

**A Brief Look at the Approach of the New Zealand  
Courts to Intellectual Disability**

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1. Since writing the abstract for this conference I have been involved in a case involving an intellectually disabled man with an IQ of 65 sentenced to 3 years 6 months imprisonment for being the ringleader of an armed robbery.
2. Some time after conviction and sentence T was transferred from the prison system to intellectual disability care under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.
3. This Act is unique in that it provides a framework for providing compulsory treatment and rehabilitation for offenders who have an intellectual disability.
4. New Zealand is the only country in the world with legislation of this nature.<sup>1</sup>
5. The Author wrote extensive submissions to Parliament when the bill was first introduced and suggested that the title change from the Intellectual Disability (Compulsory Care and Rehabilitation) Bill to the Intellectual Disability (Imprisonment without Trial) Bill as it then provided for non-offenders as well as offenders to be locked up on grounds of intellectual disability. These offensive provisions were removed.
6. The fact that T was placed under this regime of course begs the question of why he was sent to prison in the first place.
7. He was transferred firstly into supervised care, by order of the Family Court,<sup>2</sup> but after he was literally seduced by one of his caregivers to live with her in a sexual relationship, and that relationship ceased he was transferred to secure care by order of the Family Court.
8. He was also sentenced to community work for threatening language, on the complaint of his ex lover. Following that the Department of Corrections decided to seek his recall to prison.
9. Judge Carruthers the Chairperson of the Parole Board on an ex parte basis recalled him to prison.
10. At this stage I was engaged as counsel.
11. It seemed to me totally inappropriate that an intellectually disabled person removed from the prison environment should be sent back, in

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<sup>1</sup> As at 2003, according to the legal team who assisted in drafting and implementing the Act. New Zealand Disability Survey 2001 states that around one percent of all adults living in NZ households have an intellectual disability.(29,000 adults), and around two percent of all children have an intellectual disability (13,000).

<sup>2</sup> The Family Court is a court of first instance, appeals lies to the High Court.

such circumstances.<sup>3</sup>

12. The first of 3 writs of Habeas Corpus was sought from the High Court. Justice Harrison granted an interim writ,<sup>4</sup> and he was transferred back to the care regime from prison. It was subsequently realised there was no jurisdiction to recall him, and that application for the writ was effectively settled. Justice Harrison commented:

[7] This application raises an issue of general importance. At one level it recognises the distinct regime imposed for the care of an intellectually disabled prisoner under the IDCCRA. At a different and more fundamental level it raises questions about the jurisdiction of the Parole Board to deal with or recall a sentenced prisoner who is subject to a compulsory care order. A review of the relationship between the IDCCRA, the Corrections Act and the Parole Act, and the reach of each, lies at the heart of Mr Togia's application. Resolution of these issues will require careful and detailed consideration of the relevant legislative provisions applicable to the detention of a sentenced prisoner following a compulsory care order.

13. A second writ was sought in April 2007<sup>5</sup> releasing him from care:

[4] The grounds advanced in support of the writ are:

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<sup>3</sup> Hansard Parliamentary Debates on the Intellectual Disability (Compulsory Care and Rehabilitation) Bill, Third Reading, Consideration of Report of Health Committee, 21 October 2003, Comment by Sue Bradford, Green Party, states:

*The need for this bill, and for its accompanying Criminal Justice Amendment Bill (No 7), was created in part by changes to criminal and mental health legislation in 1992. The Green Party totally supports the intent of those changes, which are to separate out, legally, offenders who are suffering from mental illness from those who have an intellectual impairment. Unlike some other speakers in this House over the last 24 hours, Green Party members do not think that mental illness and an intellectual disability are the same thing. It was, and is, entirely appropriate that criminal offenders in those categories should be treated quite separately and distinctly under law.*

*A problem occurred, however, when the legislative gap created by those changes meant that too few options in the intervening years were left to the courts for dealing with people with intellectual impairment in need of compulsory care. While their numbers are not large at any given time, it does not mean that we as a society should simply dump those people into inappropriate places like prisons or mental health units. Over the last 20 years or so there has been a lot in the media and elsewhere about the problems associated with that unacceptable situation.*

*For example, the incidence of physical and mental abuse of intellectually disabled offenders in prisons is well documented and lurks like an unspeakable shadow within the greater conspiracy of silence about real life in New Zealand prisons. It is also reported that such prisoners are often abused and even exploited by other inmates, are even less able to cope with the harsh environment, and are far more likely to regress rather than progress towards any form, at all, of rehabilitation. Prison is a tough place even for those in sound physical and mental health and without any physical or intellectual disability. For people with major intellectual impairment, it is horrendous that prisons have, and continue to be, the sentence of last resort. I hope that the passage of this bill really will mark the beginning of the end of that situation.*

[Bold added]

<sup>4</sup> **Solosolo Togia v The General Manager, Rimutaka Prison**, Harrison J, High Court Wellington, CIV-2007-485-358, 28 February 2007

<sup>5</sup> **Solosolo Togia v Regional Intellectual Disability Care Agency**, Simon France J, High Court, Wellington, CIV-2007-485-358, 4 April 2007

1. The original sentencing process was unfair and any detention served subsequent to it is arbitrary;
  2. The statutorily required review conducted in October 2006, which confirmed the original order, was invalid for lack of reasons, and because it wrongly combined consideration of the review with a further separate application concerning Mr Togia. Because of these process errors, the care order is said to be invalid and consequently Mr Togia has since then been unlawfully detained;
  3. At some point subsequent to 26 January 2007, Mr Togia's detention has become unlawful because his Care Co-ordinator failed to refer to the Family Court in a timely way a health assessor's report which said care is no longer required.
14. This was refused. However Simon France J did say:

[55] Standing back, although troubled by the delays that have occurred, I do not consider they have reached the stage where a lawful detention has become arbitrary. There are some parallels to a delay in placing an inmate before the Parole Board. The immediate relief is an urgent hearing and only in extreme cases might it be argued the detention was now unlawful. Given the view I take of it, it is not necessary to consider remedy, which would raise difficult issues since parole conditions need to be imposed and Mr Togia seemingly has no viable accommodation option at this point. It is not a case of accommodation options not being suitable; it is presently that there are none. Ultimately, if release were the correct outcome the lack of a suitable home could not justify maintaining the detention, but I have not in any event reached that point.

15. In my opinion the absence of accommodation is a major breach of the State's responsibility to those with disabilities<sup>6</sup>. What became clear later at the delayed Family Court hearing and its follow-up were that the best option for T was independent supported accommodation, but the caregivers had not considered this because he had exited that type of accommodation in 2003.
16. Anyone without a disability is of course free to move residence when they feel like it, but this area is rife with sanism.<sup>7</sup>
17. A third writ was sought<sup>8</sup> and refused. That application focused on the method of detention in compulsory care from the onset which occurred at a **telephone** conference:

[8] The present application does not seek to relitigate those matters, but focuses on the process followed when the initial compulsory care order was made on 23 February 2006. It is said that the extent of the

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<sup>6</sup> See for example the UN Convention of the Rights of Persons with Disabilities, Article 5 **Equality and non-discrimination**

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

<sup>7</sup> The concept of sanism is discussed below.

<sup>8</sup> **Solosolo Togia v Regional Intellectual Disability Care Agency**, Simon France J, High Court, Wellington, CIV-2007-,485-864, 8 May 2007

failures at that time to follow the statutory processes makes the order and subsequent detention unlawful so as to require Mr Togia's immediate release...

[50] There is plainly a risk that the review of Mr Togia's status may drag on. I have considered whether a High Court inquiry under s102 of the Act would be a better review route at this point. I declined that option at the time of the second application. Having considered it further, I adhere to that view. The Family Court is seized of the matter, and can assess the validity of challenges to the process in the normal way. It would accordingly be premature for me to express any views on the issues about the second assessment that Mr Ellis has raised.

18. As anticipated the Family Court matter did drag on. When it was finally held on 15 May 2007 the Family Court ordered under s 84 cancellation of the compulsory care order some 2 weeks **later** with effect from 29 May 2007.
19. That became de facto a matter considered by the Court of Appeal in appeals from the Second and Third writs<sup>9</sup>, which was also rejected. It was impossible to appeal that judgment as he was released the day following the judgment.
20. The essence of the Court of Appeal's judgment was that T was not entitled to use the habeas writ, rather he should have appealed his detention to the High Court. The ousting of a habeas jurisdiction in favour of an appeal is alarming. An appeal had anyway already been lodged a month before the Court of Appeal hearing in April, and at the time of writing no date has yet been set for its hearing.
21. The issue of his method of detention and the determination made by the Family Court Judge in my opinion conflict with the approach taken by the European Court of Human Rights, in **Gajcsi v Hungary**:<sup>10</sup>

...the reasoning of the Court decision to prolong his psychiatric detention had been very superficial and insufficient to show that his conduct had been dangerous for the purposes of paragraph 1 of that provision. As such, therefore, it had been inadequate to meet the requirements of a procedure prescribed by law within the meaning of Article 5.1 of the Convention.

22. The Family Court Judge 'determined' see Para 20 of the Court of Appeal judgment

[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

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<sup>9</sup> T v **Regional Intellectual Disability Care Agency**, CA222/07 [2007] NZCA 208, 28 May 2007.

<sup>10</sup> Application No. 34503/03, 3 October 2006.

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.

23. How T consented is an intriguing question, which raises systemic issues such as competence of all counsel practicing in the area, as well as the failure of the Court to protect his rights.
24. Well, the reasoning above suffices in New Zealand.
25. How is that since 26 January 2006 an application to release from compulsory care is not made and determined until 15 May 2006. There is a structural imbalance here. Administratively it is very easy to be locked up but hard to be released. See **van Glabeke v.**

## France<sup>11</sup>

18. As to whether a decision had been given “speedily”, she submitted that the time needed to obtain access to a judge was wholly out of proportion to the straightforwardness and rapidity of the administrative procedures relating to compulsory admission.

Relying on *Gündoğan v. Turkey* (no. 31877/96, 10 October 2002), the applicant submitted that the periods mentioned by the Government were longer than the nine days which the Court had found excessive in that case. She added that there should be no discrimination between applicants on the basis of their country of origin or place of detention (prison or psychiatric hospital).

26. Having lost the Second, and Third writ and in the Court of Appeal. One might think I might give up. Think again the case continues. His criminal appeal awaits.
27. It is hard to see how a person with such a disability can be locked up as a ringleader of an armed gang in the first place. Numerous breaches of rights are alleged on this appeal. Of course if he should not have been imprisoned in the first place then his transfer to care would have been an arbitrary detention.<sup>12</sup>
28. In addition civil proceedings will be launched for the unlawful removal to prison, and for Declarations of Inconsistency with the New Zealand Bill of Rights Act (NZBORA), not the least being as to whether the inability for the detainee to apply for release in the Family Court from an order of the Family Court.
29. As well the habeas saga will result in a communication to the United Nations Human Rights Committee in respect of a breach of Article 9(4) the habeas proviso, which is in similar terms to Article 5(4) of the European Convention.

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<sup>11</sup> ECHR Application no. 38287/02 7 March 2006

<sup>12</sup> Breaching s 22 NZBORA and Article 9(4) of the ICCPR.

