NEW ZEALAND / IN DEPTH

'Of course he misbehaves': Defence argues case to Supreme Court of autistic man detained for 18 years

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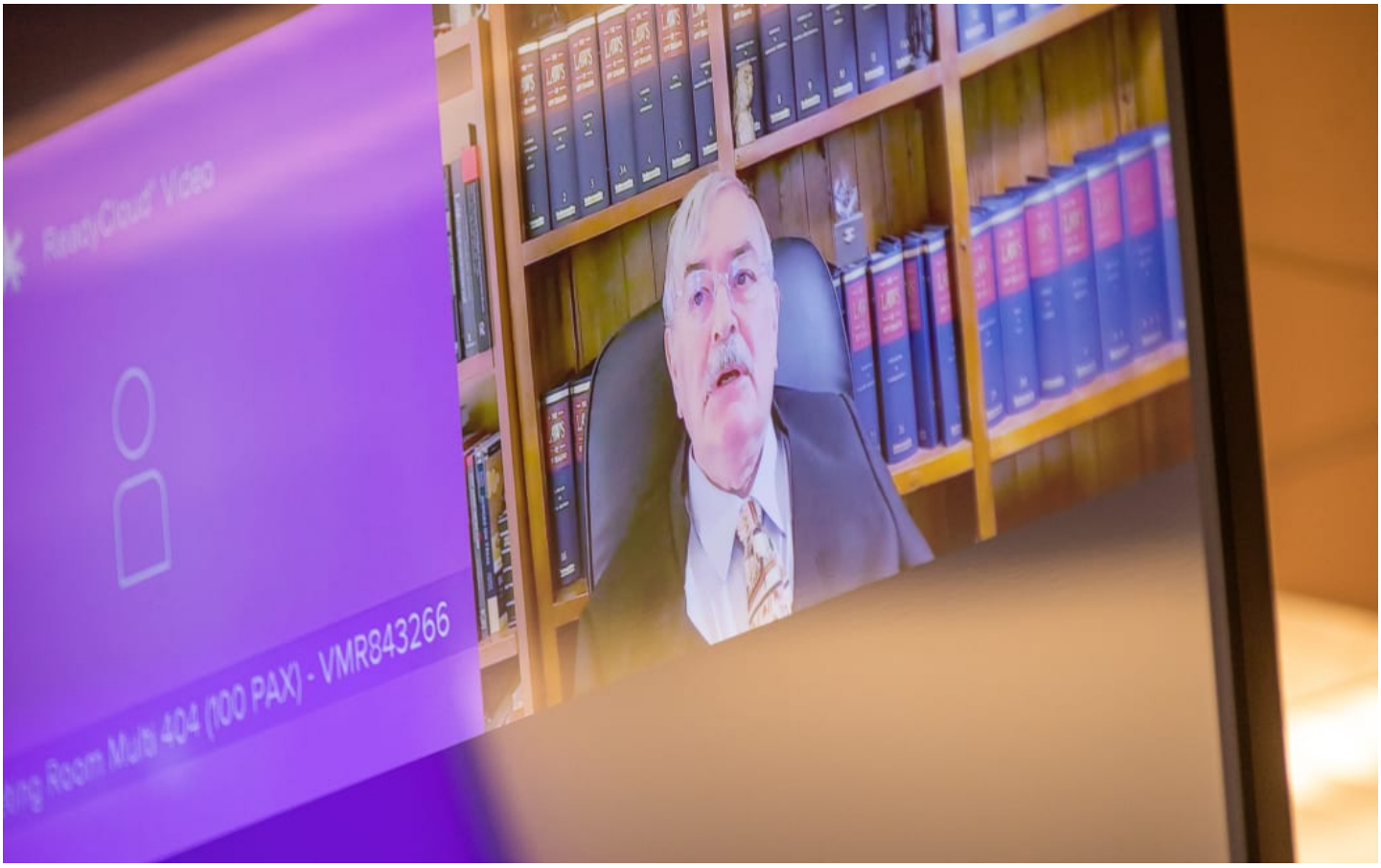

Lawyer Tony Ellis appears via video link at the Supreme Court hearing in Auckland on Tuesday. Photo: Nick Monro/RNZ

An autistic and intellectually disabled man locked up for half his life may not be as dangerous as he's been made out to be, and he may not even be intellectually disabled, his mother's lawyers have told the Supreme Court.

It is also claimed the decade-old case law used to detain him for so long, is no longer relevant.

The man Jay*, whose real name is suppressed, has been detained under the Intellectual Disability Compulsory Care and Rehabilitation Act for 18 years because he is considered too dangerous to release.

The Court of Appeal last year called the man's offending minor, but ruled his detention was justified because multiple experts said he posed a very high risk to the public if released.

The man's mother has brought his case to the Supreme Court in a bid to get his compulsory care order quashed, claiming he is being arbitrarily detained and his human rights breached.

In his opening remarks to the court on Tuesday human rights lawyer, Tony Ellis, acting for the man's mother, said the appeal also centred on whether the courts have struck the right balance between protecting the community and protecting a disabled person's rights.

Jay's care order has been extended 11 times as experts have repeatedly assessed him as being too dangerous to release, and he has spent the past four years entirely in seclusion at the Mason Clinic in Auckland.

Since being in care, he had reportedly tried to steal and hide weapons, made specific threats of harm to certain staff, and reportedly assaulted staff and damaged property at the facility. Expert health assessments had deemed Jay as posing a "high, or very high risk of committing acts of violence" if he was released into the community.

Ellis said Jay's challenging behaviour was a result of his long detention and the environment he was kept in.

"Of course he misbehaves. He's been detained for getting on for 20 years, and he's bored out of his mind. He doesn't have mental stimulation, and he just reacts.

"There's lots of minor incident reports but if he had stimulation at a pleasant place to live it's quite probable that these incident reports would diminish," Ellis said.

Jay's behaviour had improved at times when his care had improved, he said.

Lawyer Graeme Edgeler at Tuesday's Supreme Court hearing. Photo: Nick Monro/RNZ

Another lawyer for Jay's mother, Graeme Edgeler, questioned the validity of staff reports about his behaviour since he has been in care. The reports have been used by expert assessors to assess Jay and keep him detained.

"There is no judicial process for working out whether one any of these particular findings really happened, or the circumstances in which it happened."

Factual errors about Jay's behaviour, which had since been corrected, still continued to be repeated by some assessing clinicians, he said.

The Crown's lawyer, Kim Laurenson, said there was a recognition that Jay's long detention has had a significant impact on him.

"But it is justified to protect the public."

She said Jay had moved to a less secure facility for several years where he was subject to a "less restrictive regime", but his behaviour deteriorated so he was moved back to a secure facility at the Mason Clinic in 2020.

Specialist assessors had not ruled out Jay making improvements in the future and it was conceivable he could be placed in a less secure place in the future, but this would likely take some time, she said.

Medical staff at the Mason Clinic had given thought to whether Jay's regime had been "overly restrictive".

"The special assessors have assessed Jay as posing a high, or very high risk of harming people. That is not the case for most people with intellectual disability. The assessment has been made that Jay is an unusual and challenging presentation."

Medical staff at the Mason Clinic had tried different approaches with Jay but had little success, she said.

"It shows that the people who care for Jay have not stopped trying new things. Or making adjustments."

Crown lawyers (from left) Rosa Garvey, Matt McKillop and Kim Laurenson at the Supreme Court hearing on Tuesday. Photo: Nick Monro/RNZ

Laurenson said the Crown would address concerns about the validity of reports about Jay's behaviour in care when the hearing continued on Wednesday.

Jay was first detained in 2004 after he broke four of his neighbour's windows with an axe and was charged with wilful damage. Found unfit to stand trial he was made a "care recipient" under the Act in 2006 and ordered to live in a secure care facility.

According to the Act, a person is only deemed to be intellectually disabled if they are found to have an IQ of 70 or lower.

Ellis said there were different types of tests. And while Jay scored less than 70 in a standard IQ test, he scored 84 on one that focused on audio-visual skills, though he said this argument had been dismissed by the high court.

Edgeler said this was an issue that should be explored further.

Justices of the Supreme Court at Tuesday's hearing, from left: Sir Stephen Kós, Dame Ellen France, Dame Helen Winkelmann, Sir Joe Williams and Justice Forrest Miller. Photo: Nick Monro/RNZ

The Human Rights Commission and the IHC have both been granted leave to make submissions to the Supreme Court as interveners to discuss the wider human rights and disability issues arising from the Act.

Both organisations and the appellant have argued a leading piece of case law, RIDCA Central vs VM, used to justify the extension of care orders under the IDCCRA was no longer relevant.

The 2011 Court of Appeal case centres on the balance courts must strike between protecting the public from harm and protecting a disabled person's liberty.

Edgeler said New Zealand had since become a signatory to the UN Convention on the Rights of Disabled Persons, and disability politics and law has since moved on.

He said the longer someone is detained, the more scrupulous the court should be in examining the reasons for their detention.

IHC lawyer Andrew Butler told the court there had been too little focus on the impact of detention on the detainee's liberty interests.

He worried a consequence of the indefinite detention allowed under the Act would incentivise lawyers with intellectually disabled clients facing criminal prosecution to keep their client in the justice system "to avoid becoming like Jay."

The hearing continues on Wednesday.

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