IN THE SUPREME COURT OF NEW ZEALAND

SC 61/2014
[2015] NZSC 127

BETWEEN	TODD AARON MARTELEY Appellant
AND	THE LEGAL SERVICES COMMISSIONER Respondent

Hearing:	5 May 2015
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	A J Ellis and A Shaw for Appellant F M R Cooke QC and B D Huntley for Respondent
Judgment:	21 August 2015

JUDGMENT OF THE COURT

A The appeal is allowed, the Court of Appeal judgment is set-aside and the order that the appellant receive legal aid for his conviction appeal is restored.

B In this Court the appellant is awarded costs of $25,000 together with reasonable disbursements.

C The appellant is also entitled to costs and disbursements in the High Court and Court of Appeal to be fixed by those Courts.

REASONS

WILLIAM YOUNG, GLAZEBROOK, ARNOLD AND O'REGAN JJ
(Given by William Young J)

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Introduction

[1] The appellant, Todd Aaron Marteley, pleaded guilty to a charge of murder and was later sentenced to life imprisonment with a minimum period of imprisonment of 14 years.[1] He wished to appeal against his conviction and sentence. There followed a dispute with the Legal Services Agency (under the Legal Services Act 2000) and later the Legal Services Commissioner (under the Legal Services Act 2011) over legal aid for the purposes of his appeal. The Commissioner was prepared to fund an appeal against sentence but not conviction; this for perceived lack of merit.

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1 *R v Marteley* HC Hamilton CRI-2009-19-9786, 5 November 2010.

[2] The Commissioner's decision was upheld on review by the Legal Aid Tribunal. The Tribunal's decision, however, was successfully challenged in the High Court on appeal. In allowing the appeal, Collins J saw the merits or otherwise of the proposed appeal as of no moment where, as here, the grounds of appeal, if made out, would be capable of resulting in the appeal being allowed.[2] He also concluded that the Commissioner ought to have addressed the fiscal consequences of refusing legal aid which, on his appreciation, would probably involve the appointment of counsel by the Court of Appeal – an exercise likely to exceed the costs of granting legal aid.[3]

[3] The Commissioner appealed to the Court of Appeal. This was pursuant to leave granted by Collins J.[4] In giving leave, Collins J identified questions of law addressed to the correctness of his views as to (a) the irrelevance of a merits assessment and (b) the relevance of the fiscal consequences of refusing legal aid. The Court of Appeal concluded that in both respects the Judge had been in error.[5]

[4] The Commissioner did not seek a stay of the judgment of Collins J pending the determination of the appeal to the Court of Appeal and continued to fund work associated with the conviction appeal. And in the course of the hearing in the Court of Appeal, counsel for the Commissioner advised the Court that legal aid would continue for the conviction appeal even if the Commissioner's appeal against the High Court judgment was successful.[6] For this reason the Court of Appeal did not formally address the merits of the Tribunal's decision. The general drift of the judgment, however, was that the Tribunal's decision was wrong.[7] Despite this, the Court's order was that the appeal should be allowed. No order for costs was made. The position as to costs in the High Court was not specifically addressed.

[5] The further appeal to this Court is addressed to the relevance of merits to the decision to grant or refuse legal aid and costs.[8]

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2 *Marteley v Legal Services Commissioner* [2013] NZHC 1278, [2013] NZAR 875 (Collins J) [*Marteley* (HC)] at [44].
3 At [57].
4 *Marteley* v *Legal Services Commissioner* [2013] NZHC 2748.
5 *Legal Services Commissioner v Marteley* [2014] NZCA 185, [2014] 3 NZLR 143 (Ellen France, Randerson and Miller JJ) [*Marteley* (CA)].
6 See *Marteley* (CA), above n 5, at [9].
7 See at [86]–[92].
8 *Marteley v Legal Services Commissioner* [2014] NZSC 94.

The merits issue: to what extent is a consideration of the merits of a criminal appeal material to the decision to grant legal aid?

Overview

[6] The case falls to be determined by reference to s 8 of the Legal Services Act 2011. The text of that section is set out later in these reasons. At this point it is sufficient to note that legal aid in respect of an appeal may only be granted if it appears to the Commissioner that "the interests of justice require" such a grant.[9] In addressing what is required in the interests of justice, the Commissioner must have regard to, inter alia, "the grounds of the appeal".[10]

[7] The phrase "interests of justice" has appeared in all New Zealand statutes providing for criminal legal aid[11] and, in relation to legal aid for appeals, has been linked to the "the grounds of the appeal" ever since the Offenders Legal Aid Act 1954 introduced an integrated criminal legal aid system covering representation at all stages (including appeals) of the criminal process.[12] These phrases, and particularly the latter, were subject to extensive analysis by the Court of Appeal in *Nicholls v The Registrar of the Court of Appeal*[13] in 1998; this in the context of the Legal Services Act 1991. That Court concluded that:[14]

(a) the phrase "the grounds of appeal" encompassed an assessment of the merits of the grounds relied on (the "first *Nicholls* proposition");

(b) legal aid could be refused solely on grounds of lack of merit (the "second *Nicholls* proposition"); and

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9 Legal Services Act 2011, s 8(1)(c)(ii). Although s 8(1)(c)(i) provides that the "interests of justice" test need not be satisfied for a grant of aid in respect of an offence punishable by a maximum term of imprisonment of six months or more, this alternative is not applicable to an appeal: see s 8(4)(a).

10 Section 8(2)(a)(viii).

11 Starting with ss 2 and 3 of the Justices of the Peace Amendment Act 1912.

12 Offenders Legal Aid Act 1954, s 2(1) and 2(2)(c). Legal aid for criminal appeals was first provided for by s 10 of the Criminal Appeal Act 1945. The language of this provision is of no materiality in the present context.

13 *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA).

14 See at 398, 406 and 420–422 per Eichelbaum CJ; at 425, 439 and 440 per Tipping J; and at 461 per Smellie J.

(c) save in exceptional circumstances legal aid for an appeal ought not to be granted in the absence of an appearance of some merit (the "third *Nicholls* proposition").[15]

[8] A good deal of legal water has passed under the bridge since *Nicholls* was decided. *Nicholls* was criticised by the Privy Council in *R v Taito*.[16] And more significantly, the legislative scheme has changed significantly. Collins J, in the High Court, considered that the *Nicholls* approach required modification.[17] As it turns out, we are also of that view, albeit not for quite the same reasons, nor in the same respects.

[9] Against this reasonably complex background, an historical approach to the evolution of the legislative provisions is fundamental to a proper understanding of the current statutory scheme.

Pre-Nicholls evolution of the statutory scheme

[10] Section 2(1) and (2) of the Offenders Legal Aid Act 1954 provided:

> **2 Power of Court to grant legal aid to person charged with or convicted of offence**
>
> (1) Any Court having jurisdiction in criminal proceedings may, in respect of any stage of any criminal proceedings and in accordance with this Act, direct that legal aid be granted to any person charged with or convicted of any offence, if in its opinion it is desirable in the interests of justice to do so.
>
> (2) In considering whether to direct the grant of legal aid, the Court shall have regard to–
>
> (a) The means of the person charged or convicted:
>
> (b) The gravity of the offence:

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15 Tipping J said at 440 "*save in an exceptional case*, the applicant for aid has to show that the grounds of appeal have a sufficient possibility of success to justify a grant of legal aid, bearing in mind the gravity of the offence and all other relevant circumstances" and at 425 "it will *generally* be necessary to show grounds of appeal which have a sufficient possibility of success". Smellie J said at 461 "In company with the other members of the Court I am comfortable with the requirement that *save in exceptional circumstances*, on the issue of 'grounds of appeal', an applicant must show a sufficient possibility of success to justify a grant of aid." (All emphasis added).

16 *R v Taito* [2001] UKPC 15, [2003] 3 NZLR 577 (PC).

17 *Marteley* (HC), above n 2, at [43].

(c) In respect of any appeal, the grounds of the appeal:

(d) Any other circumstances that in the opinion of the Court are relevant.

[11] Up until 1989, the decision whether or not to grant legal aid was made by a judge.[18] In the case of an appellant who could not afford legal representation, the only considerations which the judge was required to take into account were "[t]he gravity of the offence" and "the grounds of the appeal". Judges could thus be expected to approach an application for legal aid on appeal by considering whether it was desirable in the interests of justice to grant legal aid having regard to the gravity of the offence and the grounds of appeal.

[12] With effect from 1 December 1989 registrars, as well as judges, were empowered also to determine legal aid applications.[19] Shortly afterwards, the 1954 Act was repealed and replaced by the Legal Services Act 1991 which came to be considered in *Nicholls*.

[13] Section 7 of the 1991 Act relevantly provided:

7 Registrar may grant criminal legal aid—

(1) Where any Court receives an application for criminal legal aid, a Registrar of that Court may, after assessing the application in accordance with the prescribed procedure, direct that criminal legal aid be granted to the applicant if, –

(a) Subject to section 15(1) of this Act, in that Registrar's opinion it is desirable in the interests of justice that the applicant be granted criminal legal aid; and

(b) It appears to that Registrar that the applicant does not have sufficient means to enable him or her to obtain legal assistance.

(2) In considering whether or not to direct the grant of criminal legal aid, the Registrar shall have regard to –

(a) The gravity of the offence:

(b) In respect of any appeal, the grounds of the appeal:

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[18] Including in the case of grants of legal aid made in Magistrates Courts prior to 1980, a Magistrate: see Offenders Legal Aid Act 1954, s 5.

[19] See Offenders Legal Aid Amendment Act 1989, s 2.

(c) Any other circumstances that in the opinion of the Registrar are relevant.

[14] Section 15(1) was in these terms:

> Where an application for criminal legal aid is made to the Court of Appeal, the Registrar who deals with that application shall, for the purposes of determining whether or not it is desirable in the interests of justice that the applicant be granted criminal legal aid, consult with a Judge of that Court, and shall take the views of that Judge on that matter into account in making that determination.

[15] The Registrar of the Court of Appeal was reasonably well able to assess the "gravity of the offence" (as were High Court and District Court Registrars in relation to legal aid grants in respect of proceedings in their courts). So the judge who was consulted under s 15(1) could be expected to focus on "the grounds of the appeal". Inevitably such focus would be on the merits of the appeal, as perceived by the judge. This is entirely consistent with the Parliamentary history of s 15. Its addition to the Bill which became the 1991 Act was explained by the Minister of Justice, at the third reading:[20]

> One important change made during the Committee stage related to the necessity to ensure that when criminal legal aid was made available for appeals to the Court of Appeal there was some vetting of the appeal to make certain that it actually had some merit before legal aid was granted. The Bill was amended to provide that the file should be referred to the President or to a member of the Court of Appeal, who could then indicate to the registrar who actually grants the aid whether, in the opinion of that appellate judge, the appeal had merit. Again, that is a very sensible and worthwhile approach.

[16] The s 15(1) procedure came to be supplemented by additional but non-statutory processes in which legal aid applications would not be refused without the sanction of three judges. All of this was part and parcel of the regime in issue in *R v Taito*[21] under which appeals by unrepresented appellants who had been refused legal aid were dealt with under what was known as the ex parte procedure.

[17] The 1991 Act addressed civil as well as criminal legal aid. The civil legal aid scheme had previously been provided under the Legal Aid Act 1969. Part 2 of the 1991 Act closely followed the scheme of the 1969 Act. Under both the 1969 Act and

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20 (23 July 1991) 517 NZPD 3078–3079.

21 *R v Taito*, above n 16.

Part 2 of the 1991 Act, eligibility for civil legal aid was provided for by reference to the nature of the proceedings and the financial means of the applicant.[22] Assuming those criteria were met, the applicant was entitled to legal aid unless refusal was required or warranted on the basis of specified criteria, some of which involved consideration of the merits.[23] In particular, legal aid was to be refused unless the applicant established that there were reasonable grounds for taking or defending the proceedings.[24] If "in doubt as to the merits of the applicant's case" decision-makers[25] could defer consideration of an application and take the advice of counsel or an expert.[26]

[18] The very different legislative approaches to criminal and civil legal aid in the 1991 Act may have been in part a function of drafting convenience in that it would have been easier to adopt and adapt the earlier legislative models than to take a clean slate approach. They also, however, presumably reflected the different contexts in which the two schemes operated. By way of example only, the human rights considerations (which we are about to address) applicable to legal aid for criminal proceedings differ from those applicable in respect of civil proceedings.

The human rights context

[19] The primarily relevant provisions of the New Zealand Bill of Rights Act 1990 are ss 24(f) and 25(h). They provide:

> **24 Rights of persons charged**
>
> Everyone who is charged with an offence—
>
> …
>
> (f) shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; …
>
> …

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22 See ss 15 and 17 of the 1969 Act and ss 19 and 28 of the 1991 Act.

23 See s 23 of the 1969 Act and s 34 of the 1991 Act.

24 See s 34(1) of the 1991 Act.

25 Decisions whether or not to grant civil legal aid were made by District Legal Services Committees rather than by Registrars, as was the case with criminal legal aid.

26 Section 21(1) of the 1969 Act. Section 24(1) of the 1994 Act was to the same effect.

> **25 Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> …
>
> (h) the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
>
> …

Consequently upon the enactment of s 25(h), the appeal provisions in the Crimes Act 1961 were amended to provide for a right of appeal without leave against conviction and sentence.[27]

[20] The expression "interests of justice" which has featured in all New Zealand criminal legal aid statutes[28] and in s 24(f) of the New Zealand Bill of Rights Act also appears in art 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR).[29] This provides:

> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> …
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it[.]
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> …

To the same general effect is art 6(3)(c) of the European Convention on Human Rights (ECHR).[30]

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27 Crimes Amendment Act 1991, s 2.

28 See above at [7].

29 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) ["ICCPR"].

30 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) ["ECHR"].

[21] Both art 14(3) of the ICCPR and art 6(3)(c) of the ECHR have been construed as encompassing appeals.[31] As well, and importantly, the associated jurisprudence suggests that, at least in serious cases, legal aid should not be refused on the basis of a merits assessment. This latter point is illustrated by the judgment of the European Court of Human Rights in *Maxwell v The United Kingdom*.[32]

[22] In *Maxwell*, the applicant had been convicted of a serious assault and sentenced to five years imprisonment. He had not been able to obtain representation for an appeal because counsel who were approached considered that the appeal was without foundation. Under the relevant rules of professional practice, counsel were not permitted to occupy court time with arguments which were known to lack foundation.[33] On this basis two counsel declined to act on appeal as did the firms of solicitors who had instructed them. The applicant then instructed a third firm of solicitors to act. They applied for legal aid and, at the request of the Scottish Legal Aid Board, obtained an opinion from counsel who considered that there were no grounds upon which the appeal could be successfully prosecuted. Legal aid was refused despite his solicitors suggesting that he should nonetheless be granted legal aid given the length of his sentence. For this reason he was unrepresented when his appeal was heard and dismissed.[34]

[23] In concluding that the applicant's art 6(3)(c) right had been breached as the "interests of justice" had required a grant of legal aid, the Court did not engage with the view that the appeal was meritless. Instead, it seems to have treated the length of the sentence of imprisonment as being of controlling importance:[35]

> The situation in a case such as the present, involving a heavy penalty, where an appellant is left to present his own defence unassisted before the highest instance of appeal, is not in conformity with the requirements of Article 6.

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31 For the ECHR, see Richard Clayton and Hugh Tomlinson *The Law of Human Rights* (2nd ed, Oxford University Press, Oxford, 2009) vol 1 at [11.334] and [11.492]. For the ICCPR see, for instance, *Karttunen v Finland* (23 October 1992) HRC Comm No 387/1989 at 122 per Bertil Wennergren; and the authorities surveyed by Eichelbaum CJ in *Nicholls v Registrar of the Court of Appeal*, above n 13, at 402–404. See also the cases discussed at [22]–[25] below.

32 *Maxwell v The United Kingdom* (1995) 19 EHRR 97 (ECHR).

33 At [20].

34 See [7]–[14].

35 At [40].

And although the Court mentioned the problem that counsel would not be prepared to argue a case without foundation, it did not grapple with the practical implications, or indeed utility, of granting legal aid in circumstances where lawyers would consider themselves precluded on ethical grounds from advancing the arguments which the applicant wished to deploy.

[24] The jurisprudence is not entirely consistent on this issue. In *Monnell and Morris v United Kingdom*, the same Court observed:[36]

> Under paragraph 3(c) of Article 6 … [the applicants] were guaranteed the right to be given legal assistance free only so far as interests of justice so required. The interests of justice cannot, however, be taken to require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6.

But while it is possible to find indications to the same effect in other cases,[37] it is fair to say that, at least in serious cases, perceived lack of merit is not seen as warranting a refusal of legal aid.[38]

[25] The ICCPR jurisprudence is not to the same effect. The complaint in *ZP v Canada* concerned, inter alia, the domestic refusal of legal aid to appeal a rape conviction.[39] The domestic decision-maker had examined the request for aid and determined, based on a perceived lack of merit in the appeal, that there was no entitlement.[40] Against this background, the Human Rights Committee concluded that the allegation that art 14(3)(d) had been breached had not been sufficiently substantiated for the purposes of admissibility.[41] In another decision, a similar

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36 *Monnell and Morris v United Kingdom* (1988) 10 EHRR 205 (ECHR) at [67].

37 For instance in *Granger v United Kingdom* (1990) 12 EHRR 460 (EComHR) at [50] the European Commission of Human Rights considered that both the likelihood of success and the importance of what was at stake were relevant to assessing the "interests of justice". The former consideration was not controlling, however, in the subsequent decision of the European Court of Human Rights: see *Granger v United Kingdom* (1990) 12 EHHR 469 (ECHR) at [46]–[47].

38 See for instance *Boner v The United Kingdom* (1995) 19 EHRR 245 (ECHR) at [43] where the ECHR repeated the passage from *Maxwell* that is set out above at [23].

39 *ZP v Canada* UNHRC 341/1988, UN Doc CCPR/C/41/D/341/1988 (6 May 1991).

40 At [4.4] and [5.4].

41 At [5.4].

refusal of legal aid on appeal was a breach of art 14(3)(d) when capital punishment was at stake.[42] The position generally is that where capital punishment is not in issue, "a State party is not required to provide legal aid for a person who is challenging a serious offence, unless the appeal has some objective chance of success".[43]

Nicholls v Registrar of the Court of Appeal

[26] In issue in *Nicholls v Registrar of the Court of Appeal* were refusals of legal aid in respect of two appeals to the Court of Appeal.[44] The case concerned the interpretation and application of the 1991 Act. Section 15(1) was engaged and, as was the practice at the time, the requirements of this section had been supplemented by the internal and informal procedures then adopted by the Court of Appeal. The merits (or otherwise) of the appeals had, as a result, been considered by three judges. In each instance legal aid was declined because of apparent lack of merit. Amongst the many issues in the case was the question whether this was legally correct.

[27] The provisions of the New Zealand Bill of Rights Act which we have set out, the articles of the ICCPR and ECHR to which we have referred and the international jurisprudence which we have discussed are reviewed extensively in the judgment of Eichelbaum CJ. He recognised that there was considerable divergence between that jurisprudence and New Zealand practice:[45]

> There is little doubt about the trend of the decisions of the international bodies, nor that a divergence has developed between that trend and the practice followed in New Zealand in dealing with legal aid applications in relation to appeals to the Court of Appeal. In the international jurisprudence, where severe penalties are involved, especially imprisonment, what has become paramount is the gravity of the subject-matter at stake, from the appellant's point of view. In such cases, for all practical purposes merit plays no part. In New Zealand practice, merit is the most significant factor, regardless of what is at stake.

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42 *La Vende v Trinidad and Tobago* UNHRC 554/93, UN Doc CCPR/C/61/D/554/1993 (17 November 1997).

43 Sarah Joseph et al *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, Oxford University Press, Oxford, 2004) at [14.109].

44 *Nicholls v Registrar of the Court of Appeal*, above n 13.

45 At 408.

[28] Also material to the issue before the Court was the legislative history of the 1991 Act. As to this the Chief Justice referred to the remarks made by the Minister of Justice which we have already set out.[46]

[29] In discussing the application of s 7(2)(b), Eichelbaum CJ observed:[47]

> Returning to the meaning of the expression "the grounds of appeal", in directing the Registrar to have regard to them the legislature, to be trite, did not intend that the Registrar should simply read them. Clearly the intent was that the Registrar should pay attention to the grounds, meaning (I think the inference is irresistible) that the Registrar should have regard to their merit and not simply to their form. A requirement of mere checking to ensure that the stated grounds corresponded to or were encompassed within s 385 of the Crimes Act 1961 or other relevant provisions would be ritualistic.

[30] The Chief Justice later went on to say:[48]

> As noted in the introductory section of this judgment the formal procedure requires the identification of an arguable ground of appeal, this being defined as meaning an appeal having an argument that could succeed. If as the applicants contend this is wrong their postulation must envisage cases where legal aid would be granted notwithstanding the absence of any grounds on which the appeal could succeed. Asked what instances might fall into this category [counsel for the applicants] replied all convictions for murder, and "complex cases". No satisfactory reason was given why the state should fund litigation which had no hope of success.
>
> …
>
> The essential point is that the LSA requires consideration of the grounds. The Act does not limit the situations where this consideration is relevant; for example it does not except homicide and other especially serious cases. If some regard is to be paid to the requirement of reference to grounds it cannot be wrong to require something more than a hopeless case or one where no arguable grounds exist. …
>
> While the statute requires consideration to be given to the grounds of appeal and the gravity of the offence in every case, it does not say or imply that they must always be given the same weight. Indeed the very concept of "gravity" means that it will carry different weight according to the offence charged. It follows that the weight to be given to the grounds of appeal will vary also. It does not follow that this element disappears from the equation altogether. There is no indication in the statute that it was intended to give automatic legal aid in serious cases even if on the most generous assessment the appeal was hopeless. However, there is no reason why tenuous grounds might not be viewed more generously where much is at stake for the appellant.

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46 See above at [15].
47 At 406.
48 At 420–421.

[31] To the same general effect were the judgments of Tipping and Smellie JJ (albeit that the latter dissented in relation to other aspects of the case).[49]

[32] As noted earlier, we see this case as standing for three propositions which we have labelled the first, second and third *Nicholls* propositions:

(a) "the grounds of appeal" encompassed an assessment of the merits of the grounds relied on;

(b) legal aid could be refused solely on grounds of lack of merit; and

(c) save in exceptional circumstances legal aid for an appeal ought not to be granted in the absence of an appearance of some merit.

Although the third *Nicholls* proposition contained an apparent element of flexibility, it was extremely unlikely, to say the least, that the Registrar would grant legal aid in relation to an appeal which the judges regarded as lacking merit.

The Legal Services Act 2000

[33] The Legal Services Act 2000 established a Legal Services Agency[50] to, inter alia, administer the legal aid system[51] and made no provision for direct judicial participation in legal aid decision-making. In this respect the new Act was responsive to concerns expressed in *Nicholls* as to judicial involvement.

[34] Section 8 of the 2000 Act corresponded generally to s 7 of the 1991 Act. Section 8(2), corresponding to s 7(2) of the 1991 Act, was in these terms:[52]

> (2) When considering whether or not the interests of justice require that the applicant be granted legal aid, the Agency–
>
> (a) *must* have regard to –
>
> (i) the gravity of the offence to which the matter relates;
> …

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49 At 425 per Tipping J and 461 per Smellie J.
50 Legal Services Act 2000, s 91.
51 Section 92.
52 Emphasis added.

(b) *may* have regard to –

(i) in respect of an appeal, the grounds of the appeal; and

(ii) any other circumstances that, in the opinion of the Agency, are relevant.

[35] For present purposes, it is s 8(2)(b) which is significant. Under this subsection, it was no longer mandatory for the "the grounds of appeal" to be taken into consideration. It was thus open to the Agency to decide that it was not appropriate to have regard to the grounds of appeal and to grant legal aid solely on the basis of "the gravity of the offence". This was thus a legislative over-ruling of the third *Nicholls* proposition (that, save in exceptional cases, some merit must be demonstrated). We do not, however, see it as inconsistent with the first and second *Nicholls* propositions (that "the grounds of the appeal" encompasses merits and that legal aid may be declined for an appeal which is devoid of merit).

[36] The 2000 Act also provided for civil legal aid. This was in terms which were largely borrowed from the 1991 Act (and thus can be traced back to the 1969 Act). The disconnect between the two legal aid regimes as to merits thus continued, as civil legal aid could only be granted if the applicant could show "reasonable grounds"; whereas under the 2000 Act there was no corresponding requirement in relation to criminal legal aid, even in respect of appeals.

Subsequent criticism of Nicholls

[37] We note that in *R v Taito*, the Privy Council observed that:[53]

> It will be obvious from this judgment that Their Lordships are in respectful disagreement with many of the dicta in *Nicholls*. Given that that there is now legislation [the 2000 Act], which incorporates new safeguards, it is unnecessary to discuss the lengthy judgments in *Nicholls*. It is sufficient to say that it has been overtaken by legislation and by the decision of the Privy Council in the present case.

[38] Although the third *Nicholls* proposition had been overtaken by the 2000 Act, we do not read that comment as referable to the relevance of merit to the decision whether to grant legal aid. This was not a topic otherwise addressed in the judgment.

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[53] *R v Taito*, above n 16, at [24].

The 2006 amendments

[39] The terms of s 8 of the 2000 Act were amended in 2006.[54] The altered s 8 was in terms similar to s 8 of the present Legal Services Act 2011, with the only variation of significance being that the 2011 Act substituted the Commissioner for the Agency as the decision-maker. For this reason there is no point setting out the amended s 8 of the 2000 Act and we can move direct to s 8 of the 2011 Act.

The 2011 Act

[40] Section 8 of the 2011 Act is in these terms:

> **8 When legal aid may be granted: criminal matters**
>
> (1) The Commissioner may grant legal aid to an applicant in respect of [criminal] proceedings if—
>
> (a) the applicant is a natural person charged with or convicted of an offence; and
>
> (b) it appears to the Commissioner that the applicant does not have sufficient means to enable him or her to obtain legal assistance; and
>
> (c) either—
>
> (i) the offence to which the application relates is punishable by a maximum term of imprisonment of 6 months or more; or
>
> (ii) it appears to the Commissioner that the interests of justice require that the applicant be granted legal aid.
>
> (2) When considering whether the interests of justice require that the applicant be granted legal aid, the Commissioner—
>
> (a) must have regard to—
>
> (i) whether the applicant has any previous conviction; and
>
> (ii) whether the applicant is charged with or convicted of an offence punishable by imprisonment; and
>
> (iii) whether there is a real likelihood that the applicant, if convicted, will be sentenced to imprisonment; and

[54] Legal Services Amendment Act 2006, s 6.

(iv) whether the proceedings involve a substantial question of law; and

(v) whether there are complex factual, legal, or evidential matters that require the determination of a court; and

(vi) whether the applicant is able to understand the proceedings or present his or her own case, whether orally or in writing; and

…

(viii) in respect of an appeal, the grounds of the appeal; and

(b) may have regard to any other circumstances that, in the opinion of the Commissioner, are relevant.

….

(4) Subsection (1)(c)(i) does not apply in respect of—

(a) an appeal; or

…

[41] Of the considerations provided for in s 8(2), those of primary relevance for present purposes are:

(a) whether the applicant is convicted of an offence punishable by imprisonment (s 8(2)(a)(ii));

(b) whether the appeal involves a substantial question of law (s 8(2)(a)(iv));

(c) whether there are complex factual, legal, or evidential matters that required the determination of a court (s 8(2)(a)(v));

(d) whether the applicant is able to understand the proceedings or present his or her own case (s 8(2)(a)(vi)); and

(e) "the grounds of the appeal" (s 8(2)(a)(viii)).

All are mandatory considerations in the sense of being considerations to which the Commissioner is required to have regard.

[42] The civil legal aid provisions are similar to those in the 2000 Act.

The approach of Collins J

[43] Collins J, taking a view of the remarks made in *Taito* which we have set out which differs from that we expressed, concluded that the *Nicholls* approach had to be modified "to make it very clear that those determining applications for legal aid for criminal appeals should not determine the merits of an appeal".[55] And he concluded:[56]

> … the Commissioner would be satisfied of the requirements of s 8(2)(a)(viii) of the Act if he considers that the grounds of appeal disclose matters which, if established, would be capable of leading to the appeal being allowed. In appropriate cases, unrepresented appellants may be entitled to a provisional grant of legal aid to investigate whether their grounds of appeal can be properly restated. This should be sufficient to ensure that truly hopeless cases are excluded from being the subject of grants of legal aid because it would be contrary to the interests of justice to provide legal aid in circumstances where the identified grounds of appeal could, on their face, never succeed.

[44] On this basis he concluded that it was sufficient for legal aid purposes if the identified grounds of appeal were capable of leading to a successful appeal. On this approach an appellant seeking legal aid can preclude any further inquiry into the merits of the appeal by asserting that there has been a miscarriage of justice (being a ground which if made out justifies the allowing of an appeal). It was this approach which Eichelbaum CJ in *Nicholls* described as "ritualistic".[57]

The Court of Appeal judgment

[45] The majority in the Court of Appeal (Ellen France and Randerson JJ) saw all three *Nicholls* propositions as current:[58]

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55 *Marteley* (HC), above n 2, at [43].
56 At [44] (citations omitted).
57 *Nicholls v The Registrar of the Court of Appeal*, above n 13, at 406.
58 *Marteley* (CA), above n 5, at [41].

> As we have seen, s 8(2)(a)(viii) requires the Commissioner to have regard to the grounds of the appeal. We accept Mr Cooke's submission that the requirement to have regard to the grounds of appeal necessarily requires some consideration of the merits of those grounds. The merits of the grounds of appeal are to be weighed along with the other factors to which regard must be had. To find otherwise would deprive s 8(2)(a)(viii) of any substance and reduce consideration of the grounds of the appeal to the merely mechanical exercise of identifying the grounds relied upon. By providing that there is no automatic right to legal aid on appeals if the offence is punishable by a maximum term of imprisonment of six months or more, Parliament intended the Commissioner to exercise a discretion whether to grant legal aid after assessing the relevant factors under s 8(2).

They took the same view as we do in respect of the non-applicability of what was said in *Taito* to the merits tests adopted in *Nicholls*.[59] The majority did not see its approach as inconsistent with s 24(f) of the New Zealand Bill of Rights Act 1990,[60] albeit that if there was any inconsistency, it represented a justified limit in terms of s 5.[61]

[46] The overall approach of the Court of Appeal is captured in the following passage from its judgment:[62]

> In summary, we find that:
>
> (a) The Commissioner is required to have regard to all the mandatory considerations under s 8(2)(a) that are relevant to the circumstances of the case.
>
> (b) In addition, under s 8(2)(b) the Commissioner may have regard to any other circumstances that, in the Commissioner's opinion, are relevant to the case.
>
> (c) The assessment of the "grounds of appeal" under s 8(2)(a)(viii) necessarily involves a consideration of the merits of the grounds of appeal … .
>
> (d) A generous approach is required having regard to the need for effective representation in the conduct of appeals in criminal cases.
>
> (e) The usual test under s 8(2)(a)(viii) will be whether there are reasonable prospects of success. This approach focuses on an assessment of the arguability of the appeal grounds rather than a judicial inquiry as to whether the appeal will ultimately succeed or fail.

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59 At [58].
60 At [83].
61 At [84].
62 At [82].

(f) The overall question is whether the interests of justice require the grant of aid. The merits of the appeal grounds are not to be considered in isolation from the other statutory considerations. The weight to be given to the mandatory considerations under s 8(2)(a) and any discretionary factors will depend on all the circumstances of the case. The weight given to the merits of the grounds of an appeal may be much less than that given to other factors such as the seriousness of the penalty imposed, any complexities of fact or law or the ability of the appellant to effectively present the appeal without the assistance of counsel. Where, for example, the penalty imposed on the appellant is serious, a grant of legal aid may be justified even if the merits of the grounds of appeal are regarded as tenuous. In such cases, a relatively cursory inquiry may suffice.

(g) On the other hand, there is no guarantee of legal aid for appeal purposes. Cases that are plainly ill-founded with no prospect of success are not intended to qualify for state-funded support. Without limiting the kinds of cases that might fall into this category, an obvious example is an appeal on the ground that the trial court had no jurisdiction. Where that proposition is patently unsustainable, the Commissioner is fully entitled to give significant weight to this factor in the overall assessment.

[47] The third Judge, Miller J adopted a slightly different approach:[63]

> [105] I turn to s 8. … I make several points about its construction.
>
> [106] First, grounds of appeal are one of eight specific considerations that the Commissioner must consider when deciding where the interests of justice lie. The section does not require that the Commissioner be satisfied about all or any given one of the eight. It follows that, as a matter of ordinary meaning, aid may be granted although the Commissioner, upon consideration, finds nothing of merit in the grounds of appeal. The interests of justice may warrant aid where, for example, the stakes are high, or the issues are complex, or the appellant cannot adequately present the case. In some such cases the court, let alone the Commissioner, may not be confident that the appellant has identified every reasonably available ground and the hearings may exhibit the appearance of injustice.
>
> [107] I acknowledge that this view separates me not only from the majority here but also from both judgments in *Nicholls*. All members of the *Nicholls* Court held that the appellant must show a sufficient possibility of success to justify aid, and the majority described merit as the most significant factor. That approach might be justified when decision-making on aid applications rested with the Court; although its processes were condemned in *Taito*, the institutional competence to assess merit resides there. But decision-making now rests with the Commissioner. I accept that re-enactment of the legislation permits an inference that Parliament endorsed the *Nicholls* standard. But in my opinion the inference is not compelling, the ordinary and natural meaning better meets the statute's stated purpose, and s 8 itself points to reasons why aid may be necessary whatever the substantive merits.

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63 Citations omitted.

> [108] In my opinion the legislation permits, but does not require, the Commissioner to take the approach illustrated by *Maxwell v The United Kingdom*, a judgment of the European Court of Human Rights sitting on a reference from Scotland. Although the legal aid regime differed, there was, as here, no automatic right to legal aid and the criterion was the interests of justice. …
>
> [109] Second, the legislation does not state that the Commissioner must consider whether an appeal will succeed. It requires rather that the grounds of appeal be considered. For the reasons given by the majority, this criterion concerns merits. But to say that the Commissioner must consider the merits is not to say that detailed consideration need be given or that the Commissioner must be satisfied that the appeal may succeed in fact. To consider whether the grounds of appeal would succeed if made out is to consider the merits, albeit at a high level. The legislation does not require that the Commissioner go any further.
>
> [110] Third, the section points to circumstances in which aid may not be warranted: notably, where the appeal involves no question of law, where factual issues are straightforward, or where the appellant can present the case adequately, in writing if not orally. In such a case self-representation may present no risk or appearance of injustice, bearing in mind that the court will do its best to identify anything of substance in the appeal and Crown counsel will draw the court's attention to anything that might be said for it.
>
> [111] Fourth, the legislation also contemplates that the interests of justice may not justify aid for a meritless appeal. In such a case legal representation can make no difference to the outcome, and there being nothing useful to say, the appellant may be capable enough of saying it. The legislation accordingly allows the Commissioner to consider whether the appeal will succeed.

Three different approaches

[48] What are effectively three different approaches have been articulated in the Courts below:

(a) In serious cases merit is all but irrelevant. It is enough that grounds are stated which, if made out, would result in the appeal being allowed. Indeed, it is wrong for the decision-maker to engage with the merits in any detail. This was essentially the approach adopted by Collins J.[64]

(b) Merit is always relevant. The usual approach is that reasonable prospects of success are required but, depending on the significance of

[64] This approach amounts to a rejection of all three *Nicholls* propositions.

the other considerations in a particular case, a "relatively cursory inquiry" may suffice as will "merits" which are "regarded as tenuous". This was the approach of the majority in the Court of Appeal.[65]

(c) The Commissioner may grant legal aid even if not persuaded that there is a reasonable basis for the appeal albeit that it remains open to the Commissioner to refuse legal aid for a meritless appeal. This was the approach of Miller J.[66]

[49] The apparent significance of the difference between the majority in the Court of Appeal and Miller J is diminished by the practice of the Commissioner (and previously the Agency) of making limited grants of legal aid to fund the preparation of a summary of issues on appeal. Such grants necessarily precede the forming by the Commissioner of any view as to the merits of the appeal. Based on the summary of issues, the Commissioner may conclude that:

(a) The appeal has reasonable prospects of success. In such a case, but depending always on the weight to be attached to the other criteria, legal aid will probably be granted.

(b) The appeal has no prospects of success. If so, it would be open on the approaches of both the majority and Miller J to refuse legal aid.

(c) It is not possible to form a view as to the merits. On the approach of Miller J, a grant of legal aid would not be precluded. On the approach of the majority legal aid might conceivably be granted on the basis that such a conclusion implies that the appeal cannot be stigmatised as hopeless and, in that negative sense, has sufficient merit to warrant a grant of legal aid. And on both approaches it would presumably be open to the Commissioner to fund such further assessment as may be necessary to form a better view as to the merits.

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65 This approach is not substantially different from that adopted by the Court of Appeal in *Nicholls*.

66 This involves an acceptance of the first and second *Nicholls* propositions but a rejection, in the context of the current statute, of the third.

Our approach

[50] We are satisfied that under s 8 of the 2011 Act, it is open to the Commissioner to have regard to the apparent merits of an appeal and, depending on the application of the other s 8(2) criteria, to refuse to grant legal aid for an appeal because it lacks merit. The reasoning of the Court of Appeal in *Nicholls* as to why "the grounds of appeal" must encompass its merits is persuasive. Indeed, an applicant for legal aid whose grounds of appeal are cogent would be disadvantaged by a formalistic approach confined to comparing the grounds of appeal asserted by the appellant with the statutory grounds of appeal. We also consider it obvious that, in the absence of countervailing considerations, the Commissioner may conclude that the interests of justice do not require the state to fund a hopeless appeal.

[51] We are, however, of the view that an affirmative conclusion that an appeal has some merit is not a prerequisite to a grant of legal aid and that the ability to grant legal aid in circumstances where no such merit is apparent is not confined to exceptional cases. On this point we prefer the approach of Miller J to that of the majority in the Court of Appeal. We are therefore satisfied that the third *Nicholls* proposition is not applicable to the current s 8.

[52] As explained above at [14]–[16], the third *Nicholls* proposition was very much dependent on:

(a) section 15(1) of the 1991 Act and its Parliamentary history; and:

(b) the limited criteria which were then required to be applied in the case of appeals (essentially whether, in light of the gravity of the offence and the grounds of appeal, legal aid was required in the interests of justice).[67]

[53] The role for judges of the Court of Appeal provided for by s 15(1) of the Act, together with the explanation provided by the Minister of Justice in the third reading debate strongly supported the view that the merits of an appeal were relevant, even

[67] See s 7(2) of the 1991 Act, set out above at [13].

in grave cases, to the decision whether or not to grant legal aid. As well, the judges were uniquely competent in terms of personal expertise to assess whether there was an arguable appeal ground. Further, they had access, if they thought it necessary, to the record of what had occurred at trial, a point which Eichelbaum CJ recognised in *Nicholls*:[68]

> … at the appeal stage the entire trial record, including the Judge's rulings and directions, is or can be made available for consideration by the person having the responsibility for deciding the grant of legal aid.

The Commissioner usually obtains a report as to merits from assigned counsel who should have the case on appeal.[69] But such a report will not usually enable the Commissioner to form a confident view one way or the other as to the merits of the proposed appeal. The Commissioner's practical ability to do so is far less than that of Court of Appeal judges acting under s 15 of the 1991 Act.

[54] As explained, the third *Nicholls* proposition had no application under the 2000 Act as first enacted because the grounds of appeal was merely a discretionary consideration. And when its status as a mandatory consideration was restored by the 2006 amendment, this was in the context of a number of additional criteria. These additional criteria have the practical effect of watering-down the significance that might otherwise be given to the grounds of appeal.

[55] Although we have reviewed extensively both *Nicholls* and the evolution of the current statutory scheme, for the future there should be no need to go beyond the text of the statute and our explanation of its operation. For ease of reference, we identify now what we consider to the be the critical considerations:

(a) Those convicted are entitled under s 25(h) of the New Zealand Bill of Rights Act and subpt 3 of pt 6 of the Criminal Procedure Act 2011 to a right of appeal. There being no direct provision for a merits filter to exclude appeals which are thought to lack merit, it is not the function

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68 *Nicholls v Registrar of the Court of Appeal*, above n 13, at 405.

69 Encompassing the indictment, transcript of evidence, summing up and, where sentence is in issue, pre-sentence reports and other material and the sentencing remarks.

of the legal aid system to provide indirectly such a filter in respect of impecunious appellants.

(b) The expression "grounds of the appeal" encompasses the merits of the appeal. It is, however, only one of seven[70] relevant criteria specified in s 8(2)(a).

(c) The stronger the apparent merits, the more likely it is that the interests of justice will require a grant of legal aid.

(d) If satisfied that an appeal is devoid of merit, it is open to the Commissioner, after having regard to the other s 8(2) criteria, to decline legal aid on the basis that the interests of justice do not require the funding of meritless appeals.

(e) The Commissioner is not required to make a close examination of the merits of an appeal and in particular should recognise that it may be difficult to conclude that an appeal is devoid of merit on the basis of the material available when the grant decision is made. Experience has shown that points upon which appeals succeed are sometimes not identified until well into the appeal process; indeed, on occasion, only at the hearing of the appeal.[71]

(f) While the Commissioner is required to have regard to the grounds of the appeal and thus apparent merit, the Commissioner may, on the basis of the other s 8(2) factors, conclude that legal aid should be granted even if, on the material available, not satisfied that the appeal is meritorious. Inability on the part of an appellant to present the appeal may be significant in this context.

(g) There is no minimum standard of merit which must be demonstrated as a prerequisite to a grant of legal aid.

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70 Eight criteria are specified but one is not applicable to appeals against conviction.

71 By way of example only, see for instance *Walker v R* [2012] NZCA 520.

Should legal aid have been granted for the conviction appeal?

The background to the conviction for murder

[56] The appellant was one of four defendants charged with murder. The others were Moana Heremaia (who was his partner), AJN and Ivan Manukau. They had formed a plan to rob the victim of money and drugs. To this end, they lured him to the house where the appellant and Ms Heremaia lived. There he was struck on the head, neck, back and limbs with a cricket bat and a tomahawk and he died shortly afterwards. The Crown case was that the appellant and AJN had been physically involved in the attack on the victim (and had used the tomahawk and cricket bat for this purpose) and that Ms Heremaia and Mr Manukau had acted as lookouts.

[57] Several weeks before the scheduled commencement of the trial, AJN pleaded guilty to murder. There followed communications between the prosecutor and Mr Michael Robb who was then acting for the appellant. These resulted in Mr Robb writing to the appellant on 19 August 2010. In this letter he brought the appellant up to date with AJN's plea of guilty and then put to him an offer which he said had been made by the prosecutor:

> … I have today received a phone call from the Crown Solicitor. He wishes to try and resolve the case without there being a [j]ury [t]rial if that is possible. I will now explain what he has said to me in our conversation.
>
> What the Crown Solicitor said was that he wants me to ask you if would consider the following things:
>
> 1. He would like to be able to offer Moana a charge of manslaughter.
>
> 2. Before he could do that he would need you to have pleaded guilty to murder.
>
> 3. The murder charge he would accept is under s 168 [of the Crimes Act 1961], namely that you planned to rob [the victim], that you and others planned for him to be hurt in the course of that robbery and that he would be hurt badly, in other words grievous bodily injury.
>
> 4. That during the robbery he died.
>
> 5. The [C]rown would then accept that they cannot prove that you used either of the weapons, but they would say that you were a willing party to that robbery involving grievous bodily injury.

> You and I have previously talked about this and you were clear that you did not wish to plead guilty under any circumstances, nor did you consider that Moana should plead guilty to manslaughter.
>
> But I am obliged to raise it with you again because the circumstances have changed a little and the [C]rown have asked me to discuss it with you again.
>
> Those changed circumstances are that [AJN] has pleaded guilty and will be giving evidence for the prosecution I am told.
>
> Mr Laybourn [counsel for Ms Heremaia] has also rang me today to tell me that he has spoken to Moana and that she is willing to plead guilty to manslaughter. He has asked me to pass that information on to you. The [C]rown say that if she pleaded guilty she may end up with a situation where has served her time or close to it, so would be eligible for release shortly after sentence.
>
> That is the second change in circumstances; that Moana is now willing to plead guilty to manslaughter and receive close to time served.

[58] In the same letter Mr Robb recorded the instructions which he had previously received from the appellant. These were to the effect that he had been party to plan to rob and beat the victim but that there had been no intention to cause him grievous bodily harm and that the appellant had not been aware that weapons would be used. The appellant had told Mr Robb that when AJN began hitting the victim he told him to stop and went so far as to place his body over the victim to protect him, with the result that he himself was struck by AJN. It is at the very least, implicit in Mr Robb's letter that he recognised that, to secure a conviction, the Crown would have to show that the appellant had intended that the victim suffer grievous bodily injury.

[59] Mr Robb went on to say:

> Apart from the latest offer from the [C]rown as outlined above, you will also need to consider your chances of successfully defending the murder charge. We have discussed those issues a number of times and again the last time I came to see you. As I have previously said, I will follow your instructions in defending you, but you need to consider whether the jury will be troubled by anything in the case against you.

He then drew the appellant's attention to certain aspects of the evidence:

(a) The appellant had taken the cricket bat used in the assault from Mr Manukau's house the day before the robbery. This action was

consistent with its intended use in the robbery and thus an intention on the appellant's part to use it as a weapon, which was also consistent with an intention to inflict grievous bodily injury.

(b) The tomahawk which was used belonged to the appellant and had his fingerprint on it. He had also admitted to the police that he had been sharpening it.

(c) The appellant's suggestion that AJN had used as weapons both the tomahawk and the cricket bat might not be seen by a jury as plausible.

(d) At interview the appellant had given differing accounts of what had happened and had not mentioned the explanation which he wished to advance at trial.

[60] Following a meeting at the High Court attended by the appellant, Ms Heremaia and their respective counsel, the appellant, along with Mr Manukau, pleaded guilty to murder and Ms Heremaia pleaded guilty to manslaughter.

[61] The defendants other than the appellant were sentenced by Heath J on 30 September 2010.[72] Mr Manukau received a life sentence with a minimum period of imprisonment of 12 years. AJN was sentenced to life imprisonment with a minimum period of imprisonment of ten years. A sentence of three years and nine months imprisonment was imposed on Ms Heremaia.

[62] The appellant's sentencing was deferred because he indicated that he wished to apply to set aside his guilty plea. Mr Philip Morgan QC was assigned to act as his counsel. He subsequently filed a memorandum with the Court in these terms:

> Mr Robb had advised Mr Marteley comprehensively about [s 168 of the Crimes Act] and its impact upon his case. All Mr Marteley really needed from freshly assigned counsel was to hear that advice again.
>
> Having heard that advice again, Mr Marteley recognises that he does not have a defence to the charge of murder. His instructions to counsel are not to proceed with any application to vacate the plea.

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[72] *R v AJN* HC Hamilton CRI-2009-19-9786, 30 September 2010 (sentencing notes of Heath J).

[63] The appellant then sought legal aid to enable him to appeal against both conviction and sentence. The Commissioner was, eventually, prepared to fund an appeal against sentence but not conviction. This decision was upheld by the Legal Aid Tribunal on the grounds that the appellant's appeal against conviction was "unarguable".

An overview of the proposed conviction appeal

[64] On the basis of the material to which we have referred, it is possible to form some provisional views as to the proposed conviction appeal:

(a) The case against the appellant was reasonably strong; so much so that if he had gone to trial there was every likelihood that he would have been found guilty of murder.

(b) The advice he received from Mr Robb was comprehensive and correct in law and on the face of it, sensible in terms of likely outcome.

(c) The appellant's decision to plead guilty was substantially contributed to by the indication from the prosecutor that if he did so the prosecution would not seek a murder conviction against his partner and an effective threat that, in the absence of such a plea, a murder conviction against his partner would be sought.

(d) When the appellant subsequently had a change of heart about his plea, he received further advice, this time from senior counsel and, as a result of this advice, decided not to persist with an application to change his plea. He was subsequently sentenced.

(e) The appellant's prospects of succeeding in a conviction appeal would:

(i) depend primarily upon the Court of Appeal concluding that the plea offer from the prosecutor in respect of Ms Heremaia had the effect of putting collateral and improper pressure on the appellant to plead guilty to murder; and

(ii) be compromised by the fact that after Ms Heremaia's plea to manslaughter had been accepted and thus after the cessation of the postulated pressure, and with the benefit of advice from senior counsel, the appellant abandoned his proposed application to set-aside his plea.

[65] The provisional views just expressed are based on the material to which we have referred. We are not sure whether all of that material was available to all of those who made decisions as to the appellant's eligibility for legal aid. It is, however, of a kind which might ordinarily be available when legal aid is under consideration.

[66] It is right to recognise that the material to which we have referred has significant limitations:

(a) All we know of the background to the murder charge and the strength of the case against the appellant comes from the material to which we have referred and the sentencing remarks of the Judge. We do not know the detail of the primary evidence; nor do we have the appellant's explanations, if any, as to the unfavourable (from his point of view) aspects of the case to which Mr Robb drew attention in his letter.

(b) We do not know, other than from what appears in Mr Robb's letter, what the prosecutor said to Mr Robb. Conceivably Mr Robb may have misunderstood what was said to him.

(c) We do not know whether there was a plausible evidentially-based view of the case in terms of which the Crown could appropriately pursue the three males for murder but Ms Heremaia only for manslaughter.

(d) If it is the case that the prosecutor's position was exactly as reported by Mr Robb, we do not have his account of why the offer was made,

in other words why he would have pursued a murder conviction against Ms Heremaia on a not guilty plea by the appellant, given that he apparently thought it proper to accept a plea from her to manslaughter assuming guilty plea to murder by the appellant.

(e) We do not know the detail of what was said at the meeting at the Court save that it appears that the appellant accepts that it was made clear to him that the final decision whether to plead guilty was for him.

(f) We do not know the detail of what passed between Mr Morgan and the appellant.

[67] Even allowing for those unknowns, it might be thought that the appeal has sufficient potential merit to warrant a grant of legal aid. Indeed it might be thought surprising that legal aid was not granted. It is, however, only fair to those involved with the relevant decisions in respect of legal aid to acknowledge that their assessment of the merits of the proposed appeal in the present case was complicated by two considerations, one of a systemic character and the other in a sense particular to this appellant and this case.

[68] The systemic consideration arises in this way. The practice of both the Agency and Commissioner has been to make limited grants of aid, confined to covering four hours work, for counsel to provide a summary of the issues on appeal – in effect advice as to the merits of the appeal. Such a time allowance was inadequate in this case to enable a comprehensive merits assessment, particularly if counsel wished to explore some of the unknowns which we have identified.

[69] The problem which in a sense is particular to this case (albeit that we suspect that such problems are not uncommon) is that the appellant has indicated an intention to prosecute his appeal on the basis of a number of additional complaints which range from the implausible to the bizarre. He alleges improprieties against Messrs Robb and Morgan, the prosecutor, the Judge, and the police. As against the police he maintains that they bribed AJN to give false evidence against him and also

that they engaged in subterfuge with animal control officers to rename and re-house his dogs. He has blamed everyone but himself for his current predicament. Unsurprisingly, there has been no enthusiasm on the part of anyone to fund an appeal premised on his florid and so far unsubstantiated allegations – allegations which have served to distract attention from what might be an arguable appeal point.

The dealings between the appellant and the Agency and Commissioner

[70] There were a great many dealings between the appellant and the Agency and Commissioner. There is, however, no point in reviewing them in detail. It is sufficient to say that:

(a) On 16 April 2012 legal aid was granted for the purposes of the sentence appeal but not the appellant's conviction appeal.

(b) At no stage was there any assessment of the propriety of the offer apparently made by the prosecutor to Mr Robb.

The Legal Aid Tribunal

[71] The appellant's application to the Legal Aid Tribunal to review the 16 April 2012 decision fell to be determined under s 52 of the 2011 Act which provides:

> **52 Grounds for review**
>
> (1) An aided person or an applicant for legal aid may apply to the Tribunal for a review of the Commissioner's reconsideration of a decision referred to in subsection (2) on the grounds that it is—
>
> (a) manifestly unreasonable; or
>
> (b) wrong in law.
>
> (2) The decisions that may be reviewed are decisions that affect the applicant for review, and relate to any 1 or more of the following:
>
> (a) an application for legal aid:
>
> …
>
> (e) the withdrawal of, or amendment to, a grant of legal aid:
>
> …

(4) In this section, **decision** includes a failure or refusal to make or reconsider a decision.

[72] In a decision issued on 1 November 2012[73] the Legal Aid Tribunal confirmed the Commissioner's decision of 16 April 2012.[74] The relevant passages from the decision are as follows:[75]

> *Prosecutorial misconduct*
>
> …
>
> [17] The Applicant's allegations of prosecutorial misconduct include the Police concealing evidence; Police exceeding their statutory authority during its investigation and prosecution of the Applicant; that there has been misconduct by officials involved with the prosecution of his case; that a witness was paid to provide a false statement adverse to the Applicant; that there has been subterfuge between animal control officers and the Police to re-home and re-name the Applicant's two dogs despite the Applicant being told that both dogs had been destroyed.
>
> [18] The Applicant has made these sweeping allegations but without any documentary records, independent accounts or other corroboration. The allegations are without support and therefore unarguable.
>
> [19] The Applicant also says he was induced to enter a guilty plea so that his partner who was also accused of the same murder could have her charge reduced from murder to manslaughter. This actually occurred. Understandably, this could have been a powerful inducement. The reduction of charge to his partner if the Applicant pleaded guilty to murder was suggested by Counsel for the Applicant's partner. Counsel for the Applicant's partner was not an official involved in the prosecution of the Applicant. The inducement cannot be said to have been made by the prosecution and therefore cannot be prosecutorial misconduct. This ground is equally unarguable.
>
> *Impugning the Applicant's own Guilty Plea*
>
> [20] A successful appeal against conviction following a guilty plea is possible but if an accused fully appreciated the merits of his or her position and made an informed choice to plead guilty, the conviction cannot be impugned.
>
> …
>
> [22] It is accepted that the Applicant's lawyer when the guilty plea was entered advised the Applicant he had a possible defence based on his instructions but in light of the prosecution evidence, including previous

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73 There was an earlier decision of 7 June 2012 in which the Tribunal refused to grant the appellant an extension of time with respect to an application to review an earlier decision of the Commissioner which had been superseded by the Commissioner's decision of 16 April 2012.

74 *Re Marteley* [2012] NZLAT 41 & 111, 1 November 2012.

75 References omitted.

> inconsistent accounts from the Applicant, that there was a significant risk that the Applicant would be disbelieved by a jury and consequently convicted. The Applicant has not disputed the correctness of this advice. The Applicant there accepts both that he was properly apprised of the merits of his position before he entered his guilty plea and that he made an informed choice to plead guilty. His concessions make this ground of appeal unarguable.
>
> …
>
> **CONCLUSION**
>
> [24] Even though the conviction is very serious and the Applicant would have difficulty arguing his own case, it cannot be in the interests of justice for the Applicant to be provided with publicly funded legal services to argue grounds of appeal that are unarguable.
>
> [25] Accordingly, the Tribunal concludes that the Commissioner was not manifestly unreasonable or wrong in law to determine the interests of justice do not require a grant of legal aid for an appeal against conviction.

The Tribunal cited the decision of the Court of Appeal in *R v Ripia*[76] in support of the conclusions expressed in [20] and [22] of its decision.

[73] As will be immediately apparent, the reasoning in [19] of the Tribunal's decision is based on what would appear to be a misunderstanding of the facts. On the material made available to us, which includes Mr Robb's letter of 19 August 2010, the proposition that the charge against Ms Heremaia would be reduced to manslaughter if the appellant pleaded guilty to murder appears to have been advanced by the prosecutor. Indeed, the letter suggests that this proposition was initiated by the prosecutor although we accept that it is possible that it may have earlier been suggested by Ms Heremaia's counsel. In any event, whatever the provenance of the proposition, what might be thought to be primarily important is that it appears to have been adopted by the prosecutor.

The appeal to the High Court

[74] The appellant's appeal to the High Court was allowed by Collins J.[77] The Judge had the advantage of a report from a psychiatrist on the appellant, a report which suggests, amongst other things, that the appellant would not make a very good fist of self-representation in the Court of Appeal.

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76 *R v Ripia* [1985] 1 NZLR 122 (CA).
77 *Marteley* (HC), above n 2.

[75] Although Collin J's approach to the appeal was premised on his legal analysis of the appropriateness and relevance of a merits analysis with which we do not agree, we endorse significant aspects of his reasoning, in particular his conclusions that:

(a) Section 8(2)(a)(ii) and (iii) weighed strongly in favour of legal aid being granted given the seriousness of the sentence imposed.[78]

(b) It was difficult to make a meaningful assessment of the matters in s 8(2)(a)(iv) and (v) but it was conceivable that the grounds of appeal identified by the Tribunal were capable of giving rise to substantial questions of law, and/or complex factual, legal or evidential matters.[79]

(c) Section 8(2)(a)(vi) weighed strongly in favour of legal aid being granted since the materials contained in the case before the High Court, including a psychiatrist's report, showed it would be particularly difficult for the appellant to present his own case and to understand the proceedings.[80]

We also note that in relation to s 8(2)(a)(viii) the Judge found that the Commissioner and the Tribunal went much further than they should have and, in effect, determined the merits of the appellant's appeal.[81] To the reasonably substantial extent that the underlying reasoning rested on the Judge's narrow approach to "grounds of appeal" which was rejected in *Nicholls*, we disagree with it. We do, however, agree with it to this extent: that in this particular case and on the material available, it was not practicable to form a definitive view as to the appellant's prospects of success and that accordingly, the Tribunal was wrong to treat its negative views of the merits as the decisive consideration.

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78 At [49].
79 At [50].
80 At [51].
81 At [52]–[54].

The appeal to the Court of Appeal

[76] We draw attention to the following comments made by the Court of Appeal:[82]

> [88] We accept that in the face of Mr Robb's letter of advice, Mr Marteley was informed of his options at the time of the entry of his guilty plea. Accordingly, a conclusion that Mr Marteley's grounds of appeal were tenuous would not have been surprising. However, although the Tribunal briefly acknowledged the seriousness of the case and that Mr Marteley would have difficulty in presenting his case on appeal without legal assistance, the decision reached by the Tribunal to refuse legal aid was clearly dominated by the assessment that the grounds of appeal were "unarguable". In other words scant attention was paid to the seriousness of the charge in a context where Mr Robb considered there was an arguable defence.
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> [89] As to the Tribunal's assessment of the possible merits of the appeal, as the Tribunal acknowledged, the offer of a plea of manslaughter to Mr Marteley's partner, Ms Heremaia is capable of acting as a strong inducement to Mr Marteley to plead guilty to the murder. However, the issue of whether there was any improper pressure on Mr Marteley in consequence of her position was considered only in relation to prosecutorial misconduct although clearly also relevant to his plea.
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> [90] In our view, while the grounds advanced at that point were properly regarded as tenuous, to dismiss them as "unarguable" went beyond the proper scope of the Tribunal's functions under the 2011 Act and effectively determined the appeal.
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> [91] The risks of a premature decision before the issues have been properly explored is also a feature of this case. As it happens, it emerged subsequently that Mr Marteley has suffered from mental illness and has serious personality defects including a tendency of pathological lying. As Mr Ellis pointed out, these matters could impact upon his level of understanding, his ability to prepare coherent grounds of appeal, and his capacity to give accurate and reliable instructions to his counsel at the time the plea was entered.
>
> [92] … The grounds of appeal as indicated to date are tenuous but Mr Marteley has been convicted of the most serious crime in the criminal calendar for which he has received a life sentence and a 14 year minimum period of imprisonment. His ability to effectively present his case on appeal is likely to be extremely limited in the absence of legal assistance. We agree with Collins J that these factors should have weighed heavily in favour of the grant of legal aid to Mr Marteley for his conviction appeal as well as his appeal against sentence.

Save for reservations as the description of the grounds of the appeal as "tenuous" we agree with these remarks.

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82 *Marteley* (CA), above n 5.

Our approach

[77] The decision whether to grant legal aid fell to be determined in the context of the sentence imposed, the evidential and legal issues associated with the propriety or otherwise of the pressure to which the appellant was subjected, whether such pressure would warrant allowing the appeal both generally and in light of subsequent events, and the inability of the appellant to present the appeal himself. In this context, there is sufficient merit in the appeal to warrant a grant of legal aid on any conceivable approach to the legal issues discussed earlier in this judgment. The conclusion to the contrary reached by the Commissioner was manifestly unreasonable[83] and that of the Tribunal was unreasonable. Their conclusions were also wrong in law as they did not identify the plausible legal basis which exists for the proposed appeal.

[78] In cases such as the present where the underlying offending is serious and the appellant is (a) plainly unable to advance coherent and sensible submissions but (b) nonetheless determined to proceed with the appeal, but legal aid is refused the Court of Appeal has no practical alternative but to appoint an amicus. As Collins J pointed out, the cost of such an exercise is likely to exceed the costs associated with legal aid. The Court of Appeal, in disagreeing with Collins J on this point, concluded that such fiscal consequences were not relevant to the decision whether or not to grant legal aid.[84] This conclusion of the Court of Appeal was not challenged on appeal to this Court. Nonetheless, the probability that the Court of Appeal, in dealing with a particular criminal appeal, will see a need for state-funded legal assistance is material to whether the interests of justice require a grant of legal aid. As well, from the point of view of the Court of Appeal, submissions advanced by an amicus are not necessarily going to be the functional equivalent of arguments advanced by assigned counsel. In such circumstances it is open to the Commissioner to treat the likely need to appoint an amicus if aid is not granted as material to whether such a grant is required in the interests of justice.

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83 See s 52(1)(a) of the 2011 Act.

84 *Marteley* (CA), above n 5, at [93]–[95].

[79] For these reasons, Collins J was right to allow the appeal from the Tribunal and, as is apparent, while differing from him in some legal respects, we endorse much of his reasoning. We also endorse the comments of the Court of Appeal which we have set out.

[80] Because Collins J was right to allow the appeal from the Tribunal the Court of Appeal ought not to have allowed the Commissioner's appeal; this despite answering the two questions posed by Collins J in favour of the Commissioner.

Costs

[81] The appellant has been successful and is entitled to costs in all Courts. That he did not seek legal aid is, for these purposes, irrelevant. For this reason we need not deal with the argument of Mr Ellis for the appellant that he should have been awarded costs in the High Court and Court of Appeal in any event.

Disposition

[82] Accordingly:

(a) The appeal is allowed, the Court of Appeal judgment is set-aside and the order that the appellant receive legal aid for his conviction appeal is restored.

(b) In this Court the appellant is awarded costs of $25,000 together with reasonable disbursements.

(c) The appellant is also entitled to costs and disbursements in the High Court and Court of Appeal to be fixed by those Courts.

ELIAS CJ

[83] The appeal concerns the application of s 8(2)(a)(viii) of the Legal Services Act 2011. That subsection requires the Legal Services Commissioner, in granting legal aid for a criminal appeal, to "have regard to … the grounds of the appeal". The issue on the appeal is the extent to which s 8(2)(a)(viii) requires assessment of the

"merits" of an appeal. In *Nicholls v Registrar of the Court of Appeal*, it was held that reference to the "grounds of appeal" necessarily involves a consideration of the merits of the proposed appeal.[85] And in that case Eichelbaum CJ expressed the view that the merits of a proposed appeal were the most significant consideration to be taken into account in determining whether to grant legal aid.[86]

Summary

[84] Mr Marteley appealed to the High Court a decision of the Legal Aid Tribunal upholding the Commissioner's rejection of his application for legal aid to appeal his conviction for murder.[87] In the High Court, Collins J held that the Tribunal and the Commissioner had misunderstood their functions under s 8(2)(a)(viii) of the Act in treating the mandatory consideration of "the grounds of the appeal" as requiring them to assess the merits of the proposed appeal.[88] He considered the merits of the proposed appeal were engaged in "grounds of appeal" only to the extent that "truly hopeless cases" may be excluded by the Commissioner.[89] Collins J took the view however that the reference to "grounds of appeal" does not permit further consideration of the merits once the Commissioner considers that "the grounds of appeal disclose matters which, if established, would be capable of leading to the appeal being allowed".[90] He held that the Commissioner and the Tribunal had been wrong to decline legal aid to the appellant.

[85] On appeal, the Court of Appeal disagreed with the interpretation of s 8(2)(a)(viii) adopted by Collins J.

[86] Ellen France and Randerson JJ applied the approach taken in *Nicholls*.[91] They considered that "[t]he usual test" was whether the grounds had "reasonable

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85 *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA).
86 At 408.
87 *Re Marteley* [2012] NZLAT 41 & 111. The appeal was brought under s 52 of the Legal Services Act 2011: see below at [110].
88 *Marteley v Legal Services Commissioner* [2013] NZHC 1278, [2013] NZAR 875 (Collins J) at [53]–[54].
89 At [44].
90 At [44].
91 *Legal Services Commissioner v Marteley* [2014] NZCA 185, [2014] 3 NZLR 143 (Ellen France, Randerson and Miller JJ) at [78].

prospects of success".[92] On this view, the role of the Commissioner in assessing the grounds of the appeal was not confined, as Collins J had thought, to identifying appeals that were "truly hopeless".[93] On the other hand, Ellen France and Randerson JJ acknowledged that "[a] generous approach [in granting legal aid] is required having regard to the need for effective representation in the conduct of appeals in criminal cases".[94] The focus should be "on an assessment of the arguability of the appeal grounds rather than a judicial inquiry as to whether the appeal will ultimately succeed or fail".[95] Depending on the other circumstances relevant, even "tenuous" grounds might be sufficient to justify an award of aid.[96]

[87] Miller J, in his separate concurring judgment in the Court of Appeal, considered that, while the Commissioner may refuse legal aid for a "meritless" appeal, the Commissioner is equally entitled to grant legal aid even if of the view that there is no "merit" at all in the appeal.[97] Miller J was of the view that the merits review permitted by the statutory reference to "grounds of appeal" was a "high level" one to consider "whether the grounds of appeal would succeed if made out".[98] In such "high level" consideration, appeals "for which there is something to be said" should not be denied legal aid.[99]

[88] Despite disagreeing with the High Court on the meaning of s 8(2)(a)(viii), all members of the Court of Appeal seemed to be of the opinion that the Commissioner and the Tribunal had been wrong in law to find that the appeal was "unarguable". By the time of the hearing in the Court of Appeal, events had moved on. The Commissioner had continued to fund the preparation of the substantive appeal pending the appeal to the Court of Appeal, not having sought a stay. In the Court of Appeal, counsel for the Commissioner advised the Court that legal aid would

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92 At [82](e). In *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA), it was held that the circumstances would have to be "exceptional": at 440 per Tipping J and at 461 per Smellie J. The standard of "reasonable prospects of success", it should be noted, was thought by Eichelbaum CJ in *Nicholls* at 421 to pose "too high a barrier" if the charge was grave, which is presumably why Ellen France and Randerson JJ considered it was a "usual" test, which could be displaced if the circumstances warranted it.

93 *Marteley v Legal Services Commissioner* [2013] NZHC 1278, [2013] NZAR 875 at [44].

94 *Legal Services Commissioner v Marteley* [2014] NZCA 185, [2014] 3 NZLR 143 at [82](d).

95 At [82](e).

96 At [82](f) per Ellen France and Randerson JJ. See also at [106] per Miller J.

97 At [106] and [111] per Miller J.

98 At [109].

99 At [104].

continue for the substantive appeal, whatever the outcome in that Court.[100] The Court of Appeal formally allowed the appeal from the High Court, seemingly on the basis that it disagreed with the reasoning of that Court on the interpretation of s 8(2)(a)(viii).

[89] Although in the particular case the question of legal aid has become moot, the decision of the Court of Appeal, reversing Collins J on the interpretation of s 8(2)(a)(viii) of the Legal Services Act, raises a point of public importance. Leave was granted to appeal to this Court to enable it to be addressed.[101]

[90] For the reasons given in what follows, I consider that the "grounds of the appeal" to which the Commissioner must "have regard" do not entail assessment of the merits of a properly constituted appeal. I would not follow *Nicholls*. Nor do I agree with the opinion of Ellen France and Randerson JJ in the Court of Appeal that, "[t]he usual test" is whether the grounds have "reasonable prospects of success".[102] On the other hand, I do not agree with Miller J and the other members of this Court that a grant of legal aid may be made under the legislation even if the grounds identified are incapable of founding an arguable case.[103] I consider that legal aid is not required by the "interests of justice" where the grounds identified are formally inadequate or the basis on which they are invoked is colourable. Once that threshold is crossed, however, I do not think the prospects of success on appeal enter into the determination about the grant of legal aid which the Commissioner is required to make in application of s 8.

[91] I reach this conclusion on the basis of the text and purpose of the legislation, interpreted in conformity with the right of appeal confirmed by the New Zealand Bill of Rights Act 1990 and conferred by the Crimes Act 1961. It is substantially in agreement with the views expressed in the High Court by Collins J. In result it may not differ very much from the view expressed in the Court of Appeal by Miller J that

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100 See at [9].
101 *Marteley v Legal Services Commissioner* [2014] NZSC 94.
102 *Legal Services Commissioner v Marteley* [2014] NZCA 185, [2014] 3 NZLR 143 at [82](e).
103 At [106] per Miller J; and see above at [51] and [55].

any "merits" assessment is a "high level" one which does not exclude "appeals for which there is something to be said".[104]

[92] I also consider that the Court of Appeal was in error in formally allowing the appeal. The appeal should properly have been dismissed, since the Court of Appeal in substance agreed with Collins J that legal aid should not have been declined on the basis that the appeal was unarguable, even applying a different approach to s 8(2)(a)(viii).

The legislative context

(i) The Legal Services Act 2011

[93] The Legal Services Act was enacted with the purpose set out in s 3:

> **3 Purpose of Act**
>
> The purpose of this Act is to promote access to justice by establishing a system that—
>
> (a) provides legal services to people of insufficient means; and
>
> (b) delivers those services in the most effective and efficient manner.

[94] Under s 8 of the Act, legal aid may be granted by the Legal Services Commissioner for criminal appeals if "it appears to the Commissioner that the interests of justice require that the applicant be granted legal aid".[105] When considering "the interests of justice", the Commissioner is required by s 8(2) to "have regard to" the considerations set out in s 8(2)(a) and, under s 8(2)(b) "may have regard to any other circumstances that, in the opinion of the Commissioner, are relevant".

[95] The mandatory considerations in determining whether it is in the "interests of justice" to grant legal aid, as listed in s 8(2)(a), are:

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[104] *Legal Services Commissioner v Marteley* [2014] NZCA 185, [2014] 3 NZLR 143 at [104] and [109] per Miller J.

[105] Legal Services Act, s 8(1)(c)(ii). The entitlement to legal aid under s 8(1)(c)(i) (where aid may be granted in respect of offences punishable by six months imprisonment or more without the "interests of justice" requirement being made out) does not apply to appeals: s 8(4)(a).

(i) whether the applicant has any previous conviction; and

(ii) whether the applicant is charged with or convicted of an offence punishable by imprisonment; and

(iii) whether there is a real likelihood that the applicant, if convicted, will be sentenced to imprisonment; and

(iv) whether the proceedings involve a substantial question of law; and

(v) whether there are complex factual, legal, or evidential matters that require the determination of a court; and

(vi) whether the applicant is able to understand the proceedings or present his or her own case, whether orally or in writing; and

(vii) in any proceeding to which section 6(c) applies, the consequences for the applicant if legal aid is not granted; and

(viii) in respect of an appeal, the grounds of the appeal; …

[96] It is to be noted that the considerations identified in s 8(2)(a) are not ranked in any order. None of the considerations dominates the others as a matter of statutory interpretation. The relevance of each in a particular case depends on context. Nevertheless, the emphasis on imprisonment indicates that seriousness of consequences for the applicant will usually be an important consideration. And the references to complexity, the capacity of the applicant to present his or her own case and, in the case of an appeal, "the grounds of the appeal" focus on the need for legal representation in the particular case. Such considerations are self-evidently important if the purpose of the Act in promoting access to justice is to be fulfilled.

[97] The circumstances in which legal aid may be granted for criminal proceedings, including criminal appeals, may be contrasted with s 10 of the Act which provides when civil legal aid may be granted. In a provision which applies to appeals as well as to other civil proceedings, the Commissioner is directed by s 10(3) to refuse to grant legal aid in civil cases "if the applicant has not shown that the applicant has reasonable grounds for taking or defending the proceedings or being a party to the proceedings". In addition to the threshold requirement of "reasonable grounds", which it is for the applicant to make out, the Commissioner is empowered to refuse legal aid in any of a number of circumstances which include, in the case of

"original proceedings", that "the applicant's prospects of success are not sufficient to justify the grant of legal aid" and, in the case of an appeal, that the Commissioner "considers that for any reason the grant of legal aid or further legal aid is not justified".[106]

[98] It should be noted that the non-mandatory consideration of "prospects of success" in respect of original civil proceedings are distinctly mentioned and that they are not equated with the mandatory "reasonable grounds for taking or defending the proceedings or being a party to the proceedings", which applies to civil appeals and original proceedings alike. "Prospects of success" is not distinctly referred to in the discretionary considerations in respect of appeals.

[99] It is of significance that the threshold an appellant must fulfil under the civil provision is that there are "reasonable grounds" for taking the appeal. By contrast, the Commissioner when considering a grant of legal aid for a criminal appeal is required to take into account "the grounds of the appeal".

[100] The scheme and sense of these provisions read together is that consideration of "grounds" does not entail assessment of the "prospects of success" of either criminal or civil proceedings. The overarching purpose of the legislation as identified in s 3 is to establish a system for provision of legal services to people of insufficient means in order "to promote access to justice". When the legislation authorises consideration of the prospects of success of litigation, those words are used in distinction to "reasonable grounds" or "the grounds". In addition, under the criminal legal aid provision, consideration of "grounds" suggests a less intrusive check than a requirement that an applicant show he or she has "reasonable grounds for taking or defending the proceedings".

(ii) The New Zealand Bill of Rights Act 1990

[101] Under s 25(h) of the New Zealand Bill of Rights Act, "[e]veryone who is charged with an offence" has, as part of the "[m]inimum standards of criminal procedure" provided for by s 25, "the right, if convicted of the offence, to appeal

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[106] Legal Services Act, s 10(4)(d)(i) and 10(4)(e).

according to law to a higher court against the conviction …". Under s 24(f) "[e]veryone who is charged with an offence" has "the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance".

[102] As s 24(f) makes clear, the right of an impecunious person charged with an offence to legal assistance without cost is not absolute. It arises "if the interests of justice so require". The terms of s 8 of the Legal Services Act in providing for legal aid if the Commissioner considers that the "interests of justice" require it is formally consistent with the Bill of Rights Act entitlement. But it falls to be applied against the background of the human right that a person convicted of an offence is entitled as a "[m]inimum standard" of criminal procedure "to appeal according to law to a higher court against the conviction". In this context, "access to justice" (the purpose of the system of legal aid) is access to a higher court for the purposes of appeal according to law.

[103] Because the decisions taken impact upon the human rights to an appeal and to legal assistance if the interests of justice so require, s 8(2) is to be interpreted, in conformity with s 6 of the New Zealand Bill of Rights Act, consistently with the rights and freedoms contained in the Bill of Rights, where such interpretation is available.

(iii) The Interpretation Act 1999

[104] In addition to the specific additional principle of statutory interpretation provided by s 6 of the New Zealand Bill of Rights Act when rights are affected, the more general provisions of the Interpretation Act 1999 require the meaning of an enactment to be ascertained from its text and in the light of its purpose, and provide that all indications provided in the enactment, including its organisation and format, may be looked to for help.[107] In interpreting s 8(2) of the Legal Services Act, the scheme and purpose of the Act and the internal indications given for example by specific reference in other provisions of the Act to "prospects of success" and "reasonable grounds" (discussed above in relation to the Legal Services Act) are

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[107] Interpretation Act 1999, s 5.

contextual indications of what is meant by the reference to "the grounds of the appeal" in s 8(2)(a)(viii).

The appeal

(i) The appeal against conviction

[105] The appeal for which Mr Marteley sought legal aid was against his conviction for murder following a guilty plea. The guilty plea was entered apparently after the Crown offered to accept a plea from Mr Marteley's partner (who had been jointly charged with him) to a reduced charge of manslaughter. The circumstances in which the plea was entered into are critical for the substantive appeal which, if to be successful, will have to set aside a guilty plea entered into with legal advice. The advice indicated that there was an available defence based on claimed lack of knowledge and intent in the assault that led to the death, although a conviction for murder was still acknowledged to be on the cards.

[106] It was important background to the guilty plea that it may have been induced by the reduced charge offered to Mr Marteley's partner. The impact of any such inducement and the circumstances in which it was offered (including possible prosecutorial impropriety and the adequacy of the legal advice received by Mr Marteley) would need to be properly investigated and assessed on an appeal. So too would it be necessary to consider Mr Marteley's capacity to process advice in circumstances where there are indications of some cognitive deficiency on his part.

[107] For the purposes of assessing the grounds of the appeal, it is however significant that there is an evidential basis for the inducement alleged and the role of the Crown solicitor in offering it, although it is possible that the contemporaneous letter of Mr Marteley's counsel reporting the offer is in error. So, too, there appears to be substantiation for a degree of impairment on the part of Mr Marteley, although the psychiatric assessment on which it was based does not seem to have been referred to the Commissioner. Even before he was sentenced, Mr Marteley took some steps to set aside his guilty plea, although that course was not followed after he obtained the advice of senior counsel, a circumstance that may itself have some bearing in the substantive appeal on whether the guilty plea ought to be set aside.

(ii) The decision of the Commissioner

[108] Counsel instructed to investigate the matter for the Commissioner on a limited basis advised that the legal advice Mr Marteley had received was deficient in some respects, although these were not all material. Importantly, counsel reported that there were issues with some merit to be raised on the appeal, although they would not necessarily lead to the guilty plea being set aside.

[109] With this information, the Commissioner advised Mr Marteley that legal aid was to be withdrawn because of lack of merit in the proposed appeal. It was considered that the lack of merit outweighed other considerations. A further application by Mr Marteley's new counsel was also declined on the basis that the appeal lacked merit. After a review of this decision, following further legal report, the Commissioner on 16 April 2012 granted Mr Marteley legal aid for the purposes of his sentence appeal but again declined to grant aid in respect of his appeal against conviction.

(iii) The decision of the Legal Aid Tribunal

[110] The decision of the Commissioner was then appealed to the Legal Aid Tribunal under s 52 of the Act which permits review of the Commissioner's decisions on legal aid if "manifestly unreasonable" or "wrong in law".[108] On 1 November 2012, the Legal Aid Tribunal confirmed the Commissioner's decision to decline legal aid for the conviction appeal.

[111] It is the Tribunal's decision that was the subject of the appeal to the High Court which is the subject of the present appeal. The Tribunal considered that Mr Marteley's allegations of police misconduct were made "without any documentary records, independent accounts or other corroboration", and were "unarguable".[109] It considered that although there might have been a "powerful inducement" to plead guilty because of the reduced charge available to Mr Marteley's partner, such inducement could not amount to prosecutorial

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[108] Legal Services Act, s 52(1).
[109] *Re Marteley* [2012] NZLAT 41 & 111 at [18].

misconduct because the suggestion did not emanate from the Crown.[110] In this, the Tribunal seems to have been mistaken (although the facts would have to be investigated) as it appears from contemporary written advice provided to Mr Marteley by his then lawyer that the proposal for the reduced charge for his partner on Mr Marteley's plea of guilty to murder was made by the Crown solicitor.[111] The Tribunal did not consider whether there was impropriety in the offer of the reduced charge for Mr Marteley's partner, on the apparent misapprehension that it had not emanated from the Crown solicitor.

[112] The Tribunal took the view that it was fatal to Mr Marteley's prospects of persuading the Court of Appeal to allow the guilty plea to be withdrawn that he acknowledged he had pleaded guilty after having received legal advice that there was a possible defence to murder available to him.[112] His actions were said by the Tribunal to be the result of "informed choice".[113] The Tribunal concluded:[114]

> Even though the conviction is very serious and the Applicant would have difficulty arguing his own case, it cannot be in the interests of justice for the Applicant to be provided with publicly funded legal services to argue grounds of appeal that are unarguable.

[113] The Tribunal, like the Commissioner, did not consider whether there was impropriety in the offer reported by Mr Marteley's then counsel as having been made by the Crown solicitor or conduct any inquiry to establish exactly what had prompted it and whether it was justified in its own terms. Its reasons for rejecting peremptorily any arguable appeal point based on the "powerful inducement" acknowledged,[115] were affected by its apparent error as to the source of the offer.

[114] It may be noted here that the Tribunal did not refer to and does not appear to have had available to it a psychiatric assessment of Mr Marteley, prepared for the purposes of his fitness to plead. It became available to the High Court and contributed to the Judge's conclusion that the psychiatric and personality

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110 At [19].
111 The relevant part of the letter sent to Mr Marteley is set out in the reasons of William Young J at [57].
112 *Re Marteley* [2012] NZLAT 41 & 111 at [22].
113 At [22].
114 At [24].
115 At [19].

deficiencies identified are likely to have impacted adversely on Mr Marteley's capacity to represent himself on the appeal, if denied legal aid.[116]

(iv) The decision in the High Court

[115] In the High Court, Collins J quashed the decision of the Tribunal upholding the Commissioner's decision to decline an award of legal aid to the appellant. He did so on the basis that the Commissioner and the Tribunal had been wrong to assess the merits of the appeal. Rather, he considered that the reference to "the grounds of the appeal" permitted a check for the existence of an arguable basis of appeal, capable of leading to the conviction being set aside.[117] This approach would allow baseless cases to be excluded while making it clear that it is not appropriate for the Commissioner to assess whether an appeal had good prospects of success, pre-empting judicial determination of an appeal brought as a matter of right and raising concerns about natural justice.[118]

[116] In addition to taking the view that assessment of the merits of a substantive appeal was not relevant to the Commissioner's task, Collins J also considered that the Commissioner should have taken into account the costs of refusing legal aid which might well, for example, have required the Court to appoint an amicus to assist it, at greater cost than legal aid.[119] He thought it relevant, too, that the sort of close assessment of the merits had led to the "greater, but unquantifiable cost of justice being denied for close to two years while collateral litigation has been pursued".[120]

[117] Collins J considered that the Commissioner failed to give effect to the factors identified in s 8(2)(a)(ii) and (iii) (concerning the seriousness of the offence and the consequences for Mr Marteley) and s 8(2)(a)(iv) and s 8(2)(a)(v) (whether the appeal involved a substantial question of law and the complexity of the factual, legal or evidential matters raised by it).[121] Collins J indicated that he considered the Tribunal

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116 *Marteley v Legal Services Commissioner* [2013] NZHC 1278, [2013] NZAR 875 at [21] and [51].
117 At [44].
118 At [43]–[46].
119 At [55]–[57].
120 At [58].
121 At [48]–[50].

was wrong to treat the appeal as "unarguable". It was, he thought "quite conceivable that the grounds of appeal identified by the Tribunal were capable of giving rise to substantial questions of law, and/or complex, factual, legal or evidential matters".[122] The factors identified in s 8(2)(a)(vi) (whether the applicant is able to present his own case) should also have "weighed heavily in favour of legal aid being granted", because of the psychiatric report and other information available on the record indicating that "Mr Marteley's personal issues would have made it particularly difficult for him to present his own case".[123]

[118] The grounds of appeal identified by the Tribunal were prosecutorial misconduct and that "Mr Marteley had 'mistakenly entered a guilty plea'".[124] Collins J considered that the task of the Tribunal in considering s 8(2)(a)(viii) had been to assess whether "if established, the identified grounds of appeal were capable of leading to a successful appeal".[125] Instead, it had made the sort of factual and legal assessments of the merits appropriate when considering an application for civil legal aid.[126] The Tribunal had erred in law in its conclusion that Mr Marteley was not to be granted legal aid.

(v) The decision of the Court of Appeal

[119] As has already been indicated, the Court of Appeal disagreed with the approach taken by Collins J to s 8(2)(a)(viii). Although it concluded that the appeal should be allowed, it did so on the basis that it was not necessary for it to determine formally whether the Tribunal was right to regard the appeal as "unarguable", since the Commissioner had decided that legal aid should be extended to cover the conviction appeal, whatever the result of the appeal in the Court of Appeal. It seems to me from the reasons given, however, that the Court of Appeal did not consider the Tribunal to be correct in characterising the appeal as "unarguable", even on the different view it took of the meaning of the legislation.[127]

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122 At [50].
123 At [51].
124 At [52].
125 At [53].
126 At [54].
127 See *Legal Services Commissioner v Marteley* [2014] NZCA 185, [2014] 3 NZLR 143 at [86]–[92].

[120] The two opinions delivered in the Court of Appeal were in agreement that s 8(2)(a)(viii) required the merits of an appeal to be taken into account and that Collins J was wrong to hold that an inquiry into the merits of the substantive appeal was not within the reference to "the grounds of the appeal".[128] The reasons given by Ellen France and Randerson JJ were:

> [41] As we have seen, s 8(2)(a)(viii) requires the Commissioner to have regard to the grounds of the appeal. We accept Mr Cooke's submission that the requirement to have regard to the grounds of appeal necessarily requires some consideration of the merits of those grounds. The merits of the grounds of appeal are to be weighed along with the other factors to which regard must be had. To find otherwise would deprive s 8(2)(a)(viii) of any substance and reduce consideration of the grounds of the appeal to the merely mechanical exercise of identifying the grounds relied upon. By providing that there is no automatic right to legal aid on appeals if the offence is punishable by a maximum term of imprisonment of six months or more, Parliament intended the Commissioner to exercise a discretion whether to grant legal aid after assessing the relevant factors under s 8(2).
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> [42] We reach these conclusions notwithstanding the different requirements applicable to the grant of legal aid in civil matters. In terms of s 10(3) of the 2011 Act, the Commissioner is obliged to refuse legal aid if the applicant has not shown that he or she has "reasonable grounds for taking or defending the proceedings". The grant of legal aid in civil proceedings proceeds on the basis of very different criteria. We do not consider these differences are material to the interpretation point at issue.

[121] In concluding that "merits" were part of any consideration of "grounds", Ellen France and Randerson JJ followed the approach adopted by the Court of Appeal in *Nicholls v Registrar of the Court of Appeal.*[129] They considered that the authority of *Nicholls* on the point had not been affected by criticism made of that case by the Privy Council in *R v Taito.*[130] As a result, they concluded that Collins J had been wrong to have "reduced" the Commissioner's role "merely to establishing" that, except in "truly hopeless cases" there were "grounds of appeal which, if established, would be capable of leading to the appeal being allowed".[131]

[122] Ellen France and Randerson JJ considered nevertheless that "a generous approach is required having regard to the need for effective representation in the

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128 *Legal Services Commissioner v Marteley* [2014] NZCA 185, [2014] 3 NZLR 143 at [78] per Ellen France and Randerson JJ and [109] per Miller J.

129 *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA).

130 *Legal Services Commissioner v Marteley* [2014] NZCA 185, [2014] 3 NZLR 143 at [58]; referring to *R v Taito* [2002] UKPC 15, [2003] 3 NZLR 577.

131 *Legal Services Commissioner v Marteley* [2014] NZCA 185, [2014] 3 NZLR 143 at [78].

conduct of appeals in criminal cases".[132] Although "the usual test" was whether there are "reasonable prospects of success", focus was on "an assessment of the arguability of the appeal grounds rather than a judicial inquiry as to whether the appeal will ultimately succeed or fail".[133] The merits of the appeal were not to be considered "in isolation from the other statutory considerations" and might well not be decisive.[134] Such interpretation they considered to be in accordance with the rights in the New Zealand Bill of Rights Act and, even if not, to be a justified limit within s 5 of the Act.[135]

[123] Ellen France and Randerson JJ emphasised that how relevant considerations are assessed is a matter for the Commissioner.[136] The prospect of success on the appeal, which they considered to be implicit in the reference to "grounds", was one the Commissioner was entitled to treat as outweighed by other considerations in a particular case. Even where the merits are "tenuous", legal aid may, they thought, be granted by the Commissioner if he considered that another consideration (such as the seriousness of the penalty) might justify an award.[137] The legislation made it clear, however, that there was no guarantee of legal aid for appeals.[138]

[124] Nevertheless, Ellen France and Randerson JJ considered that the Tribunal consideration was dominated by its view that the grounds of appeal were unarguable.[139] As a result, the Tribunal had paid insufficient attention to the seriousness of the charge when concluding that Mr Marteley had entered the guilty plea in the knowledge of legal advice that there was an arguable defence. The question of improper pressure, although important to the argument that the guilty plea should be set aside, was considered by the Tribunal only in relation to prosecutorial misconduct, not in relation to whether it was arguable that the plea should be allowed to be withdrawn.[140] The Tribunal had been in apparent error in

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132 At [82](d).
133 At [82](e).
134 At [82](f).
135 At [83]–[84].
136 At [79] and [82].
137 At [82](f).
138 At [82](g).
139 At [88].
140 At [89].

thinking that the plea arrangement had not been offered by the Crown solicitor. And, while the grounds advanced were "properly regarded as tenuous":[141]

> … to dismiss them as "unarguable" went beyond the proper scope of the Tribunal's functions under the 2011 Act and effectively determined the appeal.

[125] Ellen France and Randerson JJ thought that the risk of "premature decision" if the merits were too closely inquired into was illustrated by subsequent information that had emerged about Mr Marteley's mental health and personality defects.[142] It was possible they had impacted upon his level of understanding and his capacity to give reliable instructions to counsel and put forward coherent grounds of appeal. Although his offence was the most serious of crimes, his ability to present his appeal was likely to be extremely limited. As a result, Ellen France and Randerson JJ agreed with Collins J that these factors "should have weighed heavily in favour of the grant of legal aid to Mr Marteley for his conviction appeal …".[143]

[126] Miller J in his concurring opinion agreed with the result and substantially with the reasoning of Ellen France and Randerson JJ.[144] He wrote separately however about the role of "merits" in the decisions made by the Commissioner and the reliance placed in the decision of the other members of the Court on *Nicholls.*

[127] Although Miller J accepted that the reference to "grounds of appeal" imported consideration of the merits of an appeal, he considered that what was envisaged was a "high level" review through consideration of "whether the grounds of appeal would succeed if made out".[145] The Commissioner must, he thought, ensure that rejection of legal aid applications "do not cause the loss or abandonment of appeals for which there is something to be said".[146] Care was needed in case the appellant "lacks the knowledge to identify an arguable point or the confidence to pursue it".[147]

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141 At [90].
142 At [91].
143 At [92].
144 At [100].
145 At [109].
146 At [104].
147 At [104].

[128] Miller J considered that it was significant that s 8 does not require the Commissioner to be satisfied about any of the matters to which he is required to "have regard".[148] Legal aid may be granted although the Commissioner "finds nothing of merit in the grounds of appeal".[149] A grant may be warranted in the interests of justice where, for example "the stakes are high, or the issues are complex, or the appellant cannot adequately present the case".[150] It should not be assumed that the appellant has identified every reasonable ground.

[129] As a result, Miller J differed from Ellen France and Randerson JJ in considering that, under the Legal Services Act, *Nicholls* should no longer be followed in the view there expressed that merits were the most significant factor for the Commissioner to take into account.[151] He was of the view that, under the terms of the Legal Services Act, the Commissioner could take the approach, illustrated by *Maxwell v United Kingdom*[152] (a decision of the European Court of Human Rights), that in a serious case legal aid might be granted for an appeal even where an assessment of the prospects of success of the appeal displays nothing of merit.[153] To say that "merits" must be considered was not, he thought, "to say that detailed consideration need be given or that the Commissioner must be satisfied that the appeal may succeed in fact".[154] It was, rather, to consider whether the appeal "would succeed if made out", which was consideration of the merits at a "high level".[155] The Commissioner may decline leave for a "meritless appeal",[156] but the role of the Commissioner was not to undertake extensive exploration of the merits. Timeliness in determinations was important too.[157]

[130] All members of the Court of Appeal (Miller J by his agreement in general with the reasons of the other members of the Court except on the matters separately addressed) thought that Collins J had been wrong to suggest that the Commissioner

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148 At [106].
149 At [106].
150 At [106].
151 At [107]; see *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA) at 408.
152 *Maxwell v United Kingdom* (1995) 19 EHRR 97 (ECHR).
153 *Legal Services Commissioner v Marteley* [2014] NZCA 185, [2014] 3 NZLR 143 at [106] and [108] per Miller J.
154 At [109].
155 At [109].
156 At [111].
157 At [112].

should take into account the likely costs to the system of justice of the appeal being run by a lay person.[158] Such matters as the cost of appointing counsel to assist the court were, they considered, outside the identified statutory criteria and were irrelevant.

Assessment

[131] In this Court, counsel for the Commissioner argued that the approach taken in the High Court would make legal aid available as of right for criminal appeals, contrary to the purpose and meaning of the legislation. I consider that characterisation is exaggeration.

[132] The approach taken by Collins J permitted the Commissioner to take into account whether the grounds of appeal are arguable. Indeed, although there are differences in the starting point and in the emphasis between the Court of Appeal and the High Court and among the Judges in the Court of Appeal, it may be questioned whether the position eventually reached is substantially different. Ellen France and Randerson JJ, although appearing to endorse the approach adopted in *Nicholls*, departed from it in indicating that appeals on "tenuous" grounds might nevertheless warrant a grant of aid if the offence is serious.[159] That approach is not easily reconciled with *Nicholls*, where Eichelbaum CJ took the view that the appeal's prospects of success was the most significant factor under the Legal Services Act 1991, regardless of what is at stake (a position he accepted to be contrary to the trend internationally but required by the reference to "the grounds of the appeal" in the New Zealand statute).[160]

[133] The difference between Ellen France and Randerson JJ on the one hand and Miller J on the other should not be overstated. It is diminished by the acknowledgement of Ellen France and Randerson JJ that "[a] generous approach [in granting legal aid] is required having regard to the need for effective representation in the conduct of appeals in criminal cases"[161] and their view that the focus should be "on an assessment of the arguability of the appeal grounds rather than a judicial

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158 At [93]–[95] per Ellen France and Randerson JJ.
159 At [82](f).
160 *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA) at 408.
161 *Legal Services Commissioner v Marteley* [2014] NZCA 185, [2014] 3 NZLR 143 at [82](d).

inquiry as to whether the appeal will ultimately succeed or fail".[162] This is also not entirely easy to distinguish from the approach preferred by Miller J that the assessment of merits called for is a "high level" one which allows legal aid for "appeals for which there is something to be said".[163] All members of the Court of Appeal thought that, depending on the other circumstances relevant, even "tenuous" grounds might be sufficient to justify an award of aid.[164]

[134] What constitutes a check of the "merits" is an elastic concept. Even the view taken by Collins J in the High Court (that "the grounds of appeal" permit some check that an appeal is arguable) is on the "merits" spectrum, although at the least intrusive end. Because consideration of whether grounds are arguable seems to me to entail at least some check on "merits", I am unable to see that a reference by the Minister in relation to the Bill that became the 1991 Act to "some vetting" to ensure that an appeal "actually had some merit" is significant.[165] The critical issue is what is meant by "merits"? The answer to that question it seems to me turns on the purpose, text and structure of the Legal Services Act and the interpretative guidance provided in context by s 6 of the New Zealand Bill of Rights Act and the Interpretation Act.

[135] In this consideration, I do not think the starting point should be the approach adopted under the earlier legislation in *Nicholls*. Although the judgment of the Privy Council in *Taito* expressing disagreement with "many of the dicta in *Nicholls*" did not greatly elaborate on the disagreement (saying simply that *Nicholls* had been "overtaken by the [Legal Services Act 2000] and by the decision of the Privy Council in the present case"),[166] it seems clear from *Taito* that the disagreement sprung from the same defects in observance of the New Zealand Bill of Rights Act right to appeal and observance of natural justice (through premature determination of merits) that led the Privy Council to conclude that the system of appeals as operated by the New Zealand Court of Appeal was in breach of rights. In that connection, the Privy Council said:[167]

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162 At [82](e).
163 At [104] and [109].
164 At [82](f) per Ellen France and Randerson JJ. See also at [106] per Miller J.
165 (23 July 1991) 517 NZPD 3078 at 3079. See above at [15].
166 *R v Taito* [2002] UKPC 15, [2003] 3 NZLR 577 at [24].
167 At [13].

> Throughout Their Lordships bear in mind that the legislation was intended to confer on individuals whose fates were at stake effective rights of appeal, and that what is or is not an arguable case can only be determined after the observance of due process in considering the merits or demerits of the appeal.

[136] A Bill of Rights Act compliant interpretation of s 8, such as this Court is bound to prefer, must it seems to me take into account the two matters that exercised the Privy Council in *Taito*: the natural justice reasons why premature conclusion about merits is to be avoided; and the need to ensure that an appeal available as of right is effective. Both suggest that consideration of the "grounds of appeal" is concerned with a preliminary assessment which is at the formal end of the spectrum. Such interpretation is also indicated by the terms of s 8(2)(a)(viii) and by the purpose and contextual indications in the scheme of the Act, referred to above at [97]–[100].

[137] First, I am unable to accept the submission of the respondent that the reference to "the grounds of the appeal" in s 8(2)(a)(viii) is rendered "meaningless" unless it indicates the prospects of success on the grounds advanced. The respondent makes the submission in relation to the approach adopted by Collins J on the basis that "[a]lmost anything, if established, can be capable of leading to a successful appeal". Similarly, Ellen France and Randerson JJ in the Court of Appeal considered that Collins J's interpretation of s 8(2)(a)(viii) "had the effect of eliminating the grounds of appeal as a factor in the discretionary assessment Parliament clearly intended take place under s 8".[168]

[138] The nominal grounds advanced will bear significantly on the reasons why access to justice and the interests of justice may require legal representation, as will be the case, for example, if they raise questions of law. That is quite apart from the "merits" of the substantive argument, in the sense of their ultimate prospects of success. Although other provisions of s 8(2) also allow consideration of complexity or legality, the considerations identified in s 8(2) overlap (as can be seen in the considerations relating to gravity of the consequences). A direction to look at the grounds of appeal allows check for formal compliance with matters such as jurisdictional impediments to appeal and compliance with the terms of appeal provisions. This does not mean that the Commissioner cannot take into account

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[168] *Legal Services Commissioner v Marteley* [2014] NZCA 185, [2014] 3 NZLR 143 at [74].

whether the grounds of appeal taken at face value are plainly unarguable or raise colourable points (as might be the case if there is no foundation for an evidential ground or claim of misdirection). The immediate point is however that reference to "the grounds of the appeal" allows consideration of grounds in relation to matters other than their prospects of success.

[139] Secondly, as already foreshadowed at [97], I consider it of significance that the same legislation refers to "reasonable grounds" and considerations of "prospects of success", when it is intended that these considerations be taken into account. The structure and scheme of the legislation suggests that assessment of whether grounds are "reasonable" or assessment of their "prospects of success" are not threshold considerations for the Commissioner in considering whether legal aid should be granted for criminal appeals.

[140] Thirdly, "the interests of justice" (the criterion the Commissioner must address) is to be assessed in the context of the human right to an appeal against criminal conviction and the purpose of the Legal Services Act in promoting access to justice. The right to an appeal must be "an effective right" that ensures justice is done.[169] As the right to legal assistance where it is in the interests of justice indicates, legal representation may often be necessary to ensure that the right of appeal is effective. Legal aid determinations cannot be pitched at a level that sets up a de facto leave requirement for the poor, such as was criticised in *Taito.*[170] Although the purpose identified under s 3 of the Legal Services Act envisages delivery of legal services to those of insufficient means, "in the most effective and efficient manner", effectiveness and efficiency in the system overall do not detract from the object of "access to justice". In the context of the right to appeal against conviction to a higher court, the "access to justice" is through access to a court. It is not for the administrative agency to predict the outcome of the appeal. As experience with observance of the principles of natural justice demonstrates and as this case may illustrate if the Commissioner and Tribunal are wrong in their

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169 *R v Taito* [2002] UKPC 15, [2003] 3 NZLR 577 at [12].
170 At [20].

assessments on the basis of incomplete knowledge or argument (on the bases identified at [106]), premature assessment of merits risks injustice.[171]

[141] These considerations lead me to the conclusion that s 8(2)(a)(viii) does not envisage that the Commissioner will consider the prospect of success of an appeal that is properly constituted and arguable. The "grounds of appeal" he is required to take into account do not extend to assessment of the merits of the substantive appeal beyond that threshold check. As indicated, in the end I do not think that the position reached by the High Court or the Judges in the Court of Appeal suggests anything very different. Although Ellen France and Randerson JJ were, on the view I take, wrong to say that the Commissioner is entitled to take into account whether there are "reasonable prospects of success", the sting in that approach was drawn by their indication that prospects of success were to be sympathetically assessed. I think that the better approach is to acknowledge frankly that any "merit" implicit in the "grounds of appeal" which are to be taken into account is confined to the adequacy of the grounds in setting up an arguable basis for appeal. I consider that this approach accords with the meaning and purpose of the Act and the context of rights. I do not consider it differs in substance from the "high level" approach adopted by Miller J, directed to permitting legal aid in cases of appeals "for which there is something to be said". It has, however, the virtue of making it clear that the consideration of "merits" implicit in "the grounds of appeal" is limited to a preliminary and largely formal check.

[142] Beyond this preliminary threshold, merit assessment is for the Court, not the Commissioner or the Tribunal. The determination of whether legal aid should be granted requires contextual assessment in application of the considerations in s 8(2) against the statutory purposes of both the Legal Services Act and the New Zealand Bill of Rights Act. Its purpose is to provide effective access to the appellate court for those with rights of appeal but insufficient means to pay for representation.

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[171] It is salutary that, following rehearing in the aftermath of *Taito* under the procedure adopted in *R v Smith* [2003] 3 NZLR 617 (CA), at least two murder convictions were quashed in cases where legal aid had earlier been denied on the basis of lack of merit in the appeal: see *R v Sadaraka* CA274/03, 27 May 2004; and *Timoti v R* [2005] NZSC 37, [2006] 1 NZLR 323.

Disposition

[143] For the reasons indicated above, and in agreement with the other members of the Court, I consider that Collins J was right to set aside the decision of the Tribunal on the basis of error of law. I consider that the Court of Appeal should not have allowed the appeal from the decision of the High Court, as its formal order did. I would allow the appeal from the Court of Appeal and reinstate the determination in the High Court. I agree that the appellant is entitled to costs in the High Court and Court of Appeal, to be fixed by those Courts. In this Court I agree that he is to be awarded costs of $25,000 together with disbursements.

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