IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-001599
[2017] NZHC 463

UNDER	The Judicature Amendment Act 1972, Part 30 of the High Court Rules and the New Zealand Bill of Rights Act 1990
IN THE MATTER	of an application for judicial review
BETWEEN	PHILLIP JOHN SMITH Plaintiff
AND	THE ATTORNEY-GENERAL ON BEHALF OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing: 6 March 2017

Appearances: The Plaintiff in person
V McCall for Defendant

Judgment: 16 March 2017

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 16 March 2017 at 11.00am
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

Solicitors:
Crown Law, Wellington

Introduction

[1] The plaintiff, Mr Smith, seeks to judicially review a decision made by the Prison Director of Auckland Prison at Paremoremo on 1 December 2014. The decision revoked an authorisation Mr Smith had previously received permitting him to be issued with a custom-made hairpiece.

[2] Mr Smith filed an affidavit in support of his application, and the defendant – the Attorney-General on behalf of the Department of Corrections ("the Department") – responded with an affidavit from the Prison Director at Auckland Prison, Mr Thomas Sherlock. Mr Smith filed an affidavit in reply. Three further affidavits were also filed – one from Mr A W Taylor who is also a prisoner at Auckland Prison, and two further affidavits from Mr Smith, putting into evidence and commenting on various materials he had obtained following requests made by him under the Privacy Act 1993 and the Official Information Act 1982.[1] Mr Sherlock also filed a second affidavit, responding to various assertions Mr Smith had made that his (Mr Sherlock's) first affidavit contained inaccuracies and inconsistencies.

[3] Mr Smith sought leave to cross-examine Mr Sherlock and I heard from the parties in regard to this issue.

[4] Cross-examination in judicial review proceedings requires leave.[2] Mr Smith accepted that he could no longer assert that there were any inconsistencies which required resolution, given the second affidavit filed by Mr Sherlock. Rather, he said that he wanted to cross-examine Mr Sherlock, because he considered that the Department had acted in bad faith towards him.

[5] Mr Smith argued that cross-examination was necessary.[3] He referred to an email, dated 1 December 2014, sent by one corrections officer to another, and also to Mr Sherlock. The text of that email is in some respects unfortunate. However, Mr Sherlock did not author the email; nor did he respond to it or in any way endorse it.

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1 Mr Taylor's affidavit and a number of the comments made by Mr Smith in his second and third affidavits, were inappropriate and/or irrelevant. Ms McCall for the Department did not however take issue with the affidavits and I do not therefore take the matter any further.

2 *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA).

3 *Geary v Psychologists Board* [2009] NZSC 67, (2009) 19 PRNZ 415 at [1]; and *Commerce Commission v Powerco Ltd* CA123/06, 9 November 2006 at [38].

An explanation for the content of the email has been proffered by Mr Sherlock in his second affidavit. That explanation is readily understandable. I did not consider that the email could be said to evince bad faith by either Mr Sherlock or the Department as a whole, and Mr Smith could not point to anything else which might arguably have required leave to cross-examine. I was not satisfied that cross-examination was necessary to enable the review application to be decided properly and fairly.[4] Accordingly, I declined to grant Mr Smith leave to cross-examine Mr Sherlock.

Background

Mr Smith's Offending

[6] In 1996, Mr Smith was sentenced to life imprisonment for murder with a minimum non-parole period of 13 years. At the same time he was sentenced for a number of child sex offences (including sexual violation), aggravated burglary and kidnapping.

[7] While in custody, Mr Smith committed further fraudulent offences, first in 2006 and again in 2010. Mr Smith was sentenced for this offending in 2012.

[8] Between 1996 to 2004, Mr Smith was classified as a maximum security prisoner. From 2005 onwards, Mr Smith's security classification was periodically lowered, to the point where, in 2013 and 2014, he was allowed out on temporary release as part of the re-integration phase of his sentence.

[9] As at late 2014, Mr Smith had not been granted parole. The Parole Board expressed their view that, as at late 2013, Mr Smith remained at high risk and that he posed a serious danger to the community.

Approval for Mr Smith's hairpiece

[10] In 2001, at age of 27 years, Mr Smith was diagnosed with male pattern alopecia by a dermatologist. This diagnosis was confirmed in 2002 by another dermatologist and Mr Smith was prescribed with medication designed to treat his condition.

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[4] *Stratford Racing Club Inc v Adlam* [2008] NZCA 92, (2008) NZAR 329 at [63]; and *Deliu v New Zealand Law Society* [2013] NZHC 2597, [2014] NZAR 112 at [18].

[11] In 2004, Mr Smith sought permission from the Manager of Health Services at Auckland Prison to purchase the medications which had been prescribed for him. The request was initially declined, but was subsequently approved in 2005, after Mr Smith had complained to the Health and Disability Commissioner.

[12] Mr Smith commenced treatment for his hair loss in approximately April 2005, using the prescribed medication. However in 2008, Mr Smith ceased using the medication. It was not proving particularly effective, and Mr Smith did not consider that the ongoing costs were justified.

[13] In 2009, Mr Smith applied for a temporary removal from prison so that he could attend the Advanced Hair Studio in Napier. This application was declined.

[14] In October 2012, Mr Smith sought approval from the Manager at Auckland Prison so that he could have a custom-made hairpiece issued to him.[5] At the time, Mr Smith was in a low security unit on voluntary segregation. In his application, Mr Smith said that he had ongoing issues with self esteem and confidence, and that as a result he was using a hat in public settings to conceal his baldness. He said that he only removed the hat when required to do so to comply with prison rules. Mr Smith said that if he was allowed to use a hairpiece, it would increase his self-esteem, his self-confidence and improve how he felt about himself. He said this was important to his ongoing rehabilitation. He also stated that there were other benefits – namely the protection of his scalp from sun exposure and the prevention of heat loss through his head in winter. He commented on likely prison security concerns. He asked that the construction of the hairpiece should be taken into consideration. He said that the membrane between the scalp and the hair on the hairpiece is transparent, and that this mitigates against the risk that the hairpiece could be used to hide contraband. He noted that he was a low security prisoner being managed in a low security unit, and he asked that any perceived risk should be considered in this context. He also stated that he had a history of cooperation and compliance as a prisoner at Auckland Prison. He suggested various conditions which could attach to any grant of

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[5] Under the provisions then in force, prisoners were permitted to be issued with any property declared to be authorised property by regulations made under the Act – Corrections Act 2004, s 43(1). The regulations were published in September 2011 and they were included in Schedule 1 of the Corrections Regulations 2005. Part D of Schedule 1 included, as authorised property, any "other prisoner property allowed to be kept in cells by a prisoner, if the manager has given approval to that prisoner to keep the item".

permission, to manage any perceived risks to prison security – namely that an alert be placed on the integrated offender management system database, that his photo on that database be updated, that conditions be imposed requiring that the hairpiece be worn at all times, but that it be removed upon request when he was being searched.

[15] Mr Smith's application was supported by a departmental psychologist, who noted that, although some may not see baldness as a factor that would influence their self-esteem, this is a subjective matter for each individual. The application was also supported by a principal Corrections Officer, who considered that the benefits would be reasonable and that any risks could be mitigated. The application was also recommended for approval by the Residential Manager of the prison.

[16] The application was referred to Mr Sherlock, and he approved it on 14 December 2012. I do not know whether any conditions were imposed.

[17] Mr Smith then obtained a hairpiece through Precision Hair Plus Studio. It was custom-made and it was issued to him on 4 April 2013. It is semi-permanently attached to his scalp with glue and tape.

[18] On 18 February 2014, Mr Smith sought further approval from Mr Sherlock, asking him to approve the issue of further glue, solvent remover, cleaner and shampoo for his hairpiece. This application was approved by Mr Sherlock on 28 February 2014.

[19] On 4 July 2014, Mr Smith was transferred to the Spring Hill Corrections Facility so that he could be placed in a self-care unit. Further approval was given by the Prison Manager of Spring Hill to Mr Smith, permitting him to retain his hairpiece at that prison.

Mr Smith's escape/his return

[20] On 6 November 2014, Mr Smith was released on a temporary basis from Spring Hill. He had previously been released on a temporary basis. The purpose of these releases was to assist him to prepare for life in the community in the event he was granted parole.

[21] On 6 November 2014, Mr Smith was picked up from the Spring Hill Corrections Facility by one of his approved sponsors for a 74 hour temporary release. Mr Smith promptly boarded a LAN Chile flight to Santiago. From Santiago he travelled to Rio de Janeiro.

[22] Mr Smith was wearing the hairpiece at the time of his escape, but there is no suggestion that he used it to facilitate his escape.

[23] Mr Smith was arrested in Brazil on 12 November 2014. He was detained in a Brazilian jail until he was deported and returned to New Zealand on 29 November 2014. He was received back into Auckland Prison on that day.

[24] Mr Smith was seen by a nurse at Auckland airport when he arrived back in this country because he was disoriented. When he was received back into the prison, he appeared to be intoxicated. He was "walking wobbling", his eyes were blurred, and he had pin point pupils. He was assessed by health staff. Mr Smith advised that he had taken a sleeping pill given to him by a prisoner in Brazil. He was placed in the At Risk Unit so that he could sleep off the effects of the drug he had taken whilst under observation.

[25] These matters were brought to Mr Sherlock's attention. It was also suggested to Mr Sherlock by the police that Mr Smith may have attempted to conceal money on his person prior to his return flight, and that he may have taken some drugs, either before or during the trip back to New Zealand.[6]

Mr Sherlock's decision

[26] On 1 December 2014, Mr Sherlock made the decision to revoke the authorisation permitting Mr Smith to retain the hairpiece. In his affidavit, Mr Sherlock states as follows:

> Mr Smith's escape had directly and significantly impacted his custodial management moving forward, and for him to continue to retain the hairpiece would be inconsistent with the reasons I approved the application in the first

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[6] Mr Smith, for his part, denied that he tried to conceal any money on his person when he was returned from Brazil. He said that the only drug he took was a single sleeping pill, which was given to him as a matter of routine by the prison authorities in Brazil. He says that at no time was the sleeping pill concealed under his hairpiece.

> place. It was also inconsistent with the safety and security of both Mr Smith specifically, and the prison more generally …"

Mr Smith was not, however, given these or any other reasons for the removal of his hairpiece at the time.

[27] On 2 December 2014:

(a) Mr Smith notified prison staff that, effective from 3.30pm on 1 December 2014, he was undertaking a hunger strike. He said that this action was not "motivated by protest", but that he would see it through "until termination – approximately 10-15 days"; and

(b) a new security classification for review for Mr Smith was initiated. Prior to his escape, Mr Smith had been classified as a minimum security mainstream prisoner. The outcome of the classification review was that Mr Smith was reclassified as a maximum security prisoner. It was considered that he presented a high risk of escape. He was put under voluntary segregation and managed under what is known as a "six and six" routine. This meant that he was able to associate with a maximum of five segregated prisoners at a time.

[28] Mr Smith remained in a "dry cell" during his hunger strike and he was monitored. He ended the hunger strike on either 4 or 5 December 2014 and he was then assessed by a doctor.

[29] On 8 December 2014, Mr Smith completed a prisoner complaint form, requesting that he be given reasons for the decision to remove his hairpiece. He received a short written response from prison authorities on 18 December 2014. It read as follows:

> Have spoken with Prison Manager. Prison Manager has withdrawn his approval of the hairpiece due to the actions conducted by the prisoner.

[30] Mr Smith's escape was an unprecedented event. He had obtained a passport while in prison. His temporary release was meant to be supervised by sponsors, neither of whom contacted the Department of Corrections or the police. As a serving prisoner he managed to pass unimpeded through immigration and security checks at

Auckland International Airport. Mr Smith was in contact with New Zealand media while he was in Brazil. As a result, his escape, his arrest in Brazil and his subsequent deportation attracted significant media interest.

[31] On 9 December 2014, Mr Smith appeared by AVL before the Auckland District Court, on charges arising out of his escape. He was not wearing the hairpiece during the AVL link. There were a large number of media present at the hearing. On the evening of 9 December 2014, Mr Smith's escape appeared as the lead story on all major television new channels. The media highlighted the marked change in Mr Smith's appearance. Photographs showing Mr Smith with and without his hairpiece were broadcast. The following day, Mr Smith's story appeared on the front page of a number of major newspapers, again with comparative photos of him with and without his hairpiece. The focus was again on the change in his appearance.

[32] On 25 December 2014, Mr Smith requested copies of all documentation relating to the approvals given, first for his hairpiece and then for the related accessories. He further complained that the explanation given to him for removing his hairpiece was too vague. He asked what actions specifically had justified its removal. Mr Sherlock was away at the time. When he returned he discussed the matter with Mr Smith. He told him that:

> The matter is going before the Court and [that it] will follow that process.

[33] On 2 July 2015, Mr Smith sought a meeting with Departmental Officers in an attempt to resolve matters. No resolution was forthcoming.

[34] On 16 August 2015, Mr Smith complained to the Office of the Ombudsman about the removal of his hairpiece.

[35] On 15 October 2015, the Department of Corrections released the information sought by Mr Smith in relation to his initial applications. This material was released following intervention by the Office of the Privacy Commissioner.

[36] On 6 April 2016, the Ombudsman released his determination on Mr Smith's complaint. He took the view that Mr Sherlock's decision to remove the hairpiece

was not unreasonable. The Ombudsman noted that the hairpiece had been issued to Mr Smith in 2012 when he was in the re-integration phase of the sentence, but that his escape to South America in late 2014 had placed that phase of his sentence in jeopardy. He considered that the significant changes in the custodial regime of Mr Smith's sentence, following his return to New Zealand on 29 November 2014, negated the original reasons for approving the hairpiece. He also took the view that the glue, tape and chemical remover required to be used with the hairpiece could be used to undermine the effective management, security and good order of the prison, and that they were inappropriate items in a maximum security environment. He noted the suspicion that Mr Smith may have concealed a pill in his hairpiece when he departed South America. He recorded Mr Smith's assertion that the hairpiece had not been used to conceal a pill, but rather that he had secreted it in his sock, and that he had overlooked it. The Ombudsman took the view that whether or not the pill was concealed in the hairpiece was something that the Court might ultimately be required to determine. He opined that given the possibility that the pill may have been deliberately concealed, and that this method of concealment could be replicated in the prison, the decision to revoke approval for the hairpiece was not unreasonable.

[37] On 23 June 2016, Mr Smith filed the present proceedings.

[38] On 22 July 2016, Mr Smith was sentenced to 33 months' imprisonment on the charges arising out of his escape to Brazil.[7]

The pleadings

[39] Mr Smith pleaded the primary facts relating both to the initial approval issuing the hairpiece to him, and to the subsequent revocation of that approval by Mr Sherlock. There were three causes of action pleaded:

(a) breach of natural justice. It was asserted that the decision to revoke approval for the issuance of the hairpiece was made without consultation and without reasons. It was said that this was in breach of s 6(1)(f)(ii) of the Corrections Act 2004 and contrary to s 27(1) of the New Zealand Bill of Rights Act 1990 ("NZBORA");

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7 *R v Smith* [2016] NZDC 13828.

(b) failure to take into account relevant considerations, manifest unreasonableness and breach of his right to freedom of expression under s 14 of the NZBORA; and

(c) failure to treat him with humanity and with respect for his inherent dignity contrary to s 23(5) of the NZBORA.

Mr Smith sought declarations, an order quashing the decision to revoke approval for his hairpiece, and damages in the sum of $5,000 for breach of s 23(5).

[40] The Department admitted, albeit subject to qualification, the factual allegations. By its qualifications, it sought to put in context the decision to revoke the issuance of Mr Smith's hairpiece. In relation to the first cause of action – breach of natural justice – it admitted that Mr Smith's views were not sought prior to Mr Sherlock making the decision, and that written reasons were not provided. It said that nevertheless Mr Smith was aware at all materials times of his circumstances, and that he must have known the reasons on which Mr Sherlock made the decision to remove the hairpiece. It asserted that there is no requirement to consult or to provide written reasons, and that the reasons for the decision included, amongst others, Mr Smith's safety, the fact that Mr Smith used the hairpiece in the course of his escape and the security and good order of the prison. In relation to the second cause of action – failure to take various matters into account and unreasonableness – it asserted that the statement of claim contained allegations of law, to which it was not required to plead. To the extent it contained allegations of fact, they were denied. In relation to the third cause of action, it admitted that Mr Smith has and had the right to be treated with humanity and with respect for his inherent dignity, and said that he was so treated.

Submissions

[41] Mr Smith argued that, in his circumstances, wearing a hairpiece was an act undertaken in the exercise of his right to freedom of expression, protected by s 14 of the NZBORA. He argued that the legislation should receive a purposive interpretation, and that the right affirmed by s 14 should be defined broadly, before proceeding to consider the reasonableness of any limitation placed on that right under s 5 of the Act.

[42] Mr Smith then dealt with each cause of action, arguing first that Mr Sherlock's failure to give him any reasons for his decision was a breach of the rules of natural justice, and a breach of s 27(1) of the NZBORA and s 6(1)(f)(ii) of the Corrections Act. He argued that s 5 of the NZBORA required a "proportionality" assessment, and that Mr Sherlock, as the decision-maker, should have considered whether the limitation on Mr Smith's right to freedom of expression, inherent in the decision he was contemplating, was justified under s 5. He criticised the reasons advanced by Mr Sherlock for his decision in his first affidavit, arguing that they were ex post facto rationalisations, and that, factually, many of them were unsound.

[43] In relation to his second cause of action, Mr Smith submitted that the main issue was whether his rights under s 14 were a mandatory relevant consideration for Mr Sherlock when he made his decision. Mr Smith referred to the relevant provisions in the NZBORA, and to s 45A of the Corrections Act which deals with authorised property. He noted that the Department asserted in its statement of defence that freedom of expression was taken into consideration by Mr Sherlock, but submitted that the evidence demonstrated that he did not do so. He argued that this failure overlapped into the unreasonableness ground alleged by him, and that it affected the outcome of the decision, such that it was fundamentally flawed. He put it to me that the onus was on the Department to prove that revoking approval for his hairpiece was proportionate to the intended objective of the revocation.

[44] Finally, Mr Smith argued that the decision to revoke approval for his hairpiece did not treat him with humanity or with respect for his inherent dignity. Again, he referred to the relevant statutory provisions, and argued that taking his hairpiece, at a time when he was the subject of intense media scrutiny, did not treat him "as befits a human being, [that is], with compassion".

[45] In relation to relief, he emphasised the significance, for him, of a declaration that the decision to revoke approval for his hairpiece failed to take into account relevant considerations, and was in breach of s 14 of the NZBORA. He accepted that the appropriate course, in the event that the Court finds one or more of his causes of action is made out, is to remit the matter back to Mr Sherlock for reconsideration. He also accepted that in the event that compensation for breach of

his right(s) is awarded, that sum should be paid to the Secretary of Justice for the benefit of the victims of his offending.

[46] The Department in its submissions emphasised three broad principles.

[47] First, Ms McCall, for the Department, argued that the decision to remove Mr Smith's hairpiece was an operational decision, made in the prison management context, and that the Court should be reluctant to interfere, both in accepting that the decision is amenable to review and in granting any remedy, if it considers that there has been some breach of relevant requirements. She said that an essential character of imprisonment is the substantial displacement of the fundamental norms of autonomy and self-fulfilment, and that the absence of liberty in a prison is substantial.

[48] Secondly, Ms McCall argued that the rights protected by s 14 of the NZBORA were not engaged in the circumstances of this case, because the wearing of a hairpiece is not sufficiently expressive conduct to fall within the ambit of s 14. It was argued that the activity of wearing a hairpiece does not convey or attempt to convey a meaning. It was also argued that even if s 14 was engaged, revoking permission for Mr Smith to wear his hairpiece was a justified limitation on that right.

[49] Thirdly, Ms McCall argued that decision-makers are not always required to take the NZBORA specifically into account, and that what was required was that Mr Sherlock did not exercise his powers in a way that was inconsistent with the Act. It was submitted that the outcome of the decision made by Mr Sherlock was in fact consistent with the NZBORA, and that the decision, seen overall, was consistent with a s 5 proportionality analysis.

Analysis

Statutory provisions under which Mr Sherlock made his decision

[50] Section 43(1) of the Corrections Act provides that a prisoner may be issued with, or allowed to keep, "authorised property",[8] subject to certain conditions.

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[8] The words "authorised property" are defined to mean "property that is declared by rules made under s 45A as property that may be issued to the prisoner" – Corrections Act 2004, s 3, as at December 2014.

[51] Relevantly, s 43(2) and (3) provide as follows:

> (2) Despite subsection (1), the prison manager may refuse to issue or allow a prisoner to keep an item of property if he or she has reasonable grounds to believe that—
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> (a) the item may be used to injure the prisoner or any other person, or to damage property; or
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> …
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> (c) the item may be used to circumvent practices or procedures in the prison; or
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> …
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> (f) the item may assist a prisoner to—
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> (i) discover new methods of committing offences; or
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> (ii) continue offending; or
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> (g) the item may interfere with the effective management of the prison.
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> (3) Despite subsection (1), the prison manager may refuse to issue or allow a prisoner to keep any item of authorised property—
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> (a) if the prisoner is—
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> (i) subject to a penalty of forfeiture of privileges imposed under subpart 5 of Part 2; or
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> (ii) the subject of a direction under section 60 for the reason described in section 60(1)(b) (which relates to assessing or ensuring the prisoner's mental health); or
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> (iii) subject to cell confinement imposed as a penalty under subpart 5 of Part 2; or
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> …
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> (c) in any other circumstances specified in regulations made under this Act or rules made under section 45A.

[52] The Corrections Regulations also deal with authorised property.[9] Regulation 33 provides that authorised property can be withheld from prisoners in certain circumstances – relevantly where, in the opinion of the manager, the security of the

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[9] Corrections Regulations 2005.

prison is threatened, or the presence of an item in a shared cell threatens the safety or welfare of any prisoner in that cell.

[53] Section 45A of the Corrections Act provides that the Chief Executive of the Department must make rules declaring the items of property that prisoners may be issued with or allowed to keep, including any conditions that are attached to any item of property.

[54] At the time Mr Sherlock revoked his approval for Mr Smith to retain the hairpiece which had been issued to him, the relevant rules were the Department of Corrections Authorised Property Rules. They were notified on 9 October 2014[10] and they were effective from 16 October 2014. They were divided into five schedules – property permitted on reception, prison owned property, electrical items, clothing, and other authorised property. Each schedule listed various items of authorised property. For example, other authorised property listed toiletries, stationery, miscellaneous, correspondence and hobby items. A hairpiece was not listed as an item of authorised property. Under the Act, every prisoner commits an offence against discipline who, without the approval of an officer, has any article in his or her cell or in his or her possession.[11]

[55] In the present case, Mr Sherlock was seeking to revoke an authorisation he had already given. Presumably he was seeking to act under either s 41(2) or (3), or perhaps under reg 33. Mr Sherlock has not set out which provision he thought he was acting under. Nor did Ms McCall directly address this issue.

[56] I observe that s 43(2) permitted the prison manager to act only if he or she had "reasonable grounds to believe", and that reg 33 required the prison manager to "form an opinion" as to the existence of the state of affairs permitting authorised property to be withheld from the prisoner. Mr Sherlock's affidavits do not directly address these issues.

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10 "Rules About Authorised Property" (9 October 2014) 122 *New Zealand Gazette* 3451.

11 Corrections Act 2004, s 128(1)(f).

Freedom of Expression – s 14

[57] Each of Mr Smith's causes of action depended, to a greater or lesser extent, on his assertion that the right to freedom of expression contained in s 14 of the NZBORA extends to his actions in wearing a hairpiece.

[58] Section 14 provides as follows:

> **Freedom of expression**
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> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[59] The NZBORA seeks to affirm, protect and promote human rights and fundamental freedoms in this country.[12] It should be interpreted purposively.[13] It has been said that, in common with similar constitutional instruments, the Act calls for "… a generous interpretation avoiding what is being called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to".[14]

[60] Consistent with this approach, the Court of Appeal has given the word "expression" in s 14 a very broad meaning, saying that the right "is as wide as human thought and imagination".[15]

[61] It is clear that non verbal communication can be covered by s 14.[16] It is, however, equally clear that there are limits on what is a protected expression. By way of example, violent conduct is not protected; nor is the publishing of defamatory material or a contempt of court (making contact with jurors for the purpose of eliciting comment from them about their verdicts).[17] Similarly, falsely calling out "fire" in a crowded theatre is not protected.[18]

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12 New Zealand Bill of Rights Act 1990, long title at s 2.
13 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 268, 277 and 292.
14 *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328; *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439 (CA) at 440.
15 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15].
16 See, for example *Police v Geiringer* [1990-92] 1 NZBORR 311 (DC) – lying down in front of a car to stop the occupant from leaving held to constitute an expression; *Hopkinson v Police* [2004] 3 NZLR 704 (HC) at [31] – flag burning held to constitute an expression.
17 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC).
18 *Thompson v Police* [2012] NZHC 2234, [2013] 1 NZLR 848 (HC) at [75].

[62] In *Irwin Toy Ltd v Attorney-General (Quebec),*[19] the majority of the Canadian Supreme Court considered the rationale behind s 2(b) of the Canadian Charter of Rights and Freedoms. Section 2(b) (and an equivalent provision in Quebec's Charter) provided that everyone had various fundamental freedoms, including freedom of thought, belief, opinion and expression. The majority – Dickson CJ, Lamer and Wilson JJ – proffered a test to assist in determining whether a given activity amounts to an "expression" protected by the Charter. They noted as follows:[20]

> "Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value, both to the community and to the individual.
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> …
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> We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s 2(b) challenge would proceed.

[63] Academic commentators have suggested that this decision offers "a sensible and relatively straightforward test" as to what constitutes "expression". They consider that having a broad conception of the right affirmed by s 14 avoids the

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19 *Irwin Toy Ltd v Attorney-General (Quebec)* [1989] 1 SCR 927.

20 At 968-969. Cited in *Thompson v Police*, above n 18 at [74] – but note reservations expressed at [75] and [76].

problem of artificially categorising expression in a way that could deny protection to whole categories of expression by virtue of their content.[21]

[64] The definition of the word "expression" advanced in the *Irwin Toy* decision is undoubtedly wide and it encompasses many activities. Only purely physical activities that do not attempt to convey meaning will be excluded.[22]

[65] Jurisprudence concerning the European Convention on Human Rights has adopted a broadly similar approach. For example:

(a) In *Tig v Turkey* (*dec.*)[23] the applicant argued that he was refused entry to his university campus because he had a beard, and that the refusal was in breach of his rights under articles 8-10 of the European Convention on Human Rights. He argued that he had a beard because it was part of his physical appearance. He did not claim to have been inspired by any specific view or belief, or to be observing any religious precept. The European Court of Human Rights held that his claim was inadmissible, on the basis that, even supposing the right to freedom of expression could encompass a person's right to express his views by the way in which he grew a beard, it had not been established that the applicant had been prevented from expressing a particular opinion by the prohibition on beards.

(b) In *Kara v United Kingdom*,[24] the applicant was described by the Commission as "a bisexual male transvestite", who wore "clothes which are conventionally considered as 'female' … He dresse[d] in this way to give expression to his identity and sexuality and to what he regard[ed] as the innate feminine aspects of his personality". The applicant complained that his employer's refusal to allow him to dress as he pleased, for example, by wearing a dress to work, constituted an

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21 A Butler and P Butler, *The New Zealand Bill of Rights Act – A Commentary* (2nd ed, Lexis Nexis, Wellington, 2015) at [13.7.12] and [13.7.16].

22 See [13.7.14].

23 *Tig v Turkey* (*dec.*) (8165/03) Section II, ECHR 24 May 2005. See Council of Europe, Freedom of Expression in Europe, case law concerning article 10 of the European Convention on Human Rights (Council of Europe Publishing, Strasberg Cedex [2007] at [102]).

24 *Kara v United Kingdom* (1999) 27 EHRR CD272 (ECHR).

interference with his right to freedom of expression in violation of Article 10 of the Convention on Human Rights. The Commission considered that the right to freedom of expression could include the right for a person to express his or her ideas in the way he or she dressed. It nevertheless found that it had not been established on the facts that the applicant had been prevented from expressing a particular opinion or idea by means of his clothing. There was no violation of Article 10.

(c) Similarly, in *Stevens v United Kingdom,*[25] the Commission affirmed that clothing is a form of expression covered by the Convention on Human Rights, but that in that case it had not been established that the applicant's children (who had been required to wear a tie to school) had been prevented from expressing a particular opinion or idea by the requirement. It was held that the complainant had failed to disclose a violation of the right to freedom of expression.

[66] In New Zealand, it has been accepted that a naturist, who believed that it was natural and proper for a person to be naked and that clothing was "an artificial construct that covers the human form", was exercising his right to freedom of expression when he ran along tracks in a wooded area naked, save for running shoes.[26]

[67] In these various cases the Courts have, in effect, enquired whether the person claiming the protection affirmed by s 14 can demonstrate that his or her activity had expressive content.

[68] The question of whether or not the way in which a person styles his or her hair can engage s 14 has not been directly considered by the Courts in this country. The High Court in *Battison v Melloy*[27] struck down a school rule prescribing the way that students were to present their hair because the rule did not comply with the common law requirement of certainty. The Court expressed the view that this gave

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25 *Stevens v United Kingdom* (1999) 27 EHRR CD138 (ECHR).

26 *Pointon v Police* [2012] NZHC 3208; Similarly see *Gough v United Kingdom* (49327/11) Section IV, ECHR 7 October 2014 at [149].

27 *Battison v Melloy* [2014] NZHC 1462, [2014] NZAR 927.

the school the opportunity to consider whether or not it was necessary for it to have a hair rule. Collins J observed that the school would "… need to give very careful consideration as to whether or not any hair rule would breach a student's rights to autonomy, individual dignity and his rights to freedom of expression affirmed by s 14 of the NZBORA".[28] This comment was, however, *obiter,* and the Judge went on to say that he had deliberately refrained from commenting on the issue.

[69] In my view, the issue should not be approached in any absolute way, for example, by asserting that the wearing of a hairpiece is necessarily an act undertaken in the exercise of a person's right to freedom of expression affirmed by s 14. Rather, a court should consider the circumstances of each case, and in particular, whether the party seeking to rely on the section can establish that his or her actions in wearing a hairpiece have expressive content.

[70] In the present case, I am satisfied that the wearing of a hairpiece by Mr Smith was an action taken by him in the exercise of his right to freedom of expression contained in the NZBORA. I have reached this conclusion for the following reasons:

(a) the wording of s 14 is straightforward. It provides that everyone has the right to freedom of expression, and then goes on to say that that right includes the freedom to seek, receive and impart information and opinions of any kind in any form. The section contains its own partial definition, but that definition is inclusive and not exclusive;

(b) the use of the words "of any kind in any form" in the section reinforces that an expansive approach should be taken;[29]

(c) the right to freedom of expression is not confined to things said or the expression of opinions. Freedom of expression can extend to physical acts;

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28 *Battison v Melloy*, above n 27, at [96].

29 And see A Butler and P Butler – *The New Zealand Bill of Rights Act – A Commentary*, above n 21 at [13.7.11].

(d) not every physical act is protected by the right affirmed in s 14. It is only physical acts with expressive content that can be protected;

(e) the wearing of a hairpiece is a physical act;

(f) wearing a hairpiece was, for Mr Smith, an act with expressive content. In his initial affidavit he stated that he has:

> … always been extremely sensitive about being seen bald.

He went on –

> Having my hairpiece removed by prison authorities and then having my appearance mocked by New Zealand media on national television and in major newspapers would without any doubt in my mind have been one of the lowest points in my life. I felt totally belittled, degraded and humiliated;

(g) these assertions are not of recent invention. Mr Smith obtained approval to the issuance of a hairpiece in the first place because he wanted to improve his self-confidence and self-esteem. He was supported in this regard by various prison officers.

In my judgment, in wearing a hairpiece, Mr Smith was endeavouring to present himself to others in a way with which he was comfortable. The wearing of a hairpiece was a physical act by which Mr Smith sought to promote his self-confidence and self-esteem. Mr Smith was trying to say – this is who I am and this is how I want to look. He was trying to affect the perception that others would have of him. His action in wearing a hairpiece had expressive content.

[71] It follows that s 14 was engaged.

A mandatory consideration?

[72] The s 14 affirmation of the right to freedom of expression is obviously important. Freedom of expression is a fundamental liberty in any truly democratic society, and Mr Smith did not lose the benefit of the right afforded to him by s 14 of

the NZBORA because he was a sentenced prisoner. He would only have lost the right if it was expressly, or by necessary implication, removed by law.[30]

[73] The NZBORA applies to acts done by any person in the performance of any public function, power or duty imposed on that person by or pursuant to law.[31] The Courts have held on numerous occasions that NZBORA considerations must be read into the exercise of statutory powers of decision.[32] As Asher J put it when considering rulings given on complaints by the Broadcasting Standards Authority: [33]

> The application of the provisions of the NZBORA is a mandatory relevant consideration, and must be taken into account by the Authority if it is considering upholding a complaint.

[74] In my judgment, Mr Sherlock should have been alive to the NZBORA implications of his decision and, in making the decision whether or not to revoke his permission for the issuance of a hairpiece to Mr Smith, he should have considered whether such a decision would have been a reasonable limit prescribed by the law on Mr Smith's rights. In other words, he should have acknowledged the right affirmed by s 14 and considered s 5 of the NZBORA.

Section 5 of the New Zealand Bill of Rights Act

[75] Section 5 provides as follows:

> **Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[76] Mr Sherlock does not assert that he considered Mr Smith's right to freedom of expression or that he considered whether or not a decision to revoke the issuance of the hairpiece would be a justified limitation on that freedom.

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30 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [97].

31 New Zealand Bill of Rights Act 1990, s 3.

32 See e.g. *R v Laugalis* (1993) 1 HRNZ 466 (CA) at [473]; *Police v Beggs* [1999] 3 NZLR 615 at 625-628; *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [72]-[73]; and *Trans Rail Ltd v District Court at Wellington* [2002] 3 NZLR 780 (CA) at [41].

33 *Television New Zealand Ltd v West* [2011] 3 NZLR 825 (HC) at [86]; And see *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [77]-[82]; *Canwest TVWorks Ltd v XY* [2008] NZAR 1 (HC) at [64]; and *Television New Zealand Ltd v Attorney-General* (2004) 8 HRNZ 45 (CA) at [14]-[16].

[77] The only reasonably contemporaneous reason given for the decision was that which I have noted above at [29] – i.e. that approval was withdrawn "due to the actions of the prisoner". This suggests that the decision was intended to be punitive. It is noteworthy that Mr Sherlock did not further clarify his reasons, despite a written request to do so from Mr Smith.

[78] Mr Sherlock belatedly provided a number of reasons for his decision in his first affidavit filed in these proceedings.[34] I have already set out above one passage from that affidavit – see para [26] – when Mr Sherlock sought to explain why he had made his decision. A little later in the same affidavit, he further stated as follows:[35]

> 41. I made the decision to remove Mr Smith's hairpiece for a number of reasons, including:
>
> 41.1 It was not clear at the time Mr Smith was returned to New Zealand whether he had hidden the "small round red" pill he had received from a Brazilian prisoner, and taken on the way back to New Zealand, in or under the hairpiece;
>
> 41.2 Mr Smith's custodial management changed as a result of his escape. The reasons for which the hairpiece was initially issued to him do not currently apply to his circumstances;
>
> 41.3 Mr Smith had, and continues to have, a "risk of suicide" alert in the Corrections Integrated Offender Management System. At the time his hairpiece was removed, he was on active hunger strike which he had told Corrections officers was not by way of protest, but rather an attempt to starve himself to death. In that context, and in the context of the close monitoring required by Corrections policies in the event of hunger strikes, I did not consider his continued possession of a hairpiece was necessary or appropriate;
>
> 41.4 When Mr Smith has possession of the hairpiece, he also requires additional products to maintain the hairpiece, and to adhere it to his head. These items include glue, tape, and chemical remover. I do not consider it appropriate for him to have these products for a number of reasons:

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[34] It appears from the pages exhibited by Mr Smith to his second affidavit that Mr Sherlock asked for "supporting information and related authority around [his] decision not to re-issue [Mr] Smith's wig". An answer was provided by a Mr Kiriji, who is also a Departmental Officer, on 17 December 2014. The answer referred to s 43(1) and (2) of the Corrections Act.

[35] Mr Smith has taken issue with most, if not all, of Mr Sherlock's assertions. For example, he denies that at the time the hairpiece was removed he was on his hunger strike. He says that the decision was made on 1 December 2014, and that he only gave notice of his hunger strike on 2 December 2014.

41.4.1 Glue and chemical remover are not appropriate property for individuals at risk of suicide;

41.4.2 Given the significant change in Mr Smith's custodial management since his return to New Zealand (from a low security mainstream prisoner to a maximum (and now high) security voluntary segregation prisoner) items such as glue and tape are not appropriate in Mr Smith's current custodial environment. Such items could be used in locks or over cameras, which could threaten the security and good order of the prison;

41.5 A hairpiece is not a form of authorised property with which a prisoner may be issued or allowed to keep, pursuant to the current authorised property rules;

41.6 There are also a number of unforeseeable risks in managing a prison, which it is important to minimise where possible. Given Mr Smith is on voluntary segregation, other prisoners may seek to use his hairpiece or the associated products against him in a variety of ways, including stand-over tactics, or using them directly to harm Mr Smith.

41.7 There is also the potential risk that other prisoners will try to access the items for their own purposes. For example, they could use the hairpiece or the associated products to alter their own appearances or interfere with prison security. While I acknowledge this scenario is unlikely, the harm caused by such a course of action could be very high.

Nowhere does Mr Sherlock suggest that he gave any consideration to the NZBORA.

[79] Mr Smith argued that Mr Sherlock should have turned his mind to the NZBORA and undertaken a s 5 assessment. He referred to the decision of the Supreme Court in *Hansen v R*,[36] where Blanchard J stated as follows:[37]

> In deciding what constitutes a justified limitation under s 5, New Zealand courts have commonly adopted the test used by the Supreme Court of Canada in *R v Oakes*, which was summarised by that Court in the following way in *R v Chaulk*:
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> 1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

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36 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

37 At [64].

> 2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
>
> (a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right or freedom in question as "little as possible"; and
>
> (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.
>
> (citations omitted)

He argued that the Courts should require that evidence be put before them by the decision-maker to prove that the limitation proposed is justified, and that the standard of proof is on the balance of probabilities. Here, he argued that there is no such evidence, and that there was none before Mr Sherlock at the time the decision was made.

[80] Ms McCall argued that Mr Sherlock was not required to specifically consider s 14, or to perform a s 5 assessment in the course of making his decision. She accepted that the makers of discretionary administrative decisions are obliged to exercise their powers in a way that is consistent with the NZBORA,[38] but put it to me that, at least in the prison management context, this only applies to the outcome of administrative decision-making, and not to the process of arriving at a particular decision. She relied on a decision of the House of Lords – *R(SB) v Denbigh High School Governors*.[39] She submitted that all that was required was that the decision ultimately made by Mr Sherlock was consistent with Mr Smith's rights.

[81] In *Denbigh High School*:

> (a) a young girl sought judicial review of a head teacher's decision not to admit her to school when she was wearing a particular form of Muslim dress. She claimed the decision represented an unjustified limitation on her freedom to manifest her religion or beliefs, contrary to Article 9 of the European Convention on Human Rights. The

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38 *Taylor v Chief Executive of the Department of Corrections*, above n 33, at [80].
39 *R(SB) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100.

school had a uniform policy, which had been arrived at in consultation with local authorities, including local mosques and leading Muslim organisations. The policy provided a particular form of uniform for female Muslim students called the shalwar kameeze. The applicant had decided that the shalwar kameeze did not comply with the requirements of her religion – namely that women should wear modest dress. She sought to attend school wearing her preferred form of dress – a long dress that better covered her arms and legs, called a jilbab. She was told by the school that she could not attend if she was wearing the jilbab;

(b) it was common ground that Article 9 was engaged, and that the applicant sincerely held her religious beliefs;

(c) Lords Bingham, Hoffman and Scott held that because there were alternative schools available to the applicant at which she would be permitted to wear the jilbab, there had been no interference with her right to manifest her religious beliefs;[40]

(d) Lords Bingham and Hoffman also considered that the question for the Court was not whether the challenged decision was the product of a defective decision-making process, but rather whether the applicant's human rights had in fact been violated. Lord Bingham held that the unlawfulness prescribed by the Human Rights Act was "acting in a way which is incompatible with a convention right, not relying on a defective process of reasoning".[41] Lord Hoffman stated as follows:[42]

> In domestic judicial review, the Court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the Court might think to be the right answer. But Art 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way … Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows.

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40 At [21]-[25], [50-[55], [72] and [86]-[89].
41 At [29].
42 At [68].

[82] A similar approach was taken by the House of Lords in the following year in *Belfast City Council v Miss Behavin' Ltd.*[43] In this case, the Belfast City Council had refused the applicant a licence to operate a sex shop because it considered that it was not appropriate for any sex shops to locate in the proposed locality. The Court of Appeal had found that the Council had not shown that it was conscious of the convention rights that were engaged when the Council made its decision. The House of Lords again rejected this approach. Lord Hoffman stated:[44]

> A construction of the [Human Rights Act] which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous. Either the refusal infringed the respondent's Convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of art 10 or the First Protocol.
>
> …
>
> [S]ome convention rights may have a procedural content … In such cases, a procedural impropriety may be a denial of a Convention right … however, the question is still whether there has actually been a violation of the applicant's Convention rights and not whether the decision-maker properly considered the question of whether his rights would be violated or not.

[83] The *Denbigh High School* decision was cited by Asher J in *Television New Zealand v West*.[45] He noted that the degree of formalism which is required of the decision-making body will vary according to the nature of that body.

[84] I agree with Ms McCall that the decision-making function that Mr Sherlock was undertaking was essentially a relatively low-level managerial decision. Mr Sherlock is not a lawyer, and he does not have day-to-day access to lawyers to assist in the making of such decisions within the prison environment. Nevertheless, he was under a statutory obligation to ensure that, when he was making a decision about a prisoner, the decision was made in a fair and reasonable way.[46] Where, as here, the decision involved a potential limitation on a prisoner's rights affirmed under the NZBORA, consideration of that right, and whether or not the limitation inherent in the decision proposed was justified, were implicit mandatory considerations.

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43 *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; [2007] 1 WLR 1420.
44 At [13] and [15].
45 *Television New Zealand v West*, above n 33, at [97].
46 Corrections Act 2004, s 6(1)(f)(ii).

[85] I agree with Mr Smith's submission that, unlike the head teacher and the board in the *Denbigh High School* decision, Mr Sherlock as prison director is charged with significant coercive powers in respect of vulnerable individuals. Decisions made by Mr Sherlock have the potential to have a significant impact on prisoners' lives.

[86] In my view, the decision-making context in which Mr Sherlock found himself was rather different from that which applied to the head teacher and the board in the *Denbigh High School* decision, or the Broadcasting Standards Authority in the *West* case. Moreover, in both the *Denbigh High School* case, and in *West*, the decision-makers had tried to consider the relevant affirmed rights. Here, Mr Sherlock gave the NZBORA dimension no consideration at all. In my judgment, he should have done so.

[87] I do not consider that a full step by step analysis as discussed in *Hansen* was necessarily required. Rather, Mr Sherlock could, and should, have acknowledged Mr Smith's right to freedom of expression under s 14, and set out, albeit briefly but in a transparent way, why he had reached the conclusion that the limitation he proposed was justified under s 5. A succinct summary of his reasons would have sufficed.

[88] In the absence of any evidence to the contrary, I conclude that Mr Sherlock failed to take into account a relevant, and indeed a mandatory, consideration, namely Mr Smith's right to freedom of expression under the NZBORA, and whether or not the limitation he was proposing on that right, through a decision to revoke permission earlier given for the issuance of a hairpiece, was a justified limitation on the right.

Other causes of action raised by Mr Smith

[89] Given the conclusions I have reached, it is not necessary for me to go on and address the other causes of action raised by Mr Smith, and I decline to do so.

[90] I do observe that the reason given for the decision to revoke the issuance of the hairpiece on 18 December 2014 – see para [29] above – was inadequate. I acknowledge the point made by Ms McCall, namely that it is not clear from the Corrections Act that reasons are required. I also accept that Mr Smith would have

been aware that his circumstances had changed. He had escaped and he had been recaptured. At the time the decision was made he was in the At Risk Unit, and it is likely that Mr Smith would have known that there are strict rules relating to the retention of property by prisoners within that unit. Nevertheless, in my view it is unfortunate that Mr Sherlock did not provide a rather fuller suite of reasons for his decision.

[91] The giving of reasons encourages transparency of thought, which of itself is a vital protection against a precious or arbitrary decision.[47] The very process of giving reasons is likely to mean that the decision is better thought out. When reasons are given, it can more readily be seen that the decision-maker has considered relevant matters and refused to consider irrelevant matters. The approach the decision-maker has taken to any evidential issues or matters of law will be exposed. The person affected may well be more inclined to accept the decision if it is reasoned. At the very least, he or she will be better able to determine whether there is still a legitimate grievance and what the prospects of any challenge to the decision may be. A decision-maker should not be able to avoid challenge by giving perfunctory reasons, and in my view the more or less contemporaneous reasons given by Mr Sherlock – the decision was made because of Mr Smith's actions – were perfunctory.

Relief

[92] It is axiomatic that the grant of relief in the context of judicial review proceedings is discretionary. The Court has a discretion to provide the remedy which it considers is effective to vindicate the right in issue.

[93] Here Mr Smith seeks a declaration that Mr Sherlock's decision to revoke the issuance of a hairpiece to him breached s 14 of the NZBORA.

[94] Ms McCall emphasised that the very nature of prisons as custodial institutions requires that on the spot decisions be made by prison officers, the effect of which will often be to impose some restrictions and possibly punishments on inmates.[48]

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47 *Television New Zealand Ltd v West*, above n 33, at [82].
48 *Daemar v Hall* [1978] 2 NZLR 594 (SC) at [603]-[604].

[95] I agree with Ms McCall that the Court should not become involved in micro-managing the prison system. Rather, prison managers should be left to maintain prison order and discipline but only according to law.[49] In the present case, I have concluded that Mr Smith's fundamental right to freedom of expression was ignored, and circumstances which required to be taken into account. In my judgment a remedy is required in this case. An important right has been breached and the breach may be material. It cannot be said that the decision would necessarily have been the same if the provisions of the NZBORA had been taken into account.

[96] Particularly within the prison context, declarations are a valuable remedy. The making of a declaration enables the prisoner to say that what happened to him should not have happened, and that he or she should not have been treated in the way in which he or she was. Its effect is that the Department must stop treating the prisoner unlawfully. This is to the prisoner's advantage. In a broader context, declarations ensure that there is oversight of important public institutions such as prisons.[50]

[97] For the reasons I have set out, in my judgment, Mr Sherlock did not appreciate that his decision to revoke the approval he had earlier given to Mr Smith for the issuance of a hairpiece had the potential to breach Mr Smith's right to freedom of expression under s 14 of the NZBORA. As a result, Mr Sherlock failed to take into account as a relevant consideration Mr Smith's right to freedom of expression, and he failed to conduct any assessment under s 5 of the NZBORA.

[98] It is appropriate to make a declaration in this regard. I declare that:

(a) Mr Sherlock, in making his decision on 1 December 2014 to revoke the authorisation for the issuance of a hairpiece to Mr Smith, failed to take into account as a relevant consideration Mr Smith's right to freedom of expression under s 14 of the NZBORA; and

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49 *Mitchell v Attorney-General* [2013] NZHC 2836 at [35]; *Department of Corrections v Taylor* [2009] NZCA 129, [2009] 3 NZLR 34 at [49]; *Taylor v Chief Executive of the Department of Corrections* [2010] NZCA 371, [2011] 1 NZLR 122 at [28]-[29]; *Smith v Attorney-General* [2017] NZHC 136 at [128]-[129].

50 *Taunoa v Attorney-General*, above n 30, at [15].

(b) Mr Sherlock, in making his decision of 1 December 2014, failed to conduct any assessment under s 5 of the NZBORA of the limitation on Mr Smith's right to freedom of expression under s 14 which his decision would result in.

[99] It is also appropriate to make an order in the nature of certiorari quashing Mr Sherlock's decision of 1 December 2014 because the decision failed to take into account a relevant consideration and as a result was unlawful.

[100] I am mindful that many of the reasons belatedly advanced by Mr Sherlock for his decision go to the operational requirements of Auckland prison, and I agree with the Ombudsman that, on the face of it, at least some of those reasons are reasonable. The matter is remitted back to the Department, so that the Prison Director can consider the issue afresh, in light of the matters discussed in this judgment. The order quashing the decision of 1 December 2014 is to lie in Court for a period of 14 days so that the Prison Director has sufficient time to properly make a fresh decision and to finalise the reasons for it.

[101] Finally, I note that Mr Smith sought damages in the sum of $5,000.

[102] Damages were not expressly sought in relation to the cause of action on which I have decided this matter. Nevertheless, I briefly address this issue for the sake of completeness.

[103] The claim is clearly a specified claim, caught by s 6 of the Prisoners' and Victims' Claims Act 2005. It has been brought by Mr Smith as a prisoner. It is based on acts or omissions undertaken by or on behalf of the Crown, and alleges breach of the NZBORA. The Court cannot order compensation unless it is satisfied that Mr Smith has made reasonable use of all internal and external complaint mechanisms, and another remedy or combination of remedies cannot provide effective redress.[51]

[104] As I have already set out, a declaration is a remedy of considerable potency. It vindicates the right breached, and it should deter and denounce the decision that

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[51] Prisoners' and Victims' Claims Act 2005, s 13.

was made. Here, in my judgment, the declaration and the order quashing the decision, which I have made, are sufficient to vindicate the right which I have found was breached.

Costs

[105] Mr Smith represented himself. He cannot seek an award of costs. He may, however, be entitled to any reasonable disbursements he incurred, and I reserve leave for him to file a memorandum in this regard within 10 working days of the date of this decision. Any memorandum from the Crown in response is to be filed within a further period of five working days. Memoranda are not to exceed five pages. I will then settle the disbursements payable by the Department on the papers unless I require the assistance of Mr Smith and/or the Attorney-General.

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Wylie J