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IN THE SUPREME COURT OF NEW ZEALAND SC 10/2024

I TE KŌTI MANA NUI O AOTEAROA [2024] NZSC Trans 15

BETWEEN **J, COMPULSORY CARE RECIPIENT, BY HIS WELFARE GUARDIAN, T**

Appellant

AND **ATTORNEY-GENERAL**

DISTRICT COURT AT MANUKAU

FAMILY COURT AT MANUKAU

CARE CO-ORDINATOR

CARE MANAGER

Respondents

IHC NEW ZEALAND INCORPORATED
HUMAN RIGHTS COMMISSION
Interveners

SC 11/2024

BETWEEN **J, COMPULSORY CARE RECIPIENT, BY HIS WELFARE GUARDIAN, T**
Appellant

AND **CARE CO-ORDINATOR**
Respondent

IHC NEW ZEALAND INCORPORATED
HUMAN RIGHTS COMMISSION
Interveners

Hearing:	20 August 2024
Court:	Winkelmann CJ Ellen France J Williams J Kós J Miller J
Counsel:	A J Ellis (via AVL) and G K Edgeler for the Appellant K Laurenson, M J McKillop and R E R Garvey for the Respondents A S Butler KC (via AVL) and D Qui for the Intervener IHC New Zealand Incorporated

D T Haradasa and B J Peck for the Intervener
Human Rights Commission

CIVIL APPEAL

WINKELMANN CJ:
Mr Ellis, you appear, yes.

MR ELLIS:
Yes, Ma'am. Sorry, it's a bit – you're all postage stamp sized.

WINKELMANN CJ:
You're entering your appearance along with Mr Edgeler?

MR ELLIS:
Yes, thank you Ma'am, I appear for T the welfare guardian of J the appellant, with Mr Edgeler. Thank you, Ma'am.

WINKELMANN CJ:
Tēnā kōrua.

MS LAURENSON:
E ngā Kaiwhakawā, tēnā koutou, ko Ms Laurenson ahau, kei kōnei mātou ko Mr McKillop, ko Ms Garvey, mō te Karauna.

WINKELMANN CJ:
Tēnā koutou.

MR BUTLER KC:
Ata mārie, e ngā Kaiwhakawā, Butler and Qui appearing for IHC Incorporated.

WINKELMANN CJ:
Tēnā kōrua.

MS HARADASA:

E ngā Kaiwhakawā, tēnā koutou, ko Tas Haradasa ahau, kei kōnei māua ko Brittany Peck, mō Te Kāhui Tika Tāngata.

WINKELMANN CJ:

Tēnā korua, Ms Haradasa and Ms Peck. Right, just before we call on you, Mr Ellis, a couple of matters. Well, one really, in relation to suppression. Just reminding people that there are suppression orders in place, as is apparent for the use of the alphabetic, and those extend, those suppression orders are designed to ensure that the identity of J is – that is not known, made known, and that would require careful reporting so as not to include any identifying particulars which might, when combined with other identifying particulars out in the marketplace or in the reporting, tend to identify J. So just great care is needed in relation to reporting.

The other preliminary matters. I think, Mr Butler, you need to be away today, do you? You are only here –

MR BUTLER KC:

That is correct, Ma'am. That is correct, your Honour.

WINKELMANN CJ:

And is there any time, you are sitting there in Australia, are you?

MR BUTLER KC:

I am, indeed, your Honour.

WINKELMANN CJ:

And what time do you need to be away, have you got the day?

MR BUTLER KC:

I have got the day.

WINKELMANN CJ:

Excellent, okay. So what we propose is that we will hear from the appellant and then we will hear from the interveners. Mr Ellis. And counsel should feel free to –

MR ELLIS:

Right, thank –

WINKELMANN CJ:

Counsel should feel free not to have their cameras on when they're not addressing the Court.

MR BUTLER KC:

Thank you, your Honour.

MR ELLIS ADDRESSES THE COURT – AVL CAMERA DISCUSSIONS (10:06:12)

WINKELMANN CJ:

So it's Chief Justice, Justice France, Justice Williams, Justice Kós and Justice Miller are sitting. Did you get that? Me in the middle, Justice France and Justice Williams either side, and Justice Kós and Justice Miller either side of those, got it? You're now on mute, you have muted yourself, Mr Ellis, which is no way to go when you are making submissions.

MR ELLIS ADDRESSES THE COURT – AVL DISCUSSIONS CONTINUE (10:07:19)

WINKELMANN CJ:

Go ahead, Mr Ellis.

MR ELLIS:

I have recalled, many moons ago, when Justice Blanchard wrote a paper for the Law Society on presenting appeals, and the one thing that stuck in my mind was his Honour said: "90% of your persuasion is in the written submissions and only 10% is likely to influence the Bench on what you say orally." And bearing

that in mind, I am not going to say very much, because if I haven't convinced you already then I am not going to. But what I have found is –

WINKELMANN CJ:
Now you are on mute.

MR ELLIS:
Why is it doing that? So that we have, for the first time in eight years, two interveners and that means for the first time presenting submissions in numerous courts on this debate I am now not alone and there are people who actually agree with what I have to say, which is remarkable. So I am going to spend a short time on the – what the interveners say, because they're a nice précis of what I say, really, so that is the approach I'm going to take.
1010

Mr Edgeler, as he has in the other cases before you, has been allocated "discrimination" and he's well tested in that field and he will be dealing with that which ultimately is what I say, and then this whole thing is a discriminatory proposition, so if we actually started with the proposition in the IHC submissions entitled "(inaudible 10:11:00) allegation" it probably says the essence of what I'm trying to say.

WINKELMANN CJ:
Which paragraph?

MR ELLIS:
Paragraph 19: "…because the courts have been persuaded (with the assistance of medical evidence) that he poses a high risk of committing acts of violence if released" –

WINKELMANN CJ:
So that's a discrimination issue but Mr Edgeler is dealing with it. Are you going to assist us with the argument about arbitrary detention?

MR ELLIS:

Well, yes. I will do, yes, but I'm just trying to set the more helicopter scene.

WINKELMANN CJ:

Okay.

MR ELLIS:

Anyway, so J was only eligible to have such a judgment made because of being charged with a criminal offence and being adjudged unfit to stand trial, which he wasn't, of course. He wasn't found to be unfit to stand trial.

In 21 it says: "Put another way, due to his ID J is able to be treated differently to other persons who pose a serious level of dangerousness. This is prima facie discriminatory," and the Attorney-General says you should reject that proposition, and in 25 the IHC remind us that people who are simply dangerous can't be locked up unless there's some rather thorough piece of statutory authorisation for that, and that, as the IHC put it, that's the starting point. People who might be dangerous are not to be detained unless they defend, and J has been detained now for 18 years plus for essentially the index offence of breaking three windows, and that is plainly, in my submission, an arbitrary detention.

Now we don't have the benefit of the Court's decision in *Attorney-General v Chisnall* SC 26/2022 as yet which was about a year ago where we argued that the effects of his public protection order amounted to an arbitrary detention and a year on we still await the decision which makes it slightly more difficult. It would have been of assistance to the Court and to counsel if we'd had a decision on that, but nevertheless I have set out in my submissions the General Comment 35/11 in paragraph 15, the overlapping provisions, and I'm not going to take you to the definition of what "arbitrary detention" was, it is in paragraph 16 there, but it must be inappropriate, unjust, lacking in predictability, and failure to abide by the due process of law to keep locking somebody up –

WINKELMANN CJ:

Mr Ellis, in some of the submissions material you refer us to in relation to "arbitrariness" there is a reference to "without proper rehabilitation". How do you say the amount of rehabilitation offered or the quality interacts with the link of detention in terms of arbitrariness? How do we look at those factors?

MR ELLIS:

Yes, I think that again is covered by my friend from the IHC that the further, the longer that one is detained the more your liberty interest prevails and that's happened here. We've had the original detention on an offence which had a maximum period of imprisonment for somebody who is not intellectually disabled is three months and he was detained for, I think it was, 20 or 22 months on that while it was sorted out whether he was fit to plead and he was then detained for a further three years and then has been detained subsequently a number of times until we've got to the detention now of 18 years and more time to serve. Each time that the detention is reactivated, and I suggest that it's the same penalty just increased, it's not a new penalty, it starts with the first and then it's incrementally increased, and each time that has to happen the *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641 philosophy of liberty interest increases must apply, and we've now got a man who's been in prison, if we can call it that, certainly detained, for such a massive length of time that the only comparators are going back to what were called the Māori Land Wars and are now called the New Zealand Wars, and it cannot be proportionate that somebody who's broken three windows and some van windows, valued at $8 or $900, is still detained. His life has been exhausted in – the middle years in his life have been wasted while he's detained and now he's detained again in the Mason Clinic and he isn't mentally ill. He just suffers from intellectual disability and autism.

So in determining whether he's arbitrarily detained it is not proportionate by any description to detain somebody who has broken some windows to be locked up for 20 years, particularly as it is discriminatory, and he has never had a trial. He's incapable of having a trial because he's unfit to stand trial and, as you are

aware, my submission makes the point in *Noble v Australia* CRPD/C/16/D/7/2012 (23 August 2016) there are similarities and I would go as far as adopting the Hearing Rights Committee's proposition that the detention cannot be longer than the criminal offence that was the trigger to it, three months.

1020

So that's my proposition. Anything over three months is an arbitrary detention and I would be more than happy to take that short point to the Committee on the Rights of Persons with Disabilities, because it is an important point and it may well be that your decision terminates that possibility, but it may it not, but it is a matter of significance and whilst *VM* on its face looked quite liberal and advanced it's, of course, a long time ago and times have changed and the law should develop with it and it is time that *VM* was put to bed and we had a consistent detention that fits section 22 of the Bill of Rights Act 1990 and its covenant equivalent, that this is plainly an arbitrary detention.

WINKELMANN CJ:

So the – it might be argued that the detention is justified by his treatment and your submissions are that his treatment is, in any case, deficient?

MR ELLIS:

Well, yes, I think strangely over the last year or two the specialist assessors have come to the conclusion that what he is getting is not treatment in the Mason Clinic. He is detained and he isn't receiving treatment, because nobody can work out what treatment he requires, because they don't understand it. And it is tricky, because he has dual diagnosis of intellectual disability and autism and even Tania Breen, who was the early-on psychologist, who did a report on him following the Youth Court matter where he was detained for causing a cut on the neck of a fellow student, and she went on to do a Doctorate in Health Science on the interaction of people with autism with the criminal justice system, and she managed to find 20 people in New Zealand who this applied to. So the cohort of persons involved is very low and how you can, when you're describing risks, as we know, it's not your risk, it's the risk of you

compared to people in a like group, and you can't find a like group of J, because they simply don't exist. So we're left in a little bit of a dilemma, and I think I have forgotten what your question was, Ma'am?

WINKELMANN CJ:

I was just putting to you the proposition that treatment might be said to justify the detention if he's – if J is assessed as dangerous and treatment is being offered to avoid that. But you point to recent reports that say that the treatment is ineffective and underfunded?

MR ELLIS:

Yes, yes, very much so and I suppose when we go back to the beginning, if we think about what happened and he was charged with the criminal offence of some sort of assault, I suppose it was, in the Youth Court and he got – so, we've never found the Youth Court report – but he got no realistic penalty, convicted and discharged. But from the time that that offence occurred until the next one, the windows, was a couple of years, and then he was in his mother's custody really and stayed there. He committed no other offences that required the intervention of a criminal law.

WINKELMANN CJ:

And the other point I think you address is the assessment that he is dangerous and you challenge the quality of that assessment. What approach do you say – what is the proper approach, the material we've had offered to us in relation to that?

MR ELLIS:

Well, as I say we had – which I think is the genesis of why he is dangerous. The genesis of that was really the description by Dr Breen that he was dangerous, the clinical psychologist, that he was dangerous, but she had started the assessment on the basis that J had detained the young lady, his classmate, and held her down, tied her down, and slit her throat, neck, and she was in, he was in, he was in hospital for two weeks and had various stitches

and so on. Well, that just wasn't true. He wasn't tied down – she was not tied down by T and when the analysis –

WINKELMANN CJ:

He also didn't cut her throat. He made a cut to the back of her neck.

MR ELLIS:

Yes, that's right, which had two or three stitches and she was out for the afternoon. Well, she recognised that she got the information wrong but she nevertheless said: "I'm sticking by my analysis," you know, and that analysis has infiltrated his perception by other medical professionals that he's dangerous because it's still in the file and from time to time it comes up and another psychiatrist says: "Well, he's still a threat. He must be dangerous." Well, we have to be very careful about an assessment of "dangerousness" and at the very least we've got to get the facts right.

KÓS J:

I'm not sure that's right in terms of the record but we'll need to look at those reports. Sorry, it's Justice Kós. Can I go back to the Chief Justice's earlier question which concerned treatment?

MR ELLIS:

Yes.

KÓS J:

If we look at sections 24 and 25 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 treatment features very little in the Act. The Act's focus, or foci, are care and rehabilitation and part of that under section 25(1)(b) is "any medical or psychological treatment that the care recipient requires" but I'm not certain that treatment is an essential pre-requisite for the continuation of a care order. Some conditions simply will be untreatable.

MR ELLIS:

Well, yes, I think that must be correct, Sir. Some problems, disabilities, are incapable of treatment in the sense of something that turns you into something that is not dangerous. I mean can you treat "dangerousness"? No, you can't in that sense, and you're quite right that the thrust of the Act is care and rehabilitation, and can you be locked up for 18 years to be treated? Well, treated for what, we'd have to ask ourselves? What's he been treated for?

KÓS J:

That's rather my point. You – he might be legitimately, and I'm not forming a view, I'm listening to your argument, but he might be legitimately detained for care, perhaps to a more limited degree rehabilitation to the extent that's possible, but it may be that treatment is almost entirely beside the point.

1030

MR ELLIS:

Well, I think I would agree with that. It is not within the scope of the medical profession to make a diagnosis of J and say "this treatment is required and it will have any value". That is, essentially, I suppose, a red herring. He can't be treated. He can be cared for and, as you say, to the extent that it's possible he can be rehabilitated. Well, I am not sure that even that is possible. What has happened is whilst he has been cared for by his mother, he's been various, variously pretty innocuous and she undertook the care of him after the broken window incident, or she said she would, but he was removed to disability care. But for the first 18 years, I think, I might not have that right, 18 years of his life he had been cared for by his mother, and we had, what's her name, Dr Duff, the leading psychiatrist in the diagnosis of autism, who has been his clinical manager, essentially, for any number of years at the Mason Clinic and outside the Mason Clinic, but I think she's retired now. But there is no treatment available to him in the Mason –

WINKELMANN CJ:

So Mr Ellis.

MR ELLIS:

Yes, sorry.

WINKELMANN CJ:

Mr Ellis, can I just ask you, because this is moving on to how he is actually cared for and I think looping back to what I was asking you before.

MR ELLIS:

Yes.

WINKELMANN CJ:

There is, in the material you have referred to us, reference to the fact that he could have a more liberty-enhancing treatment, he could be engaged more in the outside world, have a more normal experience, if there were better staffing ratios, but because of a lack of funding, I think the point is made, he's not able to be dealt with in that way.

MR ELLIS:

Yes.

WINKELMANN CJ:

Is that relevant to the assessment of arbitrariness?

MR ELLIS:

Yes, I think it is. It must be, because it goes to the proposition that it is unjust, that will take us, 60 I think, just find that. I am in the wrong set of submissions.

WINKELMANN CJ:

I think it is at page 19 of your submissions?

MR ELLIS:

Page 19?

WINKELMANN CJ:

Yes.

MR ELLIS:

All right.

WINKELMANN CJ:

Paragraph 74.

MR ELLIS:

Oh, yes. So, he has been detained at the moment: almost entirely for security and control and the funding might allow an improved service. But if you contrast that with a definition of arbitrariness, does it have elements of inappropriateness, at paragraph 16 injustice? Well, it does. So what one says is that having him detained almost solely for secure – security and control, is arbitrary and it is arbitrary because it is inappropriate and injust – can't be injust, can you – unjust. So, I mean, that's the thrust of that.

And, you know, what's happened now is that there's an entire suite of rooms in the Mason Clinic given to this man when he could be at home with some additional funding, so that, you know, the windows are barred and so on and it's not so easy to get out, and he could have a life. Instead, there's another – I should have put it in, but there's so much – there's another hearing in the Family Court on the 2nd of September which will address this report from Dr Johnston in paragraph 74 and he'll no doubt be detained further. So essentially the State has really given on him in terms of care and rehabilitation and he's now –

WINKELMANN CJ:

Can I take you back to the point you were making about "dangerousness"? In your article that is cited in your submissions you refer to an American model which requires recent evidence of dangerousness?

MR ELLIS:

Yes, there should be a causal connection between the current form of detention and temporal proposition. So it should be in the last six months or whatever, not 18 years ago that the index offence is still being in prison because of the

index offence 18 years ago. He should be detained for something that is happening in the last six months otherwise what is it? It's totally arbitrary. You're being detained not for something that you've recently done and dangerousness must be assessed in terms of what is happening in the recent past, not what happened 20 years ago because otherwise –

WINKELMANN CJ:

So what might be said against you in that regard is the reports from staff?

MR ELLIS:

Yes, I agree, but the reports from staff are articulated on the basis that he misbehaves. But of course he misbehaves because he's been detained for getting on for 20 years and he's bored out of his mind. He doesn't have mental stimulation and he just reacts, and there's lots of minor incident reports but so what? If he had stimulation and a pleasant place to live it's quite probable that these incident reports would diminish. The environment that has been created for him means that there are regular misbehaviours, challenging behaviour as it's called in the terminology. So he has challenging behaviour. Well, of course he has challenging behaviour. He doesn't have an environment that is humane. So… Have I answered your question, Ma'am?

WINKELMANN CJ:

You have, thank you, Mr Ellis.

KÓS J:

Justice Kós again. Could you take us to the evidence that shows, supports the proposition you just made?

MR ELLIS:

I think I can take you – I can't take you to it off the top of my head but I can, in one of the breaks, try and find a finding that shows that his behaviour improved when the way he was kept improved, so I –

WINKELMANN CJ:

Mr Edgeler as your junior might be able to do some devilling for that.

MR ELLIS:

Yes, find that for me. I think it was a Family Court judge who says that. We had an exchange in one of the Family Court cases and there's a finding in respect of that. So right, yes, I'm sorry I can't put my finger on it.

WINKELMANN CJ:

That's all right. We can look at it after the break.

1040

MR ELLIS:

Sure, thank you. I hadn't quite finished with the two interveners. Well, I hadn't really started with the second intervener, the Human Rights Commission, and if we could go to theirs, their submissions, for a moment. If we look at their last paragraph, which is I think relevant to the discussion we have been having, paragraph 23, at least in cases like J's where the duration of detention is some 72 times the maximum index sentence a fundamental principle such as proportionality crumbles. Where a person is assessed as largely 'beyond' rehabilitation (at least within a reasonable time) it's difficult to sustain the proposition that detention is based on rehabilitation. That's quite a profound statement, really. I mean, if you're, after all this time, you can't be rehabilitated, well, what are you – why are you being detained? That's a proposition.

Now, if I could just, jumping about a bit there, but if I could just go back –

ELLEN FRANCE J:

Sorry, Mr Ellis, before you do that, Justice Ellen France, just in terms of taking it back to *VM*, that, the Court of Appeal decision there, what they say in relation to rehabilitation is: "... success or failure of rehabilitation efforts made during the compulsory care order, and the prospects for further rehabilitation are relevant factors in determining ... whether the community protection interest is sufficiently significant to outweigh the liberty interest of the care recipient." Now,

as I understand it, your argument is when you get to the point that there aren't any prospects for further rehabilitation, that that would be the – that should be the end of the order?

MR ELLIS:

Yes, I think that's right there and I think what *VM* was trying to do was – which was, I think, a noble attempt at advancing the law, I think it's not appropriate to make the comparison between somebody detained for three years and somebody detained for 20 years. It's a different ballgame and I think probably the Judges in that would have been a little horrified to think that their decision was being used to detain somebody for 20 years rather than the three years that that case was about. So it's, it was a start, but we lose, we lose touch with reality if we're saying that the same approach to rehabilitation applies to somebody who has been detained for three years and somebody who has been detained for 20 years.

I mean, if we recall that Mr J has savant abilities, which you'll remember are special abilities over and above what a normal person will have. So he has savant abilities in respect of music, some mathematics and painting, and so, for instance, if you met him and you wanted to know what day of the week you were born in, if you told Mr J, you know, "I was born 30th of November 1951" and he would say, just like that, "you were born on Wednesday", or whatever the date was. He has got that ability.

Then that does rather decry the proposition, or I think it does, that he's intellectually disabled. But I lost that argument before Justice Cull that he, you know, he doesn't have, he doesn't have the intellect and when he tested on a different IQ test to the standard one he had an IQ of 84 because it was based on audio-visual things rather than just the normal question and answer propositions. So it is difficult to say, right, this man's been detained now, let's say, for 16 years and he goes back to the Mason Clinic, we say: "Well, we're going to try and rehabilitate him again," but they find they can't and they're forced to just detain and control him. The psychologists, I think, as well as the penological approach, have lost their way in terms of what to do with somebody

like this, and bearing in mind that, the rarity of the diagnosis, it is perhaps unsurprising, and he is not now being detained in a way where he is being treated, cared or rehabilitated. He is being detained arbitrarily because there's a failure to be able to provide any meaningful assistance to him and – yes. Does that answer your question, Justice –

ELLEN FRANCE J:

Yes, thank you.

MR ELLIS:

So if I went back to the submissions of the Human Rights Commissioner – I haven't finished with the IHC but I'm – at page 4 of the Rights Commission submissions, at paragraph 8, the question for the Courts is whether the detention of intellectually disabled persons meets applicable human rights standards, which is quite right, and in footnote 27 on the next page, citing from the *Leo v Australia* CRPD/C/22/D/17/2013, 30 August 2019 case, there's a comment on the Special Rapporteur on the right to enjoyment of physical and mental health, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* A/HRC/38/36, 10 April 2018, a UN official, and they say, towards the end of that: "In detention or confinement, where the person is surrounded by staff tasked with restricting freedom, it is difficult to create and maintain healthy relationships in families, communities and societies" –

WINKELMANN CJ ADDRESSES MR ELLIS – TAKE A MOMENT (10:48:20)

MR ELLIS:

Of deprivation that…

WINKELMANN CJ:

We've read that footnote. It's very helpful, thank you. Now you're on mute, I think.

MR ELLIS:

Right. Paragraph 14 of the Commission's submissions. The lengthy and continued detention relies on the premise that the regime is based (at least in part) on treatment and rehabilitation under a "civil" regime, not punishment.

1050

While this may be true as an aspirational principle, the question in a case like J's is whether the line between treatment and punishment has been crossed and I say it has been crossed a long time ago, and in paragraph 19, the Commission say while J's detention does not have a retributive character, the triggering event is the charge laid in respect of his index offence. This is a sufficient link between the detention and index offending to warrant further interrogation as to the potential penal nature of J's detention and it is my proposition he is being punished and detained. He may not be punished in a deliberate sense, but the –

WINKELMANN CJ:

Mr Ellis, if there had not been that trigger, there had been no triggering offence, there would be no statutory basis to detain him?

MR ELLIS:

Yes, correct. Or at least in – under the Intellectual Disability Act, yes, that would be correct, yes.

And then lastly, in respect of the Human Rights Commission, 22, fourthly and relatedly, it has been suggested that because the liberty of the intellectual disability offender is not restricted for the purpose of punishment there is no corresponding reason for finitude. If, however, the Court finds this core rehabilitation objective, has lost primacy, then the justification falls away. But it must have fallen away if one applied the *VM* principle, the balancing test there. It is a long time ago when the index offence was and on that American case I cited, you need to have a recent offence that is triggering your detention and that seems quite reasonable if you are being detained, and it must be for something, you know, relatively recent or otherwise, I mean, how would

anybody ever get out of jail, if you went that far? Sorry? Thought somebody said something, no?

WINKELMANN CJ:

No, nobody said anything.

MR ELLIS:

Right, sorry. Right, and then if I –

WINKELMANN CJ:

Just Justice Williams typing loudly.

MR ELLIS:

And then the – returning to the IHC as intervener. Well, I suppose we've probably already said it, but page 3, at the bottom of paragraph 9, courts focus too much on the continued legitimacy of the aim of the detention and too little on the impact of the detention in the detainee's liberty interests, which really sums up what's being said, and then we did the discrimination proposition, and I did start to read you something from 25 and the Chief Justice kindly diverted me from it.

WINKELMANN CJ:

Sorry.

MR ELLIS:

No, that's all right. The point, 25, the point of recounting this is to remind the Court that our community tolerates the presence of people who are dangerous in society. That is further illustrated by the Department of Corrections statistics demonstrating that, between 2021 and 2022, over one-tenth of the offenders who had been released are being – served prison sentences for offences involving dangerous or negligent acts were re-imprisoned on new offences less than a year later. The starting point is that people who might be dangerous are not detained until they've offended, and what has J done that is so dangerous?

What he does, what he did was cause property damage, not human damage, person damage, and he's been locked up, you know, for that length of time.

KÓS J:

Justice Kós again. Isn't that a slightly simplistic analysis because the reason that he is detained in care is not so much because of the index offending but what the index offending has revealed in the course of his assessment and continued care which is an incapacity to stop offending? I'm not sure I can put the Crown case any better than that but that seems to be what they're saying.

MR ELLIS ADDRESSES THE COURT – TECHNICAL ISSUE (10:56:17)

MR ELLIS:

Sorry, Justice Kós, I apologise –

KÓS J:

We've just lost you again.

THE COURT ADDRESSES MR ELLIS – TECHNICAL ISSUE (10:58:20)

MR ELLIS:

I asked Justice Kós if he would be good enough to repeat the question.

KÓS J:

It was, you were saying that J had been detained because of the index offence of breaking three windows and I was suggesting that what the Crown is saying is that as a result the assessment process and the further assessments during care have shown it's more J's inability to stop offending or his degree of danger, as they put it, that justify the detention, not the original index offending. That was simply the prerequisite but it's long since spent.

1100

MR ELLIS:

Well, yes, I understand that they say that, but that's not the reality. When we get get an assessment of J, as is common and normal the psychologists go

back to the start and say, well, his index offending was this, and they go through it, he was locked up and he's been subsequently detained ever since. So this material is before the Family Court Judge when they make the current detention order, or care rehabilitation order, so you can't excise the index offence from what is happening now, and the approach the minders, if I can call them that, carers in the Mason Clinic have is, of course, when they're recording his challenging behaviour, it's in the context of they read his file and they know what has happened, and it's indelibly imprinted in their approach to him that he started off dangerous in that he assaulted a young lady, and then he did, broke some windows, and they're looking and reporting on the current misbehaviour, not the current salient behaviours or whatever, the whole way he is treated and encapsulated is he is a dangerous person.

WINKELMANN CJ:

So your point is that he's, that it's that footnote 27 you took us to in the HRC submissions, about the difficulty that effectively mental health detention is not a therapeutic environment, and it is that there's an artificiality, he's trapped in time by prior assessments, he's kept in an environment which is liberty-denying and therefore provokes him and sensorily…

MR ELLIS:

Deprivation.

WINKELMANN CJ:

Yes, he's deprived of normal life's engagements, so of course he's angry, obstructive et cetera. However there is, now we've lost the image of you, can you hear us Mr Ellis? Mr Ellis can you hear us?

MR ELLIS:

(no audible answer 11:03:35)

WINKELMANN CJ:

Mr Edgeler, I mean Mr Ellis is probably just about finished his submissions in any case, would you say?

MR EDGELER:

I think coming towards it Ma'am.

WINKELMANN CJ:

Yes. Should we take a short break while he re-establishes himself? I think the one question that really, I think he's covered most of his ground, but the one question that Justice Kós has asked, which I was about to loop back around to, was what are we to make of the reports that describe violent ideation and, you know, where the staff and the practitioners assess risk. Now that's Mr Butler. In the small picture. Oh Mr Ellis, there you are. Did you hear that? We were thinking about taking a break to allow Mr…

MR ELLIS:

No, I didn't hear it Ma'am, I'm sorry.

WINKELMANN CJ:

Mr Ellis, do you want to take – I think we've gone through the main part of your submissions. We could hand over to Mr Edgeler and you could loop back around at the end to cover anything that's not covered, because I can tell that you're struggling with your chest.

MR ELLIS:

That would be great, I'd appreciate that, yes.

WINKELMANN CJ:

I think we'll do that. Are you happy with that Mr Edgeler?

MR EDGELER:

Yes.

MR ELLIS:

I'll turn my noise…

WINKELMANN CJ:

And you can turn yours on mute then Mr Ellis. So Mr Edgeler, you're addressing us in relation to discrimination?

MR EDGELER:

Yes, but perhaps I could start with the question you just asked because it comes into the – part of what I'm doing is, are the statutes discriminatory?

WINKELMANN CJ:

Yes.

MR EDGELER:

The answer is different from the *Chisnall* one in the sense of I think the powers that are exercised in this particular case, section 85 of the Intellectual Disability Act, the power to extend or re-continue a compulsory care order, is a discretionary power and so general principle discretions must be exercised consistently with rights not to be discriminated against and, of course, also a right not be arbitrarily detained, and so the statute itself is not always going to result in breaches and indeed should never, but sometimes, of course, that can happen and we therefore have processes of appeal and in this particular case the section 102 application to the High Court which is before your Honours, and so the question is –

KÓS J:

Even before we get to that, sections 44 and 45, which enable –

THE COURT ADDRESSES MR ELLIS – TECHNICAL ISSUE (11:06:23)

KÓS J:

Sections 44 and 45 which are the foundation of a compulsory care order before we even talk about 85 and renewing them, don't you think they are remarkably opaque?

MR EDGELER:

Yes, and –

KÓS J:

I mean I don't think I've ever seen a statutory provision which enables, gives the authorities such a blank cheque.

MR EDGELER:

No, at least on its face –

KÓS J:

Well, that's all there is.

MR EDGELER:

– although in this particular case 44 and 45 were not the basis on which J entered because it was – 44 and 45 is the process, I think, if someone is in prison and can be then moved to the intellectual disability system, if I've got the right subpart. I was looking through for it earlier and I think those (inaudible 11:07:16) someone's in prison they can be moved to an intellectual disability and so – but if you're starting in there then it's an order made under the Criminal Procedure (Mentally Impaired Persons) Act 2003 which is deemed to be an order under, I can't remember, it's 44 or 45, or is treated as such, and so for J it's that order which started it and it's section 85 which is "the Court may extend" is effectively an – with no more detail than that.

VM was the good first attempt at adding some of that detail and the question is, you know, *VM*, as Dr Ellis was pointing out, dealt with someone who had been detained for three years effectively, or somewhere around that, under the compulsory care order.

We have a different situation with J, not 18 years under the CCO because we had the sort of 42 months of various forms of what we would call detention. There's some slight disagreement with the Crown over whether it all counts. The first 22 months it was bail to the – an intellectual disability. For J it's the

same as detention but whether it officially counts – it was certainly – compulsorily removed from his familial home with his mother, and so whether that's detention or not – the CCO itself is heading towards 15 years, I think, but yes, it's one of those things where you come before various courts so often saying how long it's been and need to remind yourself each time that each time we come here it's six months or a year or two years longer which is, of course, the problem we have of continued extensions, and so what is the Family Court to do when it gets one of these applications, particularly where the index offence is what it is, but even where the challenging behaviours are what they are, and so the case that Dr Ellis took you to – or didn't take you to the case but referenced it, paragraph 52 of the submission which is 36 of his report for the Harvard – his article, "article" is the word I'm looking for –

WINKELMANN CJ:
His article, yes.

MR EDGELER:
It's like it's not a dissertation, what was it? So United States District Court for the Eastern District of Wisconsin, *Lessard v. Schmidt*, No. 71-C-602, Judgment of 18 Oct. 1972, and so the recent overt act, and so –

WINKELMANN CJ:
That's the American decision?

MR EDGELER:
Yes, it is the Wisconsin, Federal –

WINKELMANN CJ:
That was the one I had in mind when I was asking you about that point.

MR EDGELER:
Yes. So, you need a current finding of dangerousness and Family Court Judges are making such a finding, but US and potentially also sort of your equivalents in the *Oliveira* – ECHR, *Fernandes de Oliveira v Portugal*, Appl. No. 78103/14,

GC Judgment of 31 Jan. 2019 – case – I probably pronounced that wrong, the Portugal case –

1110

WINKELMANN CJ:

So are you saying that District Court Judges are adding in that requirement?

MR EDGELER:

No I'm saying they're not.

WINKELMANN CJ:

They're not.

MR EDGELER:

Well it's part of the assessment of dangerousness certainly is the, a Family Court judge I don't think would say dangerous solely because of what happened nearly 20 years ago. They are looking at the recent reports. The recent reports, a lot of them do repeat, sometimes inaccurately, sometimes slightly more accurately, the other things. The was it the throat, was it the neck, and various things, and so those reports get repeated and sometimes someone makes the mistake of reading one of the older reports which doesn't correct it, and then repeating it in a way which doesn't accurately reflect what happened. Judges are then looking at that, not just the index offence, the other things in that report, and the challenging behaviours they're looking at now, but in what sense are they making findings, and so – I mean one of the assessments here, look at *Lessard v Schmidt*, it's a recent overt act, and there's a report, and so someone files an incident report, a supervisor or a carer at one of these facilities files an incident report, those incident reports, or the bundle of them get handed to the psychologists or psychiatrists depending on a particular person who's doing the assessment. They read those incident reports and say whether this is, you know, is this something on which we can base a finding of dangerousness, or here's my concerns, and here's why a judge might be able to find dangerousness, but there is no judicial process of working out whether one, any of these particular findings really happened, or the circumstances in

which it happened where they might be more or less justifiable or raise more or less concerns, where if you knew the full facts, and so someone writes an incident report.

That incident report goes to a psychologist. That psychologist picks out three or four particularly concerning ones, and a judge reads those. But there isn't a judicial finding of that overt act. There is no sort of process, and there could be a process of that here's what has happened in the last two years of the extension, and particularly concerned about what's happened in the last six months, make that finding. Have the possibility, that won't always be necessary, of the assessment. Did this really happen. What were the circumstances, and sort of the next step, have an actual judicial finding of. Here are the things which have happened over the last six months that give me cause to believe that there is dangerousness. So not just what happened 18 years ago, but also what has happened in the last six months. You could start with, okay, well, and yes, sort of the Crown's, sort of alternative, well if we can't do this then what will happen is every time, every six months they'll charge him with a threatening to kill or a threatening someone, and I think that is unnecessary, but judicial findings of things like that are things that could be made in the assessment of dangerousness in the Family Court, and it is not something that happens. There are – the only witnesses generally, sometimes a mother or someone like that will give a statement, or tell the Court, you know, here's what I'd like to happen to J. I think J should come home and live with me. Generally not as formal evidence. You will occasionally have the specialist assessors give evidence but you will never have, or at least not in J's case, the types of findings of what has happened. What overt act are we pinning it on now. That's, okay, something happened 18 years ago. They found a process at that time. They entered into that process and found, okay, there are concerns that are ongoing. What has happened now that we could start, and so to bring it back to discrimination, which is what would happen if he wasn't intellectually disabled. If you're asking a court to order someone's detention, whether it's at an early stage bail, or at a later stage sentencing, or the parole Board even, you get the chance to defend yourself against these allegations, and the person

that makes the really, the formal finding of what's happened here is the person who writes the incident report.

WINKELMANN CJ:

So your point is that the processes that are followed in relation to this are not sufficient for the significance of what's happening. Not sufficient to justify detention?

MR EDGELER:

Yes.

WILLIAMS J:

What are the qualifications of the carers?

MR EDGELER:

That might be something to take – generally not medically qualified, they are…

WILLIAMS J:

Are they nurses?

MR EDGELER:

There were some nurses, but some carers, and so the carer –

WILLIAMS J:

What's a carer? Is a carer a person on minimum wage, or do these people have specialist qualifications in care. It seems to me relatively important in terms of the reliability of what they say.

MR EDGELER:

When a person –

WILLIAMS J:

Well, no, perhaps not the – the accuracy, the technical accuracy of what they say.

MR EDGELER:

There are, like particularly in the Mason Clinic and that sort of environment, they are people who care for people in that that environment, so very much there are psychiatric nurses but not everyone is. Everyone is – it's an answer that I suspect the fourth respondent – which one's the Court? Not the Court – my friends at the Crown –

WINKELMANN CJ:

The IHC?

MR EDGELER:

Yes, the IHC certainly, perhaps, but also the –

WINKELMANN CJ:

And the Crown. The Crown?

MR EDGELER:

The care co-ordinator, will have a better sense of that than me.

WINKELMANN CJ:

Anyway, we – yes, but your point is anyway that their status is expert witnesses, not investigators, in this process?

MR EDGELER:

Yes.

WINKELMANN CJ:

Can I ask –

WILLIAMS J:

My point in raising that is the one phrase that's not being used widely here is "care" and it is after all a compulsory care order –

MR EDGELER:

Yes.

WILLIAMS J:

– that involves a level of detention because of, it appears, risks. Mr Ellis seemed to accept that even if J goes home there would be a level of detention there because he said, well, you might need to put bars on the windows to stop him getting out. So there's no doubt that this man needs care.

MR EDGELER:

Yes.

WILLIAMS J:

The question is whether care should involve control of his movements. It does seem to be the case that there is agreement that control of his movements is necessary, isn't there?

MR EDGELER:

Some certainly though it is useful for –

WILLIAMS J:

Right, so the question is only whether control of his movements can be achieved in the community or whether it's necessary for that control to be in a State run or funded institution for his care.

MR EDGELER:

Yes.

WILLIAMS J:

That seems to me the correct lens, and so it would be rather dangerous, wouldn't it, if you over-judicialised that process, because there is more to this than just detention? There is care and, in fact, I'm experience of these institutions, care is a very big part of the way they deal with people living in these circumstances.

MR EDGELER:

Yes, and the updating affidavit from – I've forgotten the Crown's –

ELLEN FRANCE J:

Rachel Daysh.

MR EDGELER:

– yes, thank you – with sort of the number of people who are assisted essentially by the health system who have intellectual disabilities and the levels of compulsional caring, the vast, vast majority of people who get assistance through that process have no compulsion, at least no formal compulsion in the sense of, you know, a court order or anything like that. They are just: "I'm a person, I'm a mother who needs help looking after my child," and for someone with a physical disability it's "we need a ramp" and whatever, for someone with an intellectual disability it works out in a slightly different way, but the same process, and that's the vast majority of them. Then a – sort of the vast majority of those for whom compulsory care with the formal court order are still in community care, they tend to be community supervised.

WILLIAMS J:

That's right, but it seems to me a fundamental question that needs to be asked is what does his care require?

MR EDGELER:

Yes.

WILLIAMS J:

Which is a social and economic rights question, not a civil and political rights question.

MR EDGELER:

Yes.

WILLIAMS J:

And no one seems to be asking that question, at least not here and that's probably because we're lawyers, not clinicians. It does seem to me to be an important frame to bring to bear on this question.

WINKELMANN CJ:

Well, we have the evidence of the experts about what they say his care requires.

MR EDGELER:

Yes, and it's certainly one of the possible – that is, you know, the end result of what are we asking for and it depends how the –

WILLIAMS J:

Yes, but it seems to me to be a legal question, not just a clinical question.

MR EDGELER:

Yes, yes, and again sort of one of the unfortunate – the High Court hearing, several days long, was several different hearings. There were at least one or two appeals from a Family Court decision, there was an application for an extension of time for an appeal from the original breaking windows criminal process, and the application for the section 102 application under the Intellectual Disability Act of let's have a High Court Judge look at probably those very things, so what type of care is needed and what element of compulsion is necessary with the Judge then able to make various orders, you know, should it be –

WINKELMANN CJ:

Mr Edgeler, isn't your point though on this appeal that ultimately this kind of clinical caregiving lens has been allowed to distort the view that really what's happened to this person, to J, is that he's had his liberty taken away –

MR EDGELER:

It is.

WINKELMANN CJ:

– in response to an offence –

WILLIAMS J:

I thought that was in your argument, the –

WINKELMANN CJ:

– in response to an offence that happened X period of time ago and he hasn't had adequate process nor was such a basis made out to continue the detention. 1120

MR EDGELER:

Yes, yes, and I mean, and we have the slight argument, at what point would we say the detention became arbitrary?

WILLIAMS J:

But your argument is not really an argument about care, your argument is that risk control has dominated and suppressed care.

MR EDGELER:

It has, yes, that is very much our argument.

WILLIAMS J:

So it's, yes, that's not, that, the binary, is not care versus liberty.

MR EDGELER:

No, no, so –

KÓS J:

Can I ask you a question about the process that you seem to be contemplating under section 85.

MR EDGELER:

Yes.

KÓS J:

Do you envisage a kind of involvement hearing by the Family Court Judge focused on recent behaviour?

MR EDGELER:

Yes. I think that's probably a – particularly when you are getting well past, you know, if someone was –

KÓS J:

When you're past a period to which you might have been sentenced had you committed the original offence.

MR EDGELER:

Yes.

KÓS J:

And do you say that process would be adequate?

MR EDGELER:

I am not sure that the current law could be interpreted in a way which means that arbitrary detentions, or discrimination, particularly discrimination, is wholly avoided. But it would minimise the risks of it and so, you know, if we were to redraft the legislation entirely, could we get something even better than that? I think the answer would be "yes". But with the legislation we have, the question is really for us and the Court, particularly concerned, you know, is *VM* the right approach? Is that a gloss to add to *VM*, essentially, and say when you're looking at this, particularly when you're looking at it well past the maximum that would have applied to a non-disabled offender, yes, and so you don't necessarily need a criminal charge and…

KÓS J:

Right.

MR EDGELER:

And go through the CP(MIP) process, but if it is relying on, you know, recent – I'm always reluctant to use the offending, because no one – no question in this case has ever been proved beyond reasonable doubt and so me calling it "offending" seems to admit something that the Crown hasn't even

sought to prove, much less sort of a Court accepted as such – but offence-like behaviours, if they are the basis on which someone's – like, 18 years ago, this happened, two years before that there was something else and that was a concern at the time, but if we're wanting to go forward and keep locking this person up, then look at, look at what has happened recently and someone would essentially, you know, not unlike an involvement hearing, but again in the Family Court not the District Court and not with, sort of, with the process of, you know, intellectual disability and unfitness to go through a full criminal trial having been accepted, essentially, and certainly, I mean, one way you can get out of this system is "actually, we realise this person is not intellectually disabled", not that you can be improved but, sort of, you know, someone actually does an assessment and I've had one case of that where a client I had, we were dealing with him later, who had at one point been put in intellectual disability care and then, you know, after, you know, "oh, now that we've had him with actual sort of psychologists, you know, around the clock for a year, we realise he is not intellectually disabled".

So that's a – that can end it as well, but in J's case we had that argument in the High Court and we lost the argument, essentially, and if the difficulty is his autism and he, in fact, may not be intellectually disabled, the evidence in cross-examination didn't go that way. We think there might still be something in it, but it's not something we pursue here.

WINKELMANN CJ:
Could you just take us through the statutory framework?

MR EDGELER:
There isn't –

WINKELMANN CJ:
Or is that too tricky for you?

MR EDGELER:
There isn't – I can, I think, just –

KÓS J:

Could I, but could I just subdivide the Chief Justice's question?

MR EDGELER:

Yes.

KÓS J:

Don't you think section 85 would permit exactly the process that you are contending for?

MR EDGELER:

I think it would, yes, absolutely.

KÓS J:

So what statutory amendments, what addition to the current law do you need?

MR EDGELER:

I don't think you do need an addition to the current law to have that process. No, and I think that's sort of –

WINKELMANN CJ:

So your argument turns on section 85?

MR EDGELER:

Yes, yes.

WINKELMANN CJ:

And your argument is not just that it needs better process, it is also what the Human Rights Commission and the IHC argue, which is at a certain point, however, that process can't justify detention beyond – and the Human Rights Commission, what could have been served for the triggering event?

MR EDGELER:

Yes, yes. And so when you –

WINKELMANN CJ:

So it is multi-layered?

MR EDGELER:

It is and so essentially the only – the, I mean, a statutory prohibition, you know, one way of resolving this and certainly one thing we argue, we have adopted that as well, you know, it's the maximum should be the maximum, you know. It's just for someone like J the maximum should be served in intellectual disability care. For someone who's not intellectually disabled the maximum would be in prison, and so that is something that you would need a statutory amendment, for example.

WINKELMANN CJ:

So can I ask you this?

MR EDGELER:

Yes.

WINKELMANN CJ:

I asked Mr Ellis this question and he gave me an answer but it had a qualification. The sort of triggering event was the smashing of the windows, the property damage. If there had not been such a triggering event, could J be detained?

MR EDGELER:

No. It's – when the Intellectual Disability Act was being enacted, the Intellectual Disability Bill did allow for that, so it was analogous to the mental health legislation. So mental health can be a CP(MIP) process. Mental health can also be a Mental Health Act process. The Intellectual Disability Bill is introduced. It has that same. You can start in a criminal case or you can start in a civil case, in the same way you can for mental health. That was – there were submissions from, I suspect, groups like IHC and others, probably the Human Rights Commission, saying this is not what you should do. You should treat – this is criminal only, and so stripped out of the Bill, the final passage of

the Act, no civil process, or at least no civil initial entry in the way that there is in the Mental Health Act, but a criminal one, you can be diverted from a criminal trial or potentially diverted from a prison or indeed diverted from a mental health, you know, say, someone locked up, multiple issues, mental health, and actually this person's needs would be better met by an intellectual disability thing, and so those are essentially the three ways you can get into intellectual disability care, having been prosecuted and found unfit or prosecuted and convicted and then either the Judge instead of passing sentence can say that or prosecuted, sentenced to prison and the prison realising, oh, this person is – happen, usually that type of thing we realise someone, relatively minor or not terribly serious offence, just pleads guilty and so –

WINKELMANN CJ:

Sorry, prosecuted and found unfit. What was the second one?

MR EDGELER:

Prosecuted and convicted with the Judge then saying: "I'm not going to sentence you to prison. I'm going to make a compulsory care order," of some sort, and then – or alternatively third…

WINKELMANN CJ:

And then found, once they're in prison found to be –

MR EDGELER:

Once they're in prison or – and I think there's the new one now of the PPO facility can operate the same way as the prison. So if someone is made subject to a PPO or the PPO process that can – as like the, I think the – the sections in the Public Safety Act are the Chief Executive can make an application as though the person was a prisoner and then we'll treat them as a prisoner so that the statutory test is met, this person was a prisoner. But there isn't a – if someone is just intellectually disabled and no one has ever alleged a criminal offence in a formal way in a court, you could never end up in compulsory care.

KÓS J:

That was the difference that Professor Brookbanks was talking about in the passage that's quoted at 38 to 39 of the Court of Appeal judgment.

MR EDGELER:

Yes.

KÓS J:

That was the gap that was left.

MR EDGELER:

Yes, and there was also a gap for a while, and certainly a gap that has been concerning. We repealed – there were a lot of people who previously, intellectually disabled, and you'd just find them mentally ill effectively under the old '50s' Mental Health Act. That was repealed or I think amended, that was probably what it was, and for a number of years there was a gap. This person is not mentally ill because mental illness means psychosis or someone who needs psychiatric care, and for a period of maybe not quite 10 years or somewhere around there, there was just no orders that could be made, and so then we have the Intellectual Disability Act which also updated the Mental Health Act and so okay, then we have the criminal entry process at that point.

But yes, very much the answer to the question, if there had never been a charge laid J could not be here, and potentially the answer might be if they hadn't laid that charge, you know, we don't know what would have happened and five years later in the community something else happens, okay, well, we're going to have to lay a charge now, always the sort of question, and potentially they could do that with some of his challenging behaviours in the facility he's currently in or whatever. You know, at any point someone could say: "We need a new order. Let's find some new offending and start the process." That seems a step that's unnecessary but the process section 85 is silent as to what the requirements are and so the *Lessard v Schmidt* recent overt act finds something, establish it, allow challenge and then sort of go from there assessing, okay, what care is necessary, what level of danger are they actually,

particularly as someone gets older and in some cases more frail, although J is still relatively young, and so –

1130

MILLER J:

Is this…

MR EDGELER:

Yes.

MILLER J:

I'm just trying to reconcile this with what I understand to be a principal argument of yours which is that because you only get into this statute via a criminal pathway section 85 can only be used in some to an extent which is proportionate to the original criminal behaviour.

MR EDGELER:

Yes.

MILLER J:

Because what you're talking about now seems to be that section 85 can be applied in a way which is rights consistent after that period.

MR EDGELER:

It is very much, I think, the step-down, and so it's an alternate. Like the – Dr Ellis didn't take you to the European case, mentioned *Noble*, for example, with here's the maximum. We recognise, you know, the way the statute is written when you start, I mean J from the very beginning, you know, you've got the – when you start this process there's special care recipient, equivalent to special patient, and then care recipient, and most people, care recipient, special care recipient, the term is half the maximum, and there isn't a – there's not a – at that point no discretion. It's if you make someone a special care recipient they are – the level of care has to be hospital care, similar to special patient, and at

some point half the maximum or 10 years if it's a life imprisonment, half the maximum, at that point you become a care recipient.

WINKELMANN CJ:

How does this fit with the mental health regime which does allow people to be detained on the Crown's dangerousness past the time that they would…

It's 11.30 so that's a question for you afterwards.

MR EDGELER:

Certainly.

WINKELMANN CJ:

And the second one is the Crown is going to refer us to a whole lot of material as to assessments of risks and incidents, et cetera, so just also you should address us on that, anything you want to say about that, and then you're coming onto discrimination. We've taken you away from that, Mr Edgeler.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.54 AM

WINKELMANN CJ:

So Mr Edgeler, now, I left you with the question about the Mental Health Act.

MR EDGELER:

Yes.

WINKELMANN CJ:

I think I have worked out the answer myself.

MR EDGELER:

So Ma'am –

WINKELMANN CJ:

Which is, the model is different.

MR EDGELER:

It is.

WINKELMANN CJ:

You don't have to have committed a criminal offence.

MR EDGELER:

Yes, I mean, it – you can –

WINKELMANN CJ:

And therefore it detains, it contemplates detention unrelated to a triggering offence, so it contemplates detention to protect the community without criminal offending.

MR EDGELER:

Yes, or to protect the person themselves and again, it's a, at some point, and someone can certainly enter the mental health system through the criminal process, but at some point, you know, they stop being a special patient or something like that, and at some point what they get cared for is, essentially, we made an application through the appropriate authorities, mental health authority or whoever. We want to – we think you need to be detained under, you know, and they essentially move on from the criminal process and they become like someone else who had never committed, or alleged to have committed an offence at all, but for whom their mental health needs are such that – sorry, I thought I heard a phone and was like, that sounds like mine, but pretty sure it's outside – such that their mental health needs require it and there are, you know, requirements, and I'm sure in some instances the mental health processes don't work in particular individuals, but general agreement internationally is that there are certainly, if certain factors are met, then compulsory mental health care can be justified in some circumstances. So that's where we get from –

WINKELMANN CJ:

And it's one of the grounds of authorised detention under the European Human Rights Commission.

MR EDGELER:

Yes. Yes, specifically, yes.

WINKELMANN CJ:

Convention.

MR EDGELER:

But one that is and tried to operate in a way which is non-discriminatory. So that's, I think, the Mental Health Act you had.

The second question was, well, the Crown are going to point to a lot of evidence of dangerousness and shouldn't that be a concern that we have, and I think it was the Human Rights Commission with their sort of particular example, it was one I had forgotten in writing our submissions, about the mall attacker, as the example of the processes that were used, you know, the Crown in that particular case, or police did everything they could to try and detain him for as long as they could, but at some point the ultimate matters for which he was convicted before being released were such that no matter how dangerous he was, or potentially in his particular case, how much more dangerous he'd become because of the way he'd been treated over the last sort of four years before it got to that point, had to be released and it's just something that, I think I put in the High Court similar, like society sucks it up. You know, there are dangerous people out there, and as a general rule we lock them up after they do something and not before, and so you have that justification at the beginning of this process, and you could potentially have that justification ongoing if you, you know, establish new Acts and try and use it in a way which is similar to the mental health process of, okay, well, is this still necessary, but the way the Act currently is, the Act, not at the moment. So it's the question of isn't this – aren't these two approaches quite different from each other?

The statutory maximum is the same as the maximum that you could have a CCO, compulsory care order, versus, well, you could continue it and those certainly are different but the approach in *Noble* and I forget which European case it was, or CAT 35 probably, General Comment of, you know, there should not be a discrimination in this case. So the maximum a non-disabled person could be detained would be three months, or technically six and a half weeks, I guess, with the automatic release for a short-term sentence. The maximum should be the same for an intellectually disabled person. It might be that their care is different, one in a prison, one in an intellectual disability facility, but that is a gloss on the statute that, you know, we think it's potentially open but it's a harder ask for a Court to say, you know, the statute says the maximum term for a special care recipient is half the maximum of the sentence, but does not have – the maximum for a care recipient is three years but can be renewed for three years and three years and often, in J's case, it's they might be two year and there also was one 18 month renewal I think.

But this Court is saying, there isn't a statutory maximum for this but, in fact, right back in the District Court when the first order was made, I think two years at that point, there have been some three-year ones, that might have been three years, the first order was made, the maximum length that first order could have been made would have been three months and, you know, that's a harder ask for a Court to say, the statute adds this, and we think it's open, a possibility, you know, the statute being silent is something you can add, but if you're not going down that route and have a hard maximum, once a CCO has reached, the statutory maximum ends and if someone wants to do it again, start again with a criminal process which is, the Crown have said, would happen, and so if the –

MILLER J:

The trouble with using the criminal process in an ongoing way like that, and the trouble with the comparison with dangerous offenders who are released every day, is that someone who is not intellectually disabled must be presumed to have agency. They chose to offend, that's why they went to prison, and they can choose not to.

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Now we know that, in fact, some people are always going to re-offend and probably quite soon, but we have to adopt that presumption, don't we, and that is the distinction that's being drawn in this legislation which allows an initial order which might well be longer than three months is that the disabled person does not have that agency?

WINKELMANN CJ:
Some might, some –

MR EDGELER:
Yes, and it's something that I suspect was dealt with Dr Ellis. I can give the brief answer, you know, now that we are signatories to the Convention on the Rights of Persons with Disabilities and the assumptions that are built into the Intellectual Disability Act, and perhaps even in some ways perhaps less in the Mental Health Act, are not the assumptions that are built into the Convention, for example, and so there might be – and again it might be a factual thing in particular cases. I don't think we should assume – the courts should not assume that finding of intellectual disability, even the finding of intellectual disability in a criminal context, does in fact automatically mean this person doesn't have agency, and that's going to be a question of fact in particular cases and with the CRPD certainly having the approach of, you know, even quite severely intellectually disabled people can have at least some agency and it might be –

WINKELMANN CJ:
With support. But in this case there are indications that – to support Justice Miller's proposition that there is impaired agency, that J has impaired –

MR EDGELER:
I think that's certainly – impaired agency is perhaps a fairer way of putting it in this case. It's certainly not an absence of agency which is the thing the CRPD is very much wanting to avoid, you know, categorising. This person fits in this

category so we treat them this way and the law treats them this way, and that is certainly something I think to be avoided, and as the law in sort of other aspects, you get it into sort of not criminal cases but the various civil contexts, you know, who can bring civil proceedings, for example, and do you need a litigation guardian or do you only need them to do certain bits but actually this person can do some of it on their own, and sort of the moment, you know, High Court Rules 2016 are – "Do you meet this test?" "Okay, then you have a litigation guardian and they make all the decisions," and that might – definitely something for another case, but you have sort of whether that all or nothing approach is the correct way to go in a number of areas of law, protection of personal property and various things like that which could be intellectual disability or also sort of aged-related things of, well, what powers does an Enduring Power of Attorney or something actually need to have and what ones can you still continue to exercise by yourself?

WINKELMANN CJ:

So there are three, well, there are probably far more models than three models.

MR EDGELER:

Yes.

WINKELMANN CJ:

There are three models that have been discussed in the submissions. One is, the Human Rights Commission, that it's just beyond –

MR EDGELER:

Maximum sentence, yes.

WINKELMANN CJ:

– maximum sentence, beyond that arbitrary. Then there's I think the IHC is more – that the further it gets from that maximum sentence the more scrutinous the Court must be that this is arbitrary.

MR EDGELER:

Yes. *VM* or *VM* plus and then very much it sort of –

WINKELMANN CJ:

Yes, and it must be doing something you would –

MR EDGELER:

Must be doing something, yes.

WINKELMANN CJ:

Yes, and more close, assiduous the Courts will be in their processes perhaps under section 85, perhaps.

MR EDGELER:

Yes.

WINKELMANN CJ:

That's scrutinous, and then the third model is that it's a care model and so long as the person presents as a risk to themselves, using the language of section 85 –

MR EDGELER:

Yes.

WINKELMANN CJ:

– danger to the health or safety of the care recipient or of others, then it can be rolled over.

MR EDGELER:

Well, you have this slight odd thing. So that's 85(3), and so 85(1) is do you roll over the order at all? 85(3) is is it compulsory care with a direction for secure care or a direction for supervised care, and so that 85(3) bit which, you know, I would have thought should be in 85(1), do we need an order at all, that's the assessment at least on the statute the Court makes of, well, we can have the

order, doesn't have to meet that threshold. That's the order you can only – you have to meet that threshold for secure care.

WINKELMANN CJ:
Yes, quite right.

MR EDGELER:
You don't have to necessarily meet that for supervised. So again, yes, that sort of thing, you know, 85 is, as we noted earlier: "The Family Court may, on the application of the co-ordinator, extend the term," and it's one of the broadest powers (inaudible 12:04:47). An order has been made, the Family Court may extend it and what we're – *VM* added this sort of at the start, and then we have, well, is that enough, and equally sort of *VM* recognised the longer you go the more you need. That's sort of an assessment potentially you have as well here, and again we get to the bit I was discussing, well, if you can't sort of see your way to the Human Rights Commission approach which I think is our first sort of highest point is the maximum's the maximum and stop discriminating, please, which is a possibility under the words of section 85(1), if you can't go to that then sort of, well, you do still need to meet the *Lessard v Schmidt* type thing or actually have recent overt acts and to at least some extent prove them.

We have the question of, you know, at what point, something I think I started asking and then answering, at what point does this become arbitrary, and so from sort of the Human Rights Commission perspective it becomes arbitrary once you get beyond the maximum.

There is at least, and it's part of the discrimination argument, there's an argument it becomes arbitrary well even before then. For the bit that the Court of Appeal expressed it's concerned about in this case and is also in other cases, the High Court I remember a case and I won't try and remember it because I think it was name suppressed, it's arbitrary in a sense because it's discriminatory right from the beginning. Even if say the term of the order at the very beginning had been: "Going to make you compulsory care order. The maximum's three months, I'm going to give you three months in a

compulsory care order," still be discriminatory for – because the element or the involvement hearing is at the balance of probabilities, and so at that point, you know, one of the bases on which a detention can be arbitrary is if it's discriminatory. The only people you are detaining in a particular circumstance, you know, you go back to sort of the strong examples, people of particular race, or Ireland or something like that with unmarried women who have given birth, and you sort of – and this, intellectual disability, no one else for whom it was only proved beyond the balance of probability – not no one else – no one who was not intellectually disabled –

WINKELMANN CJ:
So the involvement hearing, you are saying –

MR EDGELER:
The involvement hearing.

WINKELMANN CJ:
So the criminal justice processes are triggered not by beyond the – because of the involvement hearing process. The criminal justice processes are triggered not by J's offending having been proved beyond reasonable doubt –

MR EDGELER:
Yes.

WINKELMANN CJ:
– but by J's offending having been proved on the balance of probabilities?

MR EDGELER:
Yes, and so in that sense, and I think, yes, very much line with what counts as arbitrary detention, you know, Dr Ellis took it to you briefly, what's one basis? One basis is discrimination, and we do have that here and we do have that here ab initio, especially, you know, given the period in which J was detained before the order was made, so –

WINKELMANN CJ:

But wouldn't you say it's not – it's arbitrary without discrimination, isn't that an argument which may, I can't recall if it was addressed in the Court of Appeal's judgment, that when you bring to bear criminal justice processes on the basis of civil standards, that's arguably –

MR EDGELER:

Yes, it very much is, and so the Court of Appeal has quite a good analysis of that, having recognised that in a few other cases and sort of quoting them, you know, we've raised this concern before, and so one of the issues in sort of the United Kingdom – shouldn't say that – at the very least the English and Wales approach, you can have a jury for the involvement hearing. They're instructed: "You're not looking at this bit," you know, potentially some aspects of the mens rea not being involved, but a jury can be involved and – but that involvement hearing is on beyond reasonable doubt still, and so it's certainly possible to have this sort of process and this sort of system with that starting point, and given that New Zealand doesn't it's not something – it's something that in the High Court we asked for a declaration of inconsistency over. That in particular is not something we're doing now, not least because the two sections under which J was dealt with are not the sections under which people are now dealt with. It's still balance of probabilities but it's a different section the – when they changed the order, they changed the wording slightly, and it's like that does not affect J and it never has, and so asking for a declaration of inconsistency for something that doesn't apply to anyone else any more seems unnecessary and particularly given the way that it went in the High Court, how the argument went and – it was certainly raised. It was in the submissions and was in the judgment but it was not a focus in the way that, and take, for example, *Chisnall*, of the types of evidence you want when you're dealing with a declaration of inconsistency, and there just wasn't a focus of, certainly the Crown evidence, of here's why it's a good idea to do it this way and not, you know, beyond reasonable doubt, and I don't know if the Crown has a reason for that and we're not asking them to put one up for you today, but it is a discrimination and we say one that J is obviously well beyond the maximum sentence now.

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So not one we need to pursue but it is something that was concerning for the Court of Appeal and has been concerning to other courts when they have dealt with particular cases of people found unfit to stand trial and for whom – if this was beyond reasonable doubt it would be quite a bit easier for me to find you not guilty completely, and there's one, I'm trying to remember what the name of the case was, and again I think it's suppressed, was someone, the defence was self-defence, or defence of another.

WILLIAMS J:
Is that Justice Edwards' decision?

MR EDGELER:
I think so, I think so. And again, you know, that is, the standard of proof at the involvement hearing is one of the very clear ways in which the scheme affecting J and others like him discriminates in a way which we say is not justified and it's not something to fix now. This isn't the criminal appeal, we got denied leave to extend time in the High Court, and so the criminal appeal is not here, but when looking at discrimination and, you know, there's discrimination at this stage at section 85, we say, because he is treated differently from someone else who was coming up before the Parole Board, or whatever the particular analysis might be, that you are bringing comparator at that time, you know, who's the comparator? The comparator at the section 85 stage is potentially the equivalent, in some respects, of the Parole Board. You've served your minimum sentence, there's a bit left, you know, which we can detain you for the safety of the public until we get to your statutory release date, but once we do, then we'll have to let you out. But during that period the assessment for the Parole Board is what it is, the assessment for the Family Court, but when you're dealing with beyond the maximum sentence it very much is discriminatory there as well. I think I have largely dealt with the discrimination points now.

WINKELMANN CJ:
So were you talking about comparators?

MR EDGELER:

Yes, certainly, yes.

WINKELMANN CJ:

Because your submissions have got a nuanced approach to comparators.

MR EDGELER:

Yes, yes and I think if you're making an assessment of is a particular provision discriminatory, the assessment of who is the comparator, and my friends at the Humans Rights Commission, you know, you don't always need a comparator. I find it easier to approach that, you know, if someone wasn't intellectually disabled, would this be happening? If the answer is no, you've got a good chance you've got discrimination, justified sometimes maybe, but a discrimination which would need to be justified. But the assessment is different at different times, so the assessment in the CP(MIP) process in the trial court, is this person, are we going to start this process? I think you're not looking at someone at the same level of risk, you know, as someone who is this risky as an intellectually disabled person versus someone who is this risky as a person charged with an offence, and I don't think you are looking at their – the comparison at the, do I find you involved, do I find you guilty, is between sometime charged with the same offence. So when you are assessing is there a justified discrimination at that first CP(MIP) process, is involvement hearing, the comparison is if you weren't intellectually disabled we'd have a higher standard of proof.

The comparator when you are looking at the section 85, should we extend this, is probably looking not at someone charged with the same offence, or convicted of the same offence, you are probably looking at someone who is an equivalent level of dangerousness, and so you have the useful example my friends from the Human Rights Commission brought up of Mr Samsudeen, the mall attacker. Dangerous individual who got to the end of the criminal process and got a sentence because he had served well beyond what a prison sentence would have been on remand, and so a community order, supervision or the equivalent, or the intensive supervision I think it was, and the comparator you're getting

there is two people with a level of dangerousness, what happens if you're not intellectually disabled, and what happens if you are, and so it is useful to think at various points in the process what the actual comparator is, and if you're looking at, you know, someone, perhaps not J, because three-month maximum sort of takes it well out of that realm, but someone in a relatively serious – a burglary or something like that. You could potentially, may be slightly difficult and – but someone who did something similar to J could potentially, a burglary charge, maximum 10 years, and you get the CCO that lasts two or three years at the beginning, and the assessment you're making at the different points before you get to that 10-year process, that 10-year point, is going to be a different comparator to someone who is, well, if you've gotten well past that 10-year point, or three months in this case, then slightly different questions of whom are we comparing you to to see if there is a difference because, because of your intellectual disability, and for J –

KÓS J:

Justice Miller's question before about agency was really directed to this comparator point, I think.

MR EDGELER:

Yes.

KÓS J:

Isn't another alternative comparator people who are in the mental health stream, who present a degree of danger attributable not to intellectual disability but to a mental capacity? What do you say about that comparator?

MR EDGELER:

It's not – certainly, I think useful to ask the question. It has, it doesn't immediately sound particularly good to –

KÓS J:

It's not particularly helpful to you.

MR EDGELER:

Yes, no, no, and equally is the: "Okay, well, we treat people with mental health difficulties and intellectual difficulties both badly and therefore it's not discrimination because there are two groups of society whom we treat badly and you are not being treated worse than this other group whom we treat badly," and then you just, okay, at that point I would suggest that you broaden out the distinction so the question then isn't is J being discriminated against because he's intellectually disabled, comparing to someone who is mentally ill, but are all people who are facing intellectual difficulties or mental difficulties, and you've got the, sort of the test in the – I'm trying to remember what the statutory test is. There's a word in the Intellectual Disability Act or in CP(MIP) which encompasses both groups and so it –

WINKELMANN CJ:

Can I just say isn't your answer to Justice Kós that there is a statutory basis for the discrimination against those who are mentally, under Mental Health? That's a structure. It's a statutory structure, so it's not…

MR EDGELER:

There is although, you know, there's a –

WINKELMANN CJ:

Yes.

MR EDGELER:

There is a statutory structure obviously and also an intellectual disability but the difference is between –

WINKELMANN CJ:

But you're saying there isn't, that there isn't under the – there isn't the same statutory structure.

MR EDGELER:

There isn't a civil one, yes, and so they are treated differently, but the…

WINKELMANN CJ:

So which – yes, okay. It just seems to me there's something there.

MR EDGELER:

If someone who is dangerous because they are mentally ill can be detained under the civil process…

WINKELMANN CJ:

But there are express powers to do so.

MR EDGELER:

Yes.

WINKELMANN CJ:

Whereas this is…

MR EDGELER:

Does have to follow on from a criminal process and the – one bit I didn't mention when – how do you get into this? The charge that you face in this has to be an imprisonable charge, and so one case we did – these three charges count and half way through the hearing realise: "Oh, you can't do an involvement hearing on this one, your Honour, because it's a traffic offence which has a fine only maximum," not sort of, you know –

WINKELMANN CJ:

So the triggering event under this legislation cannot be something which is not, does not –

MR EDGELER:

It must be imprisonable and so you don't, you do not have a statutory CP(MIP) process, you know, even someone who is, you know, obviously difficulties or unfit to stand trial. You'd have to use essentially common law arguments of this person needs a stay rather than a, using sort of stay of proceedings arguments rather than if you ever needed one of those.

MILLER J:

Do you accept that the original motivating reason for this legislation was that intellectually disabled people were being discriminated against because the State was not providing for their particular circumstances? There's some indication of that in the legislative record, isn't there?

MR EDGELER:

Yes, certainly when you go back to the old Mental Health Act, and you have that sort of intervening period where they didn't qualify for either. I mean, I think the answer I would have, officially at least, no, because you don't need the compulsion regime, you can just – the vast, vast majority of people who get care from the intellectual disability system do not do so under – do not get it under the Intellectual Disability Act, they get it under health legislation and the budget passes money and here's the pot of money that goes towards health, some of which gets spent on caring for people with intellectual disabilities, just in the same way it does for people with physical disabilities, or illnesses generally and so, you know, that is a – that would, as a general rule, the better system to use to care for someone like J is the health system.

MILLER J:

Right, so you'd say that the legislation is discriminatory from inception?

MR EDGELER:

Yes.

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WINKELMANN CJ:

Mr Edgeler, why is it not implicit in section 85 that a person can be detained longer than their statutory sentence? Because it says once they're no longer subject to the criminal justice system.

MR EDGELER:

"No longer subject to the criminal justice system" means – J was never subject to the criminal justice system, in the terms.

WINKELMANN CJ:

Right, okay.

MR EDGELER:

It's a statutory term about, if you look at the definitions section, I can't remember what it was, and –

WINKELMANN CJ:

It's when they, when the –

MR EDGELER:

It's when a special – so someone who is a special patient or a special care recipient is a person subject to the criminal justice system, and so for J he was never one of those. The initial order was not as a special care recipient but as a care recipient under a compulsory care order and so –

WINKELMANN CJ:

Yes, it's the different pathways in.

MR EDGELER:

It's the different pathways and so someone who's in for a murder, as a general rule, will start as a special care recipient. They will have the statutory maximum, which is also the statutory minimum. It is 10 years for a life sentence and at that point, once the 10 years is up, or such lesser period for some other offences which people can be made a special care recipient, then they are no longer subject to the criminal justice system.

WINKELMANN CJ:

Yes, that was why I was asking you about the statutory scheme because it's quite a complex statutory scheme, as I remember from the case of *M* and just looking at bits of it can give you an artificial idea about how it's operating.

MR EDGELER:

Yes. Yes, very much so and like, as sort of noted earlier, the process by which, you know, someone starts. You look at what's the power, where's the power in this Act to make the compulsory care order in the first place, and it's sections 44 and 45. But as a general rule, most people who have an order have it made under the CP(MIP) Act instead and it's just deemed to be an order under section 45. But yes, so a – it's courts, the Family Court is not involved in looking at or determining, is this special care recipient's detention, ongoing detention justified. We get to the end of that process and it's a ministerial decision, although trying to remember the name of the case Dr Ellis and I did looking at this, and it was like when does the Minister have to make the decision to move you from special –

WINKELMANN CJ:

That was *M* wasn't it?

ELLEN FRANCE J:

M, I think.

WINKELMANN CJ:

Yes.

MR EDGELER:

Yes, *M*, yes, that's right, that's it. Yes, *M*, and so *M* was the special care recipient at one point, then becomes the care recipient and defined by the statute as "no longer subject to the criminal justice system", although, of course, someone could charge him again, just the slightly odd turnabout in the Act.

WINKELMANN CJ:

Yes, yes. Right, I think you're finished?

MR EDGELER:

I think that might be me, but I am –

WINKELMANN CJ:

Right, any questions, is that what you're asking, pondering?

MR EDGELER:

Yes.

ELLEN FRANCE J:

Sorry, could I just check on a completely different topic.

MR EDGELER:

Absolutely.

ELLEN FRANCE J:

Did you have any submissions, you or Mr Ellis, that you wanted to make on the question of jurisdiction? You recall the re-call application?

MR EDGELER:

Yes, yes, yes, and so there was the joint – not a joint application but a joint memorandum supporting it.

ELLEN FRANCE J:

Yes.

MR EDGELER:

I have sort of – I gave it some thought as to, like, the position raised in that application appears to be correct on the terms of the statute. I sort of thought, is there a discrimination here, other people get to go to the Supreme Court and J doesn't. I don't think it's necessary to look at that because, well, one, we are at the Supreme Court under an appeal from the section 102 application and depending whom the comparator is, and I sort of looked at it, well, the comparator – what role is the Family Court playing? The Family Court is essentially playing the role of the criminal justice system played by, at least before that maximum period, played by the Parole Board and you don't get to appeal from the Parole Board even to the High Court, except on specific orders. The Parole Board says: "No, come back in two years, we'll just, you know, we're

not releasing you today, we'll just put you on the system and see you again." There isn't an appeal at all and so someone, you know, there is a general concern, I think, generally there are several other Family Court type decisions which can't be appealed beyond the Court of Appeal.

J is treated the same as them but also because of section 102 of the Act, does have the ability to, one, get it in the High Court as of right, or at least an application under section 102, we say should have been granted and then sort of consequent orders made, but the statute does seem clear, and even with the process of removing some of those High Court appeals to the Court of Appeal, I think a sensible process given what a, you know, a relatively extensive look in the High Court at J's circumstances, that that does not seem to make a difference. It is still, you know, the Intellectual Disability Act and the process does very much appear to make appeals from that sort of renewal final in the High – in the Court of Appeal, however we got there, and so tried to come up with something to say, no you can, but in the end didn't seem necessary and I think we'd be pushing it to say oh the removal makes a difference because it's not that the decision of the second appeal is final, it is the decision of the Court of Appeal is final, and so even if it was, even if that was on first appeal removed, it is still very much seems to be the Court of Appeal is it but we have the advantage of –

ELLEN FRANCE J:

Yes, there is language in 134 that might provide an argument for the idea that you're stepping through, and it's when you've stepped through those earlier stages that it's then final. Whereas here, because of the transfer, you've missed out on that, but you're saying, well, effectively we're here anyway so…

MR EDGELER:

Yes. It's an issue which is J should be looked at in the Family Court appeals generally. You certainly get some on some issues, but there are still remaining, fewer now than there used to be things where the Court of Appeal is the final arbiter and it does appear to be what the statute says here and with the advantage of a section 102 application and one or two judicial reviews of

various decisions. Someone in J's position has the ability to have his case heard by this Court, if it grants leave, whether it started in the Family Court or not, and so that is a process which ensures, at least in the result, he isn't discriminated against by anyone else, and so we are here and the Court can make its decision primarily, we would suggest, on the section 102 appeal as to what the High Court should do, but part of that – what the High Court should have done in the section 102 application will obviously help assist Family Courts in what they should do in section 85 applications, and so if the glosses that we have suggested should be applied to section 85 applications, would apply equally to a High Court looking under section 102, and so this is something that this Court can determine. I can't see a useful way around that and happily don't need to.

WINKELMANN CJ:

Thank you. So Mr Ellis, did you have anything? I said we'd loop back to you Mr Ellis if you had anything to, that you wanted to finish up on.

MR ELLIS:

You did indeed Ma'am. I'm conscious of the fact that probably talking aggravates my…

WINKELMANN CJ:

Cough, which I think so. But Mr Edgeler has covered the small part that you hadn't covered I think in your submissions

MR ELLIS:

Yes.

WINKELMANN CJ:

So are you content to sit with that?

MR ELLIS:

I'll just say one thing, if I may, in answer to Justice France.

WINKELMANN CJ:

Yes.

MR ELLIS:

Where I think, well I know, in *EB v New Zealand* CCPR/C/89/D/1368/2005, a case before the Human Rights Committee –

WINKELMANN CJ:

Is that *EV*, V for Victor.

MR EDGELER:

B.

WINKELMANN CJ:

B for Bunning. Thank you.

MR ELLIS:

B for breakfast yes.

WINKELMANN CJ:

Thank you.

MR ELLIS:

It was a family case, this is about, I think it's about 2006, I can't quite remember, I can look it up in a second. The argument was partly that there was no right of appeal from the Court of Appeal. It was a custody access case, and this was, I assume it was discriminatory, I don't know what argument I put, but it was certainly part, and the Committee did note it in the reason, as we won for some other reason. I don't think that we ever got a result, but it might be of some use on that issue. It might not.

WINKELMANN CJ:

Thank you.

MR ELLIS:

That's the only thing I needed to add. Thank you Ma'am.

MR ELLIS:

A decision in 2007 of the Human Rights Committee.

WINKELMANN CJ:

2007, and the respondent in that case, Mr Edgeler, was?

MR EDGELER:

New Zealand.

WINKELMANN CJ:

New Zealand, Human Rights Committee.

MR EDGELER:

I'll give the communication number 1368/2005.

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WINKELMANN CJ:

Thank you. So in terms of interveners, the logic perhaps is to hear from the Human Rights Commission first and then the IHC, or have you discussed an alternative order, Ms Haradasa?

MS HARADASA:

Yes, your Honour, Mr Butler KC is going to go first.

WINKELMANN CJ:

Okay.

MS HARADASA:

Noting also that he is away tomorrow, just in case timing is an issue.

WINKELMANN CJ:

You think he is going to go on that long?

MS HARADASA:

I don't think so.

WILLIAMS J:

But you might?

MS HARADASA:

No, no, but I'm obliged for the lunch break.

WINKELMANN CJ:

Mr Butler.

MR BUTLER KC:

Good afternoon your Honours, and first just to acknowledge and thank the Court for hearing from IHC in respect of this intervention. I am conscious of the fact that there is quite a bright background behind me so if at any stage it becomes –

WINKELMANN CJ:

You can't draw the curtains?

MR BUTLER KC:

No, unfortunately not, so that's the thing about the Gold Coast and so there is just some issues associated with those, so if it does become distracting I can always just move to audio rather than visual, if that becomes distracting for your Honours.

Outlining the submissions, your Honours have the 10-page submissions that have been filed by IHC. Your Honours will know that IHC is the oldest specific NGO looking after the interests of people who live with intellectual disability. It's a long-formed advocacy group set up originally by parents of children living with intellectual disability and over the many decades of its existence it has branched out.

One of the frames that it has always used to understand how it is that the people it advocates for are treated by society, and it is not just the State, by society, has always used the frame of human rights and so that is the particular perspective that IHC is wishing to bring to bear here.

In terms of the role that we indicated, we're not making any particular submissions in respect of J, so we're not advocating for a particular solution or anything like that. But we do think that J's case does demonstrate some issues associated with the way in which this legislation operates, and by "operate" we mean two aspects. First of all, the statutory scheme and then, second of all, actually how it is resourced and funded.

Now, in light of the way in which the leave judgment has been crafted, and certainly in terms of our role on the intervention, we are not focusing on that second aspect of resourcing and the like. Your Honour Justice Williams, I think, had a question around the nature of staffing and so on at the Mason Clinic and so on. We can certainly try and track down some information in relation to that but I am assuming that my friends for the respondents have already done that and will be able to inform the Court. But if there is anything further that we can assist the Court with in terms of the practical operation of this statute, we're very happy to do that.

We have included one or two reports from the Ombudsman's Office which we thought might at least give a bit more colour or flavour to the way in which the scheme operates. There is a number of case studies and the like that are provided for then that might assist the Court just to get a bit of an understanding, because fundamentally we are dealing with two statutes here that are pretty dry, technical, and complex I don't, I think, doesn't even begin to capture the level of overlap and interaction that's involved.

Before I turn to the particular points that I wanted to address in the oral presentation, I should simply note that as an appendix to our written submissions we've attached two flow charts. So the idea of the flow charts was to try and explain some of the complexity that your Honours have touched on,

just to show the various pathways that are available under the combined CP(MIP) and IDCCRA –

WINKELMANN CJ:

Yes, I find them very difficult to read.

MR BUTLER KC:

I do apologise for that, that isn't –

WINKELMANN CJ:

Would be wonderful if somebody could produce A3 versions of them, but –

MR BUTLER KC:

Yes, well, I can certainly – that would be helpful.

WINKELMANN CJ:

Or a magnifying glass.

MR BUTLER KC:

Indeed, your Honour, and being a recent sufferer of having to need glasses, I have some appreciation of the difficulty now, because certainly myself, trying to read the first flow chart was challenging, I do accept, on a small A4 piece of paper. But if it would be more helpful for us to produce that in A3, or whatever the larger version is, we can certainly do that after the break.

WINKELMANN CJ:

It would.

MR BUTLER KC:

Certainly will, and Ms Qui she will look to do that. But the point of providing you with the flow charts is just to underscore the complexity of the scheme and also of the different pathways and the fact that you can be on one, you can be on – going through one pathway and then find yourself in another, in another pathway. So trying to see the scheme as a whole is, I think we would all agree, challenging.

In the time available to me, and I'm conscious we're just simply an intervener, I thought that I would focus on just a couple of points that arose out of the written submissions and which I think – and some additional points I think your Honours have touched on upon which maybe I can be of some use.

I thought, therefore, that the particular points I would talk to were the decision of – sorry, the notion of arbitrary detention under section 22 of the Bill of Rights, and the Court of Appeal's decision in *VM* which has largely been the lodestar by reference to which the Court below guided itself. I thought I could then talk to the United Nationals Convention on the Rights of Persons with Disabilities. I thought I should probably talk to, because it was we who raised the Samsudeen example, and I just want to talk about the extent to which it is helpful and then the extent to which it is not, or at least it needs, you know, care needs to be taken with it and then talk a little around the notion of dangerousness. I think I should talk to the *Noble* decision because care does need to be taken with *Noble*. And then lastly, if you do wish to hear from me on *Winko v British Columbia (Forensic Psychiatric Institute)* [1999] 2 SCR 625, I can talk to *Winko* but I think my friends from the Human Rights Commission are dealing with that in their submissions, and in respect of each of those points, I thought a couple of minutes on each and then I'll, obviously, I'll take questions along the way to the extent that your Honours wish to question me on any aspect. Does that sound like a way forward?

WINKELMANN CJ:

Yes, thank you.

MR BUTLER KC:

Thank you, your Honour. You will see that in our submissions, while we noted that a number of rights under the Bill of Rights were raised as possible vehicles through which the statutory scheme should be assessed, we've largely focused for the purposes of J's case on the role of section 22 of the Bill of Rights.

We have also discussed section 19, the discrimination aspect. Not because we think it's necessarily helpful for Mr J's predicament but simply because, as we understand it, and we do see that the procedural aspect of the case has been quite complex, but because as we understand the questions of discrimination may still be "on the table" because of J's desire for an indication of inconsistency. So that's why, or that's how I see the distinction between the two and it seemed to me that if we're looking at J's predicament, his individual circumstances, it's the section 22 right which is probably most relevant.

The Court well knows that the concept of arbitrariness is a multiheaded hydra, because arbitrariness means unlawfulness and by "unlawfulness" we mean obviously non-compliance with the statute that governs, or the common law principle that governs or regulates the detention or arrest. But very importantly, the Human Rights Committee and New Zealand domestic courts have, right from the get go, emphasised that you can have an arrest or a detention which appears on its face to comply with the statutory scheme, and typically what we mean by that more narrowly is that it is within power, or appears to be within power, ex facie, but then when you look at certain qualities of the detention in actuality, those circumstances mean that the detention can be and should be fairly described as arbitrary.

So it could be that somebody has technically committed an offence, for example, but actually it was inappropriate for them to be, for example, charged with the particular offence in all the circumstances. It could be that it was right for a person to be arrested or detained, it was available on the statutory language and it was a reasonable exercise of the power at the time at which the power was exercised, but over the – due to the effluxion of time, the statutory purpose which informed the power is no longer capable of being fulfilled, or simply too much time has passed for the authorities to be given the chance to continue to try and give effect to that statutory purpose, and it's into us that was probably in that space that section 22 was relevant.

1240

My friend Mr Ellis has touched on the *VM* case, and you'll have seen in the written submissions that we suggest that some care needs to be taken with that case, and one of the reasons why care needs to be taken with that case is, of course, that the length of the detention in issue there, somewhere between three to four years it would appear from the report, I've not myself been able to narrow it down any more precisely than that, is of a duration that is substantially than what we are dealing with here. And the length of the detention is a central fact that simply has to be confronted when deciding whether or not the ongoing detention of J under section 85 is available in light of section 22 of the Bill of Rights.

Now one of the reasons that we put section 22 at the forefront of our submission is also that, and here we come back to *VM*, that fundamentally the power of the State is being used here to control the movement and location of J. This is not simply a case of care being given by the State under the healthcare system. It is a care plus regime, or a detention plus care regime, but detention lies at the heart of what's going on here.

So one of our concerns is that the approach adopted in *VM* understandable and all as it might have been in light of the facts and the circumstances as they presented in that case, can lead one to lose sight of what has, certainly by now we would submit, become a central concern, or something that ought to be a central concern, namely the duration of the detention. Because when you look at how the Court of Appeal in *VM* approached the statutory scheme, and trying to reconcile the purpose provision, section 3 of IDCCRA, section 11, the so-called balancing principle in IDCCRA, and then section 85, the power of the Family Court to continue orders, the notion of balance is the controlling notion. So in other words the Court of Appeal looks to section 11 to be the engine of decision-making, the drivers of decision-making, but does so on a balancing basis.

For our part of IHC we would say that in a case like J's we need to return to basics in terms of how one interprets a statute in light of the Bill of Rights. There is nothing, we say, in section 85 of IDCCRA which would mean that an

interpretation of that provision, which avoided arbitrary detentions, cannot be adopted, and we say more to the point that section 6 requires the Court to adopt an interpretation, therefore a frame, to section 85 which ensures that there can never be an arbitrary detention under section 85.

Now we say that obviously conscious of the fact that there may be criticisms that could be made of the statutory scheme in terms of how it operates, who gets in, who gets out. There's issues, for example, in section 23, subsection (3) I think it is, which deals with bail, and says that wherever the Court is making an order for a person to be assessed and bail is an issue under section 23, the primary consideration, I think it might be described as the paramount consideration, is public safety, whereas typically under the Bail Act that's not quite how you would look at things. So I'm just using that as an example of something which might be criticised at an earlier point in the statutory scheme. What we say is at least by the time you reach section 85, and you look at the words of section 85, there is nothing about the words of section 85 that preclude a reading and an application of it that is consistent with section 22 of the Bill of Rights.

We submit that one of the problems with *VM* is that it tends to obscure rather than bring out or illuminate the Bill of Rights starting point, and that starting point, we say, was quite important. Now someone's asked me a question, I'm sorry?

ELLEN FRANCE J:

Yes, sorry, just in relation to that, the Court of Appeal in *VM* uses three headings, proportionality, rehabilitation and increasing justification.

MR BUTLER KC:

Yes.

ELLEN FRANCE J:

Do you agree that that's, I mean I understand you say it's not a balancing exercise, but in fact if you took a different view, say, of what proportionality meant than the Court of Appeal did in *VM*, you could get to the point…

MR BUTLER KC:

Yes you could your Honour.

ELLEN FRANCE J:

Of interpretation consistently with section 85, so I'm just trying to understand quite what the analysis, how the analysis you say should be applied, should be packaged, if you like, in terms of the Family Court then applying section 85.

MR BUTLER KC:

Yes, it's a very fair question. So the first thing I'd say in relation to the three headings that your Honour made reference to, of course is that his Honour, this is the Court of Appeal rather, and indeed Justice Simon France in the High Court, used those headings as a way of responding to the view of the legislation that was had by the authority.

ELLEN FRANCE J:

Yes, yes.

MR BUTLER KC:

And I think I make this point in my written submissions, that another reason why one needs to take care with *VM* is because the focus in *VM* is on what I would characterise as somewhat extreme, I think I might have described them as rather extreme, submissions that had been made on the detaining authorities and the Attorney-General. So the focus very much in that case was on saying why the approach that was being advocated for by those authorities was wrong and they're going forward, rather than dealing with a case like the one we've got in front of us now.

ELLEN FRANCE J:

Yes, yes, I can see that, although in the High Court judgment, for example, you do get a different approach taken to the various factors, but I accept the point you're making about the context.

MR BUTLER KC:

Yes, and so the point simply I would like to make is that when one looks at the Court of Appeal's approach in *VM*, and you go back and trace, it's an interesting case, judgment to go back and look at because when you look at it, the way in which the Court of Appeal went about analysing the statutory scheme was one which implicitly has regard to, is the way I think I can fairly categorise it, implicitly has regard to, and in one or two places is a little bit of explicit reference to the Bill of Rights, but it's not, it's more a rights considerations are relevant considerations to be given account to and need to be given weight, as opposed to what we would say would be the next step up, namely the starting point must be to avoid an arbitrary detention.

Now out of that statement flow a number of propositions which may have more or less relevance depending, for example, at the point in time that the Family Court is making a particular decision, which might be more or less relevant at the point, at a point in time when considering, well what value does "care" and more particularly "rehabilitation" offer to the person who is the subject of the CCO. But it all points, we would be saying you've got to go back and use arbitrary detention as the touchstone.

1250

WINKELMANN CJ:

In that analysis, Mr Butler, this is Chief Justice, in that analysis where does the, so the value of the care and the rehabilitation importance, what about the length of time the person could have served in prison for the offending?

MR BUTLER KC:

So your Honour, I think, correctly identified the range – a range of possible approaches that's before the Court and, for our part, the way we thought was

sensible to tackle it was, we had some awareness, if I could put it that way, of a position that might be adopted by the Human Rights Commission and the Court asked us not to be overlapping and simply saying the same things, so for IHC's part, the view that we've taken is that if the Court is not attracted to a tight analogy with what's available under the applicable criminal statute, offence provision and the maximum or some relevant indicator of imprisonment length that might be found under that statute, then you're into a more free-floating length of detention and it's, if when it's in that territory, then proportionality does become important. Purpose, proportionality, and proportionality, we would say, must have some regard and over time perhaps increasing regard, to what might have happened to the person if they had been disposed of within the criminal justice system.

WINKELMANN CJ:

So if you were to formulate that in terms of rational justification for taking which approach, the first approach would be that you can only be subject, so the Human Rights Commission's approach, you could only be subject to this because it's been triggered by offending and so there can be no basis for detaining you for longer than the sentence.

MR BUTLER KC:

Correct.

WINKELMANN CJ:

The second approach might be, well, when you look at the statute, it's not just about – it's not a punitive statute, it's a caregiving statute, so it might justify, in the interests of the community and the individual, a caretaking regime which is proportionately longer than that in order to achieve the objectives which is to rehabilitate the person so they're safe for themselves and the community.

MR BUTLER KC:

Exactly, exactly. But it's not an open, it's not a blank cheque in terms of detention and the exercise of control over a person. In other words, we would say that the scheme provides an opportunity for that care and rehabilitation to

be explored with the person, to see what strategies can be put in place towards rehabilitation and care that might reduce the concerns associated with that individual but at some point in time the duration just simply goes beyond the pale.

WINKELMANN CJ:

So that period of time that's additional, might be the period of time to rehabilitate, or it might actually be the period of time required to make sure that the structures are in place in the community to enable them to be managed in the community.

MR BUTLER KC:

Correct, correct. And so, so for example in that regard, in this case for example where the maximum period of imprisonment would have been three months, as I understand it, and that you're applying the Parole Act 2002 because it's less than two years if the scheme still works as I understand it to, then release would be automatic, would it not, after 50% of time served, so that would be six/seven weeks. One might take the view that six/seven weeks is not an appropriate period of time within which to work out a care and rehabilitation plan, for example.

KÓS J:

What then, Mr Butler, in the event that the rehabilitation limb is really a busted flush?

MR BUTLER KC:

Yes.

KÓS J:

What happens then?

MR BUTLER KC:

We would say, in that particular case, that the length of detention then must become a determining factor, because at some point your entry point into the

system, being an entry point through the criminal law system, must come back into the loop and be used as a check against whether or not the length of detention you've experienced is just simply – and I know this is not exactly a legal term of art – beyond the pale. Now, if what the Court is concerned about is how to provide guidance to the Family Court to get it just right, it seems to me there can be no hard-edged rules that can be applied, it is a sense of judgement that must be exercised.

KÓS J:

Is it not possible that the consequence of the failure of the rehabilitation side is to enlarge the care side, in other words, there may be a connection between those two, indeed, the very reason why rehabilitation is failing may be because care is more necessary?

MR BUTLER KC:

There can be elements of the chicken and egg in that regard, your Honour, and that was one of the reasons why, for example, we made reference, again, just not because it's bang on point, but just simply to remind all of ourselves, along the lines that Mr Ellis did in his submissions, that enforced control and detention in a particular place does lead to impacts on human beings that we are familiar with in terms of, for example, being cheesed off, interference with what one would like to do. We generally speaking say, well, to those who are being criminally punished, well, tough, that's the price you pay for your criminal conduct and we're prepared to take or we're prepared for you to suffer those consequences.

When you're looking at somebody like J, you're looking at somebody through a different lens and if rehabilitation is not working, for whatever reason it may be, you're left essentially with a choice, it seems to me, which I think is the choice your Honour is asking me to confront, namely between care, and really it's not care it's detention, and release back into the community with a risk to the community that the person who you no longer subject to a CCO may do some bad things.

KÓS J:

No, I don't think it's fair to say "it's not care it's detention". Why does one – why do you draw that distinction? I mean, plainly the form of care here is in a form that doesn't give him freedom of movement but, nonetheless, there is clearly considerable care devoted and substantial resources devoted to him.

MR BUTLER KC:

And I accept that that is so, Sir. But the question then becomes how much of that care could be given in the community? So it should not be the case that if J were back in the community the care would not be provided to him. So, in other words, what I'm trying to say is, it's not necessarily so binary between care subject to restraint and no care at all. There will be a very substantial middle ground and this is a gentleman who, from what I've read of the record and as I say, we're – I'm being very careful not advocating for him, but the one thing I think I can note is that on multiple occasions he has indicated a desire to be at home. That is the place he wants to be and that is the place that his mother has said she would like him to be.

MILLER J:

But that amounts really to saying there is a less restrictive form of detention. The question that Justice Kós is asking you is at what point is it simply not legitimate to detain him for reasons of care rather than rehabilitation?

MR BUTLER KC:

I suppose because I had approached the issue as not being a choice between care and no care, but between care in different settings. I didn't – I think where your Honour Justice Miller and Justice Kós are coming from was the answer that was given by my friend Mr Edgeler, where I think what Mr Edgeler was saying was that if J were to be released back into the community, certain measures ought to be put – would inevitably be put in place to make the environment in which he was staying safe.

1300

So that was, it was that which he trying to get at, I understood, when he made reference to having bars on the window and suchlike to try and save himself from his escape desire, which from reading the file he seems to have an escape desire. That's a kind of a, describing that as controlling his movement is an interesting characterisation because it could be just as easily described as his mother, which is how I understood Mr Edgeler to be putting the point, his mother putting in place mere health and safety measures to make the home environment as safe as it could possibly be, knowing what some of his risk factors are to himself, such as absconding and the like. But I can't take it any further than that your Honour because as I said I'm trying to walk the line here, of being a little bit more a helicopter.

WILLIAMS J:

Perhaps part of the answer is in the idea that the care assessment undertaken early on and throughout the period of care, whatever that might be, needs to be one focused on achieving transition to unsecured care.

MR BUTLER KC:

Yes.

WILLIAMS J:

And if there's been a – at least one judge that I read has commented on the possibility that the nature of the isolation has made the problem, the behavioural problems worse not better –

MR BUTLER KC:

That is correct.

WILLIAMS J:

And that seems to me to be a system failure if that is the case, and that probably reflects insufficient focus on achieving a particular outcome from the outset, nonetheless we're stuck with it.

MR BUTLER KC:

And that's right Sir. So that is, one aspect of what I was getting at earlier when I talked about the chicken and egg, and it was the point I was trying to make by drawing on a very different situation, but the same human reaction in that independent review of Mr Samsudeen's situation, and I think –

WILLIAMS J:

Here we've got a situation where the family wants to provide the care. There's no doubt that J needs care, no one's arguing with that as far as I can see. The family wants to provide the care, the State says it wants to provide the care as a proxy for the family.

MR BUTLER KC:

Yes.

WILLIAMS J:

Somewhere between those two points is the point of balance which maximises quality of life for J, while ensuring appropriate care. It seems to me the way to look at this is that care includes community safety, but care is the focus, and the longer the detention the stronger the focus must be on care as a way of thinking about risk.

MR BUTLER KC:

Yes Sir, and I think that is correct, and of course one of the challenges, I think, when trying to consider the statutory scheme, and in fact like J, is that you're doing two things at the same – there maybe more than two things that are going on here Sir. First of all the only reason the matter is before the Court is because of the circumstances of J. By that I mean the case is about J.

WILLIAMS J:

Yes.

MR BUTLER KC:

And what the right answer is in J's case, but the case also is about how we think about approaching decisions to be made under the statutory scheme, and

if I come back to the point that your Honour made about, well, we are – we didn't say it quite this way, but I think this is your point, well we are where we are today in respect of J. Maybe, no criticism made, I'm not an expert, I don't know, maybe things could've been done a little bit differently earlier on which might have meant that we wouldn't find ourselves today where we now are. What IHC is particularly interested in, and I don't mean to sound in the least bit as if we're not interested in J's situation, but I suppose the thing that motivates us more is to understand at what point along the journey that J has gone, should there have been an off-ramping or some other choices made so that we don't have another situation where we have another J down the track who also spends something like 20 years in various forms of detention. So it's for that reason that we're suggesting that we need to be thinking about having the notion of arbitrary detention involved in the assessment of the orders that are made under the Act as early as possible so that nobody loses sight of the fact that there needs to be a real focus on duration of detention and those sorts of considerations so we're avoiding arbitrary detention. Now I see your Honour's, I might be arbitrarily detaining you.

WINKELMANN CJ:

You are detaining us Mr Butler so we'll take the –

MR BUTLER KC:

It's 11.04 in the Gold Coast, it's 1.04 in New Zealand, so is this a good point?

WINKELMANN CJ:

Yes, it doesn't seem right that on the Gold Coast you're sitting in a hotel room at a certain time, but there we are. Mr Butler so we're up to, are we about to go onto your C, what's your C?

MR BUTLER KC:

Yes so what I wanted to – I wanted to make one or two more points around *VM*, and then I would think that if we're back at 2.15 that I should be able to be done, I don't know, in about, say 20 minutes. Is that reasonable?

WINKELMANN CJ:

Okay, yes, that's reasonable, but no more than 20 minutes.

MR BUTLER KC:

No, thank you your Honour.

WINKELMANN CJ:

Well we'll try not to ask you extensive questions so you can get through it.

MR BUTLER KC:

No, no, thank you, questions are good. Thank you, 2.15?

WINKELMANN CJ:

Yes.

COURT ADJOURNS: 1.05 PM

COURT RESUMES: 2.17 PM

MR BUTLER KC:

Your Honours.

WINKELMANN CJ:

Well, we can thank your junior for the A3.

MR BUTLER KC:

Indeed.

WILLIAMS J:

Oh, excellent.

WINKELMANN CJ:

Mr Butler.

MR BUTLER KC:

So just before I recommence, in case I forget, your Honours, in fact I'm not staying at a hotel on the Gold Coast, I'm staying with some friends in an apartment and if it were possible could I ask permission to withdraw and leave Ms Qui in charge of representing IHC in the Court, just so I can give them their apartment back?

WINKELMANN CJ:

Yes, you may.

MR BUTLER KC:

Thank you, your Honours.

WINKELMANN CJ:

I take it those curtains can't be drawn behind you, they're just decorative?

MR BUTLER KC:

No, I tried and they just will not, they will not get any further than what I've managed to achieve.

WINKELMANN CJ:

Right.

KÓS J:

You need some better friends, Mr Butler.

MR BUTLER KC:

Yes, quite.

WILLIAMS J:

I thought the halo rather suited you, Mr Butler.

MR BUTLER KC:

There might have been some comment to that effect from Ms Laurenson, earlier. So, your Honours, just before the break, I had made the bulk of the submissions and I had indicated there were just a couple of points I would like

to make and I tried to make some notes and I do think I will be done quicker than 20 minutes.

So the first point I want to begin with was the *Noble* decision of the Committee on the Rights of Persons with Disabilities. So you have reference to that, but I don't know whether your Honour's have been taken to it, I think not?

WINKELMANN CJ:

Well, I'm, in your list I've got of things, I've got United Nations Convention on Rights of Persons with Disabilities, Samsudeen example, dangerousness, *Noble* decision and *Winko*.

MR BUTLER KC:

Great, so I won't talk anymore about Samsudeen, because I think I have made those points and Mr Edgeler has made those points, so I feel I don't need to go into that territory unless your Honours wish me to.

WINKELMANN CJ:

Okay. What about the United Nations Convention on Rights of Persons –

MR BUTLER KC:

That's what I want to talk about next, *Noble* being the decision of that, of the relevant committee of – the Committee on the Rights of Persons with Disabilities. So I think one or two points to be noted about the decision. I'm not sure, I know it's in the bundle of authorities, I'm just not sure whose one it is in, but it is probably worth noting the case – the decision, rather, is distinguishable to a degree, to an extent, but it seems to me there is still material in there that will be of use to the Court when deciding what to do with J's case.

So the first point of distinction to be made, which must be noted up front, is that in this particular case the disposition that Mr Noble received was imprisonment. So he was put in an ordinary prison and one of the many complaints he made was, well, look, that was a completely inappropriate place for me to be and,

second of all, I was subjected while there to violence and what have you. My understanding is the same cannot be said in this particular case, plainly.
1420

But what can be said here is that a matter of great concern to the Committee and it is captured at paragraph 8.9 of the decision, was the fact that, and here I'm just reading: "...the Committee notes that the author was detained for more than 13 years, without having any indication as to the duration of his detention. His detention was deemed indefinite in so far as, in compliance with section 10 of the Mentally Impaired Defendants Act, 'an accused found under this part to be not mentally fit to stand trial is presumed to remain not mentally fit until the contrary is found'."

So what happened in that particular case is he was never able to stand trial to meet the charges that had been made against him and what the committee went on to find was: "Taking into account the irreparable psychological effects that the indefinite detention may have on the detained person, the Committee considers that the indefinite detention to which he was subjected amounts to inhuman and degrading treatment."

Now, we've analysed the case under arbitrary detention, because from our perspective we would see elements of inhumanity and degrading treatment as being applicable just as much to section 22 as it would be to section 9. But I just wanted to emphasise that part of the *Noble* decision because it resonates, in my submission, with the point that I made earlier about the impact that long duration detention will have on any human being and, indeed, additionally on those who, like J, suffer from some form of disability. So I just wanted to note that but accept that there are ways in which that case could be distinguished, but the essence of it shouldn't be lost. So that was the first point I wanted to raise.

I touched briefly before the break saying I'd touch on *Winko*. You're likely to hear quite a bit about *Winko* from the Crown because the Crown will hold up *Winko* and say, at least in the discrimination area, that *Winko* is the authority

you should follow. There is just a few points I think that should be noted and no doubt the Court will raise with the Crown but I might as well list some of the now.

First, the period of detention involved in *Winko* is nothing like the period of detention at which J has experienced.

Second, *Winko* is a case which involved a challenge to the constitutionality of the relevant provisions. The significance of that, of course your Honours, is that had the Supreme Court acceded to the challenge, then it would have in effect been left with striking down the legislation under the Charter. That is a much heavier remedy than what I understand J is looking for here, which is a mere indication, insofar as discrimination is concerned. On the one hand, that's the systemic challenge and then, on the other hand, release from detention in recognition of the fact that, in his case at least, the detention has gone on too long. What I'm trying to say to you, in other words, is that the nature of the challenge in *Winko* is different from the nature of the challenge here.

The third point to note is that the approach to the discrimination analysis in *Winko* pleads very closely to the discrimination analysis that is typical under the Canadian Charter where you are looking for stereotyping and the like. New Zealand has never adopted the Canadian approach to discrimination. The approach that has appealed largely to our courts is that which is expressed in the *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 decision, the parents as caregivers case, which does not require a showing of stereotyping or an intent of stereotyping, but when you read *Winko* you will see that it is full of that language.

Then the fourth point to note about *Winko* is that in *Winko* the pivot point for the Court in that particular case was the view that all members of the Court formed, namely that the legislation there was beneficial, it was designed to be remedial not punitive legislation, and that is a theme, I think, that a number of your Honours have touched on in the questions that you put to both myself and to my friends Mr Edgeler and Mr Ellis. But it is possible for it to be submitted here

that, notwithstanding the fact that the animating purpose of the legislation is to be beneficial not punitive, that in particular cases things have happened under it that take it out of the beneficial and make it, if not technically punitive, as close as is necessary for one to take the view that it is no longer a benefit.

So that's all I wanted to say about *Winko*. But drawing on the last point I made, there's cases in the bundle of authorities both *Vincent v New Zealand Parole Board* [2020] NZHC 3316, and then I think we've included in our authorities the recent decision of the High Court of Australia in the *NZYQ v Minister of Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37, (2023) 415 ALR 254 case. The point of each of those authorities –

WINKELMANN CJ:
What was the other one Mr Butler?

MR BUTLER KC:
The *NZYQ* –

WINKELMANN CJ:
No, the first one.

MR BUTLER KC:
Oh the first one, *Vincent v Parole Board*.

WINKELMANN CJ:
Vincent, thank you.

MR BUTLER KC:
And the point of both of those cases is simply to emphasise that while the original purpose of detention was undoubtedly legitimate, over time in the case of those individuals, the purpose could not realistically factually be fulfilled anymore. Now as regards the sort of people, this issue about indefinitely detention, which is a concern that IHC has got in respect of what's happened here, the select committee report is before the Court. I understand it's tab 5 in

the Crown's bundle, the respondent's bundle. I hope I've got that right. The issue of indefinite duration detention was an issue which the select committee noted at pages 16 and 17 of its reports, had been raised by the Mental Health Commission. So what the select committee report records, and again your Honours I don't know whether you're turning to it, I don't want to run ahead of you if you're wanting to do that.

WINKELMANN CJ:

I'm not sure if we've got it, thank you.

MR BUTLER KC:

Got it, thank you. So there's a heading at the bottom of page 16, "Term of compulsory care order", and it's noted there that: "The Mental Health Commission expressed concern in its submission that there is a possibility within the bill to renew a compulsory care order an unlimited number of times provided that a person will meets the criteria. Orders used in this way may amount to indefinite preventive detention." And that, of course, is the concern that's being expressed to you.

Now the select committee report potentially is ambiguous in terms of the response, because it goes either way, because it acknowledges the concern that's been raised by the MHC, and then goes on to say that "… a number of mechanisms within the bill that ensure that continuing care is justified." So what I'm saying there is the select committee doesn't directly refute the proposition that an unlimited number of rollovers could occur. Rather its response to say is well, continuing care will be justified because of the number of mechanisms that are put in place, and it refers to a number of the mechanisms that your Honours will have seen in the system.

It then goes on to say, at the top of page 17: "It may be necessary in a limited number of cases, for example, in the case of a repeat child sex offender that he or she remains subject to the bill's controls. This would only happen if it is not possible to manage the individual's behaviour and if, as part of the clinical

review, his or her behaviour continues to be assessed as being a high risk to others."

All I'm wanting to do by drawing your Honour's attention to this example is it seems to be implicit in what the select committee is saying is that it does contemplate that it might be possible for there to be indefinite detention. So I think it's important that, as counsel, that I acknowledge that. But at the same time I think, and this goes to the view that's been put to you, particularly by Mr Ellis and Mr Edgeler and IHC, the nature of the offending that is referred to, it seems to me, is interesting. It's a repeat child sex offender, so there is emphasis on the particular type of offending, and also on its repetitive nature, and it seems to me that brings out the point around the quality of the dangerousness by reference to proven patterns, and I can take it no further than that, but it was something I thought the Court needed, ought to have had its attention drawn to, and I know it's referred to in some of the written submissions, so I just thought it was important that I do that for you.

1430

The next point I wanted to make briefly was that standing back one of the – if the Crown's interpretation and approach is correct, then a lawyer who was advising a client who might come within IDCCRA in respect of where they're facing a charge of a relatively short duration finite sentence offence, might well think it is in the best interests of their client for them to work as hard as they possibly can to persuade the Court that IDCCRA doesn't apply to them, to their client I mean to say, in order to avoid the sort of outcome that has been visited on J. In other words, a preference to keep them in the criminal justice system in the hope that, yes, they might get convicted, but then at sentence they might be able to put forward some of their health concerns, or health issues or challenges, to ask for a mitigated sentence or some other form of sentence which would not involve incarceration, or wouldn't involve a very long period of imprisonment, and it seems to me that when one thinks about the philosophy of the legislation, that's not what beneficial legislation ought to be encouraging the legal advisor to a client to be thinking of.

Then the last point I wanted to make was your Honour Justice Miller made reference to, in the context of the discrimination analysis, and put to Mr Edgeler that one thing that perhaps the mental health legislation and this IDCCRA legislation have in common is a foundational premise that whereas in the field of ordinary criminal justice, the concept of agency, individual agency is strong and fundamental. The concept obviously of free will, which is a very strong feature obviously of the Judeo-Christian underpinnings of our criminal law, whereas in contrast people under the mental health legislation, IDCCRA, are not attributed that agency.

I would just like to echo what you heard from Mr Edgeler in response to that, which is that the teachings of the UN Convention are to remind us that in very many cases that assumption of agency/no agency is far to binary and far to sharp, unnecessarily so, when coming to deal with the disposition of offenders like J, and I would commend the General Comment that had been made by the Committee in this area, which really does remind us, it does make you sit up and think again. So I'm not saying your Honours haven't sat up or anything like that, but reading that material does remind us of how strong those underpinnings of agency/no agency are behind some of the legislation, and not all of the legislation has necessarily kept pace with our more modern understandings in relation to impairment, intellectual or mental. It is open to the Court, in IHC's submission, to, notwithstanding underpinnings of agency/no agency, to have a more nuanced approach to that question and give life to it, attribute proper interpretation and application of the legislation. Your Honours, those are –

WILLIAMS J:

As general proposition that's unarguable really, but in this case there is a binary, is there not, in the sense that the clinical evidence and the judicial findings were a lack of appreciation of impact of action. So there is an absence of agency in a material way here perhaps.

MR BUTLER KC:

Perhaps. I leave it to my friends Mr Edgeler and Mr Ellis to deal with that in more detail. Certainly I understand what your Honour is saying in terms of the reports, but I also take on board the point they made about the way in which the reports are crafted. I can add nothing more to that. Your Honours, were there any further questions?

WINKELMANN CJ:
No than you Mr Butler. That was very helpful, thank you.

MR BUTLER KC:
Thank you your Honours.

WINKELMANN CJ:
You are released to go about your Sunshine Coast day.

MR BUTLER KC:
Thank you your Honours.

MS HARADASA:
Thank you your Honours. We're obliged for the opportunity to make brief oral submissions and we will attempt to keep them brief. The Commission really just wishes to make six to seven short points to supplement its written submissions. But if I may just first make two points of clarification arising from the exchanges this morning and the first point is that, at least as we see it, the Commission's submissions do not take, I suppose, as firm or as hard line a position that you cannot in any case detain beyond the maximum penalty of the index charge and if we have inadvertently suggested that and caused a lack of certainty, I do apologise.

The points that we were really trying to emphasise in our written submissions were that proportionality considerations should be given greater weight. As we read the Court of Appeal decision at *VM*, those considerations are really reserved only for the finely balanced cases, and that is quoting the CA judgment. The Commission's position is that it should always be a key part of

any decision-making under the Act, but that is not to say it may be determinative in every case, and related to that, another reason that we perhaps emphasise this idea of proportionality, was that if the lack of proportionality and the lack of the corresponding need for finitude is justified on the basis that detention is because of treatment, rehabilitation, or care, not punishment which is what, at least as I read *Winko* as quoted in the Court of Appeal judgment under appeal, seems to suggest, it is in that context that the Commission suggests, well, then the Court really needs to interrogate whether, in fact, the detention is based on those factors or whether it has, in any given application, taken on penal, or as Mr Butler put it, as close to penal aspects.

Having said that, we have drawn the Court's attention to criticisms by international bodies that criticise a regime that enables detention for periods of time exceeding the maximum length of sentence to which an intellectually disabled person would have been liable if they were able to go through the criminal justice system. Just for your Honours' reference, and I don't propose to take you there, but that is the Committee against Torture report *Concluding observations on the seventh periodic report of New Zealand* CAT/C/NZL/CO/7, 24 August 2023 cited at footnotes 61 of our written submissions, and more recently there is also the CRPD Committee's observations on New Zealand's second and third periodic reports which is not in the bundle but which we can provide if your Honours consider that would be helpful.

WINKELMANN CJ:

Yes, it would be helpful, I think.

MS HARADASA:

And finally on this point of clarification, like Mr Edgeler submitted for the appellants, the Commission also sees the potentially discriminatory nature of the IDCCRA as beginning from the gateway itself, I think Mr Edgeler used the term "ab initio", rather than just in the length of detention and that is because, as we have attempted to step out in our written submissions, because minor index offending can get an intellectually disabled person charged with an offence into a risk-based preventative detention regime, whereas in the criminal

justice system you tend to need a more serious qualifying offence. Generally, there is a remarkable sort of convergence between the qualifying offences for the PPO preventive detention and ESO regimes that we have referred to in our footnotes and they all, generally speaking, centre around serious violent and sexual offending, usually punishable by at least seven years, although there are some exceptions for the ESO regime.

KÓS J:

Again, it depends on your comparator, doesn't it? If you were comparing it with the mental health process, you require no offence whatsoever.

MS HARADASA:

Yes, I would –

KÓS J:

The question is what conduct or behaviour has led you to be drawn into that care regime? In one instance, divide – or this instance, divided by whether the behaviour is caused by which form of disability, whether it is mental illness or intellectual disability.

MS HARADASA:

Thank you Sir, and if I may take that in two parts. First, you may not be surprised to know that the Commission has significant concerns around the BORA consistency of the Mental Health Act and has – there is currently before, going through the senior courts, a case called *Gordon* which –

WILLIAMS J:

Gordon, did you say?

1440

MS HARADASA:

Gordon, yes. It is about those issues. As I understand it, as things stand, leave to appeal the High Court judgment has been sought from the High Court.

The Commission intervened in that case and raised its concerns about the mental health regime.

KÓS J:

Can you give us the *Gordon* citation?

MS HARADASA:

Yes, I will, if I could –

KÓS J:

Yes, Ms Peck, perhaps.

MS HARADASA:

And then I think echoing the point made by my friend Mr Edgeler, if that is the case, in our submission, it suggests that disabled persons as a whole, whether intellectually or mentally, are perhaps not being treated in a comparably similar way as offenders, non-disabled persons, in the criminal justice system.

The second point, your Honour, of clarification and it is just a minor comment, and for the record, but there was reference to the HRC's submissions on the LynnMall attacker example, but just to clarify that was made by the IHC, not the Commission and the Commission does not wish to get into that.

So with those points in mind, if I could come to my, I have six here, but it might be seven now, points.

WINKELMANN CJ:

It's all right, we'll let you have – we'll give you one point leeway.

MS HARADASA:

Thank you, I am obliged. My first point is that the Commission thinks, as we say in our submissions, that there are several BORA rights and freedoms engaged in this appeal and I just thought it might be useful to explain to the Court why we have decided, within our 10-page limit, to focus on unlawful

discrimination on the grounds of disability and that's really because the Commission sees the discriminatory nature, or potentially discriminatory nature, of the CCO regime as at the heart of many of the human rights concerns in this case and, in part, that is because the protection against discrimination of disabled persons is crucial to securing the full enjoyment and the full complement of their human rights and freedoms.

So, Mr Butler has referred your Honours to the Convention on the Rights of Persons with Disabilities, the CRPD I will call it, and in preamble (c) of the CRPD which is in, I think, various sets of the authorities, but certainly in the Commission's bundle of authorities, emphasises the need for persons with disabilities to be guaranteed the full enjoyment of all their human rights and fundamental freedoms without discrimination and that is because, in our submission, non-discrimination is a really core feature of a society based on democracy and a society where each individual is valued as a person worthy of dignity and respect, and this desire to promote respect for the inherent dignity and aspirations of disabled people really animates the CRPD.

We also note, your Honour, Justice Williams' exchange with my friends earlier this morning about the lack of focus on the ESC rights, the economic, social and cultural rights, and just in case that is useful we note that the CRPD encompasses both the civil and political rights but also those ESC rights and those rights are interrelated. By way of example, you would need the economic and social supports to be able to fully enjoy your civil and political rights, in our submission, and just by ways of example on that point, there is a stand-alone right in the CRPD Article 19, it is the right to live independently in the community fully and I suppose we would say you need the economic and social supports to be able to enjoy that Article 19 right. If not, as we have seen in cases like this, you may not be able to live in the community and –

WILLIAMS J:

I was thinking of it – and I see that point – I was thinking of it more in terms of in a caring community the right of vulnerable people to be cared for and the obligation of the community to do the caring, either within the whānau or via the

State or State-funded agencies if that's not possible. That's really the point I'm making. Individual human rights are all very well but, applied without care – sorry about the pun – you get a very uncaring kind of community and we don't want that.

MS HARADASA:

Yes.

WILLIAMS J:

That doesn't seem to me what anyone is aiming at here and, of course, that is a balancing, always, because care can turn into oppression and that is really what this case is about and that seems to me, at its heart, the real question here.

MS HARADASA:

Yes, I agree with that. I'm not sure what else I can add at this stage, but –

WILLIAMS J:

No. Yes, I just wanted to have a rant, that's all right.

MS HARADASA:

Yes.

WINKELMANN CJ:

Although you would say that this is care which is forced upon J and there is an alternative care regime for J.

MS HARADASA:

Yes and just if I may on that point and as we think – there was a comment from the Bench, I'm not, sorry, I don't recall who from – that maybe we need to be focusing on transitions and I was interested in the submissions filed by my friends for the respondents on the issue of publication. There was a reference to an RNZ article just making the point that J's case had been commented on in the public and that was the reason that article was cited, but my friend

Ms Peck and I were reading that and there is – it's quite an interesting article and there's an example given there of a person who was once considered and I quote "one of New Zealand's most dangerous people" and how they had – that person has been able to transition into the community, "a cottage by the sea" I think is what the RNZ article says, with the appropriate supports and has therefore required, in a way, less of the resources than was required of them when he was committed under the, in that case, the mental health regime.

I just draw your Honour's attention to that, I suppose, only to make the point that perhaps we do need to be considering what has been done in other cases and the possibility for other cases. Because the Commission, based on its view that the CRPD is really important, would really highlight and I – this is the point I was going to make a bit later but the CRPD, read as a whole, I think really rejects this idea of segregation, institutionalisation, and that's not just in this context but in all contexts, education, health, et cetera, and that is why you have, for example, that Article 19 right, a stand-alone right to be able to live in the community independently.

There's a, if I just look at my notes, Article 3(c) of the CRPD records as a general principle animating the entire Convention, "full and effective participation and inclusion in society" and the Commission's submission is simply that that is useful as it shows that as disability rights thinking has advanced and the context here, of course, is the historic treatment of disabled persons, which was to isolate and segregate, and that is why, as your Honours I think noted in the *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69 judgment, the CRPD model represented a radical shift in disability rights thinking, rejecting that paternalistic best interests model of substitution decision-making towards supports, providing adequate supports to allow people, disabled people, to live their best lives and I just wanted to draw your attention to that. That this is a theme that is applicable across the CRPD about the benefits of inclusion and, I suppose, on the flip side, the disadvantage perpetuated by segregation of disabled people away from their whānau, away from their community supports.

WINKELMANN CJ:

Can I just ask a question.

MS HARADASA:

Yes.

WINKELMANN CJ:

About your seven points, or six, are you going to come to the significance of the detention period? Because you eschewed the point that it's a, you know, you shouldn't go past the statutory sentencing release date, but presumably – but I had discussed with Mr Butler or Mr Edgeler the notion that's – that release date was very significant and perhaps you should, well, it must be able to be extended if it is necessary for rehabilitation or to allow transition. So I'm just wondering if you're returning to that?

MS HARADASA:

Yes, I'll return to that point, your Honour.

WINKELMANN CJ:

Right. I didn't want to take you out of your order, Ms Haradasa.

ELLEN FRANCE J:

And – oh, sorry.

KÓS J:

Sorry, after you.

ELLEN FRANCE J:

I was just going to ask, in terms of the focus on discrimination, I suppose one reason for looking at it instead, well, giving perhaps more weight in this context to arbitrary detention, is that might provide a better way in which guidance can be provided, for example, as to how section 85 should be applied in a particular case, or do you see the means, if you like, of discrimination giving you that, the same ability?

1450

MS HARADASA:

I think I would accept your point and certainly we do see the arbitrary detention right as very important and are happy to adopt our friends for the IHC's written submissions on that and I think more broadly, and this is a point the Commission has made in other interventions before this Court, recent interventions and I'm thinking here about *Chisnall*, is that perhaps that prescribed by law standard in section 5 – and I'm a bit conscious here, we're in a bit of a difficult situation because this has not been brought as a, you know, full on declaration of inconsistency case.

ELLEN FRANCE J:

Yes.

MS HARADASA:

But at the same time, the Commission, like the IHC, does not want to comment or stray too far into the specific disposition of J's case, so I'm trying to walk a line there to effect, but it is deeply regrettable, from the Commission's perspective, that such a potentially coercive power in section 85 has been drafted, I suppose, so open-endedly, and his Honour Justice Kós referred to a "blank cheque". Because the prescribed by law standard, as least as we see it and we submitted to this Court in *Chisnall*, is under-theorised to an extent, because the focus is generally on demonstrable justification but is – it has a legality requirement and we cited various English cases for that and we see that as sort of compatibility with the rule of law and I think the American jurisprudence void for vagueness doctrine, so we certainly accept that the Court of Appeal in *VM* has, I think as Dr Ellis said, made a noble attempt towards trying to clarify that and we would say that this Court should provide as much concrete guidance as possible because these decisions are being made every – maybe not every day – but often in the lower courts who would much appreciate that guidance, and we would say as much certainty that you can provide would be relevant and I think, in particular, we see the arbitrary detention right as not only applying after something has happened but prophylactic, in a way, and that's a – that comes from *Butler v Butler* because persons detained should have meaningful standards by which they can assess

whether their detention has been lawful without having to go through, I suppose, the whole court system, maybe all the way to the Supreme Court to get there.

WINKELMANN CJ:

So guard rails, or guide rails, would be helpful.

MS HARADASA:

Yes.

WINKELMANN CJ:

But you see, they're two different – they're addressing two different concerns, aren't they, the discrimination and the arbitrary, right?

MS HARADASA:

Yes, I will accept that.

WINKELMANN CJ:

So really then the HRC, they're running on the arbitrary?

MS HARADASA:

Yes.

KÓS J:

Presumably, Ms Haradasa, the Crown or the body seeking to extend the CCO under section 85 would have an obligation to come to the Family Court and present a range of options? I mean, for a start they're seeking extension of the CCO, so surely they should come with the CCO and say, these are the potential conditions that could be imposed and these are the ones which must be imposed, because if you only had these ones that's not going to be enough, and then in addition to that, they should be presenting to the Family Court options other than the CCO they're seeking and explain to the Family Court why it is that those alternative, less-restrictive options are inappropriate. Is that how the process works and is that what should happen?

MS HARADASA:

I would accept that that is what should happen. I am less familiar with how the process works, not sort of being involved in that area. But I would agree with that and I, perhaps if could add, in a way it might only be the State parties that are able to provide that information because it is them that know what resourcing is available –

KÓS J:

Absolutely.

MS HARADASA:

– what supports and what funding can be provided. So I would agree with that and that is clear throughout. Even *VM* says, at the end of the day, the CCO should only be imposed if it's the least restrictive option.

KÓS J:

Right, so that in each case, for instance, they should be coming along and saying: "This is why Mr J cannot go and stay with his mother in a somewhat more reinforced home."

MS HARADASA:

Yes, I would accept that.

KÓS J:

Yes.

MS HARADASA:

And I think if I could piggyback off Mr Butler's submissions of, I suppose, I think he said "the wrong starting point", if you had at the end of that term liberty as your animating factor, I suppose, you might think – and I'm not talking about technical, legal onuses and reverse presumptions, but that it's almost for the State to say, why/why not, yes.

WINKELMANN CJ:

So what you're saying is that when we look at arbitrariness, which is not the focus of your submissions, it would be good if Family Court had a set of guide rails as to how they avoid imposing an arbitrary detention?

MS HARADASA:

Yes, I think so, and not just for the Family Court, your Honour, but also for…

WINKELMANN CJ:

Clinicians.

MS HARADASA:

Welfare guardians and care recipients, so that they know, without having to go through the court process, which is lengthy and costly, they can have a fair sense of whether they have been treated in a manner compatible with their rights as this Court finds.

My second point which is to reiterate that in terms of unlawful discrimination and noting Dr Butler's point on this, the Commission endorses the three-stage test from *Atkinson* and in our written submissions we've attempted to step that out, and we don't propose to repeat what's in there, but I just thought if I spent some time on comparators. It will be apparent from our written submissions that the Commission considers it is permissible, as I understand my friend Mr Edgeler suggested, to identify different treatment by drawing multiple points of comparison with groups whose treatment is logically relevant to the claimant group, and that phrase "logically relevant" comes, I believe, from the *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512 decision and we do not think that a single or conclusive comparator is necessary, and your Honours will know that in our written submissions we draw points of comparison between intellectual disabled people who are charged with an offence, and non-disabled offenders who pose a similar risk of future offending, and as I understood it, that was, there was a bit of difficulty in the lower courts where they said it is really difficult to find a comparator in this case but if a comparison must be made then the comparison is non-disabled offenders who pose a similar risk to J, and I understand the parties also agree

that if a comparison must be made, that is the comparison to make, and we adopt that as well, and the point we make in our written submissions is that the threshold, the gateway into these risk-based preventive protective detention regimes, is much lower for intellectually disabled people, compared to non-disabled offenders because as in J's case a comparatively minor index offence has gone in within this gateway, within this scheme, whereas if one thinks about *Chisnall* with the ESOs, PPOs or even preventive detention, it is that much higher threshold where your index offending itself sort of aligns with the future risk of violent and sexual offending that those regimes are trying to protect the community from.

WINKELMANN CJ:

Once you frame it this broadly it gives society and those people who are charged with operating a system of – a big problem, doesn't it, because suddenly they're being told there's a significant risk, and they're being asked to release a person, and that's human nature not to do so, and it's a problem for decision-makers.

MS HARADASA:

Yes, 100%, and it's not lost on the Commission that these are verry difficult issues and actually all decision-makers, the medical professionals involved, everyone is trying their best, and they certainly, as your Honour the Chief Justice says, if there is this risk of imminent offending, which that's a higher standard than here, that's the standard from the PPO, it is difficult to make that decision. It might suggest perhaps a risk aversion of sorts because of that, because you're more, I suppose, worried of the false negatives rather than the false positives, and we appreciate all of that. Our point, however, I suppose is the Commission, and as the national advocate for human rights is that that can't undermine unjustifiably these really important liberty interests of

all people in New Zealand society including, on an equal basis, intellectually disabled persons who are charged with an offence. That point I made about –

WILLIAMS J:

Doesn't it take you, sorry, it's Williams J here, I know you can see me Ms Haradasa, but for those on the screen, just letting you know, Mr Ellis, that it's me. Does that mean this comes down to the burden on deciders to satisfy themselves and the outside world that they have explored every possibility proportionate with the extent of risk, and the longer the detention, the greater the burden to explore.

1500

MS HARADASA:

Yes, and just picking up on a point made by Justice Simon France in the High Court in *RIDCA*, or *VM* I think is what we're calling it, and then taken on in the Court of Appeal is as time passes there's an ongoing and increasing justification necessary because that liberty interest just expands and expands, and this is a case probably where it is high or close to as high as it can get.

WINKELMANN CJ:

So would that mean then on that analysis you would have to have – so isn't it enough that it's someone's perception of risk to detain someone for a long, long time, perhaps indefinitely, so clinicians see someone's ideation and fractious engagement with staff and decide this person's a high risk of serious offending and they can be detained forever or does there actually have to be, as Mr Edgeler and Mr Ellis submitted, a proven incident? I think it's "injurious" was a – *Ledress [sic]*, the American case that's referred to. It's not enough because risk is a notoriously difficult thing and if you're just doing it in a vacuum, drawing threads together from behaviours you see which are not serious offending, can that justify indefinite detention, because what I'm really asking you, I suppose, is are you saying there could be circumstances in which indefinite detention is justified under this regime and, if so, what are they, because you seemed to accept that from Justice Williams?

MS HARADASA:

If I could come back to that, your Honour, I don't want to put the Commission in a straitjacket without discussing with my colleague, if that's okay, but I will come back to it at the end.

WINKELMANN CJ:

Yes. So there were two questions really wrapped up in that which is very unhelpful to me. First is does the Commission say that indefinite detention could be justified on this basis if there was someone who was very high risk and, secondly, what kind of evidence do you need of high risk? Is it the *Ledress [sic]*, I think it's the name of the case, *Ledress [sic]* standard, where you actually have a proximate serious incident, serious offence, or is it enough just to have the sort of low procedurally assessed risk perception?

KÓS J:

I mean it also – Justice Williams and I have asked very similar questions in terms of the range of options that should be tested at hearing on an extension of the section 85. It's possible that another aspect that might be required is that the State provide, as it were, counter evidence or black hat evidence. In other words, it must fund an analysis as to the options from a more liberty-focused perspective as opposed to perhaps a retentive focus. What do you think of that?

MS HARADASA:

Yes, I think I'd accept that based on our previous exchange, noting again that it is really the Crown that is able to have the information, in those circumstances.

WINKELMANN CJ:

I'll tell you what I think is the answer to the first question.

MS HARADASA:

Please.

WILLIAMS J:

That's your first question.

WINKELMANN CJ:

My question. Just judging from what Mr Edgeler has said and what you've said, I think the position is perhaps it could justify it but you'd need to have properly procedurally assessed evidence of a serious incident that really makes out a strong case for that risk, not just these low evidence basis risk assessments, and I think *Ledress [sic]* talks about it. Is it *Ledress [sic]*? I keep on saying that name but…

MR EDGELER:

Lessard. *Lessard v Schmidt*?

WINKELMANN CJ:

Yes, *Lessard*, thank you. I knew it had a lot of esses in it and an L. So I thought that might be – and that would – if you had something like that it might bring it more into keeping with the ESO and PPO regimes, but of course there's an alternative answer which is no, it never could really.

MS HARADASA:

Yes, your Honour, and I am grateful for your help. On comparators, just one point I wanted to add and that was I was re-reading his Honour, Justice Simon France's decision, in *VM* and although his Honour did not undertake a formal discrimination analysis he offered, I think, some quite useful comments on other points of comparison that can be made, and the relevant part of the discussion begins at paragraph 72 although I don't think the High Court judgment is in the bundle so we could certainly provide that if that would be helpful.

WILLIAMS J:

Yes, please.

WINKELMANN CJ:

Yes, thank you.

MS HARADASA:

And his Honour talked about because in that case the nature of index offending – sorry, if I start back. If we think about non-disabled persons who are convicted, his Honour said that it would either be the finite sentences or indefinite sentences, thinking about really there's – he was talking about life imprisonment, this was before the PPO regime, and I think he mentioned that the extended supervision order was new and comparatively rare at that time in 2009. But because nobody had suggested that the type of index offending that *VM* had committed would have qualified *VM* to an indefinite sentence, Justice Simon France said that a valid comparison can be made with non-disabled defendants who receive a finite sentence but still pose an ongoing risk, and the point his Honour made was that if at the end of your finite sentence you still continue to pose that risk, that ongoing risk, you still must be released. You have to be released when you reach your full term even if that risk continues to exist and Justice France at paragraph 77 and 78 says that's because: "As a society we –

WINKELMANN CJ:

Lessard.

MS HARADASA:

"As a society we regularly release into the community offenders who pose a known on-going risk. We do so because there is no power to do otherwise ... we do not detain, and indeed cannot detain, indefinitely a dangerous offender who is subject to a finite sentence ...".

WINKELMANN CJ:

So that suggests something like the first model I gave you, doesn't it, which is that if a person was at the level, very high, high level which justifies preventative detention, ESO or PPO, then it might justify a longer detention but the index offence is critical?

MS HARADASA:

Yes and I think the, I suppose, the resistance we have to and although we are drawing a point of comparison with the ESO, PPO, is we think it is significant that you can only get into that regime if you have committed a qualifying offence or relevant offence, it is defined differently in the different Acts, of a serious sexual or violent nature and that, we say, is a long way away from the threshold for intellectually disabled people to get into a (inaudible 15:07:06) regime which it can be any imprisonable offence. Here, the offence was under the Summary Proceedings Act 1957, I believe.

WINKELMANN CJ:

And the question would be whether the Court, would be legitimate for the Court to read in that kind of high threshold to justify longer detention than the index offence.

MS HARADASA:

Yes, your Honour.

KÓS J:

Why are we focused on the index offence, what about clearly proven serious offending during the course of the care regime?

MS HARADASA:

We, for us we see the index offending as continuing to play a role, notwithstanding our friend for the Crown's comments that, and I'm just paraphrasing here, but I think as your Honour said, it's spent, in effect, it's – it was just the gateway and there's no ongoing link. But I think for us we say, well, there must be because that fact of index offending is the only reason the State is able to exercise these coercive powers over persons like J. Because as my friend Mr Edgeler said for the appellants, originally the IDCCRA Bill, as Professor Brookbanks discusses in that 2003 article which is also cited by the Court of Appeal in *RIDCA*, it was going to capture non-offenders and offenders and there was, as I understand it, significant – I was only five in 2003, so I don't, I wasn't there, I just thought I'd put that on the record –

WINKELMANN CJ:

But you weren't reading that material.

MS HARADASA:

I was five going on 50, I think, but not, still not reading that material. But there was pushback because of the public thought that was going too far, to allow non-offenders, people who haven't been – come within that criminal system and I suppose although it's not going as far, if we sort of ignore, I suppose, the index offending we would say we might be getting closer to that sort of regime.

I just thought it might be useful to just briefly touch on the case of *R v Elliot* [1981] 1 NZLR 295, which is discussed by the Court of Appeal in *RIDCA* at paragraph 65 and obviously that was under a different regime but just simply to make the point that his Honour Justice Richardson for the Court of Appeal made the point there that even though the special patient regime in that case under the Mental Health Act provided a "benevolent alternative" and I'm quoting from Justice Richardson here: "a 'benevolent alternative to a custodial sentence in a penal institution' ... to invoke it without regard to the gravity of the offending is to overlook that the subject is before the Court only because he has committed an offence. Reasonable proportionality between the offending and the severe curtailment of liberty inherent in an order for detention as a committed patient must not be lost. If that proportionality is not present and involuntary committal is thought necessary, the authorities should invoke the procedures under the Mental Health Act in the ordinary way." And as we have discussed this morning, that involuntary committal for non-offenders is not available for intellectually disabled persons.

1510

WILLIAMS J:

There's a certain unreality about this discussion really because, with respect, the 16 or 20-odd events that occurred early on in J's care would, without doubt, have been replicated in some form in prison, in fact probably worse, and there would have been an ongoing cycle of offending and re-offending and re-offending, and we do, we are aware of prisoners being stuck in this cycle.

Sometimes they take years to get out, and it seems to me unrealistic to suggest that that would not have been the fate of J left to his own devices in the much harsher context of a prison if he'd gone to jail, which he probably wouldn't have, to be fair. So I think we have to be realistic about what we're trying to achieve here and what we're comparing ourselves to, I suggest.

MS HARADASA:

Yes, your Honour, I'd accept that and, as the Court of Appeal says, with the comparator analysis it can get quite hypothetical or lose an air of reality, I think, the point is made. I'm hesitant to get into the facts of J's offending, as the Commission, but…

WILLIAMS J:

Yes. It does seem to me the fact of the matter is you've got an intellectual disability compulsory care regime. That's a bit of a warning bell you would have thought, wouldn't you, because it's not just people with intellectual disabilities that represent these kinds of risks to the community as we know. So on its face it is discriminatory. The question is really whether it is justified, and that's not a straightforward question.

MS HARADASA:

No, it is not a straightforward question and I suppose the Commission would say that when the Court is assessing that justification there are a couple of points that it should, I suppose, keep in mind or test with the State actor offering that justification. One is, with respect, there seems to be a lack of certainty as to the objective of the detention and it might be, and as you say, it might not just be black and white. It may be too simplistic to say, oh, it's prevention or it's treatment. It could be both or it could be – but I think we do need some clarity around that because that is the basis on which, in my submission, the Court can assess whether that objective –

WILLIAMS J:

Is being achieved.

MS HARADASA:

Is being achieved, and if I could just draw your Honour's attention to the end of footnote 21 of my written submissions, and it's a very long footnote. It looks a bit like an American academic article, I think, and it's right at the end so it's on page 4. It's just making that point but in a much more elegant way from the UN Human Rights Committee where they say: "States parties must offer to institutionalised persons programmes of treatment and rehabilitation that serve the purposes that are asserted to justify the detention," and I suppose from the Commission's perspective we would resist a label, I suppose, that this is rehabilitative or focused if in fact it is not and we need to interrogate that sort of true nature of the detention, and if that rehabilitative purpose, I think we say, has lost its primacy then there are other difficult questions, is whether is it okay for us to continue to detain people purely for preventative reasons and perhaps in that context the closer it gets to punishment or having elements of finality we would suggest that factors such as proportionality might have greater weight, and I think that's probably as high as I could put it.

WINKELMANN CJ:

Are you still on point 2 or have you moved onto another one?

MS HARADASA:

I've lost my points a bit, your Honour, but…

WINKELMANN CJ:

You're referring just to footnote 21 to make the point that if you're going to assert as a justification for this thing being proportionate that you're giving treatment and rehabilitation but you cease really to do that then the justification tends to disappear?

MS HARADASA:

Yes, your Honour.

WINKELMANN CJ:

Was that one of your points?

MS HARADASA:

Yes, yes. It was going to come up a bit later but I will make it now. If I move on then finally to the third point and that's just about the material disadvantage stage of the analysis, and just to briefly make the point that the Commission would resist the suggestion that there is no material disadvantage because the parallel CCO regime is more advantageous to disabled persons than the criminal justice system and, your Honours, there has already been discussion this morning and through to the afternoon with my friends for the appellant and IHC about material that shows the very real negative impacts that being in isolation, being excluded, being in detention can have on mental health and psychological well-being and we have also cited in footnote 27, which I think Dr Ellis took your Honours to earlier this morning, statements to that effect from the Special Rapporteur on the right to mental and physical health.

We would just want to add, your Honours, that the Commission is concerned that a belief, I suppose, that disability-based attention is benevolent and well-intentioned, and it may well be well-intentioned, will nevertheless make invisible the profound disadvantages that we have just discussed of isolation, segregation and detention and that is a concern shared by the *Special Rapporteur on the Rights of Persons with Disabilities* which is in our authorities at tab 43.

WINKELMANN CJ:

Tab?

MS HARADASA:

Tab 43, and in particular looking at around paragraph 24.

KÓS J:

I mean, that really does depend on that comparison, the life the person will be living if not detained. In some situations, it's not – may not be a therapeutic environment, but it may still be the better environment. You have to compare with what it is that the person will be doing if they were not detained, I think.

WILLIAMS J:

Well –

MS HARADASA:

Yes, I agree and I would say that counterfactual, I think, would have had to – there's obligations in terms of making that counterfactual a pretty – a better one than just, you are out in the community by yourself.

WINKELMANN CJ:

So don't, you don't – do you agree, or don't – isn't the counterfactual, isn't it whether they're being cared for? Because, I mean, what would they be doing if they weren't being detained? Isn't the question what would they being if they weren't cared for? Why is the – why does it have to be detention? I suppose I'm just challenging the notion that if unless a – that a person has to be detained to be cared for?

WILLIAMS J:

Well, would they be cared for and safe.

KÓS J:

Yes.

WILLIAMS J:

I think is probably the fair...

WINKELMANN CJ:

Safe is important, is the only counterfactual thing there, if they're going to be unsafe if not detained.

MS HARADASA:

Yes, yes. I'm sorry if I've confused matters, but I think as we see it, it's not an either/or detention or just out on your own, there is – "middle ground" might not be the best way to put it, but there has to be a potentially better way to help these people. If you take the CRPD rights at its highest, to provide the supports,

the accommodations that the State is obliged to, to allow people with disabilities to – because these people also have legitimate aspirations as human beings – to allow them to, I suppose, live their best lives and maybe that's why it was I wanted to make that point about the RNZ article that referred to people who have had very – had been assessed of very serious or dangerousness but have managed to make that transition, and I don't know the specifics of it so I wouldn't want to put it too highly, but it perhaps suggests it is possible.

WILLIAMS J:

House by the sea or bach by the sea?

MS HARADASA:

Cottage by the sea. Oh, it might be a river, sorry, I should – cottage by a river.

WINKELMANN CJ:

Something.

MS HARADASA:

Something, definitely a cottage.

WINKELMANN CJ:

But anyway, it's not evidence, I don't think. Right, so where are you at, Ms Haradasa?

MS HARADASA:

Just to tie off that point, if I may, is to say is that if we are comparing the so-called benefits to people like J of not being in the criminal justice system, the Commission is concerned that might be an overbroad lens, because, for the reasons already discussed, some core protections and safeguards that are inherent in the criminal justice system like the beyond reasonable doubt standard of proof are not applicable and that I think is quite significant and the Court of Appeal has some very strong passages on that where they do say that is highly – they don't have to make a finding, I understand, on the pleadings but they do say that does materially disadvantage intellectually disabled people.

1520

Finally, I just wanted to make some points on the *RIDCA/VM* test, and just as a starting point, your Honours, the Commission, as part of its role where it's part of the independent monitoring mechanism alongside the Ombudsman and another entity under the CRPD, has stated that the IDCCRA is not consistent with the CRPD, so that's a position the Commission has taken in that –

WINKELMANN CJ:
So what has it stated?

MS HARADASA:
That the IDCCRA is not consistent with the CRPD. It's too many –

WINKELMANN CJ:
You're overloading my tiny mind with acronyms. So wasn't it – the Act – that the Act is not?

MS HARADASA:
The Act is not consistent with the Convention on the Rights of Persons with Disabilities. My apologies.

WINKELMANN CJ:
I have this thing in my mind that when someone starts speaking in acronyms my brain shuts down.

MS HARADASA:
Understood.

WINKELMANN CJ:
And this is not a good –

MILLER J:
So where has the Commission said that?

MS HARADASA:

It's in a report by the Independent Monitoring Mechanism from June 2020 and I will provide your Honours with a copy of that because it's not in our authorities.

WILLIAMS J:

This is the Monitoring Mechanism for CRPD?

MS HARADASA:

Yes, and it's made up of the Commission, the Ombudsman and the Coalition of Persons with Disabilities. I just offer that starting point because given the Act remains on the statute books I suppose the Commission's position then would be that it must be applied in the BORA consistent manner permissible and it's in that context –

WINKELMANN CJ:

Well, that would be required in any case, wouldn't it?

MS HARADASA:

Yes, yes. It's in that context that we wish to offer some brief remarks on *VM*, and I would just like to adopt the written submissions of our friends for IHC at paragraph 17 of their written submissions about the material omissions in the *VM* analysis. My friend for the appellant, Dr Ellis, said that while *VM*, and hopefully we have quoted him correctly, that while *VM* looked liberal at the time times have changed and the law must evolve, and on this point I just want to draw your Honours' attention to paragraph (e) of the preamble of the Convention which recognises that "disability is an evolving concept" and, as we've just discussed, the CRPD in itself represented quite a radical shift in disability rights thinking to the social model of disability which sees impairments and it's society and the environment that disables persons with impairment.

Just reinforcing Mr Butler's submission, and as the Commission has submitted before to this Court as a matter of BORA interpretation and methodology, we consider that all legislation in New Zealand, whether enacted before or after the Bill of Rights, has a compound purpose, so it's the specific purposes of the

legislative provision but also the purposes of the New Zealand Bill of Rights Act, and we take as authority for that your Honour the Chief Justice's judgment at 49 of *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 but also Justice Blanchard's decision in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at paragraph 61, and I think it is fair to say that the Court of Appeal in *VM* largely focused on the Act's purposes in sections 3 and 11 without reference really to the Bill of Rights purposes of affirming, protecting and promoting, to quote paragraph (a) of the long title, fundamental rights and freedoms in New Zealand which clearly protect these values of liberty and dignity, and drawing on *Fitzgerald* the Commission would suggest that perhaps the Court of Appeal was not as proactive as it needed to be in its search for rights consistent interpretation. Relatedly, the Court did not engage with the CRPD and it was in effect at the time of the Court's decision but just so, I believe it was ratified in 2008 and the Court's decision is sort of 2009/2010.

MILLER J:

Do you make the same criticism of the Court of Appeal's decision in this case?

MS HARADASA:

Yes, I would have to do a word search to confirm that they don't refer to it but they might briefly, yes, and Ms Laurenson says they do, but I don't see it as, I suppose, materially animating the analysis, I would say, your Honour, thank you, and the reason we think that is potentially significant is that the basic position under the Convention is to reject parallel disability-based forms of deprivation of liberty. So for example, your Honours, Article 14(1)(b) of the Convention states that: "... the existence of a disability shall in no case justify a deprivation of liberty."

Now, there is some disagreement at international law and between different international mechanisms about the parameters of that and we have discussed that in our written submissions, I believe, again at footnote 21. But I think the point I just want to make here is that if the Court of Appeal in *VM* undertook that proactive search for a rights consistent meaning in the light of pertinent

international obligations under the CRPD, it may have had a different starting point, because –

WINKELMANN CJ:

Can I just ask you, what Article is that in the Convention?

MS HARADASA:

14(1)(b), 14 paragraph (1), subparagraph (b).

WINKELMANN CJ:

Yes, thank you.

MS HARADASA:

And the CRPD is in tab 35 of the Commission's authorities.

WINKELMANN CJ:

So if that's the case, if you apply that in this context, then the only justification for the deprivation of liberty is not the disability but the triggering event – triggering offence?

MS HARADASA:

Yes and as I say, your Honour, we, because of the sort of uncertainty, I suppose, or potential divergence at international law, we just want to be a bit cautious about that. But the point I just want to make here is that given that position rejection by the CRPD of disability-based attention, if the Court of Appeal, in my submission, had that I suppose at the forefront of their minds, they may well have suggested that liberty interests must receive greater weighting than it does on the *VM* approach. So it would have perhaps had more material influence on that analysis, and I think perhaps the issues with the *VM* balancing approach are seen in the fact that its application is leading to situations that may not have been contemplated by the CCO regime. Originally my notes said that were not contemplated but I had to edit that a bit after Dr Butler's reference to the…

WINKELMANN CJ:

Select committee report.

MS HARADASA:

Select committee report, although I take his point there that it can be – it's a bit ambiguous and can be read quite narrowly to focus on repeat child sex offenders. Because the point I had wanted to make was that, in effect, an application of *VM* in this case has led to lengthy and potentially indefinite detention because there is a real – there is no real suggestion that the required amount of rehabilitation will happen within a reasonable amount of time, and we see that as potentially problematic because, for example, as this Court said in *M*, that's *M (SC 82/2020) v Attorney-General* [2021] NZSC 118, [2021] 1 NZLR 770 "... neither the CPMIP Act nor the IDCCR Act contemplate indefinite detention for persons required to submit to compulsory care."

Similarly in the High Court in *VM*, his Honour Justice Simon France said: "It would be surprising if a relatively minor offence justified indefinite State control, when but for that comparatively minor offence there would be no capacity at all to force care on VM." And he later said: "... s 85 was not designed to allow for indefinite detention of someone like VM."

And the point I just want to make there, your Honours, is if the application of this approach, because that is the *VM* approach that has been applied in this case, is leading to situations that were not perhaps contemplated by the Act, that may suggest there is a problem with it. But ultimately, if a balancing-like test is endorsed by this Court, I suppose to put it simply, the Commission's position would be that the scales need to tip faster, much faster and firmer, towards the protection and promotion of liberty, not just in these finely balanced cases, and I take Dr Butler's point that the reasons for those more confined comments in the Court of Appeal, I think, was a product of how the case was argued where the Attorney was making submissions about, as I read it, perhaps the complete irrelevance of certain factors and the Court was saying: "Oh, no, that can be relevant, but qualified in finely balanced cases."

WINKELMANN CJ:

Yes, so you were going to – are those all your points?

1530

MS HARADASA:

Those are all my points. If I could just quickly discuss with my friend on the questions your Honour had for me.

WINKELMANN CJ:

It might be you want to come back to us later because it is quite an important thing for us when we're deciding – we're not dealing with someone, in the case of J, we're not dealing with someone who's as, for instance, the example you just cited, someone who's a repeat serial sexual offender against children, for instance, and we don't have to deal with that here, but we want to make sure the principles that are enunciated are not wrong in all contexts, so…

MS HARADASA:

Yes, I understand, and if I was able to come back to your Honours first thing tomorrow morning I'd be obliged.

WINKELMANN CJ:

I think that would be good.

MS HARADASA:

Sorry, Justice Kós, I just had one very small point and that was going to earlier in the day you queried the focus on treatment as opposed to rehabilitation and we've just looked into that because rehabilitation is not defined in the Act which may be somewhat surprising given, I suppose, its centrality to it. On our reading of the scheme what is contemplated is that rehabilitation is a sort of holistic, I guess, umbrella term encompassing whatever it is that a care recipient needs to be supported and I refer in particular to section 25 of the Act which refers not only to the social, cultural, and spiritual needs of the care recipient but also to the medical treatment and –

KÓS J:

Yes, I mentioned that provision. Treatment is only referred to about three times in the Act. It's unusual.

MS HARADASA:

Yes.

KÓS J:

So care and rehabilitation do a lot of work.

MS HARADASA:

Yes, and rehabilitation of course came in at the end so we're sort of left with a difficult to understand statute without much pertinent legislative history, I suppose.

WINKELMANN CJ:

I mean, not overemphasising, treatment might be consistent with the Convention though, mightn't it, which I think has concerns about the medicalisation of disability?

MS HARADASA:

Yes, I think so, and if I could, as my final point, just draw your attention to Article 26 of this Convention because that relates to the right to appropriate habilitation and rehabilitation and they use those words not interchangeably and my understanding is that the former refers to a process aimed at helping people gain new skills, abilities and knowledge whereas "rehabilitation" refers to sort of regaining those skills and knowledge that may have been lost or compromised by disability, and the Court of Appeal in *VM* at 73, 74, makes that same point because they say "rehabilitation" is not defined so they look at the Oxford Dictionary definition and they say that rehabilitation in the perhaps traditional sense of restoring a person to normal health or activity is inapt because a "cure" is not available for intellectual disability compared to perhaps more temporary mental health issues, but intellectual disabled people can be taught skills and tools to manage their difficulties and reduce their risk.

WILLIAMS J:

That must be why the mental health legislation uses the term "treatment" in its title and the IDCCR uses the term "care".

MS HARADASA:

Yes, I believe so, your Honour. Unless your Honours had any further questions, those are the submissions for the Commission.

WINKELMANN CJ:

Thank you, Ms Haradasa. Ms Laurenson.

MS LAURENSON:

Thank you, your Honours. I just wanted to say at the outset that of course this is a very sad case and it's a very difficult one for J and his whānau. The Crown acknowledges that the impact on J's rights have been very significant but it says that in the particular circumstances of the case they are justified. The Crown doesn't shy away from the fact that J has been detained for a very lengthy period, nor from the fact that the behaviour that initially brought him to the attention of police would not attract a lengthy sentence if it had proceeded through the criminal justice system to a trial. The Crown says though that that is what the legislation requires in a small number of cases, including this one, to protect the community and to protect J and to offer him care and treatment.

My friend, Mr McKillop, and I are going to divide up the argument so that I am going to address arbitrary detention, mostly in the context of *VM*, and he's going to make the discrimination arguments, and, as you will have seen, the submissions on arbitrary detention and *VM* largely endorse the approach taken by the Court of Appeal and applied by the Court of Appeal in this case.

Logically speaking, I suspect the first thing to address, and I – hopefully, almost no time at all, is the re-call application. You'll have seen the Crown's argument on that and given the acknowledgement by everybody I think that the fact of the section 102 inquiry conducted by her Honour Justice Cull means that there is jurisdiction for this Court to consider the issues that it indicated and it's granted

leave it wanted to look at. I am not proposing to really go through the arguments on the re-call application.

We set out in our written submissions a case called – oddly, J – *J (SC 93/2016) v Accident Compensation Corporation* [2017] NZSC 3 which the Crown says is an answer, a similar case, involving a jurisdictional bar and which the Crown says is an answer this Court might find that of assistance, but I am not proposing to go through that unless that would be useful.

ELLEN FRANCE J:

For myself, I'm not entirely convinced about the use of the transfer power and the effect of that in this case, given the particular wording of 133 and 134, but on the other hand it does seem, I mean, there is a base – there is jurisdiction for us, essentially, to deal with the issues that need to be addressed, so...

MS LAURENSON:

Yes, as you might imagine, having not drawn that provision to the Court's attention at the outset, we did spend quite a lot of time turning it over to see if there was a way of interpreting it so that there was no problem. But we took the view, in the end, that the reference to "an appeal" rather than a first appeal or a second appeal meant that that, that that'd have to be the outcome, but happily it doesn't, we don't think it makes any difference.

WINKELMANN CJ:

Right, well, we've got your written submissions.

MS LAURENSON:

Thank you. The other thing which is outstanding in a similarly procedural way is the status of the 2023 Family Court material. So the Court has that in the case on appeal. The parties are happy for the Court to have it but it obviously wasn't material that was before the Court of Appeal which only looked at the 2020 Family Court material and when we filed it, the Court indicated that it would reserve its position on admissibility and see where we got to today. So I am just –

WINKELMANN CJ:

Well, did you want, I mean, do you need an indication of that, or?

MS LAURENSON:

Well, I am just proposing to refer to it sort of willy-nilly.

WINKELMANN CJ:

Yes.

MS LAURENSON:

And if the Court doesn't want me to do that, now would be the time to say.

WINKELMANN CJ:

Oh, I'm sure it won't be willy-nilly, Ms Laurenson. Perhaps if you just make clear when you're referring to 2023 material, since we haven't made a determination.

MS LAURENSON:

Yes, I do think it does seem a bit odd to not, given that the matter has been back before the Family Court, it seems a bit unreal to not take into account the present position of J and that's why I've looked at it. But equally, there is a lot of material before that we can look at also. There is no shortage of material in this case.

The other thing which I could do at the outset and perhaps could do very briefly is just to consider the statuses of the three Acts that we have looked at today and how they fit together. Most of that is not relevant to J, so I am reluctant to spend a lot of time on it, but –

WINKELMANN CJ:

Well, it would be of assistance.

MS LAURENSON:

Would it? Well, then, Ma'am –

WINKELMANN CJ:

Does the A3 help us with that? Or is that beyond you?

MS LAURENSON:

Well, it's not my A3, so I'm –

WINKELMANN CJ:

Because it looks like it might be beyond most people.

MS LAURENSON:

I'm a bit reluctant to take any responsibility for it, but...

WINKELMANN CJ:

Okay. Well, it's a formidable piece of work.

MS LAURENSON:

Yes.

WINKELMANN CJ:

I don't know if Ms Qiu is responsible for it, but it's impressive.

MS LAURENSON:

No, I certainly congratulate whoever did it, but it wasn't me. So – excellent, it was Ms Daysh, apparently, from the Ministry for Disabled People Whaikaha, so I probably should endorse it.

So I – we've heard a lot about the three pieces of legislation. J obviously came into the criminal system via the Criminal Procedure (Mentally Impaired Persons) Act and he was found unfit to stand trial by reason of his intellectual disability and he then – that became the trigger for him to become a care recipient. He was never a special care recipient because the half-life, if I might use that term, of the offence for which he was initially charged was over by the time – we've heard a lot about the three months and the six weeks – it was

already over by the time the Court was considering what to do with him. So he went straight to become a care recipient.

Other people who had been charged with something more serious might spend a long time as special care recipients, meaning that if they became fit again they could still go back and stand trial and so they are still governed, in part, by the CP(MIP).

1540

There is no access point, we have heard today, for people to come into the intellectual disability compulsory treatment regime if they, if they just are concerning – causing people concern in the community. So if someone's, like the Court will probably be aware, if someone is mentally unwell in the community and causing, you know, family members or doctors or whatever some concern, then an application can be made for them to be compulsorily detained and that's under the Mental Health (Compulsory Assessment and Treatment) Act and it was initially intended when the IDCCR was drafted that there would be a civil entry point there, too, without ever having to commit an offence but that came out of the bill.

So there is just not that entry point and then just to sort of complete the picture that meant before the existence of the IDCCR that some people who were intellectually disabled became shoehorned into treatment pathways that were really designed for people with mental illness. That obviously wasn't very satisfactory for them and this regime gives them their own regime and access to treatment which is more appropriately designed for people with intellectual disability and then this is, of course, not J, but people who are mentally unwell who come before the Courts might also be found to be unfit to stand trial. They become special patients and then after the half-life of any offence that they were found unfit to stand trial for, they become patients if there is a need for ongoing detention. So that's a bit of a whistle stop.

WINKELMANN CJ:

Is it half-life or statutory release date? Half-life? It's half-life.

MS LAURENSON:

It's the half – well, it's not the statutory release date.

WINKELMANN CJ:

No.

MS LAURENSON:

Because an actual sentence is never assessed for them, so it's just half of the maximum.

WINKELMANN CJ:

No, so it's half-life.

MS LAURENSON:

“Half-life” is probably not a very good term for it, but –

WINKELMANN CJ:

Half of the maximum?

MS LAURENSON:

It’s half of the maximum, because we never get, we never get to the point where we say –

WILLIAMS J:

This is your sentence.

MS LAURENSON:

This is your sentence of six years and three months, and so, yes.

KÓS J:

And so was J made a care recipient under section 25(1)(b) of the CP(MIP) Act?

MS LAURENSON:

25(2), 25(2)(b).

KÓS J:

(2)(b), thank you – 25, no, there's no 25(2)(b) – 25(1)(b)?

MS LAURENSON:

I'll just bring that up, (1)(b), sorry, yes, (1)(b), your Honour.

KÓS J:

Okay, well, then would that not mean this just goes back to a point that was traversed before, under the Intellectual Disability Act section 6(3)(b), wouldn't he therefore be a care recipient no longer subject to the criminal justice system?

MS LAURENSON:

Yes.

KÓS J:

Yes. So he is, in fact, that person, such a person?

MS LAURENSON:

Yes.

KÓS J:

Yes.

MS LAURENSON:

Yes, that's right, and so –

WINKELMANN CJ:

And you've called him an "ordinary patient" but it's the special care recipient?

MS LAURENSON:

So he's a care recipient, "special patients" are people –

WINKELMANN CJ:

Yes, care recipient, he's a care recipient not a special care, not a special patient?

MS LAURENSON:

That's right, yes.

KÓS J:

Yes, but he's also a care recipient no longer subject to the criminal justice system as defined in the 98?

MS LAURENSON:

Yes.

KÓS J:

Yes.

MS LAURENSON:

Yes, and I think my friends have been at some point slightly critical of the Crown for what they might see as a form over substance approach, but we do say there is something in the fact that he is expressly no longer subject to the criminal justice system, this isn't a penal regime, he's not – there's no prospect where suddenly these charges get re-enlivened and he stands trial, but they're spent. I don't know if that helps me or not but that's the –

WINKELMANN CJ:

Well, what's, what is it, what is "there's something in it"? What's the "something" in that in terms of arbitrariness, or detention, or penal, or what's the "something" in that? You say there's "something" in it, what is it?

MS LAURENSON:

We say, we say that the "something", the "something" proves that this isn't, this – doesn't prove – it goes to show that this is not intended to be a punitive or a criminal system. He's outside the criminal system now and, I mean, maybe in some ways that doesn't, that doesn't help me, but I – but certainly I don't shy away from the fact that we are now in a civil detention situation. These orders are made by the Family Court, they are not, any more, about his guilt or innocence or anything of that nature.

ELLEN FRANCE J:

So do you, what section do you say, by which part of section 7(3) is he no longer subject to the criminal justice system?

MS LAURENSON:

So that's what – because he was never – so he would remain – if he had become a special care recipient he would remain subject to the criminal justice system for the time that he was a special care recipient.

ELLEN FRANCE J:

No, no, I understand that.

MS LAURENSON:

I'm sorry, I misunderstood your Honour.

ELLEN FRANCE J:

But if you look at section 7(3) – isn't that where we already are?

KÓS J:

At 6(3).

ELLEN FRANCE J:

Sorry, I was looking at the wrong – 6(3). What does he come under?

MS LAURENSON:

He's – (3)(b), your Honour. So he was – an order was made under section 25(1)(b) in respect of him and that brings him under section 6(3)(b) of this Act. I'm not sure if I've helped or made things worse, but that's –

WINKELMANN CJ:

No, it's –

ELLEN FRANCE J:

Well, it was just – I mean I understood Mr Edgeler's submission was that he didn't come within that definition, I thought, but if I got that –

MR EDGELER:

If I did say that, I didn't mean to.

ELLEN FRANCE J:

That's fine.

KÓS J:

Yes, that's what I'd taken.

MR EDGELER:

I'm not sure if I did.

MS LAURENSON:

Excellent. So what I'm proposing to do now is draw some points out from the facts and I'm reluctant to spend too much time on that but I do think there is some things that could be gained from it, and the first point to note is that J is currently detained in the Pohutukawa Unit. That's been referred to – I think my friend, Dr Ellis, said he's in the Mason Clinic, and that's true but I just wanted to be clear that the Pōhutukawa Unit is a specialist intellectual disability facility in the Mason Clinic grounds, so it's a facility which is established for people like J, and he occupies what they call a cluster in the material, a cluster of rooms for himself.

WINKELMANN CJ:

When you say "like J" what do you mean by "like J"?

MS LAURENSON:

People with intellectual disability rather than mental illness who need to receive secure care, hospital level care, and he occupies what's referred to as a cluster. So it could house another person also, that space, but it doesn't because that's too difficult to manage, so there's just J in the space which is two bedrooms and a sort of little living area, and that's where he lives and where he receives his care.

Unlike most people with an intellectual disability, the specialist assessors have assessed J as posing a high, or a very high, risk of harm to other people. My friends from the interveners have noted that that's not the case for most people with intellectual disability and there's no disagreement with that. The assessment that's been made is that J's is an unusual and challenging presentation.

Although, and we've talked about this this morning, although intellectual disability is not cured in the sense that we might think of for something like mental illness where someone might receive treatment that makes a marked and significant difference to them and we might say that they're no longer unwell, that's not likely to be the case for most people with intellectual disability, and the Court in *VM* made that point. They said intellectual disability's not about a cure but it's about learning skills and tools for safety.

J's presentation though hasn't been entirely static. He did improve for a time and the Court will have seen that before he lived in the Pōhutukawa Unit he was living in a different facility in Māngere, Te Roopu Taurima, where he had more access to the community and a wider range of activities, but that his presentation worsened for a time there and ultimately was returned to the Pōhutukawa Unit in 2020.

WILLIAMS J:
So that period at TRT was the supervised care allocation, was it?
1550

MS LAURENSON:
He spent some time on supervised care and then secure –

WILLIAMS J:
At TRT?

MS LAURENSON:
Yes and then – yes.

WILLIAMS J:

That's the period that it's – not somewhere else?

MS LAURENSON:

No, that's right.

WILLIAMS J:

Right.

MS LAURENSON:

And then, and then – but that wasn't able to be maintained and he was returned to the Pōhutukawa unit. The specialist assessors and those involved in J's care, in my submission, are not ruling out improvements or changes in the future. In 2020, Dr Immelman was saying that it was conceivable that there be a less secure placement in the future but that was likely to take a long time and I can take the Court –

WILLIAMS J:

Who said that? Dr Immelman, did you say?

MS LAURENSON:

Yes, so that's the 2020 material, it's at 203.1220, down the bottom of the page, I think. So there's a reference there to: "... sporadic progress ... that there has been a significant deterioration ... level of risk has escalated ... beyond what can be managed in a community secure setting."

And then at the last paragraph: "... it is conceivable that J would be able to live in a less secure placement in the future ... is likely to take a long time." No recommendations at the present other than what is proposed.

WILLIAMS J:

So is –

MILLER J:

We've been asked to accept that his, as I understand Mr Ellis, that his presentation has worsened partly because he is isolated, in other words, it is partly a consequence of detention, what do you say about that?

MS LAURENSON:

Well, I –

MILLER J:

What is the evidence about it?

MS LAURENSON:

So two points to make about that, Sir. The first is that he was subject to a less restrictive regime when he was at Te Roopu Taurima but nonetheless his behaviour deteriorated. Now, it's impossible to know why that was, maybe it was unrelated, but he did have that –

WILLIAMS J:

It's certainly not possible to say he's incorrigible. This is never going to be linear.

MS LAURENSON:

That's right, that's right.

WILLIAMS J:

So do any of the assessors say: "Here are the things we need to do to achieve that outcome"?

MS LAURENSON:

Well, so, so that's, so that's my second point.

WILLIAMS J:

Right.

MS LAURENSON:

So the first, the first answer is, well, he has, he has had the time when he had more exposure, did more different – did some different things, didn't – wasn't entirely successful. But more recently, in the 2023 material, the psychiatrist and psychologists are talking about what, you know, is it the case, they're considering, is it the case that he has been now overly restricted and should there be some movement back to allow some progress, and if you, the material from Dr Gardiner in 2023 might be the most useful in that regard, and I'll just ask Ms Garvey to bring that up. Because I think what is shows is that the people who care for J haven't stopped trying new things or trying to make adjustments –

WINKELMANN CJ:
What's this report though? I mean –

MS LAURENSON:
So this is Dr Gardiner and I'm just –

WINKELMANN CJ:
So I mean, these are people who are providing – they're required to provide regular reports, aren't they?

MS LAURENSON:
So Dr Gardiner is a specialist assessor.

WINKELMANN CJ:
James Gardiner.

MS LAURENSON:
And his – some of what he suggests has been adopted by the care co-ordinator and put in the 2023 care and rehabilitation plan for J which was put to the Family Court in 2023, so – and so the Court has got that as well, and so what we can see from that material – I'll just – is the prospect of reintroducing some sort of – so, to go backwards, there's that 203.1410, Dr Gardiner is talking there about adjusting J's medication and he goes through there what medication J is

currently on or what else might be tried, and above that there's some discussion about how J might be safely re-introduced to some things that he finds stimulating. So just at a very practical level there's a suggestion there about a collage of pictures being stuck up around his pod which would mostly be things that are not of particular interest to J and some of which would be things that he has reacted to strongly in the past, the idea being that a small amount of re-introduction of those things might help him to – would help the clinicians to gauge how he reacted but also might assist him to regulate his behaviour in response to those things, and there's a suggestion there that over time things could improve to the point where his reactions are attenuated somewhat.

WILLIAMS J:
It does seem to say, doesn't it, that the restrictive environment has helped make it worse?

MS LAURENSON:
Well, I think there's an acknowledgement that perhaps, so that there was a time when he had too much stimulation, he was brought back into the Pohutukawa Unit and stimulus was greatly decreased, perhaps that was overdone. But what I'm saying to the Court is this is a system that's still very much engaging with J and trying to adjust the treatment that he receives –

WINKELMANN CJ:
But it can't undermine the point that Mr Edgeler has made which is that it's also a system that could be harming him and certainly the literature seems to suggest long-term detention, especially indefinite detention, may do so and this seems to indicate that he has very limited contact with people during the week.

MS LAURENSON:
Yes, so he lives…

WINKELMANN CJ:
"Little time with others over the course of a normal weekday."

MS LAURENSON:

Yes, other care recipients live where he lives but he doesn't have a lot of time engaging with them.

WINKELMANN CJ:

Nor with staff, one imagines.

MS LAURENSON:

Well, the staff, he likes to hang out with the – "hang out" is his word, not mine – he likes to hang out with the staff and they do – there's material there about staff playing cards with him and sharing meals with him from time to time, so I think there is an effort to do that because he likes that and an engagement with staff is obviously easier to manage than an engagement with another care recipient.

WINKELMANN CJ:

But it does say he has little contact with "others" over a normal weekday. It's not saying "care recipients". It's just saying "others".

MS LAURENSON:

Sorry, where are you, your Honour?

WINKELMANN CJ:

In paragraph 104, which is the page it's on, isn't it? Yes, I'm looking at the screen. Everyone's looking at it.

MS LAURENSON:

Yes. Yes, that's right. So his mother comes – I see where you are now. So his mother is his most regular visitor. But because of the way in which he can react to other people in the unit, for example, he doesn't like – he can be unpredictable when there are loud noises, it's difficult to manage how he interacts with other patients and obviously they have, the service has obligations to them as well.

WILLIAMS J:

Is there any prospect of his mother staying for a time?

MS LAURENSON:

My understanding is that she couldn't, she wouldn't be allowed to stay in that facility.

WILLIAMS J:

Why not?

MS LAURENSON:

I don't know why not, but I have read that somewhere and I can certainly find out why not. I imagine because it's difficult to ensure her safety. People watch J all the time.

WILLIAMS J:

Yes, that it seems to me would have helped because you've got two on one awake 24/7, have you not?

MS LAURENSON:

Yes, now, yes.

KÓS J:

I'd be very interested tomorrow if you'd be able to take me at least, well, the Court have to come with me on this, through some of the evidence that shows how different options have been considered, less restrictive options. In other words, to show that the assumption simply wasn't continuation of the status quo but that there's been really robust testing of less restrictive options.

WINKELMANN CJ:

Including community-based care with support.

MS LAURENSON:

Yes, I certainly can take –

WINKELMANN CJ:

So that's at 4 o'clock, so – and this is just giving you a task for tomorrow.

MS LAURENSON:

Yes.

1600

WINKELMANN CJ:

And the other thing, other thing I am – I will be interested in, is to explore that point which is made by Mr Edgeler that in any other regime he, J, would have more procedural rights. So these are just – the evidence that is assembled is assembled on the basis of staff accounts which are then fed through to assessors and that's a large part of the material they draw on and where are the procedural protections for him? And it doesn't, *Lessard*, you know, it doesn't meet the *Lessard* threshold, it seems to me.

MS LAURENSON:

Yes.

WINKELMANN CJ:

So it's I'm interested in that point.

MS LAURENSON:

All right, well, I'm very happy to take the Court to that tomorrow and I'll just say, before I go off to do my homework that, of course, the Family Court is only being asked to make this compulsory care order extension or not. If J is to go home and live with his mother in the community, there is no need – the Family Court doesn't make the extension and then it falls away. What happens then is a matter for J and his family to explore with the health care system. So there is not a sense of – and they could take option 1 this week and option 2 the next week, so there's not, there's not this – I think part of the reason that the material perhaps that your Honour's looking for is not there, is because that is not a decision that the Family Court Judge would be asked to make, but I will –

WINKELMANN CJ:

Well, I mean, but why can't the Family Court Judge be provided with information which says: “This is the kind of support that would be available through the funded health care system for the mother,” if the carers – if the orders are not made?

MS LAURENSON:

Well, there is some information about that there, your Honour, but I think for the assessors it all falls down at the point where it doesn’t amount to detention, so we’re talking about a place where J can no longer be compelled to live, so he can –

KÓS J:

Yes.

MS LAURENSON:

– go to live with his mother, but if he decides – when he decides to go out, he can’t be stopped.

KÓS J:

So the Chief Justice’s option is a less restrictive one. There is also a middle restrictive one which is that they come to the Family Court and they say: “Look, this is what we think we might be able to do within the care and management plan, care and rehabilitation plan, so this would be a suitable order to make because we think we can move across the spectrum towards a, towards a fairer disposition, less restrictive disposition.”

WINKELMANN CJ:

Yes, a transition out, transition to community plan.

KÓS J:

Otherwise where is the forum in which those rights are tested? I mean, this is his opportunity. He’s got his counsel there, he’s got the experts there, it's the place to have that discussion.

MS LAURENSON:

Yes, we certainly – I certainly agree that it's the place to have the discussion about the least restrictive option for him, but if the option is – the least restrictive option is no more compulsory care order, the role for the Family Court does somewhat fall away, so I –

KÓS J:

Well, it does, but what about the better factor, what about the better compulsory care order? In other words, something that has a different content in effect?

WINKELMANN CJ:

Well, what about the – I think what you're aiming at, Justice Kós, is what about a requirement, just a transition plan so that, so that J has a future in which he sees "and if I do this and that, or I work with" – or J and his mother see that there is a plan to get him living back in the community as just to opposed to a three-year rollover scenario?

MS LAURENSON:

Yes, well, I don't accept that characterisation but I'll do my homework and come back.

WINKELMANN CJ:

Well, I mean, it might be that is what has happened, so interested to know.

MS LAURENSON:

Yes, thank you, your Honour.

WILLIAMS J:

Just more homework.

MS LAURENSON:

Right, get my pen.

WILLIAMS J:

If – my question to Mr Edgeler about the qualifications of the two support staff?

MS LAURENSON:

Yes.

WILLIAMS J:

Are they psychiatric nurses or?

MS LAURENSON:

So I have done some of that homework already.

WILLIAMS J:

Excellent.

MS LAURENSON:

So there's, there's a mix of, there's a mix of staff in the facility. So, we're talking there are, you've seen from the materials, there are occupational therapists, psychiatrists, and so on, at the facility.

WILLIAMS J:

Sure.

MS LAURENSON:

But the – when we're talking about the –

WILLIAMS J:

The cluster.

MS LAURENSON:

– the three-to-one support staff during the day, those are people with some skills and training but we're not talking there about a registered nurse, if that answers your Honour's question.

WILLIAMS J:

I see. Can you – this goes to the recording point, if you'll see what I mean. Sometimes in these situations, the system generates its responses because it's the way things get done and people sometimes are no longer thinking about

what they're doing in a care-related way or in a clinical-related way but just this is how it's done, and I'm not suggesting that's necessarily the case but at the risk of discriminating probably the more qualified the staff are, the more likely the recording of events will be clinically or care oriented. Nurses record stuff differently to security guards.

MS LAURENSON:

Yes, so we're talking about people who are obviously not security guards, who understand –

WILLIAMS J:

Good, good.

MS LAURENSON:

– that they are there in a therapeutic –

WILLIAMS J:

These are professionals at some level?

MS LAURENSON:

Yes, and they're helping, you know, different people with different things but there's, somewhere in the material, there's reference to "[J]" and, you know, he's showering now on his own but before that he wasn't. So these are people who are helping him and helping other people to do things like have a shower, make sure they've had lunch, that kind of thing.

WILLIAMS J:

So they're carers, yes.

MS LAURENSON:

They're carers, yes.

WILLIAMS J:

Right. The second thing is this. I tried to find the earlier reports. I've got the Family Court decisions, one of which is – there's only half of it because the

Judge forgot to turn their Dictaphone on by the look of it, which is not that uncommon. But I was interested to see what attitude the assessors brought to the initial assessments, whether they were really completely worried about risk or whether they were worried about care and eventual outcome in a more clinical fashion than a risk mitigation fashion and how that developed over time because I was quite struck by Dr Gardiner's report that it seems to be almost entirely worried about risk and not about eventual outcomes and pathways to that. That may be unfair but you can see where I'm – I'm thinking about how much care and focus on the future this system delivers to an intellectually disabled person.

MS LAURENSON:

Yes, and I think I can give you a good answer to that, your Honour, but I'll do that in the morning, if that's all right.

WILLIAMS J:

Sure.

WINKELMANN CJ:

All right, we'll retire.

COURT ADJOURNS: 4.07 PM

COURT RESUMES ON WEDNESDAY 21 AUGUST 2024 AT 10.03 AM

MS LAURENSON:

Good morning. In response to the Court's questions yesterday, what I'd like to do this morning is just go in a probably fairly pretty pedestrian fashion through some of the primary material, so I've just selected a couple of the 2020 documents that were before the Family Court Judge, and if we have time, a couple from 2023, and I think that if we just go through those that I'll be able to answer some of the Court's questions from yesterday along the way about the nature of the factual background.

So I'd like to start with the specialist assessor report of Dr Immelman from 2020, before the Family Court in 2020, and it's at 203.1208. So Dr Immelman's one of the two specialist assessors required here by the Act. I just wanted to point out before we get into the document itself that he is independent, he's exercising an independent role in the sense that he's not involved in J's day-to-day care. So he's come into look at it from the outside and to give his clinical views, and he's a psychiatrist. So everyone here is a psychiatrist or psychologist, but he's a psychiatrist.

So one of the questions I was asked yesterday was to what extent has what Mr Ellis characterised as a mischaracterisation of the neck cutting incident, we can put it that way, has that followed him around, has that become something which he hasn't been able to get away from, and so I think it'd be helpful just to look at how that's being treated by the time we get to 2020. So at 3.2, so that's a couple of pages in, Dr Immelman sets out, he refers to his earlier reports and he starts to provide what he described as the background, and he says: "In 2000 J injured a fellow student at his special needs school by cutting her neck; she required hospitalisation for her injuries, and J was charged. There is documentation indicating that he seemed to be acting out a fantasy, and there appears to have been some pre-planning."

So that's what's said. In my submission that's reasonably neutral and I think it avoids some of the mischaracterisation that Mr Ellis referred to yesterday, and

I don't think, we'll see as we go through, but I don't think the doctor's making a lot of it.

WINKELMANN CJ:

I don't know that was a major focus of the argument.

MS LAURENSON:

No, no, but to the – if it's being suggested that J's been unable to sort of escape this pathway that he's got on, I'm not – what I'm suggesting is you don't see that in the 2020 documents.

KÓS J:

Well you're damned if you do, and damned if you don't. I mean the history is the history and if it's incomplete you get criticised for incompleteness. The question is what you make of it, how relevant it is.

MS LAURENSON:

Yes, yes, and so in my submission it's been set out in the way that you might expect, and so the doctor goes on in a similar way expressing talking about J's movements and just, for the factual narrative, probably is useful for this Court as it was for the Family Court, you can see there that he is in the Pohutukawa unit at the Mason Clinic where he is now from 2007, but then there's a period where his behaviour improved and he moved to Māngere, to Te Roopu Taurima, which we heard a bit about yesterday, and he was there for some time before there was an increase in the number of incidents being reported. Some violence to staff, absconding, trying to climb out of the van.

WINKELMANN CJ:

So the report we received yesterday from the appellant's Dr Johnston, does – refers to the violence towards staff as kind of pushing and scratching and hitting I think, and one occasion of grabbing a person.

MS LAURENSON:

Yes, so it's not at the, it's not violence at the severe end of the spectrum by any stretch of the imagination, but that is obviously in part because he is closely managed in the three to one staffing ratio that we've heard about. So he's not, if he embarks on violence towards staff he's not allowed to continue it, people will step in and stop that from going further, and there's also some other material that we'll get to about attempts to obtain knives and so on, but no, I'm not suggesting that any of those assaults is at a high level, but it's also my submission that that's what you'd expect in an environment like this, where he is, where the staffing is such that that can be prevented.

So the factual background there goes on over the next page to discuss the difficulties that were experienced with the placement at Te Roopu Taurima, and this is about the time that, this report is from the time where J has been moved back to the Pōhutukawa unit, and it sets out the difficulties that were being had, and then at 3.3 the doctor talks to J, who is by this stage back in the Pōhutukawa unit, and there's some discussion there about ongoing concerns about his volatility, the fact that he's triggered by unexpected loud noises like door slamming, and that that's, the sensitivity to sound is assessed as being part of his autism.

1010

The doctor goes on to look in some detail about at the reported incidents. So he says at the bottom of 1216: "I reviewed the Summary of Incidents July to December 2019 ... 92 incidents were reported." But he's only looked further at the ones that are viewed as "Critical", and you can see those set out over the next page and I think that it is more information about your Honour Chief Justice's question, the kinds of things that we're talking about. So some of it is just threats and some of it is lower-level assaults against staff.

WINKELMANN CJ:

Yes.

MS LAURENSON:

And so there was some discussion yesterday about, well, how are those being recorded and then how are they being relied upon. So in my submission they are being – this is just a direct reporting from the staff and it's pretty factual. What is set out there is not an attempt to sort of draw conclusions from the factual material, because that is Dr Immelman's job, not the staff job. So he goes on to then, in his assessment, say "well, what does this all mean" and offer his view for the Family Court Judge, and he goes on to do that at the bottom of the page, discusses the risk assessment tool that he has used, relying on the – on a range of material but including, of course, those risk assessment reports. And just to note, that that last one there involving the chair is just slightly out of – is slightly different to some of the others that are being reported: "J picked up a heavy chair ... threw it against the window ... before being redirected ..."

So then there was, just to give the Court a sense of what the doctor is doing, there is a list at the beginning of the people they consult with. Doctor also met with J and he set out a summary there of his – of the meeting the two of them had. So I am at 3.5 "Client Interview and Mental State Examination", and in the third paragraph, sorry, have I lost you?

WINKELMANN CJ:

No.

MS LAURENSON:

No.

WINKELMANN CJ:

It's just we can speed up a bit if you like, Ms Laurenson.

MS LAURENSON:

Okay, all right, so there's a – I'm not proposing to read this out, but there is a discussion there about – between J and Dr Immelman about J's preoccupations

and then taking all of that information, doctor goes on and his recommendation at 3.11 is that a further three-year extension be sought.

Sorry, I've missed what I wanted to take the Court to which is the discussion – we had some discussion yesterday about alternative arrangements and which I said I'd come back to. So, the report writer –

WINKELMANN CJ:

Well, I'm just wondering, because it seems to me Dr Johnston's report is much more recent and discusses that, which is more what we're dealing with today, is this helpful and because this is, when is it, 2020?

MS LAURENSON:

Well, the difficulty with that 2023 report, my friend and I discussed that yesterday, is the status of that is a little bit unclear because it wasn't – it's not been the subject of a, as far as I know, as far we were able to establish yesterday, it's not been at his – it wasn't before the Family Court when the Family Court made even the 2023 decision, so.

WINKELMANN CJ:

How is it before us?

MS LAURENSON:

Well.

WILLIAMS J:

It is.

MS LAURENSON:

Yes.

WINKELMANN CJ:

No, it's not, it's not come in, in evidence, it's just been handed up, is that the point?

MS LAURENSON:

Yes, my friends refer to it in their submissions, it's not in the case on appeal. It's not before you, is what I would say about that. It's not, it's not been subject to the same – it's not been assessed by the Family Court in the way that the other 2023 material has been.

WINKELMANN CJ:

But do you have any issue with us receiving it as updating material?

MS LAURENSON:

I'd like the opportunity to discuss with my client what else might go alongside it.

WINKELMANN CJ:

Right.

MS LAURENSON:

So at 3.9, the doctor talks to J's mother T about what she would like, and she's saying at the bottom of the page that she'd love him to come home, and how she would manage that, so that's in front of the Family Court, but the doctor goes on to say he's recommending a three year extension and he say's there's been "… sporadic progress, at present it is very evident to me that there has been a significant deterioration and that the level of risk has escalated to a level both requiring a period of extension… but also beyond that which can be managed in a community secure setting. I can see little alternative… for J to continue to be managed in a hospital secure setting, with regular reviews, anticipating a graduated and carefully managed return to a community secure setting, all things being equal."

So I'm at the, sorry, that's the bottom of 203.1220. So some consideration of next steps but the doctor's view obviously is that this is some way, some significant way in the future.

WILLIAMS J:

What I'm quite struck with is the cyclic nature of this behaviour, because he was with the Te Roopu Taurima or some variant of that for nearly a decade and although there were sporadic problems, they were not so consistent that it was felt he needed to be in the Pōhutukawa unit. Do the experts in any place say why the shift? Because it does seem to me to be –

MS LAURENSON:

Why the shift in J?

WILLIAMS J:

Yes, that seemed to be pretty important in a care-based system, to know what's caused the change, because it does indicate that this is not a static situation, it is changeable, and then to some extent therefore, I'm going to use this word wrongly, but fixable, reducible, mitigable, because he's not – if you accept the reasons for him being in the Pōhutukawa unit now, he wasn't always like that.

MS LAURENSON:

No and I don't, I think to a certain extent your Honour might be looking for answers that don't, that doctors don't have.

WILLIAMS J:

Well it's just not clear that the question's been asked, let alone the answers.

MS LAURENSON:

So this is, two things on that. The first is I think it is clear that people are aware – the material does show that they think this is an unusual presentation.

WILLIAMS J:

Yes, yes, agreed.

MS LAURENSON:

This is not what they, this is not what was expected, it's a challenging medical situation. So they are certainly, they have, like your Honour, they're surprised

by this. It's not what anyone expected or wanted. In terms of fixing it, I don't think that they have identified what…

WILLIAMS J:
What caused the shift.

MS LAURENSON:
What caused the shift, no, and so because he was receiving more stimulus, more outings when he was at Te Roopu Taurima, seemed to be causing a problem, when he gets into the Pōhutukawa clinic, they're trying less for a time, and now they're trying to reintroduce, would be my very high level not doctor summary of the material.

WILLIAMS J:
Yes, well it's, the suggestions about changing that upwards are pretty tentative.

MS LAURENSON:
Yes?

WILLIAMS J:
I mean they're saying that might be a good idea, we suggest maybe this way or maybe that way, but it doesn't appear to be, I'm not being critical, I'm just trying to be descriptive, didn't appear to be a plan about that, yet.

MS LAURENSON:
Well we can get onto the 2023 material. I can –

WINKELMANN CJ:
Well I mean I was just going to say, we don't have all day, it's only a half day, so you need to be mindful of your time, and we have had this material to read, so perhaps if you can put some structure into how you're taking us to this material.

MS LAURENSON:
Yes, so that was the main, that's what I wanted –

WINKELMANN CJ:

Yes, so Justice Kós had a question.

MS LAURENSON:

Sorry.

KÓS J:

No that's fine, I'll read it myself. I just want to find the report proximate to the shift. I think that's the one that presumably is going to be the most revealing.

MS LAURENSON:

So this is the time of the shift. So the, this is –

KÓS J:

This is it?

MS LAURENSON:

This is…

KÓS J:

Okay.

WILLIAMS J:

2019 was the shift, wasn't it?

MS LAURENSON:

Yes because the Family Court, so the Family Court doesn't direct the shift. The Family Court extends the order or it doesn't, secured care, supervised care. It's the care co-ordinator who directs J as to which particular facility –

WINKELMANN CJ:

So there's no report preceding the shift recommending it?

MS LAURENSON:

No, no, that is not a requirement. That was an internal process.

WILLIAMS J:

There'll be evidence though? There'll be an assessment made, there had to be.

MS LAURENSON:

Yes.

WILLIAMS J:

And it'll be written somewhere.

MS LAURENSON:

Yes.

WILLIAMS J:

Is that not available to us? Or was it not available to the Family Court?

MS LAURENSON:

It was not available to the Family Court and it is therefore not available to you. That's…

1020

WILLIAMS J:

It seems strange that it wouldn't be available to the Family Court since it...

MS LAURENSON:

Well, I say "not available", it wasn't before the Family Court.

WILLIAMS J:

No.

MS LAURENSON:

There's, I mean, there's the – there was cross-examination in the Family Court at length about J's treatment.

WILLIAMS J:

Right, yes, yes, of course there was.

MS LAURENSON:

So that material is not in the record, but there's, there's certainly lots of engagement with J's treatment in the Family Court.

WINKELMANN CJ:

Right, so moving on.

MS LAURENSON:

So all of this, the specialist reports get funnelled into the care plan. We've looked at – I think we looked briefly at a care plan yesterday. So there's one there from 2020. It takes all the information that we've received from the specialist assessors. It talks about the programme. So, there's quite a lot of discussion of the kind of programme that he had at Te Roopu Taurima, and there was some discussion yesterday about environmental controls, you know, are they too strict? Well, the documents, in my submission, show that that's an attempt to just reduce J's reactions to loud noises and other things that bother him.

I won't take the Court to it, in the interests of time, but at 203.1178 there is some discussion about contact that he might have with other people, other care recipients and there is a short note there about the risk that that might pose, and in keeping with Dr Immelman's report, the care plan, in my submission, has a reasonably realistic approach to transition in the sense that it is not talking about transition into the community, because it is not suggested that that is realistic at this time.

WINKELMANN CJ:

Yes, so I mean, the things I think the Court is interested in are, Mr Ellis' point and I think Mr Butler also made the point, that the Court needs to bear in mind the extent to which this detention is actually reducing a lot of these behaviours. Second point is, as Justice Kós said yesterday, we're very interested to see

where's the liberty framing – liberty mindset framing of this, this engagement with J? Where is the ambition to see him in a freer environment, where is that being expressed in treatment plans? So that's what – how is that being presented to the Family Court? So that's what we'd really be assisted by. I think we've got a pretty good idea about how complex this case is and the risks he presents.

MS LAURENSON:

Yes, so –

WINKELMANN CJ:

And actually, in that regard, I thought that Dr Johnston's report was very helpful in terms of giving us a full picture.

MS LAURENSON:

Right, thank you, your Honour. So what I'd say about the transition is that the care plan, like Dr Immelman is suggesting, there's a view taken that transition is a long way away. So that's obviously in the background of all of this is that this is, at most, a three-year order. We're not talking about indefinite detention that has to be brought to an end. We're talking about an order that has a three-year order at most and might be less, and in some cases J has been subject to a shorter term.

WINKELMANN CJ:

Well, you could say that a three-year order made against a background of no plan to transition J out is, with a capacity for it to be rolled over, looks to J and the world like an indefinite detention, it's just a rolling over every three years.

MS LAURENSON:

Well, two points on that. I think the, in reverse order, the Family Court process doesn't look like a roll – I resist the characterisation of that as a "rolling over". It's an intensive process. There's something like 134 pages of notes of evidence from one of the hearings, the number of assessors called, J is

represented, his mother is represented. This isn't a rolling over, this is, in my submission, a careful examination by a specialist court.

WINKELMANN CJ:

I wasn't suggesting it was a rubber stamping, I'm just saying if there's management without a plan to transition out.

MS LAURENSON:

Yes and on that, the background that we have just been through suggests, I say, that there has been and there was an attempt to step J into a more open facility and to give him more opportunities to engage with the community on a best endeavours basis. Unfortunately, that wasn't as successful as people hoped. That is unusual, it is challenging, but that's what happened and so, responsibly, there was a step in the other direction. So, there have been attempts to lower the level of care that J received, and if that had been successful, then the level of care he received could've been lowered again, and so on, and so on. But that's not what happened.

WINKELMANN CJ:

Well there is a lowering, according to Doctor Johnston there is a lowering of the level of care he's receiving because there's not the funding for it.

MS LAURENSON:

Sorry, when I say "level of care" I mean the security of the care. So the, you have more exposure to the community, he was out and about more, he had more exposure to other people, so that's what I mean by…

WINKELMANN CJ:

That is – that comment's made in Dr Johnston's report, which is what Mr Ellis was picking up yesterday. I am interested in that, and I don't know if it come sin other evidence that's before us, that you accept is before us, but that is obviously an issue that if the State places someone in care for the purpose of caring for them, you'd expect a liberty mindset would cause you to try and

provide care that enables the person not to be sensorily deprived, et cetera, but actually be engaged with the community.

MS LAURENSON:

Yes, so perhaps this might be a good, well just one more thing to say on the 2020 material, again I'm not proposing to go to it. There is, the Court's got the notes of evidence there, Dr Duff in particular is cross-examined by my friend Mr Ellis on the incident reports so…

WILLIAMS J:

These are the notes of evidence in the Family Court or in the High Court?

WINKELMANN CJ:

Take us to them if you wish to Ms Laurenson.

MS LAURENSON:

I don't think we'll, it's not the particulars of the questions that I'm wanting to put to the Court, I'm just saying there was an opportunity for the Family Court Judge to unpack the nature of the incident reports with the doctor who works at the facility. It's not a mini criminal trial in the *Lessard* sense because we're not calling the caregivers and saying, well you said that he punched you but he didn't, did he, but there is an opportunity to engage with that material as well, that's what I'm saying.

WILLIAMS J:

Where do we find that, the notes of evidence, do you know?

MS LAURENSON:

I do know. This isn't the first page, but 203.1342.

WILLIAMS J:

Thank you.

MS LAURENSON:

And Dr Duff's being, sort of, cross-examined there on what new strategies are being tried to assist J to improve.

WINKELMANN CJ:

Sorry, what is the document number? 203…

MS LAURENSON:

So the document starts at 203.1235.

WINKELMANN CJ:

203.1235. Got it.

WILLIAMS J:

1235 right?

WINKELMANN CJ:

Yes. 203.1235.

MS LAURENSON:

Then, so with all of that in mind, Judge Wagner who has heard the witnesses obviously gives his –

WINKELMANN CJ:

Her.

MS LAURENSON:

Her, sorry, her decision, and she says there, and I might actually just bring that up. So that's 101.0419, and she says there she doesn't agree with the "… characterisation of others attributing blame to J for his various actions." She said she "… was struck by the compassion and respect… showed and expressed towards J." And she says that there "… seemed to be a unanimous drive, despite the long journey J and other have been on… to try to understand the triggers… and to provide the very best level of care and support for him as possible."

WINKELMANN CJ:

What paragraph is that?

MS LAURENSON:

Paragraph 47.

KÓS J:

So this might be a good time to address the question I was raising yesterday, which is where the authorities go to the Family Court and say, here is the section 85 renewal application, but these are the other options, more liberty-consistent, and this is why those other options won't work, so is that the approach that the authorities take? And if not, why not?

MS LAURENSON:

Well, in a sense that must always be the approach because the default is the compulsory care order that's been made will expire. So they have to put up a case for continued detention or the application is not going to be successful. So in going to the Court they must, of course, say here is why we say that we say that J should continue to be subject to it.

KÓS J:

Sure, but do they put up the counterfactuals and then knock them down?

1030

MS LAURENSON:

So in – yes, in the sense that the Judge has all the material that we have just seen, which says essentially that living in the community at this time is not realistic. So it doesn't go into the detail that I think perhaps your Honour is expecting because the clinicians are just putting that to one side, they're just saying that's – we're so far away from that, that we're not going through and saying, well, here's an IHC facility that he could live in, in this place, and they're just – they're not addressing that, because they're not seeing it as realistic. They do include, so there is the material before the Family Court Judge about

J's mother saying: "Well, I'd like to have him at home with me," and giving her thoughts about how that might work, so the Judge has that, and the Judge –

KÓS J:

Yes but this is bit of a straw man, because living in the community doesn't seem to be an option at the moment but within the care plan there are various options including, for instance, supervised care as opposed to secure care.

MS LAURENSON:

Yes.

KÓS J:

And various other arrangements which will give him more community contact?

MS LAURENSON:

Well, the Judges are being asked – the Judge is only being asked to approve either secure care, supervised care or no court order. So there is discussion in the Family Court and at paragraph 50 the Judge says: "Mr La Hood's (as he then was) submission is correct that it was not for me to determine where J should reside, only if the CCO should be secure in nature or community/supervised. Dr Louw put it succinctly at the hearing when he said 'He [J] should always be at the right place for his risk and his need, so he shouldn't be in a less restrictive place if he is high risk and high need.'"

WINKELMANN CJ:

High risk of what? We've heard what, where does – what's her finding in terms of violence?

MS LAURENSON:

What all the experts are talking about is high risk of violence.

WINKELMANN CJ:

Well, where's her finding? I'd just like to see how she puts it, because what's the question? Because it's the section's quite loose, isn't it, in terms of its – well, there's nothing, actually, but if he was subject to the criminal justice, so –

MS LAURENSON:

Yes, well, if you go up a little bit to paragraph 37, her Honour says: "All specialist assessors are of the opinion that in the absence of the support and scaffolding he receives J would shortly engage in reoffending, especially given his fixation with violence which has remained unchanged over a long period." And then she goes on to discuss that more specifically.

WINKELMANN CJ:

No finding of a particular level of danger, just to re-offending?

MS LAURENSON:

Well, the evidence was about risk of violence, and then if we go down, this is the bit where the Judge balances, considers – so at that stage the Family Court had the benefit of the High Court judgment in this matter and so she goes – follows her Honour Justice Cull's reasoning and looks at the – which talked about the liberty interest.

WINKELMANN CJ:

So I just think – I think you said J's first name, possibly reading out the transcript?

MS LAURENSON:

I don't think I did.

WINKELMANN CJ:

Oh, good.

MS LAURENSON:

I nearly did once, but I don't think I have.

WINKELMANN CJ:

It may have just been in my head.

MS LAURENSON:

Now, I've lost where I was, so – and so then at paragraph 46, the Judge says, she's responding to a submission about the nature of J's interest in feet and what form that takes, but she says, well, that doesn't matter – the reason for it doesn't matter: "... the relevant behaviour is violent." So she's talking about a risk of violence.

WINKELMANN CJ:

I am quite interested in this point, because in the criminal justice context the risk of violence that justifies ongoing detention is very specific. It's very specific and the medical practitioners are asked to the extent they humanly can, I suppose, to be – to focus about whether the risk is of serial – further serious sexual or violent offending. So it's not just any offending, it's not just any violence, it's pitched quite high and I asked Mr – oh, well, you're going to come onto your legal submissions, aren't you, but that's one thing I'm interested in is to whether a rights consistent approach would actually require there to be some focus upon that, the – you know, so that there is some shape to what is otherwise quite a shapeless bunch of opinions. That he might re-offend, well, the re-offending might be smashing someone's car windows, or we don't – he hasn't at, to this point, been convicted of any serious violent offending.

MS LAURENSON:

No. No and I think that is somehow –

WINKELMANN CJ:

Nor has he committed any serious, not convicted nor alleged to have been seriously violent.

WILLIAMS J:

No well we've got, well, the stabbing.

WINKELMANN CJ:

That was not, yes, wasn't a stabbing, it was a cut.

WILLIAMS J:

That's what a stabbing is.

WINKELMANN CJ:

No it's not Joe.

MS LAURENSON:

I'm not going to make any submissions on that. What I would say is that, yes, there has been nothing that would meet that ESO test of serious…

WINKELMANN CJ:

No, but yes, but what I'm interested in is not, obviously not. What I'm interested in is how that kind of framework in the criminal justice system should shape the thinking and you're coming to that?

MS LAURENSON:

Yes, and I'll get to that when I talk about *VM*, and I do think that's important, and I wouldn't, certainly that must have some relevance because if the risk is a risk of smashing more windows, then I would agree with what my friends have said, which is that there is a certain level of low level criminal behaviour that we just have to, we as a society just have to live with. That wouldn't justify ongoing detention, but what, a close reading of the specialist, well not even a very close reading, a reading of the specialist assessor's report shows is that they are worried about something more significant than that, and specifically violence, leaving aside I don't think anyone knows whether there would be a sexual aspect to it, but violence.

ELLEN FRANCE J:

But not serious violence?

MS LAURENSON:

I think serious violence is possibly apprehended if you look at the nature of J's fixations and –

WINKELMANN CJ:

That's your inference though, they don't really address what they're looking at. I mean that's what we're asking I suppose.

MS LAURENSON:

I think they do do that, and they're saying, you know, given his unpredictability, his occasional aggression, his interest in weapons, and knives in particular, that that combination of things certainly could amount – and the difficulty people have in redirecting him when he is in that state of mind, I think the assessors do, are suggesting that could be –

WINKELMANN CJ:

Okay, right, well it will be helpful if your juniors could just give us some pinpoint references in those reports. We don't need to –

KÓS J:

Dr Johnston, paragraph 54, is certainly, potentially serious or even lethal violence so, that report…

WINKELMANN CJ:

Yes, I mean I personally think that a report's very helpful, we're still waiting as to your attitude to it.

MS LAURENSON:

Yes, I'm just wondering if it comes in, it might need to come in with some other material, so I'd just like to come back to the Court on that because it won't have been, I don't think it was a standalone document. So I would just like to confirm that.

So that's 2020. So her Honour granted the three year order and so the matter's back before Judge Goodwin in 2023. We looked yesterday at Dr Gardiner's report, and I'm not proposing to go to that again in any detail. That's the report in which the doctor talks about possible adjustments to the medication, reintroducing some stimulus, and how that might best methods by which that might be achieved, so that was the discussion we had yesterday about the collage and so on, how can – because J –

WINKELMANN CJ:
Whose report was that sorry in…

MS LAURENSON:
Dr Gardiner.

WINKELMANN CJ:
Oh Dr Gardiner.

MS LAURENSON:
So in my submission that's an acceptance that the things that J is interested in are always going to be present in the community. So for him to progress he needs to be able to respond to those things in a less heightened way, and so the discussion there about how that might be achieved, what can we try.

WINKELMANN CJ:
The Court desensitised I suppose.
1040

MS LAURENSON:
Yes. There's some discussion at paragraph 35 of the doctor's report about some of the things that J has said about his interest in feet and what his, the nature of his fixation and the doctor goes on to say: "... it is clear that J would not necessarily realise the damage that he would be doing by way of amputation," if he were to act out what he's saying.

One of the things that was said to me in the course of yesterday was, is he spending all his time alone, and at paragraph 51 there is some discussion about that and what the doctor says is: “The Pohutukawa staff also explained that J spends a lot of time alone in his cluster, which he largely prefers. He tends to do poorly in the presence of consistent human company, or in the event of sudden loud noises. The fact that he is alone in his cluster is a way of managing difficulties with human company. That is when he becomes impulsive and assaultative ...” and there is – that sometimes happens when his mother is visiting. Those visits continue, but that is just a reporting of what happens and the staff: “... are keen to support increases in frequency and length of visits,” with J’s mother.

So what I’m simply taking from that is that it's not that company wouldn't be available to J in terms of the other care recipients if that was what he wanted. Sometimes it is difficult but also it’s not always what he wants, and so obviously even within the environment that he lives in, he does have some choices and there is some discussion in the documents about a balance between letting him make some choices about that and also encouraging him to do what the clinicians think is good for him, and so then the, after the receiving the specialist assessors, there has been a care plan provided. It –

WINKELMANN CJ:
What document number is that?

MS LAURENSON:
203.1422.

WINKELMANN CJ:
Is that in Dr Gardiner’s report?

MS LAURENSON:
No, it's a separate document prepared by the care co-ordinator, because that’s her statutory role.

WINKELMANN CJ:

203.1422?

MS LAURENSON:

Yes and, then we don't have it, but there was also there – it's clear from the judgment that there was also cross-examination in front of Judge Goodwin who makes the 2023 decision, but we don't have it in the case on appeal.

WINKELMANN CJ:

So –

WILLIAMS J:

I thought we did. Is it – or is that an earlier judgment?

MS LAURENSON:

It's earlier.

WILLIAMS J:

Right.

WINKELMANN CJ:

So these care plans are standard or are they built, are they designed, for this particular statutory regime?

MS LAURENSON:

There's a template which is designed for the statutory regime, is my understanding.

WINKELMANN CJ:

There's a requirement that a care plan be –

MS LAURENSON:

Well, it's a requirement that they produce a plan. I'm not sure that the –

WINKELMANN CJ:

The template isn't in the statutory scheme though, is it?

MS LAURENSON:

No, there's some certificates which are in the statutory scheme for the clinician to certify this status of person. But the plan itself is –

WINKELMANN CJ:

Yes, so when you look at it, where is the part that is about – where is the part you say kind of addresses the liberty interest, or part or parts?

MS LAURENSON:

Well, if we – again, the recommendation of the assessors is that J not – is that the order be extended. So the care plan is about maintaining the care that J received and what it does is it incorporates the ideas that I have put to the Court, Dr Gardiner's ideas about adjustments to medication, what can be done to reintroduce some stimulus to see how that goes, there's quite a lot in there about –

WINKELMANN CJ:

Yes, I'm interested to know if anyone has ever expressed ambition that he can be transitioned into the community and what that would look like.

KÓS J:

Well, section 5, page 1444, appears to be the nearest to it, which is developing a balanced and satisfied life without offending.

MS LAURENSON:

So my – yes, yes.

WINKELMANN CJ:

But it doesn't – it's not really talking about it, it's just –

WILLIAMS J:

The heading "Progress towards independent, adaptive functioning" is at 203.1438.4

WINKELMANN CJ:

14?

WILLIAMS J:

38.

MS LAURENSON:

And at the very, at 203.1451 what the care co-ordinator says: "No transition plans at this time." So there's not, that's not specifically addressed. Well it is specifically addressed in order to say that's not what's being recommended.

WINKELMANN CJ:

So that kind of – that implies that there'll be a rollover, really, in three years' time, doesn't it, or is it saying let's look in six months and see if we can get it to a transition plan? What I'm looking for is, you know, if you were designing the scheme in part, because obviously a scheme has to be designed for care, and risk management, but if you were designing it with a liberty enhancing frame of mind, then you would actually direct attention to those issues. Just how can we? There's no, where's the ambition for that transition?

MS LAURENSON:

So I think you would find that in other cases, my instructions are that in cases where people are seen as transitioning towards the community, you would see that. Now of course if the Judge had declined to make a secure order here, and had made one for supervised care, the plan would have – there would have have to been some adjustments. The clinicians, and those providing care for J, would have had to –

WINKELMANN CJ:

So it's not here because they don't think it's a realistic possibility? So are you saying in their minds it's really he's got to be detained long-term?

MS LAURENSON:

No I'm saying that they, so they will now have three years to work with J, unless they form the view at some point that he is now fit for the order to be discharged, and if that view is formed, there's an obligation to make an application for a discharge of the order to the Family Court.

WINKELMANN CJ:

The thing that interests me is when they've got three years, and I'm not sure this is right, but should they be trying to think about how within three years they can have him transitioned to the community, which may or may not succeed?

MS LAURENSON:

The care plan is not going to govern the entire three years, so there's another one, there are others that are produced as time goes on, and – but I think it would be unusual having recommended, having said this is a man who poses a very high risk and we're recommending hospital level secure care, to be looking at a transition plan in the immediate future.

KÓS J:

It seems to be a one year plan, looking at the bottom of the page.

MS LAURENSON:

Yes.

KÓS J:

It has an expiry date.

MS LAURENSON:

Yes, and so, and what the care plan is doing is talking about how, well how we might adjust his care so that he improves, and it's not said, but it seems to me,

it probably goes without saying, if he improves then things can be changed, but he's not, at the moment, improving. I mean that's what those steps are in place for. The things, the talking about reintroducing him to stimulus and adjusting his medication, and so on and so forth, so that he poses less risk, so that he can be moved out.

WINKELMANN CJ:
That's really helpful, thank you.

MS LAURENSON:
And Judge Goodwin engages with that also –

WINKELMANN CJ:
Where's his decision?

MS LAURENSON:
It is 101.0451 and paragraph 26 onwards is the discussion, so there's some liberty interests material there, and then Mr Ellis said to the Court should consider the counterfactual, so the Judge does, and if we could just scroll up there. So there's some discussion there about what it'd be like if J were to return to live with his mother.

WINKELMANN CJ:
What paragraph does he say you should consider the counterfactual?

MS LAURENSON:
Paragraph 26.

MILLER J:
It's paragraph 27.

MS LAURENSON:
Then on, yes, so paragraph 26 is where it's said, you should look at the counterfactual, and then the Judge says. yes I will, and then that's done at paragraph 27 onwards. So there's some discussion about what it would be like

if J was to return to his mother's home, and then paragraph 29 the Judge is balancing community protection and the liberty interest.

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So that was all I was proposing to do there in terms of the specific material that we have except to note two points. So Mr Ellis said yesterday that, you know, he would characterise the treatment of J as inhumane. I think he was going to come back with some material on that, which we haven't had, but in my submission it's difficult having seen the material that we've seen this morning to characterise that as, that treatment as inhumane, and indeed the Family Court appears to have rejected that idea.

The other thing is that the Court asked me for submissions on, some assistance with the attitude that the assessors brought to the initial assessments when J was first subject to the CCO. I don't, we don't have that material in the case on appeal because that aspect had, wasn't before her Honour Justice Cull. If the Court would like some of the earlier material I can certainly provide it, but it's just not there at the moment, and there's a lot of material, but we can discuss with my friends what might be helpful for the Court.

WINKELMANN CJ:

I think, well I would be assisted by it I think.

MS LAURENSON:

Yes, perhaps we could get some of the initial material. I don't think the Court will want every extension going back to 2006.

WINKELMANN CJ:

No, initial assessments and the ambition for J.

MS LAURENSON:

Yes. Perhaps we might turn, if I could turn now to my written submissions, which, and I'd like to just start with the *VM* which the Court will have seen is a test that the Crown says, everyone else I think says it's, you know, it's more

than 10 years old, it's out of date. We would characterise it actually as a very forward looking modern judgment, and we say with one exception that I'll get to, that it does what you would expect it to do and it expresses a proper balance between the liberty interest of the care recipient, and the public interest in – and the care recipient's own interest in safety.

Certainly *VM* was a different case on the facts, but because the High Court Judge had declined to extend the CCO in respect of VM, it had lapsed, and by the time – and the Crown took no steps to have that order stayed. So by the time the Court of Appeal was hearing the case everybody agreed that VM was now in the community and that that was the status. So the Court of Appeal was well aware that what it was doing was providing a judgment that was addressing itself to the general principles. It wasn't about resolving the particular VM facts. Interesting to note there that VM was only ever in supervised care and there was, in the material before the Court –

KÓS J:
She.

MS LAURENSON:
Did I say he?

KÓS J:
She, VM was a female.

MS LAURENSON:
Yes, VM was, yes. She was only ever in supervised care and there was material before the High Court about what she, about what living in the community would have looked like for her. Because the assessors were saying that's – although they were seeking an extension, it was certainly conceivable that she would be moving into the community either then or soon.

ELLEN FRANCE J:

So do you say that proportionality is only relevant in the sense referred to by the Court of Appeal in paragraph 68?

MS LAURENSON:

Well, I'll just bring that up to make sure I'm referring to the right passage. Yes, so the relevance, the Court of Appeal says the relevance of – to proportionality as against the index of offending.

ELLEN FRANCE J:

Yes.

MS LAURENSON:

Yes so the Court of Appeal – we agree with the Court of Appeal that that is relevant to the extent that it indicates risk, and in many cases that means it'll probably be more relevant earlier on, because it's immediately preceded the hearing, and then the Court of Appeal goes on to say somewhere that in a finely balanced case you might look more at the index offending, and we, yes, we endorse that.

ELLEN FRANCE J:

So where does section 22 fit, of the Bill of Rights, fight into that analysis then if you are otherwise ignoring the relationship with the index offending?

MS LAURENSON:

Well we say it's a proper and not arbitrary detention if risk outweighs the liberty interest. So it's not – it may – so we acknowledge what her Honour said in *Vincent v Parole Board*, which is that a detention may be proper at the outset, and factors can change, so Mr Vincent, the Court will recall, was a prisoner who had dementia. He was denied parole by the Parole Board on the basis that he presented an undue risk, and the High Court said, well actually the Parole Board's assessment of risk was not right, he no longer posed an undue risk, and therefore detaining him had become arbitrary. So certainly accept that

could happen in a case like this. We just say on these facts that's not, we're not at that point.

WILLIAMS J:

It doesn't seem helpful to say proportionality is only relevant in the close cases because proportionality will be relevant in all cases, it's just that it's likely to fall in favour of detention where there is serious danger.

MS LAURENSON:

Sorry, proportionality to the index offending, otherwise we say proportionality is about risk, the risk presented, which you might draw from the index offending, but you might draw from other things.

WILLIAMS J:

Well you're talking about the proportionality of the detention as against the risk including the index offending. I'm not sure we should be passing this material in a way that excludes by defining them out considerations that are clearly relevant.

MS LAURENSON:

I don't think I'm doing that. I'm –

WILLIAMS J:

No, no, I'm suggesting – well, I'm not sure. I'm not sure whether you're doing that or not.

MS LAURENSON:

No, I'm not sure either.

WILLIAMS J:

I'm just worried that you apply proportionality only to the close cases, which it appears *VM* is saying it.

MS LAURENSON:

No, I'm certainly not saying that. I'm saying, no, I'm not saying that.

WILLIAMS J:

Okay.

MS LAURENSON:

I'm saying in every case what's required is a balancing of risk on one hand, and risk – there are several things that you might use to assess risk. One of those might be the index offending, but that's not always going to be – that's not necessarily going to be the case, and on the other hand the liberty interest.

ELLEN FRANCE J:

You are saying then that the Act authorises potentially indefinite detention, even for a very – even where the index offending is very minor, without any indication in the statute of what the level of risk has to be.

MS LAURENSON:

Well in theory I suppose I do say that, but – *but* I say that when the Court conducts that balancing, if the risk is at a low level, broken windows, and the detention has been significant, then in that case the liberty interests would clearly outweigh –

WINKELMANN CJ:

Yes, but that doesn't really answer Justice France's – so say someone comes in under the broken windows, but they're there for 10 years, they start to, in a sensorily deprived environment, start to become more fixated in their problematic thinking, are resistant to care, a series of different nurses deal with them, a series of different doctors, and they rate their history and say oh well there's risks of violence, you know, so suddenly someone who's broken some windows is indefinitely detained, and does that – on your submission this scheme contemplates that. Well I mean, excluding all the narrative I gave you, but on your – about the circumstance, which it'd be unfair to ask you accept that, but on your submission this scheme contemplates the indefinite detention of someone who comes in on minor offending, and then presents very problematically over time.

MS LAURENSON:

I think, yes, your Honour set up a challenging set of facts there but what I – 1100

WINKELMANN CJ:

No, I know, I was just taking those facts out.

MS LAURENSON:

Yes, so yes.

WINKELMANN CJ:

So, well, you tell me how, because you do seem to be submitting that it authorises indefinite detention, even though the person has come in on a minor index offence?

MS LAURENSON:

Well, it contemplates three year, up to three-year extensions with a number of checks and balances even within the three years to make sure that –

WINKELMANN CJ:

But as you accept, you must look past form?

MS LAURENSON:

But, yes, you can –

WINKELMANN CJ:

Because really you're submitting that it's, that J unless his, J may be indefinitely detained, unless his presentation changes significantly, being managed in this existing paradigm.

MS LAURENSON:

Yes, with the caveat that his – what the Court of Appeal says in *VM* is that his liberty interest will increase over time and –

WINKELMANN CJ:

Well, it's quite a long time has gone.

MS LAURENSON:

Yes, but his risk is quite high, is what I would say in response to that, and so that's a significant weight on the scales on the other side.

WINKELMANN CJ:

So the model you've just set up is quite problematic, because it gives clinicians, a passing group of clinicians inevitably, an awful lot of power over liberty interests. So the Crown must accept some sort of procedural, methodological protections which are not currently apparent on the *VM* model, so what has the Crown come up with in that regard?

MS LAURENSON:

Well, firstly, I'd say it gives the Family Court a great deal of power. I don't accept that it gives clinicians a great deal of power. It gives – well, they also have a significant role in the system, but the decision is with the Family Court Judge and I think –

WINKELMANN CJ:

No, but there's no provision under your model about what the risk has to be, so it's just risk, it's – so I'm asking you, you must accept, some sort of structure to this, which I don't think we currently have in *VM*. I mean, is it enough just to say there's a risk and how are they to formulate it? Because if we are in the ESO or PPO model, we'd have a very clear idea and these clinicians would be feeling the weight of those assessments.

MS LAURENSON:

Yes, so the fact – the sort of factors that sometimes we get in this, in a – to bound a statutory discretion are not there, I certainly accept that. It's the section itself is very open-textured. But in my submission, what the Family Court, the material that the Family Court gets, and the guidance it has in *VM* to consider, the starting point is that the order will – the starting point is rights consistent, in

the sense that if there's no order made the person goes into the community, so that's always the starting point. The burden is on the Crown to make the application and to prove its case, and then –

WINKELMANN CJ:

It's on the balance of probabilities.

MS LAURENSON:

Yes and then from that starting point the Court's asked to consider should this person continue to be detained and if so is that secure or supervised care, so what gradation is necessary, and *VM* tells the Court what it should consider, safety and care and treatment. So the principles of the Act, the Court of Appeal went to the principles of the Act, as you'd expect, to say, well what does this, what does this broad discretion mean? Well, it's to provide Courts with appropriate compulsory care and rehabilitation options, recognise and safeguard their special rights and to provide for the appropriate use of different levels of care.

WINKELMANN CJ:

See, you're not – the Crown doesn't – has not come up with a framework to move *VM* on, notwithstanding the effluxion of time. So for instance, accepting that their opinions have to actually be directed to and make out a certain level of risk and what that risk is. Another thing they might consider is what's the burden on the State if it's going to detain people for their obligation of care, so morals can suggest it to have been, you know, you have to show that there is a rehabilitation pathway planned, or a reintegration pathway planned.

MS LAURENSON:

Well, certainly I think that – I certainly accept that there needs to be a plan for rehabilitation, because that's – a care and rehabilitation plan is a statutory requirement and we've looked in this case now in some depth about the rehabilitation that's proposed for J, it's just that his is a very difficult case so it doesn't look like it might look in some other cases, so I certainly accept there is an obligation.

WINKELMANN CJ:

So did you say reintegration plan or rehabilitation plan?

MS LAURENSON:

Rehabilitation.

WINKELMANN CJ:

Not a reintegration plan?

MS LAURENSON:

Well a rehabilitated person will then be reintegrated.

WINKELMANN CJ:

Well, not necessarily.

MS LAURENSON:

Well they should be. If they are rehabilitated, then they're not posing a risk, so I –

WILLIAMS J:

I don't know that that's the right way of framing that, because this is a care plan, not a risk mitigation plan, even if risk mitigation is a part of the plan, and the clinicians do talk about *need* as well as risk. That seems to me to be very important to maintain focus on.

MS LAURENSON:

Yes, it's a care and rehabilitation plan.

WILLIAMS J:

Correct. Because the clinicians say "not only is he high risk, he's high need."

MS LAURENSON:

Yes.

WILLIAMS J:

Which is a care-focused, clinically-focused idea.

MS LAURENSON:

Yes and in providing those needs – providing for those needs, we keep him – that's appropriate care for him, wherever he is, but at the moment that's in hospital, the secure care.

WILLIAMS J:

Yes, I just – I guess my point is it's not, you know, it's not the binary of liberty versus risk. If that is the only binary, we've got a problem.

MS LAURENSON:

Yes, no, I accept, I accept that that's – that's putting it – that's the argument that the Court of Appeal probably rejected in *VM* which is the, it's just about undue risk, I accept that.

WINKELMANN CJ:

So looking at the issue of risk threshold, you'll be aware of the enormous amount of literature about the difficulty of simply assessing risk on the basis of clinical assessments.

MS LAURENSON:

Yes.

WINKELMANN CJ:

And that's why models throughout the world tend to use index offending as a very critical indicator of risk. So what do you say, I mean, a rights consistent interpretation, you would think, would not just be – would not sit just on the assessment of doctors based on clinical interactions, but would have some more rigour to it. So are you – have you given thought to whether more rigour is required in this, in terms of formulating the standard of risk, in terms of proof?

MS LAURENSON:

Well, I don't think you find that in the statute and that seems to me to be a –

WINKELMANN CJ:

No, you don't.

MS LAURENSON:

That's a big read-in. What the statute does do, obviously, is it does, I understand, I'm aware of the literature your Honour is referring to, but the statute obviously places significant weight on the opinions of the specialist assessors and on the Family Court Judge's ability to engage with those assessments and produce a decision.

WINKELMANN CJ:

Well, yes, it does, because it's so open-textured, yes.

MS LAURENSON:

Well, it's open-textured when it comes to the – certainly, it's open-textured by the time we get to the section 85 discretion, but there are a lot of steps before that about the information that has to be before the Court, the plans, the reviewing of the plans, the specialist assessor's report, so yes, once you've got all of that information what you are left with is a reasonably open-textured discretion, yes, but I don't think that you should read that section without looking at what comes before and what the material is that is the – that drives all of the material coming into the Family Court in order to assist with that.

ELLEN FRANCE J:

And if you look at what *VM* says about both rehabilitation and proportionality, how do you say that fits with what the Convention in relation to disabilities requires?

MS LAURENSON:

Yes, so *VM*, that was my caveat with *VM*, is that *VM* is silent on the Convention which had not been long – well, it was in force by that time, had been ratified.

So, the Court of Appeal in this case looks briefly at the Convention and doesn't lead it to take a different approach. Article 12 of the Convention, which is the people, protection, same system Article, is – has been controversial and in the sense that it, and I don't want to stray into Mr McKillop's area, but in the sense that it might, suggests that it's inappropriate to have an entirely different system for people with intellectually disabilities or that intellectual disabilities, while obviously that, if that is so then, or we do, that is the system that we have, we do have a separate system for people who present before the courts with intellectual disability. But it's not been universally applied that way in the international jurisprudence.

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So the Court's got – I don't think we've actually General Comment t 35 from the Human Rights Committee in the materials but we do have an article by Neuman in which he explains that the Human Rights Committee has taken a slightly different view than the disability body and the Human Rights Committee hasn't always seen involuntary hospitalisation as amounting to arbitrary detention. It has approved of involuntary hospitalisation as a last resort to prevent harm to staff or to other people. So there's a bit of ambiguity or there's some differences of opinion there.

WINKELMANN CJ:

Yes, I mean the problem with the test that we currently have is it does have the problem that's been pointed out by the Human Rights Commission and the IHC that people under this regime are unique. Society treats them in a way where they're uniquely subjected to a risk assessment which is ill-defined and is operated in a way that there is no threshold being met and that's why I'm asking you no threshold of seriousness of risk, the significance of the index offence, according to you, is not entitled to significant weight. So that's why we're interested in what the Crown's position is in response to all the things that have been said to you about how we could give the test a more rights-consistent content and your response is really that there's no change to be made, or is there something that you think should be done?

MS LAURENSON:

Well in terms of the uniqueness of the regime, I'll let Mr McKillop pick that up when he talks about discrimination because I think that falls more neatly there. In terms of the test, the Crown says that because in this case we are talking about somebody that's been consistently assessed as having a high or a very high degree of risk, any test within a test that this Court might set, we say, would need to give significant weight to that risk.

WINKELMANN CJ:

Yes, so if someone came into the system with a history of serious offending, very serious violent offending, or sexual offending, and maybe they'd – that there might have been more than one incident, the index offence is obviously entitled to extreme weight and you might see that as in justifying a rollover and so J' not in that circumstance and you're saying even so his circumstance is such as to justify, so that's a big range. How would you formulate the test? So, I appreciate you'd rather just decide, just deal with J, but we need your assistance on how you say *VM* needs to change with the times?

MS LAURENSON:

Well so firstly I say *VM* doesn't need to change with the times. I say that it is actually a –

WINKELMANN CJ:

That's it?

MS LAURENSON:

No.

KÓS J:

You did say with one exception so I've been waiting for the exception.

MS LAURENSON:

So the exception was that it doesn't refer to the Convention.

KÓS J:

I see, okay.

MS LAURENSON:

So in terms of an orthodox principles of interpretation, I think we would probably now expect the Court to have engaged more with the – well at all –

WINKELMANN CJ:

Well what does that mean for the test?

MS LAURENSON:

Well, so the Court of Appeal then does in this case rather than in *VM*, the Court of Appeal does engage with the Convention. Perhaps we might be able to have a look at that. So the Court of Appeal doesn't…

WINKELMANN CJ:

Doesn't change the test in light of it?

MS LAURENSON:

That's right, yes. So at 141 the Court of Appeal says – it talks about ways in which the system might be improved. It acknowledges that in its view specialist legislation for intellectually disabled people was a positive development and then says well there's been ongoing dialogue sparked by the passage of the Convention, but it doesn't go on to – it doesn't go back and use that as a mechanism to –

WINKELMANN CJ:

So you would accept a formulation that the index offence is very significant in the risk assessment? I'm not trying to trap you here, Ms Laurenson.

MS LAURENSON:

No, I didn't think you were.

WINKELMANN CJ:

Because you would also add in, that's not limited to that, you say.

MS LAURENSON:

Yes.

WINKELMANN CJ:

The index offence is obviously very significant, so if it's very serious offending then that must weigh. You would say, however, that someone who comes in with a minor index offence, if they present to show sufficient evidence of dangerousness, that also might justify, might in the section 22 analysis justify continued detention. So what level of dangerousness do you say, I mean, and how careful, how scrutinous does the Court – do the courts have to be of that? Because what happens in the moment, without the statutory framework to shift, to shape the practitioners' reports to the Court, you know, which is very focused in other jurisdiction, other areas, is you get quite unfocused views about risk. So, has the Crown reflected on that? Would the Crown accept that there must be some burden to make, to take care over formulation, take care of the evidence, to present it in a way and what is it?

MS LAURENSON:

Yes, yes, but I'm reluctant to go too far into a test which I say would be relevant to people who present, because I say any, any test would be likely to have to put significant weight on risk and this is someone who presents as a high risk. So, in my submission, we're talking about a test, a gradation at the lower level.

WINKELMANN CJ:

Risk of what, though? Don't you accept there must be some formulation of test of risk of what? You couldn't have, you know…

MS LAURENSON:

Yes.

WINKELMANN CJ:

Property damage could not justify?

MS LAURENSON:

No, I agree, I think I've already, I think I've already accepted that, I certainly agree.

WINKELMANN CJ:

But where would you put it? It can't be risk of dangerousness excluding property damage.

MS LAURENSON:

Well, I'm not sure it's for me to set that when I say that, in this case, it's a high or very high risk of violence, violent or serious, violent offence, but –

WINKELMANN CJ:

Well, the point is tests are being set against you and I'm, so I'm looking for a response to be fair to you.

MS LAURENSON:

Yes.

KÓS J:

Could I just ascertain, because I'm not sure that I agree with the Chief Justice's formulation.

WINKELMANN CJ:

It's not my formulation.

KÓS J:

Well, no, the account that's been put to you in trying to elicit a test from you. I'm not sure a minor index offence actually continues to have ongoing significance for the purpose of the test. I can see how a significant seriously dangerous index offence would, but it seems to me that when it's something like breaking windows, well, we cease to be worried about the risk of breaking

windows, because you say that's just part of the rub of life. What we are concerned about, that passes into history and is simply the entry point into this, into this care regime. It's the ongoing continuous risk of a different kind that is far, far more relevant to any risk assessment, I think.

MS LAURENSON:
Yes.

KÓS J:
But I'm just trying to work out what your position is?

MS LAURENSON:
No, that is what I say. So I say –

WINKELMANN CJ:
That was the second model I put to you.

MS LAURENSON:
So a very serious index offending would obviously speak to risk for a long time, in my submission. So if somebody's index offending that brings them in was very serious, then that is going to be a significant factor for some time, in my submission. If it is more minor, and particularly if it's the kind of offending that we would say, well, broken windows, that is something we have to live with.

WINKELMANN CJ:
Just something minor brings him in and your point is that their conduct and presentation, once there's this sort of object, this thing that brings them within, their presentation in care can justify ongoing detention, notwithstanding the minor nature of the index and that's where you're different – your position is different to the appellants in the IHC and Human Rights Commission, who say that the index offence continues to have potency.

MS LAURENSON:

Yes, I say the index offence is the gateway. You have to have the index offence to bring you within the scope of the Act in the first place and it may continue to speak for some time in some cases. I'm not attributing any significance to it in J's case. It's not –

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ELLEN FRANCE J:

Well that's something Mr McKillop will address but that potentially then does raise questions about discrimination, doesn't it, because if you treat it simply as a gateway, it's a gateway that only applies to a particular group of people.

MS LAURENSON:

Yes, and I'll let him pick that up with your Honour.

WINKELMANN CJ:

And it's also on that model only something that can be held against J, it never assists J?

MS LAURENSON:

Well, no, I think it could – I think it could be made – well it is, it is frequently said –

WINKELMANN CJ:

I suppose it could if his presentation is not problematic on your model.

MS LAURENSON:

Yes, and I think it is frequently said for him well actually he's never done anything very serious. We're only talking about risk. So, I think that is said for him and I think that is something that the Family Court Judge can take into account. That is something that has to be balanced against the fact that well, yes, but it's suggested that the risk is of something much worse but I'm not – I think that is a point in his favour, yes, but it doesn't, in my submission, add very much in the context of the risk assessments that we have.

MILLER J:

You call it a risk assessment but the statute does give us a little bit of guidance, doesn't it, in section 11 and various other provisions. It focuses on the health and safety of the care recipient and of others and a health and safety issue for others arises in this case because there is a risk of violence from J.

MS LAURENSON:

Yes and I've set that out in – I've referred to that section in my submissions and we say that the way that the Court of Appeal in *VM* draws on that section is orthodox and appropriate.

MILLER J:

It still raises the Chief Justice's question about what standard has to be met to justify ongoing detention.

MS LAURENSON:

Yes.

WINKELMANN CJ:

I can't help thinking that it would be a good discipline for practitioners, and they would welcome it, if they were actually given some sort of framework to operate within as opposed to giving their clinical assessment because, yes, we can't over-judicialise what is a caregiving situation, but nor can caregiving be allowed to operate without the kind of basic fundamental concepts and precepts that we have in our rights frameworks and the conventions we've signed up to in our Bill of Rights Act.

MS LAURENSON:

Yes, and I'm certainly, although I'm resisting the temptation to give a list of factors, I'm certainly not –

WINKELMANN CJ:

I'm not asking you to give us some sort of nailed down thing because obviously it would be – you can't give a rigid test but –

MS LAURENSON:

No, but I am certainly accepting that the Bill of Rights has an important role to play here. It's the starting – the starting point is the person will be released so that's a very rights-consistent starting point. *VM* in my submission puts a lot of emphasis on a person's liberty interests. Just to – while we're talking, we were talking earlier about the distinctions, if one is to be made between care and treatment and rehabilitation, the select committee reported on the Bill and I've got that in the materials and I'm on page 7.

WINKELMANN CJ:

What is the reference?

MS LAURENSON:

I'm in our bundle of authorities.

WINKELMANN CJ:

At?

MS LAURENSON:

Tab 5.

WINKELMANN CJ:

So your bundle of authorities.

MS LAURENSON:

Tab 5 and I'm at page 7 of the document itself which is also page 7 of the PDF conveniently. And so I think the select – I think that the select committee may have had similar views to some of your Honour's. Care is important because that – one of the reasons that care is important is that that reduces the risk of danger that a person might pose to others but also to themselves. His care is not supposed to just be custodial, it's supposed to involve rehabilitation. There's also a recognition that for some people progress will be linear and for others there will be fluctuations and therefore fluctuations in the level of care and a change of care plan to care and rehabilitation plan to reflect that.

WINKELMANN CJ:

So we better let Mr – I'm just conscious of the time because I imagine Mr McKillop needs a little bit of time.

MS LAURENSON:

He does but he says not that much.

WINKELMANN CJ:

That may be ambitious.

WILLIAMS J:

Not any more anyway.

WINKELMANN CJ:

It might be ambitious on his part.

MS LAURENSON:

Mr McKillop and I will reconvene in the break and see if –

WINKELMANN CJ:

Well, we've got another five minutes.

MS LAURENSON:

Exactly, and see how much he does need, so I'll just carry on for now.

MILLER J:

Perhaps I could ask you a question I have now. I have a concern with the legislation at a more basic level and that is whether it permits a person to be detained at all when the only real reason for their detention is that they pose a risk to other people. This is not to dispute that the objective and principle is to look after J and ultimately return him to the community, but it's clear from this most recent report that the overwhelming consideration is the risk that he poses to others, and one can see in the Act that health and safety of the care recipient and others are principles or relevant considerations, but nowhere do you see that as an actual purpose of the Act. It's all about rehabilitation, some treatment

and care which is directed onto the needs of the person. So your section 85 is doing an awful lot of work it seems to me. It's taking someone who has entered the system through a criminal pathway and is now being detained essentially because of the risk that they pose to others, and we can see that in his case this will be obviously indefinite because there is no reason to think, on the materials that we have, that he's ever going to be able to function in the community.

MS LAURENSON:

But I think there's certainly no – there's certainly no prospect that he's going to function independently in the community but if he were to live in the community he would live still a very supported life but without the detention aspect. So there are many people, and there's evidence about this, there are many people who live in the community with intellectual disability who receive a lot of support. So that would be – that's the future for J and when people are talking about his rehabilitation, rehabilitative progress being slow but that is what he's – that is the goal, it's not to have him living independently but –

MILLER J:

I don't dispute that's the aspirational, that the clinical people are sincere about that, I fully accept that, but it does seem quite plain that his treatment at the moment is entirely dominated by managing the risk that he presents.

MS LAURENSON:

Well, certainly I accept that that's a very significant factor. I would just take your Honour back to the discussion we had at the beginning about how he has, you know, he has over time stepped out into less secure forms of care but had to be returned. So, there's no reason to think that he wouldn't be able to do that again, or he may be able to do that again.

WILLIAMS J:

Well for quite a long time, that's the striking thing about this. It's not as if he was out for six months and it was a disaster.

MS LAURENSON:

No.

WILLIAMS J:

He was out for 10 years.

MS LAURENSON:

It's strange.

WINKELMANN CJ:

Not out.

MS LAURENSON:

Yes.

WINKELMANN CJ:

But at the moment Dr Johnston's report says the primary focus of care is managing risk.

WILLIAMS J:

Including risk to himself.

MS LAURENSON:

Including risk to himself and he has presented –

WILLIAMS J:

Yes, he has.

MS LAURENSON:

The Courts will have seen dental material and other things.

WILLIAMS J:

Correct.

MS LAURENSON:

He does present a degree, a significant risk to himself.

WILLIAMS J:

So, it's probably fair to say that there is a dimension of care still in this case?

MS LAURENSON:

Yes, and the –

WINKELMANN CJ:

But more fundamentally, I suppose, what do you say about Justice Miller's point, which is quite a major point because we're dragging off into detail points, but as Justice Miller put to you that when you look at the legislation you can construe it as not justifying someone being detained to protect the community. The purposes of the legislation is directed at care of the individual.

MS LAURENSON:

Well there's – so the passage from the select committee that we just referred to suggested that care has a personal and public safety aspect to it. So that's the first thing I'd say on that.

MILLER J:

But the legislation and its passage through the House was changed to remove the prospect of civil detention where people simply needed care.

MS LAURENSON:

But that's already happened. In this report the committee has already accepted that that should be – that should come out so they are, I think when they're speaking here, they are speaking about people who are detained, having come into the Act through the CP(MIP) route.

WINKELMANN CJ:

That is the fundamental difficulty with your argument, though, is against the HRC's and the IHC's which is that it's adventitious on this model that you

happen to get a person who's committed a minor offence and they can be detained for their life, but if they're in the community and hadn't broken the glass, they wouldn't have and Parliament decided they wouldn't be detained. So, Parliament decided not to reach out into the community and take people who hadn't – they've decided on a criminal pathway and so they haven't tried to eliminate all risk associated with people who need care.

KÓS J:

Section 11(a) seems to be something of an answer to Justice Miller's point.

MS LAURENSON:

Yes, and the Court of Appeal uses that section 3 and section 11 together in *VM* to reach the position that it's reached and, in my submission, section 11 is significant because it directs the Court to be guided by the principles that it sets out protecting the health and safety of the care recipient and of others and the rights of the care recipient. So, in my submission that fills the gap that I think your Honour has pointed to and it's also –

WINKELMANN CJ:

But it doesn't really make – it doesn't answer the point that's been made against you by the IHC and the Human Rights Commission even if it fills that gap, does it, which is that this seems to be a very – it seems to be an extraordinary outcome that you can't have a civil pathway and you can only have a criminal but if the criminal pathway is a very low level of offending it can nevertheless justify lifelong detention on your model.

But, anyway, it's morning tea and we may just be looping back around but you might want to think about that and give us your best answer on it because I think that is possibly one of the major points against your interpretation.

MS LAURENSON:

Thank you, your Honour.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.52 AM

WINKELMANN CJ:

Ms Laurenson.

MS LAURENSON:

Thank you, your Honour. So, hopefully I can be quite brief now and then hand over to Mr McKillop to pick up the discrimination argument.

WINKELMANN CJ:

And he is aiming to be finished by when?

MS LAURENSON:

Well, in time to give my friends a reply, but they tell me they don't need very long.

WINKELMANN CJ:

Okay and Mr Edgeler, will you be handling the reply, given Mr Ellis' health, or?

MR EDGELER:

Largely.

WINKELMANN CJ:

Largely, right, and I think the Human Rights Commission has got one outstanding question to answer?

MS HARADASA:

Yes, your Honours, we have done our homework but I am conscious about the time, so –

WINKELMANN CJ:

Okay, we'll see that at the end.

MS HARADASA:

We could file it, you know, a brief supplementary –

WINKELMANN CJ:

Yes, we'll see if we run out of time.

MS HARADASA:

Because I think our answer, of course, my friends would want to respond to, so maybe a brief supplementary written –

WINKELMANN CJ:

Okay, all right, well, yes.

MS HARADASA:

Thank you.

WINKELMANN CJ:

Deal with that when it comes.

MS LAURENSON:

So, I think the point I wanted to make, and I perhaps have, is that the Crown certainly accepts that a significant justification is needed to outweigh the kind of liberty interest that we are talking about here, and we say that *VM* says that but we accept it anyway, that the longer the detention goes on the greater liberty interest, obviously therefore here we are at a significant – we have significant liberty interests to contend with. In fact you, and you probably always do when you're detaining someone even for a much –

WINKELMANN CJ:

And risk on your assessment – on your assertion, risk can, notwithstanding the nature of the index offence, and that's your ultimate submission.

MS LAURENSON:

Yes and we say that it's clear from the statute that that was what was intended, that there's –

WINKELMANN CJ:

Yes and to make clear to you, the Court's interest is whether that – whether we can provide clinicians and judges more clarity as to the issues they should be addressing, so what threshold those concern – any – the concerns are set at.

MS LAURENSON:

Yes.

WINKELMANN CJ:

And that would be it's consistent with the requirement, you know, prescribed by law in the Bill of Rights Act and also with a note of arbitrariness.

MS LAURENSON:

Yes.

WINKELMANN CJ:

And so that's why we have been pressing you to go beyond *VM*.

MS LAURENSON:

Yes and so in terms of the clinicians, I don't – I am very reluctant to get back into the facts – but there is at footnote 8 and 9 some material about how clinicians go about assessing risk, so their own methodology and what is required of them as proper medical professionals, so –

WINKELMANN CJ:

Yes, but you have nothing to add in terms of any framework you would accept?

MS LAURENSON:

Well, so that's the factual point, and then in terms of the framework, at paragraph 50 of my submissions I have looked at some other occasions where courts have engaged in this kind of balance – well, what we're describing as balancing exercise, and what *VM* described as a balancing exercise, and so I have set out three cases there. The first one is one of this Court, *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213,

which the Court will recall is about the power to make a child sex offender registration order and the rights consistency of that.

WINKELMANN CJ:
Yes.

MS LAURENSON:
The case was decided on other grounds but your Honour the Chief Justice and Justice O'Regan said when considering the discretion: "The level of risk that the offender poses [is] of sufficient gravity to justify the making of a registration order with the consequent impacts on the rights of the offender." And so we say that's the kind of – we see that as a similar kind of analysis to this one, obviously in a different context.

WINKELMANN CJ:
Yes, well, I suppose that's got the same problem, that was very context-specific, so when we said "risk" there, everyone knew what the risk was.

MS LAURENSON:
Yes.

WINKELMANN CJ:
But here, risk is a free-floating thing, it seems, and the question is whether we can give more guidance in relation to that and other aspects, process, et cetera.

MS LAURENSON:
Certainly I accept that in order to justify a significant justification on a person's liberty interests, we have to be talking about a significant risk of something serious. Then the other cases I've set out there, one is about an ESO, needs strong justification to overcome –

KÓS J:
Where is this, in your submissions?

MS LAURENSON:

I'm at paragraph 50, your Honour.

KÓS J:

Paragraph 50, thank you, yes.

WINKELMANN CJ:

Mosen's not the one with Justice Cooke, is it? There's a decision of Justice Cooke under the ESO framework where he reads in – he tries to give the ESO framework a more rights consistent application.

MS LAURENSON:

Yes, no, that's not this case. This case pre-dates Justice Cooke being on the Court of Appeal, I think. But Mr McKillop knows that case.

MR MCKILLOP:

The case is called *Gray*, G-R-A-Y, I think.

WINKELMANN CJ:

Gray, it's *Gray*.

MR MCKILLOP:

But it was, I think it was overtaken, essentially, by *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507, which is the case referred to in the subs.

WILLIAMS J:

How do you calibrate risk against time in detention? Because you say, and it's hard to argue against that, that the risk has to be significant risk of harm, probably significant risk of significant harm to self or others?

MS LAURENSON:

Yes, yes.

WILLIAMS J:

The longer the detention, the "what" the risk? It's a really bad way of –

MS LAURENSON:

I'm sorry, I just can't get anything from that, your Honour.

WILLIAMS J:

No, lost you? Does the risk need to increase? What if the risk remains static but the detention lengthens and lengthens and lengthens, does the risk side of the scale have to shift along with it to maintain proportionality?

MS LAURENSON:

That's an interesting question. Yes, perhaps. Yes, I mean, I think if we're thinking of a balancing and the liberty interest is increasing over time then that, to use a terrible set of scales, that's going up, so you are going to need something significant to counterbalance. Now, it might be that, of course, that the risks at the beginning significantly outweigh the liberty interests, so risks –

WILLIAMS J:

Was always going to outweigh it.

MS LAURENSON:

Yes, I – this terrible –

WINKELMANN CJ:

Isn't the – isn't it not that the risk would – not that the thing you're looking for would increase, so I mean, obviously if it's significant risk of significant offending, that's a pretty serious thing – significant offending or significant harm?

MS LAURENSON:

I think we need a different word for the second bit, but yes.

WINKELMANN CJ:

Right, anyway, but it's the cogency of the evidence?

WILLIAMS J:

That's the extent of the, the increase of the risk is the crystallisation of the risk.

WINKELMANN CJ:

Or the cogency of the evidence.

WILLIAMS J:

The less contingent the risk is, and/or the greater the possible harm will be.

MS LAURENSON:

Yes, but on reflection, you wouldn't necessarily need to see an increased risk because it may be that at the beginning it was significantly outweighed.

KÓS J:

Yes.

MS LAURENSON:

The risk.

WILLIAMS J:

Yes, I get that, yes.

MS LAURENSON:

And so risk may stay the same, but the gap between the liberty interests and the risk narrows, is what I would say.

WINKELMANN CJ:

But you wouldn't, I mean if there was – if the risk was of extremely serious offending, on your model you'd say that remains outweighing the liberty interest because you, on your model as I understand it, you say the Act can, in fact, justify indefinite detention.

MS LAURENSON:

It can, it – yes, I do say that, but –

WINKELMANN CJ:

So it doesn't get to a point where you've been in – detained so long that even though you're at risk of committing very serious offences you're released, that's not what you're accepting? Or is it what you're accepting?

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MS LAURENSON:

Well, I think I don't need to accept it or not accept it because I don't – I just don't say that this case we just, we don't…

WINKELMANN CJ:

Well, it's a very long detention.

MS LAURENSON:

But yes, but I, yes, acknowledge that we are –

WINKELMANN CJ:

More than half his life.

MS LAURENSON:

Certainly getting –

WINKELMANN CJ:

Isn't it?

MS LAURENSON:

No, but close.

WINKELMANN CJ:

Not quite, close. So the other formulation I put to you was that actually it's not – you're not looking at – I mean well there's another factor in there which is the cogency of the evidence, not an alternative necessarily, but cogency of the evidence, how compelling the case is may increase over time – required may increase over time.

MS LAURENSON:

Yes, if it was finely balanced – so if it was a very finely balanced case five years ago then you would expect it. You would need to see, I think, given that the liberty interest would increase over that five years, then you would expect to see more on the other side of the scales but in this case we say well it wasn't a finely balanced case five years ago.

ELLEN FRANCE J:

Sorry, I can't remember, do we have information about how many people are currently…

MS LAURENSON:

Yes.

ELLEN FRANCE J:

I thought we did somewhere. I just can't…

MS LAURENSON:

Yes, so there's an updated evidence – there's an updating –

ELLEN FRANCE J:

In the updated evidence there's that –

MS LAURENSON:

– evidence from – Ms Daysh does that.

ELLEN FRANCE J:

Of Ms Daysh. Thanks.

MS LAURENSON:

Yes, and so the Court will see that that's – it's a very –

WILLIAMS J:

So 180, is it?

MS LAURENSON:

No, it's much – the hospital's secured cares are 39 people and community secured care a further 37, 103 in supervised and then over 7,000 in other non in the –

WILLIAMS J:

The community, in the community.

MS LAURENSON:

In the community.

ELLEN FRANCE J:

And just remind me, does that – I have read it but does that say average length of time?

MS LAURENSON:

It doesn't.

ELLEN FRANCE J:

No.

MS LAURENSON:

No, and – no it doesn't and the figures are a bit difficult to compile because of the way in which people come in. They might be special patients for some time and in care so – and some people come out of the system and back in so I don't – we haven't given the Court those figures.

WINKELMANN CJ:

So we don't know if there are other people who are subject to long-term detention?

MS LAURENSON:

Well so there were – there is something in the Court of Appeal's decision about the evidence that was essentially given from the Bar I think in that case.

There are other people in a comparable position, a small number, 10-ish I think. Now, I'm giving evidence from the Bar having just been snippy about it.

WINKELMANN CJ:

Well we can find it in the Court of Appeal decision.

MS LAURENSON:

Yes, but those numbers have obviously fluctuated a bit since.

WINKELMANN CJ:

Yes, but it's an indication anyway.

MS LAURENSON:

Yes.

WILLIAMS J:

If you assume that for present purposes the risk remains static, do you agree that the settings in the system should require clinician's, care co-ordinators or whatever, to be increasingly imaginative over time with risk mitigation options otherwise nothing changes?

MS LAURENSON:

I don't know about imaginative but I certainly think there's an obligation on them to keep – as medical professionals, if nothing else, to keep trying new things and to give someone the best care that they can. I mean I think that's –

WILLIAMS J:

Yes, but to keep trying new things with a mindset –

MS LAURENSON:

Yes, but –

WILLIAMS J:

With a liberty possible mindset.

MS LAURENSON:

Yes, and I say that you can see that because of the discussion about rehabilitation and because rehabilitation is what would lead them to say risk has lowered and this is a good time and therefore to announce the liberty interests. So, yes, I accept that they – that and I suppose I also accept that if something is not working over a period of time, as a matter of common sense, it probably makes sense to try something different and I say that you can see that.

WILLIAMS J:

Yes, but we don't have – you're toyng with liberty there aren't you because it's more – it's got to be treated as more pressing than this isn't working so we'll try something else?

KÓS J:

Well we know what needs to be done. It's not just a question of imagination. It's a question of investment. And so Dr Johnston makes it quite clear that some of the problems are that we have no male psychologist who's available, he can't be treated by a female psychologist, and secondly, the specially fitted van for travelling. Now that's a question of investment, it's money. So does that go too as the liberty increases as time passes that the State will have to make a greater investment if needed?

MS LAURENSON:

So two points on that. The first one is that this is – I just want to – I'm not sure this is what your Honour is suggesting but I just want to make it clear that the care J is currently receiving is very expensive care so –

KÓS J:

Of course –

MS LAURENSON:

Partly because –

KÓS J:

And very static, in fact static and going backwards in some respects because the male psychologist has disappeared off the scene.

MS LAURENSON:

There's a nationwide shortage of psychologists and, of course, if you can only have a male psychologist and one who works in this kind of setting, we are talking about a really small number of people. So that's a practical difficulty and actually the Court of Appeal has recently talked about that, the difficulties of finding those clinical people in a decision called *Maaka-Wanahi.*

WILLIAMS J:

Is this the sort of case where incentives on the State need to be imposed?

MS LAURENSON:

I'm not sure that's going to produce male clinical psychologists in all seriousness because that's a 13 –

WILLIAMS J:

Well it might do.

MS LAURENSON:

Well so the – I'm now just repeating evidence I gave, I adduced in another case –

WILLIAMS J:

Did you give evidence?

MS LAURENSON:

– which I shouldn't do but it takes 13 years to become a psychiatrist so, you know, the present shortage is a problem. It's not particular to J's case except that he needs a male psychiatrist which is – psychologist which is, makes –

WILLIAMS J:

Yes, but here's the situation, we've got here detention for 18 years, no real prospect on the reports I've read of that changing any time soon, and the suggestion that part of the reason that that won't change is we don't have enough money because we're spending it elsewhere, so we detain for nearly half a man's life because we don't have enough psychologists. That doesn't sound like a good BORA reason in these circumstances. It sounds a little bit like the cases in Canada over delay in bringing a matter to trial and here.

MS LAURENSON:

I do think your Honour is making a few factual leaps there. Yes, there's presently not a male clinician available to treat J but he has had a lot of treatment over the years which at times seemed to be working and then it wasn't, and then it seemed that it was not, so I resist the suggestion that this is an ongoing problem. It's a – things have been – he has received treatment over the years and there's a – and that so –

WILLIAMS J:

Yes, of course, of course, I'm not suggesting he hasn't but how within a legal framework does one light a fire under the system because this guy has been in detention for 18 years and the system is not holding out a torch of hope here and when alternatives such as – and has spent a great deal of money reinforcing walls that perhaps could have been allocated elsewhere in a more imaginative wall, I don't know, I'm not a clinician. But one of the problems with big systems, of course, is that they start producing their own responses because of the shape of the system. Meanwhile we've got someone in detention for 18 years with no real prospect of release. It seems to be at some point you reach a tipping point where stuff needs to change and resources need to be allocated because the oppression is unbearable.

MS LAURENSON:

I certainly accept that there is more that could be done. I think that's probably always the case in a public health system but –

WILLIAMS J:

Yes, of course, but we're not talking about hip replacements here, we're talking about an 18-year detention.

MS LAURENSON:

Yes, but if we – in some of the material that we looked through, we certainly see that yes there have been reinforcements of walls but there have also been outings and guitar lessons and, you know, cultural advisors and, you know, there are – I'm resistant to the suggestion that the money has just been put into security and confining J –

WILLIAMS J:

Well the money has been – sorry I'm not saying that. The money has been put into a form of care which J resists because it involves isolation from his whānau and detention. So at some point the system needs to respond imaginatively to that because the contradictions inherent in indefinite detention become too great to bear.

MS LAURENSON:

Well certainly he resists and the why is an open question. I think sometimes he's resisting it because people are stopping him from doing the things that he would like to do and some of the things –

WINKELMANN CJ:

I imagine he's resisting it because he's spent 18 years detained.

MS LAURENSON:

Well yes I mean that is so but if you – sometimes he has been stopped from doing things he would like to do that are not safe so he is resistant to that.

WINKELMANN CJ:

In any case we've had quite a lot about I mean the circumstances in which J is held.

MS LAURENSON:

Yes.

WINKELMANN CJ:

What we're really asking you for is assistance with the principles. I think that – I mean the principles we're looking for might – they're not just to assist. Judges are also assist clinicians so that they know what task they're about because I know it would be a considerable level of anxiety for them that the notion that they are allowing it, you know, they are releasing someone who might create risk so clarity for them in their role would be of assistance I feel sure. So that's why we're asking – pressing you so hard for some assistance and I don't think that it's acceptable just to say it's a very broad test and so we're just looking at risk. It just seems too unregulated really.

MS LAURENSON:

I think that's possibly an oversimplification of what I'm saying but I don't want to go back round that again. I would just say the clinicians –

WINKELMANN CJ:

You're saying that risk ultimately can justify indefinite detention if it's serious risk – significant risk of serious harm?

MS LAURENSON:

Yes, and that it's only – I accept that in this case it has – these orders have been made again and again but we are – the Family Court is just looking at the next three years at most.

WINKELMANN CJ:

Yes.

MS LAURENSON:

And in terms of the guidance, the clinicians obviously operate in their own professional way with their own professional guidance. I'm not saying that they would be unopposed to guidance from this Court but they do –

WINKELMANN CJ:

On the other side, would you accept, because I think this is what Justice Williams is getting at, whether there's any obligation on the State in this whole scenario. So that's in terms of putting pressure on the State to say that you actually have to come up with a plan to transition the person in question, at a certain point the plan has to be transition out into the community. So, in Mr Butler's terms, it's just got too long, it's so disproportionate to the index offence that there must be a plan.

MS LAURENSON:

Yes, and I don't disagree, your Honour. I can't because I've endorsed *VM* that at a certain point there is a tipping point where liberty interests will outweigh the other things that counterbalance it. So I don't take issue with that. In terms of the circumstances of detention and the care that J's receiving, I think that some of that goes to being able to say that this truly is a care and rehabilitation plan, that's what it needs to be and that's what needs to be put in front of the Court. Some of it is I would characterise more as a claim under section 23(5) of the Bill of Rights Act but I'm not sure that matters much for present purposes given the kinds of things that the Court's picked up on but I think I've made that point somewhere in the written submissions.

WINKELMANN CJ:

So is there anything else Ms Laurenson?

MS LAURENSON:

No, I think…

WINKELMANN CJ:

Time to hand over to Mr McKillop?

MS LAURENSON:

Thank you, your Honour.

WINKELMANN CJ:

Thank you, Ms Laurenson.

MR ELLIS:

Ma'am, may I just interrupt.

WINKELMANN CJ:

Yes, Mr Ellis.

MR ELLIS:

I wasn't going to say anything today but I just wanted to clarify how Dr Gardiner's document got before the Court. I received it from Mr Gruar who is counsel for J who's not taken any part in any of the appellate proceedings and I filed it in the Court of Appeal when we were still awaiting the judgment. I filed that document and that document alone. Nobody took any notice of it in the judgment and it's as simple as that. There's always a delay between the appeal and the next hearing in the Family Court so it was just a function of timing. So thank you, Ma'am.

WINKELMANN CJ:

Thank you, Mr Ellis. Mr McKillop?

MR MCKILLOP:

On the point of the admission of the Johnston report, we discussed that and there are some other documents that have been prepared since the 2023 Family Court judgment, being the updated care and rehabilitation plans in particular, and so it seems to us that if the Court is to receive the Johnston report then seeing what the services have actually done, are seeking to implement in response to that –

WINKELMANN CJ:

So did that lead to the updated care and rehabilitation plan?

MR MCKILLOP:

Yes, so those plans have to be refreshed on a regular basis under the Act and so that's been –

WINKELMANN CJ:

But can you just clarify that Dr Johnston's report fed into the new care and rehabilitation plan?

MR MCKILLOP:

Well, I can't point to particular passages or something but –

WINKELMANN CJ:

Well, I'm just wondering about chronology.

MR MCKILLOP:

But yes, in terms of timing, yes, the care and rehabilitation, care and rehabilitation plan has come after the Johnston report, so we can provide those care and rehabilitation plans to the Court so that they can be looked at alongside. There's nothing particular that I want to refer to in those plans, but I just want to ensure that those are there.

WINKELMANN CJ:

Yes. Mr Ellis, do you have any objection to that? It's just further updating of care and rehabilitation plans?

MR ELLIS:

Well, I haven't seen them, so I'm not really sure.

WINKELMANN CJ:

Okay, well, the Crown, perhaps if off screen, quite literally, the Crown and Mr Ellis or Mr Edgeler can discuss that.

MR MCKILLOP:

Thank you, Ma'am.

MR ELLIS:

Okay.

MR MCKILLOP:

So, I'm going to very quickly deal with a few of the discrimination issues. I'm going to briefly touch on the *Atkinson* test but I'm really going to focus on the question of comparability and if the Court decides that J is in a comparable position to someone in the criminal justice system, what if any the material disadvantage is, and it won't be surprising to hear that my submission will be that J isn't truly comparable, as the courts below suggested, but if to the extent he is, it is with someone who poses a similar level of risk and I say that's without, without using the minor index offending as an artificial anchor.

WINKELMANN CJ:

So which part of the courts below analysis are you directing? Because there are different analyses.

MR MCKILLOP:

So I'm focussed, sorry, I should make clear, I am focused entirely on the section 80, on the –

WINKELMANN CJ:

No, the comparator group, which comparator group model are you rejecting? You said "he's not truly comparable in the way suggested in the courts below" I think is what you said?

MR MCKILLOP:

No, no, sorry, the courts below accepted that he wasn't truly comparable in the same way that the Supreme Court of Canada in *Winko* doubted that someone in this position was comparable.

WINKELMANN CJ:

All right.

MR MCKILLOP:

The courts below then went on to say but, you know, to the extent that we could even try it would be someone who, it would be someone who poses a similar level of risk, and the Court didn't further – the courts didn't further specify that by reference to the index offending and I say that that's – that that was the right approach because that acts as something of an artificial, an artificial anchor that doesn't reflect the time that's past, the expressions of risk and the risky behaviour that have been documented and all the risk assessments produced.

So I want to just start with something Justice Williams, that your Honour said yesterday, that obviously it's discriminatory because it's a system for people with intellectual disabilities and the question is, is it justified, and I want to address that because I don't agree with that statement.

WILLIAMS J:

I didn't think you would.

MR MCKILLOP:

No. I want to say it's not that simple – well, sorry, it's not, I just want to say, that that's not right and that otherwise, on that approach, prima facie findings of discrimination can be too easily made.

1220

So we say that under the *Atkinson* test, which we're not shying away from, there must be comparison with someone who is relevantly similar but who lacks the prohibited grounds and that result of that comparison must demonstrate material disadvantage and the background – the reason this is so difficult in this setting is that disability can present a special challenge that normally discrimination law is – starts with a universalist presumption of same treatment for formal equality. When it comes to disability though that's a particular ground where sometimes the presumption of sameness or of same treatment is actually an unsafe one, where different treatment will actually be required to protect people's rights or to reflect something categorical that just can't be dealt with within the usual system. And it's only natural then to start, as the Court of

Appeal did, with the reality that within our system of criminal law the identical treatment of disabled and non-disabled offenders is sometimes not possible, and that's because of the capacities needed to stand trial which is the one that's particularly affected J but also the capacity to be held substantively responsible.

WINKELMANN CJ:

You would accept though that this fact that you can't apply – that any difference has to be justified by particular circumstances of the group so it can't just – so, for instance, to take a simple example why is the involvement hearing only at the balance of probabilities level, that's not justified by the fact the person subject of it is disabled, is it?

MR MCKILLOP:

No, and I'm not – but I should make clear I'm not addressing that at all.

WINKELMANN CJ:

No, but I'm just starting with an easy test.

MR MCKILLOP:

Yes, yes, yes. No, I appreciate what your Honour's doing. Yes, that's right. So there obviously does have to be something which drives different treatment and as we – as the Court below noted that really this – and I want to be clear that intellectual disability doesn't exclude one from the criminal justice system, that's not what we're suggesting at all, but it's lacking the particular capacities to stand trial or to be held criminally culpable that the idea of offender agency that the Court of Appeal referred to, which drives the need for different treatment and obviously that leaves a court with the problem of a person with mental impairment, which can be a long-term or recurring condition, giving risk to others, it can't be avoided merely through exercise of will and, while obviously I acknowledge that J hasn't gone through a full trial and had a finding that he was insane in the terms of test 23 of the Crimes Act 1961, the evidence seems quite clear that he doesn't understand the moral wrongfulness of his actions, the consistent medical evidence.

WILLIAMS J:

Can you help me with why the system that is specifically designed for mentally disabled offenders, intellectually disabled offenders, is not by definition discriminatory?

MR MCKILLOP:

Well I'm saying because discrimination requires comparison and disadvantage compared to the other group so –

WILLIAMS J:

If it were a special system for homosexual offenders, it would be discriminatory?

MR MCKILLOP:

I don't want to speculate about any –

WILLIAMS J:

Well it's just you're selecting a particular group for special treatment?

MR MCKILLOP:

No, no, no.

WILLIAMS J:

Well that makes it, in terms of the definition of the word that makes it discriminatory, just gets you to the point where you can have the real conversation about whether it's justified or not.

MR MCKILLOP:

So justification – before we get to justification, we have to make a prima facie finding of discrimination and that requires there to be material disadvantage compared with a comparable group. That's the –

WILLIAMS J:

Yes, that's the *Atkinson* approach.

MR MCKILLOP:

That's the *Atkinson* test.

WILLIAMS J:

Yes.

MR MCKILLOP:

So and it was – and all I'm really doing is emphasising the reasons why the Courts below found that this group is not truly comparable. Now, I know that that's not going to stop you all thinking about the entirety of the discrimination test of course –

WINKELMANN CJ:

But that approach, is that approach consistent with *Atkinson*? How is it consistent with *Atkinson*?

MR MCKILLOP:

Because comparison is inherent.

ELLEN FRANCE J:

Sorry, the comparison is what?

MR MCKILLOP:

Well there has to be a comparison made, that's what *Atkinson* requires, and so New Zealand Courts have worked very hard to try and get the comparator right because that drives so much of the analysis. So were you to find that J was in a group which is not meaningfully comparable to the group that the appellant is suggesting –

WINKELMANN CJ:

So is your short point Mr McKillop that *Atkinson* says you have to find a comparator and where there isn't one, *Atkinson* does not require you to make it up, is your point that all *Atkinson* says is find the comparator but here applying *Winko* there's no comparator?

MR MCKILLOP:

Essentially, yes.

ELLEN FRANCE J:

So just explain to me why there's no comparator?

MR MCKILLOP:

Well I'm saying that because people who can be dealt with in the criminal justice system aren't – are so – that punishment and the whole idea of deterrence through the existence of the justice system, all of those assumptions don't have any meaningful impact for someone in J's position. So it's a very different –

ELLEN FRANCE J:

Why doesn't it have any meaning for him if he's then detained?

MR MCKILLOP:

Because he isn't punished and he isn't deterred and he doesn't deserve any penalty. All of that is just simply inapplicable to people in his situation.

WINKELMANN CJ:

So you're saying the criminal justice system is inapplicable to him but it doesn't stop it being a comparator because having a comparator accepts difference, accepts they're not in the same group.

MR MCKILLOP:

Yes. I don't want to stay on this for too long. I am trying to actually move on.

WINKELMANN CJ:

Okay. So you're just saying the *Winko* – you're just asking us to accept the *Winko* model?

MR MCKILLOP:

Yes, and –

WINKELMANN CJ:

Okay.

KÓS J:

Can I ask you then, I know you want to move on, but why is the comparator group not intellectually disabled people who are not subject to a compulsory care order?

MR MCKILLOP:

So I wanted to address the comparator that your Honour yesterday I think might have suggested mentally ill people who are in a similar position –

KÓS J:

Well that's not the group.

WINKELMANN CJ:

Well can we just skip to the one that he's now suggested?

MR MCKILLOP:

Yes, but I'm going to address more than one and you've said intellectually disabled people were not subject to this and the other one that's in the Court of Appeal's judgment, referring back to the *M* judgment in the Court of Appeal, is people with an infectious disease who also pose a risk to the public and so these have all been bandied about as possible comparators. I don't say they're not really appropriate ones because they all hinge on having a disability. They all are about a disability that creates risk and it would be a self-serving comparator for the Crown to say but look at these other disabled people. So the point of a comparator is to remove the prohibited ground from your group and to keep the other features the same to the maximum extent that you can. Obviously we say that's very difficult here and we say that the index offending isn't an appropriate anchor, all of that, but were we to compare different groups of disabled people we wouldn't really be doing a discrimination analysis, we'd be finding something – all we'd be explaining is that different kinds of disabilities

may require, may give rise to public, to community protection interest risks so yes I don't –

WINKELMANN CJ:

I mean the problem with the *Winko* approach is it tends to conflate the – it just brings justification into it and says that you can't form a comparator, it conflates all the little steps, and it's not the law in New Zealand to date, so you're saying we should adopt that approach, putting to one side *Atkinson*?

1230

MR MCKILLOP:

I'm saying that the courts below found it – they found it helpful and that comparator choice has been something that our courts have looked very carefully into. But I'm going on to address the rest of the tests so –

WINKELMANN CJ:

Okay, moving on.

MR MCKILLOP:

Yes. So if the Court thinks we can identify a comparator, as I've said, we say someone with those same – without the same incapacities, without the disability, who poses the same level of risk, and we say you ought not do this analysis with the original charges in mind as this, as an anchoring point, that would be an unreal kind of mirror comparator choice which takes a single event 20 years ago and imagines that that is the crux on which this – on which J's current detention turns, and as Ms Laurenson's made clear, and I'm sure the evidence makes clear, that's not. It's the entry point, that's obviously acknowledged, but it's not the driver of –

WINKELMANN CJ:

Well, we could take a person who's committed that minor offence and is placed in prison, and is assessed as being dangerous for the course of 20 years, and kept in there as the comparator. Because there is an artificiality in what you're constructing, too, isn't there?

MR MCKILLOP:

Well that's, I mean, that's why these groups –

WINKELMANN CJ:

Because the question is justification, isn't it?

MR MCKILLOP:

That's why these groups are so hard to compare. No I don't, the question isn't you get justification –

WINKELMANN CJ:

No, not on your analysis.

MR MCKILLOP:

– the earlier question is material disadvantage.

WINKELMANN CJ:

Yes.

MR MCKILLOP:

No, on the *Atkinson* test. So the – it is important to – it's important not, in my submission, to pick a particular regime, and I just want to respond very briefly to the Human Rights Commission's submission that it's, if they want to compare people eligible for a PPO versus people eligible for a CCO under this Act, the compulsory care order, and I just come back to the point that intellectually disabled people are actually eligible for PPOs and, just as intellectually disabled people are eligible for sentences of a determinate length or preventive detention or whatever.

WINKELMANN CJ:

Yes it's just for the Court to decide if it's appropriate.

MR MCKILLOP:

Yes, but the point, the point really is that people who remain within the criminal justice system, if they pose these risks and they are realised, in some way can

be subject to indefinite imprisonment, they can be subject to potentially indefinite orders like a PPO or an ESO. Choosing one of these regimes in particular, and anchoring too much in their eligibility criteria, again, it ignores the way that J's risk has been expressed due to him being within different institutions over the course of the last 18 years, the way that his access to potential weapons, for example, has been managed, and the way that he's been intensively nursed in order to avoid dangerous interactions, but also the way that he doesn't face criminal charges for the various incidents that he has engaged in, and while those haven't been really, really severe instances of injury, they have involved issues like biting, hitting, attempting to break people's fingers, things like – so I say that simply selecting a particular criminal justice related order misses the mark again because of that kind of false impact of the anchoring index offence.

WINKELMANN CJ:

The problem with your analysis is that it takes the discriminatory behaviour and says, well they're not – the other people aren't comparator groups because they don't have that discriminatory behaviour against them. It assumes he is detained for 20 years, that the original offence becomes irrelevant.

MR MCKILLOP:

I'm not following that, sorry.

WINKELMANN CJ:

Well, you say that it's not – it's an unreal comparator to take someone who's in the criminal justice system for a minor offence, and to focus on the original offence, because 20 years or 19 years down the track that original offence is largely irrelevant, it creates a fictional construct to say that it's still, he's still being detained in respect of that, but that's assuming the discriminatory behaviour. That's the distinguishing factor, you say, which distinguishes him from the comparator group. It seems to me problematic, because it's an approach that assumes – it drives the answer.

MR MCKILLOP:

Well, I've tried to swear off self-serving comparators.

WINKELMANN CJ:

Yes, I know you did, admirable.

MR MCKILLOP:

But I'm saying that the – that a realistic comparator is more like the sort of person that your Honour Justice Williams described yesterday of someone who can end up – can get into a prison and end up in a cycle of assaults. I mean, J has been persistently assaulting people within the places where he has lived and –

WINKELMANN CJ:

Well, that's sort of like an ESO or PPO, yes, and that's – he, that's like a PPO or an ESO though, isn't it? So –

MR MCKILLOP:

Or PD.

WINKELMANN CJ:

Or PD although, under your analysis, PD not so much because that's still the –

WILLIAMS J:

It's pretty contingent and counterfactual, really, because it...

WINKELMANN CJ:

Yes, yes.

MR MCKILLOP:

It's very – well, I mean, the fact that we're having these exchanges demonstrates just how difficult it is to –

WINKELMANN CJ:

Doesn't seem to me that contingent, I have to say.

WILLIAMS J:

The thing about *Atkinson*, I think, was that the legislative regime itself did not single out this group, the caregivers, it was a matter of policy, was it not?

MR MCKILLOP:

That's right, yes.

WILLIAMS J:

Here, the legislation says, this is only about intellectually disabled people. Now there's a question about comparator groups in terms of whether that discrimination is pernicious or not, or at least prima facie pernicious, but don't we really have to take into account the fact that the legislation is only aimed at that group? That can't be irrelevant.

MR MCKILLOP:

No, no. So to be clear, I'm not saying pick up the *Winko* approach of looking for stereotyping and all the things that Mr Butler was referring to yesterday, I'm not suggesting that. I'm simply saying that the *Atkinson* test requires a comparison to be made and for there to be material disadvantage and that that comparison –

WINKELMANN CJ:

You might just have to speak up there, because you're drifting away from your microphone.

MR MCKILLOP:

Sorry, and that comparison has to be a meaningful one.

WINKELMANN CJ:

And so your submission is that we haven't got any meaningful – and you don't try and say because the statutory authorised that means it can't be discriminatory.

MR MCKILLOP:

No.

WINKELMANN CJ:

Because you couldn't possibly say that, no.

MR MCKILLOP:

No, no.

ELLEN FRANCE J:

What do you say then to the Human Rights submission that there is material disadvantage?

MR MCKILLOP:

So on that, I say that the Commission says at paragraph 9 of their submissions that the existence of any form of detention for intellectually disabled offenders is inherently disadvantageous and –

ELLEN FRANCE J:

Well, they go on and say you're detained on the basis of the: "... risk of future serious offending, of which there is no prior history and where they have never been found criminally responsible ..." And then they go on to talk about: "Potentially indefinite detention, periodic isolation," et cetera, and the effects those can have.

MR MCKILLOP:

Yes, so the point that I really want to say in response to that is just really again to emphasise that the no prior history and no criminal responsibility –

WINKELMANN CJ:

They can't be criminally responsible.

MR MCKILLOP:

They can't be, they can't be.

WINKELMANN CJ:

But you can take that word – those words out of the Human Rights Commission's submission and this point still stands, that they can be detained even though they haven't seriously offended?

MR MCKILLOP:

Well, yes, but what I'm – the point I've already made, and I return to, is that the – is that requiring a serious offence for this to have provably occurred is not – it doesn't reflect the reality of what has occurred, which is that there have been – there's been, you know, 18 years of incident reports which haven't turned into offences.

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WINKELMANN CJ:

Now we're looking at the time Mr McKillop. How much longer are you going to be do you think?

MR MCKILLOP:

Not much.

KÓS J:

Sorry, I didn't actually understand that last answer at all. Could you have another go at it? It took a while to come out. What's the point you just made before the Chief Justice intervened?

MR MCKILLOP:

The point is that…

KÓS J:

It's an answer to Justice France's question.

MR MCKILLOP:

Yes, the point is that anchoring a comparator analysis which leads you to the material disadvantage analysis in the particular index offending, this low-level

offending, is artificial because it doesn't take into account what would occur for someone who can be subject to the criminal justice system which is that this well documented history of incidents of assault would turn into criminal charges and punishments. It also doesn't reflect the fact that within these institutions, and I'm sorry I'm using the word institutions and that's probably an inappropriate word to use, within these facilities, the way that J's safety and that his access to things like, you know, anything that could be used as a weapon, all of that is managed in a way which is far removed from the way that things occur in a prison for example. So it's just a – it's just unrealistic to remain grounded in the index offence. That's the whole point. I really do need to move on though if that's…

WINKELMANN CJ:

Thank you. It's basically the *Winko* analysis?

MR MCKILLOP:

Well…

WINKELMANN CJ:

Sort of.

MR MCKILLOP:

Yes, so I'll just say that *Winko* at 94, which I won't take you to, but it does pitch its approach in terms which are quite similar to material disadvantage tests that we have here, because I just don't have time to go to it, and essentially the justified limitation test, if we get to section 5, is that the application of *VM* ensures only justified decisions will be made.

Now there's just really one more, or maybe two more things, that I wanted to note. The first is that there's a reference in the Human Rights Commission's submissions to an Australian Law Commission, Law Reform Commission report. It's referred to in their footnote 61 and the Commission has noted how that report recommends that Australian States implement time limits on people

found unfit to stand trial because this diverging practice across different states and territories.

What I want to note about that is that this would bring Australia closer to what already occurs here in New Zealand. That what the Law Reform Commission is concerned with is their equivalent of special patient or special care recipient status which in New Zealand, as Ms Laurenson has explained, is timebound by that half of the maximum sentence timeframe, and in some Australian states and territories they don't even have that time limit for people found unfit, that it's an indefinite detention at the pleasure of the State Governor or whatever the wording is. So the point that the Australian Law Reform Commission makes at paragraph 7.91 is that people at that end stage ought to transition to the mental health system if there remains a safety issue at the expiry of that period. So the Australian Law Reform Commission is still anticipating this sort of civil system is still going to exist and be able to respond to risks.

KÓS J:

I don't know how that helps us. We have a totally different scheme where we separate mental health and intellectual disability. That's just not going to happen in this case.

MR MCKILLOP:

That's certainly right that people won't be under the Mental Health Act but my point is more that civil – is more that civil care is not being excluded by this suggestion of a limit in Australia. That's the whole point. And I just wanted to really to assist Justice Kós, a point that you made yesterday about, you referred to sections 44 and 45 of the IDCCR Act as remarkably opaque, which I'm not disagreeing with the characterisation, but I wanted to bring your Honours and, sorry, and as Ms Laurenson has said, that the Act is given an appropriate interpretation through the *VM* approach. But I wanted to just bring your Honour's attention to sections 28 and 29 of the Mental Health Act, and if your Honour were to compare the wording of those sections, your Honour would see that it's very conscientiously replicating the civil mental health standards and

that's Parliament's indication in my submission that the CCO procedure is firmly within that civil – it's just another reflection of that.

WINKELMANN CJ:

It's very helpful thank you Mr McKillop.

MR MCKILLOP:

And so unless there were any other questions arising out of any of that?

WINKELMANN CJ:

No, thank you.

MR MCKILLOP:

That's it, thank you.

WINKELMANN CJ:

We just have one question of clarification. I think Justice Kós wants to ask Ms Laurenson about the transfer of care from one place to another.

KÓS J:

It's section 85(2) of the Act is the one that provides that the Court has to determine whether a care recipient must receive supervised or secure care. So there are presumably reports that determine that or make recommendation to the Court as to what it should do and associated also the transition, was the transition here was made I think administratively?

MS LAURENSON:

But that was from one secure care placement to another secure care placement.

KÓS J:

I see. There was just a – but one was obviously, as it were, less secure, is that the position?

MS LAURENSON:

Yes, it is hospital secure and community secure.

KÓS J:

Right.

MS LAURENSON:

So, yes, so it was just – it didn't even have support because it didn't trigger that statutory –

KÓS J:

Right, so secure to secure, thank you.

WILLIAMS J:

So the transfer, there was a transfer from supervised –

MS LAURENSON:

So that happened earlier.

WILLIAMS J:

Earlier, yes, and there was a decision about that?

MS LAURENSON:

Yes, so that, yes.

WILLIAMS J:

Whose decision was that?

MS LAURENSON:

I don't remember but we can –

WILLIAMS J:

Okay, so 2009, 2010, something like that?

MR MCKILLOP:

I think it might be the 2017 Family Court decision.

WILLIAMS J:

2017.

KÓS J:

It's Judge Goodwin I think.

MR MCKILLOP:

Judge Goodwin's first decision.

WILLIAMS J:

Goodwin, all right, thank you.

WINKELMANN CJ:

Mr McKillop, thank you. Now Mr Ellis, Mr Edgeler in reply? I should say we have to adjourn at one but if we have to come back at 2.15 to carry on replies we will.

MR ELLIS:

Well Mr Edgeler had indicated that he was going to deal with that it, and it's time for me to pass the baton on so I'm handing it to him. Thank you.

MR EDGELER:

I try to usually be very quick in reply. I think I don't have too many. One point, there was a question at the end of yesterday which I sort of briefly stood up to explain the point I was making or rather the point I wasn't making, so it was essentially about the section 44 and 45. I was trying to be clear a section 45 order wasn't used in this case. It was a section 25(1)(b) of the other Act and so the order initially starting it was 25(1)(b) of the CP(MIP) and so I was trying to make clear it wasn't the order that you can start under the Intellectual Disability Act.

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WINKELMANN CJ:

Yes, we got that.

MR EDGELER:

One thing that I had not been aware of and should just let the Court know. J's mum was in court yesterday, I hadn't realised that by the time I sat down, so T is there and is grateful to have the opportunity to be here to hear the argument.

One thing to actually to assist the Court, but much of what the Court will be talking about or giving guidance to clinicians and Family Court judges in respect of, you know, the section 85 renewal in particular, one thing in particular for J's case, of course, is also the section 102 application under the Act and so that is one where the Court, in looking at that, it's something the Family Court could do potentially, I think, on a section 85 renewal, but where the High Court is looking at the sort of enquiry we asked the High Court to undertake in this case, where it could get more into well what should the care and rehabilitation plan look like. Mostly, what the Family Court is deciding is –

WINKELMANN CJ:

And you maintained your point that the Judge should have seen J?

MR EDGELER:

Yes. But certainly it's a factor, you know, looking at not just should the order continue, but what should the order look like, and so we have that question sort of that we had at the end, the difference between supervised care which must be in the community, but can involve detention. Secure care which may be in the community, or may be secure hospital care and is essentially an administration decision and of fundamentally for J and we had it for *R* as well at various points from that case, where there wasn't fundamentally a difference between supervised community care and secure community care. The difference is if there's, if there's a secure care order then the care co-ordinator gets to decide where that is, which that can be a hospital if it's secure and can't be a hospital if it's not.

Finally, I think a point I would make, it's something that came up about J's liberty interest getting – increasing over time. I would suggest we're at the point where, you know, it cannot get higher than it currently is, you know, and it's like as though there will be a difference, oh well, if this was 25 years, or 30 or 35 years, then the Crown would accept, well, you know, that's enough time. His liberty interests, given what is involved here, I don't think can get higher and if there was a tipping point it was quite some time ago and so that's why we seek the remedy that we do. Unless there's everything else, I think crossed I off, there is like little marks, because the Court has picked them up.

WINKELMANN CJ:

No. Well, we would like to acknowledge the presence in court today of J's mum, and understand it's her, her continued support of her son is very much appreciated and understood by the Court.

MR EDGELER:

Thank you. Unless I can assist with anything else?

WINKELMANN CJ:

No. Thank you, Mr Edgeler.

MR EDGELER:

Thank you.

WINKELMANN CJ:

So, Ms Haradasa, have you discussed this whole procedure with counsel, the notion of filing additional submissions?

MS HARADASA:

No, we haven't, but I have seven minutes. I'm just conscious the Crown will want a reply and there won't be –

WINKELMANN CJ:

No, the Crown doesn't get a reply.

MS HARADASA:

No? Okay. So your Honours –

WINKELMANN CJ:

You don't really get a reply either, Ms Haradasa.

MS HARADASA:

No, and I'm very conscious to make sure this is positive submission, I suppose, it's the timing, it's not a reply, and just stop me if I go over the line. Your Honour the Chief Justice asked me two questions, as I wrote down. One, was does the Commission say indefinite detention could ever be justified, such as where there's a high risk of offending and, relatedly, what evidence of high risk would be needed to justify such detention?

If I could take the first question. In our submission, your Honours, it goes back to the purpose of the detention and if I want to – if it is useful to place it within where this would fit in the legal analysis we say, as will be apparent from our argument, there is prima facie infringement with the rights. So we think the section 5 justification analysis is a good place for this and you would have seen from our written submissions that the Commission has endorsed a structured proportionality approach to that because we think, in a case like this especially, it helps expose transparently what is going into this balancing exercise and, as your Honours will be aware, stage 1 of that analysis, and we say we really need to be very clear, what is the sufficiently important objective for the limit on rights here, for the detention here? And all the other limbs, rational connection, minimal impairment, would be interrelated to that.

Now, the Commission's position would be that the purpose of this scheme, the detention, must include rehabilitation, even if that is not the only purpose. Now, there may be other purposes, community protection, but we say they're "and/and" purposes not "either/or" purposes, and as I understand the Court, in

a recent decision *R (SC 64/2022) v Corrections* [2024] NZSC 47, [2024] 1 NZLR 114, which is referred in our written submissions and is at tab 14 of the Human Rights Commission's authorities, that is how I read what the Court was saying there when his Honour Justice Kós for the Court said: "… while a governing principle of the CCO regime is treating care recipients so that the health and safety of the recipient and others are protected, its primary objective is to provide appropriate care and rehabilitation for defendants with intellectual disabilities."

That was paragraph 30. A bit later on: "…rehabilitation and care is the core function of a CCO," paragraph 32, and in that context that was distinguishing that from the much more limited rights to rehabilitation, qualified rights to rehabilitation under the PPO and ESO regime.

So if it is said to be a rehabilitative scheme or materially animated by that, then in our submission that would suggest one cannot have indefinite detention because to us, as we see it, indefinite detention presupposes that rehabilitation out of this regime is not possible. So if that ambition, to use a word that was used this morning, but ambition of transition out if it stops, or if the Court makes a judgement call that in effect it has stopped, and I acknowledge Ms Laurenson's point yesterday that people haven't stopped trying and that is on the facts of this case which we are not getting into, but if that does stop then continuing detention under this regime in our submission would become arbitrary because it is not what the Act gives State authorities the power to do. And in that case detention becomes for something else and we say that those detaining need to tell us explicitly what that something else is so that an assessment can be made as to whether there is (a) the statutory power to detain for that something else and (b) even if there was the power would they nevertheless meets human rights standards. And it seems to be in this regime if it isn't rehabilitation that something else is, in our submission, preventive detention and we would resist a regime that allows for indefinite preventive detention by stealth without the usual criminal justice safeguards and procedures for situations of indefinite detention in the mainstream criminal justice system.

Your honours, very quickly on that second point of what evidence of risk, we would say that any assessment of risk of a person with a disability should be on an equal footing with a non-disabled person, otherwise we would be accepting that there is a reason to act more preventatively in relation to disabled people which effectively in our submission would reinforce a view that they were inherently more risky, and we just draw your Honours' attention to Article 12 of the Convention equality before the law and you get the same protections of the law, same standards of proof but also ensuring there are reasonable accommodations to ensure people can be equal before the law because obviously being equal before the law does not mean everyone is treated the same. You might have to be treated differently to get equity. And any risk assessment, drawing on our footnote 27, that has been discussed with all the parties I think now, any risk assessment should consider the evidence as to how lengthy detention may actually perpetuate and worsen risk.

Just finally your Honours, and I'm grateful for the time, we say that when you assess what the risks are in these different options we need to interrogate, picking up on Justice Kós' comment, all options creatively and imaginatively, not just what is available under the IDCCRA or prison. Put simply, we need to consider what is the cottage by the river option for any given individual. So any risk assessment must include the risk in the light of the appropriate supports that the State is obliged to provide and we would say that is consistent with the social model of disability which has as its premise that it is society that disables people.

So, to put it simply, I suppose we would resist a strict dichotomy that the assessment is risk in secure detention or risk out in the community with no support. We say we need to interrogate all options creatively, imaginatively, that cottage by the river option for each person and we would say that that option then must also be the one that helps them best realise their convention rights which includes, as we discussed yesterday, Article 19, the right to be supported to live in the community but also preamble (x), paragraph (x), where the State's parties record that they are convinced that "family is the natural and

fundamental group unit of society" and that we should enable disabled people and their families "to contribute towards the full and equal enjoyment of the rights of persons with disabilities."

Now, unless your Honours had any further questions, that was my position and I thank you again for the opportunity to take instructions overnight.

WINKELMANN CJ:

Thank you Ms Haradasa. Right, well thank you counsel for your excellent assistance and we will reserve our decision.

COURT ADJOURNS: 1.01 PM