IN THE COURT OF APPEAL OF NEW ZEALAND

CA254/06

BETWEEN JOSKO SESTAN
Appellant

AND DIRECTOR OF AREA MENTAL HEALTH SERVICES WAITEMATA DISTRICT HEALTH BOARD
Respondent

Hearing: 29 November 2006

Court: William Young P, Robertson and Arnold JJ

Counsel: T Ellis and A Wills for Appellant
M R Heron and D A Marshall for Respondent

Judgment: 12 December 2006 at 4 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved.

REASONS OF THE COURT

(Given by Robertson J)

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Introduction

[1] Josko Sestan appeals against the dismissal by Asher J of an application for the issue of a writ of habeas corpus in the High Court at Auckland on 16 November 2006.
[2] The grounds of appeal were wide-ranging and diffuse. In essence it was contended that, as there were breaches of some provisions of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCAT) and the New Zealand Bill of Rights Act 1990 (NZBORA), the processing of Mr Sestan under the MHCAT was unlawful and that he is, therefore, subject to arbitrary detention contrary to s 22 of the NZBORA.

Background

[3] Mr Sestan (who is aged 42) has a diagnosis of bipolar/schizoaffective disorder. He becomes psychotic when manic. He is also depressive. As a result of his ill health, he has been subject to five admissions to hospitals since 2002. Mr Sestan's mental wellbeing depends on his taking prescribed medication.
[4] On 27 October 2006 his mother contacted the North Shore Two Community Health team because of concerns about her son's well being. She was anxious about a traffic incident, his elevated mood and excessive spending including purchasing two apartments with virtually no deposit.
[5] On earlier occasions Mr Sestan had been involved in a number of serious behavioural outbursts including jumping from a balcony, being naked in public places, experiencing hallucinations, seeing evil spirits and abandoning his car on a motorway.
[6] Various efforts were made by the mental health team to speak to Mr Sestan following the contact by his mother. Eventually he agreed to go to the emergency department, and did so at 8.54pm on 28 October 2006. The registered nurse on duty, Ms Smith,

telephoned the appellant's mother to discuss the situation and inquire whether she, or another member of the family, would come to the hospital to be with Mr Sestan while he was assessed as required by s 9(2)(d) of the MHCAT.
[7] Mrs Sestan said she did not wish to be present. On previous occasions when the family had been present her son had become angry at them for participating. She said at times she was afraid of her son. When asked if anyone else was available as a suitable support person, Mrs Sestan said she could not think of anyone.
[8] Ms Smith told Mr Sestan that no support person was available and asked him whether he could nominate anyone. He said he understood why his family would not wish to become involved and could not think of anyone else. He was offered the use of a mobile phone to call a support person but declined to use it. He told the nurse that he wished to get on with the assessment process. The hospital authorities decided to continue with the assessment process notwithstanding this position.
[9] An assessment took place at 10.30pm. Dr Stoyanoff, the psychiatric registrar on duty, concluded that there were reasonable grounds for believing that Mr Sestan was mentally disordered and needed to undergo further assessment and treatment under the MHCAT. During the assessment process, Mr Sestan became irritable and tried to leave. He refused to accept copies of relevant papers.
[10] The doctor's clinical report noted:

Josko is elevated in mood with an effusive affect. His thoughts are racing. He has been making grandiose plans around work and has been overspending. His sleep is disturbed and he is overactive.

He has placed others at risk with his driving attempting today to force another driver off the road who had been 'driving too slow'. He lacks insight and exhibits poor judgment. His ability to care for himself is compromised.

[11] A preliminary assessment certificate was issued by Dr Stoyanoff. Mr Sestan was admitted to the Tahuratu Mental Health Unit at 12.07am on 29 October 2006.
[12] Mr Sestan made an application for review which was heard and refused by a Judge on 1 November 2006. A second review was declined on 8 November 2006.
[13] On 1 November 2006, Mr Sestan was further assessed. A certificate was issued saying he needed a further 14 day period of assessment and treatment. We were informed that a Family Court hearing for his committal, which was scheduled to take place, has been postponed as Mr Sestan has exercised his right to obtain a second opinion.

The High Court proceedings

[14] Before Asher J there was a challenge to what occurred on the basis there had been a breach of s 9(2)(d), the second certificate issued under s 12 of the MHCAT was premature and invalid, and there was an issue as to whether Mr Sestan was in fact mentally disordered.
[15] Each of these issues have been raised again in this Court, but the attack is now more extensive.

Statutory framework

[16] The MHCAT provides a three-step procedure for assessment and review before a compulsory treatment order can be made. The committal process is commenced by an application made to the Director of Area Mental Health Services (DAMHS) for the assessment of the person who is suspected of being mentally disordered: s 8A. A medical certificate, made in accordance with s 8B, must accompany the application. The certificate must be from a medical practitioner, who has examined the patient within the three days immediately prior to the application, stating that he or she believes that there are reasonable grounds to believe that the person is mentally disordered. Once the application is received by the DAMHS assessment under s 9 can take place.
[17] During the initial assessment examination the medical practitioner must determine and certify whether there are reasonable grounds for believing that the person is mentally disordered and that it is desirable that the proposed patient undergo further assessment: s 10(1)(b). If such a determination is made the patient is required to undergo a further period of assessment: s 11(1). This period is termed the first period of assessment and can last up to five days. Before the expiry of the five days the responsible clinician must reassess the patient: s 12. This can result in a certificate of further assessment which may lead to a second period of assessment and treatment that lasts for 14 days. Before the expiry of the 14 days a certificate of final assessment must be made: s14. If it is the responsible clinician’s opinion that the patient is not fit to be released, then documents must be prepared for a compulsory treatment order application which is usually heard in the Family Court: s 17.
[18] Mr Ellis contended that there were a multitude of failures to follow the statutory requirements throughout the compulsory assessment and treatment process.

Were the ss 8A and 8B requirements complied with?

[19] Sections 8, 8A and 8B provide:

8 Any person may fill out application form

(1) Anyone who believes that a person may be suffering from a mental disorder may at any time fill out an application form asking the Director of Area Mental Health Services for an assessment of the person.

(2) An application is made under section 8A when the Director of Area Mental Health Services receives a filled out application form that complies with section 8A.

(3) In sections 8A and 8B,—

(a) The person who fills out the application form is called the applicant; and

(b) The person who is the subject of the application is called the person.

8A Application for assessment

An application is made under this section when the Director of Area Mental Health Services receives a filled out application form that complies with the following:

(a) it is accompanied by a certificate issued under section 8B relating to the person that states a date of examination within the 3 days immediately before the date of the application; and

(b) it states that the applicant is 18 years or over; and
(c) it states that the applicant has personally seen the person within the 3 days immediately before the date of the application; and
(d) it states the relationship or association of the applicant with the person; and
(e) it states the grounds on which the applicant believes the person to be suffering from a mental disorder.

8B Medical practitioner's certificate to accompany application for assessment

(1) This section applies when—

(a) A medical practitioner is asked, by an applicant, to issue a certificate to accompany the application form; or

(b) A medical practitioner is the applicant and wishes to issue a certificate to accompany his or her application form.

(2) A medical practitioner to whom subsection (1)(a) applies must not issue a certificate if he or she is related to the applicant or to the person.

(3) A medical practitioner to whom subsection (1)(b) applies must not issue a certificate if he or she is related to the person.

(4) The medical practitioner must—

(a) Examine the person; and

(b) If he or she considers that there are reasonable grounds for believing that the person may be suffering from a mental disorder, issue the certificate.

(5) The certificate must—

(a) State that the medical practitioner has examined the person:

(b) State the date of the examination:

(c) State that the medical practitioner considers that there are reasonable grounds for believing that the person may be suffering from a mental disorder:

(d) Set out full particulars of the reasons for that opinion, explaining in what way the medical practitioner believes that the person's condition may come within the statutory definition of mental disorder:

(e) State that the medical practitioner is not related to the person or to the applicant (except when the medical practitioner is the applicant).

[20] Mr Ellis submitted that ss 8A and 8B were not complied with and as a consequence Mr Sestan was unlawfully detained. He conceded that the appellant was "seen" and "examined" within the requisite three days and by duly qualified people having an appropriate relationship with Mr Sestan. Mr Ellis argued, however, that the medical practitioner looked at notes and discussed the matter with others. He contended that this was evidence that the medical practitioner did not therefore act independently, but had been "got at". Further, he asserted that there were insufficient reasons given for the belief that the appellant was "mentally disordered" in breach of ss 8A(e) and 8B(4)(b). Counsel submitted, therefore, that it could not be sufficiently proved that Mr Sestan was mentally disordered.

[21] Mr Heron contended that the legislation did not require a diagnosis of a mental disorder but that it was enough that the medical practitioner (and the applicant) had reasonable grounds for believing that the appellant may have been mentally disordered. He stated that there was sufficient information on the certificates to fulfill the statutory requirements of ss 8A and 8B.

[22] Section 2 provides a definition of mental disorder:

2 Interpretation

mental disorder, in relation to any person, means an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it—

(a) Poses a serious danger to the health or safety of that person or of others; or

(b) Seriously diminishes the capacity of that person to take care of himself or herself;—

and **mentally disordered**, in relation to any such person, has a corresponding meaning:

[23] The application for assessment and the accompanying certificate outlined the incident Mr Sestan had with a car which involved road rage, his excessive spending, his lying to police, his not sleeping and parental concerns about this behaviour. There were sufficient grounds to support a reasonable belief that the appellant was mentally disordered. We do not accept the more extreme aspects of the appellant's case that prior medical history is irrelevant to the examination. The current mental state of the person must be examined but the medical practitioner is not required to be blinkered. It would be irresponsible for the medical practitioner not to consider background and relevant circumstances. These may, for example, provide an explanation for a person's apparently

bizarre behaviour that does not relate to his or her mental health, such as the effects of a particular combination of medications.

Was Mr Sestan detained whilst the ss 8A and 8B processes were taking place?

[24] Mr Ellis submitted that the appellant was detained when undergoing the s 8B examination and while the s 8A application was made. While thus detained, he was not informed of his right to consult a lawyer (in accordance with s 70 of the MHCAT or s 23(1)(b) of the NZBORA). It was therefore contended that any information obtained during this process was tainted and the assessment under s 9 of the MHCAT was a nullity.

[25] Whether the appellant was detained prior to the s 9 assessment requires a close examination of the statutory framework.

[26] During the application phase (ss 8-8B) the person being examined is under no compulsion to stay and participate. Section 38(3) provides that if a duly authorised officer (DAO) decides that a person needs to have a medical examination (under s 8B) but the situation is not urgent, the DAO must "arrange or assist in arranging" for a medical practitioner to examine the person. This wording suggests that the DAO has no power to force the person to submit to an examination but must make attempts to arrange a time for examination that is acceptable to the person.

[27] The situation is different where the DAO believes that the examination is urgent and the person "refuses to go willingly" to a medical practitioner. Section 38(4)(d) provides if the DAO believes that the person needs to be examined urgently they must "take the person" to a medical practitioner and may call the police for assistance to this end.

[28] In *Innes v Wong* [1996] 3 NZLR 238 (HC) Cartwright J considered that the power to force a person to submit to examination must be read narrowly. She held that "except in cases of extreme emergency there is no basis for ignoring the rights of the person who is thought to be mentally disordered". This interpretation is in line with decisions in the District Court that hold that during the ss 8A and 8B process a person is participating voluntarily and is free to leave: see for example *Re RO [Mental Health]* (1998) 17 FRNZ 486.

[29] The voluntary nature of participation in the ss 8-8B procedure by the person suspected of being mentally disordered is underlined by a comparison with s 9. Under s 9(1) the DOA must make arrangements for the proposed patient to be assessed "forthwith". Notice of the assessment must be given to the patient "requiring" the patient to attend for the purpose of assessment examination: s 9(2)(c)(i). The language is mandatory. The proposed patient must submit to examination forthwith.

[30] Mr Ellis contended that the language of s 8B was equally mandatory and pointed to the s 8B(4)(a) requirement that a medical practitioner must "examine the person". The compulsion in s 8B(4)(a) is directed at the medical practitioner, not the person being examined. The section imposes a mandatory requirement upon the medical practitioner to examine the person before issuing the certificate.

[31] We are satisfied that, unless the situation is urgent and the s 38 procedures are adopted, a person is not detained until they are required to submit to a s 9 assessment examination.

[32] Mr Ellis argued that Mr Sestan did not voluntarily submit to the s 8B examination

and was accordingly under de facto detention. He pointed to a phone conversation between the appellant and a member of the Community Health Team where the appellant refused a home visit and stated that he would not allow the Mental Health Act to be used. He also pointed to the fact that Mr Sestan attempted to leave the hospital but was not allowed to do so.
[33] We are satisfied that Mr Sestan acquiesced to the examination process. Mr Sestan voluntarily went to the Emergency Department at North Shore Hospital. His attempt to depart was not made until after the s 8A application had been made and Mr Sestan was given notice of assessment, at which time the appellant was properly detained. In such circumstances we are satisfied that he was not "detained" until required to undergo a s 9 assessment examination. Accordingly, there was no requirement that Mr Sestan be informed of his right to a lawyer, in accordance with s 23(1)(b) of the NZBORA, up until that time.

Section 70 right to a lawyer

[34] Mr Ellis submitted that even if the appellant was not detained in accordance with s 23 of the NZBORA when the application process was being conducted, the appellant was entitled to be informed of his right to a lawyer in accordance with s 70 of the MHCAT.
[35] Section 70 provides:

70 Right to legal advice

Every patient is entitled to request a lawyer to advise the patient on his or her status and rights as a patient, or any other matters on which persons customarily seek legal advice, and, if the lawyer agrees to act for the patient, he or she shall be permitted access to the patient upon request.

[36] Section 70 states that every "patient" is entitled to request a lawyer. A person does not become a patient until required to undergo further assessment under ss 11 or 13: s 2.
[37] Section 63A states that s 70 also applies to "proposed patients". Proposed patient is defined in s 2A:

2A Meaning of "proposed patient"

A person—

(a) Starts being a proposed patient when an application is made under section 8A; and

(b) Stops being a proposed patient when a medical practitioner records a finding—

(i) Under section 10(1)(b)(i), in which case the person does not become a patient; or

(ii) Under section 10(1)(b)(ii), in which case the person becomes a patient.

[38] An application under s 8A is deemed to be made when the DAMHS receives a completed application that complies with s 8A: s 8(2). A s 8A application for assessment is not complete unless it is accompanied by a certificate issued under s 8B. Therefore, a person becomes a proposed patient only after the ss 8A and 8B processes are completed. Accordingly, up until that time Mr Sestan had no entitlement to a lawyer.
[39] We are satisfied that ss 8A and 8B were complied with.

Were the requirements of s 9 complied with?

[40] Section 9 provides that:

9 Assessment examination to be arranged and conducted

(1) Where an application is made under section 8A, the Director of Area Mental Health Services, or a duly authorised officer acting with the authority of that Director, shall make the necessary arrangements for the proposed patient to undergo an assessment examination forthwith.

(2) The arrangements required by subsection (1) of this section shall include the following:

(a) Nominating, in accordance with subsection (3) of this section, the person by whom the assessment examination is to be conducted:

(b) Determining, in consultation with the person by whom the assessment examination is to be conducted, the time and place at which it is to be conducted:

(c) Giving to the proposed patient a written notice—

(i) Requiring the proposed patient to attend at the specified place and time for the purposes of the assessment examination; and

(ii) Explaining the purpose of the assessment examination; and

(iii) Stating the name of the person who is to conduct the assessment examination:

(d) Ensuring that the purpose of the assessment examination and the requirements of the notice given under paragraph (c) of this subsection are explained to the proposed patient in the presence of a member of the proposed patient's family, or a caregiver in relation to the proposed patient or other person concerned with the welfare of the proposed patient:

(e) Ensuring, where necessary, that appropriate arrangements are made to convey the proposed patient at the required time to the place where the assessment examination is to be conducted, and, where it is necessary or desirable that the proposed patient be accompanied on the journey, ensuring that an appropriate person is available to do so.

(3) Every assessment examination shall be conducted by a medical practitioner (but not being the medical practitioner who issued the certificate under section 8B(4)(b)), being—

(a) A psychiatrist approved by the Director of Area Mental Health Services for the purposes of the assessment examination or of assessment examinations generally; or

(b) If no such psychiatrist is reasonably available, some other medical practitioner who, in the opinion of the Director of Area Mental Health Services, is suitably qualified to conduct the assessment examination or assessment examinations generally.

(4) For the purposes of subsection (1), an application under section 8A is deemed to have been made if the Director of Area Mental Health Services or a duly authorised officer receives notice of it from the medical practitioner who issued the certificate relating to the person under section 8B(4)(b). The medical practitioner may give notice by any means, including by telephone. The assessment examination must not take place until the Director of Area Mental Health Services, or a duly authorised officer, or the medical practitioner who is to conduct the examination receives an application relating to the person and complying with section 8A.

[41] Mr Ellis submitted that the respondent had failed to meet its obligations in connection with the s 9 process in five ways:

(a) non-compliance with s 9(2)(d) of the MHCAT;

(b) failure to properly inform the appellant of his rights in accordance with s 64(1) of the MHCAT;

(c) failure to properly inform the appellant of his right to a lawyer in accordance with s 23(1)(b) of the NZBORA;

(d) failure of the medical practitioner to consult with the appellant's family in accordance with s 7A(2); and

(f) breaching the appellant's common law right to silence.

Section 9(2)(d)

[42] The respondent conceded that s 9(2)(d) was breached as a family member was not present when an explanation of the assessment procedure was given to the appellant. There is no argument about the factual position. The issues are how the breach affected the processes that followed and what is the appropriate remedy? Mr Ellis contended that, because of the importance of the right contained in s 9(2)(d), it was not a right that the person affected could waive or decline to take up and the failure to observe it meant that the whole subsequent process was a nullity. Mr Heron responded that, while the failure to comply with a mandatory requirement in the MHCAT was serious, the right protected was not fundamental as it was simply a right to have a support person present for the

explanation, not for the assessment process itself. He argued that the issue of the writ of habeas corpus would not be a proportionate response to the breach.

[43] Mr Ellis placed considerable reliance on *Re S-C (Mental patient: habeas corpus)* [1996] 1 QB 599 (CA Civ) for the proposition that a procedural error in the committal process rendered the subsequent procedures a nullity. Mr Heron submitted that *Re S-C* had no application in this case because of the factual discrepancies between the two cases. We agree. In *Re S-C* a social worker acted in bad faith, lodging an application which stated that the nearest relatives had no objection to the application when she knew that the proposed patient's father objected.

[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); *Campbell v Superintendent Wellington Prison* CA3/05 14 February 2005. Procedural error does not necessarily invalidate official action: *Burr v Blenheim Borough Council* [1980] 2 NZLR 1 (CA).

[45] Whether non-compliance with a procedural requirement is fatal depends on the place of the requirement in the scheme of the Act and the degree and seriousness of non-compliance: *Burr* at 4. Further, habeas corpus proceedings are not necessarily the appropriate method for assessing procedural error. In *Manuel* this Court held at [49] that habeas corpus ought to only be available where the "arguments in issue are properly susceptible to fair and sensible summary determination". Challenges on administrative law grounds are better dealt with by way of judicial review.

[46] In the High Court, Asher J at [55] found that the breach was serious "but did not in itself warrant the drastic consequence of the subsequent invalidity of the detentions that followed". He held that declaring the s 9 assessment examination and subsequent steps a nullity was not a proportionate response to the non-compliance with s 9(2)(d).

[47] Mr Ellis argued that Asher J erred in finding that the right protected by s 9(2)(d) was not fundamental. He relied on *Keenan v Director of Mental Health Services* [2006] 3 NZLR 572 (HC) and *Chu v District Court at Wellington* [2006] NZAR 707 (HC), two decisions where Fogarty J issued writs of habeas corpus for breaches of s 9(2)(d).

[48] In *Keenan* Fogarty J noted that a breach of s 9(2)(d) was a serious error of law but did not have to decide whether the non-compliance "irretrievably tainted" the s 9 examination and subsequent procedures: at [13]. By agreement between the parties the writ of habeas corpus was issued, but it lay in Court until after a new s 8A application and s 9 assessment could be made.

[49] In *Chu*, Fogarty J issued the writ but once again the applicant was not released due to a condition imposed on him under the Bail Act 2000. *Chu* involved a situation where a family member was available and in the same building but was not present when the s 9 information was provided as the applicant was being held in a holding cell at a Court and family members were not allowed in the cells.

[50] Whether non-compliance with a statutory provision warrants the issuing of a writ of habeas corpus is contextual. This appellant had been through the committal process several times before. The facts of this case are distinguishable from *Chu*. Ms Smith had attempted to comply with s 9(2)(d). Ms Smith had asked the appellant's mother to attend but she was understandably unwilling. Ms Smith asked both Mrs Sestan and the appellant whether there was anyone else who could attend but to no avail. The appellant stated that, despite not having a support person, he wanted to continue with the process.

[51] Mr Ellis contended that, if a family member was not available, there ought to be a list of trained volunteers available from which the proposed patient (or the DAO) would select a support person. This is a sensible suggestion, but it would be inappropriate for this Court to hold that any orders and detentions under the MHCAT where a support person had not been provided were automatically to be treated as invalid.
[52] While s 9 may be described as mandatory, the consequences of non-compliance should be considered in light of the purpose of the Act. The purpose of s 9(2)(d) was enunciated by Fogarty J in *Keenan* at [11]:

The purpose of the family member, caregiver or this other person is to be someone listening to the explanation and able both to give comfort and reassurance, and further explanation if need be.

[53] The scheme of the Act indicates that it was not intended that those requiring compulsory treatment be released due to non-compliance with s 9. Section 9 does not provide that non-compliance will render the subsequent assessment invalid. The MHCAT provides for ongoing review and reassessment of the patient's mental state: ss 11, 13 and 16. Section 16 does not provide reviewing Judges with the power to release a patient on any ground other than they are no longer mentally disordered. The Act does not give reviewing Judges or clinicians (in their assessments under ss 11 and 13) the discretion to stop the statutory process because of a procedural defect.
[54] If a person refuses to have a support person present, to what lengths are DAOs expected to go to comply with the requirement? Ultimately, efforts to force a support person on the proposed patient will lead to a breach of the patient's right to privacy. To bring a stranger from a list of support people into the room against the patient's will could result in the patient understanding less of the process than to allow the patient to refuse the presence of a support person.
[55] We are satisfied that Asher J did not err in the approach that he took and was correct in not issuing a writ of habeas corpus for the breach of s 9(2)(d).

Right to be informed of rights

[56] Mr Ellis submitted that there was a failure to fully inform the appellant as to his rights under the MHCAT. Counsel accepted that Ms Smith had verbally explained to Mr Sestan the extent of his rights under the Act but argued that this was insufficient for two reasons.
[57] First, the appellant did not understand the explanation given regarding his rights. Counsel asserted that, given the vulnerable state of mental health patients, it was essential for the DAO to ensure that the person detained properly understood the advice provided: *R v Samuelu* (2005) 21 CRNZ 902 (HC); *R v Mallinson* [1993] 1 NZLR 528 (CA). We are not persuaded that this requirement can be extended to the MHCAT. In some cases, due to the mental condition of the person detained, it will be impossible to comply as the person will be incapable of understanding their rights. This cannot invalidate any subsequent assessment process. In her affidavit Ms Smith stated her belief that the appellant understood the rights explained. Ms Smith is a qualified mental health professional. We are satisfied that she did everything in her power to "bring home" to the

appellant his rights under the Act in the circumstances.
[58] Mr Ellis also argued that the explanation given was inadequate as it was based upon the standard form written notice used by hospitals around the country. He submitted that this written notice was full of errors and could not operate to sufficiently inform a patient of their rights. Whilst the notice may be capable of improvement and refinement, we do not accept that it is insufficient to inform patients of their rights.
[59] Thirdly, Mr Ellis contended that Ms Smith had failed to give the appellant written notice of his rights as a patient as required by s 64(1). Ms Smith attempted to give Mr Sestan written notice of his rights but he refused to accept the papers, so the appellant cannot now complain about what he himself prevented occurring.
[60] Even if we had found that Mr Sestan had not been adequately informed of his rights generally and his right to counsel specifically it would not necessarily follow that a writ of habeas corpus was the appropriate remedy. We note that the MHCAT provides a remedy in such circumstances in s 75 which provides that, where there is a complaint about a right being breached, the matter shall be referred to a district inspector or an official visitor.

Right to consult a lawyer

[61] Mr Sestan was informed of his right to request a lawyer when informed of his rights under the MHCAT. He was told that:

You have the right to ask a lawyer to advise on your rights and status as a patient or on any other matter.

[62] Mr Ellis submitted this information was inadequate and inconsistent with the NZBORA requirement that a detained person has the right to see a lawyer without delay and in private.
[63] The information given to the appellant was in accordance with s 70 of the MHCAT. This is a specific statutory regime created after the NZBORA. Given that there are reasonable grounds for believing that a proposed patient is mentally disordered, i.e., dangerous to themselves or others, it is reasonable that the right to counsel would not necessarily be available in private.
[64] The question of delay also needs to be considered in context. A particular step in the process may need to be undertaken with a degree of urgency and waiting until a lawyer is available – particularly one who understands this specialist jurisdiction – may simply be counter-productive. Waiting for hours or even days cannot be a requirement, but any detriment is balanced by the fact that a lawyer once appointed is able to initiate various review and reconsideration steps. In this area there is not a one-off opportunity for legal assistance to be efficacious as is often the case in a criminal context.

Obligation on medical practitioner to consult with proposed patient's family

[65] Mr Ellis submitted that the appellant was unlawfully detained as when the medical practitioner, Dr Stoyanof, conducted his s 9 assessment examination he failed to consult with the appellant's family as required by s 7A(2).

[66] The family was consulted regarding the assessment and treatment of the appellant but the consultation was made by Ms Smith, not the medical practitioner. The information gathered by Ms Smith was given to Dr Stoyanof.
[67] We are satisfied that this breach of s 7A was of no consequence. The purpose of s 7A is to involve the family of the proposed patient (or patient) in treatment decisions as much as possible – especially where the proposed patient is unable to give informed consent. In this case the family was able to have input into the process, albeit through the DAO.

Right to silence

[68] Mr Ellis asserted that the requirement that Mr Sestan submit himself for examination was a breach of his common law right to silence. He reiterated this argument in relation to the mandatory examinations under ss 11 and 13.
[69] The NZBORA right to silence under s 23(3) does not arise as a patient is not detained "for an offence". We are not satisfied that, on a sensible construction under common law, the right to silence has application in these circumstances.

Was s 10 complied with?

[70] Mr Ellis conceded that s 10 was complied with, but argued that the framing of the provision was in breach of the appellant's right to reasons: s 23(1)(a) NZBORA. He argued that when a medical practitioner certified his findings of the assessment examination, the only person entitled to receive a copy of the reasons given by the practitioner was the DAMHS: s 10(3)(b). The proposed patient is only entitled to a copy of the certificate which does not outline the reasons for the decision: s 10(4)(a)(i).
[71] Whilst the MHCAT does not specify that the patient be given a copy of the reasons for the decision, it does not deny the patient's right to receive this information. Alternative methods are available. This challenge is not persuasive.

Was s 12 complied with?

[72] If a medical practitioner determines that there are reasonable grounds for believing that a proposed patient is mentally disordered under s 10(1)(b)(ii), the medical practitioner must require the patient to undergo further assessment and treatment for five days: s 11(1).
[73] Section 12 provides:

12. **Certificate of further assessment**

(1) Before the expiry of the first period of assessment and treatment, the responsible clinician shall record his or her findings in a certificate of further assessment, stating:

(a) that he or she has carefully considered the statutory definition of mental disorder and the patient's condition in relation to that definition; and
(b) that, in his or her opinion –

- (ii) There remain reasonable grounds for believing that the patient is mentally disordered and that it is desirable that the patient be required to undergo further assessment and treatment.

...

[74] Mr Sestan was given the s 11 certificate on 28 October 2006. The first period of assessment ended at midnight on 2 November 2006 – five clear days after the certificate was issued: s 2(1). Dr McColl, the responsible clinician recorded his findings in a s 12 certificate on 1 November 2006. The certificate was done at this time because Dr McColl had to do an assessment for the first s 16 review and considered it reasonable to make an assessment under s 12 at the same time.
[75] Mr Ellis submitted that the s 12 certificate was completed two days before the expiry of the first period of assessment and that this resulted in the premature truncation of the assessment process thereby rendering it invalid.
[76] Mr Heron asserted that the early assessment was of limited consequence. He argued that the purpose of the five day period of assessment was to allow for the patient to be assessed and treated for a sufficiently lengthy period of time so that a proper decision could be made as to whether a further period of assessment was required. He submitted that Dr McColl had spent a considerable period with the appellant and was well placed to determine that there were reasonable grounds for believing that the appellant was mentally disordered and required further assessment and treatment. He argued that this is not a case where the period was truncated significantly (*Re C* (1993) 10 FRNZ 545 (FC)) or solely for the purposes of administrative convenience (*Capital Coast Health v Haliciopoulos* FC WN MHA283/2006 4 May 2006).
[77] Section 12(1) uses the phrase “before the expiry of the first period of assessment and treatment”. It does not say “on the last day of the first period of assessment”. A s 12 certificate need not be issued on the last day of the five day period. Such inflexibility would be unworkable. A grossly truncated period of assessment could invalidate the process. As Asher J stated in the High Court at [26], “a severely shortened assessment period could well mean that there was no assessment at all in terms of the Act”.
[78] We are satisfied that in the current case the first period of assessment was not grossly truncated, the timing was explicable and the requirements under s 12 were complied with.

Was s 16 complied with?

[79] Section 16 provides:

16 Review of patient's condition by Judge

(1) When an application is made to the Court under section 11(7) or section 12(7) or section 12(12) for a review of the patient's condition,—

(a) Subsection (1B) applies if the application is the only application that has been made for a review of the patient's condition during the first and second periods:

(b) Subsection (1C) applies if the application is the second or subsequent application that has been made for a review of the patient's condition during the first and second periods.

(1A) When an application is made under section 29(4) for a review of the patient's condition, subsection (1B) applies.

(1B) When this subsection applies,—

(a) The Court must grant the application; and

(b) A Judge must examine the patient as soon as practicable; and

(c) Subsections (2) to (7) apply.

(1C) When this subsection applies, a Judge must decide whether or not to grant the application. In making this decision, the Judge must have regard to any evidence before the Judge that indicates that the patient's condition has not changed since the last review.

(2) The examination shall be conducted—

(a) At the patient's place of residence, the hospital, or the other place where the patient is undergoing assessment and treatment; or

(b) Where that is not practicable, at the nearest practicable place.

(3) The Judge must do the following things before and during the examination, as appropriate and practicable:

(a) Identify himself or herself to the patient; and

(b) Explain to the patient the purpose of the visit; and

(c) Discuss with the patient the patient's situation, the proposed course of assessment and treatment, and the patient's views on these matters.

(4) As well as examining the patient, the Judge shall consult with the responsible clinician, and with at least 1 other health professional involved in the case, and may consult with such other persons as the Judge thinks fit, concerning the patient's condition.

(5) If the Judge is satisfied that the patient is fit to be released from compulsory status, the Judge shall order that the patient be released from that status forthwith.

(6) Every review under this section of a patient's condition shall, wherever practicable, having regard to the time in which that review is required to be conducted, and to the availability of Judges and other personnel and resources, be conducted by a Family Court Judge.

(7) Where it is not practicable for a review under this section of a patient's condition to be conducted by a Family Court Judge, that review may be conducted by any District Court Judge.

[80] Mr Ellis submitted that, although s 16 had been complied with in terms of a literal application of the MHCAT, the reviews were nonetheless unlawful for two reasons.
[81] First, the Judge, when conducting the first review on 1 November 2006, did not provide any reasons for finding that there were reasonable grounds for believing that the appellant was mentally disordered. The Judge simply "ticked a box". He asserted that this was in breach of the appellant's right to reasons under s 23(1)(a) of the NZBORA.
[82] Secondly, Mr Ellis contended that the second s 16 review (8 November 2006) was unlawful because the Judge failed to conduct an examination. The Judge refused to hear the review application on the grounds that there had been no change of circumstances.
[83] In the High Court proceedings, the lawfulness of the reviews were not in issue. Mr Sestan was represented by counsel experienced in mental health matters when both of the reviews were undertaken. That much we know, but we have no evidence as to what actually occurred. An appellate Court cannot make assessments or findings without an evidential foundation. We have no knowledge of how these reviews were conducted or what occurred in them, and speculation is inappropriate.
[84] Section 16 allows a patient to apply for a review of their condition. The s 16 procedure has been described as a "safety valve" to ensure that the patient's right to liberty is not curtailed for medical or other irrelevant reasons: *L v Director of Mental Health Services* [1999] NZFLR 949 at 954 (FC). Section 16(1)(b) provides that "a Judge must examine the patient as soon as practicable". It is reasonable that the Judge provides his determination at the earliest possible time. In such circumstances it is not a breach of the NZBORA for the Judge to give a "tick the box" decision and provide further reasons if requested at a later time.
[85] Where a patient makes a second application for review under s 16 a Judge has a discretion as to whether or not to grant the application. In making that decision he or she "must consider any evidence before the Judge that indicates that the patient's condition has not changed since the last review": s 16(1C). Accordingly, it was open to the Judge to determine that a second review was not required in this case.
[86] Mr Ellis repeated his right to reasons argument in relation to this point. Although the Judge did not provide reasons upon reaching a decision on whether or not to grant the review application (noting that he was not required to by the Act) the reasons for his decision could have been made available if they had been requested. Just because an Act does not require a decision maker to provide reasons for a decision does not automatically render any decision made in accordance with that Act unlawful by operation of s 23(1)(a) of the NZBORA.

Conclusion

[87] MHCAT in its long title provides:

An Act to redefine the circumstances in which and the conditions under which persons may be subjected to compulsory psychiatric assessment and treatment, to define the

rights of such persons and to provide better protection for those rights, and generally to reform and consolidate the law relating to the assessment and treatment of persons suffering from mental disorder.

[88] The statute is aimed at defining and protecting the rights of people who may be mentally disordered. Courts will not countenance breaches of the Act's provisions and obligations lightly. It should not be overlooked that, within the statutory framework, ongoing protective mechanisms exist. These checks and balances operate both during the periods of assessment and treatment and after a compulsory treatment order has been made under s 17 by a Judge.

[89] Because of the nature of the jurisdiction, it is almost inevitable that there will at times be some variance or deviations from strict statutory requirements. It is important to view any non-compliance in the round rather than from a blinkered focus on isolated provisions which ignore the statutory context.

[90] We do not accept that whenever it is demonstrated that there is any degree of non-compliance with a specific provision, the only consequence will be the total invalidity of all subsequent actions. The Court must assess what happened, why it happened and how it happened, remembering that the protection of a vulnerable person, and potentially the community, is at the heart of the legislative framework.

[91] A person in the position of Mr Sestan is entitled to seek habeas corpus, but where the critical issue is whether a person is mentally disordered there will be few circumstances in which it is the appropriate means of challenging or reviewing official action. By its nature, the speed with which an application must be determined and the limited opportunity there is for information to be put before the Court means that the mechanisms contained within the MHCAT will, in normal circumstances, be much more efficacious and appropriate. As this case demonstrates, the changing and enlarging of grounds of complaint has meant that issues were advanced on appeal which had not previously been in contention. There was no evidence on the points because they were not reasonably to have been anticipated as necessary. The respondent has an onus to justify the detention, but that does not extend to covering every possibility which the ingenuity of counsel might eventually raise at a later point in the litigation cycle.

[92] We were advised that a Family Court Judge has not yet made an assessment as to whether Mr Sestan should be subject to a compulsory treatment order, the delay arising from the request which has been made for a report under s 21.

[93] Notwithstanding that the s 9 process could have been more perfectly carried out, we are satisfied that the respondent has established that the current detainment of Mr Sestan is lawful and there is no justification for this Court to issue a writ of habeas corpus.

[94] The appeal is dismissed. Costs would normally follow the event, but if Mr Sestan is not granted legal aid he can renew his application.

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