

**IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY**

CIV 2006-412-000494

IN THE MATTER OF HABEAS CORPUS ACT 2001
BETWEEN JAMES PATRICK KEENAN
 Applicant
AND THE DIRECTOR OF MENTAL HEALTH
 SERVICES
 Respondent

Hearing: 30 June 2006

Appearances: A Stevens for Applicant
 F B Barton for Director of Area Mental Health Services for
 Respondent

Judgment: 4 July 2006

JUDGMENT OF FOGARTY J

[1] This is an application for a writ of *habeas corpus*. This is an ancient writ going back into the mists of time which has an historic and constitutional purpose of being a vital means of safeguarding individual liberty. By this writ the Court requires the person or persons holding a subject of the Crown in detention to come to the Court and justify the legality of the detention. It is now governed by the Habeas Corpus Act 2001 which requires that there be a hearing *inter partes*, that is, with both the detaining authority represented and the person detained present and/or represented within three working days of the application being made. The application was made yesterday.

[2] The current status of Mr Keenan is that he is detained being the subject of a compulsory assessment and treatment order made under the Mental Health (Compulsory Assessment and Treatment) Act 1992 today at 1 pm by a Family Court

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.

[5] The critical question is whether or not s 9(2)(d) and (e) were complied with. To understand the issue it is necessary for me to narrate relevant facts.

[6] On 3 May a psychiatric nurse, Mr Grant Ritchie, made an application under s 8A to which Dr David Bathgate gave the supporting certificate, s 8B. Ms Katie Conklin, a psychiatric nurse and an authorised officer to give notice under s 9, went to visit Mr Keenan at his flat in company of Mr Ritchie. Mr Ritchie attended because he has had a relationship with Mr Keenan over some time. Mr Keenan's family live in Wellington. Mr Keenan has flatmates. Ms Conklin and Mr Ritchie were of the view that those persons could not be fairly considered to be caregivers within the meaning and spirit of s 9. Accordingly, they deliberately did not give him the written notice and explanation required by s 9(2)(c) and (d) at his flat but rather invited Mr Keenan to come with them to see a doctor other than Dr Bathgate. Mr Keenan went with them thinking that he was going to Aspiring House and went very casually, still barefoot. He was taken to the Emergency Psychiatry Services Department of the Dunedin Public Hospital to a waiting room and in that waiting room he was given a written notice pursuant to s 9(2)(c). Present was Mr Ritchie. After that notice was given to him, and, I presume verbally explained, he then was

assessed by Dr Jo Thornton, more or less straight after that, within a few minutes or so.

[7] I move on to consider whether or not this is compliance with s 9(2). Mrs Stevens argued that it was non compliance. Her principal submission was that the notice was not given and explained in the presence of either a member of his family or a caregiver or other person concerned with his welfare. Mr Barton argued that Mr Ritchie was present and was and is a person concerned with Mr Keenan's welfare.

[8] I accept that Mr Ritchie is, in that literal sense, a person concerned with Mr Keenan's welfare. However, the meaning of the phrase:

... or other person concerned with the welfare of the proposed patient

has to be examined in the light of the purpose of s 9(2). That is a requirement of s 5 of the Interpretation Act 1999. It needs to be appreciated that after a person has been given the notice and had it explained to him or her there is a power under s 40 of the Act for the person to be conveyed to the place where the assessment examination is to be conducted, whether they co-operate or not. If need be, under s 41, the assistance of the police can be obtained. Therefore, the purpose of s 9(2)(d) is not to give an applicant an opportunity to decline to be examined. It is not in that sense a case of giving him his rights whereby he has an option to refuse.

[9] What then is the purpose? The purpose has to be to ensure that so far as possible this potentially compulsory assessment is fair. There is an ancient principle of fairness pervading public law in New Zealand and in other common law countries. A person should be given adequate notice in advance of a hearing or examination, as a result of which, he may lose his liberty. A fair notice usually requires not only that the process is fully explained in advance but also that the person has an adequate opportunity to prepare himself or herself for the examination. In the nature of mental health issues that time to prepare may indeed be quite short. It is in the interests of persons who are perceived to need this application that they are likely to be vulnerable. There is an implicit presumption underpinning the s 9 process that the application would not be made under s 8 unless the person were vulnerable.

[10] Taking into account the fact that Parliament intends the process can potentially be swift I am of the view that nonetheless Parliament also intends that within that potentially swift process it is necessary to give as much protection to the person to be assessed as is possible. In this regard Parliament does not envisage that the need for a family member or caregiver or other person concerned with the welfare of the proposed patient be dispensed with. It is a mandatory requirement. The fact that it is mandatory is reinforced by the opening phrase of subs (2) which says:

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

...

(d) Ensuring ...

(Emphasis added)

“*Ensuring*” appears for the first time in subs (d).

[11] I am left in no doubt that Parliament intended that however fast the process be, an essential requirement is that the notice be explained to the proposed patient in the presence of a third person. Here third person is used in the sense of someone who is not the applicant under s 8 or a fellow colleague of the person giving the notice. The third person has to have a degree of independence. For practical purposes, without intending to define that, one would expect the person to be either a family member or a caregiver of a voluntary or professional character or failing that a suitably qualified volunteer. It might be, for example, a member of the Salvation Army familiar with the needs of mental health patients. There has to be a degree of independence. 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. That did not happen here.

[12] I am quite satisfied that there was no deliberate breach of s 9 but there was, I am satisfied, nonetheless, a breach of s 9 and a breach of a very important part of the section. That being the case, the process of compulsory assessment and treatment started with a serious error of law. On that basis there is a very strong argument that the whole process has been tainted with that illegality.

[13] It is not necessary to decide whether it has been irretrievably tainted because after hearing counsel it is possible to address the situation in this way. I propose to issue a writ of *habeas corpus* to lie in this Court until noon on Monday. On Monday morning I understand another application will be made under s 8(a) with appropriate certificate under s 8(b) and the process under s 9 will be conducted, naturally this time ensuring that there will be that third person I have identified present.

[14] These are to be conditions attached to the writ of *habeas corpus* and a further condition will be that the assessment will be by a different clinician from Dr Jo Thornton. That has been arranged during the hearing.

[15] I wish to make it quite clear that this judgment should not in any way be understood as a criticism of Dr Thornton. She has not had a hearing. The error that I have identified was a procedural error before she conducted her assessment. The reason why I am requiring a new clinician is so that there can be no apprehension in Mr Keenan's mind that the new process will just be a replay of the old.

[16] It is unusual once a Court has decided to grant a writ of *habeas corpus* for the writ to lie in Court. It may be, indeed, that it is unique, but it is a step that is being taken with the consent of Mr Keenan, after he has had legal advice from his counsel, Mrs Stevens. She has told me that he is quite happy with this process, in fact used the word "*ideal*". As a double precaution I asked Mr Keenan to confirm directly to me. He did.

[17] Accordingly, the writ is to issue on those terms subject only to clarification of detail from counsel. Costs in these proceedings are reserved.

Fogarty J

Solicitors:
A Stevens, Dunedin, for Applicant
Anderson Lloyd Caudwell, Dunedin, for Respondent