NAME OF RESPONDENT SUPPRESSED

IN THE COURT OF APPEAL OF NEW ZEALAND

CA35/2010
[2010] NZCA 213

	BETWEEN	RIDCA CENTRAL (REGIONAL INTELLECTUAL DISABILITY CARE AGENCY) Applicant
	AND	VM Respondent

Hearing: 18 May 2010

Court: Hammond, Arnold and Baragwanath JJ

Counsel: D R La Hood for Applicant
A J Douglass and J S McHerron as counsel appointed for Respondent
M C Coleman for intended Intervenor, the Attorney-General

Judgment: 27 May 2010 at 3 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is granted, on the following question:

> **Did the High Court Judge err in his construction of the relevant considerations for an extension of a compulsory care order under s 85 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003?**

B Leave is given for the Attorney-General to intervene and to both file written submissions and be heard orally at the hearing of the appeal.

C Ms Douglass and Mr McHerron are appointed under s 99A of the Judicature Act 1908 to act as contradictors to the argument advanced by the applicant and the Attorney-General.

D No order for costs.

REASONS

HAMMOND AND ARNOLD JJ

(Given by Hammond J)

Introduction

[1] The Court is not required to give reasons for granting leave. However, in the circumstances of this case we think it appropriate to give short reasons.

[2] RIDCA, the applicant, seeks leave to appeal under s 134 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the IDCCR Act) on a question of law, from a judgment of Simon France J.[1]

[3] The broad issue the applicant seeks to have determined on appeal is the correct legal test for determining an application for an extension of a compulsory care order under s 85 of the IDCCR Act.

[4] This is a case in which a compulsory care order had been made for VM, for a term of two years. The order was extended for a year in February 2008 and again in February 2009. VM duly appealed to the High Court. Simon France J found that the

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1 *VM v RIDCA Central (Regional Intellectual Disability Care Agency)* HC Wellington CIV 2009-485-541, 8 December 2009.

Family Court should not have granted the extension to the compulsory care order and quashed it.

[5] In the Family Court Judge Ellis noted that he would be happy to see the issue of the correct interpretation of s 85 of the IDCCR Act considered by a higher court on appeal. We were told from the bar that the broad issue has continued to trouble Family Court judges. It is not an isolated issue. At the time of the hearing in the Family Court 124 persons were subject to compulsory care orders and 40 care recipients had had their orders extended, ten on more than one occasion.

[6] This is a case which would normally meet the usual principles for leave: there is undoubtedly a question of law involved and it is of public importance.

[7] The chief argument against a grant of leave, which was advanced by Ms Douglass, is that, also undoubtedly, this particular case is now moot. The compulsory care order expired as of 20 December 2009. No application was made for its extension, or for deferral of its expiry. There is no power to reinstate the compulsory care order; the respondent has, pursuant to s 83 of the Act, ceased to be a care recipient under the IDCCR Act.

[8] Ms Douglass has a secondary concern: that anything which fell from this Court in relation to the appeal could perhaps have some significance in relation to VM, were she to be again considered in the context of the care regime. Given her history, that is not a remote or fanciful concern.

[9] The law relating to mootness was recently fully considered by the Supreme Court of New Zealand in *Gordon-Smith v R*.[2] The observations of the Supreme Court, which we need not repeat here because the case is now reported, were expressly said to extend to the Court of Appeal. Normally, cases which are moot should not advance on appeal. The Supreme Court did however note that in exceptional circumstances there may be an exception to the usual approach where the question arising, even in a moot case, is one of significant public importance which is likely to come before the Court again at some point.

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2 *Gordon-Smith v R* [2008] NZSC 56, [2009] 1 NZLR 721.

[10] We take the view, after having due regard to the strong cautionary note articulated by the Supreme Court that this is one of those rare cases of mootness where leave can and should properly be given.

[11] We formulate the question for determination as:

> Did the High Court Judge err in his construction of the relevant considerations for an extension of a compulsory care order under s 85 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003?

[12] We have seen, in draft, the judgment of Baragwanath J. He appears to have two concerns. The first is that the Judge has tried to create a stratagem which could see this case advance, if appropriate, to the Supreme Court. On that we simply indicate that this is one of the statutory instances in which Parliament prescribed that no further appeal beyond this Court is allowed (s 134(3)). The Judge's second concern is that, somehow, something may be said which would prejudice the future interests of VM. But any judgment in this Court can be articulated in such a way as to draw on the facts which gave rise to the instant case, so that the case is not decided in a vacuum, without at all going to possible future factual scenarios. Indeed, it would be quite wrong for this Court to speculate as to the future.

[13] We also have before us an application for leave to intervene, and be heard, by the Attorney-General. In the circumstances of this case we consider that to be an appropriate application. The Attorney-General has an important role in the balancing of the interests which are at stake here, and oversight of this subject-area. There may also be significant questions under s 19 of the New Zealand Bill of Rights Act 1990 arising.

[14] The appointment of Ms Douglass and Mr McHerron, whose assistance has been greatly appreciated, as matters stand, is only for this leave application. We appoint them as counsel under s 99A of the Judicature Act 1908 as contradictors to present argument against that advanced by the applicant, and the Attorney-General.

[15] There will be no order for costs on these applications.

BARAGWANATH J

[16] This case is of outstanding importance as the application for admission of the Attorney-General attests. It concerns how the courts of New Zealand should strike the difficult balance between protecting the community from conduct of those who, as sufferers from intellectual disability, are prone to committing low-level offending for which they are not legally responsible; and the human rights of such people. The High Court has taken a broad view, preferring to accept the degree of nuisance and risk entailed in releasing them from compulsory care rather than maintaining compulsory constraint indefinitely, to the alternative of maintaining it, which the appellant argues is the general theme of decisions of the final appellate courts in the UK, Canada and the USA and of the European Court of Human Rights.[3]

[17] There is a significant argument in favour of the position adopted by the High Court, recounted by Gareth Peirce in a recent essay.[4] What New Zealand's position should be is, in my opinion, something on which the Supreme Court should if it chooses have the opportunity to pronounce.

[18] The case is now moot: there is no live issue affecting the respondent VM. The appellant does not challenge the Judge's decision discharging the care order in her case. Prima facie she should be left in peace. But the appellant, supported by the Attorney-General, seeks to use the fortuity of there having been a High Court decision to obtain an authoritative determination of the true construction and application of the legislation.

[19] But for the considerations next mentioned there could be no doubt as to the propriety of adopting the course endorsed by the Supreme Court in *R v Gordon-Smith* and giving leave to appeal to this Court.

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3 *Anderson v Scottish Ministers* [2003] 2 AC 602 (PC); *Winko v British Columbia* (1999) 175 DLR (4th) 193 (SCC); *Jones v United States* 463 US 354 (1983); *Allen v Illinois* 478 US 364 (1986); *Kansas v Hendricks* 521 US 346 (1997); *Hutchison Reid v United Kingdom* (2003) 37 EHRR 211.

4 Gareth Peirce "America's Non-Compliance: The Case Against Extradition" *London Review of Books* (United Kingdom, 13 May 2010) at 18 and 22.

[20] That course is however opposed by counsel appointed to assist the Court, whose role is to protect the interests of the respondent, who is no longer an effective party and lacks the capacity to appreciate the significance of the issues. They submit that any change in the construction of the legislation of the kind for which the appellant and the Attorney contend would affect the respondent adversely. There is a distinct prospect that she will engage again in conduct which would again subject her to a care order. And if the overseas authority is followed such order could be renewed indefinitely. While there could be no proper grounds to resist a procedure that allowed any adverse decision of this Court to be challenged in the Supreme Court, counsel assisting oppose use of the vehicle of the statutory appeal under the IDCCR Act because by s 134 of the decision of this Court is final. So on its current track the case could never be considered by the Supreme Court.

[21] The policy of s 134 is that, where there is a *live* dispute about the status of a care order, it would be unnecessary and perhaps oppressive to the parties affected by it to expose them to fourth tier appeal. That policy has however no application to this case, where no such order can now be made. I therefore respectfully disagree with the majority's opinion at [12] that:

> ... this is one of the statutory instances in which Parliament prescribed that no further appeal beyond this Court is allowed.

Nor do I agree that the problem is:

> ... something may be said which would prejudice the future interests of VM.

It is rather that, if this Court allows the appeal, VM will be unable to seek leave from the Supreme Court to challenge that decision.

[22] What is now needed is a definitive decision as to the construction of the Act. The conventional vehicle for that is an originating application for declaratory judgment which, because it does not entail adjudication of a live care order, may with leave be appealed to the Supreme Court. An analogous issue arose in *Wybrow v Chief Electoral Officer*,[5] where a full Court of Appeal entertained under the Declaratory Judgments Act 1908 a challenge to the construction of an electoral

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5 *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147 (CA).

provision, mounted by a political party whose contentions had been rejected by the Electoral Court from whom no appeal lay.

[23] The courts prefer when testing competing arguments as to interpretation to have a specific fact situation before them. That is why in *New Zealand Maori Council v Attorney-General*[6] this Court required the plaintiffs to provide three examples.

[24] It would be open to the respondent or to the Attorney-General to issue a declaratory judgment proceeding referring, by way of example only, to the broad circumstances of this case so they could be considered in the arguments as to interpretation. Application could be made to the High Court under s 64 of the Judicature Act 1908 for removal of the proceeding into this Court, as occurred in *Wybrow*. Such procedure would allow the joinder of the respondent as the proper contradictor which counsel for the Attorney-General recognised is imperative. It would also allow the respondent (or another party) to apply to the Supreme Court for leave to appeal against an adverse decision of this Court.

[25] Like my colleagues I accept that the importance of the issues of law warrants their consideration by this Court. But until it ceased to be live this was a case about VM's status. I appreciate the practical advantage of allowing it to be enlivened by leave to appeal. But if that is to happen the order giving leave should, in my opinion, be on terms that put her in no less advantageous position than if the case affecting her continued to be dead.

[26] I would therefore impose the condition that the appellant file forthwith a declaratory judgment proceeding in the High Court and seek leave to move that proceeding into this Court for determination conjointly with the hearing of the appeal. If such order were made the two proceedings could be heard together in this Court. That would provide both a factual setting for the legal argument and, as regards the declaratory judgment decision, jurisdiction for an application for leave to appeal to the Supreme Court.

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6 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

[27] It is the role of the Court as parens patriae to take care to safeguard the interests of those who cannot look after themselves.[7]

[28] What the majority term a "stratagem" I see as a necessary and practical protection for Ms M as the price of using her name in an appeal which, since she now has all a dismissal could provide, cannot be to her advantage.

[29] Without such condition attached to the order proposed by my colleagues I must respectfully dissent.

Solicitors:
Luke Cunningham & Clere, Wellington for Applicant
Crown Law Office, Wellington for intended Intervenor

[7] It is discussed by the Supreme Court of Canada in *Re Eve* (1986) 31 DLR (4th) 1 at 14-15. It was retained by s 16 of the Judicature Act 1908. See *Ding v Minister of Immigration* (2006) 25 FRNZ 568 at [24].