

THE HIGH COURT

2009 610 SS

**IN THE MATTER OF THE CONSTITUTION UNDER ARTICLE 40.4.2 AND
IN THE MATTER OF AN APPLICATION OF D.**

BETWEEN

D.

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

AND

THE MENTAL HEALTH COMMISSION

RESPONDENTS

JUDGMENT of Mr. Justice Michael Peart delivered on the 23rd day of April, 2009

The applicant has suffered from a mental illness for many years, but in November 2008 he was admitted to an approved centre ("St. Michael's") as a voluntary patient. A short time later on the 2nd December 2008 the provisions of Section 23 and Section 24 of the Mental Health Act, 2001 ("the Act") were invoked whereby he was detained there as an involuntary patient. In accordance with other provisions of the Act the patient's detention was the subject of a review by a mental health tribunal on the 17th December 2008, on which occasion the detention order was affirmed.

The applicant's detention was renewed by renewal order dated 19th December 2008, and, again, in accordance with the provisions of the Act, that order was reviewed and affirmed by a mental health tribunal on the 7th January 2009 for a period not exceeding three months. A further renewal order was made on the 20th March 2009, and a mental health tribunal hearing was fixed for the 8th April 2009, and following that hearing the renewal order was affirmed. However, the applicant's legal representative was of the view that the procedures adopted for the purpose of that tribunal hearing were not strictly in accordance with the procedures laid down in the Act and that this resulted in the continued detention of the applicant on foot of the renewal order made on the 20th March 2009 being otherwise than in accordance with law, and sought an order from this Court that the applicant be released from unlawful detention.

The applicant's Responsible Consultant Psychiatrist is Dr. Rosemary Shinkin, and it was she who had signed the Admission Order on the 2nd December 2008, as well as the Renewal Order made on the 19th December 2008. However, the further Renewal Order made on the 20th March 2009 and which was the subject of the review by a tribunal on the 8th April 2009 had been signed not by her but by Dr John Dennehy. For the purpose of the review hearing an Independent Medical Examination was carried out by Dr Louis O'Carroll under the provisions of s. 17 of the Act. His report records Dr Shinkin as being the applicant's Responsible Consultant Psychiatrist. The report indicates at paragraph 8 thereof, *inter alia*, that Dr O'Carroll interviewed the consultant psychiatrist responsible for the care and treatment of the patient on 03.04.09. In this regard he has inserted the date "03-04-09" opposite the wording in the standard report form "*interviewed the consultant psychiatrist responsible for the care and treatment of the patient on ...*". However, according to the affidavit of the applicant's legal representative, Paula O'Sullivan, solicitor, sworn for the purpose of this application, Dr Shinkin gave evidence at the tribunal hearing that she had not in fact spoken with Dr O'Carroll for the purpose of his report to the tribunal, and Ms. O'Sullivan goes on to state that during the tribunal hearing telephone contact was made with Dr O'Carroll who gave evidence by telephone that he had not interviewed or spoken with Dr Shinkin and further that he had not spoken with Dr Dennehy or any other doctor at St. Michael's as there was nobody there who knew the applicant.

Ms. O'Sullivan went on to aver that at the tribunal Dr Shinkin gave evidence that in fact Dr Dennehy was not "covering her patient" at the time that he signed the Certificate and Renewal Order and that "he was just looking after her area. She states that she believes therefore that Dr Dennehy was not the consultant psychiatrist responsible for this patient at the time, and also that he was not a psychiatrist attached to St. Michael's and was not involved in the care and treatment of the applicant, and did not have a real and continuing part in his care and treatment. In those circumstances, she believes that the provisions of s. 15 (2) of the Act were not properly complied with. She accepts in her affidavit that the applicant suffers from a mental illness and that he is deteriorating and requires long term care and would be unable to cope without nursing care, but nevertheless believes that his detention at St. Michael's became unlawful due to the fact that Dr Dennehy was not the person empowered by the section to make the Renewal Order on the 20th March 2009.

The second basis on which the detention of the applicant was submitted to be unlawful is the evidence that Dr O'Carroll, the independent psychiatrist who prepared a report for the Tribunal did not as a matter of fact speak to or otherwise interview the responsible consultant psychiatrist, as stated in his report and as required by s.17 (1)(c)(ii) of the Act.

Section 15 (2) of the Act provides:

"(2) The period referred to in subsection (1) may be further extended by order (to be known in this Act and referred to as 'a renewal order') made by the consultant psychiatrist responsible for the care and treatment of the patient

concerned for a further period not exceeding 3 months.”

Section 17(1) of the Act provides:

“(1) Following the receipt by the Commission of a copy of an admission order or a renewal order, the Commission shall, as soon as possible –

*(a) refer the matter to a tribunal,
(b) assign a legal representative to represent the patient concerned unless he or she proposes to engage one,*

(c) direct in writing (referred to in this section as ‘a direction’) a member of the panel of consultants established under section 33(3)(b) to –

(i) examine the patient concerned,

(ii) interview the consultant psychiatrist responsible for the care and treatment of the patient, and

*(iii) review the records relating to the patient,
in order to determine in the interest of the patient whether the patient is suffering from a mental disorder and to report in writing within 14 days on the results of the examination, interview and review to the tribunal to which the matter has been referred and to provide a copy of the report to the legal representative of the patient.” (my emphasis)*

Dr Dennehy has sworn an affidavit in response to that of Ms. O’Sullivan and in which he states that he is employed by the Health Service Executive as a consultant psychiatrist to the North Lee Catchment Area and is “based at St. Michael’s Unit of the Mercy University Hospital, being the approved centre in this case where the applicant is detained. With regard to his involvement with the applicant he states that at the time that he signed the renewal order on the 20th March 2009 Dr Shinkin was ill, and that at St. Michael’s a system operates whereby in a situation where a consultant psychiatrist is ill his/her workload is covered by another consultant psychiatrist, and that he and Dr Shinkin have a reciprocal arrangement whereby they each provide cover for the other, and that on that occasion he was covering Dr Shinkin’s work and hence that he was the consultant psychiatrist responsible for the care of the applicant. He goes on to state that Dr Shinkin’s non-consultant hospital doctor continued to be involved with her patients and would bring any matters requiring consultant input to his attention.

Dr Dennehy states that it is not correct to say that he was not familiar with the applicant. He had previously been involved in the assessment of the applicant while he was an in-patient, had examined the applicant on the 20th March 2009 in advance of signing the Certificate and Renewal Order, and had completed a consultant psychiatrist assessment of the applicant on the previous day, the 19th March 2009 following his admission. He states also that he had examined the applicant in January 2009 at Dr Shinkin’s request who had requested that he consider taking the applicant under his care in one of the long-term stay units in St. Stephen’s Hospital where he also provides services on behalf of the North Lee Mental Health Services, and further that he had agreed to do so once a placement became available.

The independent consultant psychiatrist nominated by the Commission, Dr O’Carroll has also sworn an affidavit in response to that of Ms. O’Sullivan and in which he outlines what steps he took after he received the Commission’s direction given under s. 17(1)(c) of the Act. He states that he met and examined the applicant on the 3rd April 2009 and then proceeded to complete the report required. He states that he had intended speaking with Dr Shinkin before submitting his report and attempted to telephone her but got no answer, whereupon he spoke to a Mental Health Administrator in St Michael’s Unit who told him that Dr Shinkin was ill. He then contacted the Mental Health Commission and enquired whether it would be sufficient if he spoke to a junior doctor on Dr Shinkin’s team but was informed that it would not. He confirms also that during the review hearing the tribunal contacted him in order to clarify whether or not he had spoken to Dr Shinkin and he told them that he had not done so and explained the situation. Finally he refers to the fact that in his report he had inserted “03-04-09” in paragraph 8 of the report opposite the reference to interviewing the consultant psychiatrist responsible for the care and treatment of the patient” but says that he did so in error. He refers to the fact that he did not complete paragraph 23 of the same report under the heading “Please include details from the interview with the patient’s responsible consultant psychiatrist”, and states that it is therefore clear from the report that he had not in fact spoken with the responsible consultant psychiatrist, and that the insertion of the date in paragraph was through inadvertence and was not intended to cause confusion.

Finally there is a replying affidavit sworn by Clara Daly BL who was the Chairperson of the tribunal in question which sat on the 8th April 2009 and which affirmed the renewal order. She refers to the matters raised during the review hearing and, *inter alia*, to the fact that having considered the submissions made on behalf of the applicant at the review, the Tribunal took the view that where there was no dispute as to whether the applicant was suffering from a mental disorder and that the tribunal should have regard to the report of the independent consultant psychiatrist in spite of the fact that the consultant psychiatrist responsible for the care and treatment of the applicant had not been interviewed. She states that in making a decision concerning the care and treatment of a person the best interests of the person is always the principal consideration of the tribunal and was so in this case.

On the applicant’s behalf it was submitted by Counsel that the requirement that the applicant’s “responsible consultant psychiatrist” be interviewed by the independent consultant psychiatrist is not to be simply regarded as an empty formula since it is mandated by the provisions of s. 17 of the Act; and, further, that the failure to have that interview rendered the s. 17 report defective, and that it could not therefore be had regard to by the tribunal when deciding to affirm the renewal order. It was submitted also that it was noteworthy that this requirement cannot be disregarded by the tribunal under s. 18 of the Act since s. 17 is not one of the sections referred to in s. 18(1) of the Act where a non-compliance with any such provision can be disregarded by the tribunal where it is satisfied that “such failure does not affect the substance of the order and does not cause an injustice”.

Submissions were also made that Dr Dennehy should not be regarded as the responsible consultant psychiatrist responsible for the care and treatment of the applicant even in the absence through illness of Dr Shinkin.

John Lucey BL for the Health Service Executive and Paul Anthony McDermott BL for the Mental Health Commission submitted firstly that it was already decided by the Courts that there could be more than one person who can be regarded as the responsible consultant psychiatrist depending on the particular circumstances, and further that the failure by Dr O’Carroll to have interviewed

either Dr Shinkin, Dr Dennehy or any other medical person was not such a defect as to render the s. 17 report so deficient that it could not be had regard to by the tribunal, particularly where there was no dispute raised or existing that the applicant suffered from a mental disorder at the time of the tribunal's review of the renewal order, and further that it is clear that all concerned acted with the best interests of the applicant in mind.

In the immediate aftermath of the hearing of this application I gave my decision that the detention of the applicant was in accordance with law and I refused the application for his release. I indicated at the time that I would give my reasons in a written judgment, and the following are my reasons.

In relation to whether Dr Dennehy was the responsible consultant psychiatrist of the applicant in the absence through illness of Dr Shinkin, this is a matter of fact to be decided on the facts of this case. It is clear by now that there can be more than one person who may be regarded as "the responsible consultant psychiatrist" for the purpose of s. 15 of the Act, depending on the circumstances prevailing at a particular and relevant time. I am completely satisfied from the evidence adduced on this application that Dr Dennehy was on and immediately prior to the 20th March 2009 the responsible consultant psychiatrist of the applicant, covering, as he was, and with her agreement, the workload of Dr Shinkin during her absence through illness. It is clear that he was familiar with the applicant and the illness from which he was suffering and for which his presence in the approved centre was required so that he could receive appropriate and necessary care and treatment. There has been no breach of the requirements of s. 15 of the Act.

In relation to the point raised under s. 17 of the Act that Dr O'Carroll had not interviewed the responsible consultant psychiatrist, whether that be Dr Shinkin or Dr Dennehy by the 3rd April 2009, I am satisfied firstly that there was never any attempt or intention by Dr O'Carroll to disguise the fact that he had not done so, by the insertion of the date "03-04-09" opposite the relevant words in paragraph 8 of the report form. There is no question but that he acted with complete bona fides in this regard and inserted the date through inadvertence. He did not complete paragraph 23 in any way whatsoever so it was clear that the tribunal were not misled in any way in this regard, and he conformed the situation in an event to the tribunal chairperson when contact was made with him during the course of the review hearing.

Secondly, I am satisfied that the failure to have interviewed the responsible consultant psychiatrist before submitting his report to the tribunal was not such as to render the report invalid for the purpose of s. 17 of the Act. The tribunal was entitled to and did have regard to it when deciding to affirm the renewal order. I agree of course with the submission made on behalf of the applicant that the requirement to interview the responsible consultant psychiatrist, and the other requirements and procedures laid down by the Act are not to be regarded as mere empty formulae. The Act is designed and clearly intended to provide safeguards to vulnerable and ill persons such as the applicant, and therefore it is important that these safeguards and protections are afforded to such persons. It would of course have been open to the tribunal to adjourn the review hearing if there was any issue raised, or doubt existing or apparent, as to whether the applicant was suffering from a mental disorder at the time of the review, so that the tribunal could satisfy itself in this regard by calling for the attendance of the responsible consultant psychiatrist or so that the independent consultant psychiatrist might be afforded a further opportunity to interview him or her. But in the present case there was no doubt about the existence of a mental disorder such as would have justified the renewal order being affirmed. The defect, if it be that, in the report is not so fundamental as to invalidate the report to the extent that the tribunal could not be entitled to have regard to it. In my view the tribunal was entitled to decide as it did and proceed, if it so decided, to affirm the order.

For these reasons, I am satisfied that on the date on which I heard this application for his release, the applicant's detention was in accordance with law.