Neutral Citation [2012] IEHC 547

THE HIGH COURT

Record Number: 2011 No. 1122 JR

Between:

PL

Applicant

And

The Clinical Director of St. Patrick's University Hospital

and Dr. Séamus Ó Ceallaigh

Respondents

Judgment of Mr Justice Michael Peart delivered on the 14th day of December 2012:

Arising from my judgment in this case delivered on the 24th January 2012 the applicant seeks declarations that certain 'rules of law' emanating from my judgment are incompatible with the provisions of the European Convention on Human Rights, and in particular Articles 5 and 13 thereof. The applicant is supported in his application by the Human Rights Commission who sought and was granted leave to be joined as *amicus curiae* in accordance with the provisions of section 8(h) of the Human Rights Commission Act, 2008. The submissions, both written and oral by Feichín McDonagh SC for the applicant, and Michael Lynn BL for the Human Rights Commission have been of great assistance, as have those of Mary O'Toole SC on behalf of the Attorney General upon whom Notice was served pursuant to Order 60 and 60A of the Rules of the Superior Courts.

On the relevant dates, the 21st October 2011 and 21st November 2011 the applicant was a voluntary patient, at least as defined, at the respondent hospital. While he had earlier been the subject of a detention order dated 14th September 2011, which was renewed on the 27th September 2011, that order was revoked on the 12th October 2011 as the consultant psychiatrist responsible for the care and treatment of the applicant formed the view on that date that the applicant no longer met the criteria for involuntary detention, since he was not considered to be suffering from a mental disorder as defined by Section 3 of the Act.

Thereafter, the applicant resumed his status as a voluntary patient, both as defined, and by expressing a willingness to remain in the hospital and to be treated as a voluntary patient. His consultant psychiatrist was satisfied from a discussion with the applicant on that date that the applicant was able to balance the benefits and disadvantages of remaining as a voluntary patient in the secure Special Care Unit within the hospital, and that he had capacity to choose to remain as a voluntary patient there and did so. This sequence of events is set forth in more detail in my said judgment.

The evidence before me in relation to the 21st October 2011 is set forth in my judgment. But it is notable that on the 17th October 2011 and again on the 21st October 2011 the applicant had attended a multi-disciplinary meeting in the hospital, and is noted as having expressed at both meetings his willingness to remain in the hospital as a voluntary patient, following his care plan and his remaining in the Special Care Unit.

On the 21st November 2011 the applicant again expressed a strong wish to leave the hospital, and in fact made attempts to do so by trying to jump over the garden wall. Again he was spoken to by staff and agreed to remain. Those events are set forth in detail in my said judgment. On the following day Dr O'Ceallaigh saw the applicant and they discussed the efforts by the applicant to leave the hospital the previous day. The applicant explained his reason for so doing, as set forth in my judgment, but agreed to resume his medication, and remain on a voluntary basis. It appears that for some days prior to these events the applicant had not been accepting his medication and this was thought to have led to a deterioration in his condition. But on the 22nd November 2011 he appears to have again expressed to Dr O'Ceallaigh that he wanted to leave. Another discussion ensued with Dr O'Ceallaigh at which the applicant stated that he was withdrawing his consent to remaining on a voluntary basis. This led to Dr O'Ceallaigh invoking the applicant under section 23 of the Act of 2001 so that an assessment could be carried out in order to detain him under section 24 of the Act. That second assessment was carried out by Dr Power who by the time he saw the applicant was not of the view that the applicant met the criteria for the purposes of being detained under section 24 of the Act. It appears that when Dr Power assessed the applicant, the applicant was agreeing to take his medication and also to remaining in the Special Care Unit, all with a view to a gradual move to a less restrictive environment. Again, Dr O'Ceallaigh was satisfied that the applicant had capacity to form a view as to his consent to remaining on a voluntary basis.

It is quite clear that were it not for the fact that the applicant was considered capable of giving a lawful consent to remaining and was giving that consent at relevant times, the applicant would have been considered to fulfil the criteria for being detained under section 24 of the Act in the event that he attempted to leave the hospital. All are agreed that the applicant needed to be in the hospital for the purpose of receiving necessary and appropriate treatment under the care plan in place.

That rather brief summary of relevant events ad facts suffices for present purposes. But again, I refer to my earlier judgment for a more detailed description of the facts.

I concluded that when faced with a voluntary patient who is expressing a desire to leave the hospital, it was within the margin of appreciation to be permitted to treating staff to avail of an opportunity to have a discussion about that with the patient rather than simply opening the gates and letting the patient out. In circumstances, such as in the present case, where that discussion results in the patient's agreement to remaining as a voluntary patient, and when relevant personnel are satisfied that the patient is capable of understanding matters and giving a consent, there is no question of the applicant thereafter being involuntarily detained outside the provisions of the Act of 2001. I concluded that the period of time between the attempts to leave and the renewed agreement by the applicant to remain as a voluntary patient is not to be regarded as a period in which the applicant was in unlawful detention.

I have concluded that the applicant had capacity to consent to remaining, and did so consent. I concluded also that the applicant was not unlawfully detained during the periods complained of. I did not conclude that the margin of appreciation to be allowed to

treating medical personnel permitted the applicant to be detained in circumstances which were unlawful. I stated that it was within the margin of appreciation to be permitted that a discussion should take place with the applicant rather than simply release him onto the street immediately upon his indicating a wish to leave. That is what the margin of appreciation covers in my view. It is important to keep in mind also that absent consent to remain the personnel concerned would have been entitled to invoke section 23 of the Act, thereby authorising his detention pending a second opinion for the purposes of section 24, and preventing the applicant, in his own best interests, from leaving.

Those conclusions are important, because much of the case law from the European Court of Human Rights to which I have been referred relates to cases in which the applicant had no capacity to give an informed consent, and therefore fell into the gap, sometimes referred to in the English cases as the 'Bournewood Gap' – a gap plugged by amending legislation. They are important in the light of the fact that the applicant seeks declarations that certain "rules of law" said to be found by me in my earlier judgment are incompatible with the European Convention on Human Rights 1950, and in particular Article 5(1)(e) and Article 13 thereof. Those "rules of law" are described by the applicant as follows:

> 1. That the applicant had at all times the status of voluntary patient in the approved centre …… which status was unaffected by whether he had the capacity to give an informed consent to being in the hospital on a voluntary basis or even whether he had withdrawn his consent.
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> 2. That there exists a lawful basis or bases to detain the applicant and/or refuse the applicant his requests to leave the Special Care Unit of the respondent's hospital on the dates the subject matter of this application or any of them.
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> 3. That there exists a wide discretion of margin of appreciation on the part of a treating psychiatrist as to how a treatment regime operates in respect of someone detained outside of the provisions of the Mental Health Act, 2001 to the extent that such provides a basis for his lawful detention.
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> 4. The rule justifying the detention of the applicant or the refusals of his requests to leave on the dates in question, or any of them and in the circumstances of the subject-matter of this application.

It can be readily seen how central to these declarations are the Court's findings in relation to the applicant's capacity to give consent, his having given that consent, and also the precise scope of the margin of appreciation, as found. While it is true that in my judgment I referred to the statutory definition of a voluntary patient and to the fact that by that definition the question of whether or not the patient has capacity to give an informed consent to being in the approved centre on a voluntary basis, those comments are merely 'obiter' given the fact that I was satisfied also that on the facts of the case as averred to this applicant had capacity and gave consent.

In written submissions the applicant accepts the paternalistic nature of the Act of 2001, and that a margin of appreciation must be allowed to treating personnel, but submits that it lead to voluntary patients being detained outside the parameters of the Act of 2001 where there are no procedural safeguards available to such a 'voluntary patients' to which a person is entitled who is detained pursuant to the provisions of the Act. Counsel has referred to concerns expressed extra-judicially about the plight of voluntary patients who are present in approved centres and who may not be there in a truly voluntary sense, but rather by statutory definition, or who have questionable or doubtful capacity. I am fully cognizant of such concerns, and the dangers which the authors of those concerned are anxious to highlight and avoid. But again, I have to return to the central facts in the present case that this applicant was found to have capacity, and that he gave consent, albeit after a period of time following an attempt to leave the centre during which there was a discussion with staff, and which period I have concluded was within that margin of appreciation to be permitted. This is not an applicant who was simply detained in circumstances where he was a voluntary patient expressing a wish to leave. It is more complex than that. The matter was discussed with him. He was found to have consent. He gave that consent. This case in my view is not appropriately to be characterised a Kafkaesque penumbra where voluntary patients are simply detained against their will. I am satisfied that the facts as described and found by me in my judgment are far from that.

The so-called 'Bournewood Gap' was identified by Lord Steyn in his partially dissenting speech in *R v. Bournewood Community and Mental Health NHS Trust, ex parte L* [1998] UKHL24, [1999] AC 458. On the facts as found, and relying to a significant extent on the common law doctrine of necessity, the House of Lords concluded that the applicant was not unlawfully detained. That case gave rise to an application to the European Court of Human Rights and a decision in *HL v. United Kingdom* 40 EHRR 761 in which on the fact of the case that Court concluded that there had indeed been a violation of Article 5(1)(e) of the Convention. Without going into those decisions in great detail, it is important to highlight the fact that the applicant, HL, was a person living with autism who had also severe learning difficulties associated with his autism, and had no capacity to give consent to his presence in a hospital on the relevant dates. Having been in Bournewood Hospital from the age of 13 years and for some thirty years he was discharged into the care of foster carers. However, while at a day care centre he became agitated and was admitted again to the Accident and Emergency Department of the same hospital. He was compliant upon admission having been sedated, and for that reason he was not detained pursuant to the provisions of the UK's Mental Health Act, 1983, and was therefore a voluntary patient, but had no capacity to decide to be voluntary. He was compliant and did not attempt to leave, but his carers were not allowed to visit him.

HL is therefore a case easily distinguishable from the facts in the present case, and I do not consider that the ratio of the ECHR in *H.L .v. United Kingdom* can simply be dragged across and applied to the present case for the purpose of seeking a declaration of incompatibility.

The applicant has referred also to a recent case at Strasbourg, namely *M v. Ukraine, Application* 2452/04, 19th April, 2012. Prior to the fourth hospitalisation in 2006, the applicant had been admitted to hospital in 1999, 2003 and again in 2004. It appears that in February 2006 the applicant suffered a recurrence of the mental illness for which she had received treatment during her earlier periods in hospital. It appears that in February 2006 the applicant herself made a written application for admission to hospital, the form being signed only by the applicant. Before the Court she alleged that she had been forced to sign that form under a threat of never being permitted t leave the hospital again. She remained in hospital under a very restrictive regime until she was discharged in April 2006. It appears from the facts of that case that there were question marks over the integrity of the consent signed by the applicant, and the Court concluded on that issue that her consent could not be regarded as valid and lawful, stating by way of general principle:

> *"… the Court takes the view that a person's consent to admission to a mental health facility for in-patient treatment can be regarded as valid for the purposes of the Convention only where there is sufficient and reliable evidence suggesting that the person's mental ability to consent and comprehend the consequences thereof has been objectively established in the course of a fair and proper procedure and that all the necessary information concerning placement and intended treatment has been adequately provided to him."*

In that case, also, the Court was satisfied that there was "*no evidence suggesting that the applicant's mental illness continued to persist throughout the period of the fourth hospitalisation*".

It was in these contexts that the Court reiterated that "the requirements appropriate procedural safeguards against arbitrary retention in a mental health facility are inherent in the concept of lawfulness under Article 5.1 of the Convention" and went on to state:

> *"This issue is equally important with respect to voluntary patients, because without safeguards for this type of patient, there may be improper inducements to circumvent the complicated procedure for compulsory hospitalisation by admitting a person on a 'voluntary' basis. As a result, the guarantees provided within a compulsory hospitalisation may lose their practical efficiency and not serve as a real shield against arbitrary deprivation of liberty."*

The facts of the present applicant are far removed from the factual context in which the Court considered Article 5.1 of the Convention in M v. Ukraine. Firstly, I have concluded on the evidence that the applicant had capacity and did consent. Secondly, there is no issue raised that the applicant was not suffering from a mental illness on the dates relevant to these proceedings. The fact that an issue may be raised in another case and on different facts which touch upon or make relevant the fact the lack of procedural safeguards for voluntary patients, equivalent to or similar to those available for involuntary patients under the Act of 2001 does not mean that this Court should make a declaration of incompatibility with the Convention in this case.

The importance in the present case of the finding of fact that the applicant had capacity to consent, the evidence that he was able to understand and balance relevant matters related to the decision, and did in fact give his consent, as noted at the time by the treating consultant psychiatrists in the clinical notes, is underlined by what is stated by Mr Justice Baker in his judgment in *G v. E & ors* [2010] EWHC (Fam) (26 Mar 2010) – a case relied upon by the applicants in the present case, and from which there is an extensive quotation in the helpful submissions provided. Under the heading *'Has E been deprived of his liberty at the V Unit and Z Road?"* Mr Justice Baker stated at paras. 77-78

"*Has E been deprived of his liberty at the V Unit and Z Road?*

77. As s.64(5) provides that references to "deprivation of liberty" in the MCA have the same meaning as in Article 5(1) of ECHR, any analysis of whether E has been in fact deprived of his liberty must have close regard to the jurisprudence of the European Court and of English courts on the interpretation of that Article. That jurisprudence makes clear that when determining whether there is a "deprivation of liberty" within the meaning of Article 5, three conditions must be satisfied, namely (1) an objective element of a person's confinement in a particular restricted space for a not negligible time; (2) a subjective element, namely that the person has not validly consented to the confinement in question, and (3) the deprivation of liberty must be one for which the State is responsible : see Storck v Germany (2005) 43 EHRR 96 and JE v DE and Surrey CC [2006] EWHC 3459 (Fam) [2007] 2 FLR 1150. When considering the objective element, the starting point is to examine the concrete situation of the individual concerned and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of and a restriction of liberty is merely one of degree or intensity and not one of nature or substance: Guzzardi v Italy (1980) 3 EHRR 333; Storck v Germany (supra). The key factor is whether the person is, or is not, free to leave. This may be tested by determining whether those treating and managing the person exercise complete and effective control over the person's care and movements: HL v United Kingdom (supra). So far as the subjective element is concerned, whilst there is no deprivation of liberty if a person gives a valid consent to their confinement, such consent can only be valid if the person has capacity to give it: Storck v Germany (supra). So far as the third element is concerned, regardless of whether the confinement is effected by a private individual or institution, it is necessary to show that it is imputable to the State. This may happen by the direct involvement of public authorities or by order of the court.

78. Mr. Y, the manager of X Ltd, did not accept that his organisation was depriving E of his liberty. He thought he was improving his quality of life, and he may well be right. In my judgment, however, the current care provision for E undoubtedly deprives him of his liberty. Staff at Z Road exercise what the Official Solicitor describes as complete control over E's care and movements, and over assessments, treatment, contacts and residence. As Mr. Allen points out, the concrete situation is that E is currently confined to Z Road except when he is escorted to school or on visits or activities, and has no space or possession that is private or safe from interference or examination. Miss Street, counsel for the Official Solicitor, observed that E is unable to maintain social contacts because of restrictions placed on access to other people, including family members, and a decision has been made by the local authority that he will not be released into the care of others, or permitted to live elsewhere, unless such a move is considered appropriate. In assessing whether he is at liberty, it is also important to note that E has been prescribed Haloperidol, a neuroleptic medication, to reduce his agitation and more challenging behaviour. He has no control over the administration of that medication.

79. In those circumstances, it is not disputed by the local authority that E has been deprived of his liberty while at the V Unit and Z Road. I agree."

Given the three criteria identified above by reference to established ECHR Article 5 case-law for determining whether a deprivation of liberty has occurred or not, it is necessary to establish, inter alia, "*that the applicant has not validly consented to the confinement in question*". That is not established in the present case, as concluded by me in my earlier judgment.

The above extract refers to a case also referred to in the applicant's written submissions, namely *Storck v. Germany* [2005] 43 EHRR 96. That case is relevant more to the question of what may constitute a deprivation of liberty. That issue was raised in this case to some extent, but it is not necessary to deal it further now, as the decision on whether a declaration of incompatibility should be granted turns primarily on the questions of whether the applicant had capacity to give a valid consent to the conditions in which he was in the hospital at the relevant times, and whether he gave such a consent. My findings were in the affirmative on each issue. Accordingly I am in agreement with the submission made by Ms. O'Toole for the Attorney General that the applicant lacks standing to seek the declaratory reliefs sought, and I therefore refuse the application.