THE NAMES AND IDENTIFYING PARTICULARS OF THE APPELLANT AND OF THE OTHER PLAINTIFFS IN THE HIGH COURT PROCEEDINGS ARE SUPPRESSED.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA677/2017
[2020] NZCA 394

BETWEEN	M (CA677/2017) Appellant
AND	ATTORNEY-GENERAL (IN RESPECT OF THE MINISTRY OF HEALTH) First Respondent
AND	WAITEMATA DISTRICT HEALTH BOARD Second Respondent
AND	CAPITAL AND COAST DISTRICT HEALTH BOARD Third Respondent

Court: Clifford, Courtney and Goddard JJ

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

Judgment: (On the papers) 4 September 2020 at 3.00 pm

JUDGMENT OF THE COURT

The judgment of the Court delivered on 27 July 2020 is recalled and reissued in the form attached.

REASONS OF THE COURT

(Given by Goddard J)

[1] The Court delivered a judgment in this matter on 27 July 2020.[1]

[2] Counsel for the parties have filed a joint memorandum dated 26 August 2020 which identifies an error in the judgment.

[3] Counsel seek recall of the judgment to address that error, which appears in paragraph [130] of the judgment:

> [130] The pleaded challenge to s 31(4) of the MI Criminal Procedure Act faces the additional difficulty that a direction under s 31(4) that a person be held as a care recipient under the ID Care and Rehabilitation Act does not necessarily result in the detention of that person. That turns on whether a compulsory care order made by the Family Court provides for secure care. It is especially difficult to identify a relevant comparator group in the context of s 31(4).

[4] There are two types of compulsory care order available under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (ID Care and Rehabilitation Act): a secure care order or a supervised care order.

[5] The above paragraph suggests that it is only secure care orders that result in detention of a care recipient. However, counsel submit, a care recipient subject to a supervised care order is also subject to detention. This point was not canvassed in argument before the Court. Counsel say that if the point had arisen in argument, they would have referred the Court to relevant passages in *VM v RIDCA Central* and would have made the following points (footnotes omitted):[2]

> 4.1 A direction that a defendant be held as a care recipient made under s 31(4) of the MI Criminal Procedure Act is to be regarded as a compulsory care order for the purposes of the [ID Care and Rehabilitation Act].
>
> 4.2 In *VM v RIDCA* the care recipient was subject to a supervised care order. The full Court clearly considered that the compulsory care order *VM* was subject to was an order for detention.

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1 *M v Attorney-General* [2020] NZCA 311.

2 *VM v RIDCA Central (Regional Intellectual Disability Care Agency)* (2009) 28 FRNZ 669 (HC); and *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641.

> 4.3 As the High Court held in *VM v RIDCA*, there are only two types of compulsory care order available under the [ID Care and Rehabilitation Act] — a secure care order and a supervised care order. Simon France J rejected the submission that the [ID Care and Rehabilitation Act] empowers the Court to make a "third type" of order, other than secure or supervised care, where the Court could order that a care recipient receive "non-detention" care in the community.
>
> 4.4 A supervised care order contains enough indicia of restraint to be regarded as detention. The provisions of the Act which demonstrate restraint of liberty and autonomy of people subject to supervised care orders include ss 110-114 ('Authority to take care recipients who escape'). Those sections are plainly predicated on the basis that care recipients receiving supervised care are being detained. Further, a care recipient must comply with every lawful direction given by the care recipient's co-ordinator or care manager (s 47), including directions;
>
> 4.4.1 that they be secluded from other people (s 60)
>
> 4.4.2 that they be restrained (s 61).
>
> 4.5 That such powers are reposed in a care co-ordinator suggest the Act contemplates care co-ordinators having a degree of ongoing observation and control over the environment in which a person is receiving supervised care.

[6] In *VM v RIDCA Central* Simon France J left open whether supervised care could theoretically occur without the care recipient being directed where to live, but the respondents in *VM v RIDCA Central* did not accept this theoretical possibility.[3] Counsel advised that it has never occurred.

[7] The joint memorandum indicates that an application for leave to appeal to the Supreme Court is to be filed. However counsel for all parties agreed that the issue in relation to [130] of the judgment should be raised with this Court in case the Court considered it should entertain an application to recall the judgment.

[8] Because the question of whether supervised care amounted to detention was not squarely in focus at the hearing, counsel did not have an opportunity to make the points set out at [5] above, and did not refer the Court to the guidance on this issue provided by *VM v RIDCA Central*. In light of counsel's submissions, and the relevant passages in *VM v RIDCA Central*, we accept that a person receiving supervised care is detained for the purposes of the New Zealand Bill of Rights Act 1990.

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3 *VM v RIDCA Central*, above n 2, at n 2.

[9] In these circumstances, we are satisfied that the test for recall is met.[4] We recall the judgment, and reissue it with the following paragraph substituted for the former [130]:

> [130] The pleaded challenge to s 31(4) of the MI Criminal Procedure Act faces the additional difficulty that a direction under s 31(4) that a person be held as a care recipient under the ID Care and Rehabilitation Act may result in the person receiving either secure care in a secure facility, or supervised care provided in a community facility. It is especially difficult to identify a relevant comparator group in the context of s 31(4).

[10] Our review of the judgment has identified a further point at which this misapprehension appears. At [123] the judgment reads "Detention is not a necessary consequence of care recipient status." We consider that in the interests of clarity, and consistency with the new [130], this sentence should be rewritten as follows:

> Detention in a secure facility is not a necessary consequence of care recipient status.

[11] Accordingly, we recall the judgment and reissue it with those two amendments.

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

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4 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633; and *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76.