IN THE SUPREME COURT OF NEW ZEALAND SC 61/2014

[2015] NZSC Trans 13

BETWEEN **TODD AARON MARTELEY**

Appellant

AND **THE LEGAL SERVICES COMMISSIONER**

Respondent

Hearing:	5 May 2015
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	A J Ellis and A Shaw for the Appellant F M R Cooke QC and B D Huntley for the Respondent

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CIVIL APPEAL

ELIAS CJ:

Thank you.

MR ELLIS:

May it please the Court, Ellis and Shaw for the appellant.

ELIAS CJ:

Thank you Mr Ellis and Mr Shaw.

MR ELLIS:

Thank you, Your Honour.

MR COOKE QC:

May it please the Court, Francis Cooke and Bree Huntley for the respondent.

ELIAS CJ:

Thank you Mr Cooke and Ms Huntley. Yes Mr Ellis.

MR ELLIS:

I've never sat on a stool before but with a bad toe I need to.

ELIAS CJ:

A bad?

MR ELLIS:

Toe. I had a toe operation.

ELIAS CJ:

Is that all right or do you – would you prefer to sit? If you're going to sit would you be safer sitting at –

MR ELLIS:

I would prefer to sit down.

ELIAS CJ:

Yes, why don't you do that?

MR ELLIS:

Thank you. I feel a bit precarious.

ELIAS CJ:

Yes, I would have thought so too.

MR ELLIS:
Thank you.

ELIAS CJ:
You might need to make sure, Madam Registrar, that the microphone is picking Mr Ellis up. Mr Shaw can you move along? What about you, Justice O'Regan?

O'REGAN J:
Yes, I think I will be okay.

ELIAS CJ:
Okay.

MR ELLIS:
Yes, well I'll stand for as long as I can and then if I need to sit please don't be offended. Right, so the case is relatively straight forward and simple before you. Was the interpretation of section 8 of the Legal Services Act 2011 by the majority correct, the issue I'm dealing with and Mr Shaw's dealing with the costs issue? And I'm sure everybody's read the submissions and everything else, so I've no need to take you through, in great detail what is in the submissions. I can say, discussing with my learned friend how long we thought we were going to take, which is no doubt going to be completely wrong, but we thought we might be finished by lunch time but obviously that depends on the questions from the bench.

Now I've got to get into the mode for a rights case. I put on my new 800th anniversary Magna Carta tie which I got from Salisbury Cathedral last month. Please don't ask me to name all the barons who signed it because I haven't got a clue and the whole thing, when you actually go in and see it, the best copy, the best original, is in Salisbury Cathedral and it's completely illegible, and in Norman French anyway.

But it does symbolise something about this case because in *Thomas and Haniff Hilaire v Cipriani Baptiste (Trinidad and Tobago)* [1999] UKPC 13, in 2002 Their Lordships indicated you view Magna Carta in today's language, not yesterdays, a right to move with the times, and maybe the time has come when the right to legal aid, now having its first international set of principles and guidelines, maybe it has become a human right that we recognise that goes as far as four appeals. And as

we all know, this case has its genesis in the appeal of Mr Marteley for murder and my learned friend has set out in some detail the history of how the matters got to where they are, and I need to add very little other than to, perhaps, say it was only when the Legal Services Commissioner made his decision that it occurred to me that there must be something wrong with my client because the Commissioner he'd received 12 separate sets of submissions on what were two or three legal points and I thought well, there's some sort of error.

So reading through the case on appeal which plainly Mr Morgan and Ms Levy and Mr Pyke didn't do to the end, and I don't blame them, it was 400 pages long the case on appeal. And on page 392 was the psychiatric report saying look, he's got personality disorders, he's got a history of schizophrenia and he may be a pathological liar. But the fact that it's taken five counsel to arrive at that piece of information shows how difficult it is to get to the merits of the case. And on my front page there, for President O'Regan as he then was, said, "One of the difficulties in a merits test, it's often not possible to form any clear view until the case is fully examined or evidence heard as frequently occurred in 12 counsel cases. Perhaps a power to refuse aid should be available, however, where an appeal is frivolous, vexatious or an abuse of power, I refer only to first appeals. A second appeal may warrant a merit evaluation."

Well this, of course, is a first appeal and it is difficult to get to the merit unless you've got counsel to articulate them and virtually the whole of the Court of Appeal discussion was on the merits and I think President O'Regan, ex President O'Regan, got it right. How do you find out what the merits is? And we can't articulate this in a complete vacuum.

ARNOLD J:
Legal aid provides four hours, doesn't it, for a preliminary assessment?

MR ELLIS:
Six I think.

ARNOLD J:
Oh, six hours?

MR ELLIS:
Six, yes. It could be four and six. I got six, no, sorry, I got six.

ARNOLD J:
Well anyway.

ELIAS CJ:
You've charged for six but you've been approved for four. Someone had – oh, no, Ms Levy had been hadn't she? Yes, so I think it is four.

MR ELLIS:
Yes.

ELIAS CJ:
And she said she'd done six and she rendered a bill for it. I don't know whether she was paid.

MR ELLIS:
Paid it or not, no. There's a small amount, yes.

ARNOLD J:
But your complaint is what, that that's not enough?

MR ELLIS:
Well, you couldn't read 400 pages of case on appeal and form a view. I mean the case on appeal has six different versions of what my client says happened, which he gives to the police and you think well, excuse me, which one do I, and just to get your head around it, never mind the other issues. It can't be done.

WILLIAM YOUNG J:
When was the case on appeal prepared? Did Ms Levy have it?

MR ELLIS:
I beg your pardon?

WILLIAM YOUNG J:
Did Ms Levy have the case on appeal?

MR ELLIS:

I would have thought so but I'm not sure, I think it was about 2011, I don't honestly know.

ELIAS CJ:

We don't really have a chronology apart from the respondent's which isn't really in chronology form is it, it would have been useful because – anyway.

MR ELLIS:

Yes well Mr Cooke has given a sequence of events rather than a "who did what when" –

ELIAS CJ:

Yes.

MR ELLIS:

– rather than a strict chronology. But my recollection is that the case has a CA2011 number and we've been parked while we had the various decisions and did Ms Levy have it – I don't, I can't remember when she did her opinion to be honest so I'm not sure.

ELIAS CJ:

Do we, we don't have the notice of appeal as opposed to the statement of grounds which you've got I think in two places?

MR ELLIS:

The notice of appeal in this case or the Court of Appeal?

ELIAS CJ:

No in the Court of Appeal.

MR ELLIS:

I don't we –

ELIAS CJ:

We've got the statement of grounds.

MR ELLIS:

I think that's one and the same thing in –

ELIAS CJ:

But isn't that provided to the Legal Services Commission?

MR ELLIS:

Oh, I see yes well we –

ELIAS CJ:

We don't have the Court of Appeal document, foundational document in CA, in the CA of 2011 that you're referring to? We don't need it either.

MR ELLIS:

No we don't but we would have had, it would have been amended because I said, "No I think these are the grounds of appeal now," so it would have been subsumed as counsel have changed. So you would really have needed the sequence, the first one – what Mr Pyke said – if Ms Levy did one and what I did too but no I agree with you.

ELIAS CJ:

So which is the one you did that we have, which is your statement? Because I thought Mr Cooke said all of these have been provided by Mr Marteley but that didn't seem, I wasn't sure whether that was right?

MR ELLIS:

There is a notice of appeal at page 80.

ELIAS CJ:

Is there.

GLAZEBROOK J:

Yes page 80. But that's your notice of appeal Mr Ellis it looks like.

ELIAS CJ:

I believe so.

ELIAS CJ:

Yes that is what I was referring to but I hadn't appreciated it was the one that was filed with the Court of Appeal, that's what I was thinking of.

MR ELLIS:
Yes and I think I say in my memorandum that, at page 84 I don't file any at 84 that the grounds of appeal are currently inchoate.

ELIAS CJ:
Yes. And they remain inchoate do they?

MR ELLIS:
Yes, because we had the, as Mr Cooke correctly points out, we had the allegation from my client that, to put it in simple language, the police had bribed some witnesses. Having got the private investigator to investigate that, I did not consider it would be ethical to advance that ground so we don't. Then we've got the mental health issue and we've got what is –

ELIAS CJ:
So the fresh evidence in your ground 7 –

MR ELLIS:
Yes.

ELIAS CJ:
– was that a reference to the bribery or is that a reference to the mental health?

MR ELLIS:
No, the, that was a reference to the bribery.

ELIAS CJ:
So that's gone?

MR ELLIS:
That has gone. The mental health issue, as my learned friend has said, he's quoted from a psychological report of November 2014, saying that he's not mentally ill, he's got antisocial personality disorder, leaving aside the interesting question, is antisocial personality disorder a mental illness? There's been a psychiatric report since which

I referred to briefly and those issues need some further exploration as to what is going on, I mean the essence of –

ELIAS CJ:
But all of those will simply be supportive of the principal ground which is put here as unduly pressured into pleading guilty but which presumably, as developed, cover a ground that the guilty plea should not be allowed to stand –

MR ELLIS:
Stand.

ELIAS CJ:
– so you'll be revisiting *Stretch* and all those sort of cases, yes?

MR ELLIS:
Yes and the – well I don't think it's strictly going to relate to the conviction appeal but the sentence appeal probably has the most interesting legal issue in that Justice Heath gave AJN 10 years and gave my man 14 years and that's going to have some issues about what information the sentencing Judge is entitled to have about police informants without it being made available to a co-accused in public interest immunity.

ELIAS CJ:
Your client also had a discount couched in similar sort of terms but presumably he knew what that was about?

MR ELLIS:
Well a discount to 14 years when the, what he says is the principal perpetrator gets a discount for 10 years, doesn't sound like much of a discount to –

WILLIAM YOUNG J:
But it was couched, the reasons for it weren't explained and they were assistance reasons one assumes?

MR ELLIS:
One assumes yes, so that is that issue to deal with, well which we'll probably need a preliminary hearing in the Court of Appeal and because the issue that Mr Pyke says

there's allegations about improper conduct of two prior counsel and also improper conduct of the Judge, that appears to refer to the Judge receiving what my client describes as "secret evidence" to his, to his disadvantage so those – but the issues do seem to be – what's the word – they're getting clarified and becoming less, they're becoming less issues as it's further investigated, but without the legal aid grant for the private investigator and without the grant for the psychologist and psychiatrist, obviously there wouldn't have, wouldn't have minimised so by the time we get to the actual hearing there maybe, there will be less than was formally notified. But I've forgotten what I was going to say before we went off onto that track.

ELIAS CJ:

Thank you, well anyway that's clarified what I wanted to know about.

MR ELLIS:

Yes the new, the principle new issue in this Court is relating to the literacy, the over-representation I suppose of Māori, the literacy mental health issue, it came somewhat of a surprise to find that the Minister had suggested that 92 percent of prisoners were illiterate and as you will see from my submissions I have reduced that, so in my paragraph 34 summarises the new issue. Whatever the accuracy of the figures and they are distilled from paragraph 26 there, 50.8 percent of prisoners are Māori. Women are also represented.

WILLIAM YOUNG J:

It means Māori women I think doesn't it?

MR ELLIS:

I beg your pardon?

WILLIAM YOUNG J:

There must be a reference to Māori women –

ELIAS CJ:

Must be.

WILLIAM YOUNG J:

– because women are grossly under presented in the prison population?

ELIAS CJ:

Yes.

MR ELLIS:

There's six percent of the prison population are women –

WILLIAM YOUNG J:

Well they should be 50 here if it were a perfect representation.

MR ELLIS:

I see what you mean. Yes but of the women who more than 50% –

WILLIAM YOUNG J:

Are Māori.

MR ELLIS:

– are Māori.

WILLIAM YOUNG J:

Yes, I know that's what I thought you meant.

MR ELLIS:

Yes, looks right to me. And the Minister says 90%. I discover some thesis there which said it was 71% and the, in addition to that, there's various mental health issues at 31 from the Ombudsman's own motion that 89.4% had a current substance or abuse diagnosis and a third had a range of other mental issues. An official information request said 59% at that particular date ere functionally illiterate. So putting that all together, I say most appellants are likely to be Māori, they're illiterate with a substance abuse problem and may be mentally ill or some combination of all of those. So when one comes to look at the merits that ought to be factored in and hasn't been to date.

So you're dealing with people who are severely disadvantaged and I think, interestingly, at the Government's presentation of its periodic report to the UN Committee against torture a couple of weeks ago in Geneva, they opened by saying that they hoped to reduce Māori overrepresentation significantly by 2018. And the police, for example, now have a plan to reduce the number of Māori

apprehensions that go to prosecutions by 25%. Now if that's exceeded, of course the number of prisoners who are Māori would significantly drop and presumably the number of appeals as well. So it's not an insignificant issue which we've never come to grips with in this Court or any other.

And I think it is important in terms of what section 8 is about because how can you understand how you're supposed to lodge an appeal if you're suffering from a multitude of those particular attributes. And it seemed pretty obvious, well, it did to me, from the *Marteley v Legal Aid Tribunal* HC Wellington CIV-2012-485-001314, 30 July 2012 decision that if you've got to write 12 sets of submissions on two points, there's something the matter with you.

And rightly, the Commissioner, as he says, he wasn't aware of this in the High Court. In the High Court we had, firstly, Crown Law thought to represent the Commissioner but we had them removed because there was a clear conflict of interest and then we got somebody from Minter Ellison who didn't seem to, no disrespect to them, they didn't really have a public law approach to this and Mr Cooke says, well, when we discovered it he was appointed so that the rebuttal was with larger guns than it was in the High Court. But my proposition is, of course, the Commissioner ought to be considering these issues as a matter of course when they're considering an application for legal aid. Are you illiterate, have mental health difficulties and drug dependencies? It must be a valid consideration in determination of aid.

And the – at paragraph 35 there, need for legal aid and a lawyer, referring to *Powell v Alabama* 287 US 45 (1932), which was cited with approval by Justice Blanchard in *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 I say is still the locus classicus of all judicial –

ELIAS CJ:
Sorry, where are you?

MR ELLIS:
I'm on paragraph 35, Ma'am.

ELIAS CJ:
Thank you.

MR ELLIS:

On the top of page 9.

ELIAS CJ:

Yes thank you.

MR ELLIS:

And I'm saying, "The right to be heard would in many cases be a little avail if it did not comprehend the right to be heard by counsel. He lacks both the skill and knowledge adequately to prepare his defence, even though he may have a perfect one. He requires the guiding hand of counsel at every stage of the proceeding against him. Without it, though he may not be guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more is it of the ignorant and illiterate or those of feeble intellect?" and that my learned friend uses well. You could say you were innocent and that's a ground in a sort of slightly mocking tone. Just because you say you're innocent, is that a ground for being granted legal aid. Well hopefully it is but I mean how do you ascertain your innocence, and I think Justice Miller suggests that, well, there might be cases where there are only attacks on the facts and no points of law. And that is obviously true but how can you ascertain that there's a point of law until you've actually got counsel to look at the case and analyse it. So it's a little premature to suggest, well, there are only facts.

And as I think, as it's stated further into my submissions, you don't just have an ex parte review of the papers to say that legal aid ought to be granted and that's, essentially I suppose, what has happened here, that the Taito system, where three Judges of the Court of Appeal made the decision, instead of the registrar, has been replaced by legal grants officers making the decision. And in once sense that was a step forward but in another sense it's a backward step because the legal grants officers don't have the same leave of experience as Court of Appeal Judges and they're making the decision on the merits but they're not addressing the merits in a proper fashion.

Now I don't see, with all due respect, my learned friend's submissions, that you cannot construct from section 8 the proposition that it is possible when you have a severe sentence for that not to be considered as in any other circumstances and for the Commissioner to be required to give legal aid. The section of the Crimes Act

1961 that used to be there that allowed the registrar of the Court of Appeal to pre-empt or you dismiss appeals because they were, I think the term may have been frivolous or vexatious, it was certainly frivolous or something, and that's sort of envisaged in the ex President's commentary, is something that is hard to get by but it's a dangerous situation to pre-emptorily dismiss anything unless counsel's had an opportunity to look at is and say look there are no grounds of appeal and, I mean it does happen, and I've had one just last year. I very rarely ever say, I think I've only ever done it twice say, look I just cannot sign their grounds of appeal but this particular gentlemen who had a conviction for sexual violation and got 12 years, we ran through every possible conceivable defence, including a psychological one as to whether his mental state meant a reduction in sentence was possible and I concluded there was absolutely no possibility of advancing an appeal at all.

ELIAS CJ:

I'm sure that you'll make the point from this discursion but I was rather more assisted when you were giving us propositions to latch on to rather than illustration, Mr Ellis. So the last useful proposition I noted down was that you said, well, I thought, was that you said the respondent was wrong to construct from section 8 that the term of imprisonment was – well, you didn't say irrelevant but is that what you were saying?

MR ELLIS:

That he says if it's a serious offence, that is not a reason the Commissioner should invoke and I say the reverse is true.

ELIAS CJ:

Yes.

MR ELLIS:

If it is –

WILLIAM YOUNG J:

Essentially saying it's not a, it's obviously material to whether legal aid should be granted.

MR ELLIS:

Yes. It can fit in the statute very –

WILLIAM YOUNG J:

But it's your position that if it's a serious case, legal aid must be granted?

MR ELLIS:

That is essentially my position, yes.

ELIAS CJ:

Do you have a fallback that in context it maybe that legal aid must be granted?

MR ELLIS:

Well that was why I was going on to a case that I did, there are some cases where even I would say it's hopeless, you can't give legal aid, so I wrote to the Legal Services Commission saying I cannot, even taking into account the decision in this case in the Court of Appeal, there are no grounds that Mr X should be given legal aid. That was where I was trying –

ELIAS CJ:

Well what was being put to you was that if Mr X had been imprisoned for life, would you still take that position? Or is that position still available on the statute?

MR ELLIS:

I think in terms of we don't have capital punishment, certainly in terms of international case law, capital case and life imprisonment are treated as a separate category in that you must have –

ELIAS CJ:

Imprisonment for 12 years.

MR ELLIS:

Well that was 12 years.

ELIAS CJ:

Yes.

MR ELLIS:

That one. I was content to say you cannot give him legal aid.

ELIAS CJ:
Right.

WILLIAM YOUNG J:
The *Maxwell* case interested me because that was effectively what happened in *Maxwell*.

MR ELLIS:
Yes.

WILLIAM YOUNG J:
And I'm not sure what the point of giving legal aid is in the circumstances you're postulating where no one thinks, you're not going to get someone who's going to argue it because it's hopeless.

MR ELLIS:
Well certainly in *Maxwell v the United Kingdom* (1994) 19 EHRR 97 (ECHR), we had three solicitors and often counsel, didn't we, all saying there is no hope –

WILLIAM YOUNG J:
Yes.

MR ELLIS:
– of you winning and the European Court saying, well never mind, and Sir John Freeland added into it saying well you've got to give legal aid because of the seriousness of the consequence in terms of, I don't like to look at any fiscal matters, but if it costs a hundred thousand a year to imprison somebody you're going to pay the standard rate of 3000 a year for an appeal, then why not give somebody an appeal –

WILLIAM YOUNG J:
Well what I agree on fiscal grounds that maybe right. I'm just interested in the practicality of it because if counsel, who's appointed on legal aid, takes the same view as the counsel's predecessors, then effectively the appellant isn't going to get legal aid in a practical sense because counsel are going to say, well there's nothing I can say in support of the appeal.

MR ELLIS:

Yes, well in that particular example I was giving the man was in danger of getting an increased sentence in my view not, if that is still possible under the Criminal Procedure Act 2011, but certainly before I'd done that case I wouldn't have been of the view that you could ever refuse legal aid for something as serious as 12 years. I'm certainly of that view for murder or anything that attracts life imprisonment. And the, turning to paragraph 40, if I may, of my submissions, the positions of the parties in the Court of Appeal is pretty straightforward. Mr Cooke presented comprehensive submissions and the fiscal issues that were in play there and I supported the High Court judgment well fiscal issues I think must be a, some consideration because the whole of the Legal Services scheme, just like everyone else, has to be funded and to consider whether or not you fund counsel or you fund amicus as the Court of Appeal were doing because they weren't getting, counsel weren't being appointed, are relevant considerations and seeing that the Court of Appeal were looking to my view at things in too much black and white that visions of grey that – to some extent the overall fiscal consequences of what is going on must be relevant and Mr Cooke in the indented paragraph 33, the only position is in the Court of Appeal, in my paragraph 40, submitted the correct approach is that adopted by the Court of Appeal in *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA) and the extract which Mr Cooke also repeats in his submissions is contained in paragraph 42 of my submissions, taken from *R v Taito* [2003] 3 NZLR 577 (PC) where it's obvious from the judgment Their Lordship having a respectable disagreement with many of the dicta in *Nicholls* and that must be the case and my learned friend extends that and goes through into well Their Lordships don't really deal with this issue, which of course they don't, in the context of their saying, well we don't agree with what happened. They had no need to but somehow I seem to have this feeling of déjà vu. Instead of three Judges deciding the matter, now we have a grant's officer deciding the matter and trying to second guess the merits which not only are they not qualified to do in a practical sense, but it is impossible to know what the merits are unless you've given somebody a grant of legal aid, or at least an interim grant, to go through and see if you can actually find anything.

ARNOLD J:

That happens. I must say I just don't follow where you're going with this. There was a grant of aid specifically to enable counsel to try and identify whether there are arguable grounds of appeal. In this particular case there were a number of grants of

aid for that purpose. So, I mean is the reality that you're arguing for, that everybody should just be given aid? In other words, there should be no preliminary vetting.

MR ELLIS:

Well certainly the new UN Guidelines address that everybody at appellate level should be given aid, particularly for a first appeal.

ARNOLD J:

Well yes but you've got to put this in the framework of section 8, and section 8 was re-enacted in essentially the form that was discussed in the *Nicholls* case. Don't we have to look at section 8 and try and understand it informed, I accept, by the international material?

MR ELLIS:

We can and we can reconcile it by giving a grant of aid, or an interim grant of aid, for everybody to have an opportunity to advance some grounds of aid, because otherwise, if you don't give them, you're going back to the discriminatory form of practice that happened pre-*Taito*. The rich get an appeal and the poor don't.

GLAZEBROOK J:

Do we actually know what's in front of counsel when they have that interim grant of aid? Because I don't think we've got that information. Because of course in *Taito* the issue was that there was actually very little information, as a I understand it, in front of the Judges making that initial decision. Which was an added issue in the case.

MR ELLIS:

Well then there's two answers to that I suppose. One, if you were counsel in the Court below you'd be somewhat more familiar with the case.

GLAZEBROOK J:

And you'd presumably have notes of evidence at the least?

MR ELLIS:

Yes, yes, if you're new counsel you're not going to have, have them and you're probably not got the case on appeal. You'd be talking to your client and saying what do you say the grounds of appeal are. So – a

O'REGAN J:

I think the way the system works is the case on appeal is produced once, so that counsel can, I mean most counsel say I won't do my four hours until I've got the case on appeal, and I think the Court then produces it for them. That might not be an invariable practice but I think that's what usually happens.

MR ELLIS:

Well in that case there's three answers, isn't there. Some get case on appeal, some don't.

GLAZEBROOK J:

Well we don't seem to know what happened in this case so it might be useful to know what Mr Pyke and Ms Levy had. I'm not sure that it makes any difference but – and it might be useful to have what the usual practice is in any event, because I'm not sure that there was a notice of appeal filed here until 2011 but whether that's the case or not I actually don't know because we don't have that information. And if you look at the case on appeal file I don't know whether the Court of Appeal would have prepared a case on appeal so that even whether they would need the summing up.

O'REGAN J:

That's true. They wouldn't until an appeal was filed, that's definitely right there.

ELIAS CJ:

Well there wasn't another appeal filed was there. I mean it's the 2011 –

GLAZEBROOK J:

That's certainly what it looks like because it looks as though the earlier advice was we're not going to appeal it and of course in this case we don't have the Judge's summing up, or the notes of evidence in any event, and so it maybe that it's actually irrelevant. Given the guilty plea I mean.

MR ELLIS:

Yes, yes, I understand what you mean. There does appear to have been only the one notice of appeal lodged and the rest of Mr Pyke and Ms Levy's, and to some extent my, correspondence with the Legal Service Agency, is relied upon as to what the grounds of appeal are. Ms Levy says, well, he could have got a manslaughter

verdict and so there is something that Mr Morgan got wrong, but inevitably in her view he faces the possibility he could get convicted of – could get, of murder.

ELIAS CJ:

Was that letter from the trial counsel to Mr Marteley, was that made available to Mr Pyke and Ms Levy?

MR ELLIS:

That was the impression that I got.

ELIAS CJ:

Yes.

MR ELLIS:

Yes, but I wouldn't swear to it.

ELIAS CJ:

No. It was attached, was it, to something in that case on appeal – in the case on appeal we have it's separated but I wondered whether it was actually attached, there's a memorandum, or is it the affidavit of Mr Stephens, I'm not sure. No, it wasn't. Oh yes, this DAS, what's a DAS?

MR ELLIS:

No idea. What number in the case on appeal Ma'am?

ELIAS CJ:

Page 35, but that's not, that doesn't have this letter attached to it, but I don't know.

MR ELLIS:

Of Mr Stephen's affidavit.

ELIAS CJ:

Yes. But the letter from Mr Robb is at page 36.

GLAZEBROOK J:

18th of January 2011 said that it, Mr Cooke says that it includes the review of previous counsel's advice.

MR ELLIS:

Yes I think that was a very –

ELIAS CJ:

Was the letter of 19 August 2010 at page 36 available?

MR ELLIS:

That's the one I'm looking at.

ELIAS CJ:

Oh that's the one you're talking about?

MR ELLIS:

Yes. Yes, I believe so, yes.

GLAZEBROOK J:

Well in his letter of 18 January Mr Pyke said he reviewed previous counsel's advice which presumably does refer to that.

MR ELLIS:

Yes, certainly the tone of what Mr Pyke says, and to some extent what Ms Levy says, indicate she's well aware of what's going on. But it still does seem strange. Justice Arnold says, look, let's look at this with reality what's going on. We've got all these counsel and only on the fifth counsel do we find that there's something mentally suspect about the client. So you can be given a small grand of legal aid and you may not say what's wrong.

ELIAS CJ:

What is meant by due diligence in the instruction that's given for this limited purpose?

MR ELLIS:

Well I think there's been some commentary from the Law Society about that. How can you meaningfully carry out your instructions with such a small grant and some people simply refuse –

ELIAS CJ:

But what does the Legal Services Agency mean by undertaking due diligence when it instructs these providers?

MR ELLIS:
That you do a full and proper analysis.

ELIAS CJ:
Of what, whether there are grounds of appeal –

MR ELLIS:
Yes.

ELIAS CJ:
– or whether there are grounds for the grant of legal aid?

MR ELLIS:
Well I think the two came hand in hand.

ELIAS CJ:
Well not necessarily in terms of the instruction. I'd like to know the answer to that. Maybe Mr Cooke can help us in due course about that.

MR ELLIS:
It is a matter that I say that the Law Society has expressed concern, that you can't' actually do the job for the amount you're provided with. In the pre-*Taito* days you were given one hour to draft some ground of appeal without asking for it, and now it's gone up to four hours. But whether four hours is a realistic grant, with due respect to Justice Arnold's proposition, it could be in some simple cases, but in a case such as this it is not.

ELIAS CJ:
It looks as if it's a summary of issues, doesn't it, on that letter at page 59. It looks as if due diligence in this context is simply the preparation of the summary of issues to be raised on appeal.

MR ELLIS:

Well, yes, and I've seen some of those which mirror effectively what the grounds of appeal are. I mean I generally just send the Legal Aid Agency the grounds of appeal because why do it twice when you've only got a few hours anyway. And by paragraph 43, reinforcing what I was saying just a moment ago, quoting from *Taito* and that what is not an arguable case can only be determined after the observance of due process in considering the merits or demerits of the appeal and to substitute a four hour grant and say this satisfies the observance of due process I think is a mean spirited and not a grant that would fit in referring I think to what the Chief Justice said on Friday about President Richardson in *Noort* you're supposed to be promoting and protecting the Bill of Rights, not minisuclising the grant.

ELIAS CJ:

Well wont' it depend on the context? This is the concern I have about this appeal, that we're being asked, and I know that the shape of the case has been shaped really by the appeal to the Court of Appeal by the Commissioner, but we're being asked to look at this in a very abstract sort of way. Because as you've acknowledged, some cases on four hours are reviewed, depending on the material that you have available to you, counsel may well be able to sufficiently observe due process, to come up with a confident summary.

MR ELLIS:

Yes, I suppose that the problem is it's one size fits all, whether four hours, and we are, I am influenced, of course, by the fact this is murder 10:50:28), as *Nicholls* was, and *Tikitiki* and was rape, but there may be some cases where, yes, four hours is quite sufficient if you're appealing a low sentence or even a sentence that doesn't include imprisonment. Four hours maybe adequate but we've all sort of focused on really the serious end of the scale because that's where we were with *Maxwell*. But I quite accept, on the lower end of the scale, there may be a difference set of factors that prevail and wouldn't want to pretend otherwise.

ELIAS CJ:

What, in this case the only basis of a conviction appeal would have to be that the guilty plea must be vacated, which requires, one would have thought, in many cases a very wide enquiry. Is that part of the – I'm just trying to anchor this to the facts a little bit.

MR ELLIS:

Yes, that has to be a highly relevant consideration with the only possibility he has of succeeding if he can have his guilty verdict vacated effectively and that does need an analysis of what the incentive was for his partner, if she got three years if he pleaded guilty, and he was pleading guilty on the basis he didn't use the weapon, and then he managed to get 14 years anyway, with Justice Heath saying, well we're never going to know what happened, so one does have to have an analysis of what the other three co-accused did and it's not an easy issue because as Justice Heath and particularly, not exact words, but something to the effect that it was a particularly nauseating and awful murder and a tomahawk used and pretty grizzly stuff, he doesn't pull any punches, but my man says well I wasn't swinging any weapon at all and I pleaded guilty on the basis that I was there but it was only going to be having him done over without serious injury.

WILLIAM YOUNG J:
It would have to be with an intent to inflict grievous bodily harm, wouldn't it?

MR ELLIS:
Yes.

WILLIAM YOUNG J:
So he's had to plea, his plea necessarily would encompass that, wouldn't it?

MR ELLIS:
Well he says in one of his versions, and remember as I say he had six versions in the Court of Appeal, that he had no intention of any serious harm being done at all –

WILLIAM YOUNG J:
But that's inconsistent with the plea.

MR ELLIS:
I agree.

WILLIAM YOUNG J:
Yes.

MR ELLIS:

But then he says it's inconsistent because I was influenced by my missus would only get three years and he expected, obviously, far less than 14 years. So he says he was unfairly induced into the guilty plea. I agree it is inconsistent but everything that my client says has some elements of inconsistency because you can't give six different versions of pleas. Never mind how many version he may have given counsel since. It's a tricky case to deal with and needs full analysis. It's a very tricky case. It's not just look he pleaded guilty. It's, he pleaded guilty and he got 14 years for somebody who's pleading guilty to not using a weapon. It's a bit strange.

ELIAS CJ:

It's also pleading guilty and seeking to have revocation of the plea, something that has been a substantial hurdle in the cases to date, but which may require reassessment at a time of vastly increased prosecutorial discretion, as indeed maybe this case illustrates. So –

MR ELLIS:

Yes, I recall the High Court of Australia has a case whose name escapes me for the moment but it will be in the last 10 years, which analyses the, about 400 pages I think, the what is an inducement and it's a full analysis, I think, of the common law world, which perhaps we are due for, yes. To rely on that.

WILLIAM YOUNG J:

What's the current state of play on the authorities as to setting aside a plea of guilty where there is this co-lateral advantage offered, that is your partner is going to get a better deal?

MR ELLIS:

Ah –

WILLIAM YOUNG J:

Because it must be pretty common, I mean it is pretty common, that sort of offer.

MR ELLIS:

Yes, it is very common, and I think it all boils down to the facts and circumstances of the individual case. I did do one about two years ago and my recollection is that there's no real clear signal as to what the test is, and that you've got to consider what precisely happened, where you were and so forth.

ELIAS CJ:

Well in – yes, I'm just thinking about the approach that was adopted in, even in a case like *Stretch*, where the appellate court actually did undertake a comprehensive review of the evidence to form the view that there was no miscarriage of justice. It's quite extensive and the Court took it on itself to do that.

MR ELLIS:

Yes, but I mean here, trying to apply that, we've got, we don't have a trial with evidence. We've got various people making what are effectively pleas in mitigation to their counsel and trying to ascertain what the facts are, I, I think Justice Heath got it quite right when you said we will never know what happened.

ELIAS CJ:

But you do have a foundation really I suppose in the letter because it at least indicates some of the background so it's not as if it's entirely speculative that there was this inducement. In many cases there will be an issue of fact, but here it seems pretty evident there was.

MR ELLIS:

Yes, but then the question appears to come, well where did the inducement come from, and it apparently is arguable that it didn't come from the prosecution, it came from co-counsel.

ELIAS CJ:

Co-counsel.

MR ELLIS:

Yes. But whether you're looking at –

ELIAS CJ:

Or except that letter, I know that's said in one of the reviewer, or the Tribunal decisions, but the letter on its face refers to the prosecutor. Anyway.

WILLIAM YOUNG J:

It would have to be approved by a prosecutor anyway because I mean the prosecutor would have to agree that the charge in relation to the partner be reduced to manslaughter.

MR ELLIS:

Yes, that's logic, I only said it could be argued because it was somebody else. It certainly wouldn't be my argument and I think the categories of who can induce may need to be looked at further. I think I tried to persuade you of that in *Jessop* without success, that the mother was capable of having an inducement to the daughter and certainly the Australians would accept that, but we haven't had a major review of that for some time and whilst you say the Court of Appeal have reviewed it, this Court –

ELIAS CJ:

Well the Court of Appeal hasn't, I think, reviewed it recently, there've been a couple of cases which have simply purported to apply earlier cases and at least in one, I'm not sure that it accurately followed the earlier authorities but anyway that's not, of course, before us. That would be perhaps the subject of the appeal but it's a bit awkward because we have to have some, some idea of the complexity or the possibilities in the appeal in order to look at this legal aid in context.

MR ELLIS:

Well as I probably haven't under-emphasised and perhaps I should have paid more attention to it, the sixth version of what happened that my client gave to the police that are articulated in interviews in the case on appeal of them followed by a number of further ones, so actually trying to understand, which I've now got some guidance from the psychiatrist, of how do you actually get to the genuine version of what happened, is extremely hard. It's not an easy case to get your head around and there's no way he could argue it himself. And he simply isn't capable. If he can manage 12 sets on submissions on two points before the Legal Aid Commissioner I imagine –

ELIAS CJ:

Well it's not just the facts is it, it's that there's quite a significant legal hurdle to be overcome here and some assessment of the law of the circumstances in which on conviction and appeal are – a plea will be set aside is quite important?

MR ELLIS:

Yes and one of the grounds in section 8 is are there complex, legal, factual and evidentiary issues and in this case there are. And then I probably said I was going to go to page 16 of my submissions, moving on there, that where at paragraph 61 Justice Miller says that the Commissioner considers the merits is not to say detailed consideration must be given but must be satisfied the appeal may succeed in fact. "To consider whether the grounds of appeal would succeed if made out is to consider the merits, albeit at a higher level. The legislation doesn't require the Commissioner go any further." Well I say factoring literacy and mental health issues, that should ensure Justice Miller's high level consideration is what is required and then pose the question but how can the Commissioner ever get a clear view without counsel identifying. And then over the page on page 17, I respectfully disagree with part of Justice Miller, who as you know I am essentially relying upon, where His Honour essentially says the legislation also contemplates the interest of justice may not justify a, or a meritless appeal which takes us back to *Maxwell* I suppose but both ex-President O'Regan and *Douglas v California* provide the answer to what I say are Justice Miller's mistaken views. In spite of *California's* forward treatment of indigents under its present practice the type of appeal a person has in the District Court of Appeal hinges upon whether he can pay. If he can the appellant Court passes on the merits of the case only after hearing the full benefit of written briefs and oral arguments. If he cannot, the appellant Court is forced to pre-judge the merit before it can even determine whether counsel should be provided. At this stage only the barren records speaks for the indigents unless the printed pages show that an injustice has been committed, is forced to go out as a champion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived of him when the Court decides on an ex-parte examination of the record with the assistance of counsel. It's not whether the assistance of counsel is not required and that is very much looking at it in high principle. Why should the rich get an appeal, this is *Taito* all over again. Why should the rich have an appeal as of right but the poor don't? And I emphasise that on page 18 by reaffirming the discriminatory nature of an appeal, the rich receive a full appeal, they have counsel and they are heard, the poor, illiterate and mentally ill get second-rate justice and Their Lordships observed the discriminatory effect in 68 and it's also discriminatory in breach of the oldest constitutional statutes in New Zealand, not in force in England, the statutes of Westminster the First which was 1275 the Magna Carta in force is 1282 or something like that, re-enactment, that the common right be done to all as well as poor as rich, it's the first discrimination check, statute. And you cannot allow a system that has the

rich being allowed an appeal and the poor not. This is New Zealand not the ISIS State in Syria or Iraq.

And the merits, at paragraph 72 there, I've probably said that. The *Taito* system has been transformed into decision-making by legal aid grants officers. This is a backward step and we need a simple change in the legal aid form in practice to identify people who have got these problems because taking the Chief Justice point about whether it's a relatively simply appeal and you only need four hours, well even assuming that's right, if the client is illiterate, mentally ill, whatever, he may need more than four hours. And given that more than half of them are likely to be, it's not a tempting proposition to just dismiss the simple cases with a four hour grant.

You will be familiar with the fair trial proposition in paragraph 75 and what Justice Blanchard in *Condon* said citing the *Jago* decision in the High Court of Australia. And I say at 77, an unaided process, an un-legally aided process cannot be in the interests of the justice and I cite from the Human Rights Committee General comment 32, which is a fairly recent one, I think it was 2000 and – well in the last decade anyway where states are encouraged to provide free legal aid in other case, as well as criminal. They're saying you should supply them in civil cases as well and then the quotation that Justice Collins adopted in the High Court from Justice Black from *Gideon v Wainwright* 372 US 335, 344 (1963) over the page, "That government hires lawyers to prosecute and defendants take the money," I think probably "that" missing, "That have the money, how lawyers defend are the strongest indication of the widespread belief that lawyers in criminal Courts are necessities, not luxuries." From the very beginning our state and national constitutions have made great emphasis on procedural and substantive safeguards designed to ensure fair trial.

And in *Douglas v California* they are, in denying the petitioner's request the District Court of Appeal stated it had gone through the record and come to the conclusion that no good will be served by the appointment of counsel. And I've read you the bit in spite of *California's* forward treatment but you can't just dismiss the sort of people who want legal aid by saying, oh, you know there's a grant for four hours and that's enough. That, with respect, is a mean-spirited approach to human rights and the Bill of Rights. And I say it, bringing that proposition to a close at paragraph 80, "The judgment of the Court of Appeal effectively means many an applicant, appellant will have the right to a meaningless ritual whilst the rich man will have a meaningful

appeal," citing from the passage above in *Douglas*. And that's what it comes down to.

And then turning to the UN Principles, regrettably neither of us found those in the Court below and having done a little bit of homework it seemed that the vote for these was by acclamation and the Ministry of Foreign Affairs confirm they played an active role, active role in this but we are for the first time having a set of principles and guidelines at international level on access to legal aid in criminal justice systems. And I say given that the Commissioner and MAF are part of the executive branch, these – the Commissioner should have known about these things, should have been told about them by MAF and should have drawn them to the attention of the lower Court so we have to bring it here because we've only just discovered it. I make no pretence at 84, as you well know, that such guidelines are binding, they're soft law but they're indicative of the Court's duty to interpret our international obligations when considering our domestic ones and specifically the guidelines provide, at guideline 5, paragraph 45, "To guarantee that every person charged with a criminal offence to which a term of imprisonment or capital punishment maybe imposed by a Court has access to legal aid and all proceedings at Court, including on appeal and other related proceedings." So we've moved on from *Maxwell* in that this was their interpretations to now the universal population have by acclamation, at the General Assembly, adopted these guidelines. And I've provided you with a summary by the Open Foundation as about what these do and they were clearly drafted with a keen sense of the controversies and difficulties in providing aid around the world and they attempt to provide valuable detailed guidance about best practices. And in the footnote there you'll see gender sensitivity and victims and witnesses. And my learned friend in his submission says, well look they're going a bit far from what we were expecting in New Zealand, well you know maybe it's time for a radical rethink. Why that, having the UN adopted it, is it too much for us? It certainly wouldn't have been something I would have thought about – victims and witnesses. But if that's what is where the world's going in legal aid, we can't shut a blind eye to it.

Right and then I arrived at the top of page 25 which is the costs matter which as I indicated Mr Shaw will be – but before we get there – sure –

ELIAS CJ:

Yes. I have questions yes.

MR ELLIS:

A few questions, sure.

ELIAS CJ:

Mine is just a sequencing matter because I don't understand just from, probably I should have paid more attention to the respondent's careful explanation of this but I didn't find it that easy to understand. The decision by D J Plunkett at 104, that was overtaken was it? Why did we get the second one by E J Forster at 110 and that's the only one that's the substratum for the High Court appeal is it?

MR ELLIS:

Well that was a question of procedure. Mr Plunkett was dealing with whether the submission was filed in time or not and it seemingly wasn't and that's the decision on that issue and then as I emphasised with –

ELIAS CJ:

But he decides it on the basis that there's no merit and it's an odd approach the decision of 23 February's no longer operative whereas of course it was in terms of – anyway all I wanted to know is can we disregard the D J Plunkett decision –

MR ELLIS:

Yes.

ELIAS CJ:

– and the only one that's in issue is the E J Forster one is it?

MR ELLIS:

Yes and Justice Mallon as I praised in my submission somewhere, she sorted it about and said well go back, get it, get it, get on with it –

ELIAS CJ:

She sorted that out. Properly. Okay.

MR ELLIS:

– stop messing about with time limits, there's a serious issue here. So and I need to – not if other people have got questions, I need to take a few things on what my learned friend has said and then we moved to Mr Shaw if we may.

In paragraph 5 of my learned friend's submission my friend takes exception to some additional material filed which he says is not appropriately before the Court and he footnotes that as particularly the correspondence from the President of the Court of Appeal in his administrative capacity and the correspondence regarding the fee. Well just looking at that in context, Mr Cooke in the Court below wrote to the registrar and said, "Here's some correspondence from the President," and it also included correspondence from Justice Randerson too, to legal aid and given my experience in *Nicholls* and *Tikitiki* he suggested that maybe it was inappropriate for the then president to sit, to which I responded, well I think you're in a bit of danger using material that you obtained in the *Nicholls* and *Tikitiki* case when you were counsel on this side, not that side and you shouldn't be using that, please desist and then if you want to recuse President –

ELIAS CJ:
So what's the submission you're making to us here Mr Ellis?

MR ELLIS:
That they are, they are appropriately before the Court. And that, if you want to recuse the President please make an application and he decided he didn't and the President, ex-President was entitled to know in this Court whether or not anybody was objecting to him and nobody is so I can't see why these things are irrelevant, they're relevant to the –

ELIAS CJ:
Well I don't see why you say it's relevant on that basis because you seem to be saying that it's overtaken?

MR ELLIS:
Well it would have been improper not to indicate to the ex-President that there may be an issue about his recusal –

ELIAS CJ:
Well there may be different views on that Mr Ellis but I can't see how it helps us in what we have to decide here and as you say no issue is taken, so we can move on.

MR ELLIS:

Well the context of what the President said has been the subject of funding I've discussed. How do you know what the merits are?

ELIAS CJ:

Well Mr Cooke makes the point that it's irrelevant and you seem to be accepting that it's irrelevant to what we have to decide so –

MR ELLIS:

No, no, I'm not saying it's irrelevant, I'm saying it is relevant in the context of what the President said was clearly, how do you know what the merits of the case are, which is the whole point of this appeal.

ELIAS CJ:

Well you're adopting that –

MR ELLIS:

Yes.

ELIAS CJ:

– and coming from you it's a submission.

MR ELLIS:

Yes, yes that's right.

ELIAS CJ:

A letter written by anyone however eminent is probably not authority.

MR ELLIS:

No but it came in the context – it wasn't my letter, he put it in.

ELIAS CJ:

Yes I understand that point. Yes.

MR ELLIS:

Yes and then secondly the question about the costs which he says, well whether you get, whether they get the legal services that the Commissioner funds, that side of the

table eight times more than this side is relevant to the cost question and it's no more and no less than that, so...

ELIAS CJ:
Yes thank you.

MR ELLIS:
So that was that point. And at paragraph 22 my friend notes that the psychiatric report had not been previously handed up during the High Court argument and at the close of the Commissioner's submissions in the Court of Appeal the Commissioner advised the Court that he agreed that legal aid should not be withdrawn. Well if he'd said that at the beginning it might have been, perhaps, a different story but my client was entitled to appear as respondent and he couldn't appear obviously in person without legal aid because of his psychiatric problems but it was nice of the Commissioner to say legal aid would not be withdrawn but that's at the very end of the case.

ELIAS CJ:
Sorry I did have another question relating, which you've triggered my recollection. In both of those legal aid Tribunal decisions the applicant is said to be self-represented, is that the normal course that this, that the review through the Tribunal is not something that's funded?

MR ELLIS:
No, not that wouldn't be the normal situation. As I understand it, there's a grant of two hours' legal aid to represent somebody on that and I just take the view that given you're going to spend a day or so doing, I'm not going to reply for a grant of legal aid for two hours, it's just grossly insufficient.

ELIAS CJ:
So even though you were involved in the background you didn't appear in this?

MR ELLIS:
No I didn't write the submissions, I didn't appeal, I said, "You get the decision there, I'll take over in High Court."

ELIAS CJ:

Right.

WILLIAM YOUNG J:

And just as to when you were told that the decision was made that legal aid wouldn't withdrawn, paragraph 21 of Mr Cooke's submissions suggest that that was conveyed before the Court of Appeal hearing?

MR ELLIS:

Paragraph 21. At the close of the Commissioner's submission the Commissioner advised the Court.

WILLIAM YOUNG J:

I see sorry, I think I've misinterpreted it. What they were saying was that legal aid would continued until the appeal and then at the close of the appeal hearing it was confirmed that legal aid would not be withdrawn.

MR ELLIS:

That's as I understood it yes. I've probably made the point in paragraph 26 about, at the bottom of the page in 26.2, "There's no room for an approach that mandates granting of aid because of the seriousness of the offending," well I say that's wrong because you can, it must be an integral part of interests of justice and it's also an integral part of any other circumstances so it can be read consistently, section (a), with my approach and that is just wrong. There is room. And I thought that was the last one I wanted to raise that I hadn't got earmarked for reply but, well perhaps there's 40(a) which I made some mention of. "On the High Court's interpretation the assessment of the grounds of appeal is meaningless. Almost anything can be capable of leading to a successful appeal. A claim that the appellant is innocent or the Judge is corrupt would do, for example." Well I hope they would because it is important as to whether somebody's innocent or not and in the unlikely event that a Judge is corrupt I mean obviously you'd need legal aid to advance some submissions on that or you might find it difficult to get anybody to advance it, given the laws about not, the legal ethics laws about not making allegations without proper evidence. But it doesn't pay to belittle whatever the grounds may be. If the appellant is innocent that does –

ELIAS CJ:

Is there, as has been said in some other contexts, scope to say that it's not a matter simply of pleading, as it were, that, that the ground has to be invested with some sense of reality?

MR ELLIS:

Yes and no, let us imagine that a new appellant says "I'm innocent" and the Judge is corrupt and that's what they write on the legal aid form, then there needs to be an interim grant to investigate that, obviously counsel's going to take the second leg of that very seriously and say, "well where is there some basis for this", perhaps like in this particular case the private investigators were investigating this allegation of bribery by the police –

ELIAS CJ:

But even there –

MR ELLIS:

– and there's nothing in it.

ELIAS CJ:

Well even if there was some asserted basis of what another prisoner had said or something like that which provided some sort of foundation for investigation but it gets back to my concern that we're being asked to look at this matter in the abstract because if it was looked at in the context of this case, one might say that there is some degree of reality that's invested in this by the letter of advice which preceded the plea and by the clear reluctance evinced by the, by your client seeking to have the plea vacated before sentence was imposed and so on. So, I mean, is it not something that's incapable of coming up with a test in advance and it's something that has to be assessed in the circumstances of each case?

MR ELLIS:

Yes I think I will adopt that approach. I mean certainly the possibility that can just advance anything off the top of your head, I can see where my friend is going, you just dream up any old rubbish and stick it in but it doesn't work like that because when counsel's got the allegation which in this case, if there were statements made by other prisoners about what happened and I'm not going to take you down the track as to why it's not going to be advanced as grounds of appeal, but counsel's got to look at these things too and say, advise legal aid in the summary of issues what

are the grounds of appeal and on each and every occasion they are going to be different and you cannot set a possum trap and we're heading into it and it snaps. There's no, well, you'll have to have 20 possum traps in case the possum goes this way or that way. You must look at each one in its individual circumstances on each and every occasion. Yes, Ma'am, that's right.

Now, I think I could safely say I've dealt with what I need to deal with up until this moment, and miraculously I have finished at 11.30.

ELIAS CJ:
Thank you. So we'll hear Mr Shaw – sorry, yes?

ARNOLD J:
Can I just raise something and perhaps you could think about it over the break? One of the approved questions was whether the interpretation of section 8 adopted by the Court of Appeal was correct and you've referred us to a good deal of informational material. You haven't taken us to section 8 at all and I just want to make sure that there is nothing about section 8 and the particular way in which the Court used aspects of it to reach its view that you want to refer our attention to, that you don't want to refer our attention to.

MR ELLIS:
Well, my learned friend set section 8 out in full on page 9 of his submissions and I have touched upon complex factual and evidentiary matters, which is (2)(a)(v), whether the appellant can understand the proceedings and the any other circumstances, so I've assumed that you're familiar with section 8 and that those references were sufficient to deal with it. I'm not ignoring it by any means.

ELIAS CJ:
Well, you did make the submission that section 8 can be reconciled with the UN Guidelines.

MR ELLIS:
Yes, I did.

ELIAS CJ:
Did you want to elaborate on that submission?

ARNOLD J:
Well, that's exactly the point.

MR ELLIS:
Well, I'll do that perhaps after the break.

ELIAS CJ:
All right, we'll take the adjournment now.

COURT ADJOURNS: 11.33 AM
COURT RESUMES: 11.49 AM

MR ELLIS:
I wonder if I might sit because –

ELIAS CJ:
Yes, of course, Mr Ellis.

MR ELLIS:
Yes, now, in answer to Justice Arnold's question relating to section 8, you'll find section 8 either on my learned friend's submissions at page 9 or in his tab 1 of his bundle of authorities. The way I have advanced the case really boils down to the wider question of what "interests of justice" means, and if you're following his submissions as he's bolded them, I am because it's easier, in (c)(ii), "If it appears to the Commissioner that the interests of justice require that the applicant be granted legal aid," and then in 8(2), "When considering whether the interests of justice require that the applicant be granted legal aid, the Commissioner must have regard to," and then there's a list of eight factors and the (b), any other circumstances.

Now, the importance in 8(2)(a) is that the Commissioner must have regard to these things but that isn't a totally extensive list of what the Commissioner can or may have regard to because you're obviously aware it doesn't, for instance, say the New Zealand Bill of Rights Act 1990 but that's plainly something the Commissioner is going to have to have regard to and also the international guidelines that I've mentioned. So what he must have regard to though is either by operation of law he's going to also consider the Bill of Rights Act and international obligation or, if he

doesn't agree with that, then they come in under 8(2)(b), any other circumstances that are relevant. So it's quite wide. He can do virtually anything there.

And then when we look at the analysis – not the analysis – the layout of (a), just look at each one in turn, (i) "Whether the applicant has any previous conviction."

ELIAS CJ:
How is that factored in? I suppose it could cut both ways.

MR ELLIS:
Both ways. Well, I'm taking it to mean if you've got a previous conviction you're more likely to be –have a – if you're convicted you're going to have a greater penalty because you've got a previous conviction, and that seems logical in respect of (ii) and (iii), whether he's charged with an offence that is punishable by imprisonment, and (iii) whether there's a real likelihood be sentenced to imprisonment. So I don't quite understand, Ma'am, what you say by both ways in (i).

ELIAS CJ:
I had wondered whether if they've had previous convictions they're more au fait with the system, but –

MR ELLIS:
I see.

ELIAS CJ:
But I think you're right. I think in context it can't mean that.

MR ELLIS:
And when we get to the first person with a three strike –

ELIAS CJ:
Mmm.

MR ELLIS:
-- obviously whether they've got –

ELIAS CJ:

Well, it's going to be very relevant.

MR ELLIS:

It's going to be very relevant, isn't it? And then (iv), which I've somewhat dealt with in the process of addressing you earlier, whether there's a substantial question of law and then whether there are complex factual, legal or evidentiary matters. So the Commissioner's got quite a wealth of things to consider. And then the one that I've dealt with mostly this morning, whether the applicant is able to understand or present his own case, whether orally or in writing, and that will factor in the illiteracy, being a Māori with poor education, and so on, and mental health and drug issues. So the Commissioner's being asked to consider quite a lot of matters in considering the interests of justice. It's a very wide catchment area that he has. And then – well, 6(c) is not relevant to us, but (viii), in respect of any appeal, the grounds of the appeal, and in terms of the new UN Guidelines, for example, which I've drawn your attention to, well, they are either relevant in the context of (b) "Have regard to any other circumstances," or just generally by the fact they're not a must but they will be in (a) in that, "The Commissioner must consider the Bill of Rights and the international considerations," so there's a very wide framework for the Commissioner to consider and what Parliament appears to be doing here is saying there's seven or eight chances to be granted legal aid to fit one of these things plus the additional material that I've suggested; the Bill of Rights and the International – the new International Guidelines and of course, I don't need to tell you that you're bound by section 6 of the Bill of Rights anyway, if you can give a consistent meaning to it –

ARNOLD J:

To the extent that the International Guidelines suggest a right to legal aid, they wouldn't be consistent with the, with section 8 would they, in relation to appeals?

MR ELLIS:

They wouldn't be consistent with a right, not in the strict sense of the word but you would consistently – you would say here are our international obligations, can I read section 8 consistently with this and given your, it's never going to be in isolation is it that you've got to consider whether you give somebody legal aid just because the UN Guidelines say so. One or other of 2(a) are going to apply, it's not going to be in the abstract so are you, "Have you got a previous conviction," must imply seriousness of offence, same as (2), same as (3) so it can be read –

ELIAS CJ:

So is (7) really, I mean that's significant consequences isn't it, the significance of the consequences so that there seems to be the themes in (a) seem to be significant consequences, complexities/capacity and in respect of appeal, grounds of appeal?

ARNOLD J:

I think (6), (7) is paroles.

MR ELLIS:

Parole.

ELIAS CJ:

It is, but it's the consequences in terms of section 6(c), "Postponement orders, recall orders and orders under section 107," I don't know what that is but they're all, they're analogous to sentencing matters.

MR ELLIS:

Yes section 107 is of interest there, that's an application by the Department of Corrections to keep you in until the end of your sentence so to bypass parole so you're detained for the whole, for the whole lot, so the seriousness is implicit –

ELIAS CJ:

Yes, yes.

MR ELLIS:

– in all of this. So we may not, the section may not spell out you have a right to legal aid in black letter law but in interpreting it with the protection and promotion of human rights and the new guidelines, we are not far removed from the domestic interpretation by applying the guidelines and one or more of 2(a) that you do have a right and maybe the next time the section –

ELIAS CJ:

Well you may have a right in context if that is – yes.

MR ELLIS:

Yes.

ELIAS CJ:

You may not have an absolute right.

MR ELLIS:

Absolutely not. Not until the next rewrite of the Legal Services Act so hopefully some of that answers your question.

ARNOLD J:

Yes thank you.

MR ELLIS:

Thank you Ma'am if Mr Shaw can now address you on the cost issue if there's no more questions?

ELIAS CJ:

I suppose also section 8(2) I know there is the indications in the case law that grounds mean merits but one view of looking at the difference between paragraph 5 and paragraph 8 is that in paragraph 5 you are dealing with cases that require determination of a Court and so, and whether they are complex factually, legally or evidentially is a matter to be taken into account. In the case of an appeal it's only the grounds of appeal that are – there aren't matters that require the determination of the Court outside the grounds of the appeal but that too maybe a pointer if it's to be construed as a whole to questions of whether there's a substantial question of law, whether there are complex factual, legal or evidential matters wrapped up in it. In other words it is possible to construe this I suppose, without looking to merits, just as you don't look to merits under (5)?

MR ELLIS:

Yes that's an interesting view of merits which I'd be happy to adopt. But I take a little disagreement with Your Honour that there are in this particular case, there's going to be a requirement, I think, to have a preliminary hearing of the Court of Appeal on the public interest immunity question. So there are occasions – I remember *Dean* we had five Judges on whether the criminal appeal sheet was – there are occasions when in a criminal case you need to have a determination and this is one in five but I don't want to detract from the general spirit.

ELIAS CJ:

Yes, no I understand that.

MR ELLIS:
General spirit of what you were suggesting, no, I adopt that wholeheartedly. Yes, thank you. Mr Shaw?

ELIAS CJ:
Yes Mr Shaw?

MR SHAW:
Thank you. Your Honours my focus is on the second approved ground of appeal and it is, should costs have been awarded to the applicant in the Courts below? My answer is yes, both Courts. If I could just take you to paragraph 94 to make a small correction; could you strike out the word "some" on the second line of paragraph 94.

Now my overarching proposition is, it is necessary for this Court to develop a space within our constitutional system in which powerless and impecunious voices may contend with the powerful and well-resourced voices. People should not be expected to pay the costs of the Government or Governmental entities to ensure that rule of law principles are examined and realised.

WILLIAM YOUNG J:
Can I just get just one – there is actually no decision about costs in the High Court is there?

MR SHAW:
The High Court Judge simply said what's set out at paragraph 889.

WILLIAM YOUNG J:
Yes, if I need to resolve any cost issues counsel should file memorandums.

MR SHAW:
Yes. I understand from discussions I've had with my learned friend Mr Ellis that there were discussions –

WILLIAM YOUNG J:
Yes, yes.

MR SHAW:

– between he and Mr Cooke and the result of those discussions again, from what I understand is, that it was agreed to park the High Court costs issues until final resolution of the case.

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

It is a little awkward then for us if you're seeking an order that costs be paid when the High Court Judge hasn't been given the constitutional space to make a decision.

MR SHAW:

Well, I read paragraph 64 of His Honour's judgment as having made a decision but that if there was a need for judicial intervention to resolve issues of costs –

ELIAS CJ:

Yes.

MR SHAW:

– then that was reserved. So my reading of section 64, and I understand counsel's understanding was that costs were to lie in favour of the appellant here.

WILLIAM YOUNG J:

That's been overtaken by the appeal to the Court of Appeal.

MR SHAW:

Correct.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Okay. Well, that actually doesn't trouble me. It's just that I really want to get it right in my mind as to what had happened.

MR SHAW:

And just –

ELIAS CJ:

What did the Court of Appeal say about it? I can't remember –

MR SHAW:

Mr Cooke said, as I understand it, that he wasn't seeking costs and the Court made no order as to costs.

ELIAS CJ:

Yes, I see, but didn't deal with the question of costs in the High Court?

MR SHAW:

No.

WILLIAM YOUNG J:

Were costs sought in any event on behalf – I'm sorry, how do you pronounce your client's name, Marteley?

MR SHAW:

Marteley, I understand.

WILLIAM YOUNG J:

Marteley. Was an application made on his behalf for costs in the Court of Appeal? Costs in any event?

MR SHAW:

Yes.

WILLIAM YOUNG J:

Yes, okay, so it hasn't really been dealt with by the Court of Appeal judgment?

MR SHAW:

No. Presumably on the traditional basis that if you lose you don't get your costs. But what I'm advancing as a serious submission to Your Honours is that in the constitutional Bill of Rights types of cases that should be revisited by Your Honours in

a manner that will enable Courts below to use the costs as a mechanism for addressing inequality between the parties.

WILLIAM YOUNG J:
There's another perhaps more mundane basis upon which the appeal might be allowed, that in substance the result arrived at by Justice Collins was correct even if the reasons may not have been.

MR SHAW:
Yes.

WILLIAM YOUNG J:
That in substance he won the point that was really in issue in the case. He had to – the Legal Services Commissioner could hardly pursue an appeal to the Court of Appeal without a contradictor.

MR SHAW:
Yes. I was going to make that point, Your Honour.

WILLIAM YOUNG J:
Yes, because that's a relatively straightforward basis –

MR SHAW:
I do think that's irrelevant. This is a case that needed counsel, needed a contradictor, involved important points of public law and public interest, and if there wasn't a contradictor appointed the Court of Appeal may well have been forced to appoint an amicus to represent Mr Marteley's interests. Obviously, if the appellant wins in this Court that will have knock-on effects to the issue of costs in the Courts below, but I think the proposition that I've submitted to Your Honours goes beyond that in that my assumption is even if he loses in this Court a mechanism such as that I've advanced using costs to not discourage individuals from advancing their cases in Bill of Rights and constitutional matters should be looked at seriously by this Court.

ARNOLD J:
Can I ask how the – I mean, this was a case where legal aid was offered but counsel chose not to take it. In a normal situation where counsel's on legal aid and his

client's case is successful, the Court makes an award of costs, does it, and who does that go to?

MR SHAW:

Well, normally, if the client is on legal aid and is successful, it will go back to the legal aid fund, as I understand it, but I will stand to be corrected on that. The usual thing is you lose and then the issue is will there be an award of costs and the traditional approach of, at least in the Court of Appeal is, that they'll make no order for costs to a losing appellant.

ARNOLD J:

What I'm slightly troubled about is this, I mean you're asking the Court to use costs in this broader way for which there may well be an excellent argument but this is a case where legal aid was available and counsel chose not to take it and I wonder really whether there might not be, well whether we may not be, need to be a little careful about using costs in the way that you suggest where legal aid is available because legal aid is the mechanism, whether we think it's satisfactory or not, legal is the mechanism that is available and it was available in this case.

MR SHAW:

Albeit, as Your Honour pointed out, an interim grant of four hours.

ARNOLD J:

No, no, no, as I understood it, civil legal aid was available to Mr Ellis for the Court of Appeal in this case but he chose not to accept it and you're saying what we should do is use costs as a funding mechanism for this sort of public interest litigation and all my point is, there is another mechanism, legal aid, that has been offered. Should we be – are there any concerns that we should have that counsel rejects that and seeks an alternative funding mechanism?

MR SHAW:

Well I'd be doing that on the hoof Your Honour because Your Honour is quite right, legal aid was offered and declined but – and the question of law before Your Honours is specifically directed to the situation of the applicant in this case.

ELIAS CJ:

Well your wider proposition –

MR SHAW:

Yes.

ELIAS CJ:

– your rather ambitious wider proposition was that costs should be awarded whatever the result but you don't need to make that submission here because, well you don't need to make that submission here if you succeed.

MR SHAW:

Yes. I think –

ELIAS CJ:

Well, and on the basis put to you by Justice Young you have succeeded sufficiently to support an award of costs.

MR SHAW:

I think I can adopt that position and leave the ambitious proposition probably for a more appropriate case, because if there's no point – if Your Honours do not reach the wider issue or reach the need to consider the wider issue in this case because of the ultimate result that Your Honours come to, then I don't need to force the issue today but I think it is an important issue for the Court to grapple in an appropriate case if this is not, if this isn't an appropriate case then so be it. But Justice Tipping in *Taunoa v Attorney*-General [2008] 1 NZLR 429 refers to costs being an important and under, effectively underused mechanism when it comes to costs. I've set that out at paragraph 95 of the submission at page 25.

O'REGAN J:

But the solicitor and client costs in *Taunoa* were the amount of legal aid that had been awarded.

MR SHAW:

Yes.

O'REGAN J:

And in this case you're seeking costs well in excess of the legal aid that would, that was available but turned down?

MR SHAW:

I think the way the submissions were advanced were that there was some inequality as between counsel representing the Commissioner and the costs incurred by counsel representing the appellant.

O'REGAN J:

But that was probably true in *Taunoa* too?

MR SHAW:

I can't say but Your Honour might be right but I think the underlying gravamen of the submission is the costs ought to be used as a mechanism in constitutional/Bill of Rights cases in order to rectify a striking imbalance between one party representing the state and the other party representing the appellant. I don't wish to push it out any further than that, Your Honour. That's the basis that I have advanced that submission.

Your Honours, I don't have any further or additional submissions to make except that I would like to record that *Nicholls* and *Tikitiki*, which does form a progeny basis for this appeal, was one in which Mr Cooke, myself and Mr Ellis were involved and it seems rather serendipitous that all these years later that we are here before this Honourable Court arguing similar points.

ELIAS CJ:

A reunion.

MR SHAW:

Yes, thank you.

ELIAS CJ:

Although I suppose it does perhaps indicate that nothing much changes.

MR SHAW:

As Your Honours please.

ELIAS CJ:

Yes, Mr Cooke.

MR COOKE QC:

Thank you, Your Honours. I also share the feeling of serendipity about this reunion and certainly we would never have thought all those years ago that we'd be back before this Court. Even the existence of this Court would have been beyond us at that point, but I suppose it's nice to be back arguing the same points again, perhaps.

Now, in advancing the oral submissions for the Commissioner I intend to focus on four points or four areas and they are, first, that leave to appear was granted on the question of interpretation of section 8 of the Legal Services Act and my first proposition is that this is not really an interpretation case at all, and that's because fundamental rights are legitimately addressed by the application of statutory powers as well as their interpretation and, in the end, what this case really concerns is the question of how you apply section 8 as Parliament has determined it rather than a question about the interpretation of it.

My second point will be that on that question of interpretation, looking more closely at what Parliament did, I'll be submitting that Parliament clearly addressed the question of criminal legal aid, including for appeals after *Taito*, and it did so in detail, and it devised a specific approach which included the consideration of the merits of the prospective appeals in the required overall evaluation.

The third area that I'll want to address is to consider the alternative interpretations that were advanced in the High Court by Justice Collins and then in the separate judgment of Justice Miller in the Court of Appeal and I do that to demonstrate why they are not available interpretations of section 8.

And then my fourth point will be that the specific design that Parliament has adopted in section 8 is not inconsistent with the fundamental right recognised at international law or in our Bill of Rights Act because that right is not an absolute right; it's a right that incorporates questions of evaluation of the kind that the section 8 exercise contemplates.

So those will be my four areas of submissions.

So dealing with the first of those points, the essential point is that fundamental rights can be given effect both in the interpretation of legislation and in its application. Now

the right to legal aid when the interests of justice require it is accepted to be a fundamental right and my argument is that Parliament has determined how that right is to be adopted in the New Zealand criminal justice system and it's turned its mind specifically to how that right should be dealt with in the context of legal aid for appeals and it has decided not to adopt the kind of approach that the European Court of Human Rights adopted in the *Maxwell* approach, and, in particular, it's decided not to adopt a bright line rule requiring aid to be available for an appeal when there are serious consequences for the convicted person, such as imprisonment of six months or more. Rather it has decided upon an overall evaluation, taking into account a range of mandated factors, including the grounds of appeal, and any interpretation approach that seeks to under-wind that decision that Parliament has made would involve overriding rather than interpreting the legislation, and, in my submission, that is what the High Court Judge did, and I'll come a little later to analyse the interpretation he adopted in the submissions, and also in the separate judgment of Justice Miller that is also suggested. I say "suggested" because there's a degree of subtlety about His Honour's separate judgment and ambiguity about exactly what was contemplated on his alternative approach. But I will be saying, and again I'll come to it, that there are suggestions in that of an approach that overrides rather than interprets the legislation.

What is say is this. This case is really not about interpretation. It's really about the application of section 8, and the Commissioner accepts that decisions made under section 8s should be, to adopt the Bill of Rights language, should be right-centred, and the more serious the consequences for a convicted person the more potent that factor will be in the grant decision under section 8. Now it will still require a consideration of the grounds of appeal, and I say that obviously includes the merits of those grounds, but sometimes other factors, the long term of imprisonment, the mental health issues for the convicted person, may mean that the relevance of the merits of the appeal will be less significant in, with an appeal that seems most tenuous, that legal aid may still be granted because of the potency of those other factors.

And one of the difficulties with this case is that in the end that is going to have to be a case by case assessment of the relevant cases as they come to the Commissioner for a decision under section 8, and we've only got one case before us in this appeal and in some ways it's a slightly or very unusual case because it's an appeal in

relation to a guilty verdict. So it's not a particularly good test for all legal assessments that the Commissioner's going to have to make under section 8.

ELIAS CJ:

Which the ground you've chosen to, the Commissioner's chosen, to fight on really, isn't it?

MR COOKE QC:

Well, what happened was Justice Collins released a decision that adopted a particular interpretation of section 8 that the Commissioner didn't think was the correct interpretation of section 8 and so the Commissioner appealed that question.

ELIAS CJ:

So then the case is about interpretation?

MR COOKE QC:

Yes, it is to that extent but what I'm saying is the appeal by my learned friends now against the Court of Appeal judgment really seems to me to raise more questions about how you apply section 8 in individual cases rather than a true question of interpretation. The issue on which leave has been granted is really whether it's the Court of Appeal, Justice Collins, that have got the interpretation question right and I'm very happy to address that question of interpretation but the underlying issue of fundamental rights really raises more in the nature of the application of that section in particular cases.

O'REGAN J:

But the system adopted by the Commissioner does seem to be very focused on merits. I mean, the idea of giving a lawyer so much money to investigate the merits, I mean, nobody gives a psychologist so much money to investigate the mental health or literacy of the prisoner, for example. I mean, it seems to be predicated on the fact that merits is the determining factor.

MR COOKE QC:

Well, I don't think the Commissioner would accept that merits is the determining factor but the Commissioner would say it is obviously a very important factor when it comes to assessing criminal aid for appeals and I think the Chief Justice asked my learned friends if what was anticipated would be covered by that interim grant and I

think Mr Stevens addresses that in his affidavit where he says it's not just merits that is expected to be addressed but also the interest of justice assessment under section 8 that the Commissioner is called upon to address.

O'REGAN J:
Well that's not what they're asked to do though is it?

MR COOKE QC:
Well I accept that that, if you look at the wording of those letters that go out, that it's probably ambiguous by what is meant by "a due diligence" exercise but the point of the interim grant is to provide the information to the Commissioner for the purposes of the section 8 determination about whether legal aid is –

O'REGAN J:
Well if a counsel came back and said I can't really determine the merits because my client isn't able to communicate with me properly but I am absolutely clear that my client couldn't conduct the appeal himself and I'm prepared to take it on, presumably that would be turned down on the basis of the, the way this case was dealt with?

MR COOKE QC:
Well there's always a difficulty in trying to address hypothetical cases, that's one of the difficulties in trying to address this but the Commissioner is still obliged by section 8 to take into account in relation to the appeal on the grounds of appeal.

O'REGAN J:
Well it's as one of eight matters?

MR COOKE QC:
Yes, yes.

O'REGAN J:
I mean it's not determinative is it?

MR COOKE QC:
No.

O'REGAN J:

And clearly the statute contemplates that in some cases aid will be given to give a meaningful right of appeal to say, an illiterate person –

MR COOKE QC:
Yes.

O'REGAN J:
– even if counsel can't identify grounds?

MR COOKE QC:
Yes, and the Commissioner accepts that and – but that's what really transpired with Mr Marteley's case that the Commissioner didn't really see much by way of merit but particularly in light of the information put forward by Mr Ellis as to his mental health situation, it was accepted that legal aid should be granted for his appeal.

GLAZEBROOK J:
But doesn't it suggest there might be a systemic difficulty here because counsel aren't able, one to conduct intellectual assessments to see whether somebody is intellectually capable because often people have a mental age of eight but because they've lived in the world for 35 years they're able to appear, in fact, to communicate in a way that would not be the way one would expect if they did have a mental age of eight but nobody would really suggest that someone with a mental age of eight is capable of conducting their own appeal, especially of anything that has any sort of complexity at all?

MR COOKE QC:
There's undoubtedly systemic issues about how you apply section 8. In fact any system, no system is perfect but that is the function that the Parliament has given the Commissioner to achieve.

GLAZEBROOK J:
Well but is the Commissioner achieving it if there are systemic difficulties and the only thing that the Commissioner does is send it off and give four hours to a lawyer to assess the merits of an appeal?

MR COOKE QC:

Well it's not quite as simple as that but there, the – my understanding is that original grant of, interim grant is between six and 10 hours now and it's subject to –

GLAZEBROOK J:
You see we don't have any of this information, we don't know – we don't have information as to what is supposed to be in these reports. We don't have information about what is actually said to counsel apart from a letter that says you do a due diligence.

MR COOKE QC:
Yes, and that's the consequence of the way this case has evolved and that was commenced just as a simple appeal to the High Court from –

ELIAS CJ:
Well I was going to ask you that because you're reverting to the Commissioner and I'm not sure that I'm entirely reassured by hearing that the Commissioner when he became aware that there were mental health issues did, changed his mind because there's a whole process here with a Tribunal in which I can't see these other issues emerging?

MR COOKE QC:
No, well they haven't and it's partly because –

ELIAS CJ:
No, no but what I'm saying is when we're talking about that this is only one factor, in the Tribunal's decision where's an indication that there are any other matters that are taken into account?

MR COOKE QC:
I can't say that the Tribunal's decision is particularly laudable in that sense.

ELIAS CJ:
But don't we have to be concerned about the system? If the system is not delivering, you seem to be suggesting that you're not trying to defend the outcome here. If we've got a system that's producing outcomes that are not defensible don't we need to be a bit worried about the processes that are being followed?

MR COOKE QC:

Well I don't accept the system has broken down here. The mental health issue hadn't been raised –

ELIAS CJ:

No but leave aside the mental health issue, where's there an indication of accepting that this was a potentially complex matter that was sought to be raised and that the consequences for this appellant were as serious as you can have, it's a life sentence. Where's there any acknowledgement of that in the decision?

MR COOKE QC:

I can't point to a passage of a particular document that illustrates that the Commissioner was aware of the seriousness of the consequences for Mr Marteley and the decisions that were made but that is an obvious application or implication from the decisions the Commissioner was called upon to make in this case and –

GLAZEBROOK J:

Well why's it obvious if he doesn't mention it? Why doesn't he say well the merits mightn't be very good but in fact it was, it is actually a complex decision as to when – there's a legal issues there and there actually was quite a complex factual basis to this that had to be gone through; Mr Marteley doesn't seem the most, perhaps the sharpest tool in the, in the toolbox on the basis of his statements, even if you look at the six statements that he's giving and contradictory statements and it is a life sentence. One would have perhaps expected that to be explicitly gone through?

MR COOKE QC:

That wasn't, the Commissioner's decision before the Tribunal decision put it the other way round, that the lack of merit in the appeal so outweighed the other factors that the grant of legal aid wasn't justified.

ELIAS CJ:

Where's that document, where's that decision? Is it the 16 April one is it?

MR COOKE QC:

Well there are several of course because the decisions were made in a series of places but the first one you get behind tab 15 of the case for appeal and that's in response to Ms Levy's assessment of the case and you'll see in that letter there's the

reference to considering, in the third paragraph there, "The factors identified in section 8 and after balancing the factors a lack of merit on the grounds of appeal so strongly outweigh the other considerations that legal aid is withdrawn." And that's, and neither Mr Pyke or Ms Levy or indeed Mr Ellis' first correspondents drew attention to the mental health point that later emerged about Mr Marteley and how that might affect the assessment of legal aid. When Mr Ellis came on the scene and renewed the application for legal aid and put before the material he did, there was then an assessment by the Commissioner's – in two places, one behind 21 and then one behind 23, and 23 being our request for reconsideration of the first decision and you'll see in the 23 one, that was the assessment that suggested that legal aid should be given on an interim basis to investigate a sentencing appeal for Mr –

ELIAS CJ:
So the decision of Mr Forster is it?

MR COOKE QC:
Yes that's the Tribunal.

ELIAS CJ:
Yes but that refers to a review of the decision of 16 April 2012, what – I haven't seen that one. I think the ones you've taken us to have been different dates than that?

MR COOKE QC:
Well I'm not sure about that. It may be reflected in the date of the letter is it, oh, yes it is. If you go behind to tab 24, the tab 23 –

ELIAS CJ:
Yes.

MR COOKE QC:
– what happens is that these applications get sent from the officer to what's called a "specialist advisor" who's a lawyer either inside or outside –

ELIAS CJ:
Yes.

MR COOKE QC:

– the Commissioner's office to make an assessment. So if you look at what happens at tab 23 Mr Diamond gets to assess on reconsideration the position and then that leads to the letter of 16 April behind tab 24 which is what has been referred to by the Tribunal of 16 –

ELIAS CJ:
So where's the date, I can't see it?

MR COOKE QC:
It's top of, page 102 top left-hand corner, 16 April.

ELIAS CJ:
102. I see sorry, there's two in there.

GLAZEBROOK J:
I think a chronology could be really useful here so that we can actually understand the process.

MR COOKE QC:
I'm happy to prepare one if that's of assistance.

ELIAS CJ:
Reading the whole statute, as I always think is quite a good idea, but one of the things that is striking is how narrow the review by the Tribunal is. So it's the judicial review grounds of review are essentially –

MR COOKE QC:
Wrong in law or manifestly unreasonable.

ELIAS CJ:
Yes, so that's a very narrow window of opportunity. When you come on to discuss how section 8 would be interpreted, I'd be grateful if you'd bear in mind that I think that may be a pointer to a more strict construction of section 8.

MR COOKE QC:

Well, you could also say that that might influence how you read "manifestly unreasonable" under the appeal right to the Tribunal, so precisely where that bites as an –

ELIAS CJ:

Well, you see in this decision where, of Mr Forster, when he's talking about the law, he says, "The threshold for intervention by the Tribunal is a high one."

MR COOKE QC:

Yes, yes.

ELIAS CJ:

Which again – well, it bites both on interpretation, because one way that this may be viewed is that it's inconceivable that a broad assessment of merits is what Parliament intended in this regime, so it hits the interpretation point, but it also conceivably affects the application and if you're saying that the Commissioner's assessment is, under 23 or wherever it was, is simply the, what is it, the…

MR COOKE QC:

Specialist adviser's recommendation to the officer.

ELIAS CJ:

Yes, but there it's said that the additional matters don't outweigh the lack of merits. That's it.

MR COOKE QC:

Yes, yes.

ELIAS CJ:

There's no even identification of the additional matters.

MR COOKE QC:

Well –

ELIAS CJ:

There's no indication that this is life imprisonment that is in issue.

MR COOKE QC:

Well, neither when the person who wrote this was it anticipated that we'd be pouring over his assessment line by line –

ELIAS CJ:

Yes, but –

MR COOKE QC:

– in the – so you've got to, to be fair to them –

ELIAS CJ:

Yes, absolutely, yes.

MR COOKE QC:

– there's a certain degree of common sense that they appreciate these, those kind of factors and when saying that doesn't outweigh the other factors it's obvious what they are, then it's the seriousness of the offending, the consequences for the convicted person. So – and, I mean, you have to be realistic about what happened here with Mr Marteley's case because there were a series of legally aided people who were given to, were funded to assist Mr Marteley. We had Mr Robb, Mr Morgan, then we had Mr Pyke, and then we had Ms Levy, and then we had Mr Ellis, all of whom have been funded on legal aid to assess his position in relation to a guilty plea so – and there's nothing in the, if you look at it in the overall sense, there's nothing that suggests that there's an overly high barrier that's been put up by the Legal Services Commissioner to prevent cases being brought on appeal when they do appear that the interests of justice require a grant of aid to assist that process.

GLAZEBROOK J:

But the interests of justice seem to be, just if you look at Mr Forster's conclusion at 24, is if you, even if it's serious and even if you'd have difficulty arguing it, if the grounds are unarguable you don't get. So it looks as though they see the fact that something's unarguable as controlling.

MR COOKE QC:

Well, it –

GLAZEBROOK J:

It doesn't look as though they see any subtlety that you're now putting forward.

MR COOKE QC:

Yes. Well, again it's difficult if there's a case where there was a guilty plea, so one would expect some factor that would illustrate why the guilty plea was improper or some miscarriage of justice arising notwithstanding the guilty plea.

GLAZEBROOK J:

Well, but an inducement to plead guilty because of an inducement in terms of the girlfriend would seem to me to be self-evidently something that might actually.

MR COOKE QC:

Well, it wasn't highlighted by any of, by –

ELIAS CJ:

No, but isn't that really the point?

MR COOKE QC:

But that point, if there's a systemic problem with that, that's in the design of the system –

ELIAS CJ:

Well, only if you take the view that a merits review is, is prompted. If you take the view that you're there to just check that there is some air of reality about a matter that is capable of being advanced on appeal then it's different.

MR COOKE QC:

Well, I – it's also difficult to understand when you introduce those sorts of thresholds, the air of reality is a difficult threshold to know what you're, what that means and His Honour Justice Collins went for the –

ELIAS CJ:

Well, he didn't have one and he might've been wiser not to have one.

WILLIAM YOUNG J:

But on his approach if construed literally, all you have to say is there was a miscarriage of justice –

ELIAS CJ:

Mhm.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

– that ground if made out means the appeal has to be allowed therefore his test is satisfied, well, that can't really be right.

MR COOKE QC:

Well, that's what this case is about.

WILLIAM YOUNG J:

Yes.

MR COOKE QC:

That's what Justice Collins determined. That's what troubled the Commissioner and that's why the Commissioner appealed to the Court of Appeal.

WILLIAM YOUNG J:

How many legal aid applications by those who want to appeal to the Court of Appeal are actually declined, do we know?

MR COOKE QC:

I've tried to get an answer to that question and it is not easy to get a meaningful answer in the sense of what, what the difference be if Justice Collins' approach applied rather than the one that's been applied and it's not – any attempt to try and give an answer to that is slightly misleading because the Commissioner doesn't keep a record of decisions in precisely that way. There are about 450 cases per annum. How many are dismissed on merit I haven't been able to get a clear view on that because they –

O'REGAN J:

Yes, but how many are dismissed full stop? It's a pretty small number, isn't it?

MR COOKE QC:

It's difficult. Any answer I give I'm not sure would be, is capable of being misleading because I've tried to get to the bottom of it and it's difficult to know exact because some are, some are not pursued because, probably because they don't think there's any merit or not and there tends to be I imagine an automatic filing of an appeal in the consideration to get the interim grant to see if there's any legal aid, to see if there's any basis for an appeal so, but I think I would be misleading if I tried to give any indication to the Court about what the numbers –

O'REGAN J:
My recollection is there used to be some sort of report about, a monthly report of how many applications are, been made –

MR COOKE QC:
There, there are but –

O'REGAN J:
– and how many have been turned down and how many have been –

MR COOKE QC:
There are but they don't tell you in any sensible way how many cases are dismissed because of a lack of perceived merit in the appeal, for example, and I've tried to get some sort of idea about what it is and not in a way that's going to be helpful, and the other factor is that if it really was Justice Collins' approach she would find people appealing as of right because they could get, come before the Court of Appeal in any event so it's quite hard to pin down without going through an order of all the files and trying to work out why these decisions are made, so the answer is I don't know –

O'REGAN J:
Well, I don't – I'm not so much – I don't think – the question really is not why were people declined, but of the number who actually sought it and pursued it how many were declined, is that not available either?

MR COOKE QC:
Well, I'll tell you, I'll give Your Honours an example of what I was able to ascertain from when asking that question in a previous situation by virtue of previous years which I have somewhere here, so I was instructed in 2011/2012 that there were 431 appeals, 292 approved, 34 were withdrawn, 47 refused and 10 rejected. Now –

ELIAS CJ:

What's the difference between refusal and rejection?

MR COOKE QC:

That's the problem. So rejection might be there was some problem with the –

ELIAS CJ:

Oh, yes, of a pro forma thing, yes.

O'REGAN J:

Yes, because some, I mean, some people are turned down because they have enough money to pay for a lawyer, yes.

MR COOKE QC:

And precisely which box you're in is –

ELIAS CJ:

Oh, yes, yes.

MR COOKE QC:

– you can just start getting too – because I obviously enquired into this to try and find out because I knew I was going to be asked precisely this sort of question and the conclusion I reached was that if I tried to give any answer to that question it was going to be not particularly helpful.

ELIAS CJ:

But it doesn't sound huge.

GLAZEBROOK J:

What was it, 292 were, sorry, I didn't get that down.

O'REGAN J:

He doesn't want you to write it down.

GLAZEBROOK J:

No, no, no, I just –

MR COOKE QC:
292 were approved.

GLAZEBROOK J:
Yes.

O'REGAN J:
34 withdrawn, 47 refused, 10 rejected.

GLAZEBROOK J:
Mhm.

MR COOKE QC:
Now – but I, when quizzing the officers to try and get more of an idea what, what was really at stake in the Justice Collins versus the way it's done approach. I think we're actually getting down to a reasonably small number.

GLAZEBROOK J:
Mhm, although as you say it may be that you would have more appeals filed –

MR COOKE QC:
Yes.

GLAZEBROOK J:
– if, in fact, there was automatic legal aid.

MR COOKE QC:
I think that's more likely to be the, the implication. I think Mr Stevens said in his affidavit which is in the Court of Appeal that even following Justice Collins' decision, the profession hadn't really woken up to the change and was still assessing merits as part of that process.

ELIAS CJ:
What is the – because there seems to be slightly conflicting statements, what is the actual position in terms of filing appeals and grant of legal aid? Legal aid doesn't

require an appeal to be filed before it processes things, but presumably a number of people file before the legal aid status is know, is that right?

MR COOKE QC:
As, as I understand it, there is, legal aid usually requires a pro forma appeal to have been filed in the Court of Appeal?

ELIAS CJ:
Why?

MR COOKE QC:
I think it's part of the process of having a proceeding so that they can make a decision in respect of a proceeding. It also has the advantage of the generating of Court, of the case on appeal and then counsel, some counsel who get the interim grant want to await the preparation on a case on appeal before making the assessment of a case. Others who might have been trial counsel, for example, may not need to await that preparation to make the assessment.

ELIAS CJ:
But that, but although I'm not terribly sure what we can do about Justice Collins' concern with fiscal cost and not terrible attracted to it, it clearly has a very distorting affect and is very costly. It may not be costs that the Commissioner has to count.

MR COOKE QC:
No, I have, I've assumed that this Court was already directing the leave granted to the main question of how you interpret section 8 so I haven't actually in the written submissions –

ELIAS CJ:
No.

MR COOKE QC:
– addressed the second point which Justice Collins made about taking into account the cost of –

ELIAS CJ:
Yes.

MR COOKE QC:

– appointing amicus and I'm rather just content to rely on what the Court of Appeal said about that, but it does illustrate a –

ELIAS CJ:

But aren't inconvenient results commonly taken into account in interpreting statutes?

MR COOKE QC:

Well, I don't think that is what section 8 is, is really directed. Section 8 is directed to the individual case of the applicant rather than a systemic concern as to what's the best design for a criminal legal aid system. And one of the problems with this case is as lawyers and Judges we are actually all, all have been protagonists in this exercise of the administration of legal aid in the Court of Appeal. It's very tempting to, to not think of one's own personal views about how one, how it would work best when looking at the section, but it's actually the Parliament that calls the shots on –

ELIAS CJ:

Mhm.

MR COOKE QC:

– on these, the line of the system and this is what this case is about. It was about, it really was about whether Justice Collins got the law right and that's why the Commissioner appealed and they were on further appeal, and there are these background issues in relation to how you apply section 8 in individual cases and there is a macro issue of what is the best design for a legal aid system including appeals, but with respect we have to focus on actually what section 8 says and what's –

GLAZEBROOK J:

But isn't it enough to say it's in the interest of justice because this person could not conduct the appeal themselves? That's a factor that's specifically in section 8 and that it can't be overridden by anything else because you have a right of appeal. If you can't conduct the appeal yourself because you're incapable of doing so in a meaningful fashion, then it must be in the interests of justice that you have a lawyer to assist you in that whether or not the grounds of appeal that somebody on four hours is able to find.

MR COOKE QC:

The – my response to that is that's not what section 8 says. It –

GLAZEBROOK J:

Well, but why doesn't it say that? It says you must have regard to those things.

MR COOKE QC:

Yes.

1250

GLAZEBROOK J:

It doesn't say that one overrides the other and it maybe – because the argument is that eight trumps always at least in terms of the way that the Commission seems to and the reviewer seems to have put that decision and that just may not be the case. The interest –

WILLIAM YOUNG J:

Well, it may not trump it always but it may trump it sometimes.

MR COOKE QC:

Yes.

GLAZEBROOK J:

Oh, no, no, exactly, I'm not suggesting it – what I'm suggesting is that any one of those things could trump the other ones –

MR COOKE QC:

In the individual cases.

GLAZEBROOK J:

– in the individual case –

MR COOKE QC:

Yes, well –

GLAZEBROOK J:

And there's nothing in section 8 that says that it can't be interpreted that way.

WILLIAM YOUNG J:

But I think – you don't dispute that –

MR COOKE QC:

No.

WILLIAM YOUNG J:

– what you're saying is that you can't have a blank, there isn't a blanket rule of interpretation –

MR COOKE QC:

That's right.

WILLIAM YOUNG J:

– that a hopeless case has to be funded because it's serious.

MR COOKE QC:

That's right.

ELIAS CJ:

But it depends –

WILLIAM YOUNG J:

Now, it probably will be funded because it's very hard to conclude that it is hopeless.

ELIAS CJ:

Well, yes, depends what you mean by hopeless.

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

I mean really the whole area of dispute and interpretation here is about what is, what is the merits, if you want to call it that, enquiry. What is the grounds? Are the grounds simply identifying something that is arguable or is it more than that?

MR COOKE QC:

And I would say it has to be borne in mind, which I think is a point which has been exchanged, that you're doing so at a stage, at a preliminary stage –

ELIAS CJ:

Yes.

MR COOKE QC:

– so you can't know the full case –

ELIAS CJ:

Yes, yes.

MR COOKE QC:

– so the Commissioner and we accept the Commissioner has to take that into account. The Commissioner also accepts the potency of the, the merit of the grounds will vary in the individual case and the more powerful the other factors that a person's not capable of presenting their own defence and it's a complex case. The more potent those other factors are, the more likely it is that Parliament would have expected legal aid to be granted under their test, but and the issue of interpretation, that's why I've started by saying this is a slightly artificial attempt to make this case about a question of interpretation. I say on section 8 that the grounds of appeal what it says in relation to appeals the grounds of appeal that self-evidently involves the merit of those grounds, so and then the question is just how important is the merit of, a possible merit of a case going to be in an individual case and then you just have to apply it as a matter of the discretion and making sure the discretion's applied appropriately.

WILLIAM YOUNG J:

And recognising that it's difficult to assess merit.

MR COOKE QC:

That's right, recognising that and, and I know that there, that what the Court has said about Mr Marteley's case, but I would have thought that if you look at what happened in his case in the round, it does suggest a very careful looking and relooking at Mr Marteley's situation to see whether legal aid should be granted because there were all those lawyers funded and including on interim grants to see, you know, whether in

the interests of justice required the grant of aid. It doesn't suggest an overly narrow approach or one that's not right centred but one that is careful, in my submission.

GLAZEBROOK J:
Although carefully centred on the merits of the appeal having a number of lawyers who missed what would seem to me to be the obvious ground of appeal in respect of the inducement.

MR COOKE QC:
Yes, well –

GLAZEBROOK J:
Which just shows that –

MR COOKE QC:
But that's the imperfection in the system. No legal aid system is going to be perfect and even –

GLAZEBROOK J:
Well it's likely difficult to miss that absolutely obvious ground and, well, because in many cases the ground mightn't be obvious until you've actually had a hearing where you can examine that in detail and when people, the judiciary actually are able to look at the Browns because they've been a number of cases where the actual slam dunk ground of appeal hasn't arisen until part way through a hearing.

MR COOKE QC:
Yes, well you might be being a little unfair on the various lawyers who have been involved in this case. I mean they did, Mr Robb's opinion does send very detailed advice to Mr Marteley about his plea. Mr Morgan undoubtedly, well we don't have the same written advice for him but he informed the Court that he'd repeated the advice that Mr Robb gave.

ELIAS CJ:
But Ms Levy, anyway say that he gave wrong advice because –

WILLIAM YOUNG J:
No, but she misinterpreted what he –

ELIAS CJ:
All right.

WILLIAM YOUNG J:
I mean what he says basically is on the basis of what the appellant's told me he's guilty of murder.

MR COOKE QC:
What he – and the other thing is what he was doing is explaining the situation to the Court to the best interests of his client in a situation where there had been a previous indication of vacating a plea of guilty and he was now entering the plea and it wasn't going to be in his interests to say Mr Marteley thinks he's innocent but he's going for a plea of guilty for the purpose of his sentence, so he said Mr Marteley accepts that he is guilty of this offence. So with respect to Ms Levy, I think she might have read a little but much into that.

But it's very easy with hindsight for us to look back at what has happened and say, look there was a glaring problem that everything missed because the people just do their best at the time –

GLAZEBROOK J:
No, no I think that's the point. I'm not criticising counsel and in fact when you look at the evidence that was there one could quite understand why the advice was given in the way that it was but it's really just saying, really outlining that point but at a very early stage. It is quite difficult to give such a, what I would say a slam dunk view of the merits and have that outweigh the other factors.

MR COOKE QC:
Sure, but the other point I'm going to make about this is even the international right is conditional. It says there's a grant of legal aid if, if the interests of justice requires. So even the international right and our Bill of Rights Act right do contemplate that there will be indigent people in our Court system that are not represented. So, and that's part of a system of legal assistance for –

GLAZEBROOK J:

Although usually in the international context they say if it's a small, they make that distinction between serious consequences and otherwise as I understand it.

MR COOKE QC:
That's how, certainly how *Maxwell* applied it, the sense the more serious it is the more potent the fact there is and *Maxwell* said it was an absolute –

ELIAS CJ:
Well that's just proportionality analysis, as soon as you've decided that there is a human right in issue under our Bill of Rights Act there is an human right in issue, a right to review by a further Court.

MR COOKE QC:
Yes, but my general point is that it's not, it's not an absolute – there's imperfections in the system –

ELIAS CJ:
Yes.

MR COOKE QC:
– even as recognised in international law and while the imperfections as a system is that sometimes points don't emerge until later. But the Commissioner has still got to do the job that Parliament has asked her to do, as she is now, and she must assess the grounds and I do think there is significance in the fact that the one ground that is highlighted as being specific for appeals is the one that Parliament – it said, "It respect of the appeal, the grounds of appeal." Now that doesn't mean that trumps everything but it must mean if you think about it in normal statutory interpretation exercise that that would be a particular consideration the decision maker would have to bear in mind in relation to the appeals because that's the one that Parliament has spoken about in relation to appeals.

WILLIAM YOUNG J:
Thinking of the *Maxwell* case the thing that, I suppose, puzzles me is that there's not the slightest indication in the judgment that there was a point of appeal that anyone was prepared to advance.

MR COOKE QC:

No it's quite the opposite. That everyone had looked at Mr Maxwell's case said that was just hopeless.

WILLIAM YOUNG J:
So what's the sequel to that? Has there been a sequel or have the English Courts just gone on in the same old English –

MR COOKE QC:
Well I suppose the sequel is that you now need leave to appeal in the United Kingdom.

WILLIAM YOUNG J:
You need permission to appeal?

MR COOKE QC:
Yes, and that's the other aspect of this thing and not just England and Wales and Scotland as well there's a leave to appeal the system and there's a decision in the European Court saying there's no difficulty with their being leave to appeal or that you don't have to give legal aid always for leave to appeal determinations. So it's one of the reasons why you do have to step back a bit from this and realise that there are no real absolutes in it. There are different views about how you could design a legal aid system for appeals and different views about what is more important. Here Parliament has called the shots and after the adjournment one thing I didn't do when I put the material in the bundle of authorities is put before Your Honours what, how detailed Parliament got in 2006 when it analysed what section 8 should say because they'd actually rolled their sleeves up and got quite specific in terms of exactly how section 8 should be framed. So in terms of the interpretation question which is what we are here to address I will say in a difficult area where there are a range of different views about how one should design something, Parliament has come up with a system that definitely includes the merits of appeal must go into the melting pot and the Commissioner has to apply that in any interpretation approach that effectively undermines that decision why the Parliament would not be legitimate.

ELIAS CJ:
Is grounds wider than merits in your submission?

MR COOKE QC:

Wider.

ELIAS CJ:

I mean, suppose it was a ground that raised a point of public interest, for example, or suppose it was a pretty trivial matter?

MR COOKE QC:

Yes I suppose purposively, when you're looking at the grounds of appeal, it's not purely their arguability, it is their significance or insignificance I suppose in a broader sense.

ELIAS CJ:

And finally –

MR COOKE QC:

I doubt whether that bites much in most cases.

ELIAS CJ:

– by merits do you mean arguability?

MR COOKE QC:

Arguability, yes.

ELIAS CJ:

Okay, well, we'd better take the adjournment, thank you.

COURT ADJOURNS: 1.01 PM
COURT RESUMES 2.17 PM

ELIAS CJ:

Yes, Mr Cooke.

MR COOKE QC:

Thank you, Your Honours.

Just in terms of the four points you recall I said I was going to cover, I guess I'm moving now to point number 2, which is to look a bit more closely at the statutory

interpretation exercise. One of the points to be emphasised to begin with about that is in the statutory interpretation exercise we're still engaged in what can be described as purposive interpretation. We're still trying to give effect to the intention Parliament looking at the scheme and purpose of the legislation. We have the additional dynamic, of course, of the New Zealand Bill of Rights Act and in particular sections 4 to 6 of that Act. But that still involves giving effect to the intent of Parliament to reduce, perhaps, sections 4 to 6 to a kind of shorthand. Parliament mandated an interpretation that was rights consistent but not to involve overriding when Parliament itself had made the call on the question of the application of the fundamental rights. So if Parliament deals with a tough question of how fundamental rights are to be applied, they call the shots and that's my submission what the essence of sections 4 and 5 and 6 of the Bill of Rights Act is.

My point following from that is that Parliament has plainly does so here and you can see that they've done so here by their responses to the cases that have previously taken place in relation to the Legal Services Act provisions, and how Parliament has responded to those cases. The first response, of course, was the one following from the Court of Appeal in the decision called for legislative attention to the system for legal aid administration and that was heeded in the amendments to the legislation that were first proposed in 1999 and which were subsequently adopted, and Your Honours will recall that the Privy Council was complimentary of the new Legal Services Act system that was involved. Of course, the key problem so emphatically spelled out by Their Lordships was the predetermination involved in the Judges making their assessment in the grant of legal aid and then dealing with the substantive case. Now, the Privy Council didn't say you shouldn't look at the merits in the way that the system involved and could equally have been emphatic in its rejection of the system by saying that the kind of assessment of merits involved was improper. That was part of the argument before Their Lordships, the principle that merits shouldn't be addressed in the way that it is addressed in the legal aid system, so that's the first example of the legislative response but the second example and the perhaps more telling one, in my submission, is the 2006 amendments and those were the amendments that introduced the right to legal aid for trial when you face imprisonment of six months or more, a right that was decided not to be extended to appeals. With appeals you still had the overall evaluation and the overall evaluation included considering the grounds of appeal, and it's significant in my submission to see how Parliament looked at this question, because it chose that the design of that system was looked at very carefully and I can take Your Honours to the bundle of

authorities and begin with the Minister's speech when the Bill was first introduced and that's behind tab 7 of the Commissioner's bundle of authorities. You have the first reading from the Minister, the Honourable Phil Goff, and you'll see in the second page of the Hansard transcript that we have in there at the top of the left-hand side there's the reference to the Bill retains merit tests to ensure that aid is provided only when there are good grounds for a case to proceed. Then there's the reference to the Family Court and Youth Court proceedings and the new prospects of success tests in saying the applicants will still have to show reasonable grounds for taking or defending the proceedings and then the Bill also clarified to the criminal legal aid merits tests to ensure that those facing criminal charges have representation when it is necessary because of the seriousness of the offence or the complexity of the proceedings.

Then if you go behind the next tab, tab 8 –

ELIAS CJ:
Well, that's interesting.

O'REGAN J:
That doesn't say anything about grounds of appeal, then.

MR COOKE QC:
It doesn't but let me – what I want to do is show the Bill as introduced and then as changed by the select committee.

ELIAS CJ:
It is interesting because he doesn't mean by merits. The last sentence suggests that he means by merits the seriousness of the offence and the complexity of the proceedings.

MR COOKE QC:
Well, I'll take Your Honour to the legislation. It clarifies that test because it was that Bill that introduced the right to legal aid when it's imprisonment for six months or more, so that's when the Minister is saying we're clarifying the merits tests that was previously in existence by saying –

ELIAS CJ:

What's the new merits test for Family Court and Youth Court? Because the suggestion is prospects of success was difficult to apply.

MR COOKE QC:
Yes. I confess I'm not sure what that was.

ELIAS CJ:
This is all quite slippery, isn't it, because it depends what people mean by merits and clearly if prospects of success isn't – has been replaced and if it's suggested that merits are tied up with the seriousness of the offence and the complexity of the proceedings it may not mean merits in a sense of arguability.

MR COOKE QC:
I'll show Your Honour what they were actually doing in the legislation. What the legislation did, as introduced, was say that there is an interest of justice assessment but when you face imprisonment for six months or more that will deem to be in the interests of justice to grant legal aid.

ELIAS CJ:
Yes.

MR COOKE QC:
So they were clarifying the test, saying for six months or more it's deemed to be a requirement for legal aid but otherwise the merits will be assessed as before. That's the effect of what Parliament was doing.

And I now come – I'll come to actually the provisions in a second.

ELIAS CJ:
Well, I'm just flagging that, for my part, you need to demonstrate to me why merits is – why grounds of appeal is merits in a sense of arguability because nothing in that paragraph suggests that merits is being treated as arguability.

MR COOKE QC:
Well, apart from the first line, "The Bill retains merit tests to ensure that a" –

ELIAS CJ:

Good grounds for a case to proceed, yes.

MR COOKE QC:

– that there are good grounds for a case to proceed, yes.

ELIAS CJ:

Yes.

MR COOKE QC:

Well –

ELIAS CJ:

Well, again, what do you mean by "good grounds"? But anyway, that's all right.

MR COOKE QC:

And then –

GLAZEBROOK J:

Well, is that – then it immediately goes on to talk about Family and Youth Court.

MR COOKE QC:

And then the Bill clarifies the criminal one.

GLAZEBROOK J:

Mmm, it's not very –

MR COOKE QC:

So it's – and it's in effect –

GLAZEBROOK J:

Frankly…

MR COOKE QC:

Well, it may depend on where your starting point is in reading these passages, but let's follow it through. If you – behind tab 8 is what the Minister said after it comes back from the select committee and I'll show you what happened in the select committee. So tab 8 is the second reading from them, the Honourable Mark Burton,

and you see what is said in the third paragraph there, "I turn now to the changes to the Bill recommended by the committee. The committee has recommended changes first to the criminal merits test. The test as introduced by the Bill represents a significant improvement over the previous tests which provided little guidance to litigate applicants or to decision makers. The new test clarifies that the interests of justice require a grant of aid where the person is charged with an offence for which a maximum term of imprisonment is six months or more. For less serious matters the Bill lists the various considerations that the Agency must weigh when deciding whether it is in the interests of justice to grant legal aid," and then it recommends adding another factor to the list of relevant considerations, which was the previous convictions point that Your Honour, the Chief Justice, raised with my learned friend, and that's, and that is supported.

GLAZEBROOK J:
But they're really just talking about merits being you look at a whole pile of considerations to see whether it's in the interests of justice. That actually seems to me to be what they're actually saying.

MR COOKE QC:
With respect, I think it is merits in terms of the merits of the appeal and whether it should –

GLAZEBROOK J:
Well, it can't really be when they say the merits test for criminal is six months or more imprisonment because that's nothing to do with merits, but they're putting that under the criminal merits test.

MR COOKE QC:
But that's because they were clarifying that test. They were saying there is a criminal merits test and we're now clarifying that so that you get it as of right if it's six months or more imprisonment.

GLAZEBROOK J:
Well, that's not merits. That's just a consideration that says you get it for six months or more imprisonment.

MR COOKE QC:

It's more than a consideration. It's a new rule that was being imposed.

GLAZEBROOK J:
Well, no, but I understand that but it's nothing whatsoever to do with the merits.

MR COOKE QC:
No, and that's why it clarifies the merits test.

GLAZEBROOK J:
Well, it doesn't clarify it. It just says if, if a criminal merits test means you have to look at the merits then it's actually not clarifying it. It's saying you don't have to look at the merits in those circumstances.

MR COOKE QC:
Well, we –

GLAZEBROOK J:
If merits means prospects of success.

MR COOKE QC:
It's identifying a category of cases that don't involve an assessment of the merits in that way, being the cases involving six months or more imprisonment, and therefore clarifying what the test is to be applied by the Legal Services Commissioner.

Now the select committee report is in the bundle but I didn't – I've included the report but not the attached legislation as amended by the committee. Madam Registrar, I wonder if I could pass that up to the Court?

WILLIAM YOUNG J:
I just see for the Legal Services Bill explanations, it has the other take on the significance of prior convictions.

MR COOKE QC:
Yes.

ELIAS CJ:
Does it?

MR COOKE QC:
It does. I was going to come to that, but it is the view that you should be more careful when you're dealing with people that haven't got –

WILLIAM YOUNG J:
When you have a key skip.

MR COOKE QC:
Yes, that –

ELIAS CJ:
All right. So it does cut both ways.

MR COOKE QC:
It does. You are quite right, Your Honour.

ELIAS CJ:
Don't take time if you don't know where it is but is the Family Legal Aid thing still in this Bill, the Act? Because they talk there about a new merits test.

MR COOKE QC:
I will check. I'm familiar with the civil test –

ELIAS CJ:
Yes.

MR COOKE QC:
– and now familiar with the criminal test. I just can't remember if there's a separate one for the family one.

ELIAS CJ:
Yes, thank you.

MR COOKE QC:
Someone tells me sotto voce there is so I'll – sorry, I can't tell you what it is right off the bat.

ELIAS CJ:
Yes.

MR COOKE QC:
But just going to the amended sections 8 and you'll see the main point I'm demonstrating is there's quite detailed attention is given to the design of section 8. So you can see what was struck out was, at the bottom of the first page, "The Agency considers that the interests of justice require the applicant be granted legal aid," and you turn over the page and what was struck out as (2) was, for the purposes of section 1(c), "The interests of justice always require that legal aid be granted to an applicant who is a natural person charged or convicted with an offence punishable by imprisonment of six months or more and who does not have sufficient means to obtain it," and that is replaced with what we've now got in the Act, which is above it, either the offence is punishable by a maximum of six months or more or it appears to the Agency.

GLAZEBROOK J:
Are you suggesting there's a difference?

MR COOKE QC:
It seems a very –

GLAZEBROOK J:
It's wording, isn't it?

MR COOKE QC:
– subtle change. The only effect of the change really seems to me that it's no longer legislatively endorsed that it is in the interests of justice to grant the legal aid. It's – that expression is not associated with the six months or more, and to show that there is still the same implication in both formulations, if Your Honours turn the page you will see subsection (6) is still carved out, so what was subsection (2) and what is subsection (1)(c)(i) does not apply in respect of an appeal or a proceeding to which section 6(c) applies, so –

GLAZEBROOK J:

But, actually, nothing happened in the select committee then because the Bill as introduced had exactly the same effect.

MR COOKE QC:

Well, it had a very similar effect in this respect. There are other little changes.

GLAZEBROOK J:

No, I understand that, but I'm saying in relation to this there wasn't a change at select committee level.

MR COOKE QC:

No, but there was a very detailed, obviously a very detailed consideration of this particular matter, and whatever significance they placed on it, very subtle changing in the wording. So what the point I'm trying to make –

GLAZEBROOK J:

Well, all I'm saying really is that there's no difference between the first and second reading –

MR COOKE QC:

It's –

GLAZEBROOK J:

– so that what's said by each minister is exactly, talking about exactly the same effect.

MR COOKE QC:

Yes, I accept it's –

GLAZEBROOK J:

Even if the wording was subtly different.

MR COOKE QC:

True. I accept substantively on this factor, feature, it's the same. But the point I'm driving at is that, was this is being looked at very carefully in the process and then going back to subsection (3), you'll see in other changes, "When considering whether

or not the interests of justice require the applicant to be granted aid, the Agency must have regard to," and what's taken out of it is "all of the following", so…

ELIAS CJ:
So, "all of the following", I see.

MR COOKE QC:
So they take out that clause and I'll take you to the select committee report which identifies the factor that sometimes factors in the list won't be relevant, and that's what they were trying to drive at. Then you get the new AA, which is, "The applicant has" –

ELIAS CJ:
Well, if they weren't relevant, of course, all of the following – I mean, all of the following is surplusage really, isn't it?

MR COOKE QC:
It is and – which is similar to the point Justice Glazebrook made to me, but what I'm trying to demonstrate is that this has been looked at carefully by the parliamentarians.

ELIAS CJ:
Someone who has changed it for drafting…

MR COOKE QC:
Nuances.

ELIAS CJ:
Well, maybe, yes.

MR COOKE QC:
And they then have added in the additional factor, double A, which is the one Your Honour, the Chief Justice, dealt with, as a reformulation of the complexity one. So it previously said complexity of the proceedings and now DA. D deals with that in more elaborate terms, complex, factual, legal or evidential matters, and there's some other little changes to that.

And then you, if you look at how they reported on that, and that's behind tab 6 of the bundle of authorities, on the first page of that, you'll see there's a heading at the bottom of that first page, "Eligibility for Legal Aid". The first part is this new double A, "Consequences of a criminal conviction for a legal aid applicant," and you'll see there's the counterpoint, "We believe that the Agency should take the possible effect of a criminal conviction into consideration when assessing whether or not to grant legal aid. We consider that specific care should be shown to applicants facing their first conviction. We believe the Agency should take into account whether or not the applicant has any previous convictions as we are concerned about the effects of a first conviction." So that's why that's been added. And then eligibility application criteria, "The bill provides more comprehensive eligibility criteria for legal aid applicants, recommend a number of changes to ensure consistency and fairness of the administration of legal aid to eligible people. We believe that eligibility criteria should be consistent for legal aid applicants in both civil and criminal proceedings," and of course civil proceedings require reasonable prospects of success. "We recommend that in proposed new section 8(3), as inserted by clause 5, the term "all of the following" be removed from the list of considerations, as we believe that not all the provisions are always relevant when the Agency is considering specific applications for legal aid in criminal cases. We note the Agency will still have to consider whether each factor applies."

So, as I said, my point in this is this is not something that's gone through the process without very careful consideration of the design of the system by, by Parliament not only when the Bill was first proposed but in the process of consideration by the select committee. I should just draw Your Honours attention to the National Party minority view which is on page 8 of the report of the select committee if not to send a shiver down the spine. You'll see on page 8 there's, the third to last paragraph, the Bill of Rights Act, "Affirms New Zealand's commitment to the international Covenant," in relation to both civil and criminal proceedings. "We also record our major reservation that the current process for the granting of criminal legal aid requires review. Without expressing a concluded view it may well be that the previous regime involving judicial determination of criminal legal aid was better and fairer to those seeking legal aid." So that would have, as I say, send shivers down the spine in the sense of reverting to *Nicholls* and *Tikitiki* and I notice the membership of the committee, which is on the following page, but that, of course, hasn't come to fruition.

So what I say is that this has been a careful and deliberate crafting of the system for legal aid and a deliberate decision to say that the, the proposal, the rule that you should get it automatically for six months or more would not be applied for appeals. That was a consistent feature both in its introduction and through the assessment by the committee of what's appropriate and –

GLAZEBROOK J:
Really just reverting to the point you're putting quite a lot of emphasis on this merits review. Why is the merits review not a reference to all of the factors that were taken into account rather than the actual merits of the appeal, because mer – clarifying a merits review by saying you don't have to do a merits review doesn't, it seems as though they're using merits review in a much wider sense than you are putting forward –

MR COOKE QC:
Well –

GLAZEBROOK J:
– ie, you're putting forward merits being the merit of the –

MR COOKE QC:
Merits.

GLAZEBROOK J:
– yes.

MR COOKE QC:
Well that –

GLAZEBROOK J:
And that doesn't seem to be the case. They're looking at complexity, they're looking at previous convictions, they're looking, so the merits review is the merit of getting legal aid taking into account all of the factors I accept they have carefully calibrated and decided on.

MR COOKE QC:

Well, even if you read it in that way and it's not the way that I read it when I read this material –

GLAZEBROOK J:

Mhm.

MR COOKE QC:

– I just thought merits naturally meant what it normally means.

ELIAS CJ:

Well, to lawyers.

GLAZEBROOK J:

One would normally think that, yes.

MR COOKE QC:

Yes. But that's probably the most, the other significant factor is that we've got in relation to the appeal or the grounds of the appeal, and if even on that view merits must incorporate the, the –

GLAZEBROOK J:

I don't necessarily have a problem with that. I just don't think they are using merits in the sense that we would normally think of as merits in terms of lawyers because they – I, I – it seems to me now, having looked at that, what they mean by merits is whatever they have decided to put in that list of carefully calibrated, ie, not at all for the six months but for everything else.

MR COOKE QC:

Well, in a way I can accept that because neither am I arguing that the test for criminal legal aid is solely the merits.

GLAZEBROOK J:

I understand that and that's clear from your submissions.

MR COOKE QC:

But even on Your Honour's view of that parliamentary material, that merits incorporates the arguability of the case –

GLAZEBROOK J:
Well, certainly incorporates grounds of appeal. Whether that incorporates arguability is perhaps a further argument.

MR COOKE QC:
Well, and I would say that's the other feature, that first of all when Parliament looked at this carefully after it had been apparent from *Nicholls and Tikitiki* and *Taito* and the arguments advanced in those cases, that what was involved in the previous application of a section, including the respective appeal, their grounds of appeal, was an assessment of the merits in the sense of the arguability of the merits. When they came to reconsider that post-*Taito* and reconsider the criminal legal aid merits test, they must have understood that that involved a consideration of the arguability of the appeal when repeating the grounds of appeal point.

ELIAS CJ:
But the removal from a judicial assessment to an administrative assessment, I'm not sure that that does carry over because the problem, well, one of the problems in *Taito* was the predetermination of substantive matters which it's for the Court to determine. If they are taking away that risk it's not going to be pre-judged then the only policy is the legal aid policies.

MR COOKE QC:
But that's still going to – you take it out of the hands of the Judges but give it to the officials but give them the same test, as they originally did before these, this refinement in the first change in 1999 which the Privy Council gave its judicial blessing to. That must have incorporated the same approach but with the appropriate independent of the judiciary persons making that call, and so – and there was no criticism of the idea that, about taking it out, with respect of appeal –

ELIAS CJ:
Well, it probably didn't occur to anyone that an administrative body looking at this would be looking at arguability –

MR COOKE QC:

Well –

ELIAS CJ:
– except at some very low threshold level.

MR COOKE QC:
Well, can that really be correct because that was really what was being done in *Nicholls and Tikitiki* and *Taito* under the same verbal formulation in respect of appeal, the grounds of appeal, and the condemnation of that was that the Judges are doing that and predetermining the actual outcome of the case, so the Judges shouldn't be doing that, said the Court in *Nicholls and Tikitiki*, reiterated so firmly by the Privy Council in *Taito*, so that was the thing that was changed, but otherwise the substance of what was to be assessed remained the same until it was nuanced in this process after *Taito*.

So it can't, you can't really say that no one would have thought officials, although it's lawyers contracted to the Legal Services Commissioner, wouldn't be assessing merits because that's what had always happened and what was plainly going to continue to happen under the new regime with the same tests, and then Parliament's, in this process, rolled up its sleeves and given a – directly confronted the *Maxwell* issue, should there be an absolute right because of the consequences, and decided, well, yes, but only for those who face prison for six months or more and only for trial. For appeals, it's still going to be the same old, same old, that is, it will – a list of factors that include the grounds of appeal which, by definition, must include the merit of those grounds.

ELIAS CJ:
Well, are you going to take us to *Nicholls* because, I mean, that's what *Nicholls* decided, wasn't it?

MR COOKE QC:
Yes, yes.

ELIAS CJ:
And I still have difficulties with that, probably not shared by others but – so you can do it fairly briefly but…

MR COOKE QC:

Well, I will go to *Nicholls* –

ELIAS CJ:

Yes.

MR COOKE QC:

– in the sense of I'd like to go first to the alternative ways that Justice Collins and Justice Miller did it.

ELIAS CJ:

Sure.

MR COOKE QC:

Then how the Court of Appeal majority did it and then how that reconciles with *Nicholls*. But just before I do that, I would say two further things about that formulation in respect of an appeal, the grounds of the appeal. The first thing is that there must be grounds. That's what this section is contemplating, and the grounds that they must be identifying are the grounds that are recognised at law for an appeal, so a miscarriage of justice under section 232 of the Criminal Procedure Act or an error of sentence under section 250, and that then interleaves with the interim grant of aid given by Legal Services to establish whether there are those grounds of appeal and then once you get grounds, I accept it doesn't say grounds for appeal it says grounds of appeal, but once you get those grounds they then go into the overall evaluation under section 8 and, with respect, the only way that they can meaningfully go into that evaluation in terms of interests of justice must be whether the person applying has got good arguments to make that should be funded, that's the only real significance that can be said to be involved in looking at the grounds of appeal for interests of justice purposes otherwise it becomes meaningless. Why would you be looking at the grounds in terms of interests of justice if you weren't looking to see what sort of case the person had to pursue on appeal. That can be the only reason why you've got that in there.

ELIAS CJ:

Sorry, can you just remind me, in *Taito* the legislation permitted the registrar to make the determination didn't it?

MR COOKE QC:

Yes, but there was –

ELIAS CJ:

And the Court decided it would be a better process, I think I'm right –

MR COOKE QC:

Yes.

ELIAS CJ:

– to look at the merits in a preliminary way.

MR COOKE QC:

It was – there were, in fact, three Court of Appeal Judges ended up from the lead of a, one of them –

ELIAS CJ:

Yes.

MR COOKE QC:

– to all look at it.

ARNOLD J:

Didn't the legislation require the registrar to consult with a Judge?

MR COOKE QC:

It did.

ARNOLD J:

That's right.

MR COOKE QC:

Yes.

ARNOLD J:

And so what they did, they effectively replaced a single consultation with the three.

ELIAS CJ:

But the decision was the registrar in consultation with a Judge.

ARNOLD J:

In the framework of the statute, yes.

ELIAS CJ:

But in that framework why is it a necessary – well, you'll get on to *Nicholls* and explain how in that context but I'm struggling. You say, well, we replaced this judicial consideration.

MR COOKE QC:

Because of the same tests.

ELIAS CJ:

It was the same test but the statute didn't actually envisage the process that was adopted by the Court for all the best reasons.

MR COOKE QC:

Yes, and that was condemned.

ELIAS CJ:

So I'm just wondering why you can be so confident that because the same, leaving aside the statutory history, I understand your argument on that, but that in the earlier statute the grounds of appeal necessarily meant the merits of the appeal.

MR COOKE QC:

Well that was what was being done and that was what was attacked in both *Nicholls* and *Tikitiki* and *Taito*, part of the argument, that when they roped in several actors in this case, Justice Arnold was, of course, arguing for the Crown in that case, but what was in issue in that case –

ELIAS CJ:

No, but what I'm looking for is what is there in the legislation that gives you the steer that the merits were in the contemplation of Parliament, the merits of the appeal? I know that's how it was worked and a preliminary view was taken of the arguability but

what is there in the legislation that gives that because the fact that it's a decision of the registrar, even in consultation with one Judge, doesn't really suggest that to me.

MR COOKE QC:
Well I can't say that the legislation itself gave –

ELIAS CJ:
Yes.

MR COOKE QC:
– gave any greater indication of that then the present legislation does because that's the same verbal –

ELIAS CJ:
No, and I understand your argument based on Parliament knew when it came to do these amendments in this new legislation of the background but, thank you.

MR COOKE QC:
There wasn't any word “merits” or anything in the previous legislation or anything it was the same verbal formulation in respect of, I think it was, is it, respective of appeal, the grounds of appeal. I will just check that because it's behind these tabs. Yes it was and I'm behind tab 3 of the bundle of authorities. I think that was the relevant section at the time.

ELIAS CJ:
Thank you.

MR COOKE QC:
There was 7(2)(b) in respect of any appeal on the grounds of the appeal, “In any other circumstances the opinion of the registrar are relevant.”

So I was then going to go to the High Court Judge’s analysis because in a sense this is what this case has been about because that's what the decision was and what the Commissioner appealed to the Court of Appeal. That’s behind tab 2 of the case on appeal. I particularly identify paragraph 53 of His Honour’s judgment in the way that His Honour interprets the legislation there as explained in paragraphs 42 to 46 the Commissioner would have discharged his responsibility under 8(2)(c)(viii) of the Act

by simply deciding that if established the identified grounds of appeal were capable of leading a successful appeal. In undertaking this assessment the Commissioner and the Tribunal should have avoided assessing the merits of Mr Marteley's appeal. So that seems to me – and if you look at how His Honour has explained that in more detail from paragraphs 43 to 46 is undoing what Parliament has done in this scheme of requiring the grounds to be assessed and that's reiterated at paragraph 44. I conclude the Commissioner would be satisfied of the requirement of 8(2)(a)(viii) of the Act if he considers the grounds of appeal disclose matters which, if established, will be capable of letting the appeal be allowed, and that seems to me to reduce it to a situation where the Chief Justice and others indicated it can't just be looking to check that the grounds are –

WILLIAM YOUNG J:
Correspond with the statute.

MR COOKE QC:
That's right. There must have been some assessment of the arguability of those grounds. So in my submission that just undoes the regime that Parliament has decided upon and it's not consistent with that. An illustration of the difficulty with Justice Collins' approach is really it does allow allegations such as corruption and here Mr Marteley effectively made that allegation there was a corruption obtaining of a guilty plea by the paying of witnesses and we have legal aid – after Justice Collins' decision legal aid was granted so that a private investigator could conduct an investigation about what someone had said in prison about paying off a witness. With respect, that is precisely the sort of grant of legal aid that Parliament had anticipated wouldn't occur.

WILLIAM YOUNG J:
Or to investigate an allegation that the Judge was party to a conspiracy?

MR COOKE QC:
Well, presumably.

WILLIAM YOUNG J:
That is part of the grounds of appeal as he himself had formulated.

MR COOKE QC:

And Parliament has obviously – there's a shifting process in there. Even internationally it's recognised that not everyone gets legal aid. There has to be some decisions on who does and doesn't get it. So Parliament's made its decision here and I suggest by giving the absolute right for six months or more but the broader analysis for appeal, the kind of allegation that this was corrupt and the idea that Legal Services have to fund private investigators to conduct that sort of investigation is exactly what –

ELIAS CJ:
Well, we wouldn't be deciding that they did have to do it. That's not before us.

MR COOKE QC:
No, no.

ELIAS CJ:
It does seem a strange decision.

MR COOKE QC:
Your Honours have been putting to me before the adjournment Mr Marteley's case in a way that's suggesting you would be looking at what that decision was.

ELIAS CJ:
Well, what some of us have been putting to you is that there may be – it's not either/or. There is a continuum on any argument, even your argument, and it's really where it's pitched.

MR COOKE QC:
I accept that entirely and all I can say the difficulty in doing it for all cases in a hypothetical way in trying to address it. The question of statutory interpretation, because we do have to work out how you interpret the statute in a particular way if it's to be other than a continuum exercise and Justice Collins has tried it and with respect I don't think it works.

WILLIAM YOUNG J:
Well, on his approach all you have to do is say there was a miscarriage of justice.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

So if you say there was a miscarriage of justice that's fine. If you say well, the moon is made of cheese it's not fine.

GLAZEBROOK J:

Although the Court of Appeal would actually not really accept as a ground of appeal that there's been a miscarriage of justice. They would expect that those grounds be detailed as to why there was a miscarriage of justice and it might be that that's what Justice Collins was looking at.

WILLIAM YOUNG J:

All right, there was a miscarriage of justice because the Judge misdirected the jury. Well, do you have to say in what respect? I mean, the trouble is you get on a slippery slope as soon as you require more and more particularisation. You're really requiring a plausible ground of appeal, I guess –

ELIAS CJ:

Well, plausible ground of appeal I think may be the right threshold.

MR COOKE QC:

But –

ELIAS CJ:

But assessing how arguable the point is may be quite different.

MR COOKE QC:

But plausibility must – that involves some degree of assessing the arguability.

ELIAS CJ:

But it's a plausible ground of appeal, not a plausible appeal.

WILLIAM YOUNG J:

But I suppose if the Judge misdirected the jury one would expect that that would have to be teased out. I mean, the Legal Services Commission would be entitled to say, "Okay, but in what respect?"

MR COOKE QC:
And then it must have been contemplated that they're looking at – and I note what Your Honour, Chief Justice, just said, but plausibility and arguability are themselves on a continuum and it's just, those are just words to describe different status –

ELIAS CJ:
Yes.

MR COOKE QC:
– that you might assign to someone's case, and bear in mind again, as I said, we're looking at this because how, how much of an injustice there has been at the trial informs the interests of justice in relation to the appeal. So the more you can point to something wrong at trial, the more the interests of justice suggest you should have legal aid for an appeal. Equally, the less so, the less potent that factor is in the overall evaluation, and I just don't think we get anywhere by bright line rules, saying it's just checking that it's an available ground or it's a plausible ground or other somewhat arbitrary status given to the test. The test isn't framed that way and can't be unpacked in that way. It requires an overall evaluation, including the merits of what you say about what has gone wrong with your conviction or your sentence.

And I say the same problems emerge from Justice Collins, I'm sorry, Justice Miller's decision, and that's behind tab 29 in the case on appeal, and what I say about what His Honour says here is it's not entirely clear how he is saying this should be applied. And I need to say really from the point of view of the Commissioner, who is an independent statutory officer, the most important thing for the Commissioner to know is what the test is. It's, he's not, I don't appear here for the Crown, to represent the Crown's interests. I appear for a statutory officer who is trying to apply a statute. So the difficulty with Justice Miller's concurring but separate judgment is it doesn't really identify with clarity what is involved, and that's perhaps demonstrated most at his paragraph 108 where he says this, "In my opinion the legislation permits but does not require the Commissioner to take the approach illustrated by *Maxwell* of the European Court," and the problem with that is *Maxwell* says it is irrelevant whether you've got an argument or not. Once it's serious, you must grant legal aid, and the idea that the Commissioner could adopt that as a policy would be inconsistent with the statute because the statute plainly requires an overall evaluation.

WILLIAM YOUNG J:

But it does require, I know the language of section 8 was fiddled around with, but it does require the Commissioner in the case of appeal to have regard to the grounds of appeal. I mean, that must apply in every case. Now it may be that the consideration that can be given to it is constrained by practicality.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

Whereas *Maxwell* basically says –

MR COOKE QC:

It's out.

WILLIAM YOUNG J:

– you don't have regard to grounds of appeal.

MR COOKE QC:

That's right. It's irrelevant. So you can't say you're permitted to adopt that approach because that's inconsistent with what the actual statute requires. And then, just to make that –

ELIAS CJ:

Well, he does say that the approach illustrated. He's clearly using it to indicate that the Commissioner is able to say in the circumstances legal aid must be granted.

MR COOKE QC:

Because of the other factors are so strong.

ELIAS CJ:

Well, I'm not sure that it's always a question of balance. These are only factors to be taken into account. The evaluation is the interests of justice.

MR COOKE QC:

Which involves balance, does it not? If you're going to have the interests of justice –

ELIAS CJ:

Well, it's not necessarily balancing those factors. It's, in the end, it's an assessment, it's a judgement that it's in the interest of justice to grant leave.

GLAZEBROOK J:

In the interest of justice because the person could not conduct an appeal without assistance.

MR COOKE QC:

Well, that's one of the factors.

GLAZEBROOK J:

Well, but that might be the only factor that's taken into account because it can't be in the interest of justice if someone is unable to conduct their appeal.

MR COOKE QC:

It can't be the only factor taken into account because the section does mandate –

GLAZEBROOK J:

Well, no, you've had regard to the other factors –

MR COOKE QC:

Yes.

GLAZEBROOK J:

– but this one, it doesn't outweigh them, it just means that it is in interests of justice because of that one factor.

MR COOKE QC:

Well, I guess what I'd say about that one factor is that, to be realistic about it, that covers almost all people who are convicted of offences that the chances of them being able to conduct their own appeals are very slim, isn't it, there might be –

GLAZEBROOK J:

Well, no, I don't actually think that's necessarily the case. If – it would be the case if it was a complicated argument on law.

MR COOKE QC:
Mmm.

GLAZEBROOK J:
But it's not necessarily the case. There are people who conduct their defence quite, quite well.

MR COOKE QC:
Well, one irony about that is the latest case on someone who managed to successfully appeal their guilty conviction was the case of Mr Lyttelton, which I've put in the bundle of authorities, where he acted for himself and persuaded the Court of Appeal that he was mentally unwell and his guilty verdict couldn't stand, so I suppose –

WILLIAM YOUNG J:
Guilty plea couldn't stand?

MR COOKE QC:
Sorry?

WILLIAM YOUNG J:
A guilty plea couldn't stand?

MR COOKE QC:
That's right, sorry, I said verdict, yes. So I accept there are but some people who can but, and that was a hard argument that, because of his own mental illness he was not able to understand the consequence of his guilty plea, but I do think that's rather – anyway, we may be getting a bit diverted because we're talking about individual cases again.

GLAZEBROOK J:
Well, I was really talking about somebody who from a lack of literacy, I wasn't talking about the ordinary run of because it is assumed that people can defend themselves –

MR COOKE QC:
Mhm.

GLAZEBROOK J:

– if they are ord – unless it's something that is particularly complex legally.

MR COOKE QC:

Well, we – this debate keeps on going round and round in terms of what particular fit is significant in particular cases which is the problem about this case because it's not really what this case is about. This case is about a statutory interpretation exercise as we apprehended it and it's hard to say as a matter of interpretation how Your Honours' approach should be cemented in some way which is why I'm going to these, what the –

ELIAS CJ:

What does having regard to the grounds of appeal mean?

MR COOKE QC:

And my submission must be that that includes assessing the argueability of the grounds because it is the thing that must go to why it's in the interest of justice for people to get a, because the more that they have been unjustly treated or possibly unjustly treated, the more they have got the, an argument to say the interest of justice mean they should be funded for a lawyer to make that point and it's, in my submission –

ELIAS CJ:

But if that, but this is against the background of a right to appeal.

MR COOKE QC:

Yes, yes.

ELIAS CJ:

Anyway, yes, I do understand the argument.

MR COOKE QC:

And just to pick up where Justice Miller was going and show you the difficulty of trying to find the alternative formulation, if you go to section, his paragraph 109 and if I go through that sentence by sentence to indicate what I think is right and what I think is questionable. "So second the legislation does not state the Commissioner must consider whether an appeal will succeed." Well, there's no doubt about that, it

doesn't, doesn't require that at all. "It requires rather the grounds of appeal be considered." Agreed. "For the reasons given by the majority, this criterion concerns merits," and I say "agree", I'm not sure if some members of the Court might disagree with that, "But to say that the Commissioner must consider the merits is not to say that detailed consideration need to be given," maybe, "… or that the Commissioner must be satisfied that the appeal may succeed in fact," true. "To consider whether the grounds of appeal would succeed if made out is to consider the merits albeit it at a high level." That appears to be Justice Collins again to consider whether the grounds of appeal would succeed if made out because it just turns it all into a –

ELIAS CJ:
Pleading point.

MR COOKE QC:
Pleading, yes. "The legislation does not require that the Commissioner go any further," and so in articulating this alternative view it appears to be Justice Collins' approach but more subtly expressed or more ambiguously expressed in my opinion, in my submission, and therefore I would say it's equally wrong as Justice Collins was. So what do I say is the correct approach, and Your Honour, the Chief Justice, foreshadowed what I'd say about *Nicholls* and *Tikitiki*. I think what, with respect, that what the Court, the majority said at paragraph 82 of the judgment is a sound summary of the correct interpretation.

ELIAS CJ:
Where do we find that?

MR COOKE QC:
Paragraph 82 of the judgment.

ELIAS CJ:
Of the judgment on appeal, yes.

O'REGAN J:
Tab 29.

MR COOKE QC:

I'm sorry. At tab 29, page 145. That summarises, in my respectful submission, that the appropriate response, perhaps 82(f) is perhaps the most important of that. "The overall question is whether the interests of justice require the grant of aid. The merits of the grounds are not to be considered in isolation. The weight to be given to the mandatory considerations and any discretionary factors will depend... The weight given to the merits of the grounds of an appeal may be much less than that given to other factors such as the seriousness of the penalty imposed. any complexities of fact or law or the ability of the appellant to effectively present the appeal without the assistance… Where, for example, the penalty imposed on the appellant is serious, a grant of legal aid may be justified even if the merits of the grounds of appeal are regarded as tenuous. In such cases, a relatively cursory inquiry may suffice."

So all of that seems sound and it's interesting that Their Honours, at paragraph 78, regard their reasoning is no – "We see no reason to differ from the approach adopted by this Court in *Nicholls."* Though I note the next sentence, "In particular we favour an approach along the lines adopted by the Chief Justice as discussed at paragraph [48] to [50]." There is a subtle difference in the judgments in *Nicholls* between what was said by the Chief Justice and what was said by Justice Tipping and Smellie, and just so you can see the approach that was being endorsed there by the Court of Appeal, the *Nicholls* and *Tikitiki* decision is behind tab 11 of the bundle of authorities and the relevant passage from the –

ELIAS CJ:
Sorry, what tab?

MR COOKE QC:
Tab 11.

ELIAS CJ:
Yes, thank you.

MR COOKE QC:
And page 421. Page 421, line 6. "While the statute requires consideration be given to the grounds of appeal on the gravity of the offence in every case it does not say or imply they must always be given the same weight, indeed, the very concept of gravity means it will carry different weight according to the offence charged. It also follows the weight to be given to the grounds of appeal will vary also. It does not follow that

this limit disappears from the equation altogether. There is no indication in the statute that it was intended to give automatic legal aid in serious cases even on the most generous assessment of the appeal was hopeless. However, there is no reason why tenuous grounds might not be viewed more generously where much is at stage for the appellant, it is a question of balancing or weighing."

So that's the approach that the primary judgment the Court of Appeal is following. It is slightly differently expressed from Justice Tipping. At page 440, at line 18, "Allied with the issue of grounds, there were some debate about the degree of likelihood of success which those grounds much demonstrate before aid should be granted. As the answer is capable of varying with gravity – the sliding scale concept – it is not possible to be definitive. All that can usefully be said is that the policy of the 1991 Act is that save an exceptional case, the applicant for aid has to show that the grounds of appeal have a sufficient possibility of success to justify a grant of legal aid, bearing in mind the gravity of the offence and all other relevant circumstances."

Now I accept the possible nuance about that is the idea of "save an exceptional case" which adds in a gloss to the assessment that possibly doesn't exist in the statute and doesn't assist.

ELIAS CJ:
But do you – you don't argue in support of a sufficient possibility of success to justify a grant of legal aid?

MR COOKE QC:
I prefer the formulation of the Chief Justice. I do think they are trying to grapple with the same concepts and often, you know, we have a problem with using language in the abstract to describe what is intended. I am content to rely on what, the way the Chief Justice formulated which is what I apprehend the Court of Appeal has done in particularly noting that formulation of it.

Now, Your Honour, the Chief Justice, asked me to address why the level of appeal from the decision of the Commissioner's offices to the Tribunal would be relevant. I don't think, with respect, that does change what the correct interpretation of section 8 is.

ELIAS CJ:

Well, I see that under the former statute it was similarly quelling. It had to be – I might have picked that up in *Nicholls* itself, a reference.

MR COOKE QC:

I think that would be a very oblique way of saying that there's an interpretation of section 8. Just so Your Honours know, there's a decision of the Court of Appeal in a case called *JMM v Legal Services Agency* and the reference is [2013] 1 NZLR 517 where the Court identified what was meant by those grounds of appeal to the Tribunal. It dealt with "manifestly unreasonable" at paragraphs 99 to 102 and "wrong in law" at paragraphs 103 to 112. But, with respect, I don't think it changes the primary interpretation we must glean from looking at the section in its context.

Now the fourth point I wanted to make, you'll recall the four points that I started with, is this design of the system is, in my submission, a system that is consistent with the international right and that is because the international right is not absolute right. It contemplates this very kind of assessment, and I'm talking both about Article 14 of the International Covenant, which is replicated in section 24(f) of the Bill of Rights Act and it's unusual, I suppose, as an international right because it has one important word in it, and that word is "if", that there's a right to legal aid if the interests of justice so require. So it is conditional and the condition is whether the interests of justice require the grant of aid, not, it's not whether the seriousness of the offending requires the grant of aid but what's in the interests of justice and that obviously involves an evaluation, and if you think about international obligations, that's an evaluation that the party state would obviously be conducting within its own domestic law systems. That's what the international right must have contemplated. So it would contemplate that the state agencies involved in the administration of legal aid in the country would administer legal aid in the light of that requirement, here by the independent Legal Services Commissioner, and there must therefore be a margin for appreciation involved in how individual states go about undertaking that evaluation exercise in their own criminal justice systems, and that is reflected in the General Assembly resolutions that my learned friends have now emphasised because they, in those introductory words to those resolutions, and I'm talking about paragraph 3 of the new General Assembly resolutions, it talks of the spirit of the principles and guidelines bearing in mind the diversity of states that are party to the resolutions and the particular principles my learned friend refers to are in the guideline sections of the General Assembly resolutions, and even when you get to them they talk about, repeat again the interests of justice as the qualifying factor.

So, in my submission, states are allowed to have their own way of assessing the interests of justice requirement. The international right is not contemplating that everyone will get legal aid. It is going to be some only who get it. I accept that is not what *Maxwell* said, but it's interesting that *Maxwell* didn't really turn on the wording of Article 14. What it turned on was the existence of the right of appeal in domestic law and said if you're going to have that right, it has to be a meaningful right and therefore you have to have a lawyer. So in all the – in that conclusion of the Court in *Maxwell* was derived from the domestic law structure as much as the international law right, and here in our system we've got a different system for administering the criminal legal aid system, including for appeals.

We have our New Zealand Bill of Rights Act right that gives a right of appeal but a right of appeal in accordance with law and that law is both substantive and procedural. It's substantive in the sense that we have in our statutes identified when you can appeal your conviction because the Parliament has set out in the Criminal Procedure Act and it's, the Acts before it, what you would have to show to get your conviction overturned be it a miscarriage of justice or whatever. And the same is true of the procedure, so it's, the Legal Services Act is part of the criminal justice system where Parliament has turned its mind to the procedure that is involved in our system including what/when someone gets legal aid and as we've gone through that that system does not incorporate right but an evaluation exercise, so if you look at our system both substantively and procedurally, it's all appropriately what the international obligations contemplated would occur within domestic states in terms of giving effect to the rights that are enshrined in the instruments. So that's the fourth point I wanted to make about how the system, I say, has been developed by Parliament or reiterated after *Taito* is consistent with the international rights.

So that's all I particularly wanted to say on this critical question. There is, of course, this question of costs that I dealt with, should deal with briefly but Your Honours may or may not have further questions about the section 8 issue.

O'REGAN J:

What happens where the public defence service is acting for an appellant? Is there, does this, does this whole regime apply or not?

MR COOKE QC:

I might have to ask a question. Would you like me to ask?

O'REGAN J:

Sure, yes. I think if it's not a yes/no answer perhaps we should leave it –

MR COOKE QC:

It isn't –

O'REGAN J:

It's obviously not critical to the outcome of the case.

MR COOKE QC:

No, I think it's, I've been – the brief explanation is that effectively it does because it's a replicated system for the public defence service?

O'REGAN J:

Okay, that's all I needed to know.

MR COOKE QC:

So just on costs. There are two arguments that have been advanced to suggest that Mr Marteley should have been awarded costs in the Courts below. The one is the idea that in public interest litigation that someone in Mr Marteley's position should be, in effect, funded by the award of costs in a lower Court and my answer to that is that altogether from that being a, a reasonably significant departure from the established authority on costs that I've set out in the written submissions, that we set out in the written submissions. There's no real justification for that here because the Legal Services Commissioner is in a slightly opposition of not always funding the other side of cases against him because of the availability of civil and criminal, availability of civil legal aid in relation to those challenges, so civil legal aid was available to Mr Marteley in the lower Courts to pursue the point he wanted to pursue and, of course, it was available so in the Tribunal in terms of the challenge to the Commissioner's decision in the Tribunal. So, with respect, there doesn't seem to be the overriding need for a parallel Court created costs regime to give effect to some public interest because there is the mandated parliamentary regime for assisting those who can't afford to bring proceedings such as the proceeding, this proceeding the availability of legal aid.

In terms of the argument that, well, Mr Marteley effectively succeeded in his case in the lower Courts, I think, with respect, there are two things about that. The first is still the point is that Mr Marteley had the civil legal aid system available to him to pursue this case in the lower Courts and that seems, with respect, to have been the appropriate way to manage his claim to be able to challenge the decision in the High Court and the other point is that –

GLAZEBROOK J:
But if he chose not to do that and won he would get costs. It wouldn't matter whether he could have had legal aid because the Legal Aid Service would have had costs awarded.

MR COOKE QC:
Yes, I guess that's true. It puts the legal services in a slightly unusual position because they can't –

GLAZEBROOK J:
Well I understand that but I wouldn't have thought it makes any difference because if you had somebody who wasn't legally aided or somebody who decided not to apply for legal aid but could have got it I would have thought you just get costs in any normal way.

MR COOKE QC:
Sure, but the reason why I'm raising that point is because this case has always had two dimensions to it. There has been Mr Marteley's case but also underlining it has really been the big issue that first troubled my learned friends was *Nicholls* and *Tikitiki* and what was being argued in the High Court, and remember this is an appeal on a question of law, was this interpretation exercise. It wasn't, so, I mean, of course that involved Mr Marteley's case but what the main argument was, what's the main interpretation of section 8 that's appropriate bearing in mind *Nicholls* and *Tikitiki* and *Taito* in the current formulation, and that's the issue which Mr Marteley didn't succeed on ultimately as a consequence of the Court of Appeal decision. Now you might, whether you would regard that a bit more generously for the purposes of Mr Marteley's case I think is tempted by the fact that he always would have been able to have that argument and his case argued on civil legal aid if he'd wanted it so it's not quite as simple as saying Mr Marteley succeeded because the argument that

he succeeded on has been overturned by the Court of Appeal and, with respect, I think the argument in this Court I doubt that Justice Collins' interpretation is going to be the one that finds favour with this Court.

WILLIAM YOUNG J:
I mean you heard the sort of simpler version of the argument which I put to Mr Shaw. The decision of the Tribunal was distinctly challengeable simply on the merits that there was a failure to take into account, the Tribunal member seems to have misunderstood the aspects of the pressure argument, failed was perhaps too dismissive of it, because I doubt if *R v Ripia* is the last word on this topic, failed to take into account the complexity of the issue as to whether a plea of guilty in these circumstances can be set aside and there was no real evaluation of the strength of the case against him or I suspect it's a pretty strong one.

Now once Justice Collins had given his decision you really had to have a contradicter in the Court of Appeal, didn't you?

MR COOKE QC:
Yes, and that's what led to my discussions with my learned friend after that case which was to say well, look, we need to take this further but we don't want it to prejudice Mr Marteley's appeal so there won't be any application for a stay of, you know, and legal aid will be available for him to pursue his appeal and then it was a question of which case came first.

WILLIAM YOUNG J:
Yes.

MR COOKE QC:
And then when it was this case that came first we indicated to the Court of Appeal particularly the psychological report, it indicated that even if we succeeded we wouldn't be removing the grant that he'd been granted as a consequence of the High Court decision.

WILLIAM YOUNG J:
So he has sort of won the case?

MR COOKE QC:

Sort of, yes, but the primary reason why he has won the case is not because of what's been argued in the proceeding it's because the availability of the psychological report.

WILLIAM YOUNG J:
Yes, I must admit, I don't go much on the Tribunals decision.

MR COOKE QC:
Yes, well – and you can criticise the Tribunal's decision and also you can possibly criticise the High Court decision being that's what was argued in the High Court, what was the interpretation of section 8. So what the record does show is that legal services have been prepared to look again at the case whenever it has been suggested they look again at the case, Mr Ellis, when he came for the second time to apply for legal aid the legal aid interim grant for a sentence appeal was granted. So it's not a situation where he's had to fight tooth and nail through the Court system to get legal aid, in the end it's been legal aid that have decided legal aid who have decided that it's appropriate in the circumstances of his case.

ELIAS CJ:
Well really you're simply saying we don't need to exceed to the suggestion that we fashion a parallel universe for –

MR COOKE QC:
That's right.

ELIAS CJ:
– for costs rather than really resisting the award of costs in this case.

MR COOKE QC:
Well, I mean, if Mr Marteley succeeds in this Court, also the whole dynamic changes, but the reality is that although he succeeded in the High Court, the point on which he succeeded in the High Court was overturned on the Court of Appeal. Obviously, the Commissioner doesn't seek, hasn't sought costs in either Court but it doesn't seem to me that that means he should be, on the conventional approach, entitled to costs in the High Court because he, in the end, ultimately lost the argument that he pursued in the High Court on conventional…

GLAZEBROOK J:

Well, although he won his argument in terms of – I just – because that often happens, that you don't necessarily win on all of your arguments but if you win the case you're usually entitled to costs.

MR COOKE QC:

Yep.

GLAZEBROOK J:

Unless you've slightly unreasonably extended or the argument – I just…

MR COOKE QC:

But, yeah, but he lost all the arguments were ultimately incorrect in the High Court as the Court of Appeal saw it. So the reason why he won was not because of the Court decision but because the Commissioner decided to not withdraw aid even if he was going to succeed in the Court of Appeal. So – and the position of Mr Marteley would have been perfectly adequately protected by civil legal aid grants to cover him off.

ELIAS CJ:

Can I just go back to this so-called test, the sliding scales and balances and all those metaphors –

MR COOKE QC:

Yes.

ELIAS CJ:

– I think it's quite useful to really dig down into. You said when we were going through that you don't think that it was necessary to establish that it was likely that an appeal would be successful.

MR COOKE QC:

Well, no, but, of course, if you did do that it would be a potent reason why legal aid would be granted. This is part of the problem with answering questions like –

ELIAS CJ:

Yes, but I'm just trying to work out when – are you saying that if it was likely an appeal would succeed you must grant legal aid?

MR COOKE QC:
I can't really even say that either, can I?

ELIAS CJ:
No.

WILLIAM YOUNG J:
It's just a factor in favour of legal aid.

ELIAS CJ:
Yes.

MR COOKE QC:
Yes, it –

ELIAS CJ:
But also where's your threshold?

MR COOKE QC:
Well, you – that's the problem. We can't say any more than the threshold is what as Parliament described it, when the interests of justice require the grant of aid. If you try and prescribe a different threshold, you are replacing Parliament's threshold with the Court.

ELIAS CJ:
Well, Parliament's threshold is have regard to the grounds of appeal.

MR COOKE QC:
Yes, against the test of what's in the interests of justice.

ELIAS CJ:
Yes.

O'REGAN J:
The threshold's interests of justice.

ELIAS CJ:

Yes, well, but the standard is interests of justice.

GLAZEBROOK J:

It doesn't help your statutory officer. Well, you said the statutory officer needs to know what to do. It doesn't actually help the statutory officer to say, "Well, it depends."

ELIAS CJ:

Yes, well, that's what I was really –

GLAZEBROOK J:

Which doesn't mean that that wasn't what the legislation says but I'm not sure that it's a very potent argument to say the statutory officer needs to know what to do. Under Justice Collins the statutory officer knows very well what to do because it's –

MR COOKE QC:

Yes, well, I –

GLAZEBROOK J:

– absolutely clear.

MR COOKE QC:

Fair enough.

GLAZEBROOK J:

Under the other test, the statutory officer knows it depends.

MR COOKE QC:

Yes, the wrong tests certainly give a much firmer idea what to do. But you can't get away from the fact that the right approach to the section is inherently evaluative.

ELIAS CJ:

Well, unless – yes, I –

MR COOKE QC:

And I can say this, but it's clear from the statute that in relation to appeals one fact that Parliament has said you should definitely address for appeals is the grounds of appeal, and I say that must mean whether there's been an injustice in your conviction or in your sentence. That must be that, and if Parliament's done that it is, it is identifying if – of all the factors that are listed in that section, it's the one that applies for appeal that only appeals. The rest are more ubiquitous. This is the one that's particularly significant for appeals. So if you're going to grade them, it's the one that does obviously stand out more.

ELIAS CJ:
But you don't grade.

MR COOKE QC:
No, you don't. I'm not saying you –

ELIAS CJ:
Why don't you grade any other criminal process in this provision of entirely general application, so it applies to the most trivial cases as well as to the most serious?

MR COOKE QC:
Yes.

WILLIAM YOUNG J:
Well, so it doesn't really, because it doesn't apply to serious cases of first instance because they're caught by the, you must get it if it's over six months.

MR COOKE QC:
Yes, that's right.

GLAZEBROOK J:
I mean you can understand why you look at grounds of appeal because you can't look at grounds of anything else in a criminal proceeding.

MR COOKE QC:
Yes, of course you can't say how guilty you are.

GLAZEBROOK J:

Well no, well exactly because you – what's going to happen in a criminal proceeding is they are going to establish the facts and then apply the law to those facts. I'm just thinking something under six months and at the moment –

ELIAS CJ:

Which is what the section –

GLAZEBROOK J:

– at that stage it is very difficult.

ELIAS CJ:

Which is what the section points you at –

MR COOKE QC:

That must be –

ELIAS CJ:

– by saying that –

GLAZEBROOK J:

Yes.

ELIAS CJ:

– if there is something –

GLAZEBROOK J:

The complexity –

ELIAS CJ:

– that a Court has to decide –

MR COOKE QC:

And that must have been what Parliament was appreciating but I know Your Honour, the Chief Justice, didn't like that when clarifying the legal merits tests, the criminal appearance test because they must have said, "Well it's a bit silly to try and get someone to evaluate the interests of justice for whether you get legal aid for trial," because, you know, it really does, you can't really assess the merits of a case

against a trial. And Justice Tipping made this point in *Nicholls* and *Tikitiki,* the point of an appeal is to correct that something has gone wrong with the criminal process so you then – and that's why the legislature then says, well you've got to have grounds of appeal, so there's got to be some formulation of what has gone wrong with the process and why there is now a meaningful ability to engage in an interest of justice assessment.

ELIAS CJ:

Well that's, yes, but that's really what Justice Glazebrook was saying, you have to have some constitutive, well, something that constitutes an appeal whereas in an accusatory system of criminal justice you're responding to the case that's rort and there's something that has to be determined. So you can understand why the grounds of appeal matter but whether the simple identification of grounds of appeal mean that you have to look at the likelihood of success when there's no requirement to look at the likelihood of success in relation to any other process that the Crown brings against an accused is a gap, I think.

MR COOKE QC:

Well is it a gap or is it a reflection of a fact that when you're appealing it's you, the appellant, who is saying something has gone wrong with my criminal conviction or my criminal sentence.

ELIAS CJ:

But you have a right of appeal.

MR COOKE QC:

Which I have a right to demonstrate but whether the state will fund you to exercise, to pay for your, for lawyer to exercise that right will depend on whether the interests of justice require it having regard to the considerations and it is inevitable, isn't it, that the more a person can say, "This is an honest travesty of justice," but more the interests of justice which actually should be funded to advance it and if you accept that it must be the other way round as well.

ELIAS CJ:

But the interests of justice must be pitched at a level that allows you to have an effective right of appeal if that's your right. Anyway, I think –

MR COOKE QC:

Yes, yes, I'm not –

ELIAS CJ:

I just –

MR COOKE QC:

I'm not – but, you see the section even contemplates people at trials who won't be representative, it's for less than six months. So Parliament, you might criticise it but Parliament is contemplating people, indigent people dealing with their own criminal processes in, at trial even but also on appeal, it's a given. So you can't just say, well to be meaningful you've got to allow people to have representation.

ELIAS CJ:

No I'm not disagreeing with any of that I'm disagreeing with the fact that you won't face up to the – and I agree, there probably isn't a standard but if it's not pitched at a level of arguability, if in some cases it's going to have to be likelihood those are really judicial determinations that are being administratively made and which may effectively deny someone on appeal. So it's – I feel a lot more comforted if there was, if the sliding scale had a stop.

MR COOKE QC:

Well this is what I've said before. One would – if I were redesigning the legal aid system there are lots of changes I'd like to make to it. We've got to work with what Parliament has actually given us and, you know, as I've said, they've given us something after looking at it with, in detail. Any system is going to have its shortcomings. Your Honour has just made the point that it might, this might involve the arm of the executive making quasi judicial decisions but, of course, the whole furore around *Nicholls and Tikitiki* and *Taito* was that we shouldn't have judicial officers making these decisions. So there are –

ELIAS CJ:

Well, not the whole furore. There were some of those.

MR COOKE QC:

Well, no, no, I understand.

ELIAS CJ:

There are other things. Yes.

MR COOKE QC:

But so there is no perfect system for this. It's got inherent problems whichever way you go. We've just got to accept what Parliament has given us and that's what I say the Court of Appeal has correctly identified in its decision.

ELIAS CJ:

Yes, thank you. Yes, Mr Ellis. You can stay seated if it's…

MR ELLIS:

I won't be very long though. I'll take the middle, if I may.

I wanted just to refer back to the case on appeal, tab 27, which was Mr Forster's decision of the Tribunal, because that's how we started. At the last page of the decision, 117, under the heading, "Conclusion", "Even though the conviction is very serious and the applicant would have difficulty arguing his own case, it cannot be in the interests of justice for the applicant to be provided with publicly funded service to argue grounds of appeal that are unarguable." Well, the conclusion is inherently contradictory on its face because, as we know, in section 8 one of the grounds is whether the applicant is able to understand the proceedings or present his own case, and he's accepting he would have difficulty in arguing his own case but we're not going to give it to you anyway. When you look back at paragraph 5 where you see he had 12 sets of submissions, I mean, it's remarkable that you could have such a conclusion but there's a slight twist, I think, to it. When I asked one of the members of the Tribunal what did they get paid for being members of the Legal Aid Tribunal, I was somewhat taken aback when they said $50 an hour. So no doubt you don't expect very much. I mean –

ELIAS CJ:

It's a pretty offensive submission, Mr Ellis.

MR ELLIS:

What, that – no, it's not, Ma'am. What I'm saying is the system doesn't provide a proper system of remuneration for the Legal Aid Tribunal members and maybe they don't put as much effort in as they might do if there was a reasonable –

ELIAS CJ:
I think you've made it more offensive.

MR ELLIS:
– if there is a reasonable remuneration. I think it's offensive that they're given such poor remuneration. Anyway, he arrives at this answer and he plainly shouldn't. And in going to the High Court I asked Miss Gordon, who was counsel then for the Commissioner, "Well, why are we arguing this given the psychological reports? Can't you get the Commission to change its mind and we don't have to argue it?" and she said, well, she'd tried but she was unable to get anybody to give her instructions that it was unnecessary to proceed with the case. So we continued.

Now there's very little I really need to say. I'm tempted, of course, to indulge in reminiscences in *Nicholls and Tikitiki* and *Taito* but I'm not going to. I'm just going to say two things really.

The international right, which my friend says is subject to the interests of justice, is quite true but it's not got to be a meaningless right or a meaningless ritual that I addressed you on before. It's not an absolute right, but it's not a right or a consideration even that the select committee took in to consider. They didn't consider Article 14 of the Covenant or apparently section 25 of the Bill of Rights so, you know, this Court when it's interpreting section 8 must do so in accordance with both section 25 of the Bill of Rights and article 14. And I think not last but penultimately on the costs question, well, there's two hours legal aid for the legal aid tribunal and that's a discouragement for counsel to do it unfortunately and some don't because you can't be bothered to spend the day or so and you get two hours payment and that doesn't help the system. Then when we get to the, the High Court as has been discussed, we won, we seemed to have won and we discussed with Mr Cooke QC, "Well, look scale 2B is 11,500, I'm quite happy to take that," and he says, "Well, yes, but if we win in the Court of Appeal we can't get the money back because he's impecunious," and that's fair enough so I just did the gentlemanly thing and said, "Okay, I won't take it until we sort it out," and when we get to the Court of Appeal, it was abundantly clear that a contradictor was needed and I guess I took that role, but it does seem to be a, an extension of the rich and the poor proposition that I put to you because why should one side, both being funded by the Legal Aid Commission, why should one side get paid eight times as much as the

other side, so it's not surprising that one doesn't accept the amount that's civil legal aid suggests.

And finally, I wanted to read the conclusion from *Nicholls* and *Tikitiki* the submissions to the Court of Appeal in 1997 because we seem to have a feeling of déjà vu –

ELIAS CJ:
You're reading these to us because you're adopting them –

MR ELLIS:
Yes.

ELIAS CJ:
– to deliver to us.

MR ELLIS:
Yes and I'll take two minutes.

ELIAS CJ:
How does it arise in reply? Perhaps you better précis it.

MR ELLIS:
Well, when you see the, when you see what they say it will be obvious and by the time you've cross-examined beyond that I'll have finished.

ELIAS CJ:
Yes, all right, we'll trust you.

MR ELLIS:
Conclusion – as foreshadowed in The Legal Services publication and the interests of justice in evaluation of criminal legal aid in New Zealand, the structure of criminal legal aid itself is fundamentally flawed and riddled with contradictions, contradictory accountabilities, powers and responsibilities. Maybe not much has changed. People falling through the cracks cannot continue to do so. The test interest of justice must be applied and applied lawfully, and applied now and we're arguing exactly the same thing as we were then.

And the last line of this conclusion said assembly line justice must cease. Assembly line justice is injustice, quoting Justice Douglas from *Argersinger v Hamlin* 407 US 25 at page 36, and at page 58 Justice Powell dissenting, and that's what Mr Marteley got. He got assembly line justice with the, the merits outweigh everything else. There was nothing further put into it and the Legal Aid Tribunal didn't do much better with their decision, so really not advanced from the 22nd of December 1997, but let us hope the decision does advance this, thank you.

ELIAS CJ:

All right, thank you, Mr Ellis. Thank you counsel for your assistance. We'll reserve our decision.

COURT ADJOURNS: 3.45 PM