IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA143/2023
[2023] NZCA 217

BETWEEN	KINGI DUVAL MAAKA-WANAHI Appellant
AND	ATTORNEY-GENERAL First Respondent
	TE WHATU ORA | HEALTH NEW ZEALAND – WAIKATO Second Respondent

Hearing:	25 May 2023
Court:	French, Goddard and Ellis JJ
Counsel:	M S Smith and D T Haradasa for Appellant K Laurenson and I M C A McGlone for First Respondent P N White for Second Respondent L A Anderson KC for Criminal Bar Association
Judgment:	13 June 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order as to costs.

REASONS OF THE COURT

(Given by Goddard J)

Introduction

[1] Trial courts are often called on to determine issues relating to the mental health of a defendant, including whether the defendant is unfit to stand trial, whether the defendant is insane for the purposes of s 23 of the Crimes Act 1961, or the type and length of sentence that may be imposed on that defendant. In order to ensure that the court is in a position to make an informed decision about these matters, s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the Act) provides that a court may order that a health assessor prepare an assessment report (a s 38 report).[1]

[2] The timely provision of s 38 reports is necessary to ensure that people with mental health issues are treated appropriately in the criminal justice system. There has been an increase in awareness of the implications of mental health for defendants in the criminal justice system. As a result, the number of s 38 reports ordered by the courts has increased. But there is a shortage of psychiatrists and psychologists available to prepare s 38 reports. The result has been growing delays in the provision of s 38 reports.

[3] Significant concerns have been expressed about those delays. That has led to an increased focus on who is responsible for the preparation of s 38 reports, and on how those reports are funded. In particular, there has been some uncertainty about the obligations of Te Whatu Ora | Health New Zealand (and its predecessor District Health Boards) where a court makes a s 38 order which (as is often the case) is not addressed to a named health assessor.

[4] In order to resolve some of these uncertainties Te Whatu Ora | Health New Zealand – Waikato (HNZ Waikato) brought proceedings in the High Court seeking declarations to clarify its obligations under the Act where a court makes a s 38 order.

[5] Mr Maaka-Wanahi also brought proceedings in the High Court seeking clarification about the operation of s 38. These issues are of direct concern to him as a defendant in criminal proceedings in respect of whom s 38 orders were made.

---

[1] Section 4 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 provides that a health assessor may be a practising psychiatrist, a psychologist, or a specialist assessor under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

[6] One of the issues raised before the High Court concerned the timeframe within which a s 38 report must be completed. Mr Maaka-Wanahi argued that s 38 requires reports to be completed within 14 days (or up to 30 days, if an extension is granted under s 40 of the Act). McQueen J did not accept that argument. She held that the time limits referred to in ss 38(2) and 40 relate to the period for which a person may be detained for the purpose of assessment. Those provisions do not set a time limit for preparing the s 38 report and sending it to the court.[2]

[7] Mr Maaka-Wanahi appeals from that finding.

[8] We consider that the Judge's finding on this point was clearly correct. As she said, s 38 is not drafted clearly or simply.[3] But it is in our view very clear that the time limits referred to in s 38(2) relate to the period for which a person is detained for the purposes of a s 38 assessment. Section 38 does not prescribe timeframes within which a s 38 report must be prepared. The provision cannot reasonably be read in any other way.

[9] We do not accept the submission made by Mr Maaka-Wanahi that reading s 38 as prescribing a time limit for preparation of s 38 reports would better protect the rights of defendants awaiting trial. There is no reason to think that the overall timeframe for preparation of s 38 reports would be reduced by reading s 38 in this way, as we explain below. It is equally plausible that imposing time limits on the preparation of s 38 reports would reduce the number of health assessors willing to provide such reports, exacerbating the current shortage of report providers and associated delays. There is no evidence before the Court that would enable us to say with any confidence that Mr Maaka-Wanahi's preferred reading of s 38 would improve the timely provision of s 38 reports. There is also a real prospect of an adverse impact on the quality of s 38 reports, if the time for making relevant inquiries and preparing the reports was curtailed in this way. The interpretive presumption in s 6 of the New Zealand Bill of Rights Act 1990 (NZBORA) is not engaged here, as there is no reason to think that the rights affirmed by NZBORA would be better protected by the reading contended for by Mr Maaka-Wanahi.

---

2 *Maaka-Wanahi v Attorney-General* [2023] NZHC 187 [High Court judgment] at [76].
3 At [79].

[10] The appeal must therefore be dismissed.

[11] Our reasons are set out in more detail below.

Relevant provisions

[12] The purpose of the Act is set out in s 3:

> **3 Purpose**
>
> The purpose of this Act is to restate the law formerly set out in Part 7 of the Criminal Justice Act 1985 and to make a number of changes to that law, including changes to—
>
> (a) provide the courts with appropriate options for the detention, assessment, and care of defendants and offenders with an intellectual disability:
>
> (b) provide that a defendant found unfit to stand trial for an offence must be the subject of an inquiry to determine whether the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence:
>
> (c) provide for a number of related matters.

[13] This appeal is concerned with the interpretation of s 38 of the Act:

> **38 Power of court to require assessment report**
>
> (1) When a person is in custody at any stage of a proceeding against the person, whether before or during the hearing or trial, or while awaiting sentence or the determination of an appeal, a court may, on the application of the prosecution or the defence or on its own initiative, order that a health assessor prepare an assessment report on the person for the purpose of assisting the court to determine 1 or more of the following matters:
>
> (a) whether the person is unfit to stand trial:
>
> (b) whether the person is insane within the meaning of section 23 of the Crimes Act 1961:
>
> (c) the type and length of sentence that might be imposed on the person:
>
> (d) the nature of a requirement that the court may impose on the person as part of, or as a condition of, a sentence or order.

(2) If a court orders that an assessment report on a person be prepared under subsection (1), the court may—

(a) make it a condition of a grant of bail that the person go to a place approved by the court for the purpose of the assessment; or

(b) order that the person be detained in a prison for the purpose of the assessment for any period not exceeding 14 days as the court thinks fit; or

(c) order that the person be detained in a hospital or secure facility for the purpose of the assessment for any period not exceeding 14 days as the court thinks fit, if—

(i) a remand to a prison for that purpose would be inappropriate for any reason; and

(ii) a health assessor has expressed the opinion, in a certificate or in evidence, that it would be desirable if an assessment, or a further assessment, take place in a hospital or in a secure facility.

(3) No order may be made under subsection (2)(b) or (c) in respect of a person if—

(a) the person is bailable as of right; or

(b) the person would have been released on bail but for the need for an assessment report.

(4) If the court makes an order under subsection (2)(c) for a person's detention and assessment in a hospital or secure facility, it must record the reasons why it would have been inappropriate to order the detention of the person in a prison for that assessment.

(5) Subsection (1)—

(a) has effect despite other enactments; but

(b) is subject, in the case of a defendant who is under 20 years, to sections 171 to 175 of the Criminal Procedure Act 2011 and to section 15 of the Bail Act 2000.

[14] In *Togia v Police* this Court held that the reference in s 38(1) to persons in custody includes persons on bail who appear in court as a condition of bail, as persons present in court answering bail are in the custody of the court.[4]

[4] *Togia v Police* [2012] NZCA 544, [2013] 2 NZLR 478 at [27].

[15] Section 39(2) provides that unless the court directs otherwise, every order under s 38(1) is deemed to include a direction that, in preparing the assessment report, the health assessor must consult, wherever practicable, with certain persons about the subject's condition and background: caregivers, welfare guardians, parents and guardians of subjects who are children or young persons, and the subject's family or whānau.

[16] Section 40 provides for the extension of periods of detention under s 38(2)(b) or (c) in certain circumstances:

> **40 Period of detention may be extended**
>
> (1) The period for which a person may be detained under an order made under section 38(2)(b) or (c) may, from time to time, be extended with the consent of the person or the person's guardian, but the total period of detention under the order may not exceed 30 days.
>
> (2) It is not necessary for a person subject to detention to be present when the period of detention is extended under subsection (1), as long as the person is represented by counsel.

[17] Section 38(2)(b) and (c) refer to detention for a period not exceeding 14 days. Section 40 provides for that period to be extended up to a maximum of 30 days with the consent of the person (or the person's guardian). The central issue before us is whether these provisions can be read as requiring, expressly or by implication, that a s 38 report be prepared within 14 days (or any extended period under s 40).

High Court judgment

Parties before the High Court

[18] As already mentioned, there were two proceedings before the High Court seeking declarations in relation to the operation of s 38: one brought by HNZ Waikato, and one by Mr Maaka-Wanahi. The parties to the two proceedings, which were heard together, were the applicants Mr Maaka-Wanahi and HNZ Waikato;[5] the Attorney-General, who was named as a respondent in both proceedings; and the New Zealand Law Society, the New Zealand Bar Association and the New Zealand Criminal Bar Association, who participated in the hearing as intervenors.

---

5 HNZ Waikato was also a respondent to Mr Maaka-Wanahi's application.

Time limits for s 38 reports

[19] The Judge began her analysis by considering Mr Maaka-Wanahi's application for a declaration in relation to time limits for preparing s 38 reports.

[20] The Judge noted that s 38(1) empowers a court to order an assessment report for one or more of the specified purposes. There is no reference in this subsection to a timeframe for provision of the report.[6]

[21] Section 38(2) goes on to provide for a court to make further orders when a report is ordered pursuant to s 38(1). Section 38(2)(a) allows a court to make it a condition of bail that the defendant go to a place approved by the court for the purpose of the assessment. No timeframe for the provision of a report is mentioned. Section 38(2)(b) and (c) contemplate the defendant's detention for up to 14 days for the purpose of the assessment.[7]

[22] The Judge was not persuaded by Mr Maaka-Wanahi's argument that the use of "assessment" in s 38(2)(b) and (c) should be understood as shorthand for "assessment report" as used in the chapeau of s 38(2). Rather, it seemed to her that "assessment" was used deliberately to emphasise that the detention of a person is to facilitate the assessment taking place. This recognises that once a person has been assessed, there is no need for that person to continue to be detained "for the purpose of assessment" while a report is drafted and provided to the court.[8]

[23] The Judge added that this distinction also recognises that detention for the purposes of assessment is not a matter addressed by the Bail Act. Following the completion of the assessment or at the latest, the expiry of the time-limited period of detention, a person detained pursuant to s 38 may be remanded in custody in the normal fashion, or released on bail.[9]

---

6 High Court judgment, above n 2, at [79].
7 At [79].
8 At [80].
9 At [80].

[24] The Judge considered that this interpretation of s 38 is supported by two other matters.[10]

[25] The first is the approach to timeframes in other sections of the Act. Section 38 does not contain a requirement as found in s 23(4) of the Act that a report "must be completed as quickly as practicable and, in any event, within 30 days". Section 23 addresses inquiries that must be made following findings that either a person is unfit to stand trial or is acquitted on account of insanity. The Judge noted that s 35(3) contains a similar time provision in relation to persons who have been convicted, but in respect of whom a court directs inquiries to determine the most suitable method of dealing with that person. Those inquiries also must be completed as quickly as practicable and, in any event, within 30 days.[11]

[26] The Judge concluded that Parliament was cognisant of setting timeframes in the Act, but chose not to do so in relation to the provision of a report under s 38.[12]

[27] The Judge considered that the precursor of s 38, which was s 121 of the Criminal Justice Act 1985, supported reading s 38(2) as directed to detention for the purpose of assessment and not the timeframe for provision of a report.[13] The time limits in s 121 of the Criminal Justice Act 1985 were clearly focussed on the period of detention of a defendant for the purpose of assessment. Although that provision was redrafted, no time limit for provision of s 38 reports was included in the Act. That would have been an appropriate time to include an explicit time limit for the provision of s 38 reports, were that Parliament's intention.[14]

[28] The second matter identified by the Judge was the need for an interpretation of the relevant provisions to accord with human rights considerations. The Judge considered that a rights-consistent approach to timeframes for the provision of s 38 reports is possible without concluding that the 14-day and 30-day timeframes refer to the time in which reports are to be completed. The Judge was not willing to determine

---

10 At [82].
11 At [83].
12 At [84].
13 At [85].
14 At [86].

in the abstract what an appropriate or reasonable timeframe might be for provision of s 38 reports.[15]

[29] The Judge made the following declaration in relation to this issue:[16]

> (a) Section 38 does not impose a specific time frame within which s 38 reports must be provided following the making of a s 38 order. The 14 day period referred to in s 38(2)(b) and (c) refers to the period of detention for the purpose of an assessment and not the period within which a report must be completed. The 30 day timeframe referred to in s 40 refers to the period of detention permitted with the consent of the defendant or their guardian and not the period within which a s 38 report must be completed. However, such reports must be provided without undue delay or there may be a breach of a defendant's rights under NZBORA.

Other issues determined by the High Court

[30] The Judge determined a number of other issues raised by the parties in relation to the operation of s 38. She made the following declarations in relation to those issues:[17]

> (b) HNZ Waikato does not meet the requirements of the definition of 'health assessor' in the [Act]. HNZ Waikato is not legally obliged to provide a s 38 report when it receives a s 38 order addressed to an unnamed "health assessor". Nor is it obliged to locate and commission a health assessor to complete a s 38.
>
> (c) HNZ Waikato is legally obliged to comply with an order made under s 38(2)(c) ordering the detention of a person in Puawai's inpatient facility, provided the requirements in that section have been satisfied. A failure to comply with the requirement in s 38(2)(c)(ii) does not make an order under s 38(2)(c) void ab initio, but constitutes a reviewable error, which is a basis upon which a court may conclude that such an order is void.
>
> (d) In deciding whether to make a s 38 order, a judge may consider the opinion of a forensic nurse following their completion of a screening assessment. However, the [Act] does not require that such a screening assessment take place nor that a forensic nurse recommend a s 38 report in order for the Court to exercise its power to make a s 38 order.

---

15 At [87]–[88].
16 At [128(a)].
17 At [128 (b)–(d)].

[31] The Judge declined to make certain other declarations sought by Mr Maaka-Wanahi and HNZ Waikato, and directions sought by the Criminal Bar Association as an intervenor.[18]

[32] There is no appeal before us in relation to any of the other issues determined by the High Court. In particular, there is no appeal from the declaration that HNZ Waikato is not legally obliged to provide a s 38 report when it receives a s 38 order addressed to an unnamed "health assessor", and is not obliged to locate and commission a health assessor to complete a s 38.[19] We return to this below.

Submissions on appeal

Submissions for Mr Maaka-Wanahi

[33] Mr Smith, who appeared for Mr Maaka-Wanahi, submitted that the High Court erred in declining to adopt a bright-line time limit for completing s 38 reports. He submitted that interpreting s 38 in light of its purpose and context, and proactively seeking a rights-consistent meaning, supports a bright-line standard.

[34] Mr Smith emphasised the right to a fair trial affirmed in s 25(a) of NZBORA. The requirement that a defendant be fit to plead and to stand trial "is not just a matter of procedural fairness, but a substantive requirement 'firmly rooted in the accused's constitutional rights to a fair trial'".[20] A key mechanism for ascertaining a defendant's fitness to stand trial is s 38 reports. Thus, interpretive issues concerning s 38 engage consideration of the s 25(a) fair trial right.

[35] Mr Smith also emphasised the right to be tried without undue delay affirmed in s 25(b) of NZBORA. These rights overlap: the longer the delay in getting to trial, the greater the possibility that there cannot be a fair trial.[21] But it is also "a distinct right whose purpose is also to minimise pre-trial restraints (imprisonment or restrictive bail conditions) and to minimise other personal disadvantage as well as anxiety for

---

18 At [129]–[130].
19 At [128(b)], cited in full at [30] above.
20 Warren Brookbanks *Competencies of Trial: Fitness to plead in New Zealand* (LexisNexis, Wellington, 2011) at 3, citing *R v Duval* [1995] 3 NZLR 202 (HC) at 205.
21 *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750 at [9].

someone who is entitled to be presumed innocent until guilt is established by verdict at a trial."[22]

[36] Mr Smith submitted that where a court orders a s 38 report, proceedings pause until the report is completed. The longer it takes for a report to be completed, the longer a defendant languishes under the label/status of a "criminal accused", with all the pre-trial restraints and personal disadvantages associated with that label/status.

[37] Mr Smith said that s 38 of the Act does not permit a person to be detained in custody or in a hospital or secure facility for the purpose of assessment, if they would otherwise be entitled to bail. Section 38(3)(b) makes this clear. So a court considering what order to make under s 38 must first make a decision under the Bail Act on the grant of bail versus detention. A decision can then be made under s 38 on whether to order an assessment. If the defendant is bailed, the order may amend their bail conditions to enable the assessment to be undertaken (s 38(2)(a)). If the defendant is not granted bail, the order may *alter* their place (location/institution) of custodial detention for the assessment process (s 38(2)(b) and (c)). Under s 38(2)(b), the court can direct that the defendant be detained at a particular prison, where that is desirable in order for the assessment to take place. Under s 38(2)(c), the court may direct the detention to be in a hospital or secure facility, where that is desirable in order to enable the assessment to take place. Mr Smith submitted that in either case, the circumstances of detention may be more restrictive or less convenient (for example, for the purpose of family visits) than the location where the person would otherwise be detained.

[38] The more onerous/restrictive bail or custody change should, Mr Smith submitted, continue for the least possible time required to undertake the assessment, within a maximum of 14 days (30 days with consent). References in s 38(2) to undertaking the assessment should be understood as references to the entire process culminating in a report, including examination of the defendant (s 41) and consultation with family members and other specified persons where practicable (s 39(2)).

---

22 *R v Williams* at [8], citing *R v Harmer* CA324/02 and 352/02, 26 June 2003 at [130].

[39] Mr Smith accepted in the course of argument that he needed to identify who would be required to prepare the s 38 report within 14 days (30 days, if extended). Such a requirement would be meaningless if a report were addressed to an unnamed health assessor: there would be no person to whom the requirement would apply. He also accepted that a s 38 report could not be addressed to HNZ Waikato, consistent with the Judge's finding on that issue (from which there was no appeal). His argument proceeded on the basis that a s 38 report should be directed to a named health assessor, who had confirmed to the court that they could carry out the assessment and complete a report within 14 days.

[40] Mr Smith argued that reading "assessment" as the entire process, with a 14-day timeframe for the named health assessor to complete that process, would avoid problems relating to delays in the provision of s 38 reports. It would also promote and protect a number of rights under NZBORA including s 25(a) and (b), and also s 25(e) (the right to present a defence), ss 18(1) and 22 (in relation to freedom of movement and the right not to be arbitrarily detained), s 23(5) (the right to be treated with humanity and respect for dignity), and s 19(1) (freedom from discrimination).

[41] Mr Smith submitted that the key textual indicator when ascertaining what the words "14 days" refer to is s 38(3)(b). What that provision makes clear is that a person cannot be detained in a prison or hospital or secure facility solely for the purpose of an "assessment report". Thus, persons who are subject to s 38(2)(b) or (c) orders are persons who, independently of s 38 issues, are denied bail and ordered to be remanded in custody. Mr Smith argued that the reference to 14 days in s 38(b) and (c) cannot be a reference to the period for which a person is to be remanded in custody. That is an issue to be decided under the Bail Act. If it is not a reference to the period for which a person may be remanded in custody, Mr Smith said, the question becomes what the 14-day period refers to. He submitted it must be a reference to the period within which the reports must be provided.

[42] In support of this argument Mr Smith referred to the fact that the law of criminal procedure is replete with statutory deadlines and timeframes aimed at securing substantive progress in order to ensure the expeditious progression of matters, consistently with s 25(a) and (b) of NZBORA. Consistent with this approach, he said,

the scheme of the Act envisages the timely progression of matters, recognising the negative implications of delay, in particular for mentally and institutionally vulnerable persons.

[43] He submitted that the Judge was wrong to draw adverse inferences about the existence of s 38 timeframes from ss 23(4) and 35(4). Neither of those provisions is drafted clearly: it is not clear what "inquiries" means, and whether it is just the making of those inquiries or also includes the report to the court of the result of those inquiries. The legislative history of these provisions suggests that the timeframes were intended to be consistent with the timeframe in what is now s 38, to avoid assessments being dragged out.[23]

[44] Mr Smith also referred us to s 19 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act), which provides:

> **19 Maximum period for needs assessment and preparation of care and rehabilitation plan**
>
> (1) The process of assessing the needs of a care recipient and preparing his or her care and rehabilitation plan must be completed as quickly as practicable.
>
> (2) The process referred to in subsection (1) may not continue for longer than 30 days after the date on which the meeting is held in accordance with section 18.

[45] This, Mr Smith said, was a companion piece of legislation to the Act, introduced in the same package of reforms. He submitted that it reflects a parliamentary intention that it is not just the assessment/inquiry but also the subsequent report/plan that needs to be completed quickly and within the timeframe specified in legislation.

[46] Mr Smith submitted that the Court should adopt the most rights-maximising interpretation available. Even if it is consistent with s 25(b) of NZBORA to say that s 38 reports should be provided without undue delay or within a reasonable time, if a

---

[23] Mr Smith referred to the Criminal Justice Amendment Bill (No 7) 2001 (328-2) (select committee report) at 7, which says that in relation to the provisions that became ss 23 and 35 "assessments should not be routinely dragged out for 30 days; they should be completed speedily and effectively."

more rights-consistent approach is available, without doing violence to the text, scheme or legislative intention, then it must be adopted. A more rights-consistent interpretation is available here, by reading the timeframe specified by Parliament in s 38 as the timeframe within which the report must be provided.

[47] Finally, Mr Smith referred to a concern that lengthy delays in preparing reports after the assessment of a defendant may mean that the report is out of date, and does not provide an accurate assessment of the defendant's present state of mind. A further report may be required. Additionally, Mr Smith submitted, anything other than a bright-line standard can lead to postcode justice, which is undesirable.

Submissions for Criminal Bar Association

[48] Mr Maaka-Wanahi's appeal was supported by the Criminal Bar Association (CBA) as an intervenor. The CBA emphasised the importance of completing s 38 reports in an efficient and timely manner. This, Mr Andersen KC submitted, is required by various human rights provisions.

[49] In the course of oral argument before us, Mr Andersen submitted that in most cases, where a defendant is already remanded in custody, an assessment report can be directed under s 38(1) without the need to make any order under s 38(2). Where a defendant is on bail, an order under s 38(2)(a) may not be necessary if the person is willing to attend any assessment voluntarily: and in any event, no timeframe is referred to in s 38(2)(a). But, he said, a 14-day mandatory timeframe for preparing an assessment report (extendable to 30 days with the defendant's consent) applies where an order is made under s 38(2)(b) or (c).

[50] Mr Andersen accepted that this would mean that no time limit applied where an order was made under s 38(1) alone, or where the defendant was on bail and a s 38(2)(a) order was made.

Submissions for the Attorney-General

[51] The Attorney-General submitted that while s 38 reports should be provided promptly, s 38 does not mandate a particular time limit. Ms Laurenson, who appeared for the Attorney-General, submitted that:

(a) The natural meaning of s 38 is that it sets a 14-day maximum period of detention. It says nothing about the time within which a report must be provided. Section 40 is also focused on the period of detention.

(b) The Act does not elsewhere impose any timeframes for the completion of reports, assessments or evidence by health assessors. Reading a timeframe into s 38 would be strained and inconsistent with the scheme of the Act.

(c) Limiting the time of detention for the purpose of obtaining an assessment report is a rights-consistent interpretation under NZBORA. It is not necessary to read in a timeframe for provision of the s 38 report to achieve a rights-consistent interpretation of the Act.

Submissions for HNZ Waikato

[52] Mr White, who appeared for HNZ Waikato, supported the reasoning of the High Court. HNZ Waikato accepts that delays in providing reports under the Act are unsatisfactory and unacceptable, and have the potential to affect defendants' rights. But Mr White emphasised that the reason for those delays is primarily the lack of available persons in New Zealand to act as health assessors under the Act. That difficulty cannot be cured by adopting a reading of the Act that departs from the clear wording of the relevant provisions.

[53] Mr White also pointed out that nothing in the Act provides for what happens if the 14-day period expires without a s 38 report having been provided. There is no provision for extension of a deadline for providing such a report: s 40 provides for extension of *detention*, but not for extension of report timeframes. Nor does the Act address what would happen if a report is provided after the 14-day period expires.

Discussion

Reading s 38 in light of its text, context and purpose

[54] We share the Judge's view that s 38 is not expressed as clearly or simply as desirable. Despite that, we agree with her that it is clear from the text of the provision that the references to 14-day periods in s 38(2)(b) and (c) are references to periods of detention for the purpose of carrying out an assessment of the defendant. They are not concerned with the timeframe within which all other inquiries (including those contemplated by s 39(2)) must be carried out, and an assessment report completed and provided to the court.

[55] Section 38 does not expressly provide for a timeframe for completing an assessment report. Nor is it implicit in s 38(2)(b) and (c) that the report must be completed in that timeframe. We do not think it is a coincidence that the only references to time periods in s 38 are found in the two paragraphs of s 38(2) concerned with detention of the defendant: that is because the time limits relate to the period of detention, not to the period for preparation and submission of the s 38 report.

[56] If Parliament had intended to impose a mandatory time limit for provision of s 38 reports, we would have expected that timeframe to apply to all s 38 reports, regardless of whether the defendant was on bail or remanded in custody. It would be found in s 38(1), not in two of the three limbs of s 38(2). It is difficult to discern any rationale for imposing a time limit for providing a s 38 report in the scenarios referred to in s 38(2)(b) and (c) where a defendant is detained in a prison or hospital or secure facility, but not in the scenario where a defendant is on bail. The need to prepare reports promptly, to avoid delays in the trial process, applies equally in all of these scenarios. But it makes good sense to impose a time limit on detention for the purpose of carrying out an assessment to inform a s 38 report.

[57] It also makes good sense, and is more rights-consistent, to provide for detention only while assessments of the defendant are being carried out. Detaining a defendant in a particular location or facility after all necessary assessments have been carried out, for the further period required to enable inquiries to be made of the defendant's family and a report written up, would be an unjustified interference with the

defendant's rights. It is more rights-consistent to read the references to "assessment" in s 38(2)(b) and (c) as confined to the assessment process *excluding* preparation of the s 38 report.

[58] That reading of s 38 is confirmed by s 40(1), which provides for extension of the 14-day period. Section 40 is clearly concerned with the period for which a person may be detained, not the period within which a report must be prepared. If s 38 was intended to set a timeframe for provision of s 38 reports, one would expect the Act to provide for extension of that deadline. It does not.

[59] We accept Mr Smith's submission that little light is shed on the interpretation of s 38 by the deadline for making inquiries under ss 23(4) and 35(3). Those provisions do not specify a timeframe within which a report about those inquiries must be made to the court. We express no view on whether a time limit is implicit in these provisions. But we agree that these provisions do not provide examples of Parliament setting an express deadline elsewhere in the Act for reporting to the court, from which any inferences can usefully be drawn about the interpretation of s 38.

[60] We also agree with Mr Smith that the clearest example of Parliament turning its mind to a deadline within which a report must be provided to the court, in a comparable context, is s 19 of the IDCCR Act. But we do not see this provision as supporting Mr Smith's argument. To the contrary, it shows that where Parliament does intend to set a deadline for provision of a report, it can be expected to do so explicitly.

[61] In support of his argument that the terms "assessment" and "assessment report" are used interchangeably in the Act, Mr Smith referred us to s 42(2) of the Act, which provides:

> (2) If the assessment report on a person is sent to the court before the expiry of the period for which a person has been ordered to be detained in a hospital or secure facility under section 38(2)(c), the person must be transferred at the direction of the Director of Area Mental Health Services for the hospital or the co-ordinator for the secure facility to court or penal or Police custody for 1 or more of the purposes specified in subsection (3).

[62] Mr Smith submitted that this provision suggests that the detention terminates when the assessment report is sent to the court. We agree that once the court receives an assessment report, any further detention under s 38(2)(c) in a hospital or secure facility for the purpose of assessment can no longer be justified, so must be terminated. But that does not suggest the terms "assessment" and "assessment report" are used interchangeably. Rather, this provision proceeds on the basis that once the report has been provided, the assessment process must also necessarily be at an end. It follows that detention in a hospital or secure facility is no longer required.

Legislative history

[63] The legislative history of s 38 supports the reading of s 38 set out above. In particular, it sheds light on what "work" there is for s 38(2)(b) to do if — by virtue of s 38(3) — a defendant to whom that provision is applied will already be in custody. As noted earlier,[24] the question very fairly raised by Mr Smith is: why is it necessary to limit the period of a detention for assessment purposes when the defendant will remain detained after the assessment is completed?

[64] Although there have for many years been various powers to detain defendants for mental health reasons, the origins of s 38 go back only as far as 1970, when s 47A was inserted into the Criminal Justice Act 1954 (the CJA54) by s 10 of the Criminal Justice Amendment Act 1969. Section 47A provided:

> (1) Notwithstanding anything in any enactment, where any person charged with or convicted of any offence punishable by imprisonment or death is in custody—
>
> (a) While awaiting or during the course of the hearing or trial before any Court; or
>
> (b) While awaiting sentence by any Court; or
>
> (c) Pending the determination of any appeal to any Court against his conviction—
>
> and it appears to that Court to be expedient that a psychiatric report on the person's mental condition should be made available to the Court, the Court may exercise any of the powers conferred by subsection (2) of this section.

[24] At [41] above.

(2) The Court may—

(a) Make it a condition of any grant of bail to the person that he shall attend, for psychiatric examination by a medical practitioner, at a psychiatric clinic approved by the Court; or

(b) Make an order committing him to a penal institution for such period, not exceeding fourteen days, as the Court thinks fit, and for his psychiatric examination during that period by a medical practitioner approved by the Court; or

(c) Where a medical practitioner has certified or given evidence to the effect that a psychiatric examination of the person is requisite and it appears to the Court that it would not be practicable for the examination to be carried out if he were committed to a penal institution, or where a psychiatric report (whether obtained pursuant to paragraph (a) or paragraph (b) of this subsection or otherwise) recommending his detention in a psychiatric hospital for further observation is available to the Court, make an order for his detention and examination in a psychiatric hospital for such period, not exceeding one month, as the Court thinks fit.

(3) Any person who is subject to order made under paragraph (b) of subsection (2) of this section may from time to time, as the case may require, be removed by or under the direction of the Superintendent of the penal institution to a psychiatric hospital for the purposes of his examination, and may in like manner be taken back to the institution. On any such removal he shall not be detained in the psychiatric hospital overnight; and he shall be deemed to continue to be in the legal custody of the Superintendent of the penal institution while he is absent from the penal institution.

(4) If an order is made under paragraph (c) of subsection (2) of this section, the Court or, in the case of a District Court, any Justice may at any time, and shall on the receipt from the superintendent of the psychiatric hospital of a report on the person's mental condition, order that the person be removed from the hospital and returned to custody for the purposes of the hearing or trial, or for the purpose of his being sentenced, or for the purposes of the determination of his appeal, as the case may require, notwithstanding that the period for which he has been ordered to be detained in the hospital has not expired.

(5) Nothing in this section shall operate to prevent the treatment of any person, with his consent, during the period of his detention pursuant to an order under paragraph (c) of subsection (2) of this section.

(6) While any person is detained in a psychiatric hospital pursuant to an order under paragraph (c) of subsection (2) of this section he shall be deemed to continue to be in the legal custody of the Superintendent of the penal institution, or of the member of the Police in charge of the police station, in which he was confined before his removal to the hospital pursuant to the order.

(7) This section shall not affect the powers of a Court under section 39B of this Act in any case to which that section applies.

(8) In this section, the expression psychiatric hospital has the same meaning as in the Mental Health Act 1969.

[65] We make three points about s 47A.

[66] First, the only kinds of order that could be made under s 47A were the three orders set out in s 47A(2). There was no more general power under s 47A(1) to order psychiatric reports.

[67] Second, there was no equivalent to s 38(3) — the power to make orders under s 47A(2)(b) and (c) enabled the court to require a defendant to be detained for the purpose of examination in circumstances where that defendant would otherwise be on bail.

[68] Third, and most significantly, s 47A(2)(b) made it quite clear that a committal order under that provision was time-limited (to 14 days) *and* that the psychiatric *examination* was to occur "*during that period*".

[69] That last point makes it clear that the specified 14-day timeframe was the period within which the *examination* was to take place. As well, the possibility that a committal order could be made for somebody who was otherwise entitled to bail made it important that the duration of detention for the purposes of examination was specifically and strictly limited.

[70] In 1985 the CJA54 was repealed and replaced by the Criminal Justice Act 1985 (the CJA85). Section 47A became s 121 of the new Act. Section 121 was in similar terms to s 47A, but there were some changes that are not easy to understand. The first iteration of s 121 relevantly provided:

(1) Notwithstanding anything in any other enactment, where a defendant who is charged with or convicted of an offence punishable by death or imprisonment is in custody while awaiting or during the course of the hearing or trial before any court or while awaiting sentence by any court or pending the determination of any appeal to any court against conviction, and the court is satisfied, on the application of the

prosecutor or the defendant or of its own motion, that a psychiatric report would assist the court in determining—

(a) If the defendant is under disability; or

(b) If the defendant is insane within the meaning of section 23 of the Crimes Act 1961; or

(c) The type and length of sentence that might be imposed; or

(d) The nature of any requirement that it may impose as part of, or as a condition of, any sentence or order,—

the court may exercise any of the powers conferred by subsection (2) of this section.

(2) In any such case, the court may—

(a) Make it a condition of any grant of bail that the defendant shall attend in accordance with the court's directions, for psychiatric examination, at a place approved by the court; or

(b) Where a psychiatrist or (where no such specialist is available) another medical practitioner has certified or given evidence to the effect that a psychiatric report or a further such report cannot practicably be prepared unless the defendant is in custody,—

(i) Make an order committing the defendant to a penal institution for the purpose of psychiatric examination for such period not exceeding 14 days as the court thinks fit; or

(ii) In any case where remand to a penal institution is inappropriate for any reason, for the defendant's detention and psychiatric examination in a psychiatric hospital at which adequate facilities for the psychiatric examination are available, for such period not exceeding 14 days as the court thinks fit.

(3) Notwithstanding anything in subsection (2) of this section, no order may be made under paragraph (b) of that subsection, if—

(a) The defendant is bailable as of right; or

(b) The defendant would have been released on bail but for the need for a psychiatric report.

…

[71] It is immediately apparent that there was a conflict between subs (2) and subs (3). The time-limited power to detain under subs (2)(b) could only be exercised on medical advice that it was necessary for the defendant to be in custody for that

purpose, but subs (3) provided no such order could be made if the defendant would otherwise be released on bail. The purposive link between the detention and the *examination* in subs (2)(b) nonetheless remained clear.

[72] The tension between subs (2) and subs (3) was, however, remedied the following year, when s 121 was amended to provide that it was only an order for detention in a psychiatric hospital under subs (2)(b)(ii) that had to be based on medical evidence that it was desirable that the psychiatric examination of the defendant take place there. The restriction on the exercise of the power under either limb of subs 2(b) to defendants who would not otherwise be granted bail remained in subs (3).

[73] The provision then remained unaltered until the repeal of pt 7 of the CJA85 by the Act. Section 38 of the Act largely replicates s 121 of the CJA85, although some of the subsections of s 121 became discrete sections (such as s 41).

[74] When s 38 is read in light of the legislative history outlined above, it is tolerably plain that s 38(2)(b) is an historical artefact. It can be traced back to a time when detention pursuant to the equivalent provision might well have been ordered *only* for the purpose of a psychiatric examination. That such detention be specifically time limited was — from a rights perspective — critical. And as we have noted, it was very clear that such detention was for the purposes of the psychiatric *examination* (not for the preparation of the resulting report).

[75] In its current form, s 38(2)(b) serves little purpose. It would at most enable a court to require that a defendant be detained at a specified prison, to facilitate assessment by a particular health assessor. But Mr Smith's argument that the provision should be read as requiring the assessment report to be completed within 14 days, as otherwise it would serve little or no purpose, is answered by the provision's history. That history both explains the vestigial nature of the provision as it appears in the Act, and confirms that the provision has throughout been concerned with the period of detention while the health assessor carries out the assessment/examination of the defendant.

Would bright-line time limits better protect defendants' rights?

[76] Mr Smith placed considerable emphasis on the desirability of reading the Act as imposing bright-line time limits for the provision of s 38 reports in order, he said, to better protect rights affirmed by NZBORA. The difficulty with this argument is that there was no evidence before us to support its premise: that imposing such deadlines would reduce delays in providing s 38 reports, and protect the fair trial rights of defendants.

[77] It seems to us that the same difficulties that are encountered in finding an available health assessor after the court has made a s 38 order would be likely to be replicated on Mr Smith's approach: the only change would be that these difficulties would be encountered before the court can make a s 38 order addressed to a named health assessor. Inquiries would need to be made to find a health assessor who is available and willing to commit to providing a report within 14 days before that health assessor could be named in the s 38 order. And there would be a real risk that requiring a health assessor to commit to such a tight timeframe for provision of their report would affect the willingness of psychiatrists and psychologists, already under considerable pressure, to agree to provide such reports. There was no evidence before this Court to shed light on the likely consequences of adopting bright-line time limits for the provision of s 38 reports. Without such evidence, it would be speculative to proceed on the basis that imposing deadlines would improve the availability and timeliness of s 38 reports.

[78] We also see a real risk in imposing such deadlines so far as the quality of s 38 reports is concerned. As already mentioned, s 39(2) provides that unless the court directs otherwise, every order under s 38(1) is deemed to include a direction that, in preparing the assessment report, the health assessor consult, wherever practicable, with certain persons including the subject's family or whānau. It can take some time to make contact with family and others with relevant information about the subject of the report. There is a real risk that a bright-line timeframe for provision of s 38 reports will limit the health assessor's ability to make contact with family and others, obtain their insights, and incorporate these in the s 38 report. That would mean that courts

would receive less complete, less informed, s 38 reports. That would be contrary to the interests of the defendant, and inconsistent with the rights protected by NZBORA.

[79] In some cases, it will be clear that one available reading of a provision will be more consistent with NZBORA than another available reading. But here, Mr Smith's argument depends on the practical consequences of adopting one reading rather than another in circumstances where those consequences are uncertain, and there is no evidence before this Court that sheds light on the likelihood of those consequences. It would be wrong for this Court to speculate about the consequences of each reading, and assume that bright-line time limits would produce results more consistent with NZBORA in all (or most) cases, in the absence of any evidence to support that proposition.

[80] Because the premise of Mr Smith's arguments founded on NZBORA is not made out, we need not engage with the detail of those arguments. But we should not be taken to accept Mr Smith's argument that the most rights-affirming interpretation of a provision must be adopted. We are not aware of any authority to support that argument. Section 6 of NZBORA requires a court to prefer a meaning that is consistent with the rights and freedoms contained in NZBORA to any other meaning. But where two meanings are available, each of which is consistent with the rights and freedoms contained in NZBORA, s 6 provides no guidance on which should be preferred. The extent to which an interpretation advances rights and freedoms protected by NZBORA is likely to be a relevant factor in any interpretation exercise. But it is not possible to put the matter any higher.

Summary

[81] In summary, the text of s 38 is in our view clear. The time frames referred to in s 38(2)(b) and (c) relate to the period of detention for the purpose of carrying out an assessment, not to the period within which a s 38 report must be completed and provided to the court. That reading of s 38 is consistent with the wide statutory context in which it appears, in particular s 40. A cross-check of that reading of s 38 against the provision's purpose does not support adopting a different interpretation. Nor is a different interpretation supported by reference to rights affirmed by

NZBORA: there is no reason to think that the alternative interpretation contended for by Mr Maaka-Wanahi would better advance those rights.

Result

[82] The appeal is dismissed.

[83] The parties agreed that costs should lie where they fall regardless of the outcome of the appeal. We therefore make no order as to costs.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for First Respondent
Legal Services, Te Whatu Ora | Health New Zealand – Waikato for Second Respondent