IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA535/2022
[2024] NZCA 67

BETWEEN	ATTORNEY-GENERAL Appellant
AND	KORO PUTUA Respondent

Hearing: 15 November 2023

Court: French, Courtney and Katz JJ

Counsel: D Jones and S Cvitanovich for Appellant
D A Ewen, E T Blincoe and L C Ord for Respondent

Judgment: 21 March 2024 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed and the decision of the High Court is set aside.

B There is no order of costs.

REASONS OF THE COURT

(Given by French J)

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Introduction

[1] Mr Putua spent more time in prison than he should have done due to an error in a committal warrant prepared by a deputy registrar and signed by a District Court judge. The question on appeal is whether the High Court was correct to allow Mr Putua's compensation claim against the Crown under the New Zealand Bill of Rights Act 1990 (Bill of Rights) for the actions of the Deputy Registrar.[1]

[2] The error came about in the following way. Mr Putua was sentenced in the District Court to a total term of imprisonment of four and a half years on 16 charges.[2] The sentence was comprised as follows: three years and four months' imprisonment on a burglary charge, a cumulative sentence of one year and two months' imprisonment for possession of a sawn-off shotgun,[3] and concurrent sentences of between one month and two years' imprisonment on each of the remaining charges.[4]

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1 *Putua v Attorney-General* [2022] NZHC 2277, [2023] 2 NZLR 41 [judgment under appeal].
2 *R v Putua* [2016] NZDC 18322 [sentencing notes]. Mr Putua appealed his sentence to the High Court but the appeal was dismissed: *Putua v Police* [2017] NZHC 103.
3 Sentencing notes, above n 2, at [26].
4 At [27].

[3] Section 91 of the Sentencing Act 2002 requires that when a court imposes a prison sentence, a warrant of commitment must be issued, stating briefly the particulars of the offence and directing the detention of the offender in accordance with the sentence. The section also states that if the sentence is imposed by the District Court, any District Court judge may sign the warrant.

[4] After Mr Putua's sentencing, a deputy registrar of the District Court prepared a committal warrant for a judge to sign. Unfortunately, the Deputy Registrar mistakenly recorded in the draft warrant that the three month sentence for one of the charges was cumulative rather than concurrent. The sentencing Judge did not notice the error and signed the warrant.

[5] By the time the authorities realised the error and a replacement warrant was issued, Mr Putua had been imprisoned for 33 days in excess of the sentence that had been imposed. He then issued proceedings in the High Court seeking a declaration that he had been arbitrarily detained in breach of his right under s 22 of the Bill of Rights and also seeking damages, including interest, against the Crown. Section 22 which is headed "Liberty of the person" provides that everyone has the right not to be arbitrarily arrested or detained.

[6] The claim did not seek to hold the Crown liable for the actions of the Judge in signing the warrant. It was limited to the actions of the Deputy Registrar in preparing it.

[7] The case was heard by Ellis J. She found that Mr Putua had been unlawfully and therefore arbitrarily detained as a result of the Deputy Registrar's actions.[5] She awarded Mr Putua damages of $11,000 (together with interest)[6] and issued the following declaration:[7]

> As a result of an inadvertent mistake by a deputy registrar in the District Court when preparing a warrant of commitment following Mr Koro Putua's sentencing on 15 September 2016, Mr Putua was arbitrarily detained for 33 days (between 11 November and 14 December 2020), in breach of s 22 of the New Zealand Bill of Rights Act 1990.

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5 Judgment under appeal, above n 1, at [43].
6 At [69].
7 At [68].

[8] On appeal, as it did in the High Court, the Crown accepts that Mr Putua was arbitrarily detained. What is disputed however is whether in the circumstances of this case the Crown can as a matter of law be liable for damages through the error of the Deputy Registrar in preparing the warrant. The two issues for determination, which the Crown submits the High Court answered incorrectly, are:

(a) Were the actions of the Deputy Registrar in preparing the warrant subject to the same immunity as the actions of the District Court Judge in signing it?

(b) Even if the actions of the Deputy Registrar were not subject to the same immunity, did the Judge's signing of the warrant constitute an intervening cause breaking the causal nexus between the drafting of the warrant and the arbitrary detention?

[9] As will be apparent from our identification of the issues, the concepts of judicial immunity and causation are at the centre of the appeal. The concept of judicial immunity needs some explanation and therefore it is useful to provide that explanation at the outset.

Judicial immunity and the Bill of Rights

[10] At common law, the judges of superior courts have always had personal immunity from being sued in civil proceedings. The immunity was held to be absolute in respect of any action taken in the discharge of judicial responsibilities involving execution of judicial functions, as distinct from individual acts not done in the course of judicial office.[8]

[11] District Court judges were not originally protected by the same absolute immunity. Their immunity was confined to acts taken by them within jurisdiction.[9] However, following a 1997 Law Commission report on judicial immunity, the

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8 *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668 (CA) at 678–682 per Henry J, cited with approval in *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [161] per McGrath and William Young JJ.

9 Summary Proceedings Act 1957, s 193.

District Courts Act 1947 was amended to expressly provide that a District Court judge "has … the same immunities as a Judge of the High Court".[10]

[12] In addition to judicial immunity at common law, also relevant in this case is s 6(5) of the Crown Proceedings Act 1950. The effect of s 6(5) is that although the Crown can generally be liable in tort as if it were a private person:

> (5) No proceedings will lie against the Crown … in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him or her, or any responsibilities which he or she has in connection with the execution of judicial process.

[13] Judicial immunity in the context of the Bill of Rights became an issue once the ability to seek public law compensation against the Crown for breaches of the rights protected under that Act was recognised in *Simpson v Attorney-General* (*Baigent's* case).[11] In *Baigent's* case, a monetary claim under the Bill of Rights was held to be available against the state independently of the Crown Proceedings Act. The cause of action was not based on vicarious liability nor on tort law but was said to involve the liability of the Crown under public law.[12] As for the naming of the correct defendant, that was held to be the Attorney-General as the first law officer of the Crown.[13]

[14] Given that the immunity conferred on the Crown under s 6(5) of the Crown Proceedings Act is limited to tortious actions and that the Bill of Rights is expressed to apply to "acts done … by the legislative, executive, or *judicial* branches of the Government",[14] there was speculation whether a claim against the Attorney-General for a judicial breach was precluded by the same common law principles of judicial immunity that would prevent a direct claim against a judge personally. *Baigent's* case itself did not concern a judicial breach but was concerned with actions of police.

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10 District Courts Act 1947, s 119; District Courts Amendment Act 2004, s 7; and Law Commission *Crown Liability and Judicial Immunity: A response to* Baigent's *case and* Harvey v Derrick (NZLC R37, 1997). This is now reflected in s 23 of the District Courts Act 2016.

11 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's* case].

12 At 677 per Cooke P, 692 per Casey J and 718 per McKay J.

13 At 684 per Casey J and 693 per Hardie Boys J; and *Chapman*, above n 8, at [111] and [116], citing *Attorney-General v Chapman* [2009] NZCA 552, [2010] 2 NZLR 317 at [94].

14 New Zealand Bill of Rights Act 1990, s 3 (emphasis added).

[15] The 1997 Law Commission report on Judicial Immunity recommended that legislation be enacted explicitly providing that a remedy for breach of the Bill of Rights was not available in respect of judicial conduct.[15] That recommendation was not adopted.

[16] Significantly for present purposes, the same Law Commission report considered that generally the Crown should be liable for the actions of registrars involving a breach of the Bill of Rights.[16] However, there was also acknowledgment that in appropriate cases judicial immunity should not be limited to judges but should extend to non-judicial actors.[17] It was acknowledged too that in some cases judicial immunity will mean that no effective remedy is available.[18]

[17] In 2011, the issue of judicial immunity in the context of the Bill of Rights came squarely before the Supreme Court for determination in *Attorney-General v Chapman.*[19] Mr Chapman was seeking compensation against the Attorney-General for alleged breaches of the Bill of Rights by the judges of the Court of Appeal. The breaches were said to have occurred as the result of a practice that had been adopted to decide appeals on the papers (that is, without an oral hearing) whenever an appellant's application for legal aid was declined. The applications for legal aid were technically determined by the Registrar, but in practice were decided by three judges who each considered the file separately. This practice was held to be unlawful by the Privy Council.[20]

[18] Following a comprehensive review of both the case law, including *Baigent's* case, and the policy factors underpinning judicial immunity, a majority of the Supreme Court in *Chapman* held that the liability of the Crown should not be extended to cover breaches of the Bill of Rights resulting from the actions of the judicial branch of government.[21] Noting that judicial immunity gives effect to systemic public interest considerations (the most important of which was judicial

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15 Law Commission, above n 10, at [158] and [186].
16 See for example at [4] and [172].
17 At [143].
18 At [158].
19 *Chapman*, above n 8.
20 *Taito v R* [2002] UKPC 15, [2003] 3 NZLR 577, affirmed in *Smith v R* [2003] 3 NZLR 617 (CA).
21 *Chapman*, above n 8, at [204] per McGrath and William Young JJ and [211]–[214] per Gault J.

independence), it considered that allowing a claim of the kind brought by Mr Chapman would be "as inimical to those public interest considerations as allowing a personal claim against judges".[22]

[19] In addition to judicial independence and public confidence in that independence, the other policy factors identified were the desirability of finality in litigation, and the existence of other remedies for judicial breaches — including the appellate process — which meant it was unnecessary to provide a financial remedy.[23]

[20] The majority judgment concluded:[24]

> [H]aving examined the contention that *Baigent* damages should apply to judicial breaches, we are satisfied that step is unnecessary. It would be destructive of the administration of justice in New Zealand and ultimately judicial protection of human rights in our justice system.

[21] There could be no liability and therefore the Court had no jurisdiction to hear and determine Mr Chapman's claim against the Crown.[25]

[22] Significantly for present purposes, Mr Chapman's claim also included a claim against the Registrar for the latter's role in the unlawful process in declining the legal aid applications. The legal position of the Registrar was specifically addressed by two of the three Supreme Court Judges who made up the majority (namely McGrath and William Young JJ) in the following passage:[26]

> [208] The respondent's pleading attributes responsibility for the way the appeal was dealt with to the Registrar as well as the Judges involved and also says the Registrar had been made aware of the defects in the ex parte system for dealing with appeals. This raises the question of whether, and if so to what extent, the Registrar, who is a public servant, is protected. The Court of Appeal did not need to address this point and we received only limited argument on it or the position of other officers or employees of the executive branch referred to in the pleadings. To the extent that the Registrar's actions were superseded by decisions of judges, or give effect to what they have decided, there can plainly be no right to Bill of Rights Act compensation. This kind of distinction is difficult to make but it calls for an exercise of judgment

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22 At [97] and [192] per McGrath and William Young JJ and [212] per Gault J.
23 At [180]–[183], [193]–[198] and [204] per McGrath and William Young JJ.
24 At [205] per McGrath and William Young JJ.
25 At [209] per McGrath and William Young JJ.
26 Although the separate judgment of the third member of the majority (Gault J) strongly supported and endorsed the reasoning of McGrath and William Young JJ, it did not expressly address the position of registrars.

> commonly undertaken by the courts. In case this aspect of the case requires further consideration, we refer the proceeding back to the High Court.

[23] Since *Chapman* was decided, this Court has had occasion in *Thompson v Attorney-General* to consider another claim for public law compensation involving the actions of both a deputy registrar and a judge concerning alleged breaches of the right to be free from arbitrary arrest and detention.[27]

[24] In *Thompson*, a District Court judge had issued a warrant for Ms Thompson's arrest because she had failed to attend the Court when an application for cancellation of her sentence of community work was called. Unknown to the Judge, the application for cancellation had already been dealt with five days earlier by another judge and an order made cancelling the community work sentences. Unfortunately, a deputy registrar had failed to update the relevant records to reflect this order. Ms Thompson was duly arrested and detained in police custody overnight before the mistake was realised and Ms Thompson released.[28]

[25] Ms Thompson then issued proceedings claiming damages in tort and for breach of the Bill of Rights. The tort claims were made against the Attorney-General on the basis of vicarious responsibility for the Deputy Registrar's failure to update the court records. There was no claim against the Attorney-General for breaches of the Bill of Rights based on judicial error.[29]

[26] This Court found that the Judge's issuing of the arrest warrant was unlawful because under the Sentencing Act the jurisdiction to issue such a warrant was dependent on the existence of an outstanding application.[30] It followed that the subsequent arrest and detention was arbitrary and breached Ms Thompson's rights under s 22 of the Bill of Rights.[31]

[27] However, the Court went on to hold the Crown was not liable in tort because of s 6(5) of the Crown Proceedings Act which, as mentioned, prohibits proceedings

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27 *Thompson v Attorney-General* [2016] NZCA 215, [2016] 3 NZLR 206.
28 At [1] and [3].
29 At [3].
30 At [61].
31 At [68].

against the Crown in respect of acts or omissions done by those discharging responsibilities of a judicial nature or in connection with the execution of judicial process. The Court was satisfied that the task of record keeping by the registry was an act or omission that fell within that description.[32]

[28] As regards the claim under the Bill of Rights, this Court noted that *Chapman* left open the question of potential liability for public law damages relating to the actions of a registrar.[33] It was unnecessary however for the Court to address that question because it was satisfied in any event that independently of issues of immunity, the claim should be dismissed for want of a sufficient causative link between the Deputy Registrar's error and Ms Thompson's false detention.[34]

[29] In relation to causation, this Court accepted that had the record keeping system worked as it should have done, the District Court's case management system would have been updated to reflect the first Judge's order, thereby ensuring the matter would not have been called before the second Judge.[35] However, it considered the subsequent issuing of an unlawful warrant was too remote an eventuality to justify the imposition of liability in respect of the record keeping.[36] The effective or proximate cause of the unlawful arrest and detention was held to be the issuing of the arrest warrant, which was a judicial act.[37]

[30] It had also been argued on behalf of Ms Thompson that a claim under the Bill of Rights could still be brought due to the inadequate record keeping even if the proximate and effective cause of the unlawful arrest was the result of a judicial act. This argument was rejected. The Court did not consider there was any proper basis on which to distinguish *Chapman*, which it said compelled rejection of any argument that a claim could be made against the Crown for a breach of s 22 arising from judicial error.[38]

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32 At [39] and [46].
33 At [54].
34 At [76]–[77].
35 At [44].
36 At [76].
37 At [77].
38 At [69] and [73]–[74].

[31] As the High Court Judge in this case correctly observed, based on *Chapman* and *Thompson*, she had no jurisdiction to hear a claim for public law damages arising from the judicial act of signing the committal warrant. The Judge also considered (correctly, in our view) that based on those same authorities, liability in respect of the preparation of the warrant turned on whether the Deputy Registrar was performing essentially a judicial function which attracts judicial immunity and if not whether the mistake was superseded by the Judge's error and was not the actuating cause of the unlawful detention.[39]

[32] We turn now to address the two key appeal issues.

Did the Deputy Registrar's actions in preparing the warrant of commitment attract judicial immunity?

The High Court reasoning

[33] In addressing this issue, the Judge first considered what she described as, "the orthodox ambit of judicial acts and processes".[40] Relying on the judgment of Lopes LJ in *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson*,[41] she held that whether something qualifies as a judicial act depends on whether it requires either discretion or judgment and is not a purely administrative task.[42] Applying that test to the facts of this case, she went on to find that because the preparation of the committal warrant was a mandatory task (required by s 91 of the Sentencing Act) and the contents of the warrant predetermined, the drafting of it did not involve any exercise of discretion and accordingly it was not a judicial act.[43]

[34] The Judge then held this meant the only question was whether the policy factors justifying judicial immunity applied with similar or equal force to administrative acts of this kind.[44] She identified the policy factors for judicial immunity as being: the need to protect the integrity of the judicial process by avoiding

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39 Judgment under appeal, above n 1, at [27].
40 At [31].
41 *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 (CA) at 452.
42 Judgment under appeal, above n 1, at [32]–[33].
43 At [33].
44 At [34].

the risk of collateral attacks on decisions, the importance of finality, and the need to avoid judges being subject to the weight of improper pressure as a result of potential legal liability for their judicial acts.[45] In the Judge's assessment, it was difficult to see how those factors apply to administrative acts by registrars, however closely they might be linked to a judicial process. The Deputy Registrar had no choice but to prepare a warrant and unlike the District Court Judge was not a public figure and would not be publicly pilloried for a clerical error.[46]

[35] Ellis J concluded that judicial immunity did not therefore apply to protect the mistake made by the Deputy Registrar.[47]

The Attorney-General's submissions

[36] Counsel for the Attorney-General, Mr Jones, contended that the Deputy Registrar's actions of preparation of the warrant were subject to the same immunity as the actions of the District Court Judge in signing it. In his submission, the High Court test of what amounted to a judicial act was too narrow and contrary to authority including the passage from *Chapman* quoted above, at [22]. The correct approach, Mr Jones submitted, was that when registrars act under the direction of judges in order to give effect to their decisions, the registrar's actions are to be properly viewed as part of the judicial process. In this case, the preparation of the warrant was required to give effect to the Judge's decision (his sentencing decision) and was therefore part of the conduct of judicial business.

[37] Mr Jones also took issue with Ellis J's analysis of the policy factors. He argued that several of the factors identified as weighing against the Deputy Registrar having immunity were either irrelevant or applied as much to judges as registrars and had not been regarded by the majority in *Chapman* as a reason for withholding immunity. For example, the fact the relevant cause of action would not be against the Deputy Registrar personally, is also true for judges. If the absence of immunity would not give rise to improper pressure in relation to the preparation of warrants, then neither would it give rise to improper pressure in relation to signing them. Mr Jones further

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45 At [37].
46 At [38].
47 At [39].

contended that the Judge's analysis also involved errors of omission. There was for example no consideration of the consequences of not recognising immunity.

Mr Putua's submissions

[38] Counsel, Mr Ewen, strongly supported the Judge's reasoning. He emphasised that registrars are unambiguously a part of the executive,[48] and so are expressly bound by the Bill of Rights guarantees. Also engaged, in his submission, was art 9(5) of the International Covenant on Civil and Political Rights (ICCPR)[49] and the presumption that the Courts will take an affirmative stance in applying domestic law consistently with international law obligations.[50] Article 9(5) states that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". He drew to our attention that the *Thompson* decision has been criticised by the United Nations Human Rights Committee,[51] and submitted any extension of the *Chapman* immunity should therefore be viewed with great circumspection.

[39] Mr Ewen also sought to support the High Court decision on grounds in addition to those relied on in the judgment. He pointed out that unlike judges of the superior courts and the District Court, community magistrates and justices of the peace do not have absolute immunity. As was once the case with District Court judges, they are still personally liable for acts without or in excess of jurisdiction.[52] Developing this argument, Mr Ewen contended that the role of registrars is the same irrespective of the decision maker and in his submission it would be anomalous and inconsistent with the scheme of the District Court Act 2016, the Justices of the Peace Act 1957 and the Bill of Rights that a registrar should have immunity in relation to acts of judicial officers who do not themselves have immunity.

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48 See for example District Court Act 2016, s 62(1).

49 *International Covenant on Civil and Political Rights* GA Res 2200A (1966) [ICCPR], art 9(5).

50 Citing the Supreme Court decisions in *D (SC31/2019) v Police* [2021] NZSC 2, [2021] 1 NZLR 213; and *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.

51 *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3162/2018* UN Doc CCPR/C/132/D/3162/2018 (7 June 2022).

52 District Court Act, s 46; and Justices of the Peace Act 1957, s 4B.

Analysis

[40] In our view, there are some difficulties with the Judge's analysis.

[41] The first is that it results in the anomalous situation of there being two errors relating to this warrant, one of which is protected by immunity and the other not. Mr Ewen made valiant attempts to avoid this difficulty by resisting any suggestion that the Judge's signing of the warrant was an error. However, we consider it is beyond argument that signing an important document such as a committal warrant without properly checking it must on any view of it be an error. Further, given that the accuracy of the warrant must ultimately be the responsibility of the judge who signs it, the affording of immunity to the Judge's error but not that of the Deputy Registrar seems even more anomalous.

[42] The second difficulty with Ellis J's analysis, in our view, is her adoption of a test which delineates the concept of a judicial act by reference to the existence of a discretion.[53] If that were the test for the purposes of immunity, it would mean the District Court Judge's signing of the warrant was not a judicial act. By virtue of s 91, the Judge was under a statutory obligation to sign it. Yet, as Ellis J herself accepts, his signing of the warrant was undoubtedly a judicial act.[54] It follows that the fact the Deputy Registrar had no choice but to prepare the warrant cannot be determinative of what is and is not a judicial act.

[43] Another difficulty is that the case law on judicial immunity does not support a test which turns on the existence of discretion. The English judgment on which the Judge relied was not a case about judicial immunity.[55] It involved persons who were justices of the peace sitting outside the courtroom in a different capacity in a local authority licensing committee, the issue being the extent of judicial privilege. As indicated in our explanatory section on judicial immunity, cases that do directly concern and discuss judicial immunity, such as *Gazley* and *Chapman*, all suggest a far

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53 Judgment under appeal, above n 1, at [32]–[33].
54 At [27].
55 *Royal Aquarium*, above n 41.

wider test, namely that the immunity applies to all acts carried out by judges in their official capacity.[56]

[44] Further, insofar as the effect of Ellis J's decision would be to restrict immunity to instances when a registrar is engaged in their own decision making rather than in giving effect to the decisions of a judge, it appears to be directly at odds with the passage about registrars from *Chapman* quoted above at [22].[57] Although the passage is strictly speaking not part of the majority decision, it is, as Mr Jones pointed out, the most directly authoritative dicta on the issue.

[45] For these reasons, we are not persuaded that the presence or absence of discretion is an appropriate test for determining whether the task of preparing a warrant of commitment was a judicial act for the purposes of judicial immunity.

[46] Instead, the correct starting point in our view must be an analysis of the role of registrars and deputy registrars in the context of judicial business.

[47] Like the Court in *Thompson*, we consider the observations of Hale LJ in *Quinland* to be instructive:[58]

> The Court Service may be an agency of the executive but it exists, in part if not in whole, to facilitate and implement the workings of the judiciary. There are some of its activities over which the judiciary and not the executive must have the ultimate control. Whatever else these may include, they must include the putting into effect of the orders or directions of a court. There is little point in having an independent judiciary if the executive, through the Court Service, is free to pick and choose which of its orders to implement.

[48] The function of the registrar in giving effect to judicial decisions is a recurring theme in cases under the Crown Proceedings Act, which hold that it is the sort of work that comes within the ambit of the immunity under s 6(5).[59] The work of giving effect

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56 *Gazley*, above n 8, at 678–682 per Henry J; and *Chapman*, above n 8, at [161] per McGrath and William Young JJ.

57 *Chapman*, above n 8, at [208] per McGrath and William Young JJ.

58 *Quinland v Governor of Swaleside Prison* [2002] EWCA Civ 174, [2003] QB 306 at [41], quoted in *Thompson*, above n 27, at [43].

59 See for example *Crispin v Registrar of the District Court* [1986] 2 NZLR 246 (HC) at 250; and *Seatrans (Fiji) Ltd v Attorney-General* [1986] 2 NZLR 240 (HC) at 244.

to judicial decisions also of course features in the passage from *Chapman* quoted above.

[49] In the present case, the task of preparing the warrant was a task of implementing a judge's decision, namely the sentencing decision that had been pronounced by the Judge in open court. It was also a task to assist the Judge with the exercise of his statutory powers and duties under s 91 of the Sentencing Act. Contrary to a submission made by Mr Ewen, the fact the Deputy Registrar's execution of the task was flawed — that is to say, the fact he or she did not accurately implement the decision — is not the point. It is the nature of the task that counts, not the way it was performed.[60] It has never been suggested that the fact a judicial act is carelessly executed by a judge means the act loses its character as a judicial act.[61] Were that the case, there would not be much purpose in an immunity.

[50] The consequences of not affording immunity from suit when a registrar is engaged in the task of giving effect to a judge's decision were traversed by McGechan J in *Crispin*.[62]

[51] In *Crispin*, a deputy registrar in the District Court had, by mistake, recorded the wrong name of a judgment debtor when entering the record of a default judgment in the Court's civil record book. The person who had been incorrectly named sued the Crown in tort. It was argued, as it has been in this case, that in recording the judgment, the Deputy Registrar was not exercising a judicial power but rather a purely administrative one and therefore the Crown was not afforded the protection of any immunity.

[52] However, rather than dissect the two acts — the entry of the default judgment and the recording of it — into separate categories, one judicial and the other administrative, McGechan J considered that both steps were integral parts of the same process and therefore both were judicial acts. In his assessment, there was an "air of

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60 *Crispin*, above n 59, at 250.

61 See for example *Gazley*, above n 8, at 682 per Henry J.

62 *Crispin*, above n 59. The decision was unsuccessfully appealed to the Court of Appeal, *Crispin v Registrar of the District Court* [1986] 2 NZLR 254 (CA), which did not address the points at issue here.

unreality" in seeking to isolate one from the other.[63] The immunity of registrars when giving effect to judges' decisions was seen as a necessary corollary of judicial immunity.[64]

[53] In support of his view that the administration of justice required immunity in relation to the Deputy Registrar's action, McGechan J expressed the strong view there was a risk that otherwise the effectiveness of judicial immunity would be undermined by what he described as a flank attack on judicial decisions.[65]

[54] *Crispin* was followed in another High Court decision, *Young v Attorney-General*, where it was held that in annotating bail papers, the Deputy Registrar was discharging responsibilities that he had in connection with the execution of the judicial process and therefore he enjoyed immunity under s 6(5).[66] The erroneous annotation had resulted in the claimant being wrongfully held in custody for 23 days.

[55] This outcome can be usefully compared with the decision in *Seatrans (Fiji) Ltd v Attorney-General* where it was held that a Registrar's failure to pay money into an interest-bearing account was not within the scope of the s 6(5) immunity. It was neither a responsibility of a judicial nature nor connected with the execution of judicial process. It was an act done without reference to a judge.[67]

[56] Ellis J declined to give the *Crispin* line of authority any weight on the grounds that *Crispin* was decided under the Crown Proceedings Act and not concerned with a claim for public law compensation.[68] However, it is of course consistent with the passage about the Registrar's immunity from *Chapman* quoted above.[69] We also agree, as submitted by Mr Jones, that authorities such as *Crispin* that set out a principled basis for the immunity of registrars must be relevant to determining the extent of a registrar's immunity in relation to claims under the Bill of Rights.

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63 *Crispin,* above n 58, at 250.
64 At 252.
65 At 252.
66 *Young v Attorney-General* [2003] NZAR 627 (HC) at [26].
67 *Seatrans*, above n 59, at 244.
68 Judgment under appeal, above n 1, at [30]–[31].
69 See [22].

[57] As also pointed out by Mr Jones, judges do not work alone. They are reliant on the assistance of registry staff for the conduct of judicial business. Whether a judge has personally drafted a document, amends a document provided to them, or simply considers a draft and signs off on it, once it is signed by a judge, it is the judge's document. To deny immunity to those who prepare the document thus creates uncertainty as to the extent of judicial immunity, blurs the line of supervision between judge and registrar and also in our view incentivises claimants to go behind judicial decisions and seek to attribute fault to non-judicial actors.

[58] To insert liability in relation to the drafting of a judicial document is also problematic from the point of view of judicial independence. As mentioned in *Chapman*, the need to promote and protect judicial independence was seen as of particular importance.[70] Registrars are employed by the executive but in relation to judicial business they are under the supervision of judges. The exposure of their employer to liability as a result of them undertaking tasks for judges creates an obvious conflict of interest, or at the very least the perception of one.

[59] We therefore disagree with Ellis J's finding that the only consequence of denying immunity to registrars preparing committal warrants would be to ensure that better care would be taken.[71] We also disagree with the suggestion that the need to shield judges who make errors from adverse publicity is regarded as a significant policy factor underpinning judicial immunity.[72] It was noted by this Court in *Gazley* that as long ago as 1827, the freedom from action for suit given to judges was "not so much for their own sake as for the sake of the public, and for the advancement of justice".[73]

[60] As for the availability of alternative remedies, we acknowledge that these are more limited in this case than they were in *Chapman* where the majority was able to rely on the criminal appeal process as providing a significant means of redress.[74] Here, unlike in *Chapman*, the breach concerned the implementation of the sentence, a matter

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70 *Chapman*, above n 8, at [97] and [192] per McGrath and William Young JJ and [212] per Gault J.
71 Judgment under appeal, above n 1, [38].
72 At [38].
73 *Gazley*, above n 8, at 671, citing *Garnett v Ferrand* (1827) 6 B & C 611 at 625, 108 ER 576 (KB) at 581.
74 *Chapman*, above n 8, at [193] and [195] per McGrath and William Young JJ.

obviously outside the scope of an appeal against conviction. Further, Mr Putua did not have the ability to seek a compensatory payment under the Cabinet Compensation Guidelines for Wrongful Conviction and Detention because that scheme applies only to persons who are imprisoned as a result of being wrongfully convicted.[75]

[61] Mr Putua did however have a right to appeal his sentence which afforded a possible avenue of relief. It appears he in fact exercised that right and was represented by legal counsel without the error being raised.[76]

[62] Another alternative remedy identified in *Thompson* and in the 1997 Law Commission report is the making of an application under the Habeas Corpus Act 2001, which was something available to Mr Putua.[77] Ellis J expressed the view this was not a realistic option in the circumstances Mr Putua found himself in, [78] but did not say why that was so given Mr Putua was apparently aware of the mistake from the outset and had access to a lawyer.

[63] The availability of alternative non-compensatory remedies does not of course answer Mr Ewen's point about art 9(5) of the ICCPR. However, if denying a monetary remedy in the case of a registrar's error is a breach of art 9(5), then so too is the denial of relief for breaches by judges, even those that result in wrongful convictions.[79] Yet that was not seen as an insuperable impediment in *Chapman* or *Thompson*, nor indeed by the Law Commission.[80] Clearly the view was taken that potential breaches of art 9(5) are outweighed by the other considerations we have previously identified.

[64] For all these reasons of precedent, principle and policy, we are persuaded that Ellis J was wrong to impose liability on the Crown for the Deputy Registrar's error in the preparation of the warrant. In our view, the principles of judicial immunity are engaged by the claim.

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75 Ministry of Justice "Compensation Guidelines for Wrongful Conviction and Detention" (28 February 2023).

76 *Putua v Police*, above n 2.

77 *Thompson*, above n 27, at [73]; and Law Commission, above n 10, at [76] and [139], citing *Nakhla v McCarthy* [1978] 1 NZLR 291 at 293–294.

78 Judgment under appeal, above n 1, at [52].

79 As Mr Ewen points out, art 9(5) appears to require a legally enforceable right to compensation which a discretionary compensation scheme does not satisfy. New Zealand has made a reservation in relation to art 14(6) but not art 9(5).

80 *Chapman,* above n 8; *Thompson*, above n 27; and Law Commission, above n 10.

[65] In coming to that conclusion, we have not overlooked the additional arguments raised by Mr Ewen in support of the decision.

[66] The first was that in issuing the warrant, the District Court Judge was not exercising the jurisdiction of the Court. However, that cannot be right. Section 19 of the District Court Act headed "Powers of Judges" states in subs (2)(b) that a judge "exercises the jurisdiction of the Court by … exercising the powers conferred by this Act or any other enactment on the court or the Judge of the court". The Sentencing Act is another enactment and s 91 provides for the issue of a signed warrant by the court.

[67] As regards the status of community magistrates and justices of the peace, we are not persuaded that is directly relevant. Those judicial officers have immunity when acting within jurisdiction. Both actors in this case were acting within jurisdiction. The extent to which a registrar enjoys immunity when acting to give effect to the decisions of a community magistrate or justice of the peace made outside jurisdiction is not relevant in this case.

[68] We also do not accept there is anything in the statutory scheme of either the District Court Act or the Justices of the Peace Act which is necessarily inconsistent with a deputy registrar being afforded the immunity which applies to the judicial officer whose decision they were giving effect to. As Mr Jones submitted, and as we have found, the extension of immunity to court officers giving effect to judges' decisions is necessary for judicial immunity to be effective.

[69] Our conclusion that the preparation of the warrant was protected by judicial immunity for the purposes of a monetary claim under the Bill of Rights means the Crown's appeal must be allowed and the compensatory award of the High Court set aside.

[70] In turn this means it is strictly unnecessary for us to address the second appeal issue, that of causation, which was the Crown's fallback position in the event we were to hold judicial immunity was not engaged. However, in deference to counsel's

submission and because we consider some aspects of the Judge's reasoning on causation merit discussion, we now turn to that issue.

Was the District Court Judge's signing of the warrant an intervening cause that operated to negate any liability for the Deputy Registrar's mistake?

The High Court decision

[71] Ellis J rejected the Crown's contention that the sentencing Judge's signature was an intervening or superseding causative act. She did so primarily on the grounds that as a matter of law it was not necessary for a warrant to be signed by a judge in order for it to be valid. The Judge reasoned that if such warrants can be lawfully relied and acted on without any judicial signature, then "the act of creating the warrant itself has sufficient legal heft to give that act independent life" in Bill of Rights terms.[81]

[72] In finding that an unsigned warrant was valid, the Judge relied on three High Court decisions where that view had been expressed, namely *AB v Attorney-General*, *Forrest v Chief Executive of the Department of Corrections* and *R v Fisher*.[82] She distinguished *Thompson* on the grounds that there the consequences of the Registrar's error were not plainly foreseeable whereas in the present case the creation of the warrant was a mandatory formal act with clear consequences known to impact rights.[83]

The Crown submissions

[73] Mr Jones challenged the finding that a signature was not essential, submitting that such a finding was contrary to s 91 of the Sentencing Act. He further submitted the comments made in the three High Court decisions relied on by the Judge were either wrong on the point,[84] distinguishable because of their context, or in the case of one had been misinterpreted.[85] Two of the cases involved habeas corpus applications,[86] and the third concerned the admissibility of evidence found as the result

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81 Judgment under appeal, above n 1, at [42].

82 *AB v Attorney-General* [2018] NZHC 1096; *Forrest v Chief Executive of the Department of Corrections* [2014] NZHC 1205; and *R v Fisher* HC Auckland T236/95, 4 October 1995.

83 Judgment under appeal, above n 1, at [41]–[42].

84 *AB v Attorney-General*, above n 82.

85 *Forrest v Chief Executive of the Department of Corrections*, above n 82.

86 *AB v Attorney-General,* above n 82*; and Forrest v Chief Executive of the Department of Corrections,* above n 82.

of a body search of an accused while she was detained in the wrong custodial facility.[87] Mr Jones also contended the comments made in the three cases about the validity of unsigned warrants were not necessary to their respective outcomes and therefore less authoritative.

[74] Mr Jones emphasised that unless judges are not responsible for the accuracy of the warrants they sign — a plainly untenable proposition — the Judge in this case must on any view of it have been as responsible as the Deputy Registrar for what happened. Further, given it was the job of the Judge to supervise the Deputy Registrar in the conduct of judicial business, combined with the fact the Judge's actions were later in time, those actions superseded the actions of the Deputy Registrar and became the effective cause.

Mr Putua's submissions

[75] Mr Ewen's submissions focused on the status and function of a committal warrant. Citing *Fisher*, Mr Ewen submitted it was the sentencing decision that provided the authority to detain, not the committal warrant.[88] The committal warrant was simply evidence of the authority. That was demonstrated by the fact that Mr Putua became a serving prisoner immediately after the sentence was imposed, not when the warrant was signed.[89] The fact too that any District Court judge could have signed it was an indicator that the warrant was not a fresh judicial determination or imposition of the sentence, but simply a confirmation of it.

[76] Developing this central submission, Mr Ewen further argued that a committal warrant, whether signed or unsigned, serves two principal functions. The first is that by virtue of s 37 of the Corrections Act 2004 a committal warrant is required in order for a person to be admitted into prison. The second function of the warrant is that it provides the detainer with a defence to both criminal and civil liability.[90]

[77] Section 37 of the Corrections Act states as follows:

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87 *R v Fisher,* above n 82
88 *R v Fisher,* above n 82.
89 Parole Act 2002, s 76(1).
90 Crimes Act 1961, ss 27-28.

> **37 Effect of warrant, etc, for specified prisons**
>
> (1) Except where otherwise allowed by law, no person may be received in a prison without a valid committal order.
>
> (2) Any committal order issued, whether before or after the commencement of this Act, for the detention of any person in any specified prison is sufficient authority for the reception and detention of that person in any other prison to which he or she might have been committed.
>
> (3) Any committal order identifying the prison by reference to its location or by any other sufficient description is not invalid by reason only that the prison is usually known by another name or description.
>
> (4) In this section, **committal order** includes any warrant, writ, order, direction, or authority requiring the detention of any person.

[78] In Mr Ewen's submission, signing or non-signing was therefore incidental, and Ellis J was accordingly correct to find it was the Deputy Registrar's mistake and not the District Court Judge's mistake that led to the unlawful detention.

Analysis

[79] As we now go on to explain, we agree with Ellis J's finding of a causal link between the Deputy Registrar's error and Mr Putua's unlawful detention, but on a slightly different basis.

[80] We begin our analysis with the observation that in our view the Judge's reasoning and Mr Ewen's submissions downplay the importance of a judge's signature on a committal warrant.

[81] It is clear in our view that s 91 of the Sentencing Act requires the warrant to be signed by a judge. Signing is not optional under s 91. It does not need to be the sentencing judge who signs the warrant but it must nonetheless be signed by a judge. And only a judge. There are no provisions in the District Court Act or any relevant procedural rules which authorise a registrar to sign a warrant of commitment.

[82] That the warrant must be signed, and signed only by a judge, is further reinforced by the warrant of commitment form contained in the

Sentencing Regulations 2002.[91] The form (like other warrant forms in the same regulations, such as arrest warrants and orders to seize property) specifically provides for the signature of a judge. This is in contrast to other forms contained in the same schedule which under the signature line specify "(Deputy) Registrar".[92] Noteworthy too is the fact that the form for a committal warrant requires the place of detention to be specified, which is not something that is part of the sentence imposed by a judge in open court.

[83] There must be some reason why a committal warrant must be signed and why only a judge can do it. And the reason is obvious. It is a safeguard as to the correctness of the warrant. The warrant may not be the underlying basis for detention but it is, as Mr Jones submitted, nevertheless a formal document of some considerable consequence. It is an immediate cause of a prisoner being received into a particular custodial facility and it is the basis upon which that facility determines how long the detainee is to serve. In signing, a judge is effectively certifying the accuracy of the contents of the warrant. The judge endorses it. Or to put it another way, their signature is a representation that the warrant reflects the sentencing decision. Whether the signing judge is the sentencing judge or not, they are clearly obliged to check its contents.

[84] That said, we agree with the proposition that the authority to detain derives from the sentencing decision. Whether that in turn means an unsigned warrant is valid for all purposes is more debatable. None of the High Court decisions relied on by Ellis J directly addresses the point that the failure to sign a warrant is a breach of a statutory requirement.

[85] However, it is not necessary for us to express any concluded view on the application of the reasoning in those cases to the present case. That is because, in our view, even if an unsigned warrant does not render the detention unlawful, that cannot be determinative of the causation issue on the facts of this case.

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91 Sentencing Regulations 2002, sch, form 9.
92 See for example forms 1–4.

[86] What appears to have been overlooked in this case in terms of causation is that had an unsigned warrant (a document where a specific place for a signature has been left blank) been presented to the receiving prison, it is highly likely the receiving prison would not have accepted it outright at face value but would have made inquiries of the sentencing court, resulting in a closer look at its contents. The fact of the signature however made it almost inevitable those questions and a closer look never happened.[93]

[87] In this regard, we note too that as mentioned Mr Putua claims he protested on arrival at the prison that there had been a mistake. If that is true, then again, had the warrant been unsigned, it is likely greater credence would have been given to his protests, further inquiries made, the warrant corrected and he released at the correct point in time.

[88] The signing of the warrant was not therefore, in our view, devoid of any causative effect as Ellis J appears to have assumed. We consider it was significant.

[89] There is no discussion in the High Court decision under appeal as to what principles of causation apply in public law damages claims.[94] In the absence of any suggestion to the contrary from counsel, we therefore adopt the view taken in *Thompson*, namely that orthodox causation principles, derived from other types of claims for example in tort and contract, are applicable.[95]

[90] Under those well-established causation principles, it is not necessary for there to always be just one cause. There may be multiple causes, each of which has contributed to the harm suffered. Thus, in tort for example, the negligent creation of

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93 We acknowledge that the facts of *AB v Attorney-General*, above n 82, involved a registry practice of sending through unsigned warrants to the prison before the signed warrants were completed. However, there is no suggestion in the case that that was anything other than an isolated local practice which has since been discontinued.

94 We note that in *Fitzgerald v R* [2022] NZHC 2465, [2023] 2 NZLR 214 at [120] (a judgment heard by Ellis J at the same time as the judgment under appeal) the Judge stated she found the use of causation terminology in *Thompson*, above n 27, confusing. The Judge suggested that if viewed through the lens of the vindicatory tort of false imprisonment, the absence of an intention to detain rather than a causal link between the Registrar's action and the detention could be seen as the reason there was no breach of s 22 by the Registrar. However, not having heard any argument on the extent of the analogy with false imprisonment in the present case, the Judge did not take the suggestion any further in the judgment under appeal.

95 *Thompson,* above n 27, at [75].

a building defect by a builder and the subsequent negligent failure to detect it on inspection by the relevant local authority are both treated as contributing causes, rendering each of them liable.[96]

[91] And that in our view is the causal position here. There was an opportunity for the harm to have been totally avoided had the Judge discharged his clear obligation to check. In some senses, his is the primary responsibility because the very purpose of his checking was to prevent errors, it was his document and the drafter was his subordinate. However, as a matter of impression we do not consider that his failure to check constitutes an intervening cause completely breaking the chain of causation between the error created by the Deputy Registrar and the arbitrary detention. In terms of the authorities on intervening causes, the Judge's error was directly precipitated by or attributable to being provided with a defective draft.[97] What happened was within the scope of the risk created by the Registrar; it was a thing very likely to happen.[98] It is a different scenario from *Thompson* where the link between the Registrar's error and the arbitrary detention was significantly more tenuous and remote.[99]

[92] In short, in our view, the Deputy Registrar's error in the preparation of the warrant was an operative cause of Mr Putua's arbitrary detention, but it was not the only cause. This finding does not of course alter the outcome of the appeal which turns on the Crown being under no liability to compensate Mr Putua for the Deputy Registrar's error due to judicial immunity.

Costs

[93] Both parties sought costs in the event they were successful on appeal. However, although the Attorney General is the successful party, we are advised that Mr Putua is legally aided, meaning that no order for costs may be made against him unless the Court is satisfied there are exceptional circumstances.[100] In our view, there

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96 See for example *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Carrington v Easton* [2013] NZHC 2023; and *Body Corporate 160361 v BC 2004 Ltd* [2015] NZHC 1803.

97 *McCarthy v Wellington City* [1966] NZLR 481 (CA) at 517 per Turner J (CA); and *Pallister v Waikato Hospital Board* [1975] 2 NZLR 725 (CA) at 742 per Woodhouse J.

98 *Furniss v Fitchett* [1958] NZLR 396 (SC) at 408; *McCarthy*, above n 97, at 517 per Turner J (CA); *Pallister*, above n 97, at 741–742 per Woodhouse J.

99 *Thompson*, above n 27, at [76].

100 Legal Services Act 2011, s 45(2).

are no exceptional circumstances. Mr Putua has not conducted himself in any way that would warrant an award of costs. Finally we note that no costs award was made in the High Court.

Outcome

[94] The appeal is allowed and the decision of the High Court is set aside.

[95] There is no order of costs.

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