wasn't provided within 14 days or dispensed with within that time the appeal was abandoned, meaning practically that there could not be an appeal from the judgment of a Judge refusing to review the decision of the registrar because it would settle the requirement for another set of security. So that's as far as I got.

ELIAS CJ:

I did discover a judgment of Justice Salmon in which he indicated that total impecuniosity was an exceptional circumstance. But I left it behind in my chambers. Anyway.

MS GWYN:

I do want to deal briefly with that question which Justice McGrath raised. Before I do, the, one of the other questions positioned by the Court was what's the situation in other jurisdictions? Is there a presumptive requirement? And as I noted this morning, the, the particular – while security for costs in one form or another is a widespread mechanism the particular terms do vary from one jurisdiction to another. The presumptive requirement that we have in New Zealand parallels that was in place for the House of Lords until 2008 and under that regime the House of Lords indicated that other than by consent waiver of security would be granted only sparingly. And, like New Zealand, security wasn't required when the appellant was legally aided.

McGRATH J:

But that wasn't – that might've been for the House of Lords. It wasn't so for the England and Wales Court of Appeal, was it?

MS GWYN:

I don't know Your Honour.

McGRATH J:

Because my understanding there is that I think it was the Chief Justice said that security for costs is obtained only on application, and I understand it's very sparingly granted.

MS GWYN:

That is certainly now the position, Your Honour, for the Supreme Court and for the Court of Appeal, that it's only on application.

WILLIAM YOUNG J:
Well I think it was only on application at the time of the *Tolstoy* litigation.

McGRATH J:
Yes.

WILLIAM YOUNG J:
But at that time there was no permission to appeal process.

MS GWYN:
That's right.

ELIAS CJ:
No...

WILLIAM YOUNG J:
Permission to appeal process.

ELIAS CJ:
Oh yes. Yes, yes, no leave.

WILLIAM YOUNG J:
So now in the English Court of Appeal there won't be an appeal unless it's been the subject of permission from a Judge or on review by two Judges.

MS GWYN:
Yes. That, that's absolutely right, Your Honour, and in that sense there is a filter without the need for the security of costs provision providing that kind of filter.

The Australian jurisdictions, so far as we can perceive, provide for security on application by a respondent. Some permit security to be required only in special circumstances; others give a general discretion.

And in Canada the jurisdictions appear to be similarly varied, so there isn't one particular rule.

GLAZEBROOK J:

It is rather a blunt instrument, isn't it? Obviously costs regimes give a discipline to people not to pursue useless appeals or appeals that may but not particularly meritorious. But it is a very rough filter because there are lots of people who still pursue unmeritorious appeals because they can afford to do and afford to pay costs if they fail.

MS GWYN:

That's so, Your Honour, but what we would say is that exactly that, that there is still a sanction that if they pursue an unmeritorious appeal and are unsuccessful they are subject to an award of costs. Costs can be, costs in the event can be increased –

WILLIAM YOUNG J:

And of course at least the respondent gets some costs back.

MS GWYN:

Yes. Yes. Having had to put up security, they've got the means to put up security but having had to do so they, they forfeit that security. There is an ability under the rule to increase security so it gives an ability not just to, to reduce or waive it but an, an ability to, for a respondent to apply to, for an increase in the normal amount of security. And likewise costs in the event can be increased accordingly if there was, at the end of it, plainly no merit in the appeal. So there are sanctions. It's not without cost to those who can afford to put up security. And for those who can't, it's not an entirely blunt instrument in that there are, there is the ability to seek legal aid and if it's granted then, then security's not required, and then there is this ability that we're looking at under rule 35(6) to seek exercise of the, the discretion to waive, and that does involve, as I raised this morning, a more nuanced consideration of both the merits of a particular appeal but also whether it raises questions of public interest or importance.

ELIAS CJ:

You're going to come on though to explain why it includes the merits of a particular appeal? It's just not self-evident, to me at any rate.

MS GWYN:

I, I think, Your Honour, it does go back to that second purpose of the security for costs. So one is to ensure that the –

ELIAS CJ:

There's some money.

MS GWYN:

– the respondent has, has some money at the end of the day if the appellant's not successful. The second is, broadly speaking, in terms of facilitating the administration of justice, to, to put some discipline on the bringing of appeals and the scrutiny of the merits to, to the extent of saying, "Is there an arguable case?" which is the formulation that's used in most of these cases. That scrutiny, is there an arguable case and are there questions that go beyond the particular facts and the particular merits of this case that, or of some public importance?

GLAZEBROOK J:

Well is that a cumulative requirement or a

MS GWYN:

I –

GLAZEBROOK J:

– disjunctive requirement?

MS GWYN:

I think it's a – the way the cases apply it, Your Honour, it's a, it's a disjunctive requirement and it, it does come down to I think it's all right in this case to talk about balancing. It does come down to that, that balancing by the registrar and then the Court of Appeal Judge of all of those factors. And that does lead me on to –

McGRATH J:

Could I just – you're referring this morning to that second factor as discipline and the conduct of the appeal, but just now you've been emphasising more a discipline in the bringing of the appeal. It seems to me that the one you put it this afternoon is the right way, isn't it? It doesn't really conduct much discipline in how the appeal, how an appellant will conduct the appeal?

MS GWYN:

You're right, Your Honour, although there is to a degree an overlap perhaps, and here we would say that the 60+ pages notice of appeal signals that there will not be a discipline in the conduct of the appeal. So the way the appeal is framed – I think, I think is an overlap between those two things. I'm perhaps not quite meeting Your, Your Honour's question.

McGRATH J:

So is the – but you're not suggesting, are you, the form in which the appeal is raised as opposed to the substance of it is a relevant factor for a lay litigant?

MS GWYN:

I think –

McGRATH J:

So for a litigant representing himself.

MS GWYN:

I think certainly in this case the form of the appeal which seeks to challenge something like 180 separate findings by His Honour Justice Wylie, that the form of the – in that sense the form of the appeal is relevant because it does signal that this is going to be an unselective, all-encompassing appeal relating to every single factual finding virtually that, that His Honour made.

I just wanted to quickly turn to a question that Your Honour Justice McGrath made this morning about the meaning of "exceptional". And it, it came up in the *Fava* case, which is at tab 11 of the respondent's bundle at paragraph 9 and talks about, "Impecuniosity does not necessarily justify waiving security. Equally, the rules do allow for waiver, so it would not be right if there was an effective policy that a waiver will never be granted. An assessment must be made in the circumstances of each individual case. That said, dispensing with security is likely to be exceptional."

And Your Honour's question, as I understood it, was, "Well that doesn't just mean that it's, that it will be the exceptional case in which security is dispensed with. It must have some substantive meaning." And there are a couple of other cases where

the phrase is repeated although it does tend to get a little circular because most of them refer back to that quote from *Fava*.

But, for example, *Clarke v Watts* [2010] NZCA 221, (2010) 20 PRNZ 474 at tab 8 does assist somewhat. And this is paragraph 10 of *Clarke v Watts*, the third line, oh, second line, ”there will need to be some exceptional circumstance to justify waiver,” and the footnote is to *Fava* and so we will – and, and then I, I read the following sentences as in a sense explaining what is meant by “exceptional circumstance”. “The circumstances of the appeal are relevant, in the sense that the appellant must honestly intend to pursue it and it must be arguable: respondents should not face the threat of hopeless appeals without provision for security. The novelty or importance of the issues raised in the appeal will be particularly significant, as will the question whether there is any public interest in having them determined.” So in a sense that’s explanatory, I think, of what might ultimately result in an exceptional circumstance.

And although it’s not in front of you, but it is referred to in the footnotes, there’s another case, *Jong v Yang* [2010] NZCA 343 where a similar phrase is used in relation to exception.

And then I wanted to come back to the, I guess the, the jurisdictional question or the question that Your Honour the Chief Justice framed. And perhaps just to summarise my submission on, on this point, the first point is that, as we’ve seen, it’s acknowledged internationally that the right of access to the Courts, particularly at appellate level, isn't unlimited. That some limits on that right of access are appropriate. And that was the *Ashingdon* and the *Tolstoy* case in particular and that general comment of the Human Rights Committee.

And against that background we have section 66 of the Judicature Act which, as, as was discussed this morning, confers a right of appeal, not unlimited but a very broad right of appeal. But it is, in my submission, significantly subject, that right of appeal is subject to the provisions of the Act and to such rules and orders for regulating the terms and conditions on which such appeals should be allowed as may be made pursuant to this Act. And of course it’s subject to any other statutory provisions that, that say no, no right of appeal. So section 66, the, the appeal gateway, if you like, in itself and on its face allows for, for that right of appeal to be subject to the provisions of the Act and to rules and orders.

And I took Your Honours this morning to section 51C of the Judicature Act, and that's the, the power to make rules. So there's, there's clearly a power within the Act for – so section 51C(1), "for the purposes of facilitating the expeditious, inexpensive, and just dispatch of the business of the court" "to time make rules regulating the practice and procedure of the High Court and of the Court of Appeal and of the Supreme Court". So there's clearly a statutory power to make the rules. And then the relevant rules here are 435 itself but also rule 7, which is the rule that provides in general terms for a single Court of Appeal Judge to review the decision of a registrar. And that's rule 7(2).

And then that, that takes us to what I think Your Honour the Chief Justice's question is addressed at, addressed to, which is section 61A and how that applies in this case. And I apologise in advance if, if we had misapprehended the nature of the, the question on appeal, so it may be that the Court, if we're able, that we, we can come back with further assistance on, on this particular point. But it, it seems to me in my, my respectful submission –

ELIAS CJ:
I don't think you did. It's just that it is a matter that's raised by the appellant and it is a matter that vexes us all the time and it does seem to me that it may be a matter on – that the Court should provide some guidance on or at least an authoritative opinion.

MS GWYN:
Yes, I appreciate that Your Honour, and, and I, I do apologise because I haven't, I had relied on the decision in this Court in looking at this issue in the *Siemer* case but as, as Your Honour rightly pointed out, that was only on a, on a leave decision, so the Court presumably didn't have the benefit of full argument on that and I, I had taken that as my starting point. But it, it does appear to me on the face of the section that section 61A(1), sorry, section 61A(3) on its face clearly confers a power on, on a single Judge of the Court of Appeal to review a decision of the registrar. And then the power in section 61A(2) which enables the Court of Appeal as a whole to discharge or vary a decision, applies on its face only to those decisions made under section 61A(1). And...

ELIAS CJ:

I understand that, but my question is really why a decision made under 61A(3) is not also an incidental order able to be reviewed under section 61A(2). And I wondered if there's any authority other than the leave judgments –

MS GWYN:
Yes. We haven't –

ELIAS CJ:
– for that.

MS GWYN:
– haven't found any authority but we'll, we'll undertake –

ELIAS CJ:
When was this introduced? '77 was it?

MS GWYN:
1978. And –

GLAZEBROOK J:
I think there is authority at Court of Appeal level but – it's certainly the approach the Court of Appeal take.

ELIAS CJ:
I know, but even those authorities seem to me to be –

GLAZEBROOK J:
I'm not sure.

ELIAS CJ:
– authorities of single Judges. I'm not sure that I've seen a full Court decision on it.

GLAZEBROOK J:
I'm not sure either. But...

MS GWYN:

And, and in, in answer to your particular question, Your Honour, I think if you were reading section 61A(1) alone you might be able to say that this situation comes within it, but it seems to me the difficulty is that subsection (3) is quite specific, so it specifically marks out –

ELIAS CJ:
But that's the power of a single Judge –

MS GWYN:
Judge.

ELIAS CJ:
– to exercise jurisdiction. It has to be a power for a single Judge to exercise some jurisdiction. The question is whether that is, however, an – properly described as an incidental order or an incidental direction. Maybe it isn't. But it would be nice to think that there was some – because it is, as I said before, so odd to have an appeal from a single Judge of, of the Court of Appeal to this Court.

MS GWYN:
Yes. Yes. I, I take the general point, Your Honour, and, and as I say, I, I think on the strict wording of 61A(1) it might come within that if it weren't for the fact that individual decisions of a, decisions of an individual Judge are kind of marked out under subsection (3). But I'm, I'm certainly happy, Your Honour, to, to do any further research on that point and see if we can find some further authority that –

ELIAS CJ:
Well it may not be necessary but –

MS GWYN:
– that might assist.

ELIAS CJ:
– that's fine.

MS GWYN:
And Your Honour Justice Glazebrook referred before the luncheon adjournment to *Harrison* but as, as apprehended, that doesn't assist here because –

GLAZEBROOK J:
No, no, no. That –

MS GWYN:
– the question there was an attempt to review separately the registrar's decision as well as the Court of Appeal Judges'.

GLAZEBROOK J:
Yes, I think the point, though, was that if in fact it went to three Judges there wouldn't be the intermediate right of appeal to this, or right to apply to, for leave to appeal to this Court from the single Judge. They would – and that would be the principle that said that you waited until you had a final decision of the particular Court before you had a right to apply for leave here.

MS GWYN:
And, and, but on, on the facts of this case, at least as the rule operates, we have the final – well, I guess that's the question.

GLAZEBROOK J:
Well that's the point, yes.

MS GWYN:
There's a question, "Do we have the final decision of the Court of Appeal?" Yes. And so I'm not sure that, that at least for now I can assist further on that question, Your Honour, but we, we will look further and, and if we find anything useful we'll submit it to the Court.

I'm very conscious of time and the fact that I think and hope the written submissions set out fully the case that the respondents advance. The...

ELIAS CJ:
What test do you or standard do you say has to be set in deciding whether to waive security for costs? Because I see in some of the – this case, I think it was that there was little prospect of success whereas in some of the cases you cited, I'm thinking of that Ontario Court of Appeal one, there's a test of proceedings being frivolous and vexatious.

WILLIAM YOUNG J:
That was in the rule.

ELIAS CJ:
That was in the rule was it?

MS GWYN:
Yes. Yes. And, and we certainly – that's not part of our submission here.

ELIAS CJ:
So what do you say it should be here?

MS GWYN:
The rule itself, as, as Your Honour will have seen, doesn't specify. The cases broadly talk about – these are in the submissions in reply to the amicus footnote 44, so there's a broadly similar formulation of a test. The case, the appeal must be arguable, there must be a realistic prospect of success.

ELIAS CJ:
So "arguable" would be –

MS GWYN:
Yes. "Respectable chance of success". "Must be arguable". So there isn't one formulation but I, I think in essence –

GLAZEBROOK J:
See I have a slight difficult in why we have "general or public importance" in there. Does it mean if you don't have an arguable case if it's general or public importance you can still bring the appeal? Or does it mean that if it's general and public importance it doesn't have to be quite as arguable as others? I mean what is – why do we have "general and public importance" in there if we've got a threshold of arguability?

MS GWYN:
Mmm.

GLAZEBROOK J:

I mean I can understand the thing that says if it's inarguable you shouldn't have it and that maybe – but why would you have general or public importance on top of that? Because surely you, however generally or publicly important if it's inarguable what's the point?

MS GWYN:

I think some of the cases indicate, Your Honour, that while on the particular facts of the case it might not be – the prospects of success –

GLAZEBROOK J:

Oh, all right. So –

MS GWYN:

– might not be high –

GLAZEBROOK J:

– it's a principle of –

MS GWYN:

There, there may –

GLAZEBROOK J:

The principle may still be...

MS GWYN:

Yes, there may still be an important principle that ought to be considered by the appellate Court. So the, the balance between those two factors may well shift from one case to another.

GLAZEBROOK J:

Right.

ELIAS CJ:

In, in your subheading you have it as, "Little prospect of success". I'm just trying to get a handle on it. But in support of those, that argument at para 47 to 49 you rely on *Rae v International Insurance Brokers* [1998] 3 NZLR 190 (CA) and you say that,

make the point that there are no specific errors of law and that it's not an opportunity to have a retrial, which of course I accept. But it is a general appeal on fact and law and, although I haven't checked it, I think that *Rae* was not approved by this Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. And I wonder whether you've stated that a little bit too narrowly, the scope of the appeal. You said, "The notice of appeal doesn't reach the threshold necessary." I'm just feeling for what the threshold is.

MS GWYN:

I'll just see if I can find that decision Ma'am. Unfortunately it isn't in, in either bundle.

ELIAS CJ:

Well you, you accept that it's a general appeal on fact and law. And that if the appellant can show an arguable case, even if it's one of a finding based on credibility, that it's not fatal that it's not a question of law that's being advanced.

WILLIAM YOUNG J:

The most you can say is that if there's a finding of credibility and nothing tangible is pointed to in the notice of appeal suggesting it may be wrong then it's an appeal that has doubtful prospects of success.

MS GWYN:

Yes, Your Honour, and, and there's, there's more of a flavour of that in, in the submissions, but that's exactly the point: that when one looks at the detailed notice of appeal it does seek to challenge –

ELIAS CJ:

Of course, but the notice of appeal doesn't have to be detailed. It can simply be an allegation that the decision is wrong.

MS GWYN:

It can, Your Honour, but, but the fact of its detail indicates that what Mr Reekie is seeking to challenge are virtually every adverse finding of fact against him, the findings of credibility, and the notice of appeal itself doesn't, doesn't point to any proper basis on which those findings are, are questions. So in a sense it lists every finding against him and says, "These are wrong."

ELIAS CJ:

Well might point is that you wouldn't necessarily expect that in a notice of appeal.

ARNOLD J:

Well, I think –

ELIAS CJ:

You'd expect to hear argument on it.

ARNOLD J:

I think the, from memory, the Court of Appeal rules do provide that you have to provide a memorandum of grounds of appeal that goes beyond simply, "The decision of the Court below is wrong," and if you don't do that there'll be a direction that you do it.

ELIAS CJ:

Right.

MS GWYN:

Yes. Your Honour's correct and I, if I can just... I think it's rule 15. Rule 17 of the Court of Appeal Rules, "Matters to be stated in application for leave". Must state "the specific grounds of the appeal; and (b) why the Court should give leave; and (c) the judgment that the applicant seeks for the appeal". That, that's in an application for leave.

ELIAS CJ:

That's...

MS GWYN:

And then –

GLAZEBROOK J:

There has been a direction in this case, I think, to try and fix up the grounds of appeal. And I think not, not particularly he did but the appeal has been allowed to carry on, hasn't it?

MS GWYN:

Yes, Your Honour, the initial application to appeal I think was three lines, so it simply said wrong in fact and wrong in law, and the current version is perhaps at the other extreme.

ELIAS CJ:
Well rule 17 is about –

MS GWYN:
That's about leave, Your Honour.

ELIAS CJ:
– applications for leave.

MS GWYN:
Yes.

ELIAS CJ:
So there must be a further rule.

MS GWYN:
Yes. There is. I'll just check. I can't put my hand on it –

ELIAS CJ:
Don't worry.

MS GWYN:
– just at the moment Your Honour but I'll, I'll come back to it.

ELIAS CJ:
That's fine.

MS GWYN:
When one looks at the judgments of Justice White and Justice Miller, and, and I have somewhat lumped the two together, Your Honour, because I think the same principles apply to, to both questions, that both, both the judgments demonstrate a careful application of rule 35 and the principles that have been developed in the, in the cases referred to. That there's, there's nothing other than a proper application of

the rule that, that one can discern from those judgments. And White, His Honour Justice White, for example, said at paragraph 12, “The appeal doesn't raise issues of public importance nor contain any matter of significant legal principle, justice or public interest.” Also at 12, “involve matters of historic interest only concerning long-repealed legislation and conditions in a unit of Auckland Prison that closed in 2006”, and 13, “had little prospect of success, proceeding on the sole ground that the evidential findings of Justice Wylie were unreasonable but disclosing nothing reaching the threshold for appellate review.”

ELIAS CJ:
What does that mean?

MS GWYN:
The –

ELIAS CJ:
“The threshold for appellate review.” You mean does, is it a reference to the ultimate – I suppose it must be.

MS GWYN:
I think it is Your Honour. What he says at 13, “Nothing raised in Mr Reekie’s notice or subsequent submissions reaches the threshold necessary to throw into question the trial Judge’s assessment of the evidence.” And then similarly in...

ELIAS CJ:
It’s probably enough to simply say nothing throws into question the trial Judge’s assessment of the evidence, I suppose. I was just not sure what was meant by “the threshold”.

MS GWYN:
The word “the threshold”. Yes. Yes, I take Your Honour’s point. But, but I think if you, if you take those words out as Your Honour sees it it still makes sense.

And similarly His Honour Justice Miller’s decision in the second case, His Honour at – discusses the relevant factors, discusses the registrar’s decision. As I’ve already noted, at 10 he says, “No evidence of financial hardship but I proceed on the basis that he is impecunious. That’s an important consideration but it’s not enough in itself

to require a waiver." At 11 specifically addresses Mr Reekie's submission that his circumstances are exceptional because he's a long-serving prisoner subject to preventive detention and self-represented, and His Honour Justice Miller says, "I do not agree that these matters justify a waiver in the interests of justice." And then 12, "might but otherwise if the appeal raised any issue of general public importance that merit examination. Does not." And then at 14, "Nor does the appeal appear to have any substantive merit. The notice of appeal complains about almost every aspect of the High Court judgment. The decision is under review but without identifying any strong arguable grounds. The theme is that the High Court judgment was in every respect unreasonable."

So my submission is that in both cases the Judges applied the rule in a considered and proper manner having regard to the words of the rule itself and the principles that have developed under it and much of the written submissions detail those issues. And, and what we conclude in the submissions is that neither Judge can have been found to have acted on a wrong principle or taken into account some irrelevant matter or failed to take into account a relevant matter and nor are their decisions plainly wrong.

Now, I'm not sure whether Your Honours want me at this point to address the matters that are raised in writing in the reply submissions or whether I should ...

ELIAS CJ:
Yes, I think you should, if that's convenient.

MS GWYN:
Yes, certainly, Your Honour. These submissions dated 25 November address Mr Butler's submissions as Amicus and first respond to his two broad questions about whether Justice White adequately considered the nature of the prisoner/Crown relationship and the appellant's status as a self-represented litigant and on that second point, as I understand Mr Butler's submission, that requires some greater degree of leniency by the Court, or in this case the Court of Appeal Judge, when scrutinising the notice of appeal and evaluating the prospects of appeal. As we say in the written submissions, without a doubt there is a duty of assistance to unrepresented litigants and, of course, there's much more scope for that assistance as first instance, but there is a kind of general question about what does that duty require as a matter of detail and does it require more than was done by the two

Judges in the Court of Appeal in this case, which is to look at the notice of appeal and here we have a very detailed notice of appeal, to look at that and reach a view as to whether it was an arguable appeal.

GLAZEBROOK J:

So you suggest there's no requirement to read the judgment below and see on a generalised basis whether there might be a legal point that would perhaps have not been something that would be easy for an unrepresented litigant to pick up. If it's not in the notice of appeal, you just leave that clearly wrong decision of the Court below, or clearly arguably wrong decision.

MS GWYN:

Our submission, Your Honour, is that that duty really extends only to – the duty in terms of points of appeal that aren't articulated extends really only to patent errors, that it is not for the Court of Appeal Judge undertaking this exercise to, for example –

WILLIAM YOUNG J:

Why wouldn't the Judge just read the judgment? I would think the Judges would always read the judgment and so if there's an arguable point that sort of sticks out, then the reviewing Judge is unlikely to say that the appeal doesn't have substantial prospects of success.

MS GWYN:

Absolutely, Your Honour, and although I'm not sure if it's explicitly stated, I think it's implicit in both Justice White and Justice Miller's judgments that they did read the judgment below and one would assume that they did, so I'm not suggesting that the duty doesn't extend to reading the judgment below. It's more, does it extend to the kind of argument that Mr Butler has made, which is around, for example, what does the Court of Appeal decision in *Vogel v Attorney-General* [2012] NZHC 269 have any bearing on what might have been argued here. So the submission is advanced at a general level of principle.

GLAZEBROOK J:

That was the decision after, so it's unlikely that Justice Miller and Justice White would take them into account.

MS GWYN:

Yes. But assuming that if, for example, that decision had been issued before Justice White considered it. So it's addressed at a matter of principle but then on the written submissions we address it on the questions of fact anyway and say that all of the particular issues that are raised by Mr Butler as possible points of appeal not articulated by Mr Reekie can be addressed when one looks at the judgment. In fact, Justice Wyle did have careful regard to each of those questions.

ELIAS CJ:

Do we have the appellant's notice of appeal, the 60 page document?

MS GWYN:

Yes, you do, Your Honour. It's in the respondent's bundle of authorities. We put it in there at tabs 25 and 26. Tab 25 is the amended notice of partial appeal against Justice Wylie's judgment and 26 against Justice Hansen's judgment. So the written submissions address those two general points raised by the Amicus, and then address specifically the three further potential points that Mr Butler has identified as possibly arising on appeal, and I should say before it escapes me that as I understand Mr Butler's submissions he agrees that Justice White correctly assessed the merits of Mr Reekie's appeal, so he's saying correctly assessed the merits but I've had a further look at this and there are three things that he might potentially argue, and those are whether the Judge was correct to find that a declaration of breach under section 23(5) of the Bill of Rights was a sufficient remedy, whether he was correct to find that Mr Reekie wasn't falsely imprisoned, and the question relating to his placement in the isolation cell, whether that was correctly decided in light of the decision of the Court of Appeal in *Vogel*. I'm not sure, Your Honour, whether you want or need me to work through those submissions that covered, I think, fully in those reply submissions but I'm happy to address them if you think that's useful.

ELIAS CJ:

Your reply submissions?

MS GWYN:

Yes, Your Honour. These are the submissions of 25 November.

ELIAS CJ:

They have been read, Ms Gwyn, so it's really just whatever you want to emphasise in them.

MS GWYN:
In that case, I will briefly address them. First in relation to – they're dated 25 November, Your Honour. These submissions address Mr Butler's submissions.

Just at paragraph 14, so the first of what Mr Butler identifies as an arguable point, whether a declaration was sufficient, and we note there that there were four matters in which Justice Wylie found there was a breach of section 23(5) and made a declaration and he, in doing so, noted a lack of complaint in Mr Reekie's own strenuous insistence on remaining in the high-care unit and having looked at those issues he then applied the decision of this Court in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 ZLR 429 and concluded that a declaration was a sufficient remedy. He went on to look at section 13 of the Prisoners and Victims' Claims Act, which requires reasonable use of available complaints mechanisms as a pre-condition but, in fact, he, his, Wylie's decision not to award compensation as a remedy didn't turn on the application of the Prisoners and Victims' Claims Act. He'd already said, "Applying the principles of tone or I think a declaration is sufficient."

And on the factual issue, in fact that question about the use of complaints mechanisms was addressed by Justice Wylie at, and this is footnote 22 at paragraphs 286 and 287 of his judgment, he does specifically address that question about whether Mr Reekie had made use of the complaint mechanisms. It says, "It was clear that he was very familiar with the prison's internal complaints system, the Inspectorate and the Ombudsman. Indeed, it was clear he was a frequent complainant. Further, he had the opportunity to complain to the inspector in person when the inspector visited the high care unit in August 2002 and to the Ombudsman in person when he saw the Ombudsman in the unit on 5 June 2002.

And then the second arguable question that Mr Butler raises is in relation to Justice Wylie's finding on the false imprisonment allegation, and this is an allegation that Mr Reekie was falsely imprisoned between 9 September and 25 September 2002, and rather than go through the detail, if I could just refer the Court to those passages of the judgment that set out the relevant background.

First at paragraph 24, which notes that Judge Thorburn made an order that Mr Reekie be remanded in custody, and he made that order on 7 October 2002. Unfortunately no warrant of commitment on adjournment was then issued and then subsequent paragraphs deal with the sequence of events and when a warrant was, in fact, issued, And so the question turns on whether, in that intervening period when the oral order of – that Mr Reekie be remanded whether he was unlawfully detained. And the Judge deals with that in some detail in the judgment at paragraphs 35 through to 56 and applies –

ELIAS CJ:

I must say that I'm a little bit concerned about the approach that there wasn't any evidence on the point. One would have thought that custody has to be demons – the lawfulness of custody needs to be demonstrated. I'm just not – and there's little about, I suppose there's the *Fisher* case isn't there.

MS GWYN:

There's the *Fisher* case Your Honour and the mis – I'm not sure how you pronounce it, the *Misiu* case. And what Justice Wylie was relying on was that there was, and there was undoubtedly, an order by Judge Thorburn on 7 October that Mr Reekie be remanded in custody, so the question was – or his finding was that that was –

ELIAS CJ:

That was the one week remand was it.

WILLIAM YOUNG J:

Sorry no. This is the – the custody order made by Judge Thorburn was on 22 July.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

And that's the one where he's put in, rather cryptically, one week.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Now that could, of course, be a reference to remand for more than a week, which is, was effectively the point that one would expect some sort of notation to be made on a criminal record sheet. But there's nothing explicit as to whether consent was obtained.

MS GWYN:

No, although it's correct, Your Honour, that it's not explicit that consent was obtained, but Mr Reekie's counsel, Mr Roberts, was in Court on his behalf on that date and he wasn't called to give evidence before His Honour Justice Wylie, but His Honour found at 49 that there was a distinct possibility that Mr Roberts did consent to an extension on Mr Reekie's behalf.

WILLIAM YOUNG J:

There was a mention of this made in the submission. Was Mr Reekie challenged to call Mr Roberts?

MS GWYN:

No, Your Honour.

ELIAS CJ:

The other point that I'm left in some doubt about is although there are two first instance decisions saying that the oral order of the Court is enough to justify detention, is that not a point of law of some importance?

MS GWYN:

Yes, Your Honour. This is in the judgment at 45. That case went to the Court of Appeal and Justice Dobson's decision was upheld.

WILLIAM YOUNG J:

Orders for commitment are often – they're normally signed at the end of the day, aren't they?

MS GWYN:

Yes, and there was evidence that there's generally a bit of a gap whereas –

ELIAS CJ:

The paperwork generally catches up.

MS GWYN:

And here the paperwork did catch up. At 33 of the judgment the matter was referred to Judge Johnson on the 1st of October 2002. He issued a warrant of commitment for the period 22 July to 7 October. That warrant was faxed to Auckland Prison. What Justice Wylie concludes was that in the intervening period the oral order made by His Honour Judge Thorburn was valid and covered the position.

The third question that my friend Mr Butler raised as a possible appeal point was the containment in isolation and he submits that on the basis of the Court of Appeal decision in the *Vogel* case which, as Your Honours rightly pointed out, Justice White didn't have before him, whether that's an arguable question.

The relevant background in the judgment is – and I'll just point out to Your Honour the relevant passages – 96 to 104, which sets out the statutory framework, and at this stage we're talking about the Penal Institutions Act 1954 and the Penal Institutions Regulations 2000. Then 61 to 67, which are important background facts where the Judge sets out Mr Reekie's condition at this time and refers to the fact that he was assessed as being at risk of self-harm, this is at 61, placed in the high-care unit, and then at subsequent paragraphs talks about attempts by Mr Reekie to hang himself, the fact that he was, appeared depressed. I won't go through it all, but then at 67 culminating on 8 July with Mr Reekie being controlled and restrained from Selwyn in the high-care unit to the tie-down bed.

What the written reply submissions say is that this case on its facts and on the statutory framework is readily distinguishable from the case in *Vogel*. In the *Vogel* case, the Court found that section 23(5) of the Bill of Rights Act had been breached because there was an unlawful imposition of cell confinement as a punishment for offences of which he'd been found guilty beyond the statutory maximum period. In this case, it was a question of Mr Reekie being placed in the high-care unit for protective purposes, having been assessed at risk of self-harm, and that while there was an admitted failure to obtain further authorisation for his continued placement. There were regular re-assessments of his need to remain in the unit and when he was assessed as fit to move out after approximately five weeks, he wanted to remain and he refused to leave, threatening to self-harm or harm others. That's at 109 of the judgment. So it wasn't a similar situation where there was a statutory maximum for disciplinary purposes. Here it was a question where it was protective isolation and

there wasn't a statutory maximum, just a requirement to renew, which didn't happen. So given the technical nature of the statutory non-compliance and the absence of evidence that his placement on isolation had any adverse effect on him, in our submission it isn't arguable that Justice Wylie should have found a breach of section 23(5).

Then the final point that my friend Mr Butler raises is whether Justice White should have considered a reduction of security and our submission is it's plain here – and this is clarified in Mr Reekie's own submissions in reply – that only a waiver would, from his perspective, have enabled him to proceed with the appeal. He makes that point quite forcefully.

As I've said, Your Honour, I have kind of bundled up both cases together because in my submission the same issues and principles apply, so I haven't taken Your Honour specifically to the Justice Miller judgment but again, we say that His Honour correctly identified the relevant considerations. Mr Butler queries whether His Honour put the arguability of the appeal too highly, but as we've said in the written submissions, when you read the judgment as a whole I think it's plain that he did apply the right standard. Those are my submissions, Your Honour, but I'm happy to answer any further questions.

ELIAS CJ:
Thank you, Ms Gwyn. Yes, Mr Butler.

MR BUTLER:
I know it's becoming a pat phrase, Your Honour, but I am very conscious of time. What I thought I would do is, rather than rehearse in detail my written submissions which you have a copy of, I would provide you with a short road map to which I intend to speak. The idea of a road map from my perspective is to try and bring some shape or a little bit more order, perhaps, to some of the submissions that I've made acting as a Friend of the Court and also trying to place a bit of shape or order around the submissions you've received from Mr Reekie and from the Crown, so that's what I'm trying to do in relation to my road map.

I think it's helpful that we start with what this case is about.

ELIAS CJ:

Mr Reekie hasn't got this. Madame Registrar, can you send this through?

MR BUTLER:
It's a one page road map document.

My starting point, Your Honours, was what's this case about and what's this case not about, and in that regard I thought it was just helpful to go back to the leave question, the approved ground being whether a waiver of security for costs should have been granted. It seemed to me that looking at that approved ground, Your Honours, there's really three sub-questions that might legitimately arise in respect of that approved ground, the first one being should the Court revisit the principles to be applied in cases where waiver of security for costs is sought? If yes, how should those principles be re-stated? If no, we move to the second order question. That second order question would be, did each of the two Judges in the Court of Appeal below correctly identify the principles that are discernible from the case law and the factors that are relevant to the exercise of the discretion to waive security for costs. If Their Honours did not correctly identify the principles, what were the errors and how material were they? If, however, Their Honours did correctly state the principles at a high level and identify the relevant factors, it seemed to me there was third order of question that could be asked, which is did either Judge err in his application of those principles and/or those factors recognising, of course, that this Court's jurisdiction and its ability to set aside a decision is limited by the fact that this is an appeal against the exercise of discretion.

So they seem to me to be the three sub-questions that arose on the approved ground. The case appeared to me, assisting Your Honours, did not seem to raise was the legality of the rule 35 itself. So I don't read the question as putting an issue whether or not rule 35 is inter vires the rules. I think in that regard I'm not sure that an application of the sort before the Court would be the right form of procedure to challenge the vires of the rule in any event.

ELIAS CJ:
It would have to start with the judicial review in the High Court.

MR BUTLER:
I think that's probably right, Ma'am. Again, what I was thinking that might be a bit nit-picky of a way because obviously in one sense one might take the view, well, from

the point of view an appellant, Mr Reekie, having, dealing with this issue via a decision of a Judge which might well have gone his way and therefore the rule, the vires of the rule mightn't have mattered to Mr Reekie, to send him back to the High Court one might think is a bit harsh, but nonetheless that probably would be the correct procedure that would have to be followed so as to make sure the relevant parties were before the Court, probably, and to make sure that the legality of those rules was fairly and squarely before the Court. There would be other interested parties such as, I would imagine, the law society rules committee et cetera.

ELIAS CJ:
There's nothing much on the face of rule 35 to object to. It's totally open.

MR BUTLER:
That's what I was going to say, because I think, Your Honour, that's a very fair point. That's the second level point I was going to come to in terms of what the case is not about, because my take on the *Siemer* decision that's been referred to by my learned friends is what that *Siemer* decision and, indeed, the case of *Easton v Wellington City Council* [2010] NZSC 10 which is also in my learned friend's bundle at tab 10, which is about the High Court security for costs regime but applies a similar question was raised in respect of its compatibility with the Bill of Rights, I read both of those cases as acknowledging that in principle a security for costs regime either at a trial phase or, indeed, at an appellant phase is, in principle, acceptable. That does leave open the question of what content one gives to the relevant principles and factors that come into play and weightings that can legitimately come into play, so that's why I think it's probably not necessary for us to go into detail as to around the legality or otherwise of rule 35, putting to one side the fact that it's not even – I don't think – properly before us.

So that's the first point I wanted to make. As a subsidiary point, Your Honours, flows from that which is that if the rules themselves are not in dispute then I think we have to take the rules as they are and that means that the role allocation within the rules has to be accepted on its face and I think also the structure of the rules has to be taken at its face. The reason I think that's important, Your Honours, is that a structure of this rule, of rule 35, works from a starting assumption that security for costs will be paid in "every appeal" emphasised by His Honour Justice Hammond in the *Hills v Public Trust* [2010] NZSC 401, (2010) PRNZ 707 that's in the bundle which I can take you to shortly. There is, however, an ability to depart from that

starting assumption and I think the way in which the Judges in the Court of Appeal, and I think this Court when the issues come before it in one or two leave applications has been to say, well, we've got a – it's sensible to use a test of exceptional circumstances even though that's not the words of the rule because if your starting point is security for costs to be paid and the registrar has to be satisfied that circumstances warrant that the rule not be applied, then what one is looking for in all likelihood is something exceptional to take somebody outside the general rule. But how high the threshold of exceptionality is I think is a legitimate question that's properly before the Court today.

So I hope that's helpful and I wanted to say that right at the outset, Your Honours, because I did discern in submissions filed by Mr Reekie before the Court that quite a lot of his concern in the early part of his submissions was really about the unfairness of the security for costs regime as a regime. I just thought, again, trying to assist the Court, it was proper for me to just put out in that explicit way what is, I think, that ...

ELIAS CJ:
So the issue, you say, is its application?

MR BUTLER:
Its interpretation and application.

ELIAS CJ:
And whether that was unfair or wrong?

MR BUTLER:
Correct, or wrong, Your Honour.

In my submissions, if I can then move – so that was my introductory remarks, so the first major heading I had, should this Court revisit the principles to be applied, I've set out in some detail in my written submissions a summary of the relevant factors both as to purpose of the security for costs regime and then a great deal of detail the relevant – I've identified something like seven or eight relevant factors that the case law seems to throw up as being factors that should be taken into account in any particular case.

I would like to remark, and again, bearing in mind I'm merely an Amicus, I don't know whether I should formally be making submissions or not, Your Honour, but one of the thing I thought was very interesting in terms of the exchanges that occurred earlier today was the potential for unfairness of treatment as between different categories of appellants. In particular, the sense I had was that peculiar to the New Zealand regime, perhaps, is the fact that right of access to the Court of Appeal is by way of a general right of appeal, so there is no filtering mechanism, generally speaking, from a trial Court.

So if you're a person who is, let's say, rich and can afford to pay security for costs and doesn't really matter about having to pay – let's round it up to $6000 for your day in Court, then you will have your day in Court regardless of the merit of your case. So you've got, in one sense, a merit-free access to the Court, whereas somebody who's impecunious and therefore is not going to be in a position to pay security for costs has the ruler run, so to speak, over their appeal and what the cases seem to suggest, Your Honours, is that there's two things going on there. One, it's about protecting the respondent from being left short and two, security for costs is being used as a filter mechanism. Now, one of my submissions, Your Honours, is I have noted that second purpose behind a security for costs regime and you will see I've referred to some of the case law not only in New Zealand but also overseas where the filtering purpose of security for costs comes through.

ARNOLD J:
I'm not sure that it's a purpose, myself. I think it's a consequence.

MR BUTLER:
In my notes for myself in terms of my road map, what I've said is the way I have categorised it is that it seems to be something much more collateral, so it's not a direct purpose. So I do wonder whether, in light of the exchanges between Bench and Bar today, included Mr Reekie, whether in fact some of the cases might have overplayed the appropriateness of using the security for costs regime certainly at the Court of Appeal level as performing that public interest, that filtering exercise, as such. In other words, that is a separate role that can legitimately be played by the security for costs. What I do think is legitimate, nonetheless, is to say that a respondent, having presumably won in the Court below, is entitled to, as I think it was Justice Hammond in the *Hills v Public Trust* decision, is entitled to proceed on an assumption that a decision of the Court below is correct until such time as it is found

not to be correct and is entitled not to be put to the expense of a – I'll use the informal – second crack or a second go –and to have some sort of protection. So that's a public interest consideration designed to protect not the Court's system, as such, but a participant in the Court's system, i.e. a respondent who has already succeeded in the Court below.

Now, if that is right, that the principal focus is on – not really on acting as a filter for the Court system, as such, but rather protecting the interests of the respondent, then I think that does make the identity of the respondent and what its particular interests may or may not be relevant in the assessment of whether or not security for costs should be waived in any particular case, and I say it in that particular way just to tie into the observations that Your Honour Justice McGrath made in exchange with my learned friend Ms Gwyn, because I think in my submissions as well I'd identified the identity of the respondent as being a relevant consideration that should be taken into account and which in the case law had not yet discerned as being well articulated as being a relevant consideration.

ARNOLD J:
If it's a large multinational it will have a better ability to absorb, or are you saying the fact that the Crown is a respondent is relevant in more than the sense that Ms Gwyn said, that it is likely to be a respondent in many more cases involving what you might call public interest issues, human rights, and so on, than any ordinary litigant or are you saying, well, the Crown's got the capacity to absorb it, therefore ...

MR BUTLER:
It's a combination of those two things. If what one is trying to do is protect a respondent through and making sure a respondent is left short I think it is a relevant consideration, may be a relevant consideration is probably a better way of pitching it, to say, well, what is the nature of this respondent and how important in the overall balancing exercise that's going on is it for it to have $6000 locked up in the Court of Appeal's bank account available to meet the costs award that may, not necessarily will, and I do want to come back to the uniqueness, potentially, of Bill of Rights cases, that may be required to meet a costs award if the appellant is unsuccessful, and that may well be relevant because if one's looking at, say, a respondent, I don't know, in a private law dispute, not necessarily involving a multinational, as such, but, say, a family law dispute or something of that sort, again, from a public interest perspective where what one is trying to do is protect that respondent in, say, a family

law case, make sure that they have some comeback that they are not going to be left completely short. The way in which you balance what it is you're trying to protect, how you're trying to protect that person, may well be different from what you might say in respect of the Crown.

So that's relevant, I think, in terms of how deep is the pocket. I think that is a relevant consideration.

The second consideration which Your Honour mentions is, what is the nature of the person whose pocket we're trying to protect?

ELIAS CJ:
Because you get on to that, the protection of the respondent notion can't be taken too far because of the right of appeal because the respondent in any case knows that there is an unrestricted right of appeal, so that's the background.

MR BUTLER:
That's correct, Your Honour.

ELIAS CJ:
Otherwise you are effectively setting up a filter for appeal.

MR BUTLER:
You are, yes. Your Honour is right, and this is where I probably align myself a little bit more closely with my learned friend Ms Gwyn at a general point, so Your Honour is right to say effectively one is acting as a filter, because the question becomes a filter in pursuit of what goal or in pursuit of what aim.

ELIAS CJ:
Well, you say of protecting the respondent, but my point is that citizens in New Zealand operate within the system of justice we have and it includes the fact that there is a right to a second look.

MR BUTLER:
That's correct, Your Honour, but the question, I suppose, that arises in this case is whether that right of a second look is subject to a hurdle which is the provision of security for costs, which is a protection for that respondent. In other words, that

security for costs regime is part and parcel of what our system is, particularly bearing in mind the apparent longevity of that security for costs.

ELIAS CJ:

Yes, I understand that, but it's a question of proportion. To what extent is it actually an impediment or does it undermine for a particular class of litigants what the law has provided?

MR BUTLER:

Yes, and I'm certainly agreeing in relation to that particular point. But for some people, the fact that they have got to put up $6000 or it looks like it's going to be a long appeal and the registrar is convinced that it's got to be doubled because of the number of days of the appeal, coming up with $12,000 in advance and putting it into the bank account may well be a disincentive to taking the appeal, and to that extent I'm agreeing with my learned friend Ms Gwyn that security for costs does, can act as a way of making somebody think whether this is something they really should be doing or want to be doing. The second question which my learned friend Ms Gwyn didn't raise but I think needs to be raised by me as an Amicus is if one says, well, look, a requirement of security for costs could act as an hurdle and, in fact, in a New Zealand environment we're used to the idea of expectation of citizens is that there will be a right of general access to an appeal after trial, then that might rather suggest that, in fact, what should happen is security for costs should be done away with entirely. Why is it that a richer person should be required to meet the burden or go through the hoops of security for costs exercise as opposed to some other person? What purpose will security for costs serve?

ELIAS CJ:

Well, why not instead of thinking about it in terms of hurdle, think about it in the terms that Ms Gwyn referred to it as a discipline. If it's a discipline, then perhaps you go with Justice Salmon, which I see it was a case in which you appeared, Mr Butler. If you are impecunious and you cannot provide the money, then that is exceptional circumstances. It's not a discipline in those circumstances. It's a barrier.

MR BUTLER:

That's right. So that, then, becomes the question.

ARNOLD J:

In a way, then, to some extent this debate is a little artificial, isn't it, because rule 35 is not absolute and when you look at the basis on which waivers or reductions will be granted, certainly in the case of waivers, if there is an arguable appeal there will be a waiver.

MR BUTLER:
That's right.

ARNOLD J:
When you think about it in terms of the underlying premise of security for costs protecting the respondent, going back to what Justice Hammond said in *Hills v Public Trust,* where a Judge is satisfied that the appeal is arguable, a lot of those underlying premises are not nearly as strong.

MR BUTLER:
Exactly. You have beaten me to it, so to speak, because the first point I was going to make is I really do wonder whether, when the cases talk about the public interest in terms of protecting the Court processes in a New Zealand context, I just wonder whether in respect of the Court of Appeal that actually resonates and actually makes sense when one thinks it through, and I think that's certainly something that's come out of the discussion today, but then the second question is when you actually go and look at the cases. Interestingly enough, our research was able to find only the one case where there was a complete waiver of security for costs in the reported cases that we were able to access, which was *Fava* and then only one reduction of costs case which I think was one of Mr Easton's cases.

ARNOLD J:
There was also a case called *Ibrahim v Associate Minister for Immigration* [2012] NZSC 229 where there was a reduction.

GLAZEBROOK J:
It's not certain that the registrar's decisions on waiver would actually be available, either.

MR BUTLER:
Indeed, and so that was what I was going to say. So it's very hard to know what to make of the information that's available to us.

ELIAS CJ:

What do you make of the fact that the registrar is being asked to assess whether the case is arguable? That must have some bearing on what the threshold is, what the standard is, and on the papers.

MR BUTLER:

Indeed. So I was just going to come to that, because I think that's exactly what I was saying earlier in my outline, that we've got to take the system as it is and the role allocation in particular as it is. I think the point that's been made is quite right, that in terms of what is one can expect of the registrar of the Court of Appeal where there's no requirement of legal training, and when one looks at Registrar O'Brien, I think it was, was deciding here and she made it quite clear in her decision, look, I don't about the merits. I'm not in a position to be able to assess the merits of the case, which would rather suggest, well, that's probably not a surprising statement for the registrar to have made. I don't think I'm being disrespectful to anybody in saying it that way. However, if something was frivolous or vexatious, for example, I think discerning something of that nature might be the sort of thing that one might expect a registrar to be able to do, but I don't think I can take it much further than that because –

ELIAS CJ:

Well, I don't have a problem with frivolous or vexatious because frivolous or vexatious is pre-eminently a judgment that's made pre-emptorically on very little information. But once you start to go into little prospect of success and matters like that, it's much more finely judged and it's not a process. It's not as if we have a strikeout of an appeal in which you could run that sort of argument. It does seem a very collateral process in which to be getting to that result.

MR BUTLER:

That's right. I think that's a fair comment because it's also the case that it means only a certain number of appeals that come to the Court of Appeal actually get that treatment and how detailed, with great respect to Their Honours – I don't know how individual people go about doing, performing the exercise of review or how an individual registrar goes about performing the exercise of considering the judgment, the notice of appeal, and suchlike, but I'm not being unfair if I say that is a difficult enterprise to undertake when it's done simply on the papers, when you've got what

will often be a very convincing judgment, unsurprisingly, of the Judge below. It won't necessary be apparent where the weaknesses might lie. Yes, one might be able to identify arguable questions of law where one knows the particular issue is being debated in the law journals or there's been a line of divergent cases or something of that sort, but otherwise it's quite hard, particularly in a jurisdiction like the Court of Appeal, just coming back to the point that Your Honour raised with my learned friend Ms Gwyn towards the end of her address about the Austin Nicholls having affirmed the wide jurisdiction of the Court of Appeal on an appeal before it, and it's just not so easy to be able to discern what are going to be the good points of an appeal, particularly if what one has got is an appeal on a question of fact and I would like, if I could, just being conscious of time, at one point to direct Your Honours to *Vogel* which was, of course, decided after the decision of Justice Wylie which is illustrative of what can happen when a matter goes from the trial Court to the Court of Appeal. That was the only reason I was referring to *Vogel*. In *Vogel*, what happened was that Justice Laing in the High Court took a particular view of the facts of the case. He also took a particular view as to what remedy was appropriate on the basis of the breaches that he found. What the Court of Appeal did on appeal was two things. It took a different view on the facts and also the inferences that should be drawn from the facts from that which was taken from His Honour Justice Laing. That's the first thing he did do. So in other words, exercised its Austin Nicholls jurisdiction and departed from findings of fact and inferences drawn by His Honour Justice Laing and it also came to a different view around remedy. His Honour Justice Laing had taken the view that he didn't consider the facts to be sufficiently serious to warrant a declaration of breach of the Bill of Rights in that case. But the Court of Appeal on appeal took quite a different view and thought no, no, even though these cases are historic, so I think that case went back to even further than this case. So it was under the old 1954 legislation and the old regs unless the Court of Appeal considered it was appropriate to mark the tort, so to speak, by entering a declaration in that case.

ELIAS CJ:

Has the appellant in this case – I haven't gone through the notice of appeal – but has the appellant challenged the remedy?

MR BUTLER:

Yes, he has. That was the next document I was going to take you to, actually. If you could turn to the very back page of the notice of appeal. I can't remember which tab it was.

ELIAS CJ:
It must be arguable, surely, that the remedy is – well, it can't be said it's unarguable that the Judge was right on the remedy thing.

MR BUTLER:
It's tab 25 on the last page, and I just want to use this as an illustration, if I can. So what Mr Reekie said at paragraph 154 of his notice of appeal was that at paragraph 286 Justice Wylie correctly states the requirements of the PVC Act. He then went on to say, "But failed to apply what was reasonable for a claim that was effectively retrospective by virtue of the PVC Act 2005." Can I very briefly explain that? When the 2005 Act came in, you may remember that was a response to the decision of Justice Ron Young in the High Court where he'd awarded significant damages which were later reduced on appeal by this Court. So at that time there was quite a political reaction to damages awards going to prisoners, and there had also been a contemporaneous decision of the Humans Rights Review Tribunal in relation to a privacy case involving, I think, a Mr McMillan, also a prisoner, who'd been awarded a substantial amount of money for breach of privacy. So the PVC Act was a response to those two decisions.

What the Act did was it applied not only prospectively but also retrospectively to any claims brought after the Act came into force and which were undecided even if those claims related to incidents prior to the commencement of the legislation. So in other words, that legislation, even though it's a 2005 Act, applies in Mr Reekie's circumstances because he commenced his proceeding after 2005.

So what Mr Reekie did – when I read his notice of appeal I said, oh, so he's raising this issue around – because what the Act says, section 13 of the Act, which I happen to have here, says that, "No Court or Tribunal" – I can hand this up to Your Honours – "may award any compensation sought by a specified claim unless it is satisfied that a) the plaintiff has made reasonable use of all these specified internal and external complaint mechanisms." Then what subsection (2) says, Your Honours, "In this section, reasonable use of the complaints mechanism means the use of the Court or Tribunal considered it is reasonable for the plaintiff to have made in the circumstances." The point that I thought Mr Reekie was raising, and one I would raise in terms of the proper interpretation application of this Act, is whether what it is reasonable to expect a prisoner to have done in 2002 prior to the commencement of

this Act and is it an answer to, say, as His Honour Justice Wylie said and as the Crown supports, that when Mr Reekie complained to the prison inspector about the tie-down bed that he didn't make specific reference to his ankles as opposed to some other feature of the tie-down exercise. How precise is the expectation? What weight should be attached to what Mr Reekie has said about the challenges he faced using the inspectorate processes and what the Ombudsman said in terms of saying, "Well, I won't accept any complaints until such time as the inspector has done its job." What weight should be attached to the fact that, according to the transcript that we were taken to this morning by Mr Reekie, that Mr Amour said that he had no recollection of complaints being made by Mr Reekie prior to 2002, in other words, that Mr Reekie, it might be reasonably be said, was in the beginning phase or infancy of his use of the complaints mechanisms. All of those factors, it seems to me, arise on this appeal potentially, and it seems to me it's at least arguable that the approach the Court might take to the interpretation and application of section 13 of the PVC Act may differ depending on the data of the incident to which the proceeds relate. I may be wrong about that. I simply wanted to raise it as an example of the sort of thing which seems to me to be at least arguable, whatever the right decision may be.

That said, I notice that the same issue would have arisen in the *Vogel* case and counsel there was Mr Ellis and he didn't raise it so maybe it's not arguable. I would have argued it as it seems to me to be arguable.

So what Mr Reekie said, if you look at his paragraph 154, if you look, for example, at the last sentence, "In this respect Wylie J set the bar too high for the particular set of circumstances that the appellant claim and that was not reasonable," so I think a fair reading of paragraph 154, with respect, does show that Mr Reekie raised the question. He mightn't have expressed it in the same way in which I have sought to express it before Your Honours, but that point does seem to me, at least, to be arguable. I think a fair reading of Justice Wylie's decision does show – I disagree with the Crown on this point – I think a fair reading of paragraph 286, I think it is, of Justice Wylie's decision does show that the reason compensation was not considered to be an appropriate remedy was because, in the words of His Honour, 286, first sentence, "Compensation is not available to Mr Reekie." It's not "compensation is not appropriate." It's "compensation is not available to Mr Reekie". Why? "Mr Reekie's proceeding is a specified claim under section 6 of the 2005 Act," and then an analysis of the Act follows. So I don't think, with respect to my learned friend, Ms Gwyn is accurate when she tries to say that there was an alternative basis

upon which Mr Reekie's claim for compensation was turned down, which was the consideration of *Taunoa* principles. Yes, it's true to say that His Honour noted one or two paragraphs above that borer remedies are discretionary, that there was a core task to be undertaken, there are a number of legitimate goals to be pursued. He also does say it's true that a declaration of breach is a remedy of considerable potency. It's not toothless. Then he goes on to say, "In my view, in the present case a declaration of breach is sufficient remedy in itself." So what follows in 286, as I read it, is justification for why compensation is not available. It's not because it might not be appropriate. It's because the provisions of the 2005 Act have not been satisfied.

On the question, for example, of false imprisonment, I don't think I need to elaborate on the points that I made in my written submissions. They are in alignment with the observations that fell from Your Honour, the Chief Justice. I don't know what the right answer is, but is there an argument to be had in relation to that issue? I think there is an argument to be had in relation to that issue. As I said, I've mentioned *Vogel*. My learned friend Ms Gwyn mentions *Vogel*. In that particular case, what is why the case is very close to this particular case is that Mr Vogel consented to having more than the statutory maximum period of cell confinement imposed upon him, because he wanted to be in a drug-free environment. So he consented to it. Nonetheless, the Court of Appeal, that was one of the factors that Justice Laing took into account in saying no harm done here, no breach of section 23(5). But the Court of Appeal disagreed with that assessment and said no, the proper procedure of cell confinement is such a stringent measure – I'm trying to use a neutral term – that it is important that the procedures be properly followed. That's why I think *Vogel* is relevant. The Court of Appeal may take a different view to that of Justice Wylie, arguably.

I've slightly got ahead of myself in responding to a number of questions that Your Honours have raised. Could I just return very briefly to one or two points which are really amplificatory of the observations that Your Honour Justice McGrath made earlier today? If I could make those under the heading, they're relevant in my second heading of "Should the Court revisit principles to be applied?"

In my submission, remarks under the current system, there is an ability to give proper weighting to considerations such as the human rights dimension. A submission I was going to make to you is I don't think there is a reason why human rights cases, as such, should have their own special regime under the security for costs as such. I

think that the range of factors that are typically taken into account in a security for costs exercise are sufficiently broad to accommodate the unique features of the human rights dimension. I think one should be wary – I think this Court would want to be wary of form over substance. I don't think the Court would want to be encouraging people to necessarily dress a case up as a Bill of Rights case or a human rights case just so as to get a free pass in relation to security for costs. I think that's a legitimate concern to have. But where human rights considerations are legitimately in play, then they can be recognised appropriately, in my submission, in the weightings given to the factors that are referred to in my submissions and that are well-acknowledged in the case law. That's all I'll say in relation to that.

In terms of what the current understanding is – if I can call it the traditional understanding – of the rules and principles to be applied under rule 35, I think both Justice Miller and Justice White got it right. That's not to say that this Court might not take a different view as to whether those traditional – if I can use that terminology – factors and principles are the right ones, but if the traditional ones are the right ones then, in my submission, again, assisting the Court, I think Justice White and Justice Miller did articulate those principles at the high level correctly. I do think, however, that there might be legitimate concerns to be raised more particularly in respect of the judgment of Justice White as I have set out in that box in the middle of the roadmap, and I won't go into any of those because I've covered those already in my oral submissions.

There were one or two points I did think I should respond to in terms of points raised by Mr Reekie and by my learned friend Ms Gwyn, if I may, and I'll be brief. The issue of financial means, I think in one sense, is not in issue. Both Judges proceeded on the assumption that Mr Reekie was impecunious and whether there should be a revision of the forms or not as a result of the focus that's come onto them today, I think that would be something valuable, an indication, I think, from the Court of something to that effect might be helpful.

I think it's also important that I say in front of Mr Reekie that this case is about waiver of security for costs and not waiver of Court fees. I think there are different interests in play when one is looking for a waiver of Court fees as opposed to waiver of security for costs. If you look at the structure of the rules, the rules are different, so rule 5 of the Court of Appeal fees regulations allows waiver of the fees simply by dint

of financial hardship. So if you show financial hardship, you can – you get a waiver pretty much straight away.

ARNOLD J:
I think the reason for that – I mean, the fees is very much an access to justice point. It's the State imposing a user-pays system and so they give a waiver because the interests of the respondent are at play with the other.

MR BUTLER:
That's right. I wanted to use the contrast between the two to make exactly that point. I do think the way in which the two rules are structured does give a hint as to the driving principles that are animating them in that they're different, and so the relevant rule in terms of fee waiver are rule 5 of the Court of Appeal and fee regulations, so I thought it was important that Mr Reekie hears that because he has put some weight on the fact that he got a waiver of the Court fees, and I wanted him to hear that I think if I'm assisting the Court there are different interests potentially in play and that might explain why you might get a waiver in one case and not in another and indeed in a decision that just came out yesterday from this Court in *Slavich v Attorney-General* [2013] NZSC 130, which has just been reported, as it happens in that august journal the *National Business Review*, Mr Slavich is reported as having been required by the *NBR* as to "pony up" with security for costs, but in that decision which you released yesterday the Court said in paragraph 6 that a decision by a registrar to waive filing fees is not controlling as to impecuniosity in relation to security for costs, so again I'll just emphasise that.

WILLIAM YOUNG J:
It can't be because the respondent hasn't had an opportunity to be heard.

MR BUTLER:
That's right. It absolutely makes sense. There's any number of good reasons why that might be the case but again, I'm just making it clear for Mr Reekie's benefit why that might be so.

In terms of the Crown, I've taken you to my submissions on compensation. I've taken you to my submissions on false imprisonment. I've taken you to *Vogel*. *Ashingdane*, I want to talk about those two European Court of Human Rights cases if I may in case they might feature – and they have – in previous decisions of the Court.

I think what's important in relation to those two cases there's two things about the European approach. The first thing, all of those European cases are always factor-specific, so even in *Ashingdane* and *Tolstoy* the Court makes it quite clear they are not addressing the legality or otherwise of the animating rule. They are just saying what happened in this particular case is what happened in this particular case proportionate and non-arbitrary. That's the question that's being asked. They're not looking at the structure of the rule and that's made very clear in the *Ashingdane* case. *Ashingdane* itself was about access to the Court. That was basically a no-liability clause in relation to people who have been to certain types of mental institutions and suchlike. So that's the first thing.

The second thing about the European Court case is that I think that is appropriately emphasised. While each of them makes it quite clear that there's no guarantee of a particular form of access to the Court or a particular form of appellate process, once there is an appellant process then that process must operate in a fair and proportionate manner.

Now, what Mr Reekie is raising in his complaint towards the beginning of his submissions is that there seems to be an unfairness based on property or economic power. Obviously it would be for the Court to decide whether it feels that there is power in those submissions. We have heard complaints of that sort before. We heard it in the context not in the civil jurisdiction of the Court of Appeal but in the context of the criminal jurisdiction in the Court of Appeal and that was in the *Taito v Attorney-General* [2003] 3 NZLR 577 case. I simply raise *Taito* as an example of a situation where there had been a system in place which worked off things being done on the papers and some review, but which ultimately could, because of the people who were shunted into it and those who were left outside of it, i.e. they were on legal aid, you never had to worry about it, or if you had the money, you didn't have to worry about the system. But if you were somebody who didn't have access to money then there was a high likelihood that you were going to be reviewed in a particular way where your case was interacted based on merits, based on an on the papers assessment and we all know that the Privy Council in that case, you know, focused in very much on the fact that it was, it could mistreat people who lacked means unfairly and treat them unfairly. So I'm not trying to make a big issue out of it. I'm just simply saying that when he makes comments of those sorts or submissions of that sort, Mr Reekie, is does resonate with and remind us of the fact that that is something which has happened before, so I think it does cause me pause for thought in relation to

thinking about a system that I am part of and the working of which I have just accepted. That's as far as I think I can responsibly take that particular point.

I think I've taken my time so I will stop. There are other things to say but I'll rely on the written submissions. I hope those submissions have been of assistance to the Court.

ELIAS CJ:
Yes, thank you for that, Mr Butler. Mr Reekie, I'm afraid I'm going to have to confine you to about 15 minutes because I have to stop sitting no later than 4.25.

MR REEKIE:
Your Honour, I understand the timing and there's just so much that's been raised there. For me to even have a hope of responding to it, I have listed some points and I can fly through them but I don't know if I can get through. I can try but I can't see that I'm going to, Your Honour.

ELIAS CJ:
We're just debating, Mr Reekie, whether we could get you to put in a written response if we run out of time or whether we should do it orally. We think you are very effective orally, Mr Reekie. Get underway anyway and let's see how we go. If we run out of time, we'll consider whether to hold another hearing or whether to let you put in some further written submissions.

MR REEKIE:
That would certainly be favourable and I hear your comment about getting underway.

The legal aid review, I raised the question of the Court. Now, the Court, when it was being reviewed, and I was surprised because my understanding was there was only the matter before Justice Andrews. Now, I raised it with the Court and they said no, it was for both matters. Then I went back to the legal aid – to LARP and they said no, it was for both matters as well but there was nothing in there pertaining to it and I was certainly not put on notice that that was going to be the case. So I was stuck in that position.

In regards to merit and arguability of appeal and leaving it to chance, such an important case, it's difficult, actually, coming back over all the points. I do my best so

I do have to refresh my memory on the comments that I made the notes to. Well, I think that was the question that was raised, is it the merit or arguability, is it one or the other or is it both? I think there's arguability in both cases that are raised. I have touched on some of those and I haven't tried to go too much into certainly the 47, which is the Wylie matter. I've tried to give this Court a bit of a flavour as to some of the points and issues that I see of contention. There's certainly a lot more in the notice of appeal that some of which Mr Butler has raised as well, and I don't know if Your Honours have had a chance at all to look at my submissions to Justice Wylie, as well, on matters, which are very similar in nature to the notice of appeal. As I said, I don't think it's a thing that should be left to chance in regards to the merit or arguability of appeal. It's too important a case to me for that to occur.

In regards to the evidence of me or Mr Baker that I heard Ms Gwyn comment on and the reference to Justice Wylie saying that we were not reliable in the evidence that we gave, Ma'am, I know that in this respect I can address this in a number of simple ways, the only issue that I seen Justice Wylie had with my evidence was that I mixed up the dates. Now, in his – during the course of the trial, Your Honour, and I can just give you the transcript page and if yous would mark it down and possibly have a look, it's at page 462 and the Court states roughly at paragraph 10, "I don't think we need to worry ourselves unduly about the date. I don't imagine that is an issue, is it, Ms Foster?" There had been earlier discussions and what Justice Wylie accepted that I didn't have access to calendars and the likes so dates weren't such a big issue but then he based his – my credibility around this mix-up on the dates. That's in regards to myself. Now, I can give you some short references as to where else it was discussed. It was discussed on page 67 and 450 of the transcript where the issues around dates and mix-ups occurred. There was a further discussion which wasn't recorded, unfortunately, in the transcript, with Justice Wylie around the dates. I explained in my evidence why I had a mix-up and it has to be remembered that my mental state and the conditions I was being subjected to were not great, and given I didn't have access I think it was forgiven that if I mixed up on a couple of dates I don't think that's really grounds for dismissing my credibility.

Now, as I said, Mr Butler touched on it and when he referred to the evidence of Mr Moore in regards to being a vexatious complainant, which is one of the bits of paper that I believe I put forward to you, it's nine pages in in the bundle of the authorities of the appellant. He touched on the two points there which is – and I may as well deal with both of them here while we're on this page rather than coming back, Your

Honours – the first one is the third line down. It should read page 211 at the top of the page.

ELIAS CJ:
Yes.

MR REEKIE:
Third line down, "Given how well we know each other, Mr Amour, you cannot name even one single complaint prior to 2002?" "No, I cannot." I had not made a complaint up to, what, 11, 12-odd years in prison at that stage. I had just put up with, you know, what I'd seen and been subjected to, like a lot of prisoners do. But I drew a line in the sand when I got tortured. That was the breaking point for me, and I have fought vigorously since against the injustices that I was subjected to, the breaches and the inhumane treatment, because I'm sent to prison for what I've done wrong, not to be abused and degraded and such. I lost a lot of self-confidence and imagery over what happened to be in younger days in prison and I won't be subjected to that again, no matter what occurs.

Now, given that he couldn't name another complainant shows that something must have occurred of importance for me to all of a sudden start complaining. Now, coming down, the last question of complaint, "Do you believe the nature of the complaints I raised with you are actually valid complaints in general, Mr Amour, that I raised valid complaints with your office?" "We consider every complaint that comes to us on exactly the same level. We take all complaints seriously." "Is it true that prisoners can be labelled vexatious complainants and dealt with in different matters, in a different manner?" "There is a formal process, and I do not think you were in that category."

Now, that gives reliance on the strength of the evidence that I gave, that I'm not a vexatious complainant. Since then, I have made a lot of complaints and I make no bones about that. I have not been put in that category of vexatious complainant. In 2012, an application was made to have me labelled a vexatious complainant and it failed, Your Honours, because you can't make someone a vexatious complainant if there's merit in the complaints they make. So that is of importance so I leave that point there in regards to the evidence that I gave, because I know I do not lie and I know I'm not lying about what occurred to me in this matter. I haven't let it go

because I believe I deserve justice on this point. As I said, I was sentenced to imprisonment for what I did wrong, not to be tortured and abused or subjected to that.

So I come forward then, in regards to Mr Baker. There was a discussion – and I raised what occurred with Justice Wylie at the outset of the trial was I had been denied access to my witness. I believe I had one, possibly two, but I believe it was one interview with Mr Baker and then the Crown cut off access to me, so I had no access to him to discuss his evidence or go over it with him. I had to give him my brief of evidence to read to refresh his memory. Now, it's quite possible that that's potentially tainted some of his evidence, but I believe there's enough of his own evidence in there, certainly orally, that will – and his evidence is also backed up within the records of the State itself. So it's not like we're asking for it to be ascertained upon what he says without it being attached to anything. There's formal basis for truth in what he has stated as well.

ELIAS CJ:
Mr Reekie, you're really arguing the merits of the appeal here, which we can't get into. The question of credibility and the assessments that the Judge made were raised simply to say that they were matters that the Judge had the opportunity to come to a conclusion on, but I don't think you need to go into – we understand that you challenge those and, if given the opportunity to appeal, you would.

MR REEKIE:
I believe I can and I hear what you're saying, Your Honour. It's just very frustrating. Like, I touched on the trial matters to give yous a flavour about some of the points and the submissions and the evidence that was overlooked, ignored, or missed in the trial itself and that's why the notice of appeal is so long and it's not like I'm just stating it without having some form of factual evidence to back those contentions up. So, you know, I'm not that silly to make a complaint without having some form of being able to back that up, the points that I'm making, but to sit here and have the Crown again attack me – now, I've had to put up with a lot over the years, not only – and this ties into what Mr Butler has said. Now, the identity of the respondents is a factor, resources that they have. It's not only the resources they have in this particular case, and this ties into my relationship with the Crown, some of the complaints that I've made to the Court and to Justice Wylie about what occurred during the – before, during and after the case. I had the same thing happen to me in Justice Andrews. You know, I get interfered with. So not only do they have the resources to attack and

refute and deny me justice in that sense, which does go against the concept of justice which I pull you back to that I opened my submissions to you on, is they also have the direct power over my ability to run my case through interfering with me, and believe you me, there have been a lot of interferences with transfers. The transfers and the placement, putting me down in Spring Hill in isolation and having me interfered with while the case was still ongoing in front of Justice Wylie is just a prime example of that. So, you know, when we talk about the equality of arms, whether it's a multinational or not, they wouldn't have direct power over me like the Crown does in this particular case, so I am in a double, if not a triple disadvantage by that. So I move on from that, Your Honour.

ELIAS CJ:

Just pause. I do have to, I'm afraid, take the adjournment, and the reason is that I'm swearing in a Judge and there are a lot of people who have arrived for the ceremony. I'm afraid I have to stop. Would you prefer to put your response submissions in writing or would you prefer for us to reconvene by videolink?

MR REEKIE:

I think I can articulate myself better in person, Your Honour, and I think that way if there's any misunderstanding I think you can pick up on it and it can be addressed, whereas in writing if I say something and you don't get it, which appears to happen in my submissions and notices of appeal, which has been addressed by the Court and Mr Butler as well, so that would be the preference for me, Your Honours.

ELIAS CJ:

That's fine. I think we will have to take – we will have to work out a time that would suit. What I would like to do is set it down for – it will be no longer than 45 minutes we would be able to give you, because we're going to have to fit you in. But we'll try and do it within the next few days, Mr Reekie. You'll be contacted about that shortly. Is that all right?

MR REEKIE:

Yes, Your Honour.

ELIAS CJ:

What we'll probably be doing is putting it on before another case in the morning, which is why if you can focus your submissions that will be of great assistance.

Thank you very much counsel and Mr Reekie for your submissions. We will adjourn now and we'll resume at a date to be advised. Thank you.

COURT ADJOURNS 4.24 PM

COURT RESUMES ON THURSDAY 5 DECEMBER 2013 AT 9.00 AM

ELIAS CJ:
Thank you, Mr Reekie.

MS GWYN:
Your Honour, I did have one preliminary matter.

ELIAS CJ:
Yes. Mr Reekie, you can sit down.

MS GWYN:
The point is, Your Honour, I just wanted to note that first apologies from Ms Foster who appeared with me last week, who has another fixture this morning. I appear today with Ms Garden.

ELIAS CJ:
Thank you, Ms Garden.

MS GWYN:
Secondly, Your Honour, to note that the respondents yesterday filed a memorandum which Your Honours should have, which addresses the two issues that came up during the course of the hearing last week.

ELIAS CJ:
Yes, we do have that, thank you.

MS GWYN:
It's setting out the history of the rule relating to security for costs on appeal and also section 61A.

ELIAS CJ:

Yes, thank you. Mr Reekie, do you have that document?

MR REEKIE:

I do, Your Honour. Thank you.

ELIAS CJ:

Mr Reekie, we have another case to follow, so we'd be very grateful if you could confine your submissions to about half an hour. Don't forget that your submissions are now in reply and that we've heard your principal argument, so it's really just whatever response you want to make to the submissions that we've heard.

MR REEKIE:

Yes, I appreciate that, Your Honour. The one issue that, just in regards to what you've just said, Your Honour, is that at the outset I didn't deal with matter 102. I thought it was best to deal with them separately. I noted Crown Law and the Amicus dealt with them simultaneously whereas I didn't so I do intend upon touching upon that, Your Honour, to some extent, freshly as I never addressed it in my opening submissions to you.

ELIAS CJ:

All right, but it will have to be concluded within that timeframe, I'm afraid.

MR REEKIE:

Okay. I thought I had 45 minutes but I'll do my best and whatever I get through I get through I guess is the answer.

ELIAS CJ:

Thank you very much.

MR REEKIE:

I start off firstly, then, with the memorandum of counsel for the first and second respondents dated the 4th of December 2013 that came through yesterday, Your Honours. With the history of the security for costs regime, now, I'll try and deal with this on a broad brush so I don't spend too long on it because Your Honours most probably know more about this than what I do, but I have read it and I understand it.

But the nature of the systems or the regimes that have been in place over the years it appears that they have become more open and granting more and more access as time goes by to justice, which actually fits in with the promo of the Ministry of Justice, which is promoting access to justice. So it stands to reason when one looks at it that with the gradual passing of time that the scheme will be further and further rolled out, so that's really all I can say in regards to where the regime is going and that's –

ELIAS CJ:
That's a submission that the trend has been towards increased access to justice, is it?

MR REEKIE:
Yes, yes. That is it in a nutshell, and it's certainly supported by the moniker of the Ministry of Justice, which is promoting access to justice. One can clearly see that it has extended quite considerably from its first inception that can be recorded. It's come some ways, certainly in recent times, Your Honours.

The other issue that I just want to touch on that I note that Crown Law has made some brief submissions on in regards to the Judicature Act in regards to the palatability of a Judge-alone in chambers decision, and I know Your Honours touched on it in regards to whether it is proper and correct that a Judge-alone judgment is appealed straight to the Supreme Court rather than to the full Bench of an appeal Court Judges, and I guess that's an area that possibly needs addressing because I believe, and I could be mistaken, is that Your Honours did have a concern or query about why it didn't take that intermediary step before it came to this Court, Your Honours. So maybe that's an area that is worthy of consideration in your judgment on that issue, whether that should be tidied up or if it is, in fact, correct how it is which I submit it isn't, Your Honours.

So I come back to – I first of all want to do some housekeeping from my end in response to Crown Law's submissions. First of all, in their written submissions, Your Honour, at paragraph 35.1.

ELIAS CJ:
Not in the latest memorandum, in the original submissions?

MR REEKIE:

Yeah, in the original submissions of the respondents, Your Honour. Now, this is just a small correction, but it's the sort of misinformation that I have to deal with on a fairly regular basis coming out of the respondents and Crown Law. In the section it claims that I alleged that the cover-up of unlawful imprisonment by the Department of Corrections, the police, and the District Courts at Waitakere. Now, if I can, in my authority of the appellants dated 25 November bundle, that's the 47 case, Your Honours, page 12 and 13, Your Honours, I remember you don't have the numbering, page 63 and 64 at the top.

ELIAS CJ:
Whereabouts in the bundle is it, towards the end?

GLAZEBROOK J:
No, towards the beginning, about 10 pages in.

ELIAS CJ:
Thank you.

MR REEKIE:
These were my opening submissions in front of Justice Wylie, where I clearly state down that paragraph 25 through to paragraph 5 on the next page, Your Honours, and I clearly state who I allege the conspiracy was between, and it certainly did not involve the police, as in they were involved in the conspiracy. There was, there was issues around the police but nothing of an unlawful nature, Your Honours, but it's just clear information that's been provided to this Court yet again by counsel and I just wanted to touch on that because it's just a reoccurring theme that I have to deal with.

Next I would like to bring on, and this is following in that theme to some degree, is the accusation that the conduct of the appellant, myself, at trial could be repeated in the Court of Appeal process and why the respondent seeks security for costs in regards to myself bringing up other issues during the course of the trial. Well that is not actually the case and I intend to just point that to Your Honours. I'll just read out what I've got here and that will help me get through it.

Crown Law accused me of raising a number of issues at hearing that were not in my statement of claim. I was made aware of ankle straps being unlawful prior to hearing by Crown Law. They omitted this at hearing because they could not get around the

fact it was recorded in the documents, that's the observation sheets and that, and so on and so forth. They were also the ones who raised and admitted they were holding me in isolation without correct authority to do so during the course of the hearing. Now I note in submissions, Your Honour, that they claimed that it was a technicality and that Wylie J was correct in saying that I consented to that. well I did not consent to that Your Honours and I actually have that in the submissions and I'll come back to that and carry on.

During the course of the – I was none the wiser to this fact and would not have known to raise it had Crown Law not raised it themselves. Another of the issues I was blamed for by Wylie J was raising, for raising that was not in my statement of claim was the use of mechanical restraints on the tie-down bed yet this was first raised by Justice Wylie himself. Now I'll just – if I – I believe I make reference to it later on so I'll come back to that but if I don't I know exactly where it is Your Honours. Then Crown Law in cross-examine on Mr Baker, see page 24 of that same bundle that we were in Your Honours if I could please –

ELIAS CJ:
So is this the index of authorities or the authorities?

MR REEKIE:
It's the authorities of the appellant Your Honour.

ELIAS CJ:
Yes, thank you, and page?

MR REEKIE:
Page 24, that will be somewhere near the beginning.

ELIAS CJ:
And what are we looking for?

MR REEKIE:
And it'll have page 34 at the top, now this is the cross-examination of my witness George Baker and this is the first time that the issue of mechanical restraints on the tie-down bed was raised. It's, this whole page deals with it Your Honour and rather than my reading it I just invite you to read through.

GLAZEBROOK J:
Sorry, I haven't, is it 534 at the top did you say?

ELIAS CJ:
No it's 34, it's a bit further on.

GLAZEBROOK J:
Sorry.

McGRATH J:
It's after 290.

ELIAS CJ:
Sorry, we should really have thought of numbering it ourselves.

MR REEKIE:
I wondered about that too, I was almost tempted to send through another copy but I thought that might confuse the issue further.

ELIAS CJ:
No, no, we should have done it. We've been sitting in other cases I'm afraid.

MR REEKIE:
So you can see at the top of the page it starts off with Crown Law, Ms Foster questioning around the use of restraints on the tie-down bed and then the Court, Justice Wylie, interjects, and asks a question in regards to those restraints and then you'll see after that questioning Crown Law continues on in that vein in regards to the restraints and what they were used. Now these are some of the issues that were, that I was accused of raising as additional issues. At paragraph 58 of Justice Wylie's judgment I get accused of raising all of these issues, in regards to ankle straps, metal handcuffs on the tie-down bed, and the lawfulness to place me on the tie-down bed as a few examples. So there's the clear evidence there in regards to mechanical restraints. The evidence can also be produced in regards to the ankle restraints and in regards to Crown Law bringing those up. As I said, they did admit to it, so it stands to reason that they did bring it up.

Once again, I did not even know that the use of mechanical restraints on the tie-down bed were unlawful. Bear in mind I had never been on the tie-down bed before 2002. While the unlawful use of them did not surprise me, Crown Law denials that they were used did, however, shock me, as did Wylie's J failure to find they were, they had, with the overwhelming weight of evidence that supported the fact they had been used.

One example of this evidence can be seen at page 27. They'll be in the same bundle, Your Honour, just three pages over from where we were. Now, there is many, many examples and evidence that they were mechanical restraints used on that tie-down bed, Your Honours, and here the clear reference at the top of the page from – I guess the best way to go is from 0415 hours to 0450 hours. It states, "In from hospital, placed in mechanical restraints, gown, chest belt. Baker removed gown, right hand from chest belt, staff re-restrained in m restraints" – which stands for mechanical restraints. That's on the tie-down bed, Your Honours, where in this particular instance Mr Baker has been placing mechanical restraints on the tie-down bed which were what were used and, as I said, this is only one of the many examples where mechanical restraints were used, and they were in use. There should have been no doubt. The evidence was clear.

It is also noteworthy that Wylie J also identified the use of restraints of the tie-down bed were, in some respects, at the heart of my claim. That particular statement from Justice Wylie himself can be seen on page 21 in the same bundle at paragraph 10, and he was right to identify that as being at, in some respects, the heart of the claim, which was the misuse of the tie-down bed.

So I think where he's raised that, where I've raised all these other issues and coming back to the point I'm making is that it's not right for the respondents to be setting security for costs and blaming my mischief behaviour, if you like, Your Honours, as a reason for doing so when it's incorrectly stated that I was the one that raised all these additional issues.

The issue in regards to the treatment meted out to other prisoners that I say I witnessed, which was one of the other issues Justice Wylie said I raised, that was actually in my statement of claim. While not a clause directly, it was actually listed there as being one of the issues so there was notice that that was going to be raised at the trial. So I leave that issue on that particular regard.

While I'm on the subject of that, Your Honours, I've done a little bit of research on my own and I am limited in what research I can do, and I'm just going to read this out, what I have in front of me. Part of the exercise of reducing security for costs must concern whether ordering a reduction of security will allow the appeal to proceed. There is no sense, for example, in reducing an unaffordable $12,000 security order to an equal unaffordable $11,000 security order.

ELIAS CJ:

Just pause, Mr Reekie. What are you reading from? Is this a submission or are you quoting something?

MR REEKIE:

This is just my handwritten notes, Your Honour.

ELIAS CJ:

It's your submission and not a quote from something? If it was, I'd want the reference.

MR REEKIE:

No, it's not, Your Honour.

ELIAS CJ:

That's fine.

MR REEKIE:

This is – you'll see this is just in regards to the regime itself and maybe another aspect or a point of interest that you might find interesting in some regards. I have tried to find judgments of Court of Appeal Judges reducing security for costs which in turn allowed the appeal to be heard. I cannot find any. What I have found was very disturbing. Reduction of security happens very rarely. Despite security judgments, very often stating impecuniosity alone may be grounds for a reduction of security. I could only identify two cases. What I also discovered is that Judges are in conflict as to how they identify and treat impecuniosity. Justice Harrison of the Court of Appeal, a Judge who has issued numerous orders for security, appears never to have considered a reduction based on impecuniosity. His Honour appears quite unreceptive to the mere idea of impecuniosity. For example, in *Hart v ANZ Bank*

[2013] NZCA 9 Harrison J, despite accepting it was common ground Mr Hart was a new bankrupt and superannuatant, concluded that broad fact fell well short of demonstrating impecuniosity. The appellant submits to this Court that it is impossible for an appellant, who is prevented by the Insolvency Act from retaining more than $1000 cash, can fall short, let alone far short, of the impecuniosity test. Anyone who gets Harrison would be at the opposite end of the judicial spectrum from Justice Arnold who, as I showed, waived security for costs in the only case where security was waived, *Fava*. Despite stating he lacked information sufficient to determine financial means of Mr Fava, Justice Arnold and Harrison's approaches to the issue of impecuniosity being irreconcilable in law or fact. It cannot be just that single Judge decisions in this regime would routinely prevent Court access can be unappealable, as the Supreme Court this year stated in *Siemer v Stiassny* [2012] NZCA 24. As mentioned in paragraph 101 in my submissions, Justice Arnold of this Court cut the registrar's security order in half in *Easton v Broadcasting Commission* [2009] NZCA 252, despite concluding Easton's appeal had no realistic prospects of success. It did not matter. The reduced security of costs remains unpaid.

Same with *Harrison v Auckland District Health Board* [2013] NZSC 98, where security was reduced, $6000 to $29,500 but still remained unpaid. Relatively, Easton and Harrison both appealed to the Supreme Court against security orders and in each case this Court concluded, whilst settled, principles in the regime were applied. With no disrespect to this Court, the appellant submits that this is impossible. If Mr Easton had no prospects of success, what was the legal basis of security cut in half where it appears the most prolific appellant to the Court of Appeal, Mr Siemer, has never had security reduced? Why must Ms Harrison prove, as Justice Wild ruled she must do, and this Court confirmed only last month in *Harrison* that "the only basis on which an order dispensing with security ought to be made was if the appeal raised a question of public interest" then stated he did not consider there was any real public interest in the appeal, let alone such public interest which would warrant dispensing with security. Until this recent decision of Justice Wild and the Supreme Court confirming it last month, there was no authority which stated the only grounds for dispensing with security was a high level of real public interest.

My respectful submission is that that makes no sense and cannot be the law regarding this regime because it is arbitrary and inconsistent, Your Honours. If this Court considers reduction in my case, the only submission regarding quantum is that

anything above 100 will act as a de facto bar, which is the issue that I made in my submissions that you've read already, Your Honours.

As mentioned, the appellant has limited resources to investigate this but invites the Court and the Amicus to dispute whether there has been more than one order waiving security for costs at the Court of Appeal and more than two which have reduced security for costs in the last eight years this regime has been in force.

Finally, it appears that all of the many appeals against security orders to the Supreme Court before this current one have been dismissed, even though they are widely inconsistent in what factors have been applied as well as how they have been applied.

Thank you, Your Honours, in regards to hearing that. I'm just mindful of the time, also, Your Honours.

ELIAS CJ:
That was a very helpful submission for us, thank you.

MR REEKIE:
I thought it was somewhat interesting myself, but as I also found interesting, the work that Crown Law has done on the history of the regime.

One of the issues in regards to Alan Roberts, my trial lawyer, not being called as a witness at the hearing and while I was not asked to call him, we had a fall-out at the end of my trial and we didn't speak for many years. I spoke to him, I think, earlier this year for the first time and I had communicated with the Privacy Commissioner who actually had communication with him but that's how badly the relationship broke down, and I did explain this to Justice Wylie at point 8.20 of my closing submissions to him, Your Honour. That's not in front of you but if you'd like to confirm that, that it was pointed out that that's why he gave no evidence on that point. But I think the Court records clearly speak for themselves that Justice Thorburn was advised by the police, not by counsel, on the day, which was supported by the cellphone numbers being attached to that document, Your Honour. So that's just another area that I just wanted to address and cover off, because these are issues that while they deal with merit they were raised and I just want to give rebuttal evidence in regards to them so they're not taken out of context or they're not lopsided when considered.

I was not made aware in any regard that I needed to amend my statement of claim over any of the additional issues, either, that I was accused of raising, but had I been aware I would have certainly done so. Given – as Your Honours are aware, I was self-represented and I've never dealt with these issues and I'm fairly pressed to these sort of matters so I'm learning.

Another issue I think was touched on briefly, the respondent's submissions to the Amicus in response at 15.2, they state – and I'll just quote a section of it. "Despite extensive use of the complaint procedure on other issues not pursued complaints on the breaches of an issue." Well, there's a simple answer to that. Besides not knowing or not making a complaint prior to 2002, certainly none were put forward to the Court and Justice Wylie to back up that submission and likely none ever will be because they don't exist, is what I've found to be the case is if you go in with a whole lot of complaints, like, say I complain of being tortured and the laundry not being done and so forth, you get one dismissed and it's likely they all get dismissed. I focused on the big issues, which were the torture and unlawful use of the tie-down bed, the unlawful detention, and I also have the issue of my mental status at the time and also I was facing serious criminal charges. Now, I chose to focus on the most serious complaints at the time and I did deal with those as best as I could through the complaints system as I knew it at that time, which wasn't very well. I'm certainly a lot more knowledgeable these days.

I know there's most probably more, Your Honours, that I can raise in regards to 102 and roll back some of this stuff that's been said. Now, I'd just like to switch over into this security for costs and 102 in regards to the comments from the Amicus, and I'll just quote from this roadmap to cut it short. In regards to Justice Miller where it says "Did His Honour misdirect himself?" Sorry, that's the wrong one. It's actually in his submissions proper. Without going through, it's in the conclusions in regards to 102 that he says that Justice Miller did consider the relationship between myself and the respondents. Now, I don't think he – and I may have played some part in that – I don't know and it doesn't actually say in his judgment how well he actually considered that relationship whereas this Court has had the benefit of having my full submissions in regards to what that special relationship entails, which the Amicus has actually found was in, had some force in that argument.

Now, I believe Justice Miller, in all fairness, didn't have the benefit of that pointed out to him in full to actually make that assessment himself and he wouldn't have known to actually direct himself to the areas that I raised in support of that contention, so I believe there's a possibility that he has not fully considered the issues because he doesn't give the reasonings why he says there's no merit in that submission to him, so I think that's of consideration.

As to some of the merits, as it was thrown over by the Amicus for the parties to raise the merits of the case itself, Your Honours, I did deal with a little bit in my application for leave and I do have some documents in regards to that that I've prepared in the other bundle, the index of the appellants, Your Honour. I'm not so sure how far I'm going to get through this. I'll start with this and see how I get on.

ELIAS CJ:
Well, you could always identify the pages you want us to read if we run out of time.

MR REEKIE:
Okay, Your Honour. Again, I was only hoping to give Your Honours a flavour of the merits of the case that I was bringing forward. I was going to start off with a light issue, which was a misdirection from the prison, acting prison manager, Mr John Kanawa, to Justice Ellis in my claim for relief, interim relief, on the 8th of June. His affidavit, which can be seen at – near the beginning.

ELIAS CJ:
It's got 218 at the top of the page, 217, 218, at the top of the page.

MR REEKIE:
217 and 218, that's correct, Your Honour, and down at paragraph 5 where it states – and I'll just read the relevant part, "On the 3rd of March 2012, Mr Reekie requested transfer to Auckland, which was sent to regional movement co-ordination team. I haven't heard anything back from the team and presume he is on the waiting list along with other transfer requests." Now, this, Your Honour, was a complete dishonest statement to the Court, to Justice Ellis, on the issue. If you come back three pages or two pages, Your Honour, to a prisoner referral form which was the original request for the transfer. Now, that speaks for itself so I won't go into that. That's got 175 at the top, Your Honours. Then if you come back a page before that, as well, which is 169 at the top, now, you'll notice that this was, this email was

created by the same person who made the referral out. There he is requesting Patricia Taylor who is the RO manager at the time. Now, I just bring you back one last page. This is where I can prove that the statement of Mr John Kanawa was untruthful to the Court. It's got 176 at the top of the page, Your Honour.

Now, Phillip Leasuasu, he's the regional movements co-ordinator. Now, where he states, "Sorry, team, this was discussed and agreed by your prisoner leader," now, the prison leader, Your Honours, is Mr John Kanawa. He was the acting prison manager. "I cannot send this on," so he's directed that this request, this transfer request that I showed you on the previous pages, was not to proceed, yet he's clearly told the Court that it was proceeding and it was in the mix. That was just one of the many untruthful statements that he had in his – I think he done two affidavits for the Court. So that was the sort of stuff I was up against.

Now, Your Honour, I'll bring you back to the page, the first page in the documents, which is page 160. This was Chris Gisler and Christopher Lightbrown, who were the custodial systems manager, I believe, and the prison manager at Ngawha Prison. Now, he says, "See my red comments and yes I'm starting to see that colour." He was getting frustrated, Your Honour, and I'll bring it down further. They had accepted me to give Auckland Prison some respite, as it were, for unlawful reasons but the reasons I was given, and I do have them listed in here, are nothing like the comments that he's made here in this second half from Chris Lightbrown in the second half of that – in the middle of the page there, Your Honour. "Thanks for your response. We have similar issues with the points you have raised and in fact agreed to take him to give Auckland some rest last July." So he's saying they accepted me at that prison to give Auckland some rest. Now, that's not a lawful reason for transferring a prisoner under the regions that are allowed.

Now, I do have the – because I did ask for the reasons for my transfer to Ngawha Prison and some of them can be observed at 113. It's about 12 pages in, Your Honour. It's a letter from the Office of the Chief Executive from Inspector David Morrison and he's quoting a response after he made enquiry to the prison manager at Auckland as to the reason for the transfer. Some of the reasons that were given was "the security of the prison and safety of Mr Reekie". Now, this is different to the reasons that he's given and he's given different reasons. Two pages over, it's got 115 at the top of the page, and it's got – the first letter was 7 July 2011. This one is 20 July 2011. Again, it's from the Office of the Chief Executive. "I have made

enquiries into this matter requesting the Auckland Prison manager to respond to the complaints you have raised," because I complained about the other aspects in regards to that transfer. The relevant part in that is, "Prisoner Reekie has, over a period of time, submitted numerous complaints regarding his treatment by his residential manager and other staff, including healthcare. It was deemed appropriate that he be managed elsewhere, as it's clear his perception was that staff were conspiring against him." Well, that's not a lawful reason to transfer a prisoner offsite either, Your Honours. The Corrections Act section 152(1)(b) states, "To ensure that all prisoner under control or supervision are aware of the complaints system and are able to make a complaint if and when they choose to do so without fear of adverse consequences." So my making a complaint resulted in the adverse consequence that I was transferred offsite, Your Honours which isn't a lawful reason for that to have occurred.

Now there is another document in regards to, in regards to the issue of the prison safety, ah, security, which was one of the issues that was put forward by Mr Neil Beales who was the Auckland Prison Manager at the time and that can be seen at pages 12 to 13, which have, which have, sorry that's the wrong one, it must be the next one over. Sorry it's page 15, 15 pages in, and it's got 118 and 119 at the top. It's a letter to Ms Wood where they apologise for any distress caused by a matter in regards to an aspirin that was located, which had mistakenly been sent to her, and I believe this was the security issue of the prison. Now here they are apologising saying that it was impossible that I could have given Ms Wood this aspirin. So the security reason that they alleged that I was transferred for was disproven.

Now these were the transfers to Ngawha Prison so it's shown that the reasons that I was given when I was transferred were not correct Your Honours because if I bring you back to the first document I showed you it says that I was sent there to give Auckland Prison some rest. These are not lawful reasons as for reasons that a prisoner can be transferred. And a similar, for similar reasons I was transferred to Ngawha Prison. Now I contend, Your Honours, coming back to the Corrections Act 152(1)(b) in regards to adverse consequences for a transfer. I was transferred to Spring Hill Prison. Basically during the hearing in front of Justice Wylie I was placed into isolation. Of documents here that on arrival that the prison officers said themselves that I was not suitable for the prison. I was at risk from other prisoners and I should be kept in isolation. I was – there's also, prior to being sent I was on a

vulnerable prisoner's list and that document is actually in here as well Your Honours, you know, which shows that the prison, the prison shouldn't have accepted me.

ELIAS CJ:

Now Mr Reekie, I'm just looking at the time, and as you say what you're trying to do here is show us the flavour of the complaints because of course we can't resolve them at this hearing. Do you think you need to take us to more to show us the flavour? Because that would seem to me to be probably sufficient for our purposes.

MR REEKIE:

The last thing I'll say then Your Honours in regards to that particular issue, sorry, I have two last points that I'll make sorry. Sorry, three, and I'm going to be very brief on these and, and I just put myself in your good graces after that Your Honour, that, that I've done enough to hopefully get me over the line. Firstly, can I just come back to 47. In regards to the chief witness for the respondents in case 47, Mr Peter Fallon, going through his evidence I noted 76 untruthful statements in that evidence and a majority of those statements can be proven to be not truthful Your Honour, putting it as politely as I can. That is a significant amount of untruthful evidence that he has given and that surely should have been identified. At one point Justice Wylie did raise the question of his integrity in regards to one of the answers regarding to the use of mechanical restraints on a tie-down bed but obviously that needs to be explored further.

Further on, in regards to the lengthy notice of appeal some explanation is perhaps required on this. In regards to – I felt the, because the extensive evidence related to events which occurred over a long period of time I felt it necessary in the appeals to include details which would ordinarily be classified as submissions. Now in regards to why I had to do that Your Honour was, when I was transferred back from Auckland Prison on the – to Auckland Prison from Spring Hill on the 17th of August 2012, all my legal documents were with held from me for over a month. Now in order for me to secure my position in regards to my appeal I filed a board notice of appeal and I did amend this as, at the earliest opportunity. I also filed a memorandum in conjunction with that board notice of appeal explaining why that had occurred because if I did not do that I would have been outside of the time to appeal in the first instance and been left seeking leave. Now I notice that the respondents had not included that memorandum in there or any of what occurred after that. So that's of

significance there. Now the fact that my legal documents were withheld from me for over a month set me back in all matters both legal and other commitments that I had.

Now the last issue that I raise with you, Your Honours, is in regards to 102, just on the merits of that, is Justice Hansen claimed that the matter as mostly moot. Now in regards to the disciplinary matters, which I haven't been able to get to Your Honours, which is unfortunate, because I did have some good documents supplied in there, and I actually have my written submissions to Justice Hansen in the bundle there, at the back. It starts on page 73, unfortunately it's not numbered, but it's basically all the back pages Your Honour, you'll see them in there if you care to have a look at those. Certainly in regards to the main one for me, which was the charge that has triple seven in its registration number, that was the most significant one for me and I did have documents to support why that should have been overturned for a number of reasons. In regards to the treatment and the issues that I raised down at Spring Hill he said they were mostly academic because I'd been moved on and all the rest of it. Well that's not quite actually true. In regards to the fact that I raised that those were adverse consequences for making a complaint, that I was sent to Spring Hill Prison, placed in isolation, had my security ramped up, was interfered with in a number of respects. I was subjected to assaults and unlawful uses of force, some which have been upheld by the Ombudsman since I believe, and given that this is about the third or fourth time now that's happened to me, and it seems to happen more often than not around Court proceedings, does raise the question of what is actually happening in that regards. Now I know a lot of prisoners might actually claim that as being the case but, you know, I believe I've got reasonable evidence to support that being the case.

Now I believe Justice Hansen has somewhat overlooked that in that regards and that was really at the centre of my case. Yes, the issues in regards to the, what occurred that were not important and maybe moot in that respect but in the overall view that issue wasn't moot because it was – it had been an ongoing issue and it affects every other prisoner and a judgment, a report was done by the Office of the Chief Executive in regards to some of those issues that were before the Courts and have forwarded that some of those practices cease, or improvements be made in those areas, so it certainly isn't moot in that regard because the department itself recognised that as being the case also.

I believe it certainly needs to be looked at with a fresh set of eyes and certainly in regards to the disciplinary matters, Your Honours, I think the findings there – the VJ's documents and recordings were not made available at hearing and some of the evidence that I put forward, and some of the rulings that she made during the course of that hearing, weren't addressed properly. Like officers prevented from giving serious evidence and the documents, the original documents, complaints made against me, were never provided to me as Justice Hansen claimed at paragraph 56 of his judgment, they were not provided, and that was conceded by Crown Law that they were not provided, yet Justice Hansen has claimed they were provided. So there was a number of issues and there were some factual issues that were incorrect in that judgment Your Honours.

I understand you have got to go do another case, and I appreciate Your Honours hearing me out and giving me this opportunity to bring this matter, matters before you, and I look forward to hearing from you in due course. Thank you Your Honours.

ELIAS CJ:

Thank you Mr Reekie. Thank you counsel. We'll take an adjournment now and Mr Reekie we'll reserve our decision in this matter and you'll be notified in due course. Thank you.

COURT ADJOURNS: 9.50 AM