

IN THE SUPREME COURT OF NEW ZEALAND

SC 94/2006

BETWEEN

JOSKO SESTAN

Appellant

AND

**THE DIRECTOR OF AREA MENTAL
HEALTH SERVICES WAITEMATA
DISTRICT HEALTH BOARD**

Respondent

Coram Blanchard J
 Tipping J
 McGrath J

Hearing 14 February 2007

Counsel T Ellis and A Rossiter for Appellant
 M Heron and Mrs D Marshall for the Respondent
 Proposed Intervenor: DB Collins QC and CJ Curran

APPLICATION FOR LEAVE TO APPEAL

Ellis May it please Your Honours, Ellis and Rossiter for the applicant.

Blanchard J Yes Mr Ellis, thank you.

Heron May it please Your Honours, Heron with Mrs Marshall for the respondent.

Blanchard J Yes, thank you Mr Heron.

Heron And Your Honours the respondent for the Director, Dr Margaret Honeyman is in Court as well thank you.

Blanchard J Thank you.

Collins Mr Curran is with me for the Attorney-General Your Honours and could I say right from the outset that on receipt of a memoranda of the parties, I reached the view that the Attorney-General would not want to be heard in relation to the leave application. There is however one

matter that has emerged which I bring to the Court's attention right from the outset and signal that if it's an argument that develops then I may wish to be heard later in the morning, if it does develop, and that concerns Mr Sestan's current status and whether or not his current status meets the definition of detention in the Habeas Corpus Act.

Blanchard J Thank you Mr Solicitor. Yes Mr Ellis.

Ellis Perhaps I might deal with what my learned friend the Solicitor just raised as it was a matter of obviously some concern that I address in para.2 of my written submissions entitled 'Is he entitled as of right to apply for a writ of habeas corpus' and I noted that the Solicitor-General, or the Attorney, didn't seem to intervene on the leave application even though there was some significant arguments about access to the Court and to justice. It's useful that he appears and says what he does this morning. But if I might add two little documents to your pile and it's pretty obvious what they are. One's a short chronology; the other one may be relevant to what we're just talking about. That's the latest decision of the United Nations Human Rights Committee in respect of an arbitrary detention which was just issued by email notification this week and I only wanted to refer to para.7.2. It's a Zaoui-type case but the facts are not relevant for our purposes; it's just the notion of what arbitrariness means in 7.2. "Arbitrariness' must not be equated with 'against the law' but interpreted more broadly and in this regard the Committee recalls the important guarantees contained in Article 9 applicable to all deprivations of liberty, for example mental illness', so there was no question that Article 9 does not apply to mentally ill patients and of course he does invoke his Article 9 right. Now my research is on whether or not one could legitimately raise the argument about whether being under a Community Treatment Order while still in detention led me to two legal propositions I suppose if I can call them that. One, Professor Perlin, who is the source of the Sanism Proposition and a major author in this area, he says, and I can't quote you from way on the top of my head, but he says there is no superior Court in the common law world who have addressed the question of whether a Community Treatment Order is a detention for these sorts of purposes – so I was left with that proposition. It's a first, and then my learned friend Mr Butler drew my attention to the very strong case of, it's probably called Bellmarsh No. 2, but it's *Secretary for State v JJ* I think. It's in my opposition to leave for the Attorney-General in my mental health paper. I'm not quite sure where but it's a very recent decision in the Court of Appeal in England of the Chief Justice. I think it was the Master of the Rolls, and the President of one of the divisions to whether a terrorist on a Control Order was detained and a very firm Court said yes it was detained, but my reading of that was on the meaning of the legislation and so forth. It wasn't an argument I cared to advance at first instance in this Court but this was a matter whereas of right there was a writ issueable and it needs some considerable thought and effort to be raising that issue for the first time in a superior Court in the western

world, which is why I've put what I've put there, but I'm grateful for the Solicitor for raising it anyway. I don't propose to pursue it on that line because I don't think I can successfully, without some major research which I haven't done. You're looking puzzled Sir?

Blanchard J No, no Mr Ellis.

Ellis Right so that deals with that issue. Simply addressing my written submissions in brief.

Tipping J Could I just before you do Mr Ellis ask you in the light of what you've just indicated, which seems entirely fair, whether you accept that there cannot be an issue of a writ now, just so that we can just clear that point off the decks, whatever else you might want to say. I just want to know exactly what seems self-evident is accepted.

Ellis I'm pursuing the application but I have no hope a writ will ever issue is I put it like that.

Blanchard J It's a bit difficult to see how it could.

Ellis Well I've explained what the, well that may be the case but what has arisen is of course a serious resource question hasn't it,

Tipping J Well I didn't want to divert you Mr Ellis, I just wanted to make a very simple note on the back of an envelope so to speak

Ellis Yes, no, no,

Tipping J That you accept that a writ cannot now issue?

Ellis Well I didn't say that, but you heard what I said, you know I'm in a

Tipping J Well it's another delphic utterance you made.

Ellis Well you know I'm in a dilemma of needing to exhaust one's remedies. My client must assume his case here

Tipping J Alright, pro forma the application is still alive and needs to be ruled on?

Ellis Yes.

Tipping J Very well.

Ellis But if you do no more than deal with the issue of delay and a breach of the habeas corpus, I think it's para.19, then I think the applicant would be happy, and whether you deal with it by granting leave or dealing with it in substance in your reasons for granting or declining leave

Tipping J This is again a bit delphic for me Mr Ellis. I mean you say that if I read para.17, all will become clear would it?

Ellis 19.

Tipping J 19, I'm sorry.

Ellis Yes because what I'm saying is there's been, well as I was walking along Lambton Quay here I bumped into a senior member of the judiciary and said what I was coming to do and he said well it's actually emetic isn't it that a habeas corpus is heard without delay and has precedence over all other matters, and I said yes, of course it is, would you like to come and argue my submissions for me, and he said no, no, I'll leave it to you, but we've had serious delay because of what appears to be major resource problems of the judiciary and as I put in my submissions, that is a national scandal given the, let's look at the Habeas Corpus Act which is in

Blanchard J Well we're aware of what the Habeas Corpus Act says. It's not specific as to time but it does require matters to be handled with as much expedition as can be given. The fact of the matter though was Mr Ellis that you didn't get to the point of applying to this Court until just before the Christmas vacation. You indicated in your application that there would be a need for research; the case was still expanding; there would be a need for time to prepare submissions, and obviously that applies on both sides; and that there was the likelihood of interventions from two organisations that you mentioned. Now with something like only three or four working days left before the Christmas vacation, it was quite clearly not going to be appropriate for a Court called upon to make a definitive decision at the highest level to try to race the matter on before the vacation. It wouldn't have been fair to counsel; it wouldn't have been fair to the Court. As it happened because of the position of one of the Judges, there would have been a need to find an acting Judge who was simply not available at short notice. But that was a secondary matter. The matter has been given priority immediately following the end of the vacation.

Ellis Well with respect Sir I wholeheartedly reject what you say

Blanchard J Well it's based on your own memorandum.

Ellis So you say, but you haven't heard my submission. What I'm saying is this, and I refer to my para.21 of my written submissions. The European Court in a Human Rights case in *E v Norway* of 1980, 'It is evident that initial delays were caused by administrative problems due to the lodging of the application for judicial review during the vacation period. The Convention requires the Contracting States to organise their legal systems to enable the Court to comply with the various requirements. It's incumbent on the judicial authorities to make the

necessary administrative arrangements even during a vacation period, to ensure that urgent matters are dealt with'.

Tipping J Was this the case involving a first instance application or a second appeal – the Norway case?

Ellis It would have gone through the entire system.

Tipping J When you say it would have can you assure me.

Ellis Yes I can assure you.

Tipping J This was a second appeal was it?

Ellis It may even have more things than that

Tipping J Right, well if that's what you say we can look at it if we need to.

Ellis Yes, yes, but the point is quite simple. In the vacation the mental health system doesn't close down, but one's rights are closed down because the Government of New Zealand hasn't organised sufficient Judges for this Court to be able to sit over the vacation period. Well it is not good enough and it is a major breach of the Government's duty to ensure access to justice and it is a breach in my respectful submission but for you not to ensure that your judicial independence is not compromised by having inadequate resources, and I put a lengthy memorandum in on that and I'm not going to repeat anything

Blanchard J A memorandum which made certain assumptions which simply aren't correct.

Ellis Well perhaps you'd like to tell me what assumptions are not correct.

Blanchard J Mr Ellis it is not for you to ask us to do that. All I'll say is that it is a situation that has been considered by the Court and some representations have quite some time ago, well before this case, been made.

Ellis Well with respect Sir, if you raise the issue natural justice requires that I can answer it, so if you won't answer then there's nothing I can do about it, but I do say that part of the covenant response to anything is that States are required to ensure that the violations don't repeat themselves and this is something that if it is not fixed of course will be repeated, so if one makes a habeas application in November, it is not a question of whether or not it can be done in two or three days before Christmas, it goes back. One has to look at the chronology of events as to what happened, which is why I put a little short chronology before you. There's a hearing starting on the 14th November. The judgment of the Court of Appeal doesn't eventuate until the 12th December, having been heard on the 29th November, and that's where

the problem starts, because as you're aware, the applicant was aware that there was a vacation period up and needed to get the case on rapidly.

Blanchard J I think you're being unfair to the Court of Appeal. It has to be remembered that this case, once you came on board, expanded very considerably. The Court of Appeal had not only to consider the arguments that had been put at the trial level, but also to consider some brand new arguments that you were putting. Now that's not a criticism of you. You can't expect a Court of an appellate nature simply to bring out decisions swiftly without time for proper consideration of them. There's too much danger that the Court will simply get a matter wrong and that problem intensifies if you go up through the hierarchy, so I don't accept the criticism that you are making of the Court of Appeal.

Ellis Well let me continue and then you may change your mind. Section 17 of the Habeas Corpus Act, which is in tab 9 of the Intervenor's bundle, if you need to look at it, says 'Urgency in hearing appeals. An appeal under this Act must be given precedence over all other matters before the Court of Appeal. (2) Judges of the Court of Appeal, and we'll leave out the Supreme Court, must use their best endeavours to ensure that every appeal under this Act is disposed of as a matter of priority and urgency', and if that does not mean it is Parliament's instructions that you put everything else aside and make a decision, what else does it mean?

Blanchard J But how do you know they didn't? The fact of the matter is your case raised apparently

Ellis Because a judgment was issued in the meantime from that Court with some of those Judges sitting, that's how I know.

Blanchard J That is a facile remark Mr Ellis with respect.

Ellis It's a facile question Sir.

Blanchard J It's a facile remark because you don't know what the processes were for determining any of those cases. The Court of Appeal was faced with some knotty questions; it needed a certain amount of time in order to make up its mind, and that's the mind of three Judges. The period for which the judgment was reserved appears to be less than a fortnight.

Ellis Yes, knowing that the vacation is coming along.

Blanchard J They still could not be expected to race into a decision and possibly get it wrong.

Ellis Yes they could. If they were provided with adequate resources by the New Zealand Government so there are sufficient Judges so that urgent

matters can be dealt with then that can be done, and that's what you're not taking on board.

Blanchard J The New Zealand Government has in fact just increased the numbers of Judges in the Court of Appeal.

Ellis Yes, yes, I know it has, I know it has.

Tipping J So this is an attack on the Government for not resourcing the Courts properly, rather than attack on the Courts themselves?

Ellis Yes, and it always has been.

Blanchard J Well that's a matter for you to take up with the Government.

Ellis Well I have been taking it up. I have been lobbying for extra Judges

Tipping J Well if that is the case Mr Ellis, you've made your point. I mean what more can we do?

Ellis You can make the point too and I think it is part of your role as judicial officers to do so, to ensure that there is judicial independence in the judicial system.

Blanchard J Alright, we understand that point Mr Ellis.

McGrath J Mr Ellis from my perspective, for the Court of Appeal to have this matter to a hearing within two weeks of the High Court decision, and in the matter of considerable complexity to come up with a comprehensive judgment within two weeks is entirely within the letter and the spirit of the Habeas Corpus Act provisions for dealing with appeals. That's my response to your submission.

Ellis Well my response to that Sir is with respect you're wrong. If you take into account the International Authorities, the entire process including appeals really ought to be dealt with within a month. I mean that would be the best result, not three months, not three months.

Tipping J This was dealt with within the month, both first instance and appeal.

Ellis Yes but then the delay in this Court

Tipping J Oh well that's another matter. You're laying this heavy criticism on the Court of Appeal Mr Ellis which frankly I regard is bordering on the irresponsible.

Ellis Well you may do but my criticism is not of the Court of Appeal, my criticism is that there are inadequate judicial resources in the judicial system and if you want to turn that into saying I'm attacking the Court of Appeal, that is unfair.

Blanchard J You've made your point Mr Ellis. We understand the points you're making. It really is a matter for the Government.

Ellis Yes and with respect

Blanchard J Which has just increased the resources in the Court of Appeal.

Ellis Yes, yes, and the workload of the Court of Appeal has increased some 100's of percent.

McGrath J Mr Ellis from my point of view I want to be clear. I regard the Court of Appeal's time-tabling of this matter that time-lines are achieved as speedy compliance well within the letter and the spirit of the Habeas Corpus Act so for my part there's no flaw disclosed by the way the Court's gone into this case. What's rather happened is that the Court has very busy Courts as we know, has complied with the requirements and I doubt whether even if they'd had more Judges to deal with other business to deliver a substantial judgment in the time indicated could have been done more quickly. I think that you would have got a much shorter judgment and your complaint here would be of a different kind.

Ellis Well, I doubt it

Tipping J I agree entirely with those observations Mr Ellis. I think however many Judges you had in the Court of Appeal it would have been irresponsible for them to have rushed this case to the extent you're suggesting.

Ellis Well I repeat my submission from *E v Norway*. It is the function of the judicial system to arrange its system so that matters are dealt with steadily

Tipping J Well where do we go from here? We can't issue the writ. What more have you got to say about the systemic failures? Is it just simply that all levels, particularly the Court of Appeal and this Court were not adequately resourced, and that's the nub of the point. Is that the nub of the point?

Ellis That is the nub of the point and my proposition was that you followed the South African judgment and you sent the judgments to the Attorney-General and whatever and that would have satisfied me by making some comment about resources.

Tipping J So you want us to say in declining leave, you want us to make an observation on this issue?

Ellis On resources, yes and if it's the comment that Justice McGrath just made which I think you said you wholeheartedly agreed, then we'll go elsewhere.

- Tipping J Well it's a question really Mr Ellis of whether any official resources could reasonably have made any difference to the outcome, the time outcome in this case.
- Ellis This is a first world country, and Parliament
- Tipping J You're not listening to my point.
- Ellis Yes I am. Parliament says
- Tipping J The question is whether it would be responsible to get this judgment out with, say you had a hundred Judges in the Court of Appeal
- Ellis Excuse me, the rest of the civilised world can manage to meet the international standards but New Zealand can't. Are the New Zealand Judges not intelligent enough? Of course they are, so I completely reject that. If it's before them and it's a difficult case, we've got clever enough Judges to make decisions promptly and we should.
- Tipping J This was a very prompt decision.
- Ellis Well in this Court, it was extremely, ah delay was enormous on international standards and then we get to this Court two months, and I completely reject the propositions that the learned presiding Judge put forward, anyway, I don't think I have anything more to say about that.
- Blanchard J If you have no more to say then move on to the next point please Mr Ellis.
- Ellis Well it is obvious I hope from the various submissions that I filed that various issues of some major significance, the Bill of Rights, due process, judicial review, etc, need to be dealt with and you've clearly made up your minds, I've got nothing further to say, thank you.
- Blanchard J Thank you Mr Ellis. Mr Heron.
- Heron May I just address Your Honours just as an introduction, Mr Sestan was admitted to hospital very unwell on the 28th October 2006. On the 6th December an Inpatient Compulsory Treatment Order was made, and I'll hand up in a moment a slightly fuller chronology, because it may relate also to the criticism of the judiciary, but on the 6th December after a full hearing an Inpatient Compulsory Treatment Order was made after hearing from two Psychiatrists, including an independent Psychiatrist, a nurse and Mr Sestan himself. He then got leave into the community over the Christmas period and on the 10th January he was transferred to a Community Compulsory Treatment Order.
- Blanchard J What was the date upon which he got leave into the community?

Heron It was over the Christmas period. It occurred on a daily basis and I don't know the precise first date, but around the Christmas period. He has returned to his home, his family and his job and during the lead up to the grant of that Compulsory Treatment Order which was 6th December, he had no fewer than six judicial considerations of his case and despite the submissions to the contrary all the way through this case, this case in fact demonstrates that Mr Sestan has had careful and expert clinical care, notwithstanding his hostility to the same, he's had timely and assertive legal representation no matter what the respondent thinks of the accuracy of that. He has had the benefit of intense judicial oversight, and the respondent with respect has done a superb job to restore his health despite all this legal process and despite his antagonism as he's entitled to be antagonistic to them whilst meeting the respondent's legal and professional responsibilities, so the respondent it is clear has got this man back to his life and health despite all of this and with respect that is a very ringing endorsement of our mental health system in my submission. Could I hand up a slightly more full chronology, and it's really only relevant I expect now, I beg your pardon, I'll just hand it up, because it may even be relevant if Your Honours were inclined to make a comment in the nature of my learned friend's submission. The initial admission came on the 28th and you'll see the assessment process followed. The first judicial intervention was on the 1st November; that's a section 16 review, then on the 8th there was a second review, but a more perfunctory one as authorised by the section. Then the application was made for habeas on the 8th and there was a conference. The application was amended, removing the s.23 Bill of Rights challenge and the hearing was held on the 14th, then there was a certificate of final assessment. The decision of Justice Asher was issued two days later which with respect is admirable quickness, admirable speed and the notice of appeal wasn't filed until the 21st. The Court of Appeal therefore heard the case only eight days later. With respect that's remarkable speed and that's the speed that should be given but that's very quick as Your Honours will know, and then a decision on the 12th, so it's my submission that my learned friend's allegations are not borne out by the chronology and whatever one says about the delay in the Supreme Court, the respondent certainly has nothing to do with that and from the respondent's perspective it's entirely understood. So Your Honours what is clear from this case is that

Tipping J De facto, never mind the subtleties of what constitutes detention, he was fully released if you like back to his family and his home by the 10th January?

Heron In our submission, yes, and I accept as the Solicitor-General has raised, there may be on another case an argument about the breadth of detention. It can't arise in this case because of course we were never arguing about that situation.

Tipping J It would be a wholly new case wouldn't it?

Heron Absolutely, absolutely, so even were Your Honour to say well perhaps this isn't moot, well of course it can't arise in this case.

McGrath J Mr Heron the chronology doesn't seem to give us any references to the record in relation to the daily release over Christmas. Is that something you were just telling us from the bar or is this

Heron It is because it doesn't form part of an official document that makes part of the case because of course it came after both High Court and Court of Appeal hearings and the day leave is a decision for the

McGrath J No, no, I'm not being critical, I was just wondering if there was something

Heron No, no there isn't actually any reference in the document Sir.

Tipping J Is it a fair broad summary to say that within about a week of the application for leave in this Court de facto, he was out?

Heron I can't

Tipping J This is taking into account the day leave and so on. Okay he wasn't fully out but

Heron He was getting day leave.

Tipping J He was getting day leave and then he was fully out on the 10th?

Heron Yes, I don't think there was any relationship at all, in fact Dr McColl gave evidence at the Compulsory Treatment Order hearing that the legal process had actually delayed his stay in hospital because it was so unsettling to him and the relationship with the clinicians, as one can imagine. It was a hostile relationship rather than a therapeutic one and that was part of the problem that he gave evidence of.

Tipping J He's entitled to exercise his rights.

Heron He is indeed and that the respondent as you can see certainly respected that and

Tipping J Well he's entitled to assert them in the legal process as well.

Heron Yes, yes, undoubtedly, and the respondent has responded in the sure knowledge that it's unlikely to recover any of its costs and that's what a Crown entity should do.

Tipping J Yes.

Heron As I understand it, I'm not entirely clear from my learned friend, but he is eligible and on legal aid for these proceedings

Ellis No he isn't.

Heron My learned friend shakes his head. Well that will affect the cost position because I had always understood that he would be legally aided for these proceedings, but naturally

Tipping J But you're not seeking costs?

Heron Well this Court, and certainly the Court of Appeal, has said it's a rare case that costs will be ordered on a habeas issue

Tipping J Absolutely.

Heron So that if Your Honours were to see this as that sort of rare case I certainly would seek them for my client but

McGrath J I wouldn't want to encourage you Mr Heron.

Heron Thank you Your Honour, it's hardly the amount my poor client in the back of the Court but the amount of any costs or the Courts wouldn't approach anything.

Tipping J I think that would be counter-productive Mr Heron.

Heron Exactly, yes I understand. Your Honours as to the further issues I don't know whether you want to hear from me at all or not on points that arise

Blanchard J Not unless there's something you particularly want to say.

Heron Well, it is moot. It doesn't come within a mootness exception, and that even if you were to say well okay it might, there's nothing in this case that requires leave. It's not in the interest of justice that the appeal be heard and determined. The points have been decided on the facts according to settled law and quite correctly so. Unless there are any questions those are my submissions.

Blanchard J Yes thank you Mr Heron.

Heron As Your Honours please.

Blanchard J Anything in response Mr Ellis?

Ellis One minute I thank you Sir. I would just say in relation to my learned friend's chronology which is obviously different from mine because they have different purposes, he referred to the first judicial intervention, s.16 review and of course that was the basis for the, oh

one of the prime basis's for the appeal in the Court of Appeal, but the judicial officer had provided no reasons for him being continued to be detained and in my later paper I actually say the legislation's of course defective in that there is no right of appeal, there was only a review, so that's a major issue and there was the European Court case in October requiring detailed decisions for locking people up in Psychiatric Hospitals that the Court of Appeal chose not to mention in their judgment, so those are major issues that will return and I would simply say to Justice Tipping in relation to 'is he fully out', if I thought Your Honour was taking that sort of approach I would have been arguing that a Compulsory Treatment Order

- Tipping J I just wanted to know what the facts were Mr Ellis.
- Ellis Well one isn't fully out, one's subject to compulsory medication and those are big issues that are best dealt with on another day.
- Tipping J Whether compulsory medication is amenable to habeas corpus is no doubt a most intriguing issue.
- Ellis Yes, it's an intriguing issue, but it's best left to another day.
- Tipping J But it's hardly mainstream habeas corpus. But anyway I understand what you're saying.
- Ellis Thank you I haven't nothing further.
- Blanchard J Thank you Mr Ellis.
- Heron Your Honours could I just add one postscript about what has been learnt in any event is Waitemata Health does have a list of JPs to attend to this s.9(2)(d) requirement, so they've gone the way of the Bill of Rights type roster, or the Children's scenario, where if someone can't think of the right person they've got a list of Justices who can come along at all hours, so in case you were wondering they certainly have acted upon the various cases that have arisen.
- Blanchard J Thank you.
- Heron As Your Honour pleases.
- Blanchard J Well the application for leave to appeal is dismissed and reasons will follow shortly.
- Heron As Your Honours please.
- Ellis As Your Honours please.
- 10.37am Court Adjourned