IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-397
[2018] NZHC 1447

UNDER	the Judicature Amendment Act 1972, New Zealand Bill of Rights Act 1990, Corrections Act 2004, International Covenant on Civil and Political Rights
IN THE MATTE OF	an application for judicial review
BETWEEN	RICHARD GENGE Applicant
AND	CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIONS First Respondent
	ATTORNEY-GENERAL Second Respondent

Hearing:	6 November 2017 (Further submissions filed between 10 November 2017 and 3 May 2018)
Appearances:	Applicant in Person C A Griffin and A L Dixon-Blake for Respondents
Judgment:	15 June 2018

JUDGMENT OF CLARK J

Introduction

[1] On 25 October 1995 Mr Genge was sentenced to life imprisonment with a minimum non-parole period of 15 years for murder. He was sentenced concurrently to 12 years' imprisonment for sexual violation by rape. Mr Genge has been in prison ever since. He was denied parole when he first appeared on 29 September 2009. The

Parole Board has declined parole on nine further occasions, most recently on 30 May 2018.

[2] In this application for judicial review Mr Genge asks the Court to declare that he has been arbitrarily detained. He seeks release and compensatory and exemplary damages.[1] The broad basis for Mr Genge's claim is that the Department of Corrections has failed to provide interventions or rehabilitative programmes to accommodate his specific needs. As a result he has been denied the opportunity to present at the New Zealand Parole Board with a realistic prospect of being granted parole and his detention, Mr Genge says, has become unlawful and arbitrary.

[3] The first respondent, the Chief Executive of the Department of Corrections, claims the Department has done all that can reasonably be required of it to offer and make available to Mr Genge appropriate rehabilitative interventions but Mr Genge has refused to co-operate with departmental psychologists. The decisions of the Parole Board, and not any action of the Department of Corrections, have continued Mr Genge's detention.

[4] I turn immediately to the Corrections Act 2004 as it is necessary to understand the nature of the statutory obligation to provide rehabilitative treatment in order to assess Mr Genge's detailed claims and the Chief Executive's responses.

Statutory framework

[5] The purpose of New Zealand's corrections system is to improve public safety and contribute to the maintenance of a just society.[2] This purpose is to be achieved by a number of statutory mechanisms which are set out at s 5(1)(a) to (d). Paragraph (c) is aimed at achieving the purpose of public safety and maintenance of a just society by:[3]

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1 Mr Genge also pleads breach of statutory duty and misfeasance in public office. At a case management conference, the judicial review aspect of the claim was directed to be heard first with the tortious claims to be heard subsequently, depending on the outcome of the judicial review proceeding.

2 Corrections Act 2004, s 5(1).

3 Section 5(1)(c).

> assisting in the rehabilitation of offenders and their reintegration into the community, where appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available, through the provision of programmes and other interventions …

[6] When making decisions about the management of persons under control or supervision the paramount consideration is the maintenance of public safety.[4] Other principles guiding the operation of the corrections system are enacted in s 6. The following particular principles are relevant to the statutory purpose of rehabilitation:

(a) In developing and providing rehabilitative programmes and other interventions to assist rehabilitation and reintegration into the community, to the extent practicable and where appropriate, an offender's cultural background, ethnic identity and her or his language is to be taken into account.[5]

(b) To the extent reasonable and practicable family members must be involved in decisions relating to rehabilitation and reintegration.[6]

(c) Offenders must, so far as is reasonable and practicable in the circumstances, be given access to activities that may contribute to their rehabilitation and reintegration into the community.[7]

[7] While these principles are to guide the operation of the corrections system they are qualified in a consistent and significant way. They are to be given effect, where appropriate, to the extent practicable "within the resources available".[8]

[8] The chief executive must ensure as far as is practicable that every prisoner is provided with an opportunity to make constructive use of her or his time in prison.[9]

[9] A specific obligation on the chief executive to provide rehabilitative programmes is enacted in s 52:

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4 Section 6(1)(a).
5 Section 6(1)(c)(i).
6 Section 6(1)(e)(i).
7 Section 6(1)(h).
8 Section 5(1)(c) and s 6(1)(c).
9 Section 50.

> **52 Rehabilitative programmes**
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> The chief executive must ensure that, to the extent consistent with the resources available and any prescribed requirements or instructions issued under section 196, rehabilitative programmes are provided to those prisoners sentenced to imprisonment who, in the opinion of the chief executive, will benefit from those programmes.

[10] A "rehabilitative programme" is defined in s 3 as:

> (a) a programme designed to reduce reoffending by facilitating the rehabilitation of prisoners sentenced to imprisonment and their reintegration into society; and
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> (b) includes any medical, psychological, social, therapeutic, cultural, educational, employment-related, rehabilitative, or reintegrative programme.

[11] Section 52 gives effect to New Zealand's obligations under art 10(3) of the International Covenant on Civil and Political Rights (ICCPR).[10] Article 10(3) of the ICCPR states:

> The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. …

[12] The grant of parole in New Zealand is governed by the Parole Act 2002. The Parole Board may grant parole to eligible prisoners "only if it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community".[11] The paramount consideration is the safety of the community.[12] Offenders must not be detained any longer than is consistent with the safety of the community.[13]

Available rehabilitative programmes

[13] Over the decades a range of programmes has been designed for adult and child sex offenders and for other violent offenders. Those in the business, and the prisoners, refer to the programmes by acronyms. My preference is to avoid acronyms but in the context of this judgment that would create unnecessary length and possibly confusion.

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10 *Miller v New Zealand Parole Board* [2010] NZCA 600 at [143].
11 Parole Act 2002, s 28(2).
12 Section 7(1).
13 Sections 7(2).

Mr Genge has pleaded his case, and written comprehensive submissions, using the acronyms. Therefore, I will briefly describe the programmes and define the acronyms at the outset.

[14] Nicola Reynolds, Chief Psychologist of the Department of Corrections, described the programmes in her affidavit evidence. Ms Reynolds was appointed Director of Psychological Services in 2010. In 2012 the position changed to Chief Psychologist. She has overarching responsibility for the delivery of the Department's rehabilitative treatment programmes for high-risk offenders. Ms Reynolds gave expert testimony notwithstanding her employment relationship with the Department. Although she has not met Mr Genge nor made any psychological assessment or recommendation specific to his circumstances, in her capacity as Chief Psychologist Ms Reynolds has, in the past, responded to letters from Mr Genge's lawyers.

[15] There are six prison-based special treatment units (STUs) for violent or sexual offenders and one community-based STU for high risk offenders serving community sentences. Each STU is managed by a principal psychologist who is supported by a team of psychologists and specially trained custodial staff. One of the STUs is at Christchurch Men's Prison where Mr Genge is serving his sentence.

[16] Four of the STUs, including at Christchurch Men's Prison, provide intensive group-based treatment for high-risk violent offenders through violence relapse prevention programmes (known as STURP). The units vary in size but in total provide 140 places at any one time for men undertaking the programme. Three of the units also provide intensive treatment programmes for high-risk adult sex offenders. This is known as the Adult Sex Offender Treatment Programme (ASOTP). These groups are run annually and accommodate a total of 30 high-risk offenders. This is additional to the 140 places for violent offenders.

[17] The four STUs in their current form did not exist prior to 2007. The only prison-based high-intensity programme for high-risk violent offenders was the programme offered at the Violence Prevention Unit (VPU).

[18] The VPU opened in 1998 in Rimutaka Prison. It was the first special treatment programme for violent offenders internationally. The VPU ran an eight month programme in a 30-bed unit. As such, only a small cohort of prisoners could attend each year. The intention was to treat the most serious high-risk violent offenders.

[19] With the evolution of literature and research into the efficacy of such targeted treatment groups, in 2006 the Department piloted a high-intensity eight month programme for a select group of adult sex offenders (ASOTP). Only 10 prisoners from Auckland's maximum security prison participated. The pilot was repeated in 2007 and 2008. In 2009 ASOTP was funded to continue as a permanent option within the Department's rehabilitative treatment approach. A maximum of 30 offenders per annum were able to access the programme.

[20] By 2010 the relevance of the distinction between the operation of the VPU and the other STUs was no longer favoured for reasons which Ms Reynolds explained in her affidavit but which it is unnecessary to set out in this judgment. The VPU was renamed Te Whare Manaakitanga (TWM) and its selection criteria aligned to that for the other STUs. The short point is that four STUs now provide the STURP to 140 violent offenders annually and, with the exception of TWM, also provide the ASOTP to 30 adult sex offenders. Ms Reynolds added at this stage of her affidavit:

> Given this intensive transitioning period between 2006 and 2010, it is not surprising that Corrections staff across all service areas may confuse the terminology for what were evolving programmes. For example, even today some staff will continue to refer to the VPU when in substance referring to the STURP.

[21] Ms Reynolds said she did not expect custodial staff to be as familiar with entry criteria for the STUs or the evolution of the VPU and ASOTP programmes. And while some staff members, including case managers —

> may make suggestions or recommendations about various options (which I do not discourage), it is the recommendations of Departmental psychologists in their formal reports that ultimately are to be followed.

[22] Ms Reynolds instanced an example which Mr Genge himself included in his affidavit of staff members exhibiting confusion about entry criteria to the VPU.

[23] Ms Reynolds also outlined the methodologies applied by psychologists in the criminal justice field and the importance of timing what is described as "targeted offence specific treatment" to prepare an offender for release into the community. The model applied is known as the "risk need responsivity model" (RNR):

(a) An assessment is made of the risk an offender presents, both in terms of likelihood of offending and the level of treatment required. High-risk offenders require longer, more intensive treatment than low-risk offenders who may require no treatment at all.

(b) Dynamic risk factors, such as situational factors or personality traits, are identified. These are referred to as criminogenic (offence-related) factors. It is important to identify them to be able to plan treatment. Treatment is effective if it targets these "criminogenic needs" to reduce the risk of recidivism.

(c) The responsivity principle is concerned with tailoring treatment to suit the individual and takes account of cultural background and learning ability.

[24] The principles of the RNR framework underpin all programmes and psychological treatment. Ms Reynolds observed that engaging in therapeutic counselling in isolation is beneficial to well-being but is not treatment for re-offending risk.

Statement of claim

[25] In his first amended statement of claim dated 11 July 2016 Mr Genge pleads:

(a) Despite being forwarded for VPU in 2005 he was rejected "on the basis of non-compliance of entry and participation criteria".

(b) Mr Genge cannot enter or participate in any of the structured VPU, DTU (Drug Treatment Unit), ASOTP or STURP because of entry or participation criteria.

(c) While the Department declined to provide individual counselling Mr Genge, against opposition, managed to obtain one-on-one counselling of his own volition.

(d) At the Parole Board hearing in September 2009 Mr Genge was recommended to attend the DTU and STURP but does not meet the criteria for participation.

(e) Internecine struggles and administrative dysfunction within the Department and psychologists have precluded Mr Genge's participation in programmes and that has arbitrarily extended his custodial sentence.

(f) Contrary to s 51 of the Corrections Act no reintegration programmes have been provided since 2005.

[26] Mr Genge claims the non-provision of programmes is contrary to s 52 of the Corrections Act and a transgression of the duty of care the Department owes to him.

[27] Mr Genge also claims his detention is unlawful because the Parole Act is being retrospectively applied to him even though he was sentenced before the Parole Act's commencement.

Issues

[28] The application for judicial review raises three specific issues for determination:

(a) Has the Department failed to provide Mr Genge access to appropriate rehabilitative services and treatment?

(b) If so, is Mr Genge arbitrarily detained?

(c) Is Mr Genge's detention otherwise unlawful because he was sentenced prior to the introduction of the Parole Act?

Has the Department failed to provide Mr Genge access to appropriate rehabilitative services and treatment?

Parties' positions

[29] Mr Genge filed several sets of written submissions prior to the hearing: in September 2016, February 2017 and May 2017. He filed two memoranda following the hearing, in May 2018. I do not attempt to summarise Mr Genge's submissions. A mere precis of Mr Genge's meticulous, hand-written submissions, totalling over 100 pages, will inevitably omit content of real significance to Mr Genge's perception of his case and possibly exacerbate his concerns that he is not being heard.

[30] I have read Mr Genge's submissions and listened carefully to his oral submissions.

[31] Mr Genge is aggrieved at his continuing detention in the face of departmental changes of attitude and asserted eligibility or ineligibility for programmes. For example, up until 2013 Mr Genge said he was being pushed towards a programme (VPU) when he did not meet the criteria yet when eligible he is excluded from participation on other grounds.

[32] Mr Genge says he has limited time and the treatment of him is unfair. He said he is recorded in a Parole Assessment Report (PAR) to the Parole Board as having declined an assessment for STURP when that was not true. Mr Genge took me to a document in the common bundle which supported his account: a principal corrections officer had emailed Mr Genge's senior case manager advising Mr Genge was willing to undertake assessment and that an apparent report to the contrary was incorrect.

[33] Mr Genge took me to authorities on arbitrary detention, the statutory duty of the chief executive to provide rehabilitative programmes, and provisions in the State Sector Act 1988 underscoring the chief executive's duty to facilitate prisoners' access to rehabilitation.

[34] Mr Genge regards it as "shocking" that eight years post eligibility for parole he has still not participated in programmes that could have facilitated his release.

Mr Genge is not only upset about his current position; he expressed concern also about the earlier years when he had an entitlement to attend programmes but was given nothing. Mr Genge rightly observed that sentences are not just about punishment. They are also concerned with rehabilitation yet 23 years into his sentence the Department is failing to provide what is necessary for his release. He is caught in a classic "Catch 22" situation.

[35] Mr Genge takes issue with the objectivity of the writers of the reports for the Parole Board describing psychological services as having a "monopoly". Mr Genge also asked, rhetorically, why he should open up to people he meets for the first time. The bi-cultural therapist he saw for many years advocated his release but it took many years for Mr Genge to open up. Mr Genge sincerely does not want to be in a group, dealing with other people's issues, and feels he should not be forced into that kind of environment. He frankly described himself as not interested and, in any event, not qualified to help others deal with their issues. But Mr Genge's real point about all this — about his resistance to group interventions — is that it does not negate the fact the Department has failed to provide him with the programmes he needs.

[36] The Chief Executive's broad position is that four years prior to Mr Genge becoming eligible for parole, staff began to encourage him to attend the only group treatment programme available at the time for high risk violent offenders, the VPU. Mr Genge declined. While Mr Genge says he has been prevented, since that time, from attending any programmes, this is disputed. Since 2005 the Department has offered many opportunities to Mr Genge to be assessed for, and engage in, offence-specific high-intensity treatment which Mr Genge has refused. That said Mr Genge has accessed broader rehabilitation services both prior to and following his parole eligibility date and the Department has supported and funded access to many years of counselling from a bi-cultural therapist.

[37] Over the course of Mr Genge's sentence, particularly since 2005, there has been significant development in the range of intensive treatment programmes available to high risk offenders. Departmental psychologists' recommendations have reflected the nature and availability of programmes at the relevant point in time. It is said Mr Genge's mistrust of departmental psychologists has often led to an early

breakdown in working relationships but the Department's overarching objective is to prepare Mr Genge for STURP if he is willing to attend.

The evidence

[38] There is a great distance between the parties' accounts of what has been offered to Mr Genge during his incarceration. It is necessary, therefore, to examine the evidence. Mr Genge has sworn two affidavits and three affidavits of evidence have been filed on behalf of the respondents. A three-volume common bundle contains psychological reports between 2007–2015, Parole Board decisions from 2009 and the exhibits to Mr Genge's affidavits.

[39] I have set out in an addendum to this judgment a detailed chronology of key dates, decisions and events bearing on the issue of Mr Genge's access to rehabilitative programmes. Broadly speaking, the following recommendations have been made over time.

[40] In 2007, Helen Venning, clinical psychologist, recommended Mr Genge be assessed for ASOTP and made a referral to the Auckland Psychological Service office. Were he to be found not suitable, Ms Venning recommended a referral to the VPU. Mr Genge was seen on five occasions between October and December 2006 for a total of seven hours.

[41] In 2009, Deborah Bremner, psychologist, recommended Mr Genge first address his substance abuse issues at the DTU prior to being assessed for the programme considered necessary to address Mr Genge's criminogenic needs, the VPU. After consultation, STURP was not considered an option given the then focus on the VPU. Mr Genge was seen on four occasions for a total of six hours.

[42] In 2010, Gahan Joughin, clinical psychologist, noting a "considerable deterioration in his motivation to address his offending", recommended Mr Genge work with his bi-cultural therapist to address barriers to attending the VPU, now renamed TWM. TWM is noted as having been "consistently" considered the most appropriate for Mr Genge given his violent offence history. A psychopathy checklist assessment was also recommended to gain a better understanding of Mr Genge's

personality structure and to guide appropriate intervention. Mr Genge declined to be interviewed for Mr Joughin's assessment.

[43] In June 2011, Mr Joughin repeated the need for intervention through Mr Genge's bi-cultural therapist to address barriers to intensive group-based treatment and that sessions be "clearly directed" toward that aim. Attendance at STURP (Matapuna) was recommended if there was sustained improvement in motivation for offence-specific treatment and following a full psychological assessment. Mr Genge again declined to be interviewed for assessment.

[44] In September 2011, Scott Barnett, clinical psychologist, repeated Mr Joughin's recommendations. Mr Barnett explained the change in recommendation from VPU/TWM to STURP. Mr Genge was seen on three occasions for a total of six hours.

[45] In October 2012, Paul Carlyon, clinical psychologist, agreed STURP was the optimal means of addressing Mr Genge's needs but considered there was little to be gained from being on the STURP waitlist given Mr Genge's lack of motivation and refusal to engage with or be assessed by Departmental psychologists. Although Mr Genge's bi-cultural therapist was no longer available, a recommendation was made for further bi-cultural therapy to focus on Mr Genge's reluctance to engage with psychologists and undertake offence specific intervention. Mr Genge once again declined to be interviewed.

[46] In early 2013, Mr Genge agreed to be assessed for treatment needs by Zoe Wilton, registered psychologist. He attended three sessions for a total of four and half hours. In her April 2013 report, Ms Wilton confirmed STURP remained the most effective rehabilitative option for offenders such as Mr Genge, but there was no value in continuing to recommend it while Mr Genge consistently refused to attend group- based treatment. In the meantime he was to be referred for individual psychological treatment, contingent on his willingness to agree goals with the treating psychologist.

[47] In October 2013, Ms Venning repeated Ms Wilton's recommendations and stated serious consideration should be given to referral to STURP following review of

the recommended individual treatment. Ms Venning met with Mr Genge for two sessions totalling five and half hours.

[48] In September 2014, Teresa Watson, clinical psychologist, continued to recommend STURP as the most appropriate treatment but referral was of no value whilst Mr Genge continued to refuse to participate in group treatment. Individual psychological treatment was recommended to support the long-term goal of STURP. If Mr Genge could not engage appropriately with the treating psychologist, then no further rehabilitation recommendations would be made at that time. Mr Genge was seen on one occasion for one and half hours.

[49] In August 2015, Ms Watson endorsed her previous recommendations and emphasised the need for individual treatment. Mr Genge was seen on one occasion for one and half hours.

[50] In December 2015, Sonja Bakker, clinical psychologist, reported on the outcome of five individual treatment sessions lasting up to an hour each. Ms Bakker had also seen Mr Genge once in August 2014. Ms Bakker continued to support referral to STURP but not until Mr Genge was able to demonstrate an ability to manage his behaviour towards psychologists in one-on-one sessions for more extended periods than her five sessions. No further treatment sessions or other rehabilitation recommendations were made pending progress by Mr Genge in managing his behaviour.

[51] In June 2017, Katrina Beach, senior clinical psychologist, noted Mr Genge had been unable to develop a credible working alliance with the departmental psychologist and, as a result, no offence focussed treatment, or preparation for such treatment, could be recommended at that time. Re-referral to psychological services would be reconsidered if Mr Genge demonstrated a change in self-management to a degree that beneficial engagement with a psychologist could occur. Any re-referral would be likely to be considered by a panel of senior psychologists and relevant advisors to assist in recommending initiation of individual treatment, STURP or DTU. Mr Genge was seen on one occasion for approximately 40 minutes.

[52] Mr Genge was also engaged in treatment provided by non-departmental providers. He was referred to the DTU in October 2009 (but was exited shortly afterwards for displaying anti-social and dominating behaviour that interfered with other group members). And he was engaged for a total of 168 hours on at least a fortnightly basis from February 2008 to September 2011 in bi-cultural intervention. Mr Genge reported that he trusted the bi-cultural practitioner and the treatment had met his offence-specific needs but a report by a departmental psychologist disagreed. The intervention had not mitigated Mr Genge's risk of reoffending. Nor had he acquired the requisite skills for participation in an offender rehabilitation programme.

Expert evidence

[53] In her capacity as a senior clinical psychologist with overarching responsibility for delivery of the Department's rehabilitative treatment programmes for high risk offenders, Ms Reynolds has critically reviewed the recommendations concerning Mr Genge's treatment.

[54] Ms Reynolds observes an "overarching theme" to all the psychological reports between 2007 and 2015:

(a) Mr Genge requires high intensity treatment at STU to specifically address his offence-related risks.

(b) First, however, Mr Genge requires individual psychological treatment to prepare him for the STU environment and to assist him to overcome the current barriers to treatment.

[55] Having reviewed all the reports and recommendations against the range of options available to psychologists at the relevant times, Ms Reynolds' opinion is that the difficulties Mr Genge has faced accessing treatment do not stem from eligibility criteria. Between 2007 and 2010 Mr Genge was consistently recommended for the VPU/TWM. From 2011 (once the programme content for TWM aligned with the three other STUs that had opened) STURP was consistently recommended. Mr Genge was able to attend Matapuna STU instead of having to move to Rimutaka.

[56] Referring to Mr Genge's identification of email correspondence and other documents between 2009–2010, in which psychologists and other staff stated he was not suitable or eligible for STURP because he was waitlisted for the VPU, Ms Reynolds explained that during this time VPU had distinct entry criteria whereas STURP did not. With that criteria in place Mr Genge's needs were considered to be more closely aligned to VPU than STURP. In other words, the evolution of the programmes, and common understanding of their content and terminology which was also evolving, contributed to confused communications but Mr Genge was always headed for the STURP programme — at least from 2011 — once he was eligible to attend. It is at this point that an impasse was reached.

Assessment

[57] As I observed earlier[14] the principles which guide the operation of the corrections system are qualified. So too is the chief executive's obligation, under s 52 to provide rehabilitative programmes, qualified. In *Taylor v Chief Executive of the Department of Corrections* (in the context of determinate sentences) Ellis J discussed the nature of the obligation:[15]

> [55] … although s 52 is expressed as a duty (requiring the chief executive to ensure that rehabilitative programmes are provided), that duty is expressly stated to be subject to:
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> (a) available resources;
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> (b) any prescribed requirements or instructions; and
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> (c) the chief executive's judgement about who will benefit from such programmes.
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> [56] Putting to one side those prisoners who are subject to intermediate sentences (discussed above) there can, there can, therefore, be no absolute right to access rehabilitative programmes of a particular kind at a particular time. There can, in my view, be no question of s 52 imposing either a private or public law duty to offer rehabilitative programmes to a particular prisoner; the most can be said is that the chief executive (and his delegates) have a discretion in that regard.

[58] Similar observations had been made by the Court of Appeal:[16]

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14 At [7].
15 *Taylor v Chief Executive of the Department of Corrections* [2016] NZHC 1805.
16 *Miller v New Zealand Parole Board*, above n 10, at [143].

> Section 52 is explicitly conditional whereas art 10(3) is not. We are, of course, bound by s 52 and not art 10(3). But in any event, we think that art 10(3) cannot be sensibly construed as imposing an obligation to provide "treatment" irrespective of either cost or likely benefit.

[59] Mr Genge had a further Parole Board hearing on 1 September 2017. Parole was declined. The psychological report to the Parole Board stated Mr Genge's behavioural responses to the most recent treatment sessions offered by a departmental psychologist, and his behaviour during the most recent assessment, and behavioural responses to group treatment at the DTU "have interfered" with any treatment progress he might have made. Given the long-standing nature of these responses Mr Genge had been unable to develop a credible working alliance with a departmental psychologist. Consequently, no offence-focussed treatment, or preparation for such treatment, could be recommended at that time.

[60] The PAR for the Parole Board hearing contained the following summary of progress:

> Mr Genge has participated in individual sessions with a Psychologist both prior to and following his last Board appearance. The treatment report and a subsequent report have stated that they would require a consistent and sustained improvement in his conduct and self-management before a referral for further assessment or treatment would be considered. For his part, Mr Genge has registered a degree of frustration that he is unable to progress his rehabilitation on terms that he is agreeable to. This then creates a potential stalemate leading to no specific rehabilitation or treatment currently being recommended or waitlisted for Mr Genge. This will be reviewed as soon as Mr Genge's situation changes or a direction is received to add a specific activity.

[61] There is no question that, over time, Mr Genge has received inconsistent messages from custodial staff. For example, the principal corrections officer recorded on 21 April 2016 that Mr Genge had approached him about doing the HRPP course in the High Security Unit at Rāwhiti. The request was declined for a number of reasons including that the course was "designed for difficult and non-compliant prisoners of which prisoner is not". Yet in May 2016 in the context of assessing Mr Genge's security classification, the approving officer recorded that until Mr Genge addressed his threatening, intimidating and non-compliant behaviour "possibly by successfully completing the HRPP" he should not be considered for a huts environment.

[62] Ms Reynolds appropriately acknowledged Mr Genge's "evident frustration" in progressing his treatment. Ms Reynolds referred specifically to the incorrect advice given to Mr Genge in early 2015 that he was to be transferred to the Matapuna STU to commence STURP only for him to be told two hours later he was not going. Ms Reynolds acknowledged Mr Genge should not have experienced this set back and apologised for the error. Ms Reynolds has also provided an explanation for other apparent inconsistencies in terminologies and recommendations of Department staff.

[63] However, in large part, Mr Genge is "sick of people telling him what to do and wasting his time". The evidence shows Mr Genge demands treatment "on his own terms" and that he appears unable to focus on the role his own behaviour has played in treatment failures. Mr Genge's beliefs he is victimised by the system have been described as "well-developed and rigidly held, and preclude any insight into his cognitive distortions, and ultimately, openness to support to learn and change". Mr Genge wrote a letter to his case officer Ken Frost on 8 August 2013. In it, he says his file notes are "bullshit". Prison staff seemed "out to get [him]". The things the staff had done to him were "unbelievable" but the staff had realised "the pen is a powerful weapon". When minimal rehabilitative progress is advised because of Mr Genge's behaviour, Mr Genge has accused the Department of "lying and playing games".

[64] Mr Genge is either unable or unwilling to engage with departmental psychologists, and departmental psychologists have been unable to establish a working relationship with Mr Genge. Putting Mr Genge forward for group treatment without proper preparation is likely to lead Mr Genge to be exited from that treatment. As the Parole Board observed that would be counterproductive.

[65] The evidence shows a pattern of attempts over the years to provide Mr Genge with rehabilitative support, through programmes and through one-on-one counselling to prepare him for such programmes. The department has invested some $12,600 plus GST in Mr Genge's bi-cultural therapist. Mr Genge has had ample opportunity to engage but has resisted engagement on terms other than his own. Consequently, Mr Genge remains assessed as at high risk of violent re-offending and medium high risk of sexual re-offending.

[66] The chief executive's duty to provide rehabilitative programmes is expressly stated to be subject to available resource, and the chief executive's judgment about who will benefit from such programmes.[17] Mr Genge has demonstrated no failure to offer him the opportunities to engage in the rehabilitative programmes, completion of which will enhance his eligibility for parole. The evidence simply does not support Mr Genge's contention, however firmly held.

[67] Mr Genge has not established this ground of review.

Is Mr Genge arbitrarily detained?

[68] In support of his contention he is being arbitrarily detained, Mr Genge relied on a line of English and international decisions concerning indeterminate sentences. In some instances the courts and tribunals have held that in certain circumstances, lawful detention may become arbitrary if a prisoner's sentence following parole eligibility is not regularly reviewed and the prisoner has not been given appropriate opportunities for rehabilitation where completion of such are a condition of parole.[18]

[69] Ms Griffin submitted there are "important qualifications to this line of jurisprudence and its application in New Zealand".

[70] Given my finding that the Chief Executive has not failed to provide Mr Genge with rehabilitation opportunities it is not necessary to determine this second issue. In acknowledgment, however, of the extensive submissions and materials Mr Genge has placed before the Court, I make the following brief observations:

(a) Even accepting the line of authority on which Mr Genge relies, he has not been denied regular reviews or appropriate opportunities for rehabilitation.

(b) The United Nations Human Rights Committee recently considered a similar claim by Mr Miller and Mr Carroll that the Department of

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17 Corrections Act, s 52.

18 *James, Lee and Wells v United Kingdom* (2013) 56 EHRR 399; *R (James, Lee and Wells) v Secretary of State for Justice* [2009] UKHL 22, [2010] 1 AC 553; *R Haney v Ors v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344.

Corrections had denied them timely rehabilitation treatment before first appearing before the Parole Board and thereby hindered their ability to obtain parole.[19] Accepting the Department's evidence that special treatment programmes should be commenced in temporal proximity to an offender's release date, and in the particular circumstances of the case, the Committee considered Mr Carroll and Mr Miller had not substantiated their claims they were denied effective rehabilitation treatment and that therefore their ability to obtain parole was impeded.[20]

(c) International jurisprudence recognises that a prisoner's refusal to engage in appropriate rehabilitative activities significantly contributes to delayed release. The Human Rights Council Working Group on Arbitrary Detention noted in *Isherwood v New Zealand*:[21]

> The Working Group recognises that it is the duty of the Government to provide the necessary assistance that would allow Mr Isherwood to be released as soon as possible, but it is also incumbent upon [Mr Isherwood] to take every opportunity provided by the Government to undertake rehabilitative activities in preparation for re-entry into the community. While Mr Isherwood has the right to refuse treatment and cannot be forced to undertake rehabilitative activities, the Working Group considers that he cannot claim that he has not had sufficient chance to reduce his risk of reoffending if he did not make every effort to participate in that treatment.

[71] The determinant in Mr Genge's delayed release has been his unwillingness to back down from his refusal to engage in group treatment. That Mr Genge remains in custody is not attributable to any failure to offer appropriate treatment nor an associated inability of the Parole Board to assess his eligibility for parole. On the basis of the most recent PARs because there is still no proposal for release — in any form — Mr Genge continues to be declined parole.

[72] Mr Genge has not established this ground of review.

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19 Human Rights Committee *Views: Communication No 2502/2014* 121 CCPR/C/121/D/2502/2014 (7 November 2017) (*Miller v New Zealand*).

20 At [8.2].

21 *Isherwood v New Zealand* A/HRC/WGAD/2016/32, 7 September 2016 at [59].

Is the Parole Act 2002 applicable to Mr Genge?

Submissions

[73] Mr Genge argues the Parole Act 2002 does not apply to him. He insists he remains subject to the parole regime under the repealed Criminal Justice Act 1985 because changes effected by the Parole Act amount to an additional penalty being applied to him.

[74] At the hearing Mr Genge forcefully protested what he sees as his arbitrary detention. Dealing first with the Parole Act Mr Genge said s 8 which is "repugnant and without authority" is inapplicable to him. Mr Genge submitted that, despite their repeal, ss 96 and 97(2) of the Criminal Justice Act apply to him.

Assessment

[75] As Ms Griffin submitted, this is not a novel argument for Mr Genge. Mr Genge has tested his thesis unsuccessfully in multiple proceedings. In an earlier application for habeas corpus Mr Genge alleged the Parole Act was wrongfully applied to him; that the threshold for parole under the Parole Act is more onerous than under the Criminal Justice Act and he is therefore subject to a retrospective additional penalty. The argument was rejected by Mander J:[22]

> Section 6 of the Sentencing Act and s 25(g) of the New Zealand Bill of Rights Act are directed to variations in the penalty for an offence, not to a particular penalty imposed on an individual offender. The sentence to which Mr Genge is subject, namely life imprisonment, has remained unchanged. The Parole Act is directed at the consequences of the imposition of sentences of imprisonment on offenders and the processes to be applied when determining parole. No retrospectivity arises.

[76] Following a separate habeas corpus proceeding on the same point, also dismissed in the High Court, Mr Genge's application to appeal directly to the Supreme Court was dismissed.[23] First, Mr Genge did not challenge the warrant under which he is detained.[24] Secondly, habeas corpus proceedings are an inappropriate context in

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22 *Genge v Superintendent of Christchurch Men's Prison* [2015] NZHC 1523 at [9].
23 *Genge v Superintendent of Christchurch Men's Prison* [2017] NZSC 40.
24 At [6].

which to consider parole issues.[25] Further, no issue of retrospective application of a more onerous threshold for parole arose because there had been no change to the life imprisonment sentence to which Mr Genge was subject.[26]

[77] This ground of review amounts to a collateral attack on a final decision of a court of competent jurisdiction (the Supreme Court) in previous proceedings. As such it amounts to an abuse of process.

Result

[78] Mr Genge's application for judicial review is dismissed.

[79] Having succeeded, the respondents are entitled to costs which I would be inclined to award on a 2B basis. I will hear Mr Genge on the point however. If Mr Genge wishes to do so he may file a memorandum. The Crown may reply. Neither memorandum is to exceed five pages.

Karen Clark J

Solicitors:
Crown Law Office, Wellington

[25] At [7].
[26] At [8] referring to Mander J's decision.

ADDENDUM

(Referred to at [39])

Timeline of Mr Genge's psychological treatment

1. In March 2005, four years prior to his parole eligibility, Mr Genge was showing good motivation but also stated that he would not attend VPU in Wellington unless directed to do so by the Parole Board. Mr Genge was referred to the one on one counselling for which he had expressed a preference. Mr Genge again refused VPU on 12 July 2005. On 27 July 2005 Mr Genge expressed "most firmly" he would not attend VPU unless directed to do so by the Parole Board. He could not understand why his co-offenders were not required to do the course; therefore, he could not understand why staff continued to offer it to him. As at 25 November 2005 Mr Genge was continuing to resist VPU.

2. Mr Genge was referred to psychological services for assessment and treatment recommendations. He was seen on five occasions between October and December 2006.

3. Helen Venning's report dated 31 January 2007 recorded Mr Genge as motivated to engage in treatment although preferring individual treatment to group-based treatment. Mr Genge was recommended to be assessed for suitability to attend ASOTP or, failing suitability for ASOTP, referral to VPU. Mr Genge was unhappy with Ms Venning's recommendations.

4. As at 3 February 2007 Mr Genge had arranged a private counsellor on cultural matters and was keen to move to a re-integrative unit where he could work towards his eventual release.

5. Mr Genge was identified to attend a therapeutic programme in the Maori Focus Unit between February 2008 and September 2009 but, as at 10 August 2007, this was removed from the plan as Mr Genge was unwilling to address it or have it left in his plan. Mr Genge was involved in kapa haka and te reo, peka matauranga and mana tu programme, and a taiaha course. He was also working on a computer studies course. The case officer recorded the need for Mr Genge to identify and attend a programme in the near future as he had a Parole Board appearance in 2009.

7. On 25 January 2008 Mr Genge declined an interview for the purpose of an assessment for possible placement in the April 2008 intake of the ASOTP pilot. In November 2008 Mr Genge was deemed not suitable for ASOTP as he did not meet the sexual deviance criteria. Mr Genge was waitlisted for assessment for a STURP.

8. Mr Genge began bi-cultural therapy in February 2008 which continued through to September 2011. The therapy occurred on at least a fortnightly basis and totalled 168 hours of treatment.

9. During 2009 there was continued dialogue as to the "best possible programme" for Mr Genge. Deborah Bremner's 7 August 2009 report recommended DTU prior to assessment for VPU. There was uncertainty about whether STURP or VPU was recommended but as at 29 October 2009 Mr Genge was recommended for VPU. DTU was to be completed before he could be considered for VPU. Mr Genge was unwilling to attend VPU unless directed by the Parole Board. He preferred STURP.

His mother would not be able to visit him if he moved to the VPU in Wellington.

10. The Parole Board declined Mr Genge's parole on 29 September 2009. Mr Genge needed to attend the DTU. While there was "something of a debate" about whether Mr Genge needed to do the VPU, the Parole Board supported "serious intervention" for Mr Genge in respect of his violence and left it to others to assess the most effective programme for him.

11. Mr Genge was declined STURP in November 2009 because he was waitlisted for VPU. Although the psychologist's recommendation was that VPU was the most appropriate intervention Mr Genge wanted to do STURP so he could remain in Christchurch "causing a hiatus seemingly created by the Dept".

12. In November 2009 Mr Genge was exited from the DTU programme as he had been argumentative, struggled with those in authority and consistently dominated the group with demanding behaviour. Mr Genge was subsequently assessed as not meeting the diagnostic criteria for alcohol/drug dependency.

13. On 27 November 2009 Mr Genge said if he had to do VPU he would but he would not "be happy". He did not believe he needed to do any programmes to address his offending.

14. On 9 December 2009 STURP was again declined because Mr Genge was waitlisted for VPU.

15. On 15 June 2010 Mr Genge was offered a place in VPU. Mr Genge said "they can get fucked, I'm not doing it". Mr Genge's 28 July 2010 PAR records Mr Genge refused VPU because, due to information from his previous hearing being provided to another prisoner by the Department of Corrections, he believed he was at risk of reprisals. Mr Genge remained on the waitlist and was to be offered a place in the next programme.

16. Gahan Joughin's 20 July 2010 psychological report for the Parole Board recorded a "considerable deterioration" in recent months in Mr Genge's motivation to address his violent offending through the VPU. Mr Genge was to work with his bi-cultural therapist towards VPU.

17. On 1 September 2010 the Parole Board refused parole. Mr Genge was disinterested in completing the VPU. He had seen others attend the course and simply ticking the boxes, and he thought he had gained as much if not more value from the sessions he had with his therapist. The Parole Board observed Mr Genge did himself "no favours" by refusing to cooperate with Departmental psychologists.

18. The 30 June 2011 psychological report emphasised the importance of Mr Genge demonstrating a sustained and consistent pattern of increased motivation for offence-specific intervention before he could be considered for an assessment for STURP.

19. Mr Genge's PAR completed 1 July 2011 recorded that changes in business rules meant Mr Genge was no longer waitlisted for VPU and instead had been identified to attend STURP.

20. Rosemary Smart, an independent psychologist, provided a report dated 28 July 2011. Mr Genge could not "perceive how his unwillingness to compromise and his intransigence in refusing to undertake programmes that [had been] offered to him

(however unpalatable that he perceived them to be)" acted as an impediment to his release. Mr Genge needed to undertake departmental programmes and work in groups to test how far the changes he had made could be applied to other social situations.

21. The Parole Board declined Mr Genge's parole on 31 August 2011 and again on 30 November 2011. Scott Barnett had recommended Mr Genge participate in STURP once he had the necessary skills on 30 September 2011. The Parole Board recorded Mr Genge remained unwilling to participate in any form of group therapy and the "efficacy of such programmes for him [was] an issue for the Board". Parole was declined because the Board did not have the requisite information to decide whether Mr Genge posed an undue risk to the community. Mr Genge would not allow his private psychological report to be made available to the Board. If Mr Genge obtained a further psychological report addressing the matters which the Board identified, he could apply to be seen by the Board at an earlier date.

22. There is some disagreement as to whether in 2012 Mr Genge refused group treatment stating the Department did not have jurisdiction to require him to do so. Mr Genge's case officer supports his account he was willing to participate.

23. Craig Prince, another independent psychologist, provided a report regarding Mr Genge on 8 August 2012. Mr Genge had a long history of being "anti-establishment". Mr Genge frequently stated his reluctance to attend group treatment programmes. Mr Genge was recommended to participate in a tailor-made programme designed to address offending issues in offenders with similar personality traits and to have preparatory work that would give him the skills to cope effectively in such a programme.

24. Paul Carlyon's 8 October 2012 psychological report agreed STURP was optimal for Mr Genge but considered there was little to be gained from wait-listing Mr Genge for offence specific intervention.

25. Mr Genge's parole was declined again on 26 November 2012. The Parole Board noted Mr Genge's antipathy towards the Department psychologists with whom he was unwilling to engage. Mr Genge was only at the "beginning of his rehabilitative journey". While the work he undertook with his bi-cultural therapist was valuable, he needed to demonstrate he could work with a departmental psychologist either individually or in a group programme to address the issues that cause him to be assessed as at high risk of violent offending. Until he completed that, Mr Genge could not move on to the important next stage of reintegration.

26. Mr Genge was assessed by Zoe Wilton in early 2013. In April 2013, Ms Wilton repeated STURP was the optimal programme for Mr Genge but there was no value in its recommendation as Mr Genge was unwilling to participate. Mr Genge regarded his engagement with Ms Wilton to be "particularly successful".

27. On 4 June 2013 Mr Genge was assessed for STURP. While the special treatment unit programme format was the most effective rehabilitation of those assessed at high risk of offending because Mr Genge's consistent view was that he did not wish to attend group treatment there was no value in recommending him for a programme. Mr Genge was referred for individual psychological treatment.

28. As at 1 October 2013 Mr Genge remained at high risk of general and/or violent offending and at medium high risk of further sexual offending. Ms Venning recommended continuing to focus on Mr Genge managing his behaviour within the

prison unit and that upon review serious consideration be given to referral to a special treatment unit.

29. The Parole Board declined Mr Genge's parole on 14 November 2013. Mr Genge had indicated he was prepared to agree to individual psychological treatment sessions within the prison. The Board urged prison authorities to ensure this commenced as soon as possible. Ms Wilton had just left for maternity leave, but Mr Genge indicated he would commence treatment with a different psychologist.

30. Due to a high number of referrals and a waiting list Mr Genge did not meet a psychologist until August 2014. Following their meeting on 28 August 2014, Sonja Bakker wrote to Mr Genge. Two issues stood out for Ms Bakker including that Mr Genge's motivation was not evident when they met. He was described as very aggressive and not ready to engage with a psychologist without careful setting out of the treatment situation. Ms Bakker warned Mr Genge if he continued to exhibit inappropriate behaviours in any future sessions then discharge from treatment was the expected outcome.

31. In September 2014 Teresa Watson reported Mr Genge continued to refuse to participate in group treatment.

32. The Parole Board declined Mr Genge's parole on 3 November 2014. There had been significant change in Mr Genge's attitude to engagement with departmental psychologists but that progress had stalled. Mr Genge wanted to skip individual counselling and progress straight to STURP, which is a prerequisite to eventual release. The Board was concerned that without proper preparation for STURP Mr Genge would be exited from the programme. If Mr Genge could not demonstrate over an extended period that he could put into practice the lessons learned in his treatment, he would remain an undue risk to the community.

33. By December 2014 Mr Genge's one on-one counselling had been placed on hold because of his behaviour. Mr Genge felt the Department had failed him.

34. On 22 January 2015 Mr Genge was informed he was to be transferred to Matapuna to attend STURP. He packed his kit ready to depart, only to be told the psychologists had changed their mind and refused to take him. The report records Mr Genge took this well but if prisoners were to be motivated to participate in programmes this was not the right way.

35. On 20 February 2015 Mr Genge was advised of an expectation he would undertake individual psychological treatment prior to a move to STURP.

36. Mr Genge declined to continue engaging with psychologists after his request to record his sessions was declined on 7 April 2015. Mr Genge thought the "goal posts keep moving" regarding his rehabilitation pathway.

37. By August 2015 Ms Watson reported Mr Genge remained at high risk of further general or violent offending and at a medium high risk of further sexual offending. STURP remained the appropriate treatment in intensity, duration and post-programme support for Mr Genge which, given the degree of change required, may be of notable length. But, individual treatment was again recommended to prepare Mr Genge for treatment and for him to have the necessary skills to remain in the programme. Should Mr Genge not be able to engage appropriately with a psychologist at the time, no further rehabilitation recommendations were made.

38. In August 2015 Sonja Bakker wrote to Mr Genge to advise she was in the process of arranging times to meet with him. Mr Genge was to see Ms Bakker for five sessions lasting up to one hour, to occur weekly. Mr Genge had five sessions with Ms Bakker.

39. Mr Genge regulated his behaviour initially but by the last of the five sessions with Ms Bakker he had not maintained his behaviour but had become domineering and hostile. No treatment goals could be agreed. Ms Bakker reported:

> [11] A Special Treatment Unit Rehabilitation Programme remains the most appropriate treatment for Mr Genge. Until Mr Genge demonstrates an ability to manage his behaviour towards psychologists on a one-one basis, for more extended periods than he demonstrated in the current sessions, commencement of this programme would not be recommended.
>
> [12] No further rehabilitation recommendations are made at this time.
>
> [13] At such time as prison based staff consider referring Mr Genge for future treatment with the Psychologists' Office, there would be a number of pre-requisites for him to be considered. These would include that he would have demonstrated his ability, over an extended period of time, to consistently maintain appropriate interactions in formal and informal situations with other Corrections staff, without resorting to the following:
>
> - Maintaining focus on perceived injustices against him, whilst being unwilling to consider other perspectives;
> - Asking questions without either leaving room for a reply, or being willing to hear the reply where this was not consistent with his beliefs, and/or attempting to elicit responses where he can then argue the person is contradicting themselves;
> - Personal or professional insults, name calling, mimicking or accusations;
> - Intimidation such as threatening body language, placing himself in close proximity to others, staring, handling objects that could be potential weapons.

40. The Parole Board declined Mr Genge's parole on 23 September 2015, observing Mr Genge was frustrated about his inability to engage in treatment but wanted treatment "on his terms".

41. After his five sessions with Ms Bakker Mr Genge's treatment was only to continue if he initiated it. Mr Genge complained in December 2015 and January 2016 he had been waiting for a course for over 20 years and nothing had happened. On 29 February 2016 Mr Genge made a complaint his case manager was lying to him and about him, and that his file notes were not only incorrect but misleading. Mr Genge voiced concerns about lack of progress again throughout March 2016.

42. On 21 April 2016 Mr Genge approached Gary Brand, a corrections officer about doing the High Risk Personality Programme (HRPP) course. HRPP is for high security prisoners. Mr Genge was classified as low-medium security. On 30 May 2016 Mr Genge's case manager, Ezekiel Mafusire, attempted to talk to Mr Genge about the HRPP within his unit but the meeting ended abruptly when custodial staff

interrupted the "verbal melee" before matters escalated.

43. As at June 2017 Mr Genge remained at high risk of violent re-offending and medium high risk of sexual re-offending. No treatment, offence-specific or preparation for such treatment, was recommended due to Mr Genge's responses to previous treatment sessions. His assessment meeting had lasted for 40 minutes after which time the interviewer terminated the meeting due to safety concerns and a lack of perceived benefit in further interaction. Referral to psychological services was to be considered if Mr Genge demonstrated a change in his self-management to the degree that beneficial engagement with a psychologist could occur.

44. The Parole Board declined Mr Genge's parole on 1 September 2017. The Board could not be satisfied the risk Mr Genge posed to the community was other than undue.

45. The Parole Board also declined Mr Genge's parole on 30 May 2018. Mr Genge acknowledged parole was not an option at that time. In light of the work necessary to be undertaken before Mr Genge could be safely released, his next hearing was deferred until April 2020.