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IN THE COURT OF APPEAL OF NEW ZEALAND

CA222/07
[2007] NZCA 208

BETWEEN	T(CA222/07) Appellant
AND	REGIONAL INTELLECTUAL CARE AGENCY Respondent

Hearing: 22 May 2007

Court: William Young P, Baragwanath and Heath JJ

Counsel: T Ellis for Appellant
V Sim for Respondent

Judgment: 28 May 2007 at 4.30 pm

JUDGMENT OF THE COURT

A The appeal against both judgments is dismissed

B Costs are reserved.

REASONS OF THE COURT

(Given by Baragwanath J)

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[1] These appeals filed on 18 May 2007 challenge on behalf of the appellant T two judgments of Simon France J delivered on 4 April and 8 May 2007 refusing successive applications for the issue of the writ of habeas corpus. They concern the application and interrelation of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the Act) and the Habeas Corpus Act 2001 as they affect T who is intellectually disabled.

[2] Six decisions affecting T are of relevance:

a) On 13 August 2004 he was sentenced to imprisonment by the District Court to a term expiring on 26 November 2007. He became eligible for parole on 29 July 2005. Release conditions imposed by the Parole Board were due to terminate on 18 April 2007. An application has been made for extension and variation of the conditions.

b) On 23 February 2006 while T was still in prison the Family Court made a compulsory care order under s 45 of the Act for a term expiring on 29 November 2007, matching the date of expiration of his prison term. It provided for supervised care.

c) As a care recipient T was provided with a care and rehabilitation plan (s 24) providing for the degree of security required for his care and for the protection of others (s 26). The care and rehabilitation plan contained a crisis plan providing where necessary for a direction under s 64(1) that T receive supervised care in a designated facility.

d) There was been a direction dated 11 August 2006 by a compulsory care co-ordinator of the respondent under s 64(1) directing T, then in supervised care, to stay temporarily in a secure facility. It was effective for something less than a month.

e) On 12 October 2006 the Family Court made an order under s 86 varying the compulsory care order to provide for more stringent secure care.

f) On 15 May 2007 the Family Court ordered under s 84 cancellation of the compulsory care order with effect from 29 May 2007.

Of these only the third and fourth were made by an officer of the respondent. They are the only decisions which have not been challenged.

[3] T, now 30 years of age, was arrested with a co-accused on a charge of aggravated robbery of a liquor outlet at Porirua. The aggravation included T's possession of an airgun that fired pellets. A psychiatric assessment report ordered by the District Court recorded that, while fit to plead, T suffered intellectual disability to an extent that was unclear because the psychiatrist had not reviewed any neuropsychological test. T was assessed as suggestible. Represented by counsel other than Mr Ellis, T pleaded guilty. At sentence on 13 August 2004 the Judge adopted a five year starting point to recognise the intimidation of vulnerable complainants and T's prior convictions. In recognition of the psychiatric assessment and the promptness of his plea, the Judge imposed a term of 3½ years imprisonment. The co-accused, who was said to have played a lesser role and to have had fewer convictions, received a similar sentence. Application for leave to appeal out of time against conviction and sentence has recently been filed on T's behalf alleging such

institutional failure to recognise his intellectual disability as to have infringed his right to a fair trial.

[4] On 23 February 2006, on the application of a care co-ordinator of the respondent, the Family Court made a compulsory care order in respect of T under s 45 of the Act. On the occasion of a statutory review on 12 October 2006 that Court confirmed the order and varied it from an order requiring supervised care to one requiring secure care.

[5] T's contentions, rejected in the judgments of the High Court and now repeated, are:

a) the sentencing process in the District Court was unfair and the detention imposed arbitrary;

b) the statutory procedures that resulted in the original 23 February 2006 compulsory care order were deficient;

c) the review decision in October 2006 was invalid for combining the review with the variation of the order and for lack of reasons.

[6] After the two High Court judgments under appeal were given, an application to cancel the compulsory care order came before the Family Court at Wellington. On 15 May 2007, without opposition, the Family Court cancelled the compulsory care order, with effect from 29 May 2007. We refer to that judgment later.

The sentencing process in the District Court was unfair and the detention imposed arbitrary

[7] Section 14 of the Habeas Corpus Act does not permit a judge to use habeas corpus to call into question a conviction of an offence by a court of competent jurisdiction. Therefore the entry of a conviction on the aggravated robbery charge cannot be questioned. It is clear that once a conviction was entered the Judge was

entitled to sentence. The question is whether it is appropriate for the habeas corpus procedure to be used to mount a challenge to the sentencing decision.

[8] The third edition of Sharpe *The Law of Habeas Corpus* is not available to us. The second edition (1989) states at 59:

> Since habeas corpus is not a discretionary remedy the existence of an alternate remedy does not afford grounds for refusing review on habeas corpus. Whether the other, perhaps more direct, remedy could still be used, or whether the applicant has forgone the right to use it, its existence should not preclude or affect the right to apply for habeas corpus.
>
> This principle has not been universally followed, however, and there are cases where the writ has been refused because an appeal has been thought to be more appropriate… Some of these cases may depend upon a finding that the error alleged did not go to jurisdiction and there can be little doubt that a right of appeal may influence the Court to characterise an error as being non-jurisdictional. This is especially true in cases where it is sought to challenge a criminal conviction on habeas corpus. The courts have shown a certain determination to restrict the growth of collateral methods of attacking convictions. They seem to prefer to have the matter raised by appeal, although it must be said that this is a tendency rather than a rule of universal application.
>
> (Footnotes omitted)

[9] In the contempt case of *Linnett v Coles* [1987] 1 QB 555 Lawton LJ stated at 561:

> Having regard to what always seemed to have been a limitation on the issue of the writ of habeas corpus in criminal causes or matter, it seems to me that, save in exceptional cases, it is not the appropriate remedy for appealing against committal orders.

[10] The New Zealand Parliament has endorsed the policy that habeas corpus is excluded as an alternative to appeal against conviction. We have concluded that, while counsel for T has confined the present challenge to the sentencing process, which is not expressly mentioned in s 14, the statutory right of appeal, belatedly undertaken on T's behalf, is the only appropriate procedure for challenging both conviction and sentence in the District Court at least where that court possesses jurisdiction in the sense that the case is one with which it may properly deal. Section 14 makes plain that in the criminal context the great and simple writ of habeas corpus may not be used where the convenient procedure of appeal is

available. Parliament has rejected the use of habeas corpus as an alternative that lacks the carefully designed elements of the appeal process. The principle that statutory policy is to be treated as informing common law decisions in pari materia is now well settled: see Burrows *Statute Law in New Zealand* (3rd ed) at 369-374. Conviction and sentence are so interwoven that the policy of s 14 must be treated as informing the decision in respect of sentence.

[11] We adopt in the present context the statement in *Manuel v Superintendent of Hawkes Bay Prison* [2005] 1 NZLR 161 at 176:

> [51] The legal basis for our approach does not lie in any particular limitation on the common law remedy of habeas corpus. Rather we see the issue as turning on the interpretation of the Habeas Corpus Act which cannot have contemplated the use of the habeas corpus remedy for purposes for which the statutory process provided in the Act is plainly inappropriate.

[12] Any merit in the challenges to the sentencing processes, as they affected T with his disability, could have been assessed long ago upon a timely appeal. It remains open for consideration by the High Court which is fully able in the appeal jurisdiction to consider whatever constitutional and other arguments may bear upon the propriety of the original sentence.

The statutory procedures that resulted in the original 23 February 2006 compulsory care order were deficient

[13] T was a serving prisoner and the effect of the 23 February order was to substitute the less onerous regime of a compulsory care order requiring supervised care. If habeas corpus were available that would no doubt be a significant consideration. But in the High Court little emphasis was placed on the fact that where a Family Court has made or has refused to make an order or has otherwise determined the proceeding, s 133 of the Act confers on a party to a proceeding under the Act a right of appeal to the High Court. The point was not relied upon in the initial argument in this Court. But we formed the provisional view that there arises on the second issue as well as the first the question whether the availability of a statutory appeal excludes recourse to habeas corpus. The point was therefore raised

by the Court in a Minute issued the day after the hearing and we have considered the parties' written submissions upon it.

[14] Mr Ellis submitted that the procedure adopted infringed ss 121 and 122 of the Act which provide:

> **121 Attendance at hearing by care recipient and person in support**
>
> (1) The care recipient must be present throughout the hearing of every application unless,—
>
> > (a) in the case of an application for a compulsory care order, the Judge who examines the care recipient in accordance with section 41 certifies that it would be in the best interests of the care recipient to excuse the care recipient from attending the hearing; or
> >
> > (b) the care recipient is excused or excluded by the Court under section 122.
>
> (2) The care recipient may be supported at the hearing of an application by a person nominated by the care recipient or by the care recipient's guardian, principal caregiver, or support person.
>
> (3) A person nominated under subsection (2) is not entitled to be heard at the hearing, unless the person is otherwise entitled to be heard.
>
> **122 Excusing or excluding care recipient**
>
> (1) The Court may excuse the care recipient from the hearing of an application if it is satisfied that the care recipient wholly lacks the capacity to understand the nature and purpose of the application, or that attendance or continued attendance is likely to cause the care recipient serious mental, emotional, or physical harm.
>
> (2) The Court may exclude the care recipient if it is satisfied that the care recipient is causing a disturbance that makes it impracticable to continue with the hearing in his or her presence.
>
> (3) A discretion conferred by this section may be exercised at any stage of the hearing.

[15] It was argued for T that he was not present throughout the hearing on 23 February and the conditions of s 122 were not satisfied. The Judge relied on s 131 which states:

> **131 Court may dispense with hearing in certain circumstances**

> Despite any other provision of this Part, the Court may determine an application without a formal hearing if it is satisfied that no person wishes to be heard in respect of the application.

Mr Ellis contended that the general language of that section cannot be permitted, in the case of a care recipient suffering intellectual disability, to override the specific protection afforded by s 121. The opposing argument is that unless T was able to consent effectively to the s 131 procedure its procedure for dispensing with formal hearing could never be used.

[16] Mr Ellis also argued that the grounds stated for the decision were insubstantial and conclusory – reciting the statutory language without giving reasons for the conclusion. Mr Ellis cited the statement of the Inner House of the Court of Session in *Somerville v The Scottish Ministers* [2006] CSIH 52 at 153:

> It is to be noted that it is the reasons for making the order, not the purpose of the order, that must be specified. The question: "What was the purpose of the order?" may be answered satisfactorily by the identification of one or more of the [statutory] purposes… The question: "what were the reasons for making the order?" requires more. It requires the identification of considerations which justify the conclusion that the order is in the circumstances desirable for one or more of the… purposes. The mere identification of one or other of the prescribed purposes will therefore not serve as a statement of the reasons for making the order.

The decision is to similar effect to that of this Court in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at [81].

[17] It is convenient before turning to those submissions to summarise events.

[18] Judge Ellis responded by minute of 20 February to the application by the respondent's care co-ordinator filed on 10 February. As required by s 40 it was accompanied by an affidavit which in stating the grounds of the application recorded in italics the advice of a specialist assessor:

> 5. The specialist assessor Dr Olive Webb, following testing, has concluded that the respondent:
>
> *a. [T] has intellectual disabilities*

b. *He has little insight into the influences on his behaviour and so has little ability to impose controls on his own offending behaviour of the antecedents to it (drugs and alcohol)*

c. *His ineffectiveness in managing his own behaviour has two sources:*

i. *His inherently passive personality whereby he seeks out people who will make his decisions for him and lead him*

ii. *His intellectual disability. He is poorly equipped to forecast the outcome of his behaviours and to anticipate trouble before he is in the middle of it. His ability to problem-solve, rehearse and plan his behaviour means that he is poorly equipped to plan alternative, safe behaviours*

d. *[T] is eligible for compulsory care under the terms of the IDCC&R Act*

e. *I believe it is appropriate to transfer him from his present prison environment to compulsory supervision under the terms of that legislation.*

f. *A community supervision order would be appropriate and should aggressively embrace rehabilitative goals.*

g. *His Care Plan should aim to actively reconnect to his community and to establish him in strong relationships with 'leaders' who will keep hi[m] away from drugs and alcohol and inappropriate criminal associates.*

h. *Planning for work, etc should provide the basis of some future planning which at this stage is absent.*

6. I believe that the respondent has significant deficits in at least two areas of adaptive functioning. Areas of adaptive functioning include communication; self care; home living; social skills; use of community services; self-direction; health and safety; reading, writing and arithmetic; and leisure and work. The two (or more) areas I believe that the respondent has significant deficits in are detailed in Dr Olive Webb's reports:

"Using the information provided in the very comprehensive RIDCA Needs Assessment, it is clear that [T] has significant adaptive deficits, notably in the areas of communication, domestic and community skills and overall coping skills."

7. I believe that it is appropriate that the respondent receive **supervised** care in a community secure environment for the following reasons as detailed by Dr Olive Webb:

> *"His ineffectiveness in managing his own behaviour has two sources:*
>
> *a. His inherently passive personality whereby he seeks out people who will make his decisions for him and lead him*
>
> *b. His intellectual disability. He is poorly equipped to forecast the outcome of his behaviours and to anticipate trouble before he is in the middle of it. His ability to problem-solve, rehearse and plan his behaviour means that he is poorly equipped to plan alternative, safe behaviours"*
>
> (Emphasis in original)

[19] On 20 February 2006 the Judge visited T, who was represented by counsel, Mr Yeoman. In the following passage from his Minute we have emphasised his record of T's position:

> [5] I have carried out the preliminary steps with [T], he indicates or he has discussed with me very briefly his circumstances, he clearly has an adequate understanding of his present situation. He told me what had led him into that position, he is aware of the nature of the application, *he is familiar in general terms with the services provided by Te Mata Hou, and he is agreeable to an order being made*, so I am grateful for that indication. I am confident that with his support, with his consent we can deal with this matter in a reasonably relaxed manner.
>
> [6] It is not practicable to determine the application at this stage, and indeed I am not entitled to as a matter of law without consulting with and receiving evidence from… the compulsory care co-ordinator [and] at least one specialist assessor, Dr Olive Webb is the assessor who has made the report in this situation … .
>
> [9] *In view of [T's] consenting and co-operative attitude, I have offered the option of a consultation by telephone conference, which would not involve [T] himself but could involve his counsel. He has indicated that he is relaxed with that. His lawyer is in agreement so that is how we will proceed.*
>
> [10] I will adjourn this preliminary hearing at this stage to a time and date to be set by my Registrar as soon as we can work out convenient times to consult by telephone with both Mr Ngatai and Dr Webb…

[20] The Judge recorded by further Minute the telephone conference of 23 February in which, as foreshadowed at [9] of his previous Minute, T did not personally participate:

> Mr F Ngatai, Care Co-ordinator, RIDCA

> Mr B Yeoman, counsel for the Care Recipient
> Dr Olive Webb, Specialist Assessor
>
> With the consent of the Care Recipient through his counsel, I completed the process of consultation and informal hearing of this application by way of telephone conference.
>
> Mr Ngatai confirms that he is the appointed Care Co-ordinator responsible for this application. The application is for an order as a "care recipient", not one involving special status. The 'plan' proposes that care be provided by Timata Hou.
>
> Dr Webb confirmed her assessment. She supports the plan, and does not consider that [T] requires secure care.
>
> There was discussion of the term of the order, and rights of review. The consensus view, agreed by counsel for [T], was that the term should co-incide with the term of [T's] sentence (with an end date of 26.11.07)
>
> **Determination**
>
> Having met with and examined the Care Recipient, and having now consulted with the Co-ordinator and the Specialist Assessor, no other person requiring to be heard, I am satisfied that the application can be determined without formal hearing. (s 131)
>
> With the consent of the Care Recipient, I therefore make the determination:
>
> That the proposed Care Recipient has an intellectual disability.
>
> That it is both necessary and appropriate to make a compulsory Care Order.
>
> That the term of the order is to be for the period expiring on 26 November 2007.
>
> **A compulsory care order requiring supervised care for [T] is made accordingly.**

[21] Because the habeas corpus remedy is summary in nature it would be undesirable to determine a point of the substance of the s 131 submission without the benefit of full argument and without reference to the full record of the proceedings in the Family Court. We decline to do so. But if the purported consent by T on 20 February, supported by his lawyer, was effective, the fact that the 23 February order was made by consent might be thought to make the case rather different from one where the application is opposed. Moreover even if there was some breach of the Act, it does not necessarily follow that the procedures were a nullity or that T was thereafter detained unlawfully so as to be entitled to habeas corpus.

[22] The purpose of human rights jurisprudence and the rule of law is to protect humanity from abuse by others, especially those who exercise public power. As Mr Ellis submitted, any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5 of the ECHR, namely to protect the individual from arbitrariness (see, among many other authorities, the *Chahal v The United Kingdom* judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p 1864, § 118). He cited also *R v Oldbury Justices ex p Smith* (1995) 7 Admin LR 315, 326B-C:

> No person should be imprisoned unless the rules which govern the process by which the step is to be taken have been precisely complied with.

and Lord Woolf in *Brooks v DPP* [1994] 1 AC 568, 582G:

> Where the liberty of the subject is at stake, technicalities are important.

We respectfully agree both with the submission and with the statements of principle.

[23] But as was said in *Sestan v Director of Area Mental Health Services* [2007] 1 NZLR 767 (CA) at [44]:

> [44] Non-compliance with a mandatory provision does not necessarily mean that a writ of habeas corpus is either required or appropriate (*Manuel v Superintendent of Hawkes Bay Prison* [2005] 1 NZLR 161 (CA) and *Campbell v Superintendent Wellington Prison* (Court of Appeal, CA 3/05, 14 February 2005). Procedural error does not necessarily invalidate official action (*Burr v Blenheim Borough Council* [1980] 2 NZLR 1 (CA)).

As Lord Steyn stated in a celebrated passage in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [28] (HL) cited by Mr Ellis, "in law context is everything".

[24] We say nothing of the case of a detainee who was not already subject to a more onerous form of public detention. Here the context is of an order made with the consent of T and supported by his counsel which substantially reduced the intensity of his detention, namely from imprisonment to supervised care. It is unreal to suggest that an order improving T's condition could be set aside by habeas corpus

so as to subject him to a more onerous regime. Rather the maxim that the law operates *in favorem libertatis*, which can be used to strike down a doubtfully justifiable detention, must here operate to sustain the order which by releasing T from prison markedly improved his status.

[25] Accordingly, even if habeas corpus were otherwise available, the challenge to the 23 February 2006 compulsory care order could not succeed. Because there is no material irregularity which impugns the validity of the order of 23 February that part of the appeal must fail.

[26] But we are satisfied that habeas corpus must be refused for the further reason that, once again, it cannot be permitted to occupy the territory which Parliament has attributed to what is a full statutory right of appeal. This is the point on which we received further submissions.

[27] Mr Ellis submitted, and we accept, that access to the Court cannot be denied without clear and express words or by necessary implication. He cited *Re B (A Prisoner)* [1972] NZLR 897, 900 where Mahon J said that, although the applicant no doubt had the right to apply for certiorari, that fact, while in some cases a strong argument against the issue of a writ of habeas corpus, is nevertheless not a bar to its issue.

[28] We have cited at [8] the statement of principle in Sharpe. Clark & McCoy *Habeas Corpus: Australia, New Zealand and the South Pacific* (Federation Press 2000) refer at 242 to *Re B*. The authors state:

> The mere existence of another remedy is not by itself sufficient to deny the writ; *the question is whether the other remedy is either equally efficacious or even more so*.
>
> (Emphasis added, footnote omitted)

[29] The authorities cited by Sharpe include *R v Governor of Pentonville Prison ex p Azam* [1974] AC 18 (AC). In construing the Commonwealth Immigrants Act 1962 Lord Denning stated at 31:

> The… provisions as to appeal give rise to a question of the first importance. Do they take away a person's right to come to the High Court and seek a writ of habeas corpus? I do not think so. If Parliament is to suspend habeas corpus, it must do so expressly or by clear implication.

[30] All judgments must be construed according to context. In that case the statutory right of appeal was narrowly limited to the issue whether the immigrant's entry was in law illegal. We are satisfied that the statement of principle by Clark & McCoy ([28] above) fairly reflects the authorities.

[31] We turn to its application. By s 133 Parliament has provided for a general appeal, thus providing that there is to be full access to the Court, and has stated what the procedures for that access are to be.

[32] Mr Ellis submitted that T lacked capacity to instruct counsel to apply for waiver of court fees on such an appeal, implying that habeas corpus may be made without such concern. Certainly *Somerset's* case (*Somerset v Stewart* (1772) Loft 1 98 ER 499 (KB)) illustrates the ability of a third party to secure habeas corpus. But the Court will never permit a procedural barrier to impede access to justice. The Judicature Act 1908 provides:

> **17 Jurisdiction as to mentally disordered persons, etc.**
>
> The Court shall also have within New Zealand all the jurisdiction and control over the persons and estates of idiots, mentally disordered persons, and persons of unsound mind, and over the managers of such persons and estates respectively, as the Lord Chancellor of England, or any Judge or Judges of Her Majesty's High Court of Justice or of Her Majesty's Court of Appeal, so far as the same may be applicable to the circumstances of New Zealand, has or have in England under the Sign-manual of [Her Majesty] or otherwise.

The Court will, where necessary, exercise inherent jurisdiction to protect a person who lacks or may lack legal capacity: *Re F (Adult: Court's Jurisdiction)* [2001] 1 Fam 38 (CA). Lack of capacity to apply for waiver of court fees is no greater problem than lack of capacity to instruct Mr Ellis.

[33] While habeas corpus is a writ of right and not, like judicial review, a discretionary remedy, in *Manuel* this Court has stated at 175:

> [47] … Parliament must have contemplated a consideration of underlying questions of fact and law only to the extent to which such inquiry is possible within the procedures provided for in the Act. The inquiry envisaged must have been one that although conducted in circumstances of urgency would allow an appropriately considered judicial examination that would warrant making an unappealable finding against the lawfulness of the detention.

[34] Mr Ellis cites Clayton & Tomlinson *The Law of Human Rights* (OUP 2000) at 240:

> ... habeas corpus is, like all 'administrative law' remedies, simply concerned with the question of whether the order for detention was made with jurisdiction, not whether it was correct on the merits.

[35] "Jurisdictional error" bears a spectrum of senses. It is unnecessary to consider the availability of habeas corpus in cases where there is jurisdictional error in the fundamental sense that the decision-maker lacked authority to make the order complained of, or where there some condition precedent to its authority is unfulfilled. The challenge to the 23 February order concerns the adequacy of its reasons when there is substantial basis for considering that it was desired by T on the advice of his counsel. The statutory appeal is not only equally efficacious but clearly more so to deal with the challenge to "jurisdiction", in the sense that such order was flawed by error of law.

[36] For that reason we are satisfied that habeas corpus is not available as a vehicle for challenging the 23 February order.

The variation decision was invalid for combining it with a review decision and for lack of reasons

[37] For the same reason the challenge by habeas corpus to the variation decision in October 2006 must also fail. The issues having been argued in two courts we again offer brief comment upon the facts and the principles.

[38] The effect of the 12 October 2006 order was to increase the intensity of T's detention from supervised care to secure care; it is the opposite case from that of

23 February. Such change requires stringent compliance with statutory and other legal requirements.

[39] There is nothing in the point that a review (under s 72) may not be combined with a variation of the compulsory care order (s 86). No practical reason was suggested for prohibiting the combination; what matters is that the requisite responses are made and it is a matter of convenience as to how that should occur.

[40] As to the second point, s 86 empowers the co-ordinator to apply to the Family Court for a variation of the compulsory care order. The Court may order that a qualifying recipient:

> … receive secure care only if it considers that supervised care would pose a serious danger to the health or safety of the care recipient or of others.

[41] In her judgment Judge Ullrich QC stated:

> [2] When the review report was filed, some issues of concern were raised in the report from Dr Webb. On 11 August 2006 there was a direction under s 64 of the Act that [T] was to be transferred to a secure facility for emergency reasons. That transfer took place but subsequently he was returned to Te Mata Hau between 4 and 15 September.
>
> [3] The application under s 86 was filed on 5 October. With that application is an individual care and rehabilitation plan for [T], which has next to it a crisis plan.
>
> [4] I also have before me, apart from the report from Dr Webb, a report from Dr Barry Walsh dated 4 October 2006. I am satisfied on the basis of the reports before me that the review of plan is appropriate and that the plan which has been filed is approved. There will be a further clinical review in another six months.
>
> [5] I am also satisfied on the basis of the reports before the Court that it is appropriate to vary the Order so as to provide for community secure care for [T]. That means that he will remain living at Te Mata Hau, but with an increased level of supervision.
>
> [6] As part of his care and rehabilitation plan, there is also a crisis plan, which provides for a direction under s 64 of the Act, that [T] is required to receive supervised care in a designated facility. That direction can only be made under s 64(3) if it is required to deal with an emergency and is of a kind provided for in the care recipient's care and rehabilitation plan. That transfer to secure care is provided for as part of the crisis plan.

[7] One of the issues which has been discussed in today's hearing is what constitutes an emergency. In this context, what will be an emergency will differ from case to case, having regard to the particular circumstances of the care recipient. The crisis plan for [T] indicates a number of risk factors which often operate simultaneously. Those risk factors include absconding, physical aggression, psychological and verbal aggression, self harm, the use of drugs and alcohol and some mental health issues involving depression and also criminal behaviour if [T] has the opportunity to associate with others in the community.

[8] As Dr Barry Walsh said in his report dated 4 October, on the last occasion when [T] was transferred to the secure facility, his risk behaviours were escalating much more quickly and on the basis of the escalating risk, clinical staff considered that he was a risk both to himself and to others in conjunction with his substance abuse and owing to uncertainties over both compliance with his antidepressant medication and the extent and presence of a mood disorder.

[9] It is clear therefore in terms of the crisis plan that there would not be an emergency if there was one incident of verbal aggression, or if he had absconded on a few occasions, but there were no more risk factors involved. It may well, however, be an emergency situation if a number of the risk factors concur, or they were to escalate as described by Dr Barry Walsh. Alternatively that they would involve extreme risk behaviour such as has occurred in the past, such as making a noose with the explicit intention of killing himself.

[42] Simon France J responded to the submissions for T:

[26] Two issues arise – first whether the reasons are deficient, and second whether the consequence of inadequate reasons is that the detention authorised by the resulting decision is unlawful and arbitrary. I do not consider these two issues to be unrelated. There is a spectrum from a fully reasoned decision to an exercise of power unaccompanied by any explanation at all. I consider it is plausible that in certain circumstances the latter situation could cast doubt on the validity of the detention. It is not an area for absolutes where one would say that a lack of reasons could never invalidate the detention. The case of *Gajesi v Hungary* (ECHR, 03/01/2007, Application 34503/03) would tend to support Mr Ellis' submission that a detention may be viewed as arbitrary for this reason.

[27] I am satisfied that the present case falls well short of that. Mr Ellis identifies various deficiencies – there are no reasons why the reports satisfied the Judge, what test the Judge applied, and what standard she used. I can accept that the decision would be the better for the inclusion of such matters, but I accept Ms Sim's submission that the gist of the Judge's reasons are clear:

- the contents of the reports satisfied her as to the appropriateness of the plan and the need for increased security;

- generally there were concerns with risks posed by [T] including absconding, physical aggress, verbal and psychological aggression, self harm, the use of drugs and alcohol, and mental health issues.

> [28] It is, I consider, a decision written more for the parties, who had knowledge of the reports, than one written with the wider public in mind, but that does mean it fails to meet the tests set out in *Lewis v Wilson and Horton Limited* …. An appeal would be possible if the appellate body had the reports, and I have no basis on which to conclude the parties were unaware of why the order was made. Whilst I accept the reasons did not meet to the fullest extent the 'publicity' aspect identified in Lewis, they were in my view far from a point where it could be said none were given.
>
> [29] I note for the record that I would not have considered the 'lack' of reasons to be such that the subsequent detention was invalid.

[43] Once again, context is vital. Mr Ellis submitted that in New Zealand as in England and Europe the principles endorsed by Baroness Hale in *R (on the application of Ashworth Hospital Authority v Review Tribunal for West Midlands & Northwest Region*) [2005] UKHL at [34] applies:

> *Human rights*
>
> 34 It is not, and could not be, argued that this patient's treatment was in breach of his rights under the European Convention. Rather, it is argued that there is the potential for such breaches unless section 63 is read in the way for which the respondent contends. The detention of a patient in a psychiatric hospital cannot be justified under article 5(1)(e) of the Convention unless the three criteria laid down in *Winterwerp v The Netherlands* (1979) 2 EHRR 387, 403, para 39, are satisfied:
>
> > "In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority – that is, a true mental disorder – calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder.

[44] That submission is consistent with s 11 of the Act, of primary application to an intellectually disabled person, which provides:

> **11 Principles governing exercise of powers under this Act**
>
> Every court or person who exercises, or proposes to exercise, a power under this Act in respect of a care recipient must be guided by the principle that the care recipient should be treated so as to protect—
>
> (a) the health and safety of the care recipient and of others; and
>
> (b) the rights of the care recipient.

[45] In considering both the result and the expression of this judgment we have given careful thought to the important principles of s 11 and the purposes of the Act set out in s 3:

> **3 Purposes**
>
> The purposes of this Act are—
>
> (a) to provide courts with appropriate compulsory care and rehabilitation options for persons who have an intellectual disability and who are charged with, or convicted of, an offence; and
>
> (b) to recognise and safeguard the special rights of individuals subject to this Act; and
>
> (c) to provide for the appropriate use of different levels of care for individuals who, while no longer subject to the criminal justice system, remain subject to this Act.

[46] But on its face the order made by Judge Ullrich was within the jurisdiction of her Court and we were not provided with the record on which her decision was based. Nor has the limited time available for argument allowed us to form considered views on the interpretation of an important and complex statute. Those considerations make the issue unsuitable for summary determination. The case falls squarely within [47] of *Manuel* and any challenge must be a matter for the High Court on an appeal under s 133, not on an application for habeas corpus.

The 15 May 2007 decision

[47] We add that on 15 May 2007 Judge Ellis made an order under s 84 that the compulsory care order be cancelled completely. He said at [101]:

> [101] It is wrong in principle that he should continue to be detained simply for containment while the planning for his rehabilitation and transition to the community is put on hold. In my very clear view that is meeting neither the needs of the care recipient himself nor of the community.

But he went on to say:

> [102] The compulsory care order currently requiring ST to receive secure care is to be cancelled. ST is a care recipient 'no longer subject to the criminal justice system' – at least not while still in care. He is not a special care recipient liable to detention under a sentence, and he no longer needs to be cared for as a care recipient under a compulsory care order. ST does however continue to need care and he is entitled to expect that a proper transition plan will be put in place, with his input, and – whether he wishes it or not – with input from the Department of Corrections.
>
> [103] I have taken note of the professional advice – from both Dr Webb and Dr Judson – that the cancelling of the order should be timed to co-incide with careful planning for ST's transition. I would have preferred that such planning not be rushed but I am not prepared to countenance a delay of further months while that is undertaken. Given the steps that have already been made and the pending deadlines under the Parole Act I consider that a period of 2 weeks from the date of this judgment should be sufficient to make the necessary preparations.
>
> [104] Until those necessary preparations have been made ST's need to be cared for as a compulsory care recipient continues but those responsible for his care must take note that any continued detention beyond the period of 2 weeks would be considered by this Court unreasonable.
>
> **[105] Accordingly I make the order cancelling the care recipient's compulsory care order effective from 29 May 2007.**

[48] We add that it was competent for Judge Ellis to make an order to take effect from a future date to allow transitional arrangements to be put into effect. Mr Ellis submitted that because the original compulsory care order was invalid the subsequent order of Judge Ellis had no effect. That argument having failed, the order of 15 May 2007 remains operative. Section 84(1) provides that the Family Court may cancel the care order if a qualifying person "no longer needs to be cared for as a care recipient". Care may be required until such time as transitional arrangements are in place. In those circumstances a prospective order will be justified.

[49] There is no reason to apprehend that the arrangements carefully put in place by Judge Ellis are other than in T's best interests or could otherwise justify the

intervention of this Court. Indeed any change in T's regime of the brief period of continued compulsory care, which terminates tomorrow, could be highly undesirable as tending to destabilise those arrangements. Accordingly no question arises as to the response that this Court would have made in other circumstances to ensure his protection; the interest for which Mr Ellis has sought habeas corpus.

Decision

[50] The appeals are dismissed.

[51] We will receive memoranda as to costs filed within 14 days.

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