IN THE COURT OF APPEAL OF NEW ZEALAND

CA166/04

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

Hearing: 6 and 7 September 2004

Coram: McGrath J
Hammond J
O'Regan J

Appearances: R E Harrison QC and D Manning for Appellant
C R Gwyn, I C Carter and T M A Luey for First and Second Respondents
R M Hesketh and S A Bell for Intervener

Judgment: 17 September 2004

JUDGMENTS OF THE COURT

Judgments

McGRATH J

Table of Contents

Introduction

[1] This appeal concerns the application of provisions in the Immigration Act 1987 (the 1987 Act) and in particular Part 4A which provides for special procedures in the case of persons concerning whom immigration decisions are to be made, where classified information indicates that they pose a risk to national security. Application of the Part 4A process to a person who is not a New Zealand citizen can, following exercise of a right of review, lead directly to the removal or deportation of the person concerned. Part 4A also provides for the detention of such persons, once a preliminary decision has been taken by the responsible Minister to rely upon an earlier decision by the Director of Security that the person is a security risk to New Zealand. If the person seeks a review then he or she is detained while the Director's decision is reviewed by the Inspector-General of Intelligence and Security, an independent statutory officer who has held office as a Judge of the High Court.

[2] The central issue in the appeal concerns whether the appellant, Mr Ahmed Zaoui, who has the status of a refugee under the United Nations Convention Relating to the Status of Refugees 1951 (the Refugee Convention), and who is also the subject

of a security risk certificate under Part 4A which is presently the subject of review, is lawfully detained under the 1987 Act. Mr Zaoui is an Algerian national who is currently detained at the Auckland Central Remand Prison pursuant to a warrant of commitment issued by a District Court Judge at the Manukau District Court on 28 March 2003 under ss114G(6) and 114O of the 1987 Act. Mr Zaoui has made a number of applications to the High Court with the objective of obtaining his release from detention or his transfer to a less onerous form of detention at the Mangere Detention Centre. These applications were heard together by Paterson J in the High Court. In a judgment delivered on 16 July 2004 (*Zaoui v Attorney-General* HC AK CIV2004-404-2309), the Judge declined all of the applications. Mr Zaoui now appeals to this Court against the decision of the High Court.

[3] One of the applications made by Mr Zaoui to the High Court was an application for Habeas Corpus and Mr Zaoui's appeal to this Court includes an appeal against the High Court Judge's refusal to grant his application for Habeas Corpus. Section 17 of the Habeas Corpus Act 2001 requires that appeals to this Court in Habeas Corpus proceedings be treated with urgency. We have accordingly treated this appeal as urgent and also given priority over other Court business to the preparation of the judgment in this matter. Of necessity, that has required us to prefer brevity over comprehensiveness in the treatment of issues raised in the very extensive submissions made by counsel for all parties in this Court. That is not to say that we have not carefully considered those submissions and supporting materials. Rather, it means that we have expressed ourselves in this judgment in terms of broader principles and have referred only to a small number of the numerous authorities which we have considered.

Facts

[4] Ahmed Zaoui arrived at Auckland International Airport on 4 December 2002, having flown from Vietnam on a false passport, and sought refugee status. He was detained under the 1987 Act, first in a police station but from 12 December in Paremoremo Prison. The Immigration Service declined his claim to refugee status

on 30 January 2003. He appealed to the Refugee Status Appeals Authority, which upheld his claim.

[5] On 20 March 2003, the Director of Security (the Director) made and provided to the Minister of Immigration a security risk certificate under s114D of the 1987 Act. The certificate stated that:

> (a) Mr Zaoui's continued presence in New Zealand constituted a threat to national security in terms of s72 of the 1987 Act; and
>
> (b) there were reasonable grounds for regarding him as a danger to the security of New Zealand under Article 33.2 of the Refugee Convention.

[6] On 21 March 2003, the Minister made a preliminary decision to rely on the certificate. On 28 March 2003, the District Court issued a warrant of commitment under s144O of the Act, authorising Mr Zaoui's continued detention in Auckland Prison. The prescribed form for that warrant provided specifically for his detention in a penal institution.

[7] From a summary of allegations subsequently produced by the Director of Security, it appears that the allegations underlying the certificate are that he was involved, in Europe, in clandestine or deceptive activities which threatened the safety of persons and that aspects of his behaviour en route to New Zealand indicate a continuing security risk. Mr Zaoui denies all these allegations.

[8] Mr Zaoui has applied to the Inspector-General for review of the certificate. Because this is the first time the process has been used, there has been lengthy litigation concerning the process and role of the Inspector-General. Mr Zaoui has, as he is entitled to do, challenged decisions on those matters. Aspects of those challenges are now before this Court, the Crown having appealed and Mr Zaoui having cross-appealed against rulings of Williams J reported at [2004] 2 NZLR 239. Another challenge in the High Court (CIV2004-404-000317, 31 March 2004) led to the resignation and replacement of the Inspector-General. The new Inspector-General has not yet set a date for the review of the certificate. It is estimated that it

will be several months at least before the review is completed. Meanwhile Mr Zaoui remains in detention. In total he has now been detained for twenty-one months.

[9] The place of detention initially chosen was Paremoremo prison. For reasons which are not clear Mr Zaoui was held in conditions akin to solitary confinement. That experience has placed a heavy burden on Mr Zaoui's psychological well-being. After his lawyers made representations, he was transferred to the Auckland Central Remand Prison on 16 October 2003. The conditions of his detention there are less onerous and arrangements have been made for his culture and religion. He receives three 20 minute international calls to his family each week, at no cost to himself, and has the ability to call his legal representatives at any time during the hours of unlock. It appears that Mr Zaoui's mental state has improved somewhat under this regime, but psychological evidence indicates that it would be in his best interests if he were released on bail. Mr Zaoui's counsel have sought agreement from the Minister of Immigration for his transfer to the Mangere Refugee Detention Centre ("the Mangere Centre"). This request was refused on the basis that there was no legal option to do so. The Minister of Corrections has also refused a request for his temporary release into the care of the Auckland Dominican Community.

Judgment under appeal

[10] Mr Zaoui then brought a number of applications seeking bail, release or a change in the place of his detention. The applications were:

(a) An application for review of the decision to detain Mr Zaoui in prison, on the basis that the warrant of commitment issued was ultra vires because it specified detention in a penal institution.

(b) An application for habeas corpus.

(c) An application for bail under the inherent jurisdiction of the Court and/or as a remedy for breaches of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).

(d) Applications to vary the warrant of commitment either exercising an inherent power of the District Court or the inherent jurisdiction of the High Court.

(e) An application for a declaration that Mr Zaoui's detention and/or conditions of detention are inconsistent with the Bill of Rights Act.

These were heard in the High Court before Paterson J. He delivered judgment on 16 July 2004, dismissing all applications.

[11] In his judgment Paterson J first considered the statutory scheme. He held that s114O of the 1987 Act permitted detention outside of penal institutions, for example in special facilities, barracks or mental hospitals. On the basis of this conclusion, Paterson J held the warrant of commitment ultra vires. The requirement in the prescribed warrant that detention be in a penal institution unlawfully narrowed the statutory scheme. The Judge therefore 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.

[12] Paterson J then turned to the provisions of the Bill of Rights Act, concluding that the appellant's rights had not been breached. His conditions of detention did not breach the prohibition on disproportionately severe treatment or punishment in s9. Attempts were being made to accommodate him, and there was no suggestion that the regime was intended to humiliate Mr Zaoui. Nor was there an arbitrary detention under s22 because of the long delays following his lawful detention. The delays were not deliberate, being caused by legitimate efforts to clarify the legal process for the Inspector-General's review. His continued detention over that period was a reasonable limitation on his liberty in a free and democratic society. Rights concerning the criminal process, insofar as they applied by analogy, were also not breached. The consequence was that there could be no declaration of inconsistency, and remedies predicated on a breach of rights could not be entertained.

[13] Paterson J also rejected the application for bail. The inherent jurisdiction to grant bail was excluded by the statutory scheme, which provided for the efficient resolution of security issues rather than for release on bail. Because of the risks posed by release, that regime was demonstrably justified in a free and democratic society, so the Bill of Rights Act did not require a different interpretation even if one was available. In the alternative, he concluded that the inherent jurisdiction was available only as ancillary relief to a proceeding which was before the Court. There was no proceeding in this case because the review was undertaken by the Inspector-General. Nor, in the absence of a breach of rights, was there any basis to grant relief to remedy a breach of the protected rights.

[14] On the application to vary the warrant, Paterson J decided that the limited jurisdiction of the District Court was ancillary and related to process. It could not include a power to vary the warrant. In any event, 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. Finally, the Judge accepted that there was no justification for varying the warrant, the Mangere Centre being an inappropriate place to detain the appellant given his security risk status. For the same reason, any inherent power of the High Court was not appropriately exercised in the circumstances.

[15] The application for habeas corpus was also refused. Mr Zaoui's detention was lawful, the warrant of commitment having been upheld on review and there being no breach of the Bill of Rights Act making the detention unlawful.

[16] It followed that Mr Zaoui was unsuccessful in his attempt to secure either his release or a change in the place of his detention.

Immigration Act 1987: Part 4A procedures

[17] Part 4A of the 1987 Act is headed *Special procedures in cases involving security concerns*. It was enacted as part of the 1987 Act by the 1999 amendment and came into effect on 1 October 1999. It comprises ss114A to 114R.

[18] Section 114A states the object of Part 4A in six paragraphs which I summarise. The public interest requires that relevant classified information held by the New Zealand Security Intelligence Service be used for the purposes of the 1987 Act. The information should continue to be protected in that use. Fairness, however, equally requires that there be some protection for the rights of an individual that are affected by the use of the classified information. The balance between that 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 for the statutory purpose in the particular case. But if such approval of its use is given under the 1987 Act's processes, that should also mean that removal or deportation can then normally proceed immediately, with no further avenues of challenge being available to the individual under the Act. This is because of the significance to security of the information used. The final aspect of Part 4A's object is thus to:

> 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. (s114A(f)).

[19] Part 4A provides for the making of a security risk certificate by the Director. The Director may provide the Minister of Immigration with a security risk certificate relating to an individual, not being a New Zealand citizen, concerning whom immigration decisions are to or can be made under the Act (s114D). If the Director holds classified security information relating to such an individual, and is satisfied as to certain characteristics of that information, the Director may provide a certificate to that effect. The characteristics of the classified security information are that it is credible, having regard to its source and nature, and is relevant to particular security criteria under the Act so that, when the relevant criteria are applied to the person's situation in light of the information, the person meets those security criteria.

[20] Section 114C prescribes the relevant security criteria to be applied in the making of a security risk certificate. The criteria include refugee removal and deportation security criteria which are applicable where a decision must be made concerning whether either step should be taken with regard to a refugee or claimant for refugee status. The relevant refugee deportation security criteria are a

combination of any one or more stipulated general relevant deportation security criteria taken together with either or both of two stipulated refugee deportation security criteria. The former criteria are:

> (a) the person constitutes a threat to national security under s72 of the 1987 Act; and
>
> (b) criteria that relate to suspected terrorists under s73(1) of the Act.

[21] The latter refugee deportation criteria are:

> (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, and
>
> (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.

[22] The Minister may then make a preliminary decision to rely on the certificate made by the Director in making decisions under Part 4A of the Act. The Minister may first call for a confidential briefing from the Director, the contents of which the Minister is not permitted to divulge to any other person. If the Minister decides to rely on the certificate in relation to the person, he or she must notify the chief executive of the Department of Labour, which administers the 1987 Act. The notification triggers a process whereby any immigration applications of the person to whom the certificate relates are suspended and, if in New Zealand, the person is detained. The process of detention is initiated by the chief executive arranging for the Police to serve on the person notice of the Minister's preliminary decision to rely on the certificate (s114G(4)(d)) along with information stating the fact that the certificate has been made, the criteria applied, its potential effect and the right to have the certificate reviewed, and to be heard on the review by the Inspector-General. On serving the notice the Police must arrest the person without warrant, and place him or her in custody (s114G(5)).

[23] The existence of the certificate is sufficient grounds for the conclusion that it certifies. This scheme, however, is subject to a statutory process of review of the certificate on the application of the person it concerns, by the Inspector-General (s114F)). I also summarise the Inspector-General review process briefly, as it is of

contextual significance to ascertaining the meaning of the statutory provisions concerning detention that are central to the present appeal. Applications for review by a person served with a notice in New Zealand must be made within 5 days of notification. Importantly, the Inspector-General is under a duty to conduct the review with all reasonable speed and diligence (s114I(3)). The purpose of the review is to determine whether the certificate was properly made or not. That is done by determining if the information which led to the certificate included information which was properly regarded as classified security information, whether it was credible (having regard to its source and nature), whether it was relevant to a security criterion, and whether on its application the person was properly covered by the relevant criteria. Information that is not classified security information may also be taken into account. (s114I(5)). The ultimate question for the Inspector-General is whether the certificate was properly made or not.

[24] The person has a right of appeal to the Court of Appeal against a decision of the Inspector-General which confirms the certificate, on the ground that the decision is "erroneous in point of law" (s114P(1)).

[25] If the Inspector-General decides that the security risk certificate was properly made, the Minister must make a final decision within 3 days on whether to rely on the confirmed certificate. If it is relied on the Minister must direct the chief executive to act in reliance on it (s114K(1)). The consequence of that direction is that any visa or permit held by the person is cancelled forthwith, without right of appeal or review, and a removal or deportation order is made and executed. These actions are subject to the protection that is required by s129X of the Act (for refugees) or s114Q (for refugee status claimants).

[26] I now turn to the provisions in Part 4A for the detention of those who are in New Zealand when served with notice of preliminary reliance on a security risk certificate. The starting point, already referred to, is the obligation on the Police at the time of service of the Minister's notice, to arrest the person concerned without warrant, place the person in custody and bring him or her before a District Court Judge within 48 hours (s114G(3)(c), (5) and (6).

[27] If the District Court Judge is satisfied on the balance of probabilities that the person in Court is the person named in the Minister's notice of preliminary reliance, the Judge must issue a warrant of commitment in the prescribed form for the person's detention (s114O(1)). The warrant authorises the person to whom it is addressed to detain the person named until one of three events has occurred. The first event is that the Police require the detaining authority to deliver up the detained person to execute a removal order or deportation order. The second event is that the detaining authority is notified, by the police or an immigration officer, following success of the person in the review by the Inspector-General, that the person should be released. These events mark the alternative endings of statutory processes. The third event is an order by the High Court on application for a writ of habeas corpus to release the person (s1140(2)).

[28] If the person the subject of the warrant succeeds on the review "or for any other reason the person is to be released" the superintendent of the prison "or person in charge of other premises in which the person is detained" must be notified that the person should be released (s114O(3)).

Mr Zaoui's case

[29] Mr Harrison QC for Mr Zaoui contends that the High Court has misinterpreted the provisions of Part 4A of the 1987 Act in relation to detention. He argues that an analysis of the scheme of the 1987 Act as a whole, and a consideration of Part 4A's provisions in the context of other provisions for detention in the various parts of the 1987 Act, point to a different meaning. The argument is also supported by reference to the need, when reading the Part 4A provisions, to have regard to Mr Zaoui's fundamental rights, which are protected under the New Zealand Bill of Rights Act 1990. On a broad level counsel points to rights of access to justice and substantive rights of all persons under s29 of the Bill of Rights Act. On a more specific level he relies on rights under ss9 (not to be subject to cruel or degrading treatment), 22 (not to be arbitrarily detained), 23(1)(c) (to test validity of detention by habeas corpus and to be released if the detention is unlawful), 23(5) (to be treated

with humanity and with respect for dignity of the person), and 27(2) (to seek judicial review of the determination of a public authority affecting rights).

[30] Counsel argues that, so read, Part 4A does not justify arbitrary detention nor preclude a person such as Mr Zaoui who is the subject of a security risk certificate from establishing that the circumstances of the making of the certificate and related detention are factually unjustified for the purposes of seeking bail, release pending completion of the review, or a change in the place of detention. The threat to security that Mr Zaoui is said to present is categorised as being of a low level kind and such that his imprisonment is a disproportionately serious measure. Reliance is also placed on New Zealand's obligations under the Refugee Convention, Mr Zaoui's status as a refugee having been confirmed by the Refugee Status Appeals Authority. The protection given him under Article 33.2, as incorporated by s129X of the 1987 Act, is especially emphasised but other provisions are also relied on.

[31] Finally, Mr Harrison contends that the language directing detention in Part 4A does not exclude the possibility of releasing Mr Zaoui under an inherent jurisdiction of the High Court to grant bail or under its habeas corpus jurisdiction which the Act expressly retains.

Approach to interpretation

[32] The application of immigration legislation constantly involves discretionary decisions that lead to the admission, exclusion or deportation of persons who, not being New Zealand citizens, seek to enter or reside in New Zealand temporarily or on a permanent basis. Such decisions, made under statutory authority, will reflect current published government policy as to what the national interest requires. They will also reflect legislative directions concerning human rights standards which arise from international instruments to which New Zealand is a party. In the present context these include the Refugee Convention, which has been incorporated into both Parts 4A and 6A of the 1987 Act by the 1999 amendment and the International Covenant for Civil and Political rights which is principally given domestic legislative effect by the Bill of Rights Act.

[33] Part 6A of the 1987 Act gives legislative effect to New Zealand's obligations under the Refugee Convention. Part 4A provides a framework for use of classified security information held by the New Zealand Security Intelligence Service which is relevant generally to decision-making concerning immigration status including to refugees, in relation to national security considerations.

[34] On general principles of statutory interpretation, this Court should approach the provisions of Parts 4A and 6A on the basis that Parliament has legislated consistently with its international obligations and read the text accordingly. In the end the text itself, however, is of course central to what Parliament has stipulated: *New Zealand Air Line Pilots Association v Attorney-General* [1997] 3 NZLR 269; *Wellington District Legal Aid Committee v Tangiora* [1998] 1 NZLR 139 (CA), *R v D* [2003] 1 NZLR 41 at [25].

[35] In the case of the Bill of Rights, the issues in the appeal concern in particular its interpretation provisions ss4, 5 and 6 which provide:

> **4. Other enactments not affected -** No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),-
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
> (b) Decline to apply any provision of the enactment-
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.
>
> **5. Justified limitation –** Subject to section4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **6. Interpretation consistent with Bill of Rights to be preferred –** Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[36] These provisions require the Court to prefer an interpretation consistent with protected rights where one is reasonably available: *Ministry of Transport v Noort* [1992] 3 NZLR 260, 272; *Quilter v Attorney-General* [1998] 1 NZLR 523. Section 4 precludes the Court from reading the legislative text in a way which nullifies it or is so inconsistent with the statutory purpose as to do violence to its scheme. But

subject to those limits these provisions require the Court to apply the meaning of the text that is most in accordance with the freedoms protected by the Bill of Rights. In doing so in respect of the Part 4A detention provision of the Act the first step is to identify the meanings that are reasonably available and then to consider which of them least infringes on the protected rights. Depending on what those inquiries show it may be necessary to ascertain the extent to which the right is limited and whether effect can be given to it.

Warrant of commitment

[37] I first address questions concerning the places in which a person may be detained under Part4A of the Act. The issues are:

(a) Whether the legislation permits detention in a place other than a prison;

(b) Whether the regulation prescribing the warrant of commitment was ultra vires; and

(c) Whether there is any power to vary the warrant to alter the place of detention.

[38] Mr Zaoui was detained under a warrant of commitment in accordance with s114O(1)(b). Under that provision, the District Court Judge was required to issue a warrant of commitment in the prescribed form. In this case reg40(4) stipulates that the prescribed form is that set out in Form 9 in sch2 to the Immigration Regulations 1999. Section 150 of the Immigration Act empowers making of regulations for the purpose of "prescribing forms for the purposes of this Act" and "such other matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration".

[39] Paterson J found that s114O does not require that detention of a person to whom that section applies be in a penal institution. Although this was disputed by the Crown in the High Court, it was accepted in this Court that Paterson J was correct in that respect. I believe that concession was rightly made, given the

indications in s114O itself that detention in premises other than a penal institution may be permissible under s114O, particularly:

> (a) The reference to "Superintendent of the prison or person in charge of the other premises in which the person is detained" in s114O(3); and
>
> (b) The reference to "the person to whom it [the warrant] is addressed" rather than to a superintendent of a prison in s114O(2).

[40] Although s114O appears to allow for detention either in a penal institution or in other premises, the prescribed form of warrant provides only for detention in a specified penal institution. The form of warrant is said to be addressed to the Superintendent of a "specified penal institution", and directs the police to deliver the person who is subject to the warrant to the "specified penal institution".

[41] Mr Harrison argued that the regulation prescribing the form of warrant was ultra vires s114O because it limits detention to a specified penal institution and fails to recognise the alternative of detention in other premises in which the person may be detained. He therefore suggested that the warrant itself was invalid.

[42] In the High Court Paterson J found the warrant of commitment, which restricted the place of detention to a specified penal institution, forbade what the statute expressly permitted (detention in other premises) and was therefore ultra vires. However, he found that detention in a prison would have been inevitable even if an alternative form of detention were provided for in the prescribed form, and therefore severed the words "specified penal institution" from the form of the warrant, amending the warrant in that respect. Following severance he held that the warrant was valid.

[43] It is notable that other provisions in the Immigration Act which provide for detention pursuant to a warrant issued by a District Court Judge make provision for the place of detention in an explicit way. Examples of other provisions dealing with detention in the Immigration Act are:

(a) Section 62(2), which deals with detention pursuant to a warrant of commitment made under s60. That provision says that detention will be in a penal institution or in any other premises approved for the purpose by the Judge before whom the person is called;

(b) Section 80(2), which deals with detention under a warrant of commitment issued under s79. That provision says that detention must be in a penal institution;

(c) Section 102(2), which deals with detention pursuant to a warrant of commitment issued under s99, and also provides that detention must be in a penal institution;

(d) Section 128(7), which provides for detention under a warrant of commitment signed by a Registrar or Deputy Registrar of the District Court, and provides for detention to be in a penal institution or in some other premises approved for the purpose by the Registrar or Deputy Registrar.

[44] It can be seen from this list that the place of detention in relation to other provisions in the Immigration Act is determined by Parliament itself, or provision is made for the place to be determined by the decision-maker in relation to the warrant of commitment (either a Judge or a Registrar of the District Court).

[45] In circumstances where Parliament has not specified who should decide the nature of the premises in which a detainee is detained, the question arises as to whether the Executive is entitled to make that choice for all cases through the regulation making power, rather that invariably providing options from which the District Court Judge executing a warrant of commitment may choose.

[46] Here the contrast between Part 4A and Part 3, both of which concern threats to national security, is clearly significant. Part 4A lacks an express provision that detention is to be in a penal institution and indicates that a person may be detained in other premises. It contemplates that the prescribed warrant may permit detention

elsewhere than in a penal institution. The reason for taking a different approach to that in Part 3 may reflect the fact that conditional release is not an option under Part 4A, for reasons given later in this judgment. In effect, the question of an alternative to detention of those whose certificates are being reviewed has been left to be dealt with by regulation.

[47] Ms Gwyn properly conceded that it would be possible for the Executive, through an amendment to Form 9, to provide for a place or places of detention other than a penal institution for the purposes of s114O. I agree that that is so. However, I do not consider that it is mandatory for the Executive to provide for a number of different detention options when prescribing the form of warrant for the purposes of s114O. It is within the power of the Executive when making regulations prescribing the form of warrants for the purposes of s114O to prescribe a form which provides only for detention in a penal institution. The discretion created distinguishes the present case from *Powell v May* [1949] 1 KB 330, in which a by-law purported to prohibit a form of bookmaking expressly permitted by statute.

[48] There are undoubtedly circumstances in which detention in prison would be appropriate while the process envisaged by the Act was undertaken. The reality of the present case, however, is that the process has gone on for a much longer period than appears to have been envisaged by Parliament. In the meantime Mr Zaoui had undergone a prolonged period of detention in conditions which the High Court Judge described as "akin to solitary confinement". Paterson J said it was difficult to understand why such severe and onerous conditions were imposed on him. Having undergone that period of effective solitary confinement, he has now been confined for a further lengthy period in the remand prison. During the period of his detention, his status as a refugee has been upheld by the Refugee Status Appeals Authority, and as part of that process there has been an independent consideration of many elements of the background to his arrival in New Zealand. As well the Director has provided to him a summary of the security risk certificate.

[49] Thus, the position of Mr Zaoui has changed considerably. At the time of his detention he did not have refugee status, little was known about his background and it was envisaged that there would be a speedy process under Part 4A. Now it has

been established that he is a refugee, more is known about his background, the security certificate allows some assessment if not a complete one of the kind at risk he may pose to New Zealand and it is obvious that the Part 4A process will take a total of two years or more to be completed. Accordingly, while it may well be correct, as Paterson J found, that detention in a penal institution is appropriate in the normal course under Part 4A, there are circumstances indicating the desirability of a consideration of the appropriateness of that form of detention in the particular circumstances of this case.

[50] It is apparent from the correspondence in evidence before us that the refusal of requests to transfer Mr Zaoui to the Mangere Centre has been based on a perception that s114O does not permit such a course, rather than on concerns about security. The Minister of Immigration indicated in a letter of 24 December 2003 that there might be scope to do so, but on 2 February 2004 she wrote that "there is no scope legally for Mr Zaoui's detention other than in a penal institution". However, she said she was keen for options to be explored to deal with issues relating to Mr Zaoui. The High Court decision establishes that the advice given to the Minister was wrong. That position was accepted by Crown counsel in this Court. There is no legal impediment to Mr Zaoui's detention at premises other than a penal institution. The Executive could even now arrange for the promulgation of a Regulation to permit that course.

[51] If that course were followed, I take the view that the District Court could give effect to it by varying the warrant. Section 16 of the Interpretation Act 1999 provides:

> **Exercise of powers and duties more than once**
> (1) A power conferred by an enactment may be exercised from time to time.
> (2) A duty or function imposed by an enactment may be performed from time to time.

[52] The provision has limited effect in situations where a power, duty or function creates vested rights. As Wade and Forsyth (2000) suggest in *Administrative Law*:

> In the interpretation of statutory powers and duties there is a rule that, unless the contrary intention appears, "the power may be exercised and the duty shall be performed from time to time as occasion requires." But this gives a highly misleading view of the law where the power is a power to decide

> questions affecting legal rights. In those cases the courts are strongly inclined to hold that the decision, once validly made, is an irrevocable legal act and cannot be recalled or revised. The same arguments which require finality for the decisions of courts of law apply to the decisions of statutory tribunals, ministers and other authorities.
>
> For this purpose a distinction has to be drawn between powers of a continuing character and powers which, once exercised, are finally expended so far as concerns the particular case. An authority which has a duty to maintain highways or a power to take land by compulsory purchase may clearly act "from time to time as occasion requires". But if in a particular case it has to determine the amount of compensation or to fix the pension of an employee, there are equally clear reasons for imposing finality. Citizens whose legal rights are determined administratively are entitled to know where they stand (p235).

The passage was directed at administrative decision-making, but I see the principle as being applicable in this context. See also *In re Wilson* [1985] AC 750, 759.

[53] In *Goulding v Chief Executive of the Ministry of Fisheries* CA256/02, 24 October 2003, this Court said of the comparable power in s13 to correct errors that it could not be exercised simply because the decision-maker had changed his or her mind. Similarly, s16 is unlikely to authorise exercising a power of this nature afresh in the absence of some material change in circumstances.

[54] The order for detention pursuant to a warrant of commitment does not in my view create rights to which an important interest in finality attaches. The decision as to place of detention is an administrative one legitimately the subject of revision if circumstances change. That is also consistent with the apparent intention of Parliament to create a discretion as to place of detention rather than a conditional release regime in Part 4A. I conclude that to this limited extent the District Court has the power to vary the warrant.

[55] If presented with the alternatives of prison and some other place for detention under Part 4A's provisions, the District Court would exercise its discretion having regard to the nature of the available facilities. The security risk certificate and summary, if any, must be accepted on their face, and national security concerns given due weight along with any means proposed for managing the risks identified in a different place of detention. In those circumstances, the Crown should indicate its views on the appropriate place of detention having regard to the security risks, and

that indication must be given significant weight in the absence of an ability to assess the relevant classified information.

[56] However, under s114O, it is the Executive which has the power to determine by the mechanism of statutory regulation whether detention at other premises will be permitted, not the Courts. On that point I uphold Ms Gwyn's submission, would allow the Crown's cross-appeal, and find that the warrant of commitment was lawful and valid. There is no basis for challenging Mr Zaoui's detention on the basis of invalidity of the warrant. Accordingly, I also find, consistently with the High Court Judge, that there is no power for the District Court, or the High Court standing in the shoes of the District Court, to alter the warrant or alter Mr Zaoui's form of detention on the basis of any defect in the original warrant.

Is detention under Part 4A mandatory?

[57] I now consider the availability of conditional release under Part 4A and the inherent jurisdiction of the Court.

[58] On the ordinary meaning of the language of Part 4A, the detention regime commences immediately following the Minister's initial decision effectively to rely upon the security risk certificate made by the Director. The person who is subject of the certificate is then notified of the Minister's decision and of their right to have the certificate reviewed. Concurrently, the person is arrested without warrant, detained in custody by the police, and brought before a District Court Judge. The Judge must then issue a warrant of commitment of the person concerned in a form prescribed by regulations. Detention under the warrant continues, until the process of challenge to the certificate is concluded or the High Court orders the person's release on a habeas corpus application. The statute, thus read, makes no express provision in Part 4A for bail or other conditional release other than during the process through an order made on a habeas corpus application.

[59] The first question arising on the appellant's argument is whether the words in s114O(3) "if for any other reason the person is to be released," in the wider context

of the 1987 Act, indicate that there is a discretion to release a person from detention under Part 4A.

[60] Part 3 of the 1987 Act provides for deportation of persons who threaten national security or who are suspected terrorists. Under s72, the Minister of Immigration may certify a person to be a threat to national security, following which a deportation order can be made by Order in Council. The Minister can also order deportation of suspected terrorists (s73). In each case the person is taken into custody under s78 and brought before a District Court Judge who, as an alternative to committing the person to detention, has a discretionary power to order release under s79 if satisfied that release would not be contrary to the public interest. Any such release, which is of course pending deportation, must be made subject to conditions of residence and reporting to the police and to any other conditions that the Judge thinks fit (s79(2)(b)(ii) and (4)).

[61] Mr Harrison's point is that Part 3 provides a power for a Judge to release persons conditionally pending their deportation who have been determined by the government to be a threat to national security or suspected terrorists. It must follow, he says, that under the scheme of the Act neither national security interests, nor the efficacy of the certificate review process, are undermined by treating Part 4A as enabling conditional release in a particular deserving case.

[62] It is clear that the drafters of the 1999 amendment resorted to the provisions in Part 3 of the 1987 Act concerning detention, in providing for the security risk certificate and detention regimes under Part 4A. Both parts deal with the same subject matter. The relevant deportation security criteria under s114C(4), which form the basis for certificates under Part 4A, can form the basis for deportation decisions under ss72 and 73 in Part 3. Nevertheless, the provisions in s79 enabling conditional release from detention in the discretion of a District Court Judge were not included in Part 4A. Furthermore, because detention under s114O will ordinarily last until deportation or release, save for a very brief period or perhaps in exceptional cases, detention under s78, which triggers s79, will not be available to persons covered by Part 4A.

[63] There is however, one distinction between the two sets of provisions which appears to explain that difference of approach in the two Parts to conditional release. The Part 3 procedure is not one in which information relied on by the Minister (or the Governor-General in Council) has any specific statutory protection from use in judicial processes, as does the classified information used in the certificate processes under Part 4A. There is no statutory restraint on use of official information, relevant to whether the release of the person from detention is consistent with the public interest, that would impede it being placed before the District Court under s79. Under Part 4A, however, the classified information that is central to satisfying the security criteria, and providing the basis for the issue of a security risk certificate, is protected and cannot be used in legal processes. The national security interests with which Part 4A is concerned are at the high end of the spectrum identified in *Choudry v Attorney-General* [1999] 2 NZLR 582 at 593-4. The Minister is directed not to divulge the contents of any briefing received to any other person and may not be called upon to give evidence in relation to what the Minister knows as a result of the briefing (s114E(2) and (3)). This distinction in the statutory policy of protection of information that is used for the statutory purposes appears to be central to the differing provisions for conditional release from detention under the respective statutory provisions.

[64] In this context a conditional release regime based on exercise of a judicial discretion would have to operate without the applicant, counsel for the applicant or the Judge being informed of the key information which resulted in the making of the certificate, and detention of the person it concerns during the Inspector-General's process. That would not be a judicial process at all.

[65] Mr Harrison also argues that s114K(4)(c) in Part 4A, contemplates release from custody of a person who is subject of a security certificate but who has the status of a refugee. He says they may obtain release at the end of the process if s129X protects the person from removal or deportation. Section 129X in Part 6A prohibits removal or deportation of a refugee unless that is allowed by Articles 32.1 or 33.2 of the Refugee Convention. Because, however, the security criteria for a certificate cover the requirements for expulsion under Article 33 (see s114C(5) and (6)) it seems that there will be limited scope for the provision to operate where the

Part 4A procedure is invoked, as it was in this case, by reference to those criteria. In any event the provision is a residual one applicable where s129X applies and the person cannot because of its terms and the practical situation be deported. It offers no more general assistance in ascertaining the meaning of Part 4A detention provisions.

[66] Mr Harrison finally refers to s128(15) and 128B(12), as provisions which expressly exclude bail, and points out that no such provision is included in Part 4A. But in a long and much amended Act little can be inferred from the absence of such a provision. It would appear, in any event, as Ms Gwyn said, that ss128A and 128AA respectively empower conditional release in some circumstances so that s128's prohibition on bail is of procedural significance only. That may also be the case for s128B.

[67] Similarly I draw no assistance from the point that s114O(3) refers to "if for any other reason the person is to be released." That phrase immediately follows the precise specification in s114O(2) of the circumstances in which detention will come to an end. That context does not suggest that subsection (3) was intended to recognise that there was a general power of conditional release from detention under part 4A. Furthermore Part 4A does provide for circumstances in which a person might have to be released into the community while the review process is taking place or after it has concluded. The first is if the Court makes an order under a habeas corpus application. That provision is a logical reference for the phrase, as it appears in the previous subsection. As well the protection of s129X in relation to the rights of a refugee not to be expelled or returned could lead to release despite confirmation of the certificate.

[68] The conclusion I draw from the comparison between Parts 3 and 4A is that Parliament did not provide for conditional release of 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. The decision was accordingly taken not to provide for conditional release at all.

[69] I reach this conclusion with reluctance and note that the outcome in Mr Zaoui's case is not in conformity with the provisions of the Refugee Convention which look to application of criteria of necessity of detention to protect national security and public order and regular independent review of the continuing need (see *Attorney-General v Refugee Council* [2003] 2 NZLR 577 at [100] to [102]). It is surprising that the Inspector-General, as the fully informed certificate review authority, is not able to authorise conditional release, with an appeal against his decision to this Court. Perhaps those responsible for the policy of detention believed that the imposition of a duty to conduct the review with all reasonable speed and diligence would lead to an expedited review process with only short periods of detention. If so that supposition was sadly astray.

[70] Nevertheless, the statutory context of Part 3, and the contrast between them, puts beyond doubt that the position is that expressed on the ordinary meaning of the Part 4A provisions. Parliament did not intend that persons detained under the Part 4A scheme could be released prior to the events specified in s114O(2). Within the scheme of the Act no other meaning is reasonably available.

Inherent jurisdiction to grant bail

[71] In *R v Lee* [2001] 3 NZLR 858 a Full Court of the High Court held that the High Court had an inherent jurisdiction to grant bail which could be granted in any circumstances where the justice of the case so demands, even in respect of matters which are regulated by statute, provided that the exercise is in accordance with the relevant legislation. This conclusion was approved by this Court in *R v Payne* [2003] 3 NZLR 638. Both *Lee* and *Payne* involved the criminal jurisdiction of the Courts in an area which was not covered by the Bail Act. In principle, however, there is no reason why the inherent jurisdiction of the High Court to grant bail should not be available, subject to the same restriction of its exercise in any case being compatible with the relevant legislation, where a person is detained under a civil statutory power. I see no basis in principle for imposing in New Zealand a further

requirement that a bail application under the inherent jurisdiction, in a civil proceeding, must be ancillary to some other form of High Court proceeding as stipulated in England by Sir John Donaldson MR in *R v Secretary of State for the Home Department ex parte Turkoglu* [1988] 1 QB 398, 400-401.

[72] The next question is whether the exercise of the inherent jurisdiction by the High Court, in the present case, would be contrary to the statutory scheme. Section 114O(2) directs that the duration of the detention of the person named in the warrant is "until" one of the stipulated events occurs. There is no provision for conditional release. I have concluded in this judgment that the reason why, exceptionally in the 1987 Act, no power of release on conditions of a person detained is included in Part 4A is part of its purpose of maintaining the secrecy of the classified information that is used in the security risk certificate process. That secrecy could not be maintained if the information were made available to a Court and parties for the purposes of a judicial determination of whether a person the subject of a certificate should be released. The Act does not permit the question to be approached as one of public interest immunity (as to which see *Choudry supra*). The detained person would become entitled to that information which would be contrary to the protection envisaged in Part 4A.

[73] Part of Parliament's purpose in 1999 was that the process should be conducted with all speed and diligence, partly, no doubt, so that detention of the person would be for the briefest possible period. But there is nothing in the statute to indicate that in cases where that did not eventuate the legislative policy concerning detention could be bypassed. It is particularly unlikely that the legislature wished delays resulting from legitimate testing of the process by the person detained to give rise to the exercise of powers of conditional release when that is plainly excluded from the special procedures under Part 4A.

[74] The present case indicates the position. The Director has provided a Statement to Mr Zaoui summarising the allegations and the reasoning that have resulted in the Security Risk Certificate. The Director has said of his reasoning:

> It is based both on the publicly known security related European decisions and convictions and related unclassified information and on classified security information which cannot be divulged.

The statement then discusses the elements of definition (c) in the New Zealand Security Intelligence Service Act 1969 which reads as follows:

> (c) The protection of New Zealand from activities within or relating to New Zealand that-
>
> (i) Are influenced by any foreign organisation or any foreign person; and
>
> (ii) Are clandestine or deceptive, or threaten the safety of any person; and
>
> (iii) Impact adversely on New Zealand's international well-being or economic well-being;

And in respect of definition (c) the Director says:

> The activities of which he was convicted in Belgium and France were clandestine or deceptive or threatened the safety of persons. The Swiss government believed that his activity in Switzerland "may lead to acts of violence, and even attacks, in Switzerland". Activities of this kind in New Zealand, by Mr Zaoui or by others attracted to New Zealand by his presence here, could threaten the safety of New Zealanders.

[75] Mr Zaoui takes issue with the findings of the judicial authorities in Belgium and France and has succeeded in the Refugee Status Appeals Authority in establishing his position. But the ability of a court to exercise a judicial discretion in the grant of bail requires some understanding by the Judge of underlying matters raised by the certificate. That is simply not available under the restrictions other than in terms of the review process, including a possible appeal. For the Court to enter into the inquiry would invoke a collateral challenge to the certificate which would be inconsistent with that legislative scheme.

[76] Accordingly I conclude that the High Court is unable to exercise its jurisdiction to grant Mr Zaoui bail under its inherent jurisdiction.

Habeas Corpus orders

[77] As indicated, s114O(2) provides that the authority to detain a person who is the subject of a security risk certificate is terminated on the occurrence of any one of

three stipulated events. The first and second concern the completion of the statutory processes in relation to the security risk certificate, which result in either release or deportation. The third terminating event occurs under s114O(2)(c) if the detaining authority is:

> 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.

[78] This provision gives effect to the protection given under s23(1)(c) of the Bill of Rights which relevantly provides:

> Everyone who is arrested or is detained under any enactment-
> …
> (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

[79] Since enactment of the Bill of Rights in 1990 and Part 4A of the 1987 Act in 1999 Parliament has enacted the Habeas Corpus Act 2001 which stipulates procedural requirements for the Courts in dealing with applications for a writ of habeas corpus to challenge the legality of a person's detention (ss6 and 7 Habeas Corpus Act 2001). Features of this procedure include a requirement of priority. Applications must be given precedence over all other matters before the High Court (s9). The position is the same in this Court with appeals against High Court decisions (s17). Interim orders for release from detention, pending final determination of an application, may be made, and appropriate conditions imposed (s11). The onus of establishing that a detention is lawful lies throughout on the respondent. Where that onus is not satisfied the applicant is entitled to an order for release.

[80] While the 2001 Act provides a modern procedural framework for the Court and the parties, the substance of habeas corpus as a constitutional means of securing immediate release from an unlawful detention is unchanged by the 2001 Act. It was described in D Clark and G McCoy, *Habeas Corpus: Australia, New Zealand, the South Pacific* (2000) in this way:

> The writ exists to examine the legality of the applicant's detention in custody or the custody of the detainee from whom the applicant has initiated the proceedings. The concept of custody has been confined historically to close

> custody though, as we shall see, there has always been one major exception to this notion. There are also indications that a more liberal view of custody for habeas corpus purposes may be emerging. The requirement is that applicants must be in custody at the time of the hearing because, if they have been released before the hearing of the case, habeas does not lie. In sum it must be shown that there is a detention, that it is illegal and that it is not voluntary (pg 65 to 66).

[81] And subsequent to the 2001 Act coming into force, a Full Court of this Court in *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616 similarly said that:

> Traditionally the writ has been used only where it is sought to release someone entirely from (unlawful) custody. (para [61]).

[82] The Court in *Bennett* also emphasised that the scope of habeas corpus was "not to be shackled by precedent" saying that the writ will "adapt and enlarge as new circumstances require" (Para [60]). Nevertheless, I am satisfied that in providing that an order, made on a habeas corpus application, could be the basis for release of a person detained under Part 4A's provisions, Parliament had in mind situations in which the detaining authority could not show there was a legal justification for the detention concerned. That situation might arise in the habeas corpus proceeding itself or in a habeas corpus proceeding brought following a successful judicial review proceeding under the Judicature Amendment Act 1972 in which it was established there was a lack of authority to detain the person the subject of the certificate. The appropriate procedure may depend on whether the illegality can be demonstrated in a summary process (*Bennett* at para [59] to [74] and *Manuel v Superintendent, Hawkes Bay Regional Prison* CA67/04 15 June 2004 at paras [49] to [51]).

[83] The scope of the circumstances in which an order covered by s114O(2)(c) might be made would accordingly cover situations where there was a serious irregularity in the warrant or where the statutory purpose of deportation following confirmation of the security certificate could no longer be achieved and there was no basis for continuing detention. This is the nature of the event terminating authority to detain under s114O(2)(c). Habeas Corpus does not in my view provide a general power for the Court to allow conditional release of a person lawfully detained.

Is the detention of Mr Zaoui arbitrary?

[84] Mr Harrison argues that Part 4A does not justify an arbitrary detention and that if the court accepts that Mr Zaoui's initial detention was arbitrary, or that it has become so, he should be released under the habeas corpus provision. Alternatively he seeks a declaration that the detention is arbitrary. It is convenient to consider the arbitrary detention question on the facts at the outset before considering what the consequences of a finding adverse to the Crown would be.

[85] The leading statement in New Zealand of the meaning of "arbitrary", in the context of the Bill of Rights Act, is that in the judgment of Richardson P for the Court in *Neilsen v Attorney-General* [2001] 3 NZLR 433 at [34]:

> Whether an arrest or detention is arbitrary turns on the nature and extent of any departure from the substantive and procedural standards involved. An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.

[86] This statement, which is mainly directed at arbitrariness in the decision to arrest, reflects the general principle that the touchstones of arbitrariness are "inappropriateness, injustice and lack of predictability" *(Van Alphen v the Netherlands* [1990-92] 3 NZBORR 326 (at 5.8); *A v Australia* (Comm no 560/1993, views of 3 April 1997, UN Document CCPR/C/59/D/56/1993).

[87] I do not accept that the initial detention under Part 4A is arbitrary, given that national security concerns of a critical kind gave rise to it. The real question is whether administrative detention for lengthy periods is justified in a national security context.

[88] Detention would be both arbitrary and unlawful under the Immigration Act if the purpose of detention could not be fulfilled and the detention was therefore otherwise indefinite or permanent. I agree with the observations to this effect of Gummow J in *Al-Kateb v Godwin* [2004] HCA 37. He said at [122]:

> If the stage has been reached that the appellant cannot be removed from Australia and as a matter of reasonable practicability is unlikely to be removed, there is a significant constraint for the continued operation of s198. In such a case s198 no longer retains a present purpose of facilitating removal from Australia which is reasonably in prospect and to that extent the operation of s198 is spent. If that be the situation respecting s198, then the temporal imperative imposed by the word "until" in s196(1) loses a necessary assumption for its continued operation. That assumption is that s198 still operates to provide for removal *under* that section.

[89] Section 114O does not expressly authorise detention in the event that it becomes 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 this point in the process, however, the purposes of the Inspector-General's review, and possible deportation of Mr Zaoui, can still be achieved.

[90] It follows that if Mr Zaoui's detention is arbitrary it can only be because the delays in the Part 4A process render his continued detention inappropriate or unjust. That must be considered in the context of national security considerations, which are central to the Part 4A process, but also bearing in mind the fact that Mr Zaoui has the status of a refugee under the Refugee Convention.

[91] The case most directly analogous with the present situation is *Chahal v United Kingdom* (1996) 23 ECHR 413. In that case, the European Court of Human Rights in a national security context considered whether delays in executive decision-making relating to the deportation of Mr Chahal and his application for judicial review were sufficient to make his continued detention unlawful, under Art 5(1) of the European Convention on Human Rights. The time periods were: three months between the grant of leave and the first judicial proceeding; six months between the quashing of the decision and the fresh decision to deport; seven months between the second grant of leave and the second judicial proceedings; and eight months between the grant of leave and the determination of the appeal. The applicant was in prison for a total period of around six years. The majority did not see all of that time as relevant to the issue, implicitly taking the view that delays caused by his European Court action could not be taken into account. The Court also decided that the time taken for the decisions to deport was not excessive:

> bearing in mind the detailed and careful consideration required for the applicant's request for political asylum and the opportunities afforded to the latter to make representations and submit information ([115]).

The same was true of the judicial review application. The Court held:

> As the Court has observed in the context of Article 3, Mr Chahal's case involves considerations of any extremely serious and weighty nature. It is neither in the interests of the individual applicant nor in the general public interest in the administration of justice that such decisions be taken hastily, without due regard to all the relevant issues and evidence.
>
> Against this background, and bearing in mind what was at stake for the applicant and the interest that he had in his claims being thoroughly examined by the courts, none of the periods complained of can be regarded as excessive, taken either individually or in combination. Accordingly, there has been no violation of Article 5 of the Convention on account of the diligence, or lack of it, with which the domestic procedures were conducted [117].

[92] There were strong dissents on this point. Judge De Meyer (joined by one other) considered that, overall, detention for six years was too long. Serious and weighty matters might justify a long deportation process, but the applicant should not be detained for all of that period. Judge Pettiti took a similar view, noting that administrative detention should be scrutinised more carefully than detention under the general law.

[93] In that case detention was in part pending deportation. Mr Zaoui's situation differs in that the security risk certificate is still under review and no decision has been made concerning his deportation, if it is confirmed. However, that simply reflects the fact that New Zealand has adopted a different procedure for making decisions on deportation in the national security context where review takes place before the decision to deport is made so that the facts are clearly established. The majority decision supports the Crown's argument that the detention in this case has not become arbitrary because of delays in the process.

[94] The Human Rights Committee took a stricter approach in *Ahani v Canada* (15 June 2004) UN Document CCPR/C/80/D/10 (Communication No 1051/2002). The majority in that opinion took the view that the 9½ month duration of the hearings to determine the reasonableness of a security certificate was so long that the detention was arbitrary. The author, an Iranian national who had sought refugee

status, was detained during that period. The Committee however noted that some of the earlier delay would not be taken into account because it could be attributed to the author, who had brought constitutional challenges to the legislation. That must be contrasted with challenges to the reasonableness of the certificate, which were contemplated by the legislation, and had to be dealt with expeditiously.

[95] There were two strong dissenting opinions, arguing that the period was reasonable in a context where issues of national security had to be determined. Three members of the Committee said of the majority opinion:

> It offers no explanation of why that period violated the provision. Nor is there anything on the record it could have relied on. There is no evidence that the proceedings were unduly prolonged or, if they were, which party bears the responsibility. In the absence of such information or any other explanation of the Committee's reasoning, we cannot join in its conclusion.

And Nisuke Ando in a dissenting opinion suggested:

> Nevertheless, the process of the Federal Court's reasonableness hearing imposed a heavy burden on the Judge to ensure that the author would be reasonably informed of the cases against him so that he could prepare himself for reply and call witnesses if necessary. Furthermore, considering that the present case concerned expulsion of an alien due to "compelling reasons of national security" and that the court had to assess various facts and evidence, the period of nine and a half months does not seem to be unreasonably prolonged.

[96] The observations in dissent support the *Chahal* approach. It seems to me that, like the majority judgment of the European Court in *Chahal*, they reflect a more realistic acknowledgement of the difficulties faced by states undertaking genuine and thorough review processes in this area.

[97] In this area the difficulty is caused by conflicting imperatives. It is important that the Inspector-General's process be fair and effective. It has taken time to achieve that. Parliament has established a regime predicated on the premise that, because of the national security context it will, in general, be reasonable and appropriate not to release a person until review is completed. There may be risks of a person about whom there are national security concerns committing or inciting unlawful acts while in the community. The continued detention of Mr Zaoui for a indefinite period however itself is undesirable and the state is required by human

rights norms to seek to minimise the infringement on his liberty. Ultimately, the balance struck by the majority in *Chahal* is an appropriate one. Delays are necessary for the proper determination of cases, and in a national security context, particularly the first under the legislative process being applied, a delay of around two years does not, of itself, amount to arbitrary detention provided the State is acting with reasonable diligence. The substantial delays in the process here have been occasioned by the difficulty of the issues grappled with and the fact that this is the first time the Part 4A process has been used.

[98] Mr Harrison submitted that in Mr Zaoui's individual case no risk would arise from his release, so that in fact detention had become unnecessary and also arbitrary under s22 because of the long period of his detention. I acknowledge that much of the appellant's evidence is directed to that conclusion. The security certificate, however, is not, and it cannot be subject to attack except through the Inspector-General's review and then on appeal to this Court on questions of law. It follows that the Court cannot conclude that there is no risk arising from his release, because it does not and cannot have before it the classified security information on which the security risk certificate is based. In those circumstances I must hold that Mr Zaoui's individual circumstances do not render his continued detention arbitrary.

[99] Ms Gwyn also argued that the detention had been prolonged because of the exercise by Mr Zaoui of legal challenges other than those provided for by Part 4A. The process of review concerned confines challenges to the certificate to the Inspector-General review process and an appeal against the outcome on a point of law to this Court. I have reached the decision that there is not arbitrary detention as a result of the prolonged period involved on a basis that has taken account of the challenges to the process. It is unnecessary to consider the Crown's further argument in those circumstances. I prefer not to treat any part of what I regard as a systemic delay as one that should not be factored into the consideration of whether the appellant's rights have been breached.

[100] The period of detention should not be measured against the domestic standards applied in cases such as *R v Parkes* (1995) 15 CRNZ 377 and *Martin v Tauranga District Council* [1995] 2 NZLR 419. Those cases relate to s25(b) of the

Bill of Rights, which gives a person charged with an offence the right to be tried without undue delay. Such persons are entitled to the presumption of innocence and there is an established Court system with procedural safeguards to ensure that this right is met. There is nothing in the criminal process requiring detention of an accused, as there is in Part 4A, and no national security considerations arise. Section 25(b) is not engaged in this case, and there is no analogous right for a person in Mr Zaoui's position. The question in issue is whether his detention has become inappropriate, unpredictable or disproportionate. In my view the answer to that question is better found in the international authorities referred to above.

[101] Nor do I accept that the conditions of Mr Zaoui's detention, referred to shortly, make what would be an otherwise lawful detention arbitrary. On that point I adopt what is said by Lord Bridge and Lord Jauncey in that respect in *R v Governor of Parkhurst Prison, ex parte Hague* [1992] AC 58, 165, 173.

[102] For these reasons I conclude that Mr Zaoui is not subject to arbitrary detention at present.

Cruel or degrading treatment

[103] Section 9 provides:

> **Right not to be subjected to torture or cruel treatment** – Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

In *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 this Court said:

> But the action of removing Mrs Puli'uvea cannot be said to begin to attain to the high threshold required by the prohibition in the New Zealand Bill of Rights Act on disproportionately severe treatment. The cases here and elsewhere expand on such constitutional guarantees of decency, eg *R v P* (1993) 1 HRNZ 417, 423; 10 CRNZ 250, 255, referring to decisions of the Supreme Court of Canada and the United States Supreme Court.

[104] Paterson J referred to the opinion of Dr Zuessman a senior consultant with the Psychological Services of the Department of Corrections. He was of the opinion that from a psychological viewpoint Mr Zaoui should be released on bail.

[105] The Judge referred to evidence of steps taken to meet some of Mr Zaoui's needs while in prison. They include provision of three international telephone calls to his family each week at no cost. He has the ability to speak to legal representatives at any time during unlock hours. He has arrangements for his culture and religion.

[106] Paterson J concluded that the present treatment of Mr Zaoui was "not so excessive as to outrage standards of decency" in terms of the *Puli'uvea* test.

[107] I agree with that conclusion and agree with the High Court that s9 of the Bill of Rights has not been breached.

[108] The other protected rights relied on add nothing of substance to those discussed. Because of my conclusion that there has been no breach of the Bill of Rights Act, it is unnecessary for me to consider whether such a breach is in itself a ground for habeas corpus as that term is used in s114O(2). There are difficulties in viewing breaches of rights relating to the conditions of detention as rendering a warrant unlawful. There is no basis for a declaration of inconsistency.

Conclusion and summary of judgment

[109] I conclude that the detention of Mr Zaoui in prison is lawful. No basis has been shown for interfering with it by way of conditional release, bail or any other order on his application for habeas corpus. The regulation requiring that his detention be in prison is valid.

[110] Part 4A of the 1987 Act does however permit the making of regulations that would allow the detention of persons detained in other approved premises pending the outcome of a review by the Inspector-General under Part 4A. Fresh regulations could provide, for instance, that such a person might be detained at the Mangere Detention Centre if the District Court Judge who makes the detention decision so decides.

[111] While Part 4A does not provide for continuing review of the detention order, if the Regulations were changed a District Court Judge would be able to address where Mr Zaoui was to be detained, acting under the power conferred by s16 of the Interpretation Act. In this limited sense there is a power to vary the warrant.

[112] It is not appropriate for the Court to express a view on whether the regulations should be changed in the way indicated as the questions involved require decisions on the requirements of national security of a kind that are for the executive to determine. The Court, moreover, is not apprised of the full information concerning Mr Zaoui as is the Government. That matter should however be considered by the Government.

[113] In his judgment O'Regan J has expressed his agreement with the conclusions set out in paras [56] and [109] to [114] of this judgment. These accordingly, by a majority, represent the judgment of this Court. These two judgments are not in agreement on whether bail could ever be granted under the inherent jurisdiction but that does not affect the decision in this case. Hammond J has dissented, having concluded for reasons set out in his judgment that Mr Zaoui should now be released on bail.

[114] For these reasons Mr Zaoui's appeal is dismissed and the Crown's cross-appeal is allowed. There will be no award of costs.

HAMMOND J

Table of Contents

Introduction

[115] It has been said that "the problem of the stranger" has "proved to be the most difficult in the history of human interaction" (Sacks, *The Dignity of Difference* 2002 at 58). A stranger suddenly appears on the doorstep of a given community. Is the stranger benign or malignant? Should we let her in? What obligations, if any, do we have to such strangers, and how are we to discharge these obligations? These perennial human dilemmas find their most dramatic and difficult locus, in the law, in the case of asylum seekers, or refugees.

[116] It must be acknowledged, from the outset, that the problems associated with asylum seekers and refugees present great and complex challenges for both the Executive and the Courts. On any view of the matter any policy with respect to such persons involves a very difficult balance between conflicting objectives. Parliament has confirmed this country's obligations under the 1951 Refugee Convention not to remove individuals who have a well-founded fear of persecution in terms of the Convention on account of their race, religion, nationality, political opinion or membership of a particular group (as to the Convention, see Hathaway, *The Law of Refugee Status* (1991)). On the other hand, successive administrations have rightly stressed the need to maintain appropriate immigration controls, and to see that individuals who do not otherwise qualify for entry to New Zealand, and who claim refugee status, do not abuse that claim to delay or avoid their removal. In short, that border controls are not undermined by the arrival of unmeritorious applicants for refugee status, and in particular, persons who may present a security risk to this country.

[117] Refugee and asylum claims also raise very difficult issues for courts. As part of their historic function, our courts must ensure that the Executive does not infringe the acknowledged right to seek asylum; or act unlawfully; or infringe other fundamental rights under the New Zealand Bill of Rights Act 1990 (BORA). It is as well to acknowledge therefore - as has happened in the other common law jurisdictions - that, from time to time, this task may draw courts into extremely difficult and sensitive judgments which may create (and have done so in a number of jurisdictions) tension with the administration of the day.

[118] That said, adherence to fundamental principle ought to avoid most of the difficulties in this area. That is, there can be no question that policy is for the government of the day; that executive matters are for the Executive; but that lawfulness is for the courts. Senator Barney Cooney (who is also a lawyer) put it well in the course of a debate over detainees in Australia, when he said:

> The courts are charged by society with the task of restraining arbitrary action, whether public or private, directed by one person against another. They stand between government and those it seeks to detain. People in Australia, whether legally or illegally, are entitled to have this safeguard retained to protect their civil rights. To remove it would diminish the quality of the liberties available in Australia (*Asylum, Border Control and Detention*, Joint Standing Committee on Migration (1994) at 197).

[119] The Crown asserts that the continued detention of the appellant, Mr Zaoui, in prison, is lawful; and that he must stay in prison (notwithstanding that he has been in prison since 4 December 2002, 10 months of which were spent in solitary confinement) for so long as it takes to complete all legal processes relating to whether Mr Zaoui poses a security risk to this country, however long that may be. This notwithstanding that the Refugees Appeals Status Authority has determined that Mr Zaoui has refugee status.

[120] I am unable to accept that view. I have concluded that Mr Zaoui is now "arbitrarily" (in BORA terms) detained in prison; and that the remedy of habeas corpus is available in the circumstances of this case to enable his release on bail, on terms which I will set out in due course.

[121] I should make it clear from the outset that I am at one, and generally for the reasons given by them, with my colleagues that there was no unlawfulness in Mr Zaoui's initial detention and imprisonment; and I agree that this Court is not entitled to go behind the determination of the Director of Security as to the reasons for those steps having been taken. That is, I am quite content to adopt, for the purposes of this judgment, what the Director has said in what is available to this Court about Mr Zaoui and his background.

[122] The problem which has arisen in this case, and which has caused me much anxiety, is that in my view the New Zealand statutory processes and associated matters have miscarried in relation to the way Mr Zaoui has been dealt with subsequent to his detention. That is to say, that there has been a breach of the BORA within the overall system by way of systemic delay, for which the remedy of habeas corpus is available, and must now be applied.

[123] I am grateful to my colleagues for setting out the background to this proceeding. Given that I am in agreement with them on the issues relating to lawfulness of the initial detention, I can in this judgment proceed straight to the issues on which we differ: whether Mr Zaoui is being "arbitrarily" detained in Bill of Rights terms, and what, if any, remedy may in consequence be open to him.

Habeas Corpus

Introduction

[124] The logical order to proceed would be to deal with whether there is any breach of any of Mr Zaoui's rights, and to then consider the question of what is to be done about that breach or breaches.

[125] In this case, I reverse that order because of a central submission made by Ms Gwyn. This is that, in the circumstances of this case, there is no remedy available to Mr Zaoui, whether by habeas corpus, or by any inherent jurisdiction the Court may possess, to grant bail until all legal processes relating to the determination

of Mr Zaoui's security classification have been concluded. If, perchance, that happens to take several years, then the answer must be, in the Crown's submission, "so be it".

[126] It follows that, for all practical purposes, the Crown is contending that habeas corpus is suspended during this period (whatever it may be), notwithstanding the present existence of the remedy, in s 114O(2)(c) of the statute. A court should take a great deal of convincing on such a startling proposition: after all, the suspension or deferment of habeas corpus is a matter of the gravest constitutional moment, and historically has only occurred in wartime, or in critical national emergencies. This notion, deeply enshrined in English law, also found its way into the United States Constitution: "[habeas corpus shall] not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it" (art I, cl 9(2)). And even then in such cases, as Lord Atkin put it, Judges should guard against being more executive-minded than the Executive (see *Liversidge v Anderson* [1942] AC 206 (HL)).

[127] Ms Gwyn did acknowledge that some irregularities could, in theory, occur whilst the review process is in train. For instance, the Executive might fail to appoint an Inspector-General, so that the review process might grind entirely to a halt. But, she said, other remedies (such as mandamus) would be utilised. The Crown can therefore see no place for habeas corpus until all the state processes are complete with respect to the security issues.

[128] Whether the Crown's contentions in this respect are correct must necessarily turn on two things: first, the character and scope of the writ of habeas corpus itself; and secondly, any restriction on the present employment of the writ which is properly to be discerned in the Immigration Act 1987.

The writ of habeas corpus: general

[129] The general outline of the writ can be quickly sketched, for present purposes.

[130] Although all the other public law remedies have been overhauled and modified in the 20th Century, the ancient writ of habeas corpus, as to its substantive content, remains untouched, much as it has been for centuries. (The standard reference work is still Sharpe, *The Law of Habeas Corpus* 2ed 1989).

[131] The Habeas Corpus Act 2001 abolished some forms of habeas corpus (which are not relevant for the purposes of this appeal) in New Zealand and addressed certain procedural matters with respect to the operation of the writ. Significantly, however, s5(a) of that statute states explicitly that a purpose of the Act is "to reaffirm the historic and constitutional purpose of the writ of habeas corpus as a vital means of safeguarding individual liberty".

[132] The form of the writ which is maintained under that statute (*ad subjiciendum*) is directed to the detaining authority commanding him or her to bring up the body of the detainee, with the cause of the detention, so that the High Court can judge it's sufficiency and remand the prisoner to prison, admit him to bail, or release that person.

[133] So important is the writ, and so wide its reach, that no leave of the Court is required to apply for it. Indeed a Judge of the High Court will (if necessary) deal with the particular matter at any time. The application for the writ must be given a priority hearing, above all other business of the Court.

[134] All detentions are unlawful under our law, unless they can be lawfully justified, and habeas corpus will not be refused if the detention is found to be unlawful. The legal burden of proof of lawful justification for detention is on the detaining party.

[135] The time at which the detention is to be considered lawful or unlawful is at the point of time at which the writ is considered by the Court. Hence a detention could be initially lawful, but could subsequently become unlawful.

[136] As to the coverage of the writ, it has never been an all-purpose remedy for securing the freedom of those claiming to be the subject of an unlawful detainer. As Lawton LJ colourfully observed in *Linnett v Coles* [1987] 1 QB 555:

> A writ of habeas corpus is probably the most cherished sacred cow in the British constitution; but the law has never allowed it to graze in all legal pastures (at 561).

A simple example of this was provided by *Linnett v Coles* itself - a person found to be in contempt of court cannot then turn around and apply for habeas corpus to avoid their having to purge their contempt. However, it is correct to say that habeas corpus is available to address most instances of unlawful detention, whether civil or criminal.

[137] In recent years, in all the common law jurisdictions, there has been a good deal of doctrinal and practical difficulty caused by the demarcation between this writ and the modern forms of judicial review of administrative action. In some subject areas, judicial review has invaded pastures once grazed solely by habeas corpus. There have even been distinct suggestions (equally distinctly rebutted) that habeas corpus should be entirely subsumed into the general concept of judicial review, with which it is often joined in the pleadings. (See, for instance, Simon Brown LJ, writing extra-judicially in "Habeas Corpus - A New Chapter" (2000) PL 31). New Zealand courts, including this Court, have recently had to grapple with these demarcation issues, but they are of no moment on this appeal; this case is habeas corpus, pure and simple.

Habeas corpus: immigration cases

[138] Whatever may be said of other subject areas, immigration cases have in fact provided lush pastures for habeas corpus to graze upon, particularly where asylum is being claimed; where there has been detention pursuant to deportation orders; custody following orders for extradition or extradition of fugitive offenders; and detention of refugees.

[139] This is because modern legal regimes, with contemporary human rights provisions, have been somewhat overwhelmed by - and their legal systems insufficiently developed for - the sheer scale of the problem of refugees which has today fallen upon administrative and legal authorities. For instance, in 2001, in the United Kingdom there were 119,015 initial decisions on asylum applications, adjudicators determined 43,415 appeals, there were 15,540 applications for leave to appeal, 3,190 administrative appeals, all of which gave rise finally to 2,210 applications for judicial review (Home Office, *Asylum Statistics United Kingdom 2001* (2002) para 22; the scale of the Australian problems are accessibly set out in Brennan, *Tampering with Asylum: A Universal Humanitarian Problem* (2003)). What followed, in the United Kingdom, and in other Commonwealth jurisdictions, has been a series of complex, and quite often hastily drafted, attempts to achieve fair and workable legislative responses, and appropriate administrative procedures, to address the problem of refugees.

[140] In the circumstances, it should come as no real surprise that the law of judicial review and habeas corpus, in the area of immigration law, has not had an altogether easy time of it in endeavouring to create a consistent and coherent whole. Wade & Forsyth *Administrative Law* 8 ed 2000 note:

> While habeas corpus for the most part deserves its high reputation as a bulwark of personal liberty, it has several times been weakened by unfortunate decisions, particularly in war time and immigration cases. The case law is 'riddled with contradictions' (footnote omitted). It has also failed to measure up to the standards of the European Convention on Human Rights and Fundamental Freedoms, which entitles a detainee 'to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful' [Art. 5, para 4] (at 587).

[141] To take only one example, from some of the cases cited to us, there is the problem of the detention of an individual admitted to a country but subsequently detained as an illegal entrant, on the ground that that person had gained entry by fraud or deception. A line of cases, including a decision of the House of Lords (*Zamir v Secretary of State for the Home Department* [1980] AC 930) held that the Court would not review such orders so long as the immigration officer had reasonable grounds for the belief in facts that would sustain the detention orders. The restrictive view taken in those cases was the subject of trenchant academic

criticism. Eventually the House of Lords changed its position in *Khawaja v Secretary of State for the Home Department* [1984] AC 74 and ruled that the power to detain could only be validly exercised if the prisoner was in fact an illegal entrant, and hence the Court was called was called upon to review the facts to determine whether the requisite "precedent fact" had been established.

[142] Counsel favoured us with a significant number of authorities. It is not feasible, even if it were otherwise possible, in an urgent judgment of this character to endeavour to synthesise the law into anything approaching a coherent whole. And fortunately, we are not faced in this instance with questions of jurisdiction, disputed facts or the like. All that need to be said for present purposes is that the writ is plainly available for securing release from unlawful detention, and here the facts are not contested in a sense which would raise some of the niceties which have troubled other appellate courts.

Habeas corpus: bail

[143] What precisely does "release from detention" mean, in this context? The term might, and most commonly does, refer to outright release. But historically, habeas corpus was, amongst other things, employed to allow bail. Indeed habeas corpus was at one time a centre-piece of criminal procedure, and the principal method of gaining bail (see generally Sharpe, above at 134 et seq). Even the famous Habeas Corpus Act of 1679 (UK) was specifically designed to address two problems: bail, and the need for a prompt trial. Essentially, a defendant had to be tried within one term or session after his commitment, or bailed and then either tried within two terms or sessions, or discharged. Although that Act has now been abolished, it was habeas corpus which gave birth to the notion of the requirement for an expeditious trial - a proposition which has resonated down the centuries, and still presses on us today. And the modern summary forms of applying for bail are a distinct offspring of habeas corpus.

[144] This point should also be noted. When a person is "bailed" that person is, in principle, not necessarily at large. Technically, the person bailed passes into the custody of those who assume responsibility for him or her, and who bond themselves

accordingly. Looser forms of release on bail are also commonplace today - such as, that the bailed person must live only at a stated address - sometimes on terms which, practically speaking, amount to house arrest.

[145] In my view the historic jurisdiction to grant bail on a writ of habeas corpus still remains in place in New Zealand.

[146] The authors of Laws of New Zealand, *Crown Proceedings and Crown Practice*, state, at para 57:

> 57. Admission to bail. The common law remedy for the improper refusal of bail was by writ of habeas corpus. However, this remedy has been superseded by the statutory procedure for securing release on bail. (Citations omitted.)

[147] The use of the term "superseded" is inaccurate, or more accurately, incomplete. Section 6 of the Bail Act 2000 refers to the granting of bail "under this Act". That Act deals with any "offence", as defined in s3 of the Bail Act. In short, the Bail Act is directed to bail for criminal offences. And whilst s22 of the Habeas Corpus Act 2001 (NZ) abolishes certain of the old English statutes, nowhere does it abrogate the power to allow bail on the writ *ad subjiciendum*.

[148] The common law position must stand until abrogated by Parliament, or by a senior appellate court, for good and sufficient reason. No authority was cited to us for the proposition that the common law rule relating to the possibility of bail on this writ has been abolished.

[149] There is nothing unusual about this. For instance, this Court has held that the inherent jurisdiction to grant bail on criminal offences has survived the enactment of the Bail Act 2000 (see *R v Lee* [2001] 3 NZLR 858, approved by this Court in *R v Payne* [2003] 3 NZLR 638).

Habeas corpus and the Immigration Act 1987 in New Zealand

[150] This brings me back to the point at which I began this part of this judgment. The Crown contends for a suspension of habeas corpus until such time as the review

process with respect to Mr Zaoui has been concluded. No matter that Mr Zaoui might spend five years in solitary confinement; or, if he was shackled whilst so confined; or any of the other more malignant things which can blight incarceration.

[151] The Crown construes the Immigration Act in Part 4A as a kind of formal minuet which proceeds, in a more or less stately way, through several successive stages in which, at the final bow, Mr Zaoui is confirmed as a security risk, or not as the case may be. The reservation of habeas corpus must be seen in such a legislative framework, and justifies this restriction on the use of the writ.

[152] This raises important issues of principle as to the proper approach to statutory construction, in a case like the present. In my view:

- The court presumes that the Parliament does not intend to deprive a person of access to the courts except to the extent expressly stated or necessarily implied. In this context the term "necessarily implied" has the same meaning as was authoritatively stated by Lord Hobhouse in *R v Special Commissioner of Income Tax* [2002] 2 WLR 1299, 1311 at [45]:

  > A necessary implication is not the same as a reasonable implication … A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation (emphasis in original).

- If the words are ambiguous, the court should interpret the words consistent with New Zealand's international obligations.

- Where possible, consistency with the rights and freedoms in the New Zealand Bill of Rights Act 1990 should be achieved - see *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

- The court should not impute to Parliament an intention to abrogate or curtail fundamental rights or freedoms.

- In any event, the words utilised in this statute as to the availability of habeas corpus are plain - habeas corpus is available - now - to Mr Zaoui, and should be given full force and effect.

[153] The objects of the Act are set out in s 114A, as follows:

> 114A. … 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.* [Emphasis added.]

[154] To my mind, subs (f) contemplates and expresses the purpose that this detention process is a relatively urgent procedure. The time limits in the various sections in this part of the Act are tight, in most cases a matter of days. Further, the review process under s 114I must "be conducted by the Inspector-General with *all reasonable speed and diligence*" (emphasis added).

[155] Of course, as has happened in this particular instance, the process may go awry - and that is a subject to which I will shortly turn - but to say that habeas corpus will not then be available strikes me as both incongruous, and wrong. One cannot logically turn things on their head and argue that, because there is a process which, if all had gone timeously, would have protected Mr Zaoui's right to habeas corpus, the right cannot now operate. The right to habeas corpus must be continuously speaking.

[156] I pressed Ms Gwyn as to whether there was anything in the text of the Act, or the scheme of the Act, pointing to why the remedy should be limited in the way the Crown suggested. As I understood her answer, the Crown says that "it must be so". However, as I see it, this is a matter of constitutional importance. As Lord Browne-Wilkinson said in *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97:

> The court should be astute to ensure that the protection afforded to human liberty by habeas corpus should not be eroded save by the clearest words (at 114).

[157] In my view, the terms of the relevant provisions are such that the availability of habeas corpus is always speaking, to the fullest extent, from the inception of the detention process until its completion. I think that is plain enough on the face of the statute. But even if that were not so, there is a very heavy onus on proponents of the Crown's proposition to make out their case, for the reasons I have already given. Indeed, I would go so far as to say that if habeas corpus is not continuously speaking from beginning to end of the detention process, then Parliament really would have to say so unequivocally (and, consequentially, be prepared to explain why, in face of its (assumed) international obligations, and its domestic undertaking in the New Zealand Bill of Rights Act 1990, it had chosen to suspend habeas corpus to the extent suggested).

Habeas corpus: conclusion

[158] In my view habeas corpus is available - now - to address Mr Zaoui's circumstances, if he is unlawfully detained. And the remedy could be employed to afford either his complete release, or release on bail, as might be appropriate.

Arbitrary delay

Introduction: the potential unlawfulness in this case

[159] Section 22 of the BORA, relevantly, provides: "Everyone has the right not to be arbitrarily … detained". This provision is not restricted to detention in the area of criminal law.

[160] Section 23(1)(c) of the same statute provides that everyone who is detained under any enactment … "shall have the right to have the validity of the … detention determined without delay by way of habeas corpus and to be released if the … detention is not lawful".

[161] The issue here is: are the circumstances of Mr Zaoui's continued detention from 4 December 2002 such that, in law, he can be said (at least now) to be arbitrarily detained?

[162] It is important to appreciate, in the context of this question, that Mr Zaoui did not enter New Zealand as an untroubled individual. He had been an Associate Professor of Theology at the University of Algiers, and Imam of his local mosque. He became a candidate for the Islamic Salvation Front (ISF) which won a landslide Parliamentary victory in the first free elections in Algeria, in 1991. Within a month of his election there was a military coup. Thereafter, for over a decade, the military and certain insurgent groups in that country conducted a prolonged battle for control of this nation. Mr Zaoui went to Europe. He was condemned as an "enemy of the state". Undoubtedly he continued to "lobby" (to use a neutral term) from abroad for a resolution to the conflict in his homeland. He was held in France and convicted on charges of association with criminal activities. He left France (illegally), for Switzerland. He spent time in Burkina Faso and Malaysia. He then travelled overland to Vietnam, intending to come to New Zealand which (on his evidence) he considered to be a safe haven for him. As I understand it, Mr Zaoui must have left Vietnam on a false South African passport, which he destroyed en route to New Zealand. It was in that context that he first came into contact with the relevant

New Zealand authorities, but as a distinctly bruised individual, after years of nomadism, and privation.

[163] On claiming refugee status at Auckland International Airport, Mr Zaoui was taken into custody, and detained at Papakura Police Station. This was on a warrant of commitment dated 6 December 2002 which was issued pursuant to s 128 of the Immigration Act 1987. A week later he was transferred to Auckland (Paremoremo) Prison where he was placed in solitary confinement in "D Block". That is, he was treated as the worst criminals in this country are treated - D Block is a prison within a prison.

[164] What happened thereafter is conveniently summarised in a helpful chronology presented to the Court by the Solicitor-General in other proceedings relating to Mr Zaoui, which I set out hereunder in full.

2003	
20 March	Issue of security risk certificate
24 March	Preliminary decision of Minister of Immigration to rely on certificate
27 March	Mr Zaoui applies to the Inspector-General to review certificate; Inspector-General decides to defer completion of review pending Refugee Status Appeal Authority decision against initial refusal of refugee status
31 March	Hearing of Mr Zaoui's appeal to the RSAA (31 March-4 April, 22-23 April, 3-6 June and 9-11 June)
1 August	RSAA allows appeal
6 October	Interlocutory decision of Inspector-General as to process for review
17 October	Mr Zaoui applies for judicial review of Inspector-General's process decision
1 December	Hearing of process decision judicial review
11 December	Mr Zaoui applies to the Inspector-General, requesting that he recuse himself on the grounds of actual or apparent bias following comments to news media
19 December	High Court (Williams J) issues decision in process decision judicial review, largely upholding Mr Zaoui's claim

2004

19 January	Inspector-General declines application that he recuse himself
27 January	Mr Zaoui applies for judicial review of Inspector-General's recusal decision
2 February	Attorney-General appeals part of the 19 December High Court decision
18 February	Mr Zaoui cross-appeals
11 March	Mr Zaoui files proceedings in the District Court, challenging his continued detention in a penal institution under security risk Certificate
31 March	High Court (Salmon and Harrison JJ) issues decision in recusal decision judicial review
	Inspector-General resigns
7 May	Mr Zaoui applies to transfer the District Court detention proceedings to the High Court and adds further claims
11-12 May	Court of Appeal hears appeal of the 19 December High Court decision
1-2 July	High Court hears Mr Zaoui's detention proceedings
16 July	High Court (Paterson J) issues decision in detention proceedings, largely declining Mr Zaoui's claim
28 July	Mr Zaoui appeals the 16 July High Court decision.

[165] The best that can be said of the events described in this chronology are that they make unfortunate reading. Having made an observation of that character, I am obliged to enlarge on it.

[166] It will be observed that on 27 March 2003 Mr Zaoui applied to the Inspector-General to review the Certificate under which he was detained. The Inspector-General decided to defer that review, notwithstanding a statutory provision that his review was to be conducted with all reasonable speed and diligence, whilst the refugee status appeal was disposed of. This review could have been done in parallel with the refugee status proceeding.

[167] In consequence, when on 1 August 2003 the Refugee Status Appeals Authority allowed the appeal and granted Mr Zaoui refugee status, the review

process by the Inspector-General had already been set back several months. This occurred in a context in which Mr Zaoui was still in solitary confinement.

[168] There was then the interlocutory skirmishing over the process to be adopted on the review which was clouded by an application that the Inspector-General recuse himself on the grounds that he had made certain unfortunate observations with respect to the circumstances of Mr Zaoui's arrival in New Zealand.

[169] By the end of 2003 the High Court had determined the process points relating to the judicial review - substantially upholding Mr Zaoui's claims.

[170] After the Inspector-General declined to recuse himself, proceedings had to be commenced in that respect in the High Court. Eventually, on 31 March 2004 that Court handed down a decision in the recusal proceeding adverse to the Inspector-General, and he resigned.

[171] The Attorney-General had appealed part of the High Court process decision. That appeal was heard in this Court on 11 and 12 May 2004. A decision has not yet been released.

[172] In the meantime, a new Inspector-General, a retired Judge of the High Court, had assumed office. He was therefore in a position to proceed with a review.

[173] It was in that context that, somewhat unsurprisingly, Mr Zaoui's solicitors commenced the proceeding which is now before us on appeal. That proceeding was dealt with commendably promptly by Paterson J, and the appeal from that decision was accommodated as promptly as was possible in this Court's list.

[174] It is not necessary, and in certain respects not appropriate, to enquire into the workings of each of these unfortunate happenings by way of lengthy delays, over the last 21 months. Rather, the question is simply whether, taken cumulatively, and given the extraordinary length of time that has elapsed to this point, it can it be said that there is a degree of arbitrariness such that there has been a breach of the human

rights provision to which I have referred? The Crown did not dispute that Mr Zaoui has the protection of the BORA.

Arbitrary detention

The law

[175] In my view s 22 of the BORA protects persons within the statute from a detention which, although lawful at the outset, as in this case, becomes unreasonable by virtue of indefinite or prolonged duration or disproportionate consequences.

[176] The case law on arbitrary detention in New Zealand is still developing. Most of the current New Zealand authorities and commentaries focus on whether unlawful conduct is necessarily arbitrary. To date there has been little discussion of where initially lawful detentions can become arbitrary.

[177] The leading statement, at a general level, of the term "arbitrary" in s 22 of the BORA is that of Richardson P in *Neilsen v Attorney-General* [2001] 3 NZLR 433:

> Whether an arrest or detention is arbitrary turns on the nature and extent of any departure from the substantive and procedural standards involved. An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures (at 441-442).

[178] In *Manga v Attorney-General* [2002] NZLR 65 at [44], I suggested that "lawful detentions may also be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality" (citations omitted).

[179] Lord Cooke of Thorndon also had occasion, in delivering the advice of the Privy Council in *Fok Lai Ying v Governor-in-Council* [1997] 3 LRC 101 to consider the meaning of the word "arbitrary" in art 14 of the Hong Kong Bill of Rights. This provided that "no-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence …". That provision is identical to art 17 of the International Covenant on Civil and Political Rights (ICCPR).

Lord Cooke referred to *Van Alphen v The Netherlands*, (a decision of the United Nations Human Rights Committee (UNHRC), reported in New Zealand as (1990-1992) 3 NZBORR 326) in these terms:

> The relevance of the case for present purposes is that the Committee said, albeit referring directly to art 9, that arbitrariness is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means, the Committee said, that a remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances (at 112-133).

[180] Article 9(1) of the ICCPR provides that 'No-one shall be subject to arbitrary arrest or detention'. The UNHRC has been firm on the point that the term 'arbitrary' includes not only actions that are unlawful per se but also those that are unjust or unreasonable. In *Van Alphen v The Netherlands*, the UNHRC stated at 5.8:

> The drafting history of art 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime.

[181] In *A v Australia* (Communication No 560/1993, 3 April 1997), the UNHRC stated, at paragraph 9.2:

> [T]he Committee recalls that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.

And at 9.4:

> The Committee observes … that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.

[182] The International Bar Association's Task Force on International Terrorism published a report in 2001 entitled *International Terrorism: Legal Challenges and Responses* (2003), which stated at p69:

> Where non-nationals are detained pending removal, for example on the grounds of national security, it is permissible for them to be detained without trial, subject to immigration procedures and judicial review. However, in the case of some detainees it may not be possible to deport them, either for practical reasons or because it would constitute a violation of international law. In such cases it is incumbent upon states to ensure detainees have access to judicial review of their detention. Nevertheless, even with a right to judicial review, prolonged detention could still constitute a violation of the prohibition on arbitrary detention.

[183] The Asia Pacific Forum of National Human Rights Institutions Advisory Council of Jurists in its *Reference on the Rule of Law in Combating Terrorism* (May 2004) said, at pp37-38:

> Even where a person is charged with an offence, pre-trial detention should be the exception and only resorted to where it is necessary in all of the circumstances of the case, for example to prevent flight or interference with evidence. What is commonly called administrative detention, that is, detention for the purposes of public security or for questioning and intelligence-gathering, is likely to be more difficult to justify, even in the context of an investigation involving terrorism. In exceptional circumstances it may be justifiable for a strictly limited period if absolutely necessary because of the particular circumstances of the individual concerned and taking into account the level of the threat. If a person being questioned or held is not themselves suspected of involvement in any terrorist offence, detention is, in our view, unlikely ever to be justifiable. Detention of non-suspects may also impinge upon other rights such as the right of freedom of association.

[184] It will be observed that there is a fairly close concordance between Lord Cooke's formulation, and that which I suggested in *Manga*. That is to be expected, because the authors of both those statements were looking to the same international instruments and authorities for assistance. And Lord Cooke's insistence that the various propositions could be reduced to an even more straightforward proposition - the detention must be "reasonable in all the circumstances" - is consistent with views advanced by His Lordship elsewhere in our public law.

Arbitrariness in the case?

[185] The tests for "unreasonable delay" are still evolving in our law.

[186] One possibility is the ad hoc balancing approach adopted by the United States Supreme Court in *Barker v Wingo* 407 US 514 (1972). Factors to be weighed include the length of the delay, the reasons for the delay, the accused's assertions of his rights and "position", and prejudice to the accused.

[187] That approach informed some of the early Canadian Charter of Rights cases. However, the now infamous *R v Askov* [1990] 2 SCR 1199 decision of the Canadian Supreme Court led to this subject area being revisited in *R v* Morin [1992] 1 SCR 771. That decision requires a balancing of these factors:

- the length of the delay;
- any waiver of time periods;
- reasons for the delay (including inherent time requirements for the case; the actions of the Crown and the accused); limits on institutional resources; and any other relevant reason);
- prejudice to the accused (which is to be given real weight).

[188] For Canada, see generally, Stuart *Charter Justice in Canadian Criminal Law* 3 ed 2001 at 316-333.

[189] Similar considerations have informed the jurisprudence of this Court to date. See *R v Parkes* (1995) 13 CRNZ 377; *Martin v Tauranga District Court* [1995] 2 NZLR 419; *R v Drew* (1998) 4 HRNZ 614.

[190] The criminal law jurisprudence is of assistance, at least by analogy, although it has to be said, as Mr Harrison rightly pointed out, that Mr Zaoui is not in prison on

pending criminal charges, and hence the law should be even more astute to insist on timeousness in his case.

[191] Another possible line of analysis is to isolate the "interests" which the law ought to support in a case such as the present. One would be the human dimension - to prevent the oppressive incarceration of an individual during the pendency of a legal inquiry; a second would be to see that the integrity of an inquiry should be protected; and a third would be to allay any public concerns as to what the "real" position is regarding the particular kinds of allegations which had been mounted.

[192] Still another line of analysis is both more jurisprudential, and purposive, and would turn on the role of a Bill of Rights in New Zealand. The BORA could be seen as serving three somewhat different purposes.

[193] First, the BORA could be seen as a code, of a kind - a list of quite specific, relatively determinate prohibitions and requirements. As so conceived, a Bill of Rights regulates practices that require that kind of treatment. The BORA is then a kind of corrective law reform instrument. This sort of conception arises most often in criminal cases, and because so many of the BORA cases emanate from that jurisdiction, the deeper aspects of the BORA can be obscured.

[194] A second conception of the BORA would treat it as a way of correcting various deficiencies in representative government. This could be called the "structural" view. The underlying notion is that representative Government cannot always be trusted to do some important things well. Hence, this conception is that the BORA is there to make up for these endemic deficiencies in democratic governance. Habeas corpus is, at one level, a good example of this kind of "corrective". It is just too easy, particularly in troublesome times, to put the troublemaker aside. Indeed, some highly respected legal philosophers have cogently argued that the longest lasting detrimental effect that terrorism may have, is the damage which may well be done to essential democratic institutions and remedies by the governmental measures adopted. (See eg Yale Law Professor Bruce Ackerman's compelling and widely read piece "Don't Panic" in the London Review of Books, 7 February 2002. Professor Richard Rorty of Stanford has also argued powerfully in

a number of his writings that unless great care is taken, the war on terrorism may be won but we may no longer live in a democracy.)

[195] A third conception of the BORA is closest to the popular conception - that it is a charter of fundamental human rights, by which I mean those rights that an individual should have against the state in any society. There are very complex moral and intellectual problems with this conception: it presupposes that moral objectivity is possible; and there is the vexed question of institutional competence to address the questions so thrown up.

[196] What is important, for present purposes, is that whichever of these conceptions is held, in the case of "arbitrary detention" there are very powerful moral, intellectual, and instrumental reasons for giving the fullest force and effect to the BORA, and there is no real room for question that the courts have, in this area at least, the institutional competence to "draw the line" for arbitrariness. This sort of exercise is the sort of thing courts have to do, all the time, and for which they are well equipped.

[197] In my view, in Mr Zaoui's case, the New Zealand statutory system and associated processes, as a "system", have miscarried. This has given rise to what has sometimes been termed, "systemic" delay. It is not a matter of breaking out each element in the chain of events, and ascribing "fault" as it were to each "failure", if indeed there was one. What has to be looked to is the cumulative effect, or impact, of delay in relation to the fundamental right which is protected.

[198] I start, of course, with a proper recognition that there is a "security" element in the case. But the notion of national "security" is not a mantra, or a security blanket for the state, to be thrown lightly over an object. That "object" is a human being, and the blanket can become oppressive and debilitating and disproportionate.

[199] To contend, in this day and age, that a person (not on a criminal charge) can be incarcerated for something like two years, with common (and not so common) criminals, whilst the state decides what to do with him, beggars description. What has happened here is that the relevant processes, taken as a whole, have not dealt

timeously with Mr Zaoui. His incarceration has become oppressive, and quite disproportionate to the things which are said against him.

[200] Neither am I sanguine that all will settle comfortably into place in the foreseeable future. Mr Harrison was optimistic that the Inspector-General's review might be concluded by the end of this year. Would that it might be so. However, there is still an outstanding judgment of this Court; there are possible appeal rights to the Supreme Court arising thereout; we were told from the Bar that the review hearing alone (when it is eventually held) might take two weeks of hearing time, with a large number of witnesses to be brought from overseas, and it would be naïve to think that there may not be distinctly contentious issues of a public law character in relation to that review which will give rise to further proceedings.

[201] There is authority for the proposition that, in cases such as the present, prolonged periods of detention are justified by the need to conduct a careful investigation of what are usually complex and competing claims. This was the finding of a majority of the European Court of Human Rights in *Chahal and others v United Kingdom* (1996) 1 BHRC 405. However, as has already been noted, the delays experienced in this case are a result of a systemic failure of the relevant New Zealand system to provide what was intended to be a speedy resolution to cases such as that of Mr Zaoui. It was never the intention of Parliament that the Part 4A process would take as long as it has in the present case. Consequently, I consider that it is not appropriate to allow what is, in effect, a margin of appreciation to the Executive in this case.

[202] Further, there is nothing to suggest that releasing Mr Zaoui on bail would frustrate the aim of conducting such a complex investigation. This point was made in the opinion of Judge De Meyer in *Chahal* (in which Judge Golcuklu joined on this point) which noted that, while the need to conduct complex investigations "may be enough to explain the length of the deportation proceedings", it could not be used to "justify the length of the detention, any more than the complexity of criminal proceedings is enough to justify the length of pre-trial detention".

Relief

Habeas corpus bail

[203] A starting point for a principled consideration of bail would be the approach I had occasion to suggest in *Gillbanks v Police* [1994] 3 NZLR 61, a case which was subsequently acknowledged as a foundation for the legislation by the Justice and Law Reform Select Committee in its 1999 report on the Bail Bill (No 300-2, piii).

[204] That approach recognises that the onus is on the detaining authority to demonstrate just cause for a continued detention. That onus may be discharged, in general terms, by showing that the detained person may abscond pending the determination of this cause; may commit other offences whilst on bail; or may in some manner interfere in the course of justice.

[205] The first and third elements can be disposed of at once. Mr Zaoui wants to be in New Zealand and is in more peril outside New Zealand, than in it. He is not going anywhere else. And the evidence relating to his alleged activities all comes from outside New Zealand. It is therefore difficult to see how concerns could arise under the third head.

[206] The second head goes to the heart of what the Crown concern seems to be in this case. What Williams J required the Director of Security to provide, if I read it correctly, was a summary of the allegations that are made against Mr Zaoui - by which I mean the essential nature of those allegations - and such detail as the Director felt able to provide without compromising security operations.

[207] My reading of that exchange (much was said about it in the documentation and correspondence; and again by counsel before us) is that the Director has to be taken as having provided the essential nature of the allegations, but not necessarily all the detail to support them.

[208] Mr Zaoui is not alleged to be a terrorist. What is alleged is what, in broad terms, can be characterised as "criminal associations" in Belgium and elsewhere. Then it is said that New Zealand's international wellbeing would be affected if this country were seen to allow a person with Mr Zaoui's public record "to settle here" thereby impacting on New Zealand's "international wellbeing".

[209] It will be observed at once therefore that the first limb of the proposition depends on factual matters - what Mr Zaoui actually did elsewhere. Then there is the question whether, if that proposition is well founded, New Zealand has to be "seen to be doing something about it".

[210] If there had not been any further investigation of Mr Zaoui's background I incline to the view that full faith and credit would have to be given, at face value, to what is said in the Certificate. But in this instance, there has been an in-depth quasi-judicial investigation into Mr Zaoui's background which, in a general way, supports his proposition: that he has been "blackened", as it were, for self-serving reasons by the murky forces of Algerian and European politics, and that he is indeed a genuine "refugee".

[211] Further, on all the material that is in front of us at this point of time, it is difficult to accept the assertion - if such it is - that Mr Zaoui amounts to a present threat to somebody or something, in New Zealand.

[212] The great worry in a case like the present for a reviewing court is whether there is something which is not known and which cannot be made known, publicly, because of its implications for security operations or which is otherwise "classified security information". However, as I have already indicated, if there is something of this character then this Court is perfectly entitled to infer that it must be of the character of the allegations already put before this Court, for otherwise the Director would not be in compliance with the direction of the High Court. Good faith on the Director's part should be assumed.

[213] Taking all these considerations into account, along with the projected course which events are likely to follow in Mr Zaoui's case, in my view this is an appropriate case for bail.

Bail: to where, and on what terms?

[214] As to arrangements for bail, two alternatives are put forward.

[215] One possibility is for bail to the Mangere Refugee Resettlement Centre (Mangere Centre); the other suggestion has been to bail Mr Zaoui into the care of an order of the Catholic Church.

[216] We have before us the details of the Mangere Centre and its operations. The central problem, or so it appears to me, with this Centre is not that Mr Zaoui's situation could not be managed; rather, those responsible for the administration of that Centre are more concerned (in human terms) that other refugees (in many cases quite traumatised persons) would have some difficulty if Mr Zaoui were to be amongst them. In short, that there would be problems of human interaction.

[217] The position of the Catholic Church appears by the affidavits of Bishop Leamy and Father Murnane to be follows. The Catholic Church in Auckland has consented to offer Mr Zaoui a place to live with the Dominican Friars at St Benedicts' Priory in Newton in central Auckland. That community consists of six Dominican priests and the local parish priest. The accommodation is a four floor building adjacent to the Church of St Benedicts. The Dominican Order is an international one with links to Europe.

[218] The affidavits of those two persons are supported by an affidavit from Margaret Bedggood, the Chief Human Rights Commissioner of the New Zealand Human Rights Commission from 1989 to 1994. Ms Bedggood is a former Dean of Law and Professor of Law in the University of Waikato. She is also a member of the Refugee Council of New Zealand. Throughout this protracted matter, she has, admirably, endeavoured to support Mr Zaoui's personal wellbeing and his interaction, to the extent that she has been able to do so, with the Church.

[219] I would bail Mr Zaoui to the Order, at the Auckland address I have mentioned, and on the usual terms and conditions of bail: viz, that he report twice weekly to the Auckland Police at a nominated police station in his locality; that he not reside outside the Order without procuring a variation of bail; and that he be present at that address between the hours of 6.00pm to 9.00am.

Alternative relief

[220] The view I have arrived at makes it unnecessary for me to consider two alternative forms of relief - resort to the inherent jurisdiction of the Court to allow bail; or to the *Baigent* ([1994] 3 NZLR 667) remedial jurisdiction.

Conclusion

[221] In the result I would allow the appeal; I would make a declaration that Mr Zaoui's continued detention in prison is arbitrary and in contravention of his rights under s 22 of the New Zealand Bill of Rights Act 1990; and I would allow the application for habeas corpus to the extent that I would grant bail on the terms I have indicated, generally, in this judgment.

O'REGAN J

[222] I am in general agreement with the judgment of McGrath J, which I have considered in draft. I agree that the appeal should be dismissed and the cross-appeal should be allowed. In the light of the urgency which has been accorded to the preparation of the Court's judgments, I will confine my remarks to a few additional concurring comments and a more general discussion of the High Court's bail jurisdiction, on which my views differ from those of McGrath J.

Place of detention

[223] I agree that the warrant of commitment is valid in this case. I am in no doubt that s114O of the Immigration Act permits detention at premises other than a penal institution. That was conceded in this Court by Crown counsel, Ms Gwyn, but was contested by the Crown in the High Court.

[224] I agree that s114O does not require the Executive to prescribe a form of warrant for the purposes of s114O which authorises detention in a variety of institutions – Parliament has left the range of premises in which detention can occur to the Executive, although it has to be said that s114O appears to be incompletely drafted. If the form of warrant for the purposes of s114O allowed for detention at different types of premises, s114O does not explicitly provide who would determine which premises are appropriate for a particular detainee. That contrasts with other provisions, such as ss62(2) and 128(7) which empower the Judge or Registrar who determines that a warrant should issue also to determine in what premises the subject of the warrant should be detained. In my view, the same approach would have to be taken under s114O, and the decision made by the District Court Judge who issues the warrant.

[225] As stated, the position taken by the Crown in the High Court was that s114O required detention in a penal institution. If that position reflects the basis for Executive's decision to prescribe a warrant of commitment that permits only detention in a penal institution, that would indicate that there has been no informed determination by the Executive to choose only one option (penal institution) from the variety of possible premises for detention permitted by s114O. It is open to the Executive to consider those options now, given that the scope of s114O has now been clearly established by the decision of Paterson J, which we have upheld.

[226] A consideration of those options would, of course, be at a general level, rather than focussed only on Mr Zaoui's position. Nevertheless, the human dimension, highlighted in the other judgments of the Court cannot be ignored. Under the statutory scheme, the Executive is well placed to undertake that

consideration because, unlike the High Court and this Court, the Executive has the ability to gain access to the classified security information which is said to inform the Director of Security's security risk certificate. That means the Executive is better placed than the Courts to assess the extent to which the risks which the Director identifies in the security risk certificate require detention of Mr Zaoui in a penal institution and to assess whether detention in less restrictive surroundings could adequately address those risks.

[227] Such consideration could also take account of the fact that the process of review of the security risk certificate, which s114I(3) envisages will be conducted "with all reasonable speed and diligence", has taken much longer than was obviously envisaged by Parliament in Mr Zaoui's case, and still has a long way to go. While detention in a penal institution during the "speedy" process envisaged by s114I may be appropriate, as Paterson J found, it does not follow that prolonged detention in such surroundings will be, especially where there are grounds for concern about its impact on the mental health of the detainee.

[228] I therefore add my voice to that of McGrath J in highlighting the potential for Executive action to broaden the scope of detention options, consistently with Parliament's intention as reflected in the wording of s114O, to allow for detention in premises other than a penal institution. That in turn would mean that an alternative, less restrictive, form of detention would become an available option in Mr Zaoui's case.

Bail

[229] I now turn to the issue of bail. In his judgment, McGrath J concludes that the High Court is unable to grant Mr Zaoui bail under its inherent jurisdiction. He says that it would be contrary to the legislative scheme for the High Court to enter into an inquiry about the appropriateness of a grant of bail. In effect, McGrath J is saying that the High Court's inherent jurisdiction is ousted in Part 4A matters, or, at least, that it would never be able to be invoked in Part 4A matters. I disagree with those propositions.

[230] Mr Zaoui applied to the High Court for bail. His counsel submitted to the High Court that the Court had an inherent jurisdiction to grant bail, which it could exercise in the circumstances of his case. He submitted that, on the merits, bail was justified because the security risk certificate did not disclose any reasonable cause for his continued detention in a penal institution, and the Crown had not advanced any other reason which supported his continued detention.

[231] Paterson J found that the Court did not have inherent jurisdiction to grant bail in Mr Zaoui's case for two reasons, namely:

(a) An inherent jurisdiction to grant bail was not in harmony with s114O;

(b) The inherent jurisdiction to grant bail applied only to matters before the Court, and there was no proceeding before the Court in respect of which bail could be given as ancillary relief.

Does the High Court have inherent jurisdiction to grant bail?

[232] The starting point for the analysis is the decision of the Full Court of the High Court in *R v Lee* [2001] 3 NZLR 885. That case confirmed that the codification of the law relating to bail in the Bail Act 2000 did not oust the inherent jurisdiction of the High Court in bail matters. In that case, the Court found that jurisdiction to deal with the particular situation before it existed under the Bail Act itself, but the Judges noted, at [15], that, even if that were not the case, there would be jurisdiction as part of the High Court's inherent jurisdiction. The reason given for that conclusion was that the power to grant bail in respect of matters before the High Court falls within the general principle that the Court may invoke its inherent jurisdiction whenever the justice of the case so demands, even in respect of matters which are regulated by statute, provided that the exercise is "in harmony with the relevant legislation".

[233] The full Court's decision in *Lee* was approved by this Court in *R v Payne (Burrett's case)* [2003] 3 NZLR 638.

[234] Crown counsel accepted that there was some authority for the existence of an inherent power of the High Court to grant bail. However, she suggested that it was restricted following the passing of the Bail Act, properly exercised only within the criminal sphere, and required a substantive proceeding to which the application for bail could attach.

[235] While the High Court's jurisdiction to grant bail has usually been invoked in criminal matters, I do not believe that there is any basis for the assertion that the inherent jurisdiction is limited to such matters. As the Court said in *Lee* at [15], the Court may invoke its inherent jurisdiction "whenever the justice of the case so demands". It is obvious that the bail jurisdiction is normally relevant to criminal matters, because most detentions made by the State are made in the context of criminal proceedings. But where other statutes provide for detention, as the Immigration Act does, the need to invoke the inherent jurisdiction to grant bail may equally arise.

[236] A number of United Kingdom authorities support the proposition that there is a jurisdiction to grant bail in immigration matters: *R v Secretary of State for the Home Department, ex parte Swati* [1986] 1 All ER 717, *R v Secretary of State for the Home Department, ex parte Turkoglu* [1988] 1 QB 298, and *R v Secretary of State for the Home Department, ex parte Sezec* [2001] EWCA Civ 795.

[237] In the New Zealand context, counsel for Mr Zaoui, Mr Harrison QC also relied on the decision of Baragwanath J in *Poon v Commissioner of Police* [2000] NZAR 70. In that case, it was found that a fugitive held for the purposes of extradition proceedings could be released on bail. However, that decision was based, at least in part, on the Judge's finding that the fugitive was entitled to the benefit of s24(b) of the New Zealand Bill of Rights Act, which entitles a person charged with an offence to be released on reasonable terms and conditions unless there is just cause for continued detention. That conclusion was based on the fact that the fugitive was charged with an offence in Hong Kong (in respect of which extradition was sought) and no similar circumstance arises in this case. In my view, s24(b) does not apply to Mr Zaoui in this case, which means that this case is distinguishable from *Poon*.

[238] I note also that there is conflicting High Court authority. In Both *Schlaks v Superintendent of Mount Eden Prison* HC AK M1039/98, 18 December 1998 and *Callahan v Superintendent of Mount Eden Prison and United States of America* HC AK M648/91, 22 July 1991, it was found that a fugitive held for the purposes of extradition is not a person "charged with an offence" for the purposes of s25 (or, by analogy, s24) of the New Zealand Bill of Rights Act.

[239] In my view, there is no basis for reading down the inherent jurisdiction of the High Court in relation to bail to criminal matters only. Given that the Bail Act now deals with almost all issues relating to bail in criminal matters, such a conclusion would mean that the Bail Act has, in effect, supplanted the inherent jurisdiction. There is nothing in the Bail Act itself to indicate that that was its intention or effect, and such a conclusion would be inconsistent with a decision of the full Court in *Lee*, which has been approved by this Court in *Payne*.

[240] That means that it is now necessary to consider whether the inherent jurisdiction applies in the present context. That in turn requires consideration of two issues, namely:

> (a) Whether the inherent jurisdiction can be exercised only as an ancillary matter to a proceeding already before the Court;
>
> (b) Whether the Immigration Act either expressly or by necessary implication deprives the Court of its inherent jurisdiction (to use the words of Lord Russell of Killowen CJ in *R v Stilsbury* [1898] 2 QB 615 at 620).

[241] I will consider these issues in turn.

Ancillary proceeding

[242] The Crown's submission that the High Court's inherent bail jurisdiction requires a substantive proceeding to which the application for bail can attach was based on the decision of the English Court of Appeal in *Turkoglu.* Paterson J found that decision persuasive, and concluded that bail was an ancillary form of relief. He

drew support for that conclusion from the decision of the full Court in *Lee*, which referred to a power to grant bail "in respect of matters before the High Court". He concluded that, as there was no proceeding in the High Court in respect of which bail could be given as ancillary relief, bail was not available in the present case.

[243] The *Turkoglu* case also concerned an immigration matter. In that case the United Kingdom government accepted that bail was available and, indeed, the Home Secretary wanted bail to be granted so that sureties could be required (the alternative was that the applicant could be granted temporary admission to Britain which meant he or she was able to move about freely, subject to an obligation to surrender to immigration authorities in certain circumstances).

[244] Sir John Donaldson MR accepted that bail was available in those circumstances but said (at 400):

> …in my judgment 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.

[245] He did not provide any authority for that proposition and, in my view, there is no legal principle which inevitably leads the Court to the conclusion that bail is not a remedy available to a detained person whether it is sought as an ancillary remedy to other proceedings or not. Given the importance of bail as a remedy, I cannot see any reason to impose this limitation on the High Court's jurisdiction.

[246] I do not think *Lee* supports this limitation of jurisdiction. The Court in *Lee* was dealing with a situation where the statute provided for the District Court to have jurisdiction, with the High Court having an appeal jurisdiction. The limiting of the scope of the inherent jurisdiction to matters before the High Court is attributable to that particular situation. And it is clear from *Lee* that, before the Bail Act, the High Court routinely considered and dealt with bail applications, under its inherent jurisdiction, even when the applicant's criminal proceeding was being dealt with in the District Court, and there was no High Court proceeding to which the bail application was ancillary. That situation has some similarity to the present case, in

that the power to detain has been exercised by a District Court Judge, and the bail application is made to the High Court.

Does the Immigration Act exclude bail?

[247] I now turn to the question as to whether the applicable legislation in this case either expressly or by necessary implication deprives the Court of the inherent jurisdiction: *R v Stilsbury* at 620. In *R v Stilsbury*, Lord Russell determined that the Court's inherent power to admit to bail was a historical power that had long been exercised by the High Court, but noted that it was a power which ought to be exercised "with extreme care and caution". I look first at the Immigration Act as a whole, then at Part 4A specifically.

[248] The decision of Baragwanath J in *Poon* can be seen as consistent with *Stilsbury*. However, as already discussed, the *Poon* decision was also influenced by Baragwanath J's finding that a fugitive held under New Zealand's extradition legislation was entitled to the protection of s24(b) of the New Zealand Bill of Rights Act.

[249] The starting point is that there is no specific provision in the Immigration Act which says that the Court's power to grant bail is excluded by the Act on a general basis. That can be contrasted with the Migration Act 1958 (Cth) of Australia. Section 189 of that Act requires an immigration officer to detain a suspected unlawful non-citizen in Australia, and s196(1) says this detention must continue until the detainee is removed, deported or granted a visa. Section 196(3) says:

> To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

[250] There is no equivalent provision in Part 4A.

[251] The English Court of Appeal has determined that the Court has an inherent power to grant bail in situations of detention under similar immigration legislation. *Turkoglu* is an example of this, as are *Swati* (at 724) and *Sezec* (at [5], [16]). I can

see no reason to take a different approach in New Zealand, given that the High Court's inherent jurisdiction in relation to the bail is one which it inherited from the English High Court.

[252] That conclusion is also supported by the fact that there are two provisions in the Immigration Act, s128B(12) and s128(15) which explicitly provide that a person detained under s128B and s128 respectively "must not be granted bail". In both cases, the reason for the prohibition appears to be that a statutory form of release from detention subject to conditions is provided for. Thus, the prohibition on granting bail is not indicative of an intention to prevent any kind of regime for release from detention, but rather to require that only the statutory regime for release may be utilised. One could ask why the legislature would feel it necessary to provide that bail was not available under ss128 and 128B if, in fact, the High Court's inherent jurisdiction to grant bail would not otherwise apply. The explicit prohibition on granting bail in those provisions therefore supports the contention made on behalf of Mr Zaoui that the Court's inherent jurisdiction to grant bail does apply in relation to the Immigration Act, unless ousted by a particular provision in the Act.

[253] I therefore conclude that there is nothing in the scheme of the Immigration Act itself which expressly or impliedly overrides the Court's inherent power to grant bail, except in the narrow circumstances provided for in s128B(12) and s128(15).

[254] I now turn to Part 4A itself. Part 4A envisages that a person who is the subject of a security risk certificate will be detained throughout the process of review of the security risk certificate by the Inspector-General. It is also clear that Parliament envisages that this period of detention would not be lengthy, because the process will be undertaken "with all reasonable speed and diligence": s114I(3).

[255] Ms Gwyn said that this regime of continued detention was sufficient to impliedly override the Court's inherent power to grant bail. She placed particular reliance on s114O(2), which makes it clear that detention is authorised until execution of a removal order or deportation order, a successful outcome of the review by the Inspector-General or an order of the High Court or a Judge of the High

Court on an application for a writ of Habeas Corpus. She said that this made it clear that there was no further alternative, namely release on bail, and that this can be said to impliedly override the inherent power to grant bail.

[256] However, s114O is not quite as absolute as that.

[257] Section 114O(3) deals with notification to the superintendent of the prison, or the person in charge of any other premises in which the detainee is held, that the detainee is to be released. This provision is said to apply if the detainee "is successful in a review by the Inspector-General under s114I, or if for any other reason the person is to be released". Mr Harrison said that the words "for any other reason" was more general than the specific wording in s114O(2). He said if it were contemplated that release was possible only in the specific circumstances set out in s114O(2), it is likely that the legislature would have specifically referred to the circumstances outlined in s114O(2), rather than using the general terminology "for any other reason". I would not read too much into this choice of words, because "other reason" could be limited to another reason for release under the provisions of Part 4A. But I accept the general wording used is at least consistent with Mr Harrison's argument.

[258] Mr Harrison also argued that the wording of s114O simply provides that the warrant of commitment authorises detention, but does not say specifically that detention until completion of the Inspector-General's review is mandatory. He compared this to other provisions of the Act where more mandatory language is used, such as s62(2), which says that a person who is to be detained in custody under a warrant of commitment made under s60 "is to be detained" and ss80(2) and 102(2), which use the wording "shall be held in a penal institution". He also pointed out that s128B, to which reference has already been made, provides in similar terms that a warrant of commitment under that section authorises the superintendent of the penal institution or person in charge of the other premises to detain the person until certain future events. However, unlike s114O, s128B contains a specific prohibition on the granting of bail (albeit in circumstances where a provision for release which has some similarity to bail is applicable).

[259] Again, I do not see those drafting differences as determinative. But I accept that they provide limited support for the argument that, notwithstanding the fact that a regime of continued detention is contemplated by Part 4A, the Court's inherent power to grant bail is not specifically overridden, and it is not a necessary implication that it is overridden.

[260] However, Ms Gwyn said that an inherent power to grant bail was inconsistent with the overall scheme of Part 4A, particularly the national security considerations which arise. She pointed out that the regime of Part 4A is to provide for review of the security risk certificate not by a Court, but by the Inspector-General. She said that there was no basis on which the Court could have access to the classified information which was the basis for the security risk certificate (unlike the Inspector-General) and that the Court would therefore not be in a position to exercise the normal bail jurisdiction.

[261] I accept Ms Gwyn's submission that these factors may make it difficult for the High Court to exercise its bail jurisdiction. They would be strong indicators against the granting of bail in circumstances where the Crown opposed the grant of bail on the basis of security risks which could not be disclosed to the Court because such disclosure would involve disclosure of classified information. She said that where the Director of Security determines that a person is a threat to New Zealand's national security, and that there are reasonable grounds for regarding him as a danger to the security of New Zealand, a Court could not go behind the security risk certificate to form a view, in the absence of the classified security information on which the Director of Security relied, as to the suitability of the person to be released on bail.

[262] The Crown's concerns about the granting of bail in circumstances where national security considerations arise must be read in the light of other provisions of the Immigration Act which contemplate that persons who are deemed to be threats to national security are able to be released.

[263] If, at the end of the process mandated by Part 4A, a security risk certificate is confirmed by the Inspector-General and the Minister relies on it, then moves may be

made to deport the person who is the subject of the certificate under Part 3. A person who is subject to deportation under Part 3 may be arrested and brought before a District Court Judge under s79(2). The District Court Judge may either issue a warrant of commitment for that person or, under s79(2)(b)(ii), order that the person be released on conditions if satisfied that the release of the person would not be contrary to the public interest. The conditions which may be imposed are conditions which are typically imposed in bail cases (s79(4)).

[264] Where the person who is subject to the security risk certificate has been found to have refugee status (as Mr Zaoui has), that person may be entitled to protection from removal or deportation under s129X – this will depend on the nature of the security risk and whether either of Article 32.1 or Article 33.2 of the Refugee Convention applies. Ms Gwyn accepted that a person subject to the protection of s129X is entitled to be released. Mr Harrison said this also indicated that the fact that a person is a risk to national security will not necessarily make it inappropriate that that person be released from detention, particularly, where appropriate conditions can be imposed as would be the case where bail was granted.

[265] I agree with Ms Gwyn that, in cases where the Part 4A process proceeds in a quick and effective way as Parliament intended, it is highly unlikely that the issue of bail will arise, or that it would be appropriate to grant bail. But, in my view, that is a different thing from a determination that the Court's jurisdiction in relation to bail is ousted for all cases coming within Part 4A. Rather, it is a reflection that the inherent jurisdiction to grant bail will be exercised only in exceptional cases, as Sir John Donaldson MR said in *Swati* at 724 and which he repeated in *Turkoglu* at 399.

[266] Ms Gwyn said the existence of an inherent jurisdiction in relation to Part 4A was not in harmony with the legislation, relying on *Lee*. But *Lee* refers to the exercise (i.e. the invoking of the jurisdiction) being in harmony with the legislation. I believe that the real issue in the present case is not whether there is jurisdiction to grant bail, but whether the invoking of that jurisdiction is appropriate, given the statutory setting where issues of national security arise, and continued detention appears to be the intended norm.

[267] I concur with McGrath J that there has not, to date, been any breach of s22, s23(5) or s9 of the New Zealand Bill of Rights Act 1990. As I have already said, s24(b) does not apply to Mr Zaoui, because s24 applies only to persons who have been charged with an offence. Mr Harrison argued that s24(b) applied by analogy to Mr Zaoui. He said that the terms of the security certificate, as amplified in the summary prepared by the director of security pursuant to the order made by Williams J in the High Court, did not disclose a reasonable basis for detention.

[268] In my view that proposition, even if it were correct, would not be sufficient to bring this case within the exceptional category described in *Turkoglu*. The legislation anticipates detention in one form or another during the period that the security risk certificate is subject to review. The fact that a court formed the view, in advance of the decision of the reviewer (the Inspector-General) and in the absence of classified security information, that release of the detainee would not be a danger to the public, would not, in itself, suffice to justify a grant of bail. In my view the circumstances of this case are not such that it is appropriate to invoke the Court's inherent jurisdication to grant bail.

[269] However, I would expressly leave open a possibility that a grant of bail could be an available remedy if the review process is not able to be brought to a reasonably swift conclusion. Whether bail would be justified would depend on the extent of the delay, the causes of the delay, the conditions under which Mr Zaoui is detained and their impact on his health and wellbeing, the extent of the available information about the security risk certificate, the risks it discloses and the extent to which such risks could be properly averted through conditions of bail.

[270] The unavailability to the Court of the classified security information would, of course, be a factor which would lead to a cautious approach being taken. But I do not believe that it would be an impenetrable barrier. There is already in the public domain the summary of the security risk certificate, and it is possible that further information will become available. There is also the very full discussion of the conduct of Mr Zaoui in other jurisdictions before his arrival in New Zealand, which provides some context to the security risk certificate. The Court may also have regard to the fact that the security risk certificate is concerned primarily with the

risks to security arising from Mr Zaoui being permitted to reside in New Zealand, rather than being addressed to the risks of his being held in a less restrictive environment during the period of the review process.

[271] For these reasons I would leave open the possibility of a grant of bail by the High Court in its inherent jurisdiction if the circumstances of the case warrant it.

[272] It may be that a situation justifying the invoking of the inherent jurisdiction to grant bail as I have outlined it above would equally justify the granting of habeas corpus bail as described in the judgment of Hammond J. I have not focussed my attention on that possibility and express no view on it.

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