

**THE HIGH COURT
JUDICIAL REVIEW**

[2014 No. 463 J.R.]

BETWEEN

M.C.

APPLICANT

AND

CLINICAL DIRECTOR - CENTRAL MENTAL HOSPITAL

RESPONDENT

AND

MENTAL HEALTH (CRIMINAL LAW) REVIEW BOARD

NOTICE PARTY

JUDGMENT of Mr. Justice Eagar delivered on the 20th day of June, 2016

1. These proceedings were taken by the applicant on 28th July, 2014, seeking the following reliefs:-

- (i) A declaration, by way of an application for judicial review, that the respondent's refusal to make such arrangements as are necessary for facilitating compliance by the applicant with the conditions of a Conditional Discharge Order, the subject of the notice party's decision at a hearing held on 14th November, 2013, (and resumed on 21st November, 2013) is unlawful, unreasonable and in breach of the provisions of the Criminal Law (Insanity) Act 2006, s. 13A as inserted by s. 8 of the Criminal Law (Insanity) Act 2010.
- (ii) A declaration by way of an application for judicial review, that the respondent is under a statutory non-discretionary duty to facilitate compliance by the applicant with the conditions of the order as aforesaid.
- (iii) A declaration by way of an application for judicial review, that the respondent's refusal as aforesaid violates the applicant's rights pursuant to the provisions of Bunreacht na hÉireann, Article 41 and/or Article 40.3 and/or the provisions of the European Convention on Human Rights and Fundamental Freedoms 1950, Article 8.
- (iv) A declaration by way of an application for judicial review, that the respondent's refusal as aforesaid is an unlawful and an unwarranted interference with the exercise of the statutory powers and functions of the notice party.
- (v) Certiorari by way of an application for judicial review of that refusal.
- (vi) Mandamus by way of an application for judicial review, directing that the respondent make such arrangements as are necessary for facilitating compliance by the applicant with the conditions of the Conditional Discharge Order as aforesaid, and/or comply with the statutory obligations pursuant to the provisions of the Criminal Law (Insanity) Act 2006, s. 13A, as inserted by Criminal Law (Insanity) Act 2010, section 8.
- (vii) Damages for breach of the applicant's constitutional and Convention rights.
- (viii) Further or other relief.
- (ix) Costs.

2. The affidavit of Áine Hynes, Solicitor, was the statement grounding the application for judicial review, which set out some of the history of the case and exhibited much of the correspondence. This application was made ex parte to Baker J. on 30th July, 2014, who granted leave to apply by way of an application for judicial review for all the reliefs sought in the statement of grounds save that for further or other reliefs.

She made a further order pursuant to the provisions of s. 27(1) of the Civil Law (Miscellaneous Provisions) Act 2008, that the publication or broadcast of any matter relating to the proceedings which would or would be likely to identify the applicant is prohibited.

3. An appearance was put in by McDowell Purcell Solicitors, on behalf of the Mental Health (Criminal Law) Review Board (herein "Review Board") and on 5th December, 2015, an affidavit was filed on behalf of the notice party by its Chief Executive Officer Greg Hyland. A statement of opposition was lodged by the respondent on 10th March, 2015. The statement of opposition complained of delay on the part of the applicant and that the proceedings had been rendered moot following a decision by the notice party on 12th December, 2014, discharging the applicant unconditionally from the Central Mental Hospital. At the outset of the proceedings, the respondent sought a preliminary issue as to the proceedings being moot and this was agreed by counsel for the applicant and counsel for the respondent in relation to certain aspects of the proceedings.

4. It is also noted that no information was provided to this Court in relation to the reasons for the applicant's detention, namely the drowning incident that involved the killing of her infant son and the attempted killing of her youngest daughter. This omission appears to this Court to be without explanation, as it was of relevance to the issues to be determined by the Court.

5. The applicant:

- (a) is 41 years old and is a married woman;
- (b) She was found guilty but insane of a homicide offence. She was committed to the Central Mental Hospital.
- (c) She was re-classified as a person found not guilty by reason of insanity under the Criminal Law (Insanity) Act 2006.
- (d) In accordance with the provisions of the Act of 2006, the applicant underwent periodic reviews by the Review Board.

6. On a review of 23rd July, 2012, the Review Board made an order certifying that the Review Board was satisfied with the conditions which had been agreed, and was prepared to grant a conditional discharge to the patient.

Condition 1.1 set out the following, that M.C. was to comply with the conditions laid down by the National Forensic Mental Health Service treating team in relation to her residing at any location and any change of location.

Condition 1.2 set out that the place of residence of M.C. would be determined by the legally responsible consultant psychiatrist Dr. Helen O'Neill, or in her absence another consultant psychiatrist, nominated by the Clinical Director of the National Forensic Mental Health Service. At all times the place of residence would be discussed with M.C., and any decision in relation to the place of residence will be based clinical reasons (this Court's emphasis) and insofar as is practicable, by agreement with M.C.

Condition 2 related to the maintenance of the applicant's mental health, and set out that the applicant should inform the treating team, if she experienced symptoms of mental illness, persisting psychological distress, self harm or suicide. M.C. would allow members of her treating team to visit her at home.

Condition 5 related to harmful behaviours.

Condition 6 related to intoxicants.

The conditional discharge order also set out that M.C. was required to inform the treating teams if her husband were to resume drinking alcohol (this Court's emphasis). M.C. was also obliged to inform the treating team of any deterioration in their marital relationship.

7. On 17th June, 2013, M.C. telephoned her local Mental Health Centre to report that her husband had been verbally abusive and had threatened physical violence to their teenage son on 15th June, 2013. When M.C. tried to intervene, she said her husband retorted "who's going to listen to you anyhow, you mental whore". M.C. rang the Gardaí, and her husband left the house before the latter arrived. Dr. O'Neill noted that at her last review with M.C. on 12th June, 2013, M.C. informed her that she intended to disclose to her husband that she had undergone a tubal ligation during her stay in the Central Mental Hospital. It had been her intention previously not to inform him of this, but on 12th June, M.C. explained to Dr. O'Neill that she decided to tell him because of the increasing marital tension relating to their sexual relationship. She denied at this review with Dr. O'Neill that her husband had resumed drinking alcohol.

8. Following the telephone call from M.C. to her local Mental Health Centre, she was removed by Dr. O'Neill from the home. Dr. O'Neill instructed M.C. that her place of residence would change from her family address, where her husband resided, to her mother's address. In correspondence it is detailed that Dr O'Neill noted the risk of violence, the increasing marital tension, the fact that M.C. had a psychotic relapse in February that year, and also noted verbal abuse by M.C.'s husband in making her decision to remove M.C. from the family home. It was noted during the course of the hearing that M.C. after a time was allowed to stay at her family home with her husband. Eventually, she was permitted to stay at the family home overnight.

9. In August, 2013, through her solicitor, the applicant sought amendment of the conditions, in order for herself to become the primary decision maker in relation to her place of residence. She believed that the current place of residence, at her mother's address, as recommended by the treating team, was detrimental to her health and wellbeing. She indicated that if conditions 1.1 and 1.2 were to be amended, she would agree to abide by the recommendations of Dr. O'Neill in relation to her gradual and phased return home on an overnight basis. M.C. further indicated that she wished to stay at home overnight with her husband, and she was not aware that the hospital had concerns in this regard. The Review Board considered the application on 14th December, and subsequently on 21st December, 2013, and made a further conditional discharge order acceding to vary the conditions. Under this conditional discharge order, M.C. would have been the primary decision maker in relation to her place of residence.

10. By letter dated 13th November, 2013, the Review Board wrote to the Clinical Director of the Central Mental Hospital (herein "Clinical Director"), requesting that he would confirm that the necessary arrangements facilitating the conditional discharge order would be made, under s. 13 A (2) of the Criminal Law (Insanity) Act 2006. These arrangements had to be made before the Board could implement the varied conditional discharge order.

11. By letter dated the 19th November, 2013, the Clinical Director set out his refusal to make the necessary arrangements to facilitate a variation in the conditional discharge order. He opined in this letter that there were two possible conclusions to be drawn from the Review Board's decision. First, that M.C. was requesting to live with her husband as a result of impaired mental capacity. He suggested that it would be unsafe to comply with her request if this was the case. Second, if the Review Board believed M.C. was of intact mental capacity, then the Review Board ought to grant her an absolute discharge.

12. Further, the Clinical Director in his affidavit sworn on the 12th March, 2015, noted that "when a Mental Health Review Board grants a conditional discharge, the conditions have invariably been agreed between the treating consulting forensic psychiatrist and the patient before the application is submitted to the Review Board. A strong positive therapeutic relationship based on trust is an essential prerequisite for conditional discharge." He also stated that in determining whether to grant a conditional discharge, the propensity for relapse and reoffending are important guides for the decision maker, namely the consultant psychiatrist.

13. By letter dated 3rd February, 2014, the Chief Executive of the Review Board again requested the Clinical Director to make the necessary arrangements for the implementation of the varied conditional discharge order. The letter stated that the Board believed that the Clinical Director was under an obligation to make the necessary arrangements. In light of the relevant statutory provisions, the Review Board asked the Clinical Director to reconsider his position. This suggests to this Court that the Review Board considered that it was appropriate to allow the Clinical Director to reconsider his position.

Addressing the two possible conclusions the Clinical Director had drawn from the Review Board's decision, set out in his letter dated

the 19th November, 2013, the Chief Executive set out the view of the Review Board, namely there was no question of M.C.'s request to live in her family home being the product of impaired mental capacity, nor did her treating psychiatrist ever make such a suggestion. The Review Board noted that the question of granting an unconditional discharge did not arise at this time, as M.C. had not sought such an unconditional discharge (although, in the view of this Court, the reality of varying the conditions so that M.C. would be the primary decision maker in relation to her place of residence, in effect, appeared to be an unconditional discharge).

14. By letter dated 4th March, 2014, the Clinical Director responded to the Chief Executive Officer of the Review Board, stating the following:-

(1) He regretted that he was not in a position to make such arrangements;

(2) Conditions 1.1 and 1.2 allowed the responsible consultant psychiatrist, Dr. Helen O'Neill to permit M.C. to spend time in the family home including overnight stays. The conditions also empowered Dr. O'Neill to limit overnight stays, enabling Dr O'Neill to reduce M.C.'s exposure to high emotion, including verbal abuse which had, in the recent past, caused her to relapse.

(3) The conditions also enabled Dr. O'Neill and the team to act flexibly in response to M.C.'s own requests and confidential disclosures.

(4) Varying the conditions would allow M.C. to reside anywhere she chooses. This would mean that should she suffer domestic stresses of any kind, including those known to cause her to relapse, M.C. would not be in material breach of the conditional discharge order by remaining in this location. The treating doctors would have no power to protect her by moving her to a more appropriate place of residence.

(5) He stated that the current conditions of the order allowed M.C. to spend substantial periods at home as she wished and he urged the Review Board to leave the conditions as they were. He suggested that if it was the Review Board's view that M.C. was making a competent decision, and was of intact mental capacity, M.C. ought apply for an absolute discharge.

15. Dr. O'Neill in a letter to the Clinical Director on 20th February, 2014, had indicated that there was a consensus clinical opinion that the potential destabiliser to M.C.'s mental state would be marital/domestic disharmony and violence. That judgment is based on the background history to date and also on structured professional judgment regarding domestic and general violence (this Court's emphasis). A relapse of her mental illness would also increase the risk of violence to her husband and it remained Dr. O'Neill's opinion that she should retain the authority to determine M.C.'s place of residence.

16. By letter dated 18th March, 2014, the Chief Executive of the Review Board acknowledged that there was a fundamental and legitimate disagreement in relation to the management of risk in this case (this Court's emphasis). However, he also pointed to the wording of s. 13A (2) of the Criminal Law (Insanity) Act 2006, that the Clinical Director shall (this Court's emphasis) make arrangements as necessary, and that the Clinical Director had not addressed this legal issue. Notably, the Review Board did not give any reasons for rejecting the concerns raised by Dr. O'Neill and the Clinical Director.

17. This Court notes that despite the finding of the applicant as guilty but insane, and her subsequent reclassification as a person not guilty by reason of insanity under the Criminal Law (Insanity) Act, 2006 M.C. had only spent three and a half years as a patient in her local psychiatric hospital after the drowning incident, and was admitted to the Central Mental Hospital on the verdict of the jury.

18. Dr. O'Neill in a comprehensive report given to the Review Board delivered on 19th July, 2012, set out in full the background issues with regard to M.C. She also gave a report dated 9th October, 2013, detailing the various issues of which she had concerns. This Court did not have before it any material that indicates that the Review Board considered or addressed these concerns.

19. By letter dated 26th May, 2014, the Review Board again requested the Clinical Director to make the necessary arrangements for the implementation of the varied conditional discharge order.

20. By letter dated 3rd June, 2014, the Review Board wrote to the applicant's solicitor stating that it remained prepared to vary the conditional discharge order, but despite its efforts, it remained unable to make the proposed variations to the order in the absence of the necessary confirmation from the Clinical Director.

21. In the weeks leading up to July, 2014, M.C. had been living at home full time with her husband. At a meeting of 4th July, 2014, the Clinical Director again refused to make the necessary arrangements. On 30th July, 2014, the application for judicial review was made before Baker J. and it was also indicated to Baker J. that M.C. intended to apply for an unconditional discharge order. On 7th August, 2014, this application was made before the Review Board, then chaired by the recently retired High Court Judge, O'Neill J. An unconditional discharge order was granted on 14th December, 2014 by the Review Board.

22. It is agreed that the unconditional discharge order rendered certain reliefs moot including the order for certiorari and mandamus.

23. However, the applicant states that the reliefs set out above at (i), (iii) and (vii) still remain as live issues, i.e. that there had been a breach of statute, M.C.'s rights had been breached resulting from this breach of statute, and that M.C. deserved damages. One question for this Court is whether or not the reliefs sought in this case are moot or whether they are live issues still to be determined.

24. This Court notes the decision of Hanna J. in *J.B. v. Mental Health (Criminal Law) Review Board* [2011] 2 I.R. 15. In that case, Hanna J. refused the reliefs sought by the applicant. The head note indicates:-

"...in refusing to discharge the applicant, the first respondent had acted in the interests of the applicant and the public at large, having regard to the unsuitability of the other options available to it under the Act of 2006. In the circumstances, the first respondent had acted reasonably and within jurisdiction."

25. Hardiman J's defined the doctrine of mootness in *G. v. Collins* [2005] 1 I.L.R.M. 1, cited in *O'Brien v. Personal Injuries Assessment Board* (Unreported, Supreme Court, 16th November, 2006) as follows:-

"proceedings may be said to be moot where there is no longer any legal dispute between the parties."

26. In the Supreme Court judgment of *Irwin v. Deasy* [2010] I.E.S.C. 35, Murray C.J. stated the following:-

"The mootness doctrine was applied by the courts to restrain parties from seeking advisory opinions on abstract, hypothetical or academic questions of the law by requiring the existence of a live controversy between the parties to the case in order for the issue to be justiciable."

27. Murray C.J. quoted *G. v. Collins* [2005] 1 I.L.R.M. 1:-

"An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the Court is called upon to reach a decision. The general policy is enforced in moot cases unless the Court exercises its discretion to depart from it." (This Court's emphasis)

28. He continued:-

"The general practice of this Court is to decline, in principle, to decide moot cases. In exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance, the Court may in the interests of the due and proper administration of justice determine such a question.

However, the discretion to hear an appeal where there is no longer a live controversy between the parties should be exercised with caution, and academic or hypothetical appeals should not be heard."

29. When the judicial review proceedings were initiated by leave granted by Baker J. on 30th July, 2014, M.C. was at that time subject to a conditional discharge. Subsequently in the course of that year, in December, she obtained an absolute discharge from the Review Board. Counsel for the applicant has argued that the three issues that remain live are the issues of breach of statutory duty by the respondent, the subsequent breach of M.C.'s rights, and that damages lie. Thus, the remaining reliefs sought by the applicant are set out below:

(a) A declaration that the respondent's refusal to make such arrangements as are necessary for facilitating compliance by the applicant with the conditions of a conditional discharge order the subject of the notice party's decision at a hearing held on 14th November 2013 and resumed on 21st November 2013 is unlawful, unreasonable and in breach of provisions of the Criminal Law (Insanity) Act, 2006.

(b) A declaration that the respondent's refusal as aforesaid violates the applicant's rights pursuant to the provisions of Bunreacht na hÉireann, Article 41 and/or Article 40.3 and/or the provisions of the European Convention on Human Rights and Fundamental Freedoms, 1950, Article 8.

(c) Damages for breach of the applicant's constitutional and Convention rights.

30. There is, in the Court's view, a duty upon the Review Board to respond to the concerns raised by Dr. O'Neill and the Clinical Director. A public body established by statute should give reasons that respond to issues raised by experienced professionals. This Court notes that Dr O'Neill and the Clinical Director raised such concerns in light of their duty to the general public and to society to assess the appropriateness of the terms of the conditional discharge of M.C. This Court is conscious of the facts of the case, including that in June, 2013 M.C.'s husband had been verbally abusive and threatened physical violence to their son and which resulted in her contacting the Gardaí, and as a result of this, she was removed by Dr. O'Neill from the family home. It was also noted that M.C. had a psychotic relapse in February of that year.

31. In the absence of detailed responses to these issues, the acknowledgement that the Clinical Director was entitled to disagree with the decision of the Board, and the Review Board requesting the Clinical Director to reconsider his position in correspondence put before the Court, I am satisfied that there has not been a breach of statutory duty.

32. For these reasons I also believe that the respondent's refusal does not violate the applicant's rights pursuant to the provisions of Bunreacht na hÉireann, Article 41 and/or Article 40.3 and/or the provisions of the European Convention on Human Rights and Fundamental Freedoms, 1950, Article 8.

33. In relation to the question of damages, this Court is of the view that having regard to the background issues, of which little has been explained by counsel for the applicant, regarding the killing of her infant son, this Court will not grant damages where the respondent had acted in the interest of the applicant and the public at large.

34. In those circumstances, this Court considers that the issues remaining in the case are moot, but the Court has taken the opportunity to identify its view on these issues.