IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 13/2004

BETWEEN	AHMED ZAOUI Appellant
AND	THE ATTORNEY-GENERAL First Respondent
AND	THE SUPERINTENDENT, AUCKLAND CENTRAL REMAND PRISON Second Respondent
AND	HUMAN RIGHTS COMMISSION Intervener

Court: Elias CJ, Gault, Keith, Blanchard and Eichelbaum JJ

Counsel: R E Harrison QC and D Manning for the Appellant
T Arnold QC, Solicitor-General, C R Gwyn and
T M Luey for the Respondents
R M Hesketh and S A Bell for the Intervener

Hearing: 10 and 11 November 2004

Judgment: 25 November 2004

JUDGMENT OF THE COURT

A The High Court has jurisdiction to grant bail to a person detained under Part 4A of the Immigration Act 1987.

B A District Court, or the High Court on removal of an application into that Court, may vary a warrant of commitment issued under s114O of the Immigration Act 1987 to direct that the detention be in premises other than a penal institution.

C The applications before the Court for bail and variation of the warrant of commitment are adjourned until 10am on Thursday 9 December with the following directions:

i The respondents may file any further material they wish the Court to consider which is relevant to the questions of bail or the premises in which any detention should continue, in variation of the warrant of commitment, by 3pm on Wednesday 1 December.

ii The parties are to file and exchange written submissions by 3pm on 6 December.

REASONS OF THE COURT

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Introduction

[1] Ahmed Zaoui is detained in the Auckland Central Remand Prison under a warrant issued by a District Court Judge under s114O in Part 4A of the Immigration Act 1987 (the Act) which mandates special procedures in cases involving security concerns.[1] He has been found to be a refugee in terms of the Refugee Convention.[2] But, before that finding was made, the Director of Security[3] had provided the Minister of Immigration with a security risk certificate under Part 4A. Mr Zaoui has sought a review of that certificate but a decision on it is awaiting the outcome of other proceedings subsequently brought by him.

[2] In those circumstances, which have led to lengthy delays, Mr Zaoui has made an application to the High Court for a grant of bail and, alternatively, an application for an order of habeas corpus releasing him from custody. If unsuccessful in obtaining release from custody by either of those means, he seeks to have the warrant of commitment varied so that he can be transferred to the Mangere Refugee Resettlement Centre (the Mangere Centre).

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[1] Part 4A is attached to this judgment as an Appendix.

[2] Convention Relating to the Status of Refugees (1951) 189 UNTS 150.

[3] Under the New Zealand Security Intelligence Service Act 1969.

[3] That Centre is not a penal institution. The prescribed form of warrant of commitment under s114O appears to contemplate only detention in a penal institution as nominated by the District Court Judge.[4]

[4] Having been unsuccessful with any of his applications in both the High Court and the Court of Appeal, Mr Zaoui now appeals to this Court by leave given on 14 October 2004.

[5] It has seemed to us preferable to deal in the first instance with the jurisdictional arguments.

Facts

[6] Mr Zaoui, an Algerian national, arrived in New Zealand on 4 December 2002 without a valid passport. He claimed refugee status. That claim prevented his removal from New Zealand.[5] At first, on 6 December, a warrant of commitment was issued under s128(7) of the Act. Mr Zaoui was placed in maximum security at Auckland Prison, Paremoremo. On 30 January 2003 a refugee status officer declined his application for refugee status. He immediately appealed against that decision to the Refugee Status Appeal Authority.

[7] Before the appeal could be heard, on 20 March 2003 the Director of Security provided a security risk certificate to the Minister of Immigration under s114D of the Act and the Minister made a preliminary decision to rely upon it. Mr Zaoui was served with notice of that decision in accordance with s114G(2)(d). He then sought, from the Inspector-General of Intelligence and Security,[6] a review of the Director's certificate under s114I.

[8] On 28 March 2003 the District Court at Manukau issued a warrant of commitment under s114O(1)(b). Section 114O, which is central to this appeal, provides:

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[4] Reg 40(4) of the Immigration Regulations 1999 (Form 9 in Schedule 2 of the Regulations).

[5] Section 129X of the Act. See also s114Q.

[6] Appointed under the Inspector-General of Intelligence and Security Act 1996.

114O Warrant of commitment in security cases

(1) Where a person detained under section 114G(5) is brought before a District Court Judge to seek a warrant of commitment, the following provisions apply:

> (a) If satisfied on the balance of probabilities that the person is not the person named in the notice under section 114G, the Judge must order that the person be released from custody immediately:
>
> (b) Except in a case to which paragraph (a) applies, the Judge must issue a warrant of commitment in the prescribed form for the detention of the person.

(2) Every warrant of commitment issued under this section authorises the person to whom it is addressed to detain the person named in it until—

> (a) Required by a member of the Police to deliver up the person in accordance with the provisions of this Act relating to the execution of a removal order or a deportation order; or
>
> (b) Notified under subsection (3) that the person should be released; or
>
> (c) Ordered by the High Court or a Judge of the High Court, on an application for a writ of habeas corpus, to release the person.

(3) If a person who is subject to a warrant of commitment under this section is successful in a review by the Inspector-General under section 114I, or if for any other reason the person is to be released, an immigration officer or a member of the Police must immediately notify in writing the Superintendent of the prison or person in charge of the other premises in which the person is detained that the person should be released.

[9] In a decision made on 1 August 2003 the Refugee Status Appeal Authority found that Mr Zaoui was a refugee within the meaning of Article 1A(2) of the Refugee Convention and granted him refugee status.

[10] The Inspector-General issued an interlocutory decision on 15 October 2003 concerning the manner in which he proposed to conduct his review of the security risk certificate. This led Mr Zaoui to bring an application for judicial review of that interlocutory decision. His application succeeded in part in the High Court. The Crown was unsuccessful in an appeal to the Court of Appeal and is currently seeking leave for a further appeal of that matter to this Court.

[11] Mr Zaoui has also succeeded in a second judicial review proceeding in which the High Court found that the former Inspector-General should have recused himself

from carrying out the review of the security risk certificate on the ground of apparent bias. A new Inspector-General has been appointed but the review has been unable to be progressed because of the appeals in the first judicial review proceeding.

[12] In the meantime, on 16 October 2003, Mr Zaoui had been transferred to the Auckland Central Remand Prison where he remains. On 11 March 2004 he commenced a proceeding in the District Court at Manukau seeking recall and/or amendment of the warrant of commitment issued under s114O(1)(b). On 7 May 2004 he sought from the High Court an order for his release on bail or an order of habeas corpus. The District Court proceeding was then transferred to the High Court and all matters were heard together by Paterson J on 1 and 2 July 2004.

The High Court judgment

[13] Paterson J delivered a reserved judgment on 16 July 2004.[7] He found that any residual inherent jurisdiction for the High Court to grant bail in civil matters was excluded in the particular case by the statutory scheme in Part 4A. He said that the purpose of the procedure under Part 4A was to resolve effectively and quickly whether the detained person should be removed or deported or should be allowed to stay in New Zealand. It was not in harmony with s114O that there be an inherent right to grant bail. The New Zealand Bill of Rights Act 1990 did not require a different interpretation even if one was available. The Judge also considered that there was no High Court proceeding in respect of which bail could be granted as ancillary relief, as English authority required.

[14] The Judge concluded that Mr Zaoui's rights had not been breached. His conditions of detention did not constitute disproportionately severe treatment or punishment in terms of s9 of the Bill of Rights. Attempts were being made to accommodate his needs. There was no suggestion that the detention regime was intended to humiliate him. Nor was there an arbitrary detention because of the long delays which had occurred. They were not deliberate, being caused by legitimate efforts to clarify the legal process for the Inspector-General's review. Mr Zaoui's continued detention was a reasonable limitation on his liberty in a free and

[7] HC AK CIV 2004-404-2309 16 July 2004.

democratic society. Rights concerning criminal process, in so far as they applied by analogy, were also not breached.

[15] Paterson J was prepared to hold that s114O did not restrict detention to penal institutions. Other possible places of detention included special facilities such as military barracks or mental hospitals. He found that the prescribed form of warrant of commitment was *ultra vires* because in referring only to detention in a penal institution it unlawfully narrowed the statutory scheme. The Judge severed that requirement from the warrant. He declined, however, to order a change in Mr Zaoui's place of detention as in his view detention in prison was inevitable in the circumstances as the Mangere Centre was unsuitable for the detention of a person subject to a security risk certificate.

[16] Paterson J also decided that the jurisdiction of the District Court did not include a power to vary the warrant. The District Court was functus officio having exercised its statutory power. It could not revisit its decision in the absence of the invalidity of the warrant.

The Court of Appeal judgment

[17] The members of the Court of Appeal were divided in their views and delivered separate judgments. On the question whether conditional release was available under Part 4A or on an exercise of the Court's inherent jurisdiction, McGrath J observed that, when it was introduced by amendment in 1999, the drafters had resorted to the provisions of Part 3, which concerns deportation of persons threatening national security and of suspected terrorists. Both parts dealt with the same subject matter. The criteria which form a basis for certificates under Part 4A can form the basis for deportation decisions under Part 3. However, the provisions of s79 enabling conditional release from detention were not included in Part 4A. The Judge noted a distinction between the two sets of provisions in that the information relied on by the Minister under Part 3 has no statutory protection from use in judicial processes, as is given by the issue of a security risk certificate. This distinction in the statutory policy of protection of information appeared to McGrath J to be central to the differing provisions concerning release from detention. The

conclusion he drew from the comparison of Parts 3 and 4A was that Parliament did not provide for conditional release for persons detained under s114O because it was impractical to provide for the exercise of a judicial discretion for that purpose in circumstances in which the parties would necessarily have to be informed of the matters to be reviewed. The crucial information would always be of a classified security kind which could not be produced at a hearing before the District Court. Such a regime would be unworkable.

[18] McGrath J said that he reached this conclusion with reluctance. He remarked that the outcome was not in conformity with the Refugee Convention. And, although he was of the view that the High Court does possess an inherent jurisdiction to grant bail without any requirement that in a civil proceeding it must be ancillary to some other proceeding, he considered this could not occur in cases under Part 4A when powers of conditional release had been plainly excluded. For the Court to enter into an enquiry about the matters underlying a security risk certificate would invoke a collateral challenge to the certificate and would be inconsistent with the statutory scheme.

[19] The other judge in the majority, O'Regan J, agreed that the High Court had an inherent jurisdiction to grant bail whenever the justice of the case so demanded and not merely as ancillary to another proceeding. Furthermore, he considered that bail could be granted under the Act. He referred to ss128 and 128B (in Part 6) which provided that a person detained under that Part must not be granted bail but could be released upon statutory conditions. He asked why the legislature would feel it necessary to provide that bail was not available under those sections if the High Court's inherent jurisdiction would not otherwise apply.

[20] Turning to Part 4A, O'Regan J accepted that the inability of the Court to have access to classified information which was the basis for the security risk certificate might make the exercise of the bail jurisdiction difficult. In cases where the Part 4A process proceeded in a quick and effective way, as Parliament intended, it was highly unlikely that the issue of bail would arise or that it would be appropriate to grant bail. O'Regan J was of the view that bail could still be granted in exceptional

circumstances, but this was not such a case, although he left open the possibility if the review process were not able to be brought to a reasonably swift conclusion.

[21] On the habeas corpus application, McGrath J noted that s114O(2)(c) expressly requires a detention under Part 4A to terminate when, on an application for a writ of habeas corpus, the High Court or a Judge orders the detaining authority to release the person. That provision gave effect to s23(1(c) of the Bill of Rights. McGrath J said that Parliament had in mind situations in which the detaining authority could not show there was a legal justification for the detention. The reference to habeas corpus did not in his view provide a general power for the High Court to order conditional release of a person lawfully detained.

[22] McGrath J said that the initial detention of Mr Zaoui under Part 4A had not been arbitrary given the national security concerns. The real question was whether administrative detention for lengthy periods was justified in that context. It would be arbitrary if the purpose of detention could not be fulfilled – in the event it became impossible to deport Mr Zaoui for an indefinite period of time. Should that eventuate, the Court would grant habeas corpus and order his release on appropriate conditions. At the present point in the process of the Inspector-General's review it was possible deportation could still be achieved. Nor was McGrath J persuaded that there was an arbitrary detention because of the prolonged period of delay caused by challenges to the review process or because of the conditions of the detention. There had also been no breach of s9 of the Bill of Rights. O'Regan J agreed that there had been no such breaches.

[23] Hammond J's dissenting judgment dealt only with the habeas corpus application. He would have granted it. He considered that Mr Zaoui was now arbitrarily detained and should be released on bail. Section 22 of the Bill of Rights protected persons from a detention under the Act which, although lawful at the outset, as in the present case, became unreasonable by virtue of indefinite or prolonged duration or disproportionate consequences. Here the statutory system and associated processes had miscarried; in Hammond J's view there had been systemic delay. The nearly two years of incarceration had become oppressive and "quite disproportionate to the things which are said about him".

[24] On the application for the warrant of commitment to be varied and directed to the Mangere Centre, McGrath J considered that the respondents were correct in conceding that s114O does not require the detention to be in a penal institution. But he was of the opinion that the Executive was not obliged to provide for a number of detention options when prescribing the form of warrant. Under s114O it was the Executive which had the power to determine whether detention at other premises would be permitted, not the courts. The cross-appeal against Paterson J's judgment on this point should be allowed. He also said that if the Executive were to promulgate a regulation to permit detention in the Mangere Centre, the District Court could give effect to it by varying the warrant, which was permitted by s16 of the Interpretation Act 1999. The views of O'Regan J on this application were essentially the same as those of McGrath J.

Issues

[25] The issues addressed in the present judgment are:

(1) Does the High Court have jurisdiction or power to order the appellant's release on bail from detention under a warrant issued pursuant to s114O of the Act?

(2) Does either the High Court or a District Court have jurisdiction or power to order the appellant's transfer from detention in a penal institution to some other place of detention, specifically the Mangere Centre?

The inherent jurisdiction to grant bail

[26] The respondents contend that the non-statutory jurisdiction of the High Court to grant bail is an ancillary power which does not give rise to a substantive remedy. They submit that it can be exercised only in relation to a proceeding already before the Court.

[27] That proposition was accepted by Paterson J in the High Court.[8] He did not consider it necessary to decide a submission on behalf of the respondents that the non-statutory jurisdiction of the High Court to grant bail was confined to criminal cases, but held that bail was not available in the present case because there was no substantive proceeding before the High Court. In reaching this conclusion Paterson J found persuasive the views of Sir John Donaldson MR in *R v Secretary of State for the Home Department, ex parte Turkoglu* that

> … bail is to be regarded in civil proceedings – as it is in criminal proceedings – as ancillary to some other proceeding. It is not possible, so far as I know, to apply to any court for bail in vacuo. It is essentially an ancillary form of relief.[9]

On that basis, an application for bail could be entertained by the High Court only if it had before it an application for judicial review, or an appeal (including a bail appeal), or if it was otherwise seized of proceedings to which questions of interim custody were properly ancillary.

[28] In the Court of Appeal, McGrath J[10] and O'Regan J[11] rejected the contentions of the respondents that the inherent jurisdiction of the High Court to grant bail was limited to bail in criminal cases, citing the decision of the High Court in *R v Lee* that the inherent jurisdiction may be invoked "whenever the justice of the case so demands".[12] The point is not pressed again on further appeal to this Court. We agree that the inherent jurisdiction to grant bail is not confined to cases of detention of those charged with criminal offences. That appears from the history of the inherent jurisdiction to grant bail referred to below.[13] And the explicit exclusion of bail under ss128 and 128B of the Act can only be a reference to exclusion of the inherent jurisdiction: there is no statutory jurisdiction to grant bail under the Immigration Act and the Bail Act 2000 is concerned only with those charged with criminal offences.

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[8] At para [62].

[9] [1988] 1 QB 398, 400.

[10] At [71].

[11] At [235].

[12] [2001] 3 NZLR 858 at [15].

[13] At [38]-[39].

[29] The Solicitor-General repeats in this Court the argument that the jurisdiction is merely ancillary to other proceedings before the Court. Since the High Court was not seized of any substantive application or appeal in relation to which questions of bail are ancillary, he submits that it lacked jurisdiction to grant bail as a "stand alone" remedy. The same contention was rejected in the Court of Appeal by McGrath J and O'Regan J. (Hammond J did not deal with the inherent jurisdiction, because he considered that the jurisdiction to grant bail arose through the writ of habeas corpus *ad subjiciendum.*)

[30] We consider that the High Court does have a jurisdiction to grant bail on a direct application which is not ancillary to some other process already before that Court. We do not share the doubts expressed in *R v Secretary of State for the Home Department, ex parte Turkoglu* and repeated in *R (Sezek) v Secretary of State for Home Department*[14] as to whether the jurisdiction can be invoked by the High Court *in vacuo*, when the High Court is not already seized of a challenge to the detention. In neither case was there extensive consideration of authority or the history of the inherent jurisdiction to grant bail. And in neither case was the court considering the supervisory jurisdiction of the superior courts.

[31] Unless excluded by statute, the inherent jurisdiction of the High Court to grant bail may be directly invoked whenever someone is detained under any enactment pending trial, sentence, appeal, determination of legal status, or (in immigration cases) removal or deportation from New Zealand. The jurisdiction can be exercised whether or not the High Court is seized of proceedings challenging the lawfulness of the detention. Thus, before the Bail Act provided in criminal cases for a statutory right of appeal from the District Court, the High Court commonly granted bail in its original inherent jurisdiction after bail had been declined by a District Court.

[32] Detention must be by authority of law. The exercise by inferior courts or officials of a statutory authority to detain falls within the supervisory responsibilities of the High Court. It is mistaken to regard the inherent jurisdiction to grant bail as "stand alone" or *in vacuo*.

[33] In the present case, the statute permits detention only by judicial warrant. That imports judicial oversight – first in exercise of the statutory power by a District Court and secondly by the High Court through its general supervisory jurisdiction.

[34] The power of the High Court to grant bail to someone detained is an ancient common law jurisdiction exercised by the superior courts of England in civil and criminal cases. The common law jurisdiction became part of New Zealand law in 1840.[15] The powers of the English superior courts have devolved in New Zealand on the High Court.[16] The power inheres in the Court itself as an independent common law jurisdiction, rather than as an incidental power ancillary to other jurisdiction (as are many procedural powers described as "inherent" or "implied").[17]

[35] Some confusion may arise because the term "inherent jurisdiction" is applied both to substantive and procedural powers. The ancillary inherent powers of courts to regulate their own procedure arise equally in relation to their statutory and common law substantive jurisdictions. Courts which do not possess an inherent substantive jurisdiction (as is the case where their substantive powers are entirely statutory) nevertheless have inherent or implied procedural powers necessary to enable them to give effect to their statutory substantive jurisdiction.[18]

[36] Both the substantive and procedural inherent jurisdiction can be displaced by legislation. Thus, the procedural mechanisms adopted by the courts to bring bail applications before them may be affected by legislation, as for example through the changes to the exercise of the supervisory jurisdiction over inferior courts brought about by the Judicature Amendment Act 1972.

[37] Similarly, the inherent substantive jurisdiction of the High Court to grant bail can be excluded by statute, provided the statutory purpose is plain. It was made

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[14] [2002] 1 WLR 348.

[15] English Laws Act 1858.

[16] Section 16 Judicature Act 1908, preceded by the Supreme Court Ordinances of 1841 and 1844 and the Supreme Court Acts of 1860 and 1882.

[17] *R v Gage* 3 Vin Abridg 518, per Holt CJ; *In re Nottingham Corporation* [1897] 2 QB 502, 509 per Pollock B; *R v Spilsbury* [1898] 2 QB 615, 620 per Lord Russell CJ; and see RJ Sharpe *The Law of Habeas Corpus* (2 ed 1989) 141-142.

[18] *Department of Social Welfare v Stewart* [1990] 1 NZLR 697, 701.

clear in *R v Spilsbury* by Lord Russell CJ[19] and Kennedy J[20] that there is a presumption against erosion of what Kennedy J called "the ancient and important jurisdiction of this Court to admit to bail". In that case the defendant had failed in his challenge to an order for his return to Tangier under the Fugitive Offenders Act 1881 (UK). The Act contained no power to grant bail pending the fugitive's return. Lord Russell CJ held that the inherent jurisdiction to grant bail could be invoked:

> Now arises a question of some difficulty. Failing the application to set aside the order for the return of the defendant, he asks that he may be admitted to bail until the time when he is to be returned. So far as I know this is the first occasion on which this question has arisen for decision. It is necessary to consider first how the question is to be viewed. Was Mr Sutton right in saying that the defendant was bound to shew that power is given to admit to bail under the Fugitive Offenders Act, 1881, or, in other words, is the onus of shewing that the power to admit to bail exists cast on the defendant? I think not. This Court has, independently of statute, by the common law, jurisdiction to admit to bail. Therefore the case ought to be looked at in this way: does the Act of Parliament, either expressly or by necessary implication, deprive the Court of that power? The law relating to this subject is well stated in 1 Chitty's Criminal Law, 2nd ed. p97, as follows: "The Court of King's Bench, or any judge thereof in vacation, not being restrained or affected by the statute 3 Edw. 1, c.15(1) in the plenitude of that power which they enjoy at common law, may, in their discretion, admit persons to bail in all cases whatsoever, though committed by justices of the peace or others, for crimes in which inferior jurisdictions would not venture to interfere, and the only exception to their discretionary authority is, where the commitment is for a contempt, or in execution. Thus they may bail for high treason, murder, manslaughter, forgery, rapes, horse-stealing, libels, and for all felonies and offences whatever."[21]

[38] Despite admitting "some difficulty … in working out the procedure", Lord Russell CJ came to the conclusion that the provisions of the statute were consistent with recognition of the power to bail in the inherent jurisdiction pending return:

> This inherent power to admit to bail is historical, and has long been exercised by the Court, and if the Legislature had meant to curtail or circumscribe this well-known power, their intention would have been carried out by express enactment.[22]

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19 At 622.

20 At 625.

21 At 620.

22 At 622.

[39] Habeas corpus was originally a procedural mechanism of the common law adopted by the courts to bring someone before a superior court of common law or equity so that the court could exercise jurisdiction, both civil and criminal, over the person. It became the main method by which someone in detention could be brought before the court to enable the validity of the detention to be assessed. Following the Habeas Corpus Act 1679, which reformed procedure in criminal cases, habeas corpus became the principal way in which those arrested for offences could apply for bail.[23]

[40] The reason for using habeas corpus in this way was to secure the right either to be tried according to law (including in accordance with the requirements for prompt trial in the 1679 Act) or release, including on terms as to bail.[24] But where bail was granted, the jurisdiction being exercised included the inherent common law power to grant bail.[25]

[41] In the 19th century the courts permitted summary chambers applications for bail, which saved the expense of bringing the prisoner before the court under habeas corpus.[26] In *In re Kray*,[27] Lord Gardiner LC approved as still valid the views expressed by Hale that "[t]he Court of King's Bench may *virtute officii* bail any person brought before them …upon an original indictment before them in the county where they sit, or upon an indictment removed by certiorari, or upon a prisoner removed by habeas corpus".[28] To that list must be added the more modern summary application which has largely obviated the need to have recourse to procedure by habeas corpus. The High Court's inherent substantive jurisdiction to grant bail can still be invoked today (where not modified by statute) by different processes: on summary application, by judicial review, or by the procedure of habeas corpus, if necessary.[29]

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[23] Sharpe, 134.

[24] See Sharpe, 136-137 and 140.

[25] See cases discussed in Sharpe, 141.

[26] Sharpe, 134.

[27] [1965] Ch 736.

[28] *Pleas of the Crown* (1800) 147.

[29] *Tobin v Minister for Correctional Services* (1980) 24 SASR 389.

[42] Where the jurisdiction is not excluded, it may be doubted that recourse to it is properly to be characterised as "exceptional", as suggested by O'Regan J,[30] particularly where there is no statutory power to release on conditions under the legislation providing power of detention.[31] Whether bail should be granted in a particular case is a decision which must be taken in context, including the context of the scheme and purpose of the legislative power to detain. It may be in a particular case of detention prior to deportation that the likelihood of speedy removal will count against the grant of bail as a matter of discretion. We are not at present concerned with the exercise of the power, but with its availability.

[43] We conclude therefore that the inherent jurisdiction of the High Court to grant bail is not restricted to cases where it is ancillary to other proceedings before the High Court. It is an original common law substantive jurisdiction which continues unless abrogated by statute. It is therefore necessary to deal with the contention of the respondents that the jurisdiction is inconsistent with detention under Part 4A of the Act.

Does Part 4A preclude the exercise of inherent jurisdiction to grant bail?

[44] The inherent jurisdiction by its very nature, protects the basic liberty of the individual to be free from detention, even if on a conditional basis. For such a jurisdiction to be taken away, clear statutory wording is required.[32] Further, as McGrath J recognises, the presumption that legislation should if possible be interpreted consistently with New Zealand's obligations under international law is engaged here.[33] Article 31(2) of the Refugee Convention requires Contracting States not to apply to the movement of certain refugees restrictions other than those which are necessary. That provision – the application of which the Solicitor-General did

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[30] At [268].

[31] There were such statutory powers in respect of the legislation considered in *R v Secretary of State for Home Department, ex parte Swati* [1986] 1 All ER 717 and *R v Home Secretary, ex parte Turkoglu* [1988] 1 QB 398.

[32] Above at [37] and [38]. See also Lord Lester QC and Dawn Oliver in 8(2) *Halsbury's Laws of England* (4 ed reissue) paras 102(7) and 115 citing, among others, *Khawaja v Secretary of State for the Home Department* [1984] AC 74 and *Budydaycay v Secretary of State for the Home Department* [1987] AC 514.

[33] See eg *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, 57 and 59 and the cases referred to there; see also ss129A and 129X(2) of the Act.

not question – plainly contemplates that individuals who are detained should be entitled to challenge their detention. The Solicitor-General said that national security reasons could be one reason for detention. No doubt that is so, but such reasons have to be tested in the particular case. Security cannot provide a basis for a blanket exclusion of such cases. Again, strong statutory language is required to defeat that entitlement.

[45] The scheme of the relevant provisions has been set out in the judgments of Paterson J and in the Court of Appeal, by McGrath J. Their setting in the Act must be considered. Part 4A was introduced into the Act by amendment in 1999. The Act, in separate parts, provides procedures for dealing with categories of persons in respect of whom there are issues concerning entitlements to enter or remain in New Zealand.

[46] The powers of detention under the Act relate to the possibility that the person detained or considered for detention may be removed from New Zealand once the necessary procedures have been followed.

[47] Those subject to that possibility differ greatly : they may, for instance, be long term lawful residents or they may have been refused entry at the border since they had no entitlement at all to enter. The reasons for removal may also differ greatly, from that simple lack of entitlement (possibly of people who have no connection at all with New Zealand) to being considered a threat to national security or having committed serious offences within a prescribed period of obtaining residence. The decision makers and the form of the proceedings, too, may differ greatly depending on the rights and interests in issue; further, those rights and interests may be in sharp competition, as with the right of a very long term resident to continue to live here against the protection by the State of national security.

[48] The categories of individuals can be listed in this way (some will fall under more than one heading):

1. *Those refused permits at the border (Part 6)*. They are to be detained and placed in custody pending departure on the first available craft. If they are to be detained for more than 48 hours, a District Court Registrar is to issue a

warrant for detention for up to 28 days in a penal institution or some other premises. A District Court Judge may extend the term. While the right to bail is expressly denied, a Judge may order conditional release.[34] If review proceedings are brought, the time periods for detention are adjusted and a District Court Judge is to consider the question of continued custody.[35]

2. *Those whose eligibility for a permit is not immediately ascertainable (Part 6, s128B).* The uncertainty may arise from suspicion that the individual is not eligible for exemption or for a permit, because of their criminal record, their having been previously deported, their believed involvement in terrorism or criminal offending, the likelihood of their endangering New Zealand's security or public order, or their involvement in a group engaged in criminal activities whose presence would be a threat to the public interest and public order;[36] or because the individual has no appropriate documentation for immigration purposes or it appears to be false. The individual is to be given the opportunity to comment on, and rebut, the grounds for the belief that s7 applies. Pending determination, adults are detained in a police station or a penal institution or in premises approved by the chief executive of the Department of Labour. The detention must be reviewed after 28 days and every seven days thereafter. If the determination is against the individual, they are to be held under s128 (1 above) pending departure. Once under s128 those individuals become subject to the time limits on detention and to the power of conditional release. Again bail is expressly denied.[37]

3. *Those in New Zealand unlawfully (Part 2).* This group consists of those who overstay their permit, whose permit is revoked, who enter without an exemption or permit or who lose their citizenship.[38] They may appeal to the Removal Review Authority, but only on narrowly stated humanitarian and

[34] Sections 128 and 128AA-128AD.

[35] Section 128A.

[36] Section 7.

[37] Section 128B(12).

[38] Section 45(2), which ends "or otherwise".

public interest grounds;[39] there is a further appeal on questions of law to the High Court and to the Court of Appeal.[40] Refugee status claimants have protection from this liability to be removed.[41] A person arrested with a view to removal must be released if not removed within 72 hours unless a warrant of commitment is issued by a District Court Judge. Such a warrant may be extended for limited periods in specified circumstances although, if unlikely to abscond, the person may be released on conditions. Detention is in either a penal institution or any other premises approved for the purpose by the Judge.[42]

4. *Those seeking refugee status (Part 6A).* This part, enacted in 1999, has as its object the provision of a statutory system by which New Zealand ensures it meets the obligations under the Refugee Convention.[43] It establishes procedures, confers powers on officials and provides for the establishment of, and appeals to, the Refugee Status Appeals Authority. As in Part 2 (and Part 6), Parliament has given refugees and refugee status claimants protection against removal in terms of articles 32(1) and 33(2) of the Convention.[44] This Part does not regulate detention, since other parts (usually Parts 2 and 6) will apply. It is sufficient to note s129X which provides, in effect, that no person recognised as a refugee may be deported save on grounds of national security. The Solicitor-General made it clear that if the security risk certificate should be confirmed and relied on by the Minister, Mr Zaoui would not be deported to a country where he would face persecution as that would contravene the Convention Against Torture[45] to which New Zealand is a party.

5. *Those with criminal convictions since arrival (Part 4).* This Part, which dates back to 1978, provides for the deportation of persons who are

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[39] Sections 47-52.

[40] Sections 115A and 116.

[41] Section 53(2).

[42] Sections 53-60.

[43] Section 129A.

[44] Section 129X.

[45] Article 3, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85. See also Article 33.1 of the Refugee Convention.

convicted of offences of prescribed seriousness within fixed periods. In general they will have residence permits. They may appeal to the Deportation Review Tribunal and, like the Minister, may appeal on points of law to the High Court. A District Court Judge may issue a warrant of commitment only if satisfied that a person is likely to abscond. If not, he or she is to be released on conditions. If a warrant is issued, detention is in a penal institution and is to be reconsidered after 28 days and at intervals of seven days thereafter.

6. *Suspected terrorists (Part 3, s73).* This Part, which also dates back to 1978, empowers the Minister to order the deportation of any person where the Minister has reason to believe that the person is involved in defined ways in terrorism. There is no time limit, nor any connection to a particular immigration status. Those arrested pending or following the making of the deportation order are to be released on conditions pending the further steps if a District Court Judge is satisfied that would not be contrary to the public interest. They have a right of appeal to the High Court, the decision of which is final and conclusive. The High Court Judge is given powers to protect security by forbidding publication of certain information and excluding persons from the proceedings. The Refugee Convention protections are not expressly mentioned in these provisions.

7. *Persons threatening national security (Part 3, s72).* Where the Minister of Immigration certifies that the continued presence of a person constitutes a threat to national security the Governor-General may by Order in Council order that person's deportation. Again this provision, also enacted in 1978, is unlimited in terms of time and immigration status and the refugee protections are not expressly included. By contrast to the terrorism provision, no statutory appeal or review procedure is provided for; if judicial review were sought questions of public interest immunity might arise and would have to be dealt with under the general law. The same provision for release on conditions[46] applies as in the case of suspected terrorists (6 above).

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[46] Section 79.

8. *Persons allegedly involved in terrorism, endangering security and public order, threatening national security, or convicted of a particularly serious crime (Part 4A).* Because we consider the detail of this Part throughout these reasons, here we simply note that the Part expressly overlaps Part 3, categories 6 and 7 above, and Part 6, categories 1 and 2 above; and that those subject to it who have refugee status or are refugee claimants expressly retain the protection of the Refugee Convention against removal.[47]

[49] It is against that background and by reference to particular features of the detention provisions for each group that we consider the ways in which Part 4A deals with detention. It is not easy to discern any pattern in the approach in the different Parts to places of detention, how that is to be determined, and by whom. Under Part 3 conditional release may be ordered as an alternative to detention in custody at the time of initial consideration,[48] whereas in other instances it may be ordered only on subsequent review of a warrant of commitment. In the case of a convicted criminal, a police officer may impose conditions for remaining in the community pending deportation.[49] Where bail is expressly excluded there is, in one case, an express provision for conditional release which is of similar effect,[50] whereas, in the other, the availability of conditional release is left (at best) to be inferred from a requirement that the "question of that person's continued custody" is to be considered at short intervals.[51]

[50] Three matters are significant. The first is that the express exclusion of bail in ss128 and 128B recognises that bail would otherwise be possible. The second is that release on conditions, even for persons considered to be threats to national security or suspected terrorists, is contemplated under Part 3 subject to a case by case assessment of the public interest.[52] The third is that, apart from short periods of

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47 Sections 114K(3)(b) and 114Q referring to s129X.

48 Section 79.

49 Section 98.

50 Section 128AA.

51 Section 128B(10).

52 Section 79.

detention, only under Part 4A is there no express provision for regular reviews of detention.

[51] In the drafting of Part 4A, the wording for some of the sections has plainly been adopted from provisions in other Parts of the Act. Yet while those other Parts have more complete provisions, Part 4A has omissions. For example, there is no express direction as to the premises in which a person the subject of a warrant of commitment may be detained, and by whom that is to be determined. There is no express provision for review of the detention, no matter how long it may continue and in what circumstances. That would be a significant omission when persons enjoying refugee status are affected, having regard to their Convention right to be detained only to the extent that is necessary.[53]

[52] Where statutory provisions appear less than comprehensive the courts must do their best to give them workable meaning. Inferences from other provisions can assist where they lead in one direction. That is not the position here. And it is of prime importance that any powers of detention be approached in light of the fundamental right, long recognised under the common law, of liberty for all persons subject only to such limits as are imposed by law.

[53] Consideration of the provisions of Part 4A should therefore proceed on the basis that there is a jurisdiction to grant bail in a suitable case unless that is clearly excluded, expressly or by necessary implication. In Part 4A it is not expressly excluded, as it is in ss128(15) and 128B(12).

[54] Paterson J was of the view that bail is precluded by implication from the provisions of Part 4A. He said that he was

> … satisfied that the legislative intent was that a person detained under Part IVA has no right to apply for release on conditions. The purpose of the procedure under Part IVA is to effectively and quickly resolve whether the detained persons should be removed or deported, or allowed to stay in New Zealand (s114A(f)). An inherent jurisdiction cannot exist against this specific legislative intent. As was noted in *Lee*, the inherent jurisdiction

[53] Article 31.2 of the Refugee Convention.

> must be exercised in harmony with the relevant legislation. It is not in harmony with s114O that there be an inherent right to grant bail.[54]

[55] McGrath J reached the same conclusion "with reluctance" but O'Regan J disagreed. Hammond J did not deal with this point.

[56] The matters relied upon as strongly precluding the possibility of bail have been carefully reviewed in the judgments of the courts below. First, it is said that the scheme of Part 4A contemplates speedy processes for the assessment and removal of persons who pose security risks. That is a stated object of Part 4A.[55] Where a security risk certificate is to be reviewed (which must be sought within five days), the Inspector-General must proceed with "all reasonable speed and diligence".[56] After a certificate has been confirmed on review (the determination of which must be notified ("as soon as possible"), the Minister must make a final decision whether to rely on the certificate within three days. If it is relied upon a deportation order is to be made "immediately".[57]

[57] On a preliminary decision by the Minister to rely on a security risk certificate the person to whom it relates must as soon as practicable be arrested and placed in custody.[58] The person is to be brought before a District Court Judge who "must" issue a warrant of commitment for the detention of the person "until" execution of a removal or deportation order, release under s114O(3) or an order is made by the High Court on an application for habeas corpus.

[58] Section 114O(3) is important because it gives guidance as to where a person is to be detained and the circumstances in which he or she might be released. Detention is to be in a prison or "other premises". Release is provided for if the person succeeds on review of the security risk certificate "or if for any other reason the person is to be released". Other reasons appear in s114L which provides that if

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54 At [60].

55 Section 114A(f).

56 Section 114I(3). In any case where the Inspector-General is not available an appointment of an acting Inspector-General may be made "within a time which will ensure that any review is completed with all reasonable speed", to review a decision of the Director: s114B(2).

57 Section 114K(4)(b).

58 Section 114G(4)(d) and (5).

either the security risk certificate or the Minister's reliance on it is withdrawn, the person is to be released from custody immediately. Further express provisions for release apply upon a decision by the Inspector-General that the certificate was not properly made,[59] upon failure by the Minister to make a final decision within the three days allowed and, even though the security risk certificate is confirmed, if deportation is prevented by s129X. These are said, by the respondents, to be the only "other reasons" intended. It was therefore argued that, because Part 4A contains no provisions for conditional release or continuing supervision of the detention, persons to whom the provisions apply are to be detained in custody in prison or "other premises" under the management of the person to whom warrants of commitment are issued until the statutory processes are complete, or give rise to illegality attracting habeas corpus. Bail, although not expressly excluded, would be impractical because of the inability of the court to assess its appropriateness without access to the classified security information on which the security risk certificate is based. It was submitted that no inference should be drawn from the express exclusion of bail in Part 6 of the Act as the references there are of procedural significance only since conditional release is provided for the circumstances concerned.

[59] Do these provisions necessarily preclude the exercise of the High Court's inherent jurisdiction to grant bail in all circumstances? This case illustrates circumstances that may arise. The processes might not be completed in the short time frame apparently contemplated. Those affected may have particular rights as refugees.

[60] As already indicated, release into the community with or without conditions is not wholly precluded under the Act. Those threatening national security or suspected terrorists may be granted conditional release pending deportation under Part 3. A person who is the subject of a security risk certificate but who cannot be deported[60] is released without conditions. Even under s128B, where bail is expressly excluded, the detention must be reviewed by a Judge after 28 days.

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[59] Section 114J(2).

[60] Section 129X.

[61] As we have already observed,[61] the express prohibition of bail in s128B is significant. It is applicable in situations somewhat analogous to those covered by Part 4A (suspected terrorist pending clarification). That prohibition cannot be dismissed as merely procedural – no express statutory alternative of conditional release is provided for. It was in the Act when Part 4A was introduced, yet no similar express prohibition was included in Part 4A.

[62] McGrath J based his conclusion that Part 4A did not provide for conditional release essentially on what he referred to as the impracticality of informing the parties of the matters to be reviewed:

> The crucial information would always be of a classified security kind, which could not be produced at a hearing before the District Court. Such a regime would be unworkable. The decision was accordingly taken not to provide for conditional release at all.[62]

[63] We do not accept that argument for two reasons, the first relating to the Act itself and the second to the general law and practice of the courts relating to security sensitive information.

[64] So far as the first reason is concerned, the practical problems to which McGrath J refers could equally arise in respect of the same information under Part 3 (national security and suspected terrorists). Despite that, Parliament has provided for conditional release of those who are held under that Part. The overlap between the parts was indeed made explicit by Parliament in 1999 in the definitions of "relevant security criteria" which it included in s114C(4) in Part 4A. They refer directly to the tests in ss72 and 73(1) in Part 3. Further, that Part recognises that in an appeal brought in respect of suspected terrorists questions of information security may arise and accordingly it empowers the court to make appropriate orders to protect sensitive information.[63]

[65] Secondly, the Courts are increasingly familiar with such issues and no longer apply blanket rules but make assessments in the particular case, as appears for

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[61] At [50].

[62] At [68].

[63] Section 82.

instance from *Choudry v Attorney-General*[64] and the cases from Australia, Canada, New Zealand, the United Kingdom and the United States discussed in that decision.

[66] The practical difficulty in determining whether in a particular case bail should be granted obviously would be very real where there is a security risk certificate based on classified security information. We do not see that, however, as dictating a conclusion that the jurisdiction to grant bail must be inconsistent with detention ordered on the basis of a security risk certificate. The Solicitor-General submitted that to embark upon a consideration of bail would be to fly in the face of the statutory conclusiveness of the certificate.[65] But that statutory conclusiveness relates to a different question. There is no necessary incompatibility in a person being regarded as a danger to the security of New Zealand within the statutory security criteria if allowed to remain in this country, on the one hand, and the release of that person under conditions fixed and supervised by the courts for a limited period whilst the statutory processes are completed, on the other. The considerations would not necessarily be the same.

[67] The provision in s114O(2) directed to release from detention by order of the High Court on an application for habeas corpus draws no distinction between an order for outright release and an order granting bail. If construed as encompassing an order granting bail, it recognises the jurisdiction directly. But even if it is construed as contemplating only outright release on such an application, it is not to be inferred that bail on that or any other form of application is precluded.

[68] We see no need to confine the words in s114O(3) "or if for any other reason the person is to be released" to the reasons expressly set out in other provisions of Part 4A. Nor do the provisions expressly requiring release in certain circumstances necessarily require mandatory detention until those circumstances arise. The references to release in the specified circumstances are quite capable of being read as applying in the event that the person has not otherwise been released.

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64 [1999] 2 NZLR 582, 593-597 and 598-601 and [1999] 3 NZLR 399.

65 Sections 114F and 114H(4).

[69] Accordingly, we are not convinced that Part 4A contains the necessary implication that in all circumstances the inherent jurisdiction of the High Court to grant bail is excluded. Of course, when the processes for dealing with persons who are subject to security risk certificates proceed with the dispatch contemplated by the Act, bail is not expected to become an issue. When it does, the matter of security will be of major importance and the formulation of conditions will need to take that into account. In that respect there is some guidance in the provisions in other Parts of the Act directed to conditional release in various circumstances.

[70] Mr Zaoui has made it clear that he is not seeking unconditional release and that his preferred outcome is bail. Given that, and the conclusion that the High Court has inherent jurisdiction to grant bail, it is unnecessary at this stage to consider the alternative argument for Mr Zaoui that his detention has become arbitrary in terms of s22 of the Bill of Rights. It is not suggested that the initial detention was arbitrary. The principal basis upon which arbitrariness is put is the length of time that has elapsed since the warrant of commitment was made. The time Mr Zaoui has spent in custody can be taken into account in considering whether bail should be granted. Any grant of bail will alleviate the present circumstances relied on as making his continued detention arbitrary.

Is there power to transfer Mr Zaoui from detention in a penal institution to some other place of detention?

[71] In this part of our reasons we consider whether the High Court and the District Court have jurisdiction or power to order Mr Zaoui's transfer from detention in a penal institution to some other place of detention.

[72] In the High Court, Paterson J decided that there was such a power but declined to exercise it because he considered that the Mangere Centre would not be an appropriate place to which to transfer a person subject to a security risk certificate unless the Centre's structure and security requirements were modified.

[73] In the Court of Appeal, McGrath and O'Regan JJ held that the prescribed form of the warrant of commitment had lawfully restricted the premises where a person could be detained under s114O of the Act to penal institutions.

[74] We have already set out s114O but for convenience reproduce the parts most relevant to the present issue:

> (2) Every warrant of commitment issued under this section authorises *the person to whom it is addressed* to detain the person named in …
>
> (3) If a person who is subject to a warrant of commitment … for any … reason … is to be released, an immigration officer or a member of the Police must immediately notify in writing the Superintendent of the prison or *person in charge of the other premises* in which the person is detained … . (emphasis added)

[75] The Immigration Regulations 1999 prescribe the following form:[66]

WARRANT OF COMMITMENT

Section 114O(1)(b), Immigration Act 1987

To every member of the Police (*or* To ……………………. member of the
[*Full name*]
Police), and to the Superintendent of ....………………………
[*Specified penal institution*]

.......…………..…………….. (in this warrant called the subject), a citizen of
[*Name*]
...............…………………, was detained pursuant to section 114G(5) of the
[*Country, if known*]

Immigration Act 1987, and is to be detained for more than 48 hours.

I DIRECT YOU, the said member(s) of the Police, to deliver the subject to ....………….. and you, the said....…………………......... to receive
[*Specified penal institution*] [*Superintendent*]

the subject into your custody and detain the subject until required by a member of the Police to deliver up the person in accordance with the provisions of the Immigration Act 1987 relating to the execution of a removal order or a deportation order, or unless earlier notified in writing by an immigration officer or member of the Police that the subject should be released in accordance with section 114O(3) of the Immigration Act 1987.

Signature: .....……...……………........... Date: ....
District Court Judge
District Court at ....
[*Place*]

[76] It will be seen that the Act contemplates, first, the warrant being addressed to persons other than the Superintendent of a penal institution (otherwise subs(2) would simply have referred to such an official); second, detention in a "prison or … other premises" (subs(3)). But the form, at least on first reading, is limited to detention in

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[66] Form 9 in Schedule 2.

a "penal institution".[67] Since the Solicitor-General accepted that the reference to "other premises" plainly means that the power conferred by s114O extends to premises other than penal institutions, provided they meet the requirements for detention under the Act, it is convenient to turn at once to his submissions.

[77] Although in form the issue now under consideration relates to the possibility of transferring Mr Zaoui to different premises, the Solicitor-General's case was that not only was there no power to order such a transfer, but also that the original commitment of a person in Mr Zaoui's situation could be to a penal institution only. His submissions had three limbs: first, the scheme of Part 4A was inconsistent with any implied power to order a transfer; second, the legislature had left the authorisation of the premises to the Executive, by means of the form of the warrant which was to be prescribed, and the prescribed form authorised penal institutions alone; and, third, the last conclusion was reinforced by the absence of the necessary supportive powers for those detaining persons in premises other than penal institutions.

[78] Under the first heading, the Solicitor-General argued that the whole structure of Part 4A contemplated a person would be held in a penal institution until the security risk certificate process was completed. But, as the Solicitor-General accepted, the legislation reveals an underlying assumption that the process would be completed reasonably promptly. As noted,[68] it is not difficult to find indications pointing in that direction. Accepting that implication, nevertheless it could be envisaged there might be instances, not necessarily as dramatic as the present, where for whatever reasons the review process was not completed in a timely way. Even where the review was proceeding with all reasonable speed, there might be circumstances relating to the particular detainee, such as the effects of detention in a penal institution upon the individual, which required consideration of a transfer if the legislation permits. We are unconvinced by the case for implying a legislative intent that the detainee is to remain in a penal institution throughout. If the issue is

[67] The latter expression, incidentally, covers a wider category than prisons because, in terms of the Penal Institutions Act 1954, it also includes police jails.

[68] At [56].

approached as one of implication, we do not find any sufficient basis for reading s114O as excluding the ability to order a different form of detention.

[79] In considering the Solicitor-General's second argument (that by the provision for a prescribed form, Parliament has delegated to the Executive the power to identify the premises available for detention) we think it helpful to examine how the Act as a whole deals with two features regulating places of detention: the nature of the premises where detainees may be held, and the mode of identifying the places of detention.

[80] As to the nature of the premises, under two Parts of the Act detention is limited to penal institutions: national security and terrorist cases under Part 3 and criminal offender cases under Part 4. By contrast the remaining Parts, including Part 4A, empower the Judge or Registrar to order detention in other premises: Part 2 does so in the case of persons in New Zealand unlawfully, and Part 6 does so in the case of those who have been refused entry and are being held for return. It is difficult to discern any pattern in an unnecessarily complex Act which has grown over the past 40 years from 23 pages to over 200 pages without ever being systematically consolidated. But, given these distinctions, it may be inferred that in Part 4A, in defining the scope of the places where detention is permissible, Parliament deliberately took a broad rather than a narrow approach.

[81] Turning to the approval and identification of places of detention, the Act deals with this in differing ways. First, in all cases Parliament identifies the range of places of detention. Second, in all instances the Judge or Registrar addresses the particular warrant to the person in charge of the specified premises. Third, with one exception, Parliament has not conferred express power on the Executive to approve in a general way the premises identified as appropriate for detention. Nor has it conferred express power on the Governor-General in Council or on any official to exclude premises from the range of those identified in the legislation. In the one Part where Parliament conferred power to approve premises (Part 6), it did so explicitly.

[82] While the Act is a patchwork and it would be unsafe to place much reliance on supposed patterns it can at least be said that, where Parliament has delegated the power to approve premises for purposes of detention, it has done so expressly.

[83] The power to make regulations is in s150 of the Act which we set out to the extent relevant:

> **150 Regulations**
>
> The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:
>
> (a) Prescribing forms for the purposes of this Act
>
> …
>
> (m) Providing for such other matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration.

[84] The final head of power, in para (m), is subsidiary; that appears from its residual nature, the origins and purpose of that standard provision,[69] and the other 16 tightly delimited heads of power set out in s150. In any event, a regulation limiting the scope of one of the Act's provisions would not give "full effect" to the provisions of the Act. Nor on the face of it can a form with that narrowing effect be said to be for "the purposes of this Act", in terms of para (a). Paterson J in the High Court held that the form forbids what the Act expressly permits. He was however willing to declare that the italicised words "specified penal institution", appearing in the form of the warrant, should be severed; the warrant as so amended he held to be valid.

[85] In the Court of Appeal McGrath J, contrasting other provisions where either Parliament determined the place of detention, or empowered the decision maker in relation to the warrant (District Court Judge or Registrar) to do so, asked whether the Executive is entitled to make that choice for all cases arising under Part 4A through the regulation making power, rather than invariably providing options for the Judge to exercise in the particular case. The contrast with Part 3, also concerned with

[69] *Report of the Delegated Legislation Committee* (1962) IV AJHR I18 paras 11-15 and 27(3) reporting on and endorsing the adoption by the Government in 1961 of a new form of regulation making power which was designed to require regulation making powers to be set down as clearly as possible and to ensure that the review powers of the courts were not excluded or reduced.

threats to national security, he saw as clearly significant. While Part 3 provided for detention in penal institutions alone, it offered an alternative (as he saw it, unavailable in Part 4A) of release on conditions. McGrath J said that, in effect, the question of an alternative to detention for those whose certificates are being reviewed had been left to be dealt with by regulation. While the form could have provided for a place or places of detention other than a penal institution, the Executive was not obliged to provide a number of different detention options when prescribing the form of a warrant for the purposes of s114O.

[86] We are unable to agree. First, s150 empowers the Executive to prescribe forms (here, warrants of commitment) *for the purposes* of the Act; it does not confer any power to exclude types of premises of detention provided for in the Act. Next, as McGrath J's discussion accepts, the appropriateness of a particular place of detention will often depend on the conditions and circumstances of the individual: he says that "there are [now] circumstances [relating to Mr Zaoui] indicating the desirability of a consideration of the appropriateness of [detention in a penal institution] in the particular circumstances of this case." That, he said, could be addressed by the Executive promulgating a regulation permitting a wider choice. But, as he also accepted, that assessment of the particular circumstances is for the District Court Judge and not for the Executive. Such an assessment plainly falls within the power of the Judge under s114O to issue the warrant, but neither that section nor s150 confers a general power on the Executive (through regulations or chief executive action) to exclude specified premises for the purpose of detention, or to add specific premises or categories of premises. In this respect s114O may be contrasted with s128B(7) in Part 6, conferring on specified chief executives the power to approve premises.

[87] Except with the antecedent authority of Parliament, subordinate legislation cannot repeal or interfere with the operation of a statute.[70] As noted earlier,[71] the form may be read as limiting the ability afforded to the issuing Judge to select the appropriate premises among those the Act has made available for the detention of persons subject to Part 4A. Since we have found no power, express or implied, for

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[70] *Combined State Unions v State Services Co-ordinating Committee* [1982] 1 NZLR 742, 745.

[71] At [76].

the Executive to limit the scope of the legislation in this way, we need to examine the consequence for the prescribed form. The appropriate approach is to prefer a construction fulfilling the legislative purpose, rather than one contrary to it (and therefore leading to invalidity).

[88] Plainly, the form is designed to facilitate the Judge's exercise of the power conferred by s114O to issue a warrant of commitment to a prison or other premises. In concluding that the form provided for detention in a penal institution only, McGrath J drew attention to the fact that it was addressed to the Superintendent of a penal institution to be specified, and directed the police to deliver the subject of the warrant to that institution. The manner in which the form is addressed aside, however, the wording of the body of the form is inconsistent with the proposition that a Superintendent of a penal institution is the only permissible detainer. The form leaves a blank space requiring the Judge to name the person who is to receive the detainee, the word "Superintendent" being among the italicised instructions regarding the information to be inserted in the blank spaces. Were the intention that the only possible detainer be a Superintendent, the word Superintendent would have appeared in the body of the form; a blank space allowing the insertion of alternatives would have been unnecessary.

[89] The blank spaces are to be filled in by the Judge issuing the particular warrant. Taking, for example, the issue of a warrant for detention at the Mangere Centre, this would involve the replacement of "Superintendent" by the title of the person in charge of the Centre, the inclusion of the name of the Centre in the appropriate blank spaces (twice), and the inclusion of the appropriate title in the final blank space. Such minor adjustments to provisions of the form would not contradict the overall thrust of either the form itself or the legislation generally. On the contrary, such adjustments would be in conformity with the purpose of s114O in conferring the power of commitment in broad terms and of s150 in giving the power to make regulations for the purposes of the Act. We are of opinion that in the respects discussed the specified form can fairly be regarded as directory within the classic test stated by Lord Penzance in *Howard v Bodington*:

> … you cannot safely go further than in each case you must look to the subject-matter; consider the importance of the provision that has been

> disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.[72]

[90] We conclude that, if appropriate on the facts of a particular case, it is permissible for a District Court Judge to make adjustments to the form of the kind just discussed.

[91] Thus we cannot accept either part of the Solicitor-General's second limb. The legislature has not left the authorisation of the premises to the Executive by means of the form of warrant which was to be prescribed. The prescribed form is not to be interpreted as authorising detention in penal institutions alone; it may be varied to permit detention in other premises authorised under s114O. Since Parliament has made choices available regarding the nature of the place of detention and its location, on its face the legislation has left it to the Judge, as the person designated to issue the warrant, to make the choice. It would be a most unusual legislative device to limit that power by the indirect route of a form-making power delegated to the Executive. The more natural and obvious construction, and our preferred conclusion, is that the Judge is empowered to make those decisions.

[92] The Solicitor-General's third argument for reading s114O narrowly and as not extending to premises beyond penal institutions was the lack of the necessary supportive powers for those who detain persons in such premises. Disagreeing with McGrath J's reasoning that the problem could be resolved if the Executive amended the prescribed form, he said:

> Unless and until there is statutory amendment providing for such powers outside the penal institutions regime, mere amendment of the prescribed form of warrant of commitment by an amending regulation is insufficient. There would have to be, in addition, a corresponding statutory amendment conferring powers on the detainer or providing for appropriate police powers of arrest, search and seizure.

[93] We see at least two difficulties with that argument. First, it would excise from s114O the Judge's power to order detention in premises other than penal institutions. Second, there are other instances in the Act where Parliament has conferred the

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[72] (1877) 2 PD 203, 211.

power to direct detention in premises other than penal institutions, yet specific supportive powers are absent. That is so in respect of persons unlawfully in New Zealand, under Part 2; the empowering sections[73] relate only to the period leading up to and the time of arrest, not to the period of detention. That also appears to be the case with persons detained in premises other than penal institutions under s128B: while they are detained under that section, the wider powers conferred by s140A are not available since they have not come under the regime of s128.[74]

[94] Persons held in premises other than penal institutions under the statutory powers authorising the issue of a warrant of commitment are subject to the terms of that warrant authorising their detention. The prescribed forms of warrant "direct" the person in charge of the premises to "detain" the person who is the subject of the warrant for the appropriate period or until certain steps are taken.[75] Plainly that authority and direction must carry with them powers of control over those detained. In those cases, as with Part 4A, the source of the powers of the detainer is the warrant together with s140(5), added in 1999, which provides:

> (5) A person to whom a warrant of commitment is addressed may take such reasonable measures as are necessary to give effect to the warrant.

[95] Obviously enough the premises to which the individual is committed for detention must be appropriate for detaining that individual and the person in charge of the premises must be in a practical position to meet the obligations of detention and to take the "reasonable measures" contemplated by s140(5) of the Act. Any Judge issuing a warrant for other premises would have to be satisfied about those matters.

[96] The final question is whether the power to issue the warrant, having already been exercised, may be exercised again. We have no doubt that it may be. By its

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[73] Sections 134 and 137.

[74] Compare s128B(5) and (11A) detailing circumstances under which individuals may move from the s128B regime to the position under s128, for instance when it is determined that s7 does exclude their entry.

[75] See Forms 6, 9, 10 and 11 in schedule 2 to the 1999 Regulations.

very nature this is the kind of power that may be exercised from time to time, in response to changing circumstances.[76]

[97] The application to vary the warrant, originally made to the District Court, was removed into the High Court. The purpose appears to have been to allow variation to be considered along with the applications made directly to the High Court for the release of Mr Zaoui. The matter before the District Court was removed to the High Court under s43(6) of the District Courts Act 1947:

> (6) Notwithstanding the foregoing provisions of this section, the High Court or a Judge thereof on the application of any party to the proceeding may order the removal into the High Court, by order for certiorari or otherwise, of any proceeding commenced in a District Court, if the High Court or Judge thereof thinks it desirable that the proceeding should be heard and determined in the High Court. Any such removal shall be on such terms as to payment of costs, giving security, or otherwise as the High Court or a Judge thereof thinks fit to impose.

[98] The general terms of that provision plainly contemplate that the High Court will have all the powers that a District Court would have had to deal with the application.

[99] Accordingly we conclude the High Court has the power to act under s114O on the application removed to it. That power includes the power to order the detention of Mr Zaoui in premises considered appropriate by the Judge, whether they are a penal institution or not. We emphasise the need for that Judge to make a careful assessment of whether the proposed premises are fit for the purpose.

Conclusions and directions

[100] We have concluded that the High Court has jurisdiction both to grant bail and to vary the warrant committing Mr Zaoui to detention in a penal institution. We make declarations accordingly. In the ordinary course, we would have remitted the matter to the High Court for consideration of the jurisdiction to grant bail and the power to vary the warrant in the light of any further material or submissions put forward. Because Mr Zaoui has been in custody for more than 23 months, however,

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[76] Section16 of the Interpretation Act 1999.

we consider that it would be oppressive to let the process be drawn out any more and that further delay should not be countenanced. In the circumstances we are prepared to exercise the original jurisdiction of the High Court before remitting the matter to that Court for any continuing supervision.

[101] This is a case where national security issues arise. It is also a case about the liberty of someone who has refugee status in New Zealand and who is entitled to the benefit of the Refugee Convention requirement that only such restrictions upon his liberty as are necessary should be imposed upon him. The applications fall to be considered against the background of concern for liberty recognised by the Bill of Rights Act and the common law. Accordingly the case raises significant matters of public interest which require careful balance.

[102] The respondents should have an opportunity to provide any additional material they wish to place before the Court relevant to the exercise of the jurisdiction to grant bail or vary the terms of the warrant of commitment. The material so far supplied has not been directed to the issues of bail and custody. They are not necessarily the same as the considerations upon which a security risk certificate can be justified. Both parties should also be given the opportunity to address the Court further as to whether either jurisdiction should be invoked and, if so, what orders and conditions are appropriate.

[103] The respondents may provide any further materials they wish the Court to consider which are relevant to bail or the premises in which any detention should continue, in variation of the warrant of committal, by 3pm on Wednesday 1 December. Written submissions by the parties are to be filed and exchanged by 3pm on Monday 6 December. The Court will reconvene at 10am on Thursday 9 December to hear further argument on whether the jurisdiction to grant bail or vary the warrant should be exercised and, if so in either case, on what terms.

Solicitors:
McLeod & Associates, Auckland for the Appellant
Crown Law Office, Wellington for the Respondents

APPENDIX

PART 4A

SPECIAL PROCEDURES IN CASES INVOLVING SECURITY CONCERNS

114A Object of Part—The object of this Part is to—

(a) Recognise that the New Zealand Security Intelligence Service holds classified security information that is relevant to the administration of this Act; and

(b) Recognise that such classified security information should continue to be protected in any use of it under this Act or in any proceedings which relate to such use; and

(c) Recognise that the public interest requires nevertheless that such information be used for the purposes of this Act, but equally that fairness requires some protection for the rights of any individual affected by it; and

(d) Establish that the balance between the public interest and the individual's rights is best achieved by allowing an independent person of high judicial standing to consider the information and approve its proposed use; and

(e) Recognise that the significance of the information in question in a security sense is such that its approved use should mean that no further avenues are available to the individual under this Act and that removal or deportation, as the case may require, can normally proceed immediately; and thus

(f) Ensure that persons covered by this Act who pose a security risk can where necessary be effectively and quickly detained and removed or deported from New Zealand.

114B Definitions—(1) In this Part, unless the context otherwise requires,—

Certificate, or **security risk certificate**, means a certificate made under section 114D:

Classified security information means information about the threat to security, public order, or public interest posed by an identifiable individual which is held by the New Zealand Security Intelligence Service, being information which, in the opinion of the Director, cannot be divulged to the individual in question or to other persons because both—

(a) The information—

(i) Might lead to the identification of, or provide details of, the source of the information, the nature, content, or scope of the information, or the nature or type of the assistance or operational methods available to the New Zealand Security Intelligence Service; or

(ii) Is about particular operations that have been undertaken, or are being or are proposed to be undertaken, in pursuance of any of the functions of the

Service or of another intelligence and security agency (as defined in section 2 of the Intelligence and Security Committee Act 1996); or

(iii) Has been provided to the New Zealand Security Intelligence Service by the government of any other country or by an agency of such a government, and is information that cannot be disclosed by the Service because the government or agency by which that information has been provided will not consent to the disclosure; and

(b) Disclosure of the information would be likely—

(i) To prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or

(ii) To prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of another country or any agency of such a government, or by any international organisation; or

(iii) To prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or

(iv) To endanger the safety of any person.

Director, or **Director of Security**, means the Director of Security within the meaning of the New Zealand Security Intelligence Service Act 1969:

Inspector-General means the Inspector-General of Intelligence and Security established and appointed under the Inspector-General of Intelligence and Security Act 1996, and, in any case where the Inspector-General is not available, within a time that will ensure that any review is completed with all reasonable speed, to review a decision of the Director of Security, includes a person appointed under subsection (2) to act as Inspector-General:

Relevant security criterion, or **security criterion**, has the meaning given by section 114C.

(2) The Governor-General, on the recommendation of the Prime Minister following consultation with the Leader of the Opposition, may appoint a person who has previously held office as a Judge of the High Court of New Zealand to act as Inspector-General in any case where the Inspector-General is not available, within a time that will ensure that any review is completed with all reasonable speed, to review a decision of the Director of Security under this Part.

(3) The fact that a person appointed under subsection (2) exercises or performs any function or power of the Inspector-General under this Part is conclusive evidence of the authority of the person to do so, and no person may in any proceedings question whether the occasion requiring or authorising the person to exercise or perform the function or power has arisen or has ceased.

114C Relevant security criteria—

(1) For the purposes of this Part, relevant security criterion means any of the following, as the case may require:

(a) A relevant entry security criterion within the meaning of subsection (2), where a decision is to be taken as to whether—

(i) A temporary visa or permit should be issued or granted to any person; or

(ii) A limited purpose visa or permit should be issued or granted to any person; or

(iii) A residence visa or permit should be issued or granted to any person; or

(iv) An exemption should apply to any person:

(b) A relevant removal security criterion within the meaning of subsection (3), where a decision is to be taken as to whether—

(i) A temporary permit should be revoked and a removal order served; or

(ii) A limited purpose permit should be revoked and a removal order served; or

(iii) A person unlawfully in New Zealand should be served with a removal order.

(c) A relevant deportation security criterion within the meaning of subsection (4), where a decision is to be taken as to whether—

(i) The holder of a temporary permit or a limited purpose permit or a residence permit should be deported; or

(ii) A person who is exempt under this Act from the requirement to hold a permit should be deported; or

(iii) A person unlawfully in New Zealand should be deported.

(d) A relevant refugee removal security criterion within the meaning of subsection (5), where a decision is to be taken as to whether a person in New Zealand who is a refugee status claimant or refugee—

(i) Who holds a temporary permit should have that permit revoked and a removal order served; or

(ii) Who holds a limited purpose permit should have that permit revoked and a removal order served; or

(iii) Who is in New Zealand unlawfully should be served with a removal order:

(e) A relevant refugee deportation security criterion within the meaning of subsection (6), where a decision is to be taken as to whether a person in New Zealand who is a refugee status claimant or refugee—

(i) Who holds a temporary permit or a limited purpose permit or a residence permit should be deported; or

(ii) Who is exempt under this Act from the requirement to hold a permit should be deported; or

(iii) Who is in New Zealand unlawfully should be deported.

(2) The relevant entry security criteria are as follows:

(a) Any of the criteria set out in section 7(1)(e), (f), (g)(i), and (h) (which relate to terrorism and danger to security or public order):

(b) That the person constitutes a threat to national security in terms of section 72:

(c) Any of the criteria set out in section 73(1) (which relates to suspected terrorists)

(3) The relevant removal security criteria are any of the criteria set out in section 7(1)(e), (f), (g)(i), and (h) (which relate to terrorism and danger to security or public order).

(4) The relevant deportation security criteria are as follows:

(a) That the person constitutes a threat to national security in terms of section 72:

(b) Any of the criteria set out in section 73(1) (which relates to suspected terrorists).

(5) The relevant refugee removal security criteria are a combination of any 1 or more of the criteria listed in subsection (3) as relevant removal security criteria, taken together with either or both of the following criteria:

(a) That there are reasonable grounds for regarding the person as a danger to the security of New Zealand, in terms of Article 33.2 of the Refugee Convention:

(b) That the person is a danger to the community of New Zealand, having been convicted by a final judgment of a particularly serious crime, in terms of Article 33.2 of the Refugee Convention.

(6) The relevant refugee deportation security criteria are a combination of any 1 or more of the criteria listed in subsection (4) as relevant deportation security criteria, taken together with either or both of the following criteria:

(a) That there are reasonable grounds for regarding the person as a danger to the security of New Zealand, in terms of Article 33.2 of the Refugee Convention:

(b) That the person is a danger to the community of New Zealand, having been convicted by a final judgment of a particularly serious crime, in terms of Article 33.2 of the Refugee Convention.

(7) More than 1 relevant security criterion may be applicable at the same time to a particular person, but nothing in this section requires more than 1 relevant security criterion to be applied under this Part in any particular case (except to the extent that subsections (5) and (6) require a combination of criteria in relation to refugees and refugee status claimants).

114D Director of Security may provide Minister with security risk certificate—

(1) If the Director of Security holds classified security information that the Director is satisfied—

(a) Relates to an identifiable individual who is not a New Zealand citizen and about whom decisions are to be, or can be, made under this Act; and

(b) Is credible, having regard to the source or sources of the information and its nature, and is relevant to the relevant security criterion; and

(c) Would mean, when applying a relevant security criterion to the situation of that person in light of that information, that the person meets the criterion,— the Director may provide a security risk certificate to the Minister to that effect.

(2) A certificate must be in writing and must clearly identify the relevant security criterion or criteria that it relates to.

(3) In making a decision under subsection (1) the Director may take into account any relevant information that does not itself meet the definition of classified security information.

(4) For the purposes of applying this section and this Part, any reference to the belief or opinion of the Minister in the wording of a particular security criterion is to be read as including an alternative reference to the belief or opinion of the Director.

114E Minister may require oral briefing from Director on contents of certificate—

(1) On receipt of a security risk certificate the Minister may call for an oral briefing from the Director on the contents of the certificate.

(2) The content of the oral briefing is to be determined by the Director, and may not be recorded by the Minister or on the Minister's behalf.

(3) The Minister must not divulge the contents of the briefing to any other person, and may not be called to give evidence in any court or tribunal in relation to anything coming to the Minister's knowledge as a result of the briefing.

114F Effect of certificate—

(1) The existence of a security risk certificate is evidence of sufficient grounds for the conclusion or matter certified, subject only to a decision of the Inspector-General on a review conducted under section 114I, and the Minister may rely on the certificate when making a decision under this Part whether or not the Minister receives an oral briefing under section 114E.

(2) Where the Minister does rely on a certificate,—

(a) The Minister is not obliged to give reasons for any decision made in reliance on the certificate, and section 23 of the Official Information Act 1982 does not apply; and

(b) The Minister may not be compelled in any proceedings to provide those reasons or any information relating to them or to any briefing under section 114E, other than the information contained in the certificate itself.

114G Effect where Minister makes preliminary decision to rely on certificate—

(1) If the Minister makes a preliminary decision to rely on a security risk certificate in relation to an individual, the Minister must give a notice to that effect to the chief executive of the Department of Labour.

(2) The effect of the giving of a notice under subsection (1) in the case of a person who is not in New Zealand is—

(a) To require the processing of any application or other matter in relation to the named individual by a visa officer or immigration officer that is currently under way to be suspended, despite any other requirement of this Act; and

(b) To require the chief executive to immediately ensure that the processing is in fact stopped; and

(c) To require any matter under this Act in relation to the named individual that is proceeding in an Authority, the Board, the Tribunal, the District Court, or the High Court to be suspended, notwithstanding anything in this Act or any other enactment or rule of law; and

(d) To require the chief executive to send to the person a copy of the notice and to notify the person of the matters specified in subparagraphs (i) to (v) of subsection (4)(d).

(3) The effect of the giving of a notice under subsection (1) in the case of a person who is in New Zealand is—

(a) To require the processing of any application or other matter in relation to the named individual by an immigration officer that is currently underway to be suspended, notwithstanding any other requirement of this Act; and

(b) To require any matter under this Act in relation to the named individual that is proceeding in an Authority (other than the Refugee Status Appeals Authority), the Board, the Tribunal, the District Court, or the High Court to be suspended, notwithstanding anything in this Act or any other enactment or rule of law; and

(c) To require the detention of the named individual by a member of the Police under subsection (5).

(4) On receipt of a notice under subsection (1) in respect of a person who is in New Zealand, the chief executive must—

(a) Immediately ensure that the processing of any application or other matter in relation to the named individual by an immigration officer that is currently underway is stopped; and

(b) Not accept for processing any application or other matter in relation to the named individual (other than applications or matters relating to refugee status); and

(c) If appropriate, immediately advise an Authority, the Board, the Tribunal, the District Court, or the High Court, in the prescribed manner, that any proceedings or matter under this Act in relation to the named individual are to be stopped in accordance with subsection (2); and

(d) Arrange for a member of the Police to as soon as is practicable personally serve on the person concerned a copy of the notice, along with written information stating—

(i) That the Director of Security has made a security risk certificate in relation to the person; and

(ii) That the Minister has made a preliminary decision to rely on the certificate; and

(iii) The relevant security criterion or criteria that the certificate relates to; and

(iv) The potential effect of the certificate; and

(v) The rights of the person under section 114H (including the right to be heard by the Inspector-General under section 19(4) of the Inspector-General of Intelligence and Security Act 1996), and the time within which the right to a review must be exercised.

(5) Where a member of the Police serves a notice on a person under subsection (4), that member or any other member of the Police must arrest the person without warrant and place the person in custody.

(6) A person arrested under subsection (5) must be brought before a District Court Judge as soon as possible, and may in no case be detained for more than 48 hours unless, within that period, a Judge issues a warrant of commitment under section 114O for the continued detention of the person in custody.

114H Rights of person in respect of whom security risk certificate given and relied on—

(1) A person on whom a Ministerial notice is served under section 114G(4)(d) or who receives notification under section 114G(2)(d) may, under section 114I, seek a review by the Inspector-General of Intelligence and Security of the decision of the Director of Security to make the security risk certificate.

(2) A person who seeks a review under section 114I may—

(a) Be represented, whether by counsel or otherwise, in his or her dealings with the Inspector-General; and

(b) Have access, to the extent provided by the Privacy Act 1993, to any information about the person other than the classified security information; and

(c) Make written submissions to the Inspector-General about the matter, whether or not the person also wishes to be heard under section 19(4) of the Inspector-General of Intelligence and Security Act 1996 (as applied by section 114I(6) of this Act).

(3) No action may be taken to remove or deport the person on whom a notice served under section 114G(4)(d) remains in force unless and until section 114K applies in respect of the person.

(4) No review proceedings may be brought in any court in respect of the certificate or the Director's decision to make the certificate.

114I Review of certificate—

(1) A person on whom a Ministerial notice is served under section 114G(4)(d) may, within 5 days of its service, apply in the prescribed manner for a review of the decision to make the security risk certificate upon which the notice is based.

(2) A person to whom a Ministerial notice is notified under section 114G(2)(d) may, within 28 days of the notification, apply in the prescribed manner for a review of the decision to make the security risk certificate upon which the notice is based.

(3) The review is to be conducted by the Inspector-General of Intelligence and Security with all reasonable speed and diligence.

(4) The function of the Inspector-General on a review is to determine whether—

(a) The information that led to the making of the certificate included information that was properly regarded as classified security information; and

(b) That information is credible, having regard to the source or sources of the information and its nature, and is relevant to any security criterion; and

(c) When a relevant security criterion is applied to the person in light of that information, the person in question is properly covered by that criterion—
and thus whether the certificate was properly made or not.

(5) In carrying out a review, the Inspector-General may take into account any relevant information that does not itself meet the definition of classified security information.

(6) For the purposes of a review under this section—

(a) The Inspector-General has all the powers conferred on him or her by the Inspector-General of Intelligence and Security Act 1996; and

(b) Sections 13, 19 (except subsections (1)(b) and (2)), 20, 21, 22, 23, 24, 26, 28, and 29 of that Act, with any necessary modifications, apply to the review; and

(c) The chief executive of the Department of Labour must provide the Inspector-General with any file relating to the appellant, and any other relevant information, that is held by the chief executive.

(7) For the purposes of a review under this section, the chief executive of the Department of Labour must, as soon as practicable after finding out that the review is lodged, notify to the Inspector-General the name and contact details of an officer of the Department of Labour who may accept service on behalf of the chief executive of notices and matters relating to the review.

114J Result of review—

(1) If on a review under section 114I the Inspector-General decides that the security risk certificate was properly made, the consequences set out in section 114K apply following notification of the decision to the person who sought the review.

(2) If the Inspector-General decides that the certificate was not properly made, the person who sought the review must be released from custody immediately, and normal immigration processes must resume in accordance with section 114L following notification of the decision to the person who sought the review.

(3) As soon as possible after reaching a decision on the review, the Inspector-General must notify the decision—

(a) To the person who sought the review, by way of personal service in the case of a person in New Zealand; and

(b) To the Minister; and

(c) By personal service to the chief executive of the Department of Labour or to such other officer of the Department of Labour as the chief executive has notified to the Director-General [sic ? Inspector-General] under section 114I(7) as a person who can accept service on behalf of the chief executive; and

(d) To the Director of Security.

(4) The decision of the Inspector-General must be accompanied by reasons, except to the extent that the giving of reasons would itself be likely to prejudice the interests that this Part seeks to protect in relation to the classified security information.

(5) The Inspector-General may make recommendations in relation to the payment of costs or expenses of the person who has sought the review.

114K Effect of confirmation of certificate, or failure to seek review—

Where—

(a) A security risk certificate has been confirmed under section 114J(1); or

(b) The certificate is confirmed to the extent that no review has been applied for under section 114I within 5 days (or 28 days, in the case of a person who is not in New Zealand) after the serving of a Ministerial notice under section 114G(2)(d) or (4)(d),—

the Minister must make a final decision within 3 working days whether to rely on the confirmed certificate and accordingly to direct the chief executive in writing to act in reliance on the certificate under subsection (3).

(2) In making a final decision under subsection (1) the Minister may seek information from other sources and may consider matters other than the contents of the certificate.

(3) On receipt of a direction from the Minister under subsection (1) to rely on the confirmed certificate, the chief executive must ensure that—

(a) Where the person's case was before the Tribunal, an Authority, the Board, the District Court, or High Court before the certificate was made, the relevant body is immediately notified in the prescribed manner of the Inspector-General's determination or the failure to seek review, so that it can dismiss the matter in reliance on this section; or

(b) In any other case, an appropriate decision is made in reliance on the relevant security criterion as soon as practicable.

(4) In either event, the chief executive must ensure that—

(a) Any visa or permit that the person still holds is cancelled or revoked, without further authority than this section, and in such case the cancellation or revocation takes effect immediately and without any right of appeal or review; and

(b) If a removal order or deportation order is not already in existence, an appropriate person who may make such an order makes the relevant order immediately without further authority than this section, and the person is removed or deported, unless protected from removal or deportation under section 114Q or section 129X; and

(c) In the case of a person who is protected from removal or deportation by section 129X, the person is released from custody and is given an appropriate temporary permit.

(5) On receipt of the appropriate notification under subsection (3)(a) by the Tribunal, Authority, Board, District Court, or High Court considering the matter, the proceedings in question immediately lapse, and are to be treated as having been dismissed.

(6) Where this section applies, the person who is the subject of the certificate has no further right of appeal or review under this Act.

(7) The Minister is not obliged to give reasons for his or her decision to give a direction under this section, and section 23 of the Official Information Act 1982 does not apply in respect of the decision.

114L Resumption of normal immigration processes where certificate not confirmed on review, or certificate or Ministerial notice withdrawn—

(1) This section applies in respect of a person named in a Ministerial notice given under section 114G if—

(a) The Inspector-General has given notice under section 114J that the certificate was not properly made; or

(b) The certificate is withdrawn under section 114M; or

(c) The Ministerial notice is withdrawn under section 114N, or the Minister decides under that section that the relevant security criterion should not be applied to the person in question, or decides under section 114N to revoke his or her decision to rely on the confirmed certificate; or

(d) The Minister fails to make a final decision in respect of the certificate within the period of 3 working days referred to in section 114K(1).

(2) Where this section applies, the chief executive must ensure that—

(a) The person is released from custody immediately; and

(b) Any immigration processing or appeal that was stopped in reliance on section 114G immediately recommences; and

(c) The person is advised, if any application or other matter had not been accepted for processing in reliance on section 114G(4)(b), that the application or matter will now be accepted for processing; and

(d) Where the person's case was before the Tribunal, an Authority, the Board, the District Court, or High Court before the certificate was made, the relevant body is immediately notified in the prescribed manner of the failure to confirm the certificate or the withdrawal of the certificate or Ministerial notice or other relevant Ministerial decision, so that it can resume consideration of the matter that was before it.

(3) Where any proceedings have lapsed under section 114K(5) by reason of notification under section 114K(3)(a) of the Minister's decision to rely on a confirmed security risk certificate,—

(a) Those proceedings will nevertheless be treated as not having lapsed if notification of a revocation of that decision is received by the relevant Tribunal, Authority, the Board, or Court under subsection (2)(d) of this section; and

(b) Those proceedings continue accordingly from the time of notification of the revocation, with any time limits relating to the proceedings extended by the period of any lapse under section 114K(5).

(4) Where any immigration processing or appeal recommences under subsection (2)(b), or commences as a result of advice given under subsection (2)(c), the officer or body concerned is not to take into account the fact that the provisions of this Part had been applied to the person.

114M Withdrawal of security risk certificate by Director—

(1) Nothing in this Part prevents the Director from withdrawing a certificate in relation to any person at any time by notifying the Minister accordingly.

(2) If the Minister has already relied on the certificate, the Minister must immediately inform the chief executive of the Department of Labour of the withdrawal.

(3) If the Director withdraws a certificate, section 114L then applies.

114N Minister may withdraw notice, or decline to use certificate—

(1) Nothing in this Part prevents the Minister from—

(a) Withdrawing a notice given under section 114G at any time by notifying the chief executive of the Department of Labour accordingly; or

(b) Where a security risk certificate has been confirmed by the Inspector-General, deciding nevertheless that the relevant security criterion should not be applied to the person in question, and notifying the chief executive accordingly; or

(c) Revoking a decision under section 114K to rely on the confirmed certificate, and notifying the chief executive accordingly.

(2) On any notification to the chief executive under subsection (1), section 114L then applies.

114O Warrant of commitment in security cases—

(1) Where a person detained under section 114G(5) is brought before a District Court Judge to seek a warrant of commitment, the following provisions apply:

(a) If satisfied on the balance of probabilities that the person is not the person named in the notice under section 114G, the Judge must order that the person be released from custody immediately:

(b) Except in a case to which paragraph (a) applies, the Judge must issue a warrant of commitment in the prescribed form for the detention of the person.

(2) Every warrant of commitment issued under this section authorises the person to whom it is addressed to detain the person named in it until—

(a) Required by a member of the Police to deliver up the person in accordance with the provisions of this Act relating to the execution of a removal order or a deportation order; or

(b) Notified under subsection (3) that the person should be released; or

(c) Ordered by the High Court or a Judge of the High Court, on an application for a writ of habeas corpus, to release the person.

(3) If a person who is subject to a warrant of commitment under this section is successful in a review by the Inspector-General under section 114I, or if for any other reason the person is to be released, an immigration officer or a member of the Police must immediately notify in writing the Superintendent of the prison or person in charge of the other premises in which the person is detained that the person should be released.

114P Appeal on point of law from decision of Inspector-General—

(1) If the person named in a security risk certificate that is confirmed by the Inspector-General under section 114J is dissatisfied with the decision of the Inspector-General as being erroneous in point of law, the person may, with the leave of the Court of Appeal, appeal to the Court of Appeal.

(2) Any such appeal must be brought—

(a) In the case of a person who is in New Zealand at the time of notification, within 3 working days of being notified of the Inspector-General's decision under section 114J(3)(a):

(b) In the case of a person who is not in New Zealand at the time of notification, within 28 days of being notified of the Inspector-General's decision.

(3) The Court of Appeal may, at any time on or before determining the appeal, or determining whether or not to grant leave to appeal, give such directions and make such orders as it thinks appropriate in the circumstances of the case.

(4) Subject to this section and this Part, section 66 of the Judicature Act 1908, and any rules of Court, apply with any necessary modifications to an appeal under this section as if it were an appeal from a determination of the High Court.

114Q Prohibition on removal or deportation of refugee status claimant—

Despite anything in this Part, no person who is a refugee status claimant may be removed or deported from New Zealand until the refugee status of that person has been finally determined under Part 6A.

114R Minister to report annually on cases under this Part—

(1) The Minister must prepare in respect of each calendar year a report (including, if appropriate, a nil report) setting out—

(a) The number of cases in which the Minister makes a preliminary decision under section 114G to rely on a security risk certificate, and the relevant security criteria applicable to each such case; and

(b) The number of cases where a review of a security risk certificate is sought, and the number of cases in which a certificate is confirmed and the number of cases in which the Inspector-General finds that the certificate was not properly made; and

(c) The number of cases in which a security risk certificate is finally relied on and directions given under section 114K; and

(d) The number of cases in which section 114L applies, and the reasons in each case; and

(e) The number of people removed or deported from New Zealand in reliance on a security risk certificate.

(2) The Minister must present a copy of the report to the House of Representatives not later than 20 sitting days after the end of the calendar year to which the report relates.