NOTE: HIGH COURT ORDER [2017] NZHC 2629 SUPPRESSING THE NAME AND IDENTIFYING PARTICULARS OF THE APPLICANT AND OTHER PLAINTIFFS REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 82/2020
[2020] NZSC 145

BETWEEN	M (SC 82/2020) Applicant
AND	ATTORNEY-GENERAL (IN RESPECT OF THE MINISTRY OF HEALTH) First Respondent
AND	WAITEMATĀ DISTRICT HEALTH BOARD Second Respondent
AND	CAPITAL AND COAST DISTRICT HEALTH BOARD Third Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: A J Ellis for Applicant
A M Powell and J B Watson for First Respondent
D R La Hood for Second and Third Respondents

Judgment: 16 December 2020

JUDGMENT OF THE COURT

A The application for leave to appeal is granted in part (*M (CA677/2017) v Attorney-General* [2020] NZCA 311).

B The approved question is:

Was the applicant detained unlawfully after 20 December 2008 because the direction of the Attorney-General under s 31(4) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 that he be detained as a care recipient under the Intellectual Disability (Compulsory Care and

Rehabilitation) Act 2003 was not issued until 14 January 2009, and, if so, for how long?

C In all other respects the application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal on all of the 10 grounds of appeal rejected by the Court of Appeal[1] in its decision dismissing his appeal from the decision of the High Court.[2] In addition, he advances two further grounds of appeal that were not considered by the Court of Appeal.

[2] The Court of Appeal upheld the High Court judgment in its entirety, observing that it had little or nothing to add to the High Court Judge's reasoning.[3] The application for leave to this Court therefore seeks to challenge concurrent findings of the Courts below on all of the grounds rejected by the Court of Appeal.

[3] We are satisfied that the approved question raises a matter of general and public importance and grant leave on that question accordingly.[4] We are not satisfied that the criteria for leave to appeal are met in relation to any other grounds and therefore decline leave on those grounds. Our brief reasons follow.

[4] The facts are summarised in the Court of Appeal judgment and we do not repeat them here.[5]

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1 *M (CA677/2017) v Attorney-General* [2020] NZCA 311 (Clifford, Courtney and Goddard JJ) [CA Judgment].

2 *S v Attorney-General* [2017] NZHC 2629 (Ellis J).

3 CA judgment, above n 1, at [4].

4 Senior Courts Act 2016, s 74(2)(a). This point was considered by the Court of Appeal alongside an argument that the applicant's detention was arbitrary because it was an executive detention or because it was inconsistent with the United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008) [CRPD]. The approved question does not extend to those arguments.

5 CA judgment, above n 1, at [5]–[26].

[5] The Court of Appeal summarised the 10 issues before it in its judgment, and it is convenient to reproduce that summary here:[6]

> (a) *Unfair hearing and wrong burden of proof*: The Court should not have made findings that Mr M had been involved in acts of violence that were not the subject of criminal charges. He is entitled to the presumption of innocence. Moreover the burden of proof should have been on the respondents to disprove ill-treatment, not on Mr M to provide it.
>
> (b) *Litigation guardian appointment*: The requirement to have a litigation guardian in these proceedings is contrary to the [Convention on the Rights of Persons with Disabilities (CRPD)] and is unlawful. The Judge erred in finding that an earlier judgment of Ronald Young J in these proceedings, which held that the litigation guardian rules were lawful and valid,[7] was res judicata and could not be revisited.
>
> (c) *Sexual activity*: The Judge should have found that the absence of a written policy on sexual relationships meant the policy was uncertain and not prescribed by law. The policy prohibiting sexual relationships for detained persons was inconsistent with ss 9 and 23(5) of [the New Zealand Bill of Rights Act 1990 (NZBORA)].
>
> (d) *Guidelines under the [Mental Health (Compulsory Assessment and Treatment) Act 1992 (MH Assessment and Treatment Act] and the [Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (ID Care and Rehabilitation Act)]*: Declarations should have been made in relation to the alleged invalidity of guidelines under s 130 of the MH Assessment and Treatment Act, and the absence of guidelines under s 148 of the ID Care and Rehabilitation Act.
>
> (e) *Discrimination and arbitrary detention*: Mr M's detention because he was found to be unfit to stand trial was discriminatory and arbitrary, in breach of ss 19 and 22 of NZBORA.
>
> (f) *Unlawful Executive detention*: Section 76 of the MH Assessment and Treatment Act, which provides for clinical reviews of patients, gives rise to unlawful detention by the Executive.
>
> (g) *Right to second opinions*: There were failures to advise Mr M of his right to obtain a second opinion from a medical practitioner in respect of medical assessments, in breach of his rights under NZBORA.
>
> (h) *Breach of Convention against Torture*: Mr M's detention was in breach of art 11 of the Convention against Torture (CAT).[8]
>
> (i) *Failure to give NZBORA Rights prior to medical assessments*: The Judge should have found that before undertaking medical assessments

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6 At [27].

7 *S v Attorney-General* [2012] NZHC 661.

8 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

forming the basis of continued detention, Mr M should have been advised of his rights under ss 11 and 27 of NZBORA and under the CRPD.

(j) *Totality*: The conduct that is the subject of the other grounds of appeal, taken as a whole, amounts to breaches of Mr M's rights protected by NZBORA.

[6] Having considered the reasons given by the Court of Appeal for rejecting grounds (a), (b), (c), (f), (g), (h), (i) and (j), we have concluded that none of those grounds has sufficient prospects of success to justify a further appeal.

[7] In relation to ground (d), we agree with the observation of the Court of Appeal that it is surprising that no guidelines have been issued under s 148 of the ID Care and Rehabilitation Act since it came into force.[9] But, as the Court of Appeal noted, the absence of guidelines had no practical impact on Mr M.[10] Thus, while the issues relating to the absence of guidelines may be a matter of general importance, there is no practical purpose in repeating the Court of Appeal's observation, nor is there any risk of a miscarriage in not making a declaration, given the absence of practical implications for Mr M.

[8] In relation to guidelines under s 130 of the MH Assessment and Treatment Act, we do not consider there is sufficient prospect of success in relation to this point to justify the grant of leave.

[9] We have granted leave on one aspect of ground (e). In relation to the discrimination ground, we accept that the question of whether the procedure for mentally disabled defendants in the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CP (MIP) Act) is inconsistent with ss 19 and 25(c) of the New Zealand Bill of Rights Act is a matter of general and public importance. But the applicant did not seek a declaration of inconsistency in this regard in his pleadings, which would mean the Court would be addressing the issue in the absence of a detailed consideration of it in the Courts below. That, and the fact that the applicant was detained under the now repealed Criminal Justice Act 1985, rather than the CP (MIP) Act, means this is not an appropriate case to address the issue.

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9 CA judgment, above n 1, at [94].
10 At [95].

[10] The two additional grounds on which leave is sought are:

(a) that the Court of Appeal decision was inconsistent with the CRPD; and

(b) that the Court of Appeal failed to provide for special value for Mr M in accordance with *R v Narayan*.[11]

[11] We do not see either of these grounds as having sufficient prospect of success to justify the grant of leave.

Solicitors:
Crown Law Office, Wellington, for First Respondent
Luke Cunningham Clere, Wellington, for Second and Third Respondents

11 *R v Narayan* [1992] 3 NZLR 145 (CA).