High Court of New Zealand

30 October 2017

MEDIA RELEASE - FOR IMMEDIATE PUBLICATION

S v Attorney-General
CIV 2010-485-379
[2017] NZHC 2629

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz

Background

Each of the three applicants in these proceedings (referred to in the judgment as patients S, M and C) is intellectually disabled. Each also has other conditions which mean that he falls within the statutory definition of "mentally disordered".

Historically, all three men have been charged with violent offending of a moderately serious kind. They have also been involved in many other acts of violence that have not been the subject of criminal charges. Their respective disabilities meant that, for the period covered by their claims (1999-2012) they were not dealt with through the criminal justice process. Rather, they have been detained and treated in medium secure forensic hospital units controlled and operated by the Capital and Coast District Health Board (CCDHB) and Waitemata District Health Board (WDHB) on the grounds that their clinicians and the Courts have considered that they continue to pose a risk of harm to others and to themselves.

The claims

Through their litigation guardian (appointed by the Court to represent the applicants' interests) the applicants challenged the fact, circumstances and conditions of their detention over the period of the claim. The statement of claim contained 13 causes of action and was 100 pages long. The applicants alleged that the operation of the statutory provisions authorising their initial and continued detention were unlawfully discriminatory in breach of s 19 of the New Zealand Bill of Rights Act 1990. (NZBORA). They sought declarations that many aspects of their treatment

while detained constituted torture or was cruel and inhumane, in breach of ss 9 and 23(5) of the NZBORA. They claimed their detention has been punitive rather than protective and was, or became, arbitrary, in breach of s 22 of the NZBORA.

Because of the way in which the claims were framed the Court was effectively required to review (albeit at a reasonably high level) virtually every aspect of the applicants' detention over a 12 year period, including their living conditions, rehabilitation, leave, visitation rights and matters relating to sexual expression. There was a particular focus on certain key issues, namely allegations of sexual assaults on one of the applicants (S) by another patient in 1999/2000 and the DHB's response to that, the use of seclusion and restraint within the units and the continued legal basis for the applicants' detention.

Because of the applicants' respective disabilities they were unable to give evidence in Court in the usual way. The Crown therefore proposed, and then facilitated, a process whereby their evidence was given by way of DVD recording made before the hearing. Each applicant was interviewed by a specialist interviewer made available by the New Zealand Police. Counsel conferred, both with each other and with the interviewers, to create interview plans, to ensure that the interviews canvassed all of the matters that counsel wished the claimants to be questioned about. Counsel monitored the interviews and provided feedback and direction to the interviewers at various stages throughout the interviews.

Clinicians who had cared for the applicants over the years, together with officers from the Ministry of Health with expertise in forensic intellectual disability services also gave evidence at the hearing. All relevant historical clinical files still in existence were provided to the applicants' counsel and material from those files was put to witnesses. Expert psychological evidence was called by both sides.

As well, at an early point in the six week hearing, the Court and counsel visited the secure forensic units (known as Haumietiketike (at Ratonga-rua-o-Porirua) and Pōhutukawa (at the Mason Clinic)) where the applicants have been detained for much of the period covered by the claim.

Findings:

As far as the allegations of sexual assault were concerned, the Court accepted that the assaults did occur and that there were therefore grounds for considering whether the DHB had breached the protective duty found to be owed to S as a vulnerable detainee under s 23(5) of the NZBORA. The Court held, however, that there was (over 15 years later) insufficient evidence fairly to determine whether such a breach had occurred. It also held that the inquiry by a District Inspector at the time was thorough, prompt and impartial and that the DHB and the District Inspector had supported S appropriately in making a decision whether to lay a complaint with the Police.

The Court found that although each of the applicants had been the subject of restraint and seclusion over the period of the claims but that there was no evidence to suggest that such measures were used unlawfully or in a demeaning or degrading way. Nor was there evidence that restraint and seclusion was used other than in circumstances where the applicant concerned was not presenting an immediate risk of harm either to himself or to other patients or staff.

The Court also noted that both DHBs were committed to minimising the use of restraint and seclusion in future. And in fact, as staff had come, over time, better to understand the applicants' disabilities and how best to prevent and respond to their challenging behaviour, restraint and seclusion had become less and less necessary. Mechanical restraint has never been used on any of the applicants and there was no evidence to suggest that they had been chemically restrained. One incident involving the restraint and seclusion of one of the applicants (M) over a two- day period was examined by reference to s 23(5) in some detail. The Court held that while, in hindsight, it might be said that the incident could have been handled better (a point acknowledged by staff) the decisions that were made under emergency conditions at the time were not unreasonable in the circumstances. No inhumane or degrading treatment or breach of s 23(5) was established.

In terms of the applicants' continued detention, each was initially ordered by the Court to be detained as either a special patient (S and M) or a patient (C) under the Mental Health (Compulsory Assessment and Treatment) Act 1992, after a finding that they were unfit to plead. Once patients are detained on that basis they will not be released until there is a clinical finding that they are no longer a danger to themselves or others. The position is the same under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, which enables the Court to make similar dispositions in relation to intellectually disabled people who do not also have a mental disorder.

The effect of the statutory provisions is that it is possible for those such as the applicants to be detained for a period that is longer than any finite prison sentence they might have received had they been fit to plead and therefore subject to the criminal justice system. But while the duration of their detention is indefinite, they may, equally, be released at any time – once the relevant risk threshold is met. Regular (six monthly) clinical reviews are required by the statutes to ensure that there is a constant reappraisal of the continued basis for their detention and there are a number of statutory mechanisms whereby the outcome of those reviews can be (and have been) challenged.

The Court therefore found that the applicants' continued detention was lawful and authorised by Court orders made pursuant to statute.

Specific allegations of unlawful breaches of the statutory time frames for reviews by the Court were examined. The Court also concluded that (consistent with overseas authorities) the statutory regime pursuant to which the applicants are detained could not be said to discriminate against them on the grounds of their intellectual disability. Their detention was not predicated on a criminal conviction and was not a punishment. The basis for it was the risk the applicants posed to themselves and

others. For those reasons, it was not apt to compare them with "ordinary prisoners". And even if such a comparison was appropriate, the operation of the relevant legislation resulted in them receiving better treatment than prisoners, not worse.

All claims were dismissed.

Because of the applicants' disabilities, considerable thought was given by counsel and by the Court as to how best to communicate the contents of the judgment to them. A process was agreed whereby the judgment would be released to counsel and embargoed for a period to enable the necessary clinical support to be arranged. It was also agreed that the Judge would write letters to the applicants individually, in simple terms, about the case. That has occurred.

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