[2016] IEHC 25
Record No. 2015 50SS

THE HIGH COURT

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2º OF THE CONSTITUTION OF IRELAND

Between

MR M

APPLICANT

AND

THE CLINICAL DIRECTOR OF THE DIRECTOR OF THE DEPARTMENT OF PSYCHIATRY, UNIVERSITY HOSPITAL LIMERICK

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 18th January, 2016

1. Mr M appears to be very seriously unwell. He is presently being involuntarily detained at a mental health hospital pursuant to a renewal order issued under s.15 of the Mental Health Act, 2001 and dated 4th January, 2016. He was initially detained pursuant to an admission order made under s.14 of the Act of 2001, and executed on 16th December, 2015. That initial admission order was inadvertently dated 16th December "2016" by the admitting consultant psychiatrist. This last-mentioned error, it is alleged for the applicant, rendered the initial admission order invalid. Whether it did or not is no longer relevant. This is because, as of 4th January last, the initial admission order relating to Mr M has been supplanted by a new, separate and extant renewal order. The significance of the issuance of this new, separate and extant renewal order is pointed to by O'Neill J. in his judgment in *W.Q. v. The Mental Health Commission and Others* [2007] 3 I.R. 755, a case in which it was contended that a renewal order which issued under the Act of 2001 was deficient because of a previous want of compliance with the Act as regards the detention of the applicant in that case. Per O'Neill J., at 769:

> *"The scheme of detention provided for in the Act of 2001 is based upon the creation of short periods of detention each disconnected from the other, so that on every renewal the detention has to be fully justified. This is achieved by the admission order in the first instance followed then by renewal orders under section 15….A finding of invalidity of a renewal order which in itself is valid in all respects, because of a defect in a previous renewal order or admission order is a wholly undesirable eventuality and, in all probability, not in the best interests of persons suffering from a mental disorder."*

2. It might perhaps be contended that as a matter of strict logic, a 'renewal' order cannot follow a void 'admission' order. This contention, however, would appear to assume that the shorthand term 'renewal order', as employed in the Act of 2001, means to refer to the renewal of a previous order, as opposed to a renewal of detention. In fact, a consideration of s.15(2) of the Act suggests that the latter interpretation is correct , *i.e.* that it is the period of detention that falls to be renewed, not the order.Thus s.15(2) states: "*The period referred to in subsection (1) may be extended by order (to be known as and in this Act referred to as 'a renewal order')…*". But if the court is wrong in this, if a 'renewal order' is a renewal of a previous order and if that previous order was void *ab initio*, how logically can you 'renew' what did not exist? In this regard it is well to remember the observation of Oliver Wendell Holmes, Jr., that "*The life of the law has not been logic; it has been experience*". (The Common Law (1881), 1).To put matters otherwise, life is lived in the real, logic must yield to reality, and the reality is neatly caught by O'Neill J. in the above-mentioned quote from his judgment in *W.Q.* It is in no-one's interest, least of all that of the seriously unwell, that the courts would go probing into the validity of a past, now-defunct admission order, instead of confining their attentions to a present, still-extant renewal order. Perhaps such a probe would be justified if the issuance of a renewal order was an administrative task unaccompanied by all the protections that go with initial admission orders. But that is not what the issuance of a renewal order entails. The Oireachtas, in its assessment of where the proper balance lies between the rights and needs of mental health patients and the interests of society – an assessment that a democratically elected parliament is uniquely well-placed to do, and which the courts through the medium of Art.40 applications should generally be slow to displace– has devised, through the medium of the Act of 2001, a sophisticated system whereby people can be detained involuntarily at mental hospitals. This system involves various checks and balances that see (1) expert medical doctors (consultant psychiatrists) determine whether to order a commencement or continuation of involuntary detention (ss. 14, 15), (2) a prompt check of any such order by a mental health tribunal comprising medical and lay-members (ss.17, 18), and (3) a right of appeal to the Circuit Court where a tribunal affirms an admission or renewal order detaining a patient, but the patient maintains that s/he is not suffering from a mental disorder (s.19).

3. The notion that a renewal order might be tainted by a flaw in an admission order is sometimes referred to as the 'domino effect'. Presumably this metaphor means to refer to the parlour-trick whereby a row of dominoes can be lined up in such a manner that by pushing over the first, all the rest must fall. To the court, O'Neill J.'s reasoning offers a sound, patient-focused explanation as to why the validity of a renewal order ought not to be determined by reference to the validity of an admission order. More over, when it comes to the use of metaphor in judgments, this Court is ever mindful of Cardozo J.'s observation in the 'veil-piercing' case of *Berkey v. Third Avenue Railway Co* 244 N.Y. 84 (1926), 94, that "[M]*etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it*." But if mention of dominoes is required, it is to be found in the judgment of Kearns J. (for a five-person Supreme Court) *in E.H. v. Clinical Director of St Vincent's Hospital* [2009] 3 I.R. 774, a case that focused on when defects in a patient's detention under the Act of 2011 could yield a successful claim for unlawful detention.Per Kearns J., at 781:

> *"**[19]**With regard to the domino effect argument, there had been no specific complaint that the statutory processes set out in the Mental Health Act 2001 were not correctly followed in the making of subsequent detention orders….Even if there had been some irregularity in the arrangements put in place for the applicant between the 10th and 22nd December, 2008, there was no reason to believe that subsequent orders had been 'infected' or that any domino effect kicked in."*

4. Even had it not been for the judgment of the Supreme Court in *E.H.*, this Court would have respectfully adopted the above-quoted logic of O'Neill J. in *W.Q*. But the binding decision of the Supreme Court in *E.H*. leaves this Court in the position that it must conclude, as a matter of law, that there is no 'domino effect' between a possibly invalid admission order that has become defunct and a renewal order which – it was expressly accepted for the present applicant at hearing – is valid on its face. In fact, the decision of the Supreme Court in *E.H*. is so clear on this point that the court must admit to some surprise that there was any apprehension that it might reach a different conclusion in this regard.

5. Apart from the error on the face of the initial, now-defunct admission order – and the doomed 'domino-style' attempt to impugn the now-extant renewal order by reference to that previous error – there is no basis on which the within Art.40 application can succeed. It is accepted for the applicant that (1) the now-extant renewal order shows no invalidity on its face. And, when it comes to the

renewal order, there is no contention that – apart from the failed 'domino' argument – there has been or is any (2) absence of jurisdiction, (3) fundamental denial of justice or (4) fundamental flaw presenting. Contentions based on any of grounds (1) to (4) are the sole grounds identified by Denham C.J. at para.18 of her judgment in *Ryan v. Governor of Midlands Prison* [2014] IESC 54, as offering a legitimate basis for an Art.40 application by a prisoner. (In Ryan, at para.13, the Chief Justice expressly states the Supreme Court to be following and applying, in its judgment in Ryan, the statement of law given by it in *F.X. v. Clinical Director of the Central Mental Hospital* [2014] IESC 1,a decision to which this Court was kindly referred by counsel for Mr M). Of course, Mr M is neither a prisoner nor a criminal. However, it seems to this Court that the bases mentioned by the Chief Justice in Ryan reflect, *mutatis mutandis*, the bases on which an Art.40 application may properly be grounded in the context of the Act of 2001. As the sole ground raised for Mr M to impugn the lawfulness of his continuing detention necessarily fails for the reasons identified above, and no other proper ground of objection is presented, the within application must fail.

Conclusion

6. The renewal order of 4th January, 2016, is the order on which Mr M's continuing detention is grounded at this time. There is no challenge to the validity of that order, other than the so-called 'domino' effect of such error as presented in the original admission order. For the reasons stated above, the currently extant renewal order is not affected by any dating error that presented in the now-defunct, initial admission order. That is the end of matters so far as this inquiry under Art. 40 is concerned. The court must and does conclude that Mr M's continuing detention pursuant to the renewal order of 4th January, 2016, is entirely and unambiguously lawful.

7. The court hopes that in time Mr M will enjoy the full mental health that he deserves and that his loved ones doubtless wish for him to have.