STATE IMMUNITY FOR JUDICIAL BREACH OF RIGHTS: THE HUMAN RIGHTS COMMITTEE SPEAKS

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This article considers the implications of the United Nations Human Rights Committee in Thompson v New Zealand *for domestic rules that prevent claims being made against a State where human rights have been breached by a judicial actor. In the New Zealand context, this has immediate relevance to the ongoing correctness of the Supreme Court of New Zealand's decision in* Attorney-General v Chapman. *But it is also relevant for those overseas jurisdictions that have followed the Chapman decision to hold that claims for damages cannot be brought against the State for judicial breaches of human rights.*

I INTRODUCTION

In 2011, a majority of the New Zealand Supreme Court held in *Attorney-General v Chapman* that the New Zealand Crown was not liable under the New Zealand Bill of Rights Act 1990 (BORA) to pay compensation to an individual who had spent some years in jail as a result of judicial breaches of his BORA rights. The rights in question were those to a fair trial (s 25) and the observance of principles of natural justice (s 27). The majority held that to allow such a claim directly against the State for judicial breaches of rights, would be "as inimical to [the] public interest … as allowing a personal claim against judges".[1]

The decision was controversial when it was released, with a number of domestic commentators criticising its reasoning.[2] To those critics may now be added the United Nations Human Rights Committee (HRC). In *Thompson v New Zealand*, the HRC unanimously upheld a claim that had been

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1 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [97].

2 See for example Philip A Joseph "Constitutional Law" [2012] NZ L Rev 515 at 519–527; and Stephanie Woods "Judicial immunity: State immunity?" [2012] NZLJ 6.

struck out by the New Zealand Courts on the strength of *Chapman*.[3] In the course of upholding the communication filed by Ms Thompson, the HRC considered the Supreme Court's decision in *Chapman* in some detail and, in effect, found it to be inconsistent with the terms of art 9(5) of the International Covenant on Civil and Political Rights (ICCPR).[4] The HRC's views are important not only for New Zealand judges and practitioners, but for those common law jurisdictions that have taken a stance similar to that of the New Zealand Supreme Court. In the author's view, the decision of the HRC is plainly correct and should be followed not only in New Zealand, but also in all other relevant Commonwealth countries. And, as I shall explain, the reasoning of the HRC has implications for the availability of judicial immunity from suit for rights other than the right not to be arbitrarily arrested or detained.

II CHAPMAN VERSUS ATTORNEY-GENERAL

In *R v Taito*, the Privy Council had held that the process used by the New Zealand Court of Appeal to consider applications for leave to appeal convictions and sentences (which essentially employed an ex parte administrative procedure) to be in breach of multiple provisions of New Zealand's criminal procedure law, as well as the principles of a fair trial and natural justice guaranteed by BORA.[5]

A number of persons whose appeals had been dismissed under the ex parte procedure subsequently successfully re-appealed either or both their conviction and sentence. Mr Chapman was one of those. In May 2000, he had been convicted and imprisoned for six years for child sexual offending. As a result of the Privy Council's decision in *Taito* and a subsequent decision of the Court of Appeal in *R v Smith*,[6] Mr Chapman was allowed a second appeal. On that appeal, his conviction was set aside and a retrial ordered. No retrial occurred due to the loss of important video evidence and the complainant's unwillingness to give evidence a second time. Mr Chapman subsequently issued civil proceedings claiming damages on the basis that he had suffered a loss of liberty as a result of the Court of Appeal's flawed pre-*Taito* processes. He claimed, and the Crown ultimately accepted, that the application of the ex parte procedure in his case had breached his rights to an appeal and to natural justice guaranteed by ss 25(h) and 27(1) of BORA.

The Attorney-General argued that his claim should be struck out on the grounds that the principles of judicial immunity, which protect individual judges from liability for common law torts where

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3 *Thompson v New Zealand* HRC Communication No 3162/2018, CCPR/C/132/D/3162/2018 (19 November 2021), reported as *Thompson v New Zealand* (2021) 12 HRNZ 873.

4 At [7.4]–[7.6] and [8]–[9]; and International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 (adopted 16 December 1966).

5 *Taito v R* [2002] UKPC 15, [2003] 3 NZLR 577.

6 *R v Smith* [2003] 3 NZLR 617 (CA).

judicial error or unlawful process has occurred, should apply to a claim for compensation against the State under BORA in respect of the same matters.

On appeal to the Supreme Court, a 3–2 majority upheld the Attorney-General's arguments and struck out Mr Chapman's claim.[7] The Supreme Court rejected the proposition that early decisions of the Court of Appeal (in particular, *Simpson v Attorney-General* (*Baigent's case*)[8] and *Auckland Unemployed Workers' Rights Centre v Attorney-General*)[9] provided authority for the proposition that the State is liable for judicial breaches of BORA.[10] The same majority also rejected the proposition that the Privy Council's decision in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*[11] supported Mr Chapman's compensation claim.[12]

The majority held – correctly – that judges of the superior courts had always had personal immunity from suit and that the Crown could not be vicariously liable for the actions of judges at common law.[13] They considered that the independence of the judiciary, within a system founded on the separation of powers, was inconsistent with judges being regarded as employees or agents of the Crown.[14] The Court further held that three justifications for personal judicial immunity were equally applicable to a claim for compensation for breach of BORA: (1) the desirability of achieving finality in litigation, best achieved through appeal rights, rather than compensation; (2) the need to protect and promote judicial independence; and (3) the existence of alternate remedies for breaches of BORA by the judiciary (including the appellate process itself).[15]

Of interest, there was some, albeit limited, consideration of New Zealand's obligations under the ICCPR. In particular, the majority focused on New Zealand's reservation to art 14(6) which confers a right to compensation where a person's conviction has been reversed on the grounds of newly discovered facts that demonstrate a miscarriage of justice. The majority, having noted that art 14(6) is concerned with compensation for wrongful convictions, rather than effective remedies for a breach of rights, nonetheless considered that there was "clearly significant overlap" between the two

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7 *Chapman*, above n 1.

8 *Simpson v Attorney-General* [1993] 3 NZLR 667 (CA) [*Baigent's Case*].

9 *Auckland Unemployed Workers' Rights Centre v Attorney-General* [1994] 3 NZLR 720 (CA).

10 *Chapman*, above n 1, at [160].

11 *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC).

12 *Chapman*, above n 1, at [160].

13 At [161] and [175].

14 At [175].

15 At [176]–[199].

concepts.[16] Implicitly, it seems, the majority regarded it as inconsistent with that reservation for the New Zealand courts to give a monetary remedy to a person whose BORA rights had been breached by a judicial actor. Why that should be so was not explained.

III THOMPSON VERSUS ATTORNEY-GENERAL*: THE FACTS*

Against that background, the domestic and HRC decisions in *Thompson* can be considered. The facts of *Thompson* are a little complicated.[17]

On 28 July 2010, Ms Thompson was sentenced to 100 hours of community work and nine months of probation service supervision.[18] On 15 May 2012, a Probation Officer filed an application with the Wellington District Court to cancel the community work sentence.[19] On a number of occasions in June 2012, the application was adjourned on the ground that the Court had not been provided with proof of service of the application.[20] On 18 July 2012, Ms Thompson appeared before the Wellington District Court on unrelated charges and was sentenced to 15 months' intensive supervision.[21] At that hearing, a Corrections Officer asked the sentencing Judge to process the application to cancel her prior community work sentence. That Judge agreed and granted the application.[22] Later that day, the charges for which Ms Thompson had been sentenced were updated in the Court's electronic case management system.[23] An order sentencing her to 15 months' intensive supervision was prepared and signed by the Court Registrar.[24] However, in an apparent clerical error, the community work sentence, which had been cancelled by the Judge, was not recorded as cancelled in either the Court's record sheets or in its electronic case management system.[25] Accordingly, when the application to cancel Ms Thompson's community work sentence came before a different Wellington District Court Judge on 23 July 2012 (the date to which it had been formally adjourned), that Judge, being unaware that the sentence had been cancelled, issued a warrant for Ms Thompson's arrest since she had not appeared

16 At [201].

17 The facts are largely taken from *Thompson v Attorney-General* [2014] NZHC 2333, [2014] NZAR 1282 [*Thompson* (HC)].

18 At [1].

19 *Thompson v New Zealand*, above n 3, at [2.1].

20 *Thompson* (HC), above n 17, at [1].

21 At [2].

22 At [2].

23 *Thompson v New Zealand*, above n 3, at [2.2].

24 At [2.2].

25 At [2.2].

on the application before that Judge.[26] Pursuant to the arrest warrant, Ms Thompson was arrested on 31 July 2012 at 6.50 pm.[27] She was searched upon arrival at the Wellington Police Station and held overnight.[28] She was brought to Court the following morning on 1 August 2012 at 10.12 am.[29] When the true position was put before the Judge at that appearance, Ms Thompson was promptly released.[30] In total, Ms Thompson spent approximately 15½ hours in custody.[31]

Ms Thompson sued the New Zealand Crown, naming the Attorney-General as the defendant in her claim.[32] In her statement of claim, Ms Thompson relied not only on torts such as false imprisonment, breach of statutory duty, negligence by Court staff and systemic negligence in failing to train Court staff properly, but also claimed that she had been a victim of breach of s 22 of BORA, which confers on everyone "the right not to be arbitrarily arrested or detained".

Ms Thompson's claims were dismissed by the High Court.[33] The tort-based claims were dismissed on the ground that s 6(5) of the Crown Proceedings Act 1950 barred all tort-based claims against the Crown for judicial acts or omissions.[34] The BORA-based claim was dismissed on the basis that her detention was not unlawful, because it had been effected pursuant to a warrant issued by a judge. While the factual basis on which the warrant was issued was wrong, the judge in question had acted on a reasonable assumption based on the evidence known to her at the time the order had been made.

On appeal to the Court of Appeal, Ms Thompson's claims were also dismissed, albeit that the Court of Appeal held that there had in fact been a breach of s 22 BORA.[35] The Court of Appeal held that her arrest and detention were arbitrary and unlawful for two reasons: (1) when the arrest warrant was issued, there was no outstanding application for Ms Thompson to be brought before the Court

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26 At [2.3].

27 *Thompson* (HC), above n 17, at [3].

28 *Thompson v New Zealand*, above n 3, at [2.4].

29 At [2.4].

30 At [2.4].

31 *Thompson* (HC), above n 17, at [3].

32 Note that District Court judges in New Zealand enjoy immunity from civil suits when acting in their judicial capacity to the same extent as superior court judges.

33 *Thompson* (HC), above n 17, at [50].

34 Section 6(5) of the Crown Proceedings Act 1950 provides: "No proceedings shall lie against the Crown by virtue of this section 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." The New Zealand Court of Appeal in an earlier case (*Baigent's Case*, above n 8) had held that s 6(5) applied to bar all such tort-based claims, unless it was alleged that the defendant had acted in bad faith.

35 *Thompson v Attorney-General* [2016] NZCA 215, [2016] 3 NZLR 206 at [68] and [79] [*Thompson* (CA)].

and, so, the warrant lacked a legal basis;[36] and (2) the Judge had issued the arrest warrant of her own motion, not pursuant to an application by a Probation Officer, as required by s 72(3) of the Sentencing Act 2002.[37] Nonetheless, applying the New Zealand Supreme Court's decision in *Chapman*, the Court of Appeal held that the claim could not succeed.[38] The Court acknowledged that the fact that Ms Thompson had no right to compensation in respect of the period for which she was unlawfully detained seemed unsatisfactory, but it was bound by the Supreme Court's decision in *Chapman*.[39]

An application by Ms Thompson for leave to appeal the Court of Appeal's decision to the Supreme Court was denied, on the ground that her claim was governed by that Court's recent judgment in *Chapman* which was unable to be distinguished on the facts.[40]

IV REASONING OF THE HUMAN RIGHTS COMMITTEE

Article 9(1) of the ICCPR provides that:

> Everyone has the right to liberty and security of the person. No-one shall be subjected to arbitrary arrest or detention. No-one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 9(4) provides that anyone who has been deprived of their liberty by arrest or detention:

> … shall be entitled to take proceedings before a Court, in order that that Court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

In New Zealand, a number of procedures are available to give effect to this obligation, including the right to apply for habeas corpus and the right to seek judicial review. But the ICCPR does not stop there. Article 9(5) provides that: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". It was this right which was centre stage before the HRC.

Before the HRC, the New Zealand Government accepted that Ms Thompson had been arbitrarily arrested and detained for the purposes of art 9(1) of the ICCPR.[41] In doing so, the Government acknowledged the position established by the Court of Appeal (s 22 of BORA being the domestic equivalent of art 9(1) ICCPR).[42] However, the Government argued that the dismissal of her claim for

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36 At [61].

37 At [62].

38 At [74].

39 At [78].

40 *Thompson v Attorney-General* [2016] NZSC 134.

41 *Thompson v New Zealand*, above n 3, at [4.1].

42 At [4.2].

BORA compensation did not amount to a violation of the ICCPR. In short, the New Zealand Government submitted:[43]

(a) Ms Thompson had already received an effective remedy for the breach of art 9(1) of the ICCPR, in that she was immediately released once the mistake leading to the issuing of the warrant had been recognised;
(b) The Court of Appeal had determined that her rights under s 22 of BORA had been violated; this judicial recognition of a breach of a protected right amounted to an adequate vindication of her rights;
(c) Ms Thompson's scenario fell within a narrow range of circumstances in which it was appropriate for a national legal system not to provide an enforceable right of compensation. In that regard, relying on the detailed reasoning of the majority in *Chapman*, the New Zealand Government submitted that a limited reading of art 9(5) of the ICCPR was necessary to ensure that other rights requiring a fair and dispassionate legal system were not impaired by the erosion of judicial independence. The Government feared that recognising an enforceable right of compensation in the sorts of circumstances arising in Ms Thompson's case would have the effect of undermining independence, by encouraging the bringing of civil suits against the Crown, for actions of its judges.

The HRC noted the New Zealand Government's acceptance that art 9(1) had been breached in Ms Thompson's case,[44] and acknowledged that Ms Thompson had been swiftly released when the judicial error was realised (thereby conforming with art 9(4)).[45] But, the HRC emphasised, art 9(5):[46]

> … obliges States parties to establish the legal framework within which compensation may be afforded to victims of unlawful arrest or detention, as a matter of enforceable right and not as a matter of grace or discretion.

The HRC noted that States parties have substantial discretion as to the form of procedure and the type of remedy available under national law "so long as they are effective".[47] The HRC noted that while New Zealand law generally provides for compensation for wrongful arrest and detention, *Chapman* had established an exception, "whereby compensation is not required to be paid for breaches of the [BORA] by the judicial branch of Government".[48] The HRC noted that "the plain language of

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43 At [4.2]–[4.13].

44 At [7.2].

45 At [7.4].

46 At [7.3], citing Human Rights Committee *General Comment No 35: Article 9, Liberty and security of person* UN Doc CCPR/C/GC/35 (31 October 2014) at [50].

47 At [7.3], citing Human Rights Committee, above n 46, at [50].

48 At [7.4].

art 9(5) [ICCPR] does not allow for exceptions to the requirement of States parties to pay compensation for unlawful arrest or detention".[49] The HRC acknowledged that as soon as the error had been discovered, Ms Thompson was promptly released. However, release from unlawful detention "does not fulfil a State party's obligation to provide compensation within the meaning of art 9(5) [ICCPR]".[50]

The HRC noted that New Zealand had advanced detailed policy arguments to the effect that payment of compensation for judicial breaches of rights would undermine judicial independence.[51] The HRC disagreed. It noted that art 9(5) of the ICCPR "does not require the establishment of individual liability of judges or other government agents".[52] Furthermore, the purpose of art 9(5) of the ICCPR "is concerned with providing redress for harm suffered, rather than with ascribing culpability to government actors for having caused that harm".[53] For that reason, the HRC considered that:[54]

> … in cases where error by the judicial branch of government results in unlawful or arbitrary arrest or detention, compensation to the victim should not undermine judicial independence but rather should strengthen accountability and trust in the judiciary by providing a remedy for a wrong.

V BARRIO VERSUS SPAIN*:* THOMPSON *ENDORSED*

In *Hermosilla Barrio v Spain*, the HRC took the opportunity to reaffirm *Thompson*.[55] There, the author had been detained for seven months longer than he should have been, due to systemic judicial delay in addressing the application of rules on the aggregation of sentences.[56] Under Spanish domestic law, compensation for the extra seven months of detention was not available, as the author's detention had taken place pursuant to judicial orders and the failure to deal with his requests for the correct application of the rules on sentence aggregation had not amounted to a miscarriage of justice.[57]

The HRC found that the delay here was not justified, with the result that the author's detention led to unauthorised confinement of a prisoner beyond the length of his sentence and was, therefore,

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49 At [7.5].

50 At [7.4].

51 At [7.5], referring to [4.7]–[4.13].

52 At [7.6].

53 At [7.7].

54 At [7.6].

55 *Hermosilla Barrio v Spain* HRC Communication 3102/2018, CCPR/C/136/D/3102/2018 (25 October 2022).

56 At [3.1] and [5.2].

57 At [2.1]–[2.2] and [2.6]–[2.9].

arbitrary (for the purposes of art 9(1) of the ICCPR) and constituted unlawful detention for which the author was entitled to compensation under art 9(5) of the ICCPR.[58]

The HRC reiterated that under art 9(5), States parties must establish:[59]

> [T]he legal framework within which compensation may be afforded to victims of unlawful arrest or detention, as a matter of enforceable right, not as a matter of grace or discretion.

Spain had argued that compensation was not required here since the author's detention was not due to a miscarriage of justice nor an irregularity in the administration of justice.[60] Rather, it was due to the implementation of correctional policy on the aggregation of sentences in accordance with the understanding of the law on the basis of reasoned court decisions.[61] This "defence" was rejected by the HRC. The HRC stated:[62]

> The Committee observes that the plain language of article 9(5) of the Covenant does not allow for exceptions to the requirement that States parties must provide compensation for unlawful arrest or detention. Therefore, the Committee considers that, even in the present case, where the State party claims that the detention was not due to a miscarriage of justice or an irregularity in the administration of justice, but rather to the implementation of correctional policy on the aggregation of sentences handed down in accordance with the law on the basis of non-arbitrary court decisions, the obligation to protect the effective right to obtain reparation for arbitrary detention, in accordance with article 9(5) of the Covenant, still applies.

The HRC emphasised, with express reference to *Thompson*, that:[63]

> … in cases of unlawful or arbitrary arrest or detention, compensation to the victim should not undermine judicial independence but should rather strengthen accountability and trust in the judiciary by providing reparation for a wrong.

Of interest, the HRC concluded its views by noting the art 2(3)(a) ICCPR obligation on a State party to provide an effective remedy for violation of a right, which "requires it to make full reparation to individuals whose Covenant rights have been violated".[64]

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58 At [9.4].

59 At [9.11].

60 At [6.3] and [7.3].

61 At [6.4].

62 At [9.12].

63 At [9.12].

64 At [11].

VI IMPLICATIONS AND LIMITATIONS

There are a number of implications arising out of, and potential limitations to, the HRC's decision in *Thompson* and its subsequent endorsement by the HRC in *Hermosilla Barrio*.

First, the HRC's views in both *Thompson* and *Hermosilla Barrio* concern the applicability and extent of State responsibility under art 9(5) ICCPR. That provision does not provide for a general right of compensation for victims of violation of all rights guaranteed by the ICCPR. Rather, the art 9(5) obligation is specific to cases of unlawful (which also includes lawful but arbitrary) arrest or detention. Therefore, in a domestic environment, it is predictable that State governments may seek to limit the reach of the decision to judicial breaches of human rights norms that result in unlawful arrest or detention only.[65]

Second, as against that, however, the *reasoning* relied upon by the HRC in *Thompson* is applicable to rights breaches other than unlawful arrest and detention. True it is that in *Thompson* the HRC relied primarily on the "plain language" of art 9(5) to found its view that judicial independence should not bar a compensation claim under art 9(5). But of importance, the HRC went beyond the plain language of art 9(5) in rejecting the New Zealand Government's arguments. The HRC squarely addressed the underlying rationale advanced by the New Zealand Government; importantly, it rejected the notion that State liability for judicial breaches of rights could be seen as undermining judicial independence. To the contrary, the HRC considered that compensation for such breaches, in fact, should be seen as strengthening accountability and trust in the judiciary, by providing a remedy for a wrong. In short, the HRC's approach mirrors that preferred by Elias CJ in the opening paragraph of her dissent in *Chapman* in which she, drawing on old common law case law, opined that "[a] right without remedy is 'a vain thing to imagine', as Holt CJ recognised in 1704".[66]

For those reasons, in the author's view, the HRC's rejection of the proposition that judicial independence requires the State not to be liable for judicial breaches of the right not to be arbitrarily arrested or detained, should apply equally to any attempt to use the same justification in respect of judicial breaches of other rights. After all, States parties have an obligation under art 2(3) of the ICCPR to provide an effective remedy for breach of ICCPR rights, and that provision does not provide any exception where the breach is caused by the judicial branch of the State. Of course, that is not to say that every judicial breach of the ICCPR must be redressed by compensation (in some cases,

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65 Of course, it is not unusual for a breach of some other right to lead a court or the Human Rights Committee (HRC) to conclude that an arrest or detention is thereby arbitrary: see, for example the discussion of domestic and HRC jurisprudence in *Fitzgerald v Attorney-General* [2022] NZHC 2465, [2023] 2 NZLR 214 at [55]–[60].

66 *Chapman*, above n 1, at [1], citing *Ashby v White* (1703) 2 Ld Raym 938 at 953, 92 ER 126 at 136 (KB). To similar effect, see the judgment of the Grand Chamber of the European Court of Human Rights in *MacFarlane v Ireland* [2010] ECHR 1272 (Grand Chamber) at [121].

exclusion of evidence or judicial review will suffice); but it is to say that compensation should not be categorically ruled out, simply because it was a judge who has caused the breach.

Third, the HRC's rejection of judicial independence as a primary rationale to exclude State liability for judicial acts will have implications for a number of common law jurisdictions. The majority's approach in *Chapman* was explicitly endorsed and followed by the Supreme Court of Namibia in *Visagie v Namibia*,[67] and was noted and followed by the Singaporean Court of Appeal in *AHQ v Attorney-General*.[68] The Irish High Court decision of *Kemmy v Ireland* rejected a claim to constitutional damages for judicial breach of fair trial rights on a basis very similar to that later adopted in *Chapman*.[69] Those decisions may need to be reassessed in light of *Thompson*.

Fourth, and lastly, technically, at international law, the views of the HRC are not binding on a State party.[70] So it is not inconsistent with international law for its views to be ignored.[71] However, where, as in *Thompson*, the views are adopted unanimously after a fair hearing by the independent panel of experts who have been given the task of determining individual communications, it would be churlish indeed for those views to be ignored.[72]

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67 *Visagie v Namibia* [2018] NASC 411, [2019] 2 LRC 487. In this case, the plaintiff had been sentenced to three years' imprisonment following a trial before the Magistrate's Court that was described on appeal as a "disgrace" and a "failure of justice".

68 *AHQ v Attorney-General* [2014] 4 SLR 713, [2015] 5 LRC 542. (SCGA) While *AHQ* did not involve a deprivation of liberty, *Visagie* did.

69 *Kemmy v Ireland* [2009] IEHC 178, [2009] 4 IR 74. In this case, the plaintiff had been convicted of rape and serious sexual assault following a trial that the Court of Criminal Appeal held had been unfair due to the trial judge allowing the jury to have the complainant's evidence reread to them, without ensuring that the accused's evidence was also reread to them.

70 *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129, (1997) 4 HRNZ 136 (CA) at 144.

71 Of course, that is not to say that as a matter of domestic law the views of an international treaty monitoring body cannot be binding. In Spain, for example, the Supreme Court (Tribunal Supremo, Sala De Lo Contencioso-Administrativo, Sección Cuarta) has held that the views of the Committee on the Elimination of All Forms of Discrimination against Women are domestically binding: see Judgment No 1263/2018, dated 17 July 2018, in the matter of Cassation File No 1002/2017.

72 *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA) at 393; and *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17, (1999) 5 HRNZ 201 (PC) at 206.